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ADA case tests limits of employee testing

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Regardless of its ultimate outcome, a still-developing disability case in federal court in Norfolk serves to emphasize that you need to proceed with caution when instituting tests—especially written tests—for current employees or job applicants. The case also highlights the critical distinction between a "disability" and an "inability" for purposes of being covered under the Americans with Disabilities Act (ADA).

The case

Rayford Gray worked for Columbia Gas of Virginia for 31 years. He started out as a laborer and later was promoted to service technician. In 2015, Columbia decided to institute a written test for all employees. Gray took the written test but failed it three times. Although he contended that he was still able to perform the essential aspects of his job, Columbia fired him.

Gray asked Columbia to reconsider its decision because his poor test results stemmed from the fact that he had attention deficit hyperactivity disorder (ADHD) and couldn't read. The company refused, and in September 2018, Gray went to court. His lawsuit claims that Columbia discriminated against him based on his disability by not reinstating him after he made it aware he had ADHD and couldn't read.

Unanswered questions

At this point, Columbia hasn't responded to Gray's lawsuit. But if the case isn't dismissed or otherwise resolved, we can expect to learn more details as it proceeds.

Those details may include the scope of Gray's disability and whether he was in fact still able to perform the essential functions of his job. Additionally, if he couldn't perform the essential functions, then the issue becomes whether Columbia needed to—and could have—provided him with reasonable accommodations that would have enabled him to continue to do his work.

Is there a causal connection?

An interesting point that neither Gray nor Columbia has yet addressed is the connection between ADHD and the inability to read.

In 2012, the U.S. 4th Circuit Court of Appeals (which is based in Richmond and whose rulings apply to Virginia employers) considered whether ADHD is a disability. In that case, *Halpern v. Wake Forest Univ. Health Science*, the appeals court held that "ADHD and anxiety disorders constitute disabilities giving rise to protection under the . . . ADA." In reaching that conclusion, the court reasoned that the ADA protects against any "mental or psychological disorder, such as . . . specific learning disabilities." Clearly, that language includes ADHD and dyslexia.

The situation becomes trickier, however, if Gray's ADHD and inability to read are unrelated. The Equal Employment Opportunity Commission (EEOC) has previously commented in the appendix to its ADA regulations that "disadvantages such as poverty, lack of education or a prison record are not impairments." Thus, if a person is unable to read because of a poor education, that person isn't disabled.

This distinction between disability and inability is likely to be an issue that will be developed as the case moves forward. In all likelihood, addressing the matter will require expert testimony about the nature and effects of ADHD and its impact on Gray's ability to read and other cognitive functions. *Gray v. Columbia Gas of Virginia*, 2:18-cv-00475-HCM-LRL.

Avoiding ADA claims

While the distinction between ADHD and an inability to read might ultimately allow Columbia to prevail in the lawsuit, there are several proactive, preventive steps you can take to avoid disability discrimination lawsuits in the first place. The EEOC recommends that you offer an oral test as an alternative to a written test for employees who have a disability that hinders their ability to read. If administering the test in an alternative format isn't a

viable option, the EEOC suggests assessing the ability of a disabled applicant or employee "through an interview, or through education, license, or work experience requirements."

Further, if the employee or job applicant first becomes aware of having a disability that could have affected the test results only after the test is given, which is what Gray claims, you should have a policy requiring him to inform you immediately. At that point, you should consider providing a retest if a reasonable accommodation is available. Bear in mind, however, that the EEOC says you aren't required to accommodate when an employee seeks a retest for an "essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship."

Because an appropriate assessment of your obligations under the ADA involves a number of complex issues, it's always wise to consult with experienced employment counsel to make sure you have addressed all the necessary factors and have a solid factual and legal basis for the actions you take.

Editor's note: Because of the various important issues Gray's lawsuit raises for all employers, we will monitor the legal proceedings and keep you informed of key developments as the case moves forward.

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