



## The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

### ***Caution: Your Physical Ability Test May Be Considered a “Medical Examination” Under the Americans with Disabilities Act***

Do you conduct evaluations of employees to assess their ability to perform the essential functions of their position? Do you send your employees to fitness-for-duty exams administered by third parties? Do you know what those examiners are doing during those exams? Employers should be wary of physical assessments they conduct for their own employees, as well as outside practitioners who perform these assessments for employers. These assessments may be considered “medical examinations” under the Americans with Disabilities Act (“ADA”) or even California’s Fair Employment and Housing Act (“FEHA”) which may expose an employer to more liability than it bargained for.

In *Indergard v. Georgia-Pacific Corporation* (9th Cir. 2009) -- F.3rd --, Kris Indergard was an employee of the Georgia-Pacific Corporation (“GP”), a paper products manufacturer. Indergard took a 15-month medical leave of absence to undergo surgery to her knees. When Indergard indicated she was prepared to return to work, GP contracted with Columbia Rehabilitation, an independent occupational therapy provider, to conduct a “physical capacity evaluation” in order to determine if Indergard could perform the essential functions of her former position or another related position for which she was qualified. A physical therapist visited GP’s plant and observed employees who worked in Indergard’s position to assess the amount of weight an employee was required to lift, carry, push, pull, and hold, and the type of movements the position required.

The physical therapist determined the position required lifting and carrying up to 65 pounds, and the related position, 75 pounds. GP scheduled Indergard to participate in the physical capacity evaluation at the physical therapist’s office. On the first day of assessment, the physical therapist recorded Indergard’s medical history, subjective reports of current pain level, use of medication, alcohol, tobacco and assistive devices. The therapist recorded Indergard’s weight, height, blood pressure and resting pulse and measured her range of motion in her arms and legs. The therapist also palpated Indergard’s knees and looked for edema (swelling) in her legs, performed manual muscle testing, and recorded hip and knee flexion and rotation. Indergard was also required to walk on a treadmill for 20 minutes and push a weight sled. The therapist then recorded details about Indergard’s vision, communication, cognitive ability, hearing, attitude and behavior.

On the second day of assessment, the therapist performed similar tests including measuring and recording Indergard’s heart rate after she performed the treadmill test and noted that she required “increased oxygen” and demonstrated “poor aerobic fitness.” The therapist found that Indergard was unable to perform the 65 or 75 pound lift or carry identified for the position. The therapist

sent the results to Indergard's treating surgeon who agreed with the assessment. GP informed Indergard she could not return to either position and that no other positions were available. Indergard was then terminated pursuant to a provision in the collective bargaining agreement.

Indergard filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and was eventually issued a right-to-sue letter. Indergard filed a lawsuit alleging, in part, various claims of disability discrimination or perceived disability discrimination under the ADA. Indergard alleged, in part, that GP misrepresented the essential functions of the position in which she had worked prior to going on medical leave, forced her to participate in the physical capacity evaluation without "an objectively reasonable basis for doing so," and refused to allow her to return to employment after the evaluation.

GP moved for summary judgment arguing, in part, that the physical capacity evaluation was not a "medical examination" under the ADA. Under the ADA, an employer may not require a current employee to undergo a medical examination unless the examination is shown to be "job related and consistent with business necessity." (42 U.S.C. §12112 (d)(4)(A).) This section applies to all employees, regardless of whether they are disabled under the ADA. However, federal regulations allow an employer to "make inquiries into the ability of an employee to perform job-related functions" which are not necessarily considered "medical examinations." (29 C.F.R. §1630.14(c).)

The district court agreed with GP that the physical capacity evaluation undergone by Indergard was not a medical examination. Thus, GP was not otherwise required to prove that the evaluation was job related and consistent with business necessity. Indergard appealed.

The inquiry before the Ninth Circuit U.S. Court of Appeals was whether the physical capacity evaluation was a "medical examination" or simply an inquiry into whether Indergard could perform the job-related functions of the position. The Court began by noting that neither the ADA nor federal regulations define the term "medical examination."

However, the EEOC's *Enforcement Guidance* provides certain guidelines for assessing whether a particular exam is a "medical examination." The EEOC's guidelines are not binding on the Court, but may be used as an interpretive tool. The Court noted that these guidelines drew a distinction between medical examinations and physical agility tests by listing seven factors to consider in determining whether a test is a medical examination. Specifically, an exam may be considered a "medical examination" if the test: (1) is administered by a health care professional; (2) is interpreted by a health care professional; (3) is designed to reveal an impairment of physical or mental health; (4) is invasive; (5) measures an employee's performance of a task or physiological responses to performing the task; (6) is normally given in a medical setting; and (7) involves the use of medical equipment.

In addition, the EEOC's guidelines state that one factor alone may be enough to determine that a test or procedure is medical, such as blood pressure screening, cholesterol testing, and range of motion tests that measure muscle strength and motor function. However, certain tests are generally not considered medical examinations including physical agility tests that measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests measuring

performance of physical tasks (i.e. running or lifting), as long as these tests do not include examinations that may be considered medical in nature.

In this case, the Court found that GP's "physical capacity evaluation" was a "medical examination" for several reasons. First, it included range of motion and muscle strength tests. Second, it measured Indergard's heart rate and observed her breathing after a treadmill test. Third, the therapist documented Indergard's post-treadmill test heart rate, "increased oxygen intake," and that Indergard had "poor aerobic fitness." "Measuring Indergard's heart rate and recording observations about her breathing and aerobic fitness, however, was not only unnecessary to determine whether she could perform the task, but it is also the kind of examination that the *EEOC Enforcement Guidance* identifies as inappropriate to include in a non-medical physical agility or fitness test."

GP attempted to argue that the blood pressure and heart rate measurements were intended only as a precaution before beginning testing to ensure she was fit simply to take the test. However, the Court emphasized that her heart rate was taken both before and after the treadmill test, and the measurements were noted in the report to GP, which was unnecessary for the purpose of determining her physical capabilities to perform her job duties.

In addition, the Court found that the physical therapist could be considered a "health care professional." The physical therapist not only administered the evaluation, but interpreted the employee's performance and recommended that she not return to work, as well as submitted the results to the employee's treating surgeon. This distinguished the physical capacity evaluation from a situation where a supervisor or other employee might simply observe the employee's physical ability to perform job tasks.

The broad reach of the test was also capable of revealing impairments in Indergard's physical and mental health (i.e. disabilities), especially when the therapist recorded her subjective reports of pain level, use of medication and assistive devices, communication, cognitive ability, attitude and behavior. Ultimately, because the physical capacity evaluation clearly sought information about Indergard's physical or mental impairments, the evaluation was a "medical examination" under the ADA. Accordingly, the Court reversed the grant of summary judgment, meaning GP will now be required to show at trial that the "medical examination" was job related and consistent with business necessity.

### ***Conclusion***

Employers must keep several issues in mind. First, there is nothing wrong per se with requesting that employees submit to medical examinations. However, employers may only require employees to submit to medical examinations if they are both job related and consistent with business necessity. For example, if the employer has a reasonable belief that an employee's ability to perform essential functions of the job will be impaired by a medical condition or will pose a direct threat to the health and safety of others due to a medical condition, an employer may ask an employee to submit to a medical examination.

However, if an employer simply wants to inquire if an employee can perform the physical demands of the job, an employer can do so without submitting the employee to a “medical examination.” For example, in the case above, GP’s evaluation probably would not have been considered a medical examination if the physical therapist or GP’s management had simply asked Indergard to perform simulated tasks that she would have normally performed on the job (e.g. lifting, pushing, pulling, and carrying various weighted objects). These are physical agility assessments and generally not considered medical examinations.

If an employer engages a third party to perform physical assessments of employees which the employer does not intend to be a medical examination (e.g. occupational therapists), employers should explicitly inform those practitioners that the employee should only be given physical agility tests which measure the employee’s ability to perform job-related tasks. Employers should inform outside practitioners that medical tests or documentation which do not measure the employee’s ability to perform the physical tasks of the job (e.g. heart rate, blood pressure, range of motion, or asking questions about medication and medical or mental conditions) should be avoided.

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