PUBLICATION

Sixth Circuit Rules Psychological Counseling Can Be Medical Exam Under ADA

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In a case of first impression, the U.S. Court of Appeals for the Sixth Circuit has ruled that psychological counseling can count as a medical examination under the Americans with Disabilities Act. In *Kroll v. White Lake Ambulance Authority,* the Sixth Circuit held that an employer's demand that an employee "receive psychological counseling" and "see a mental health counselor" as a condition to keeping her employment may constitute a prohibited "medical examination" under 42 U.S.C. § 12112(d)(4)(A).

While Plaintiff was working for White Lake Ambulance Authority ("WLAA") as an emergency medical technician, she became romantically involved with one of her co-workers. Allegedly thereafter, Plaintiff began to show signs of on-the-job distress and employees reported concerns about Plaintiff's well-being. Following an incident in which Plaintiff was screaming on the phone while a patient was being transported in emergency status, WLAA informed Plaintiff that she must attend counseling in order to continue working at WLAA. Plaintiff informed her supervisor that she would not attend counseling and did not return to work. Plaintiff later sued her employer claiming, among other things, that its demand that she attend counseling violated the ADA's prohibition against employers requiring a medical examination.

To determine whether the counseling that Plaintiff was instructed to attend constituted a "medical examination" prohibited under the ADA, the Court turned to the EEOC's seven-factor test for evaluating whether a test or procedure qualifies as a medical examination. Those seven factors include:

(1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used.

Applying the seven-factor test to the facts of the case, the Court found that a jury could determine that the demand for counseling was a "medical examination." Specifically, the Court noted that the first two factors weighed in favor of Plaintiff's "psychological counseling" as being a "medical examination." The Court further held that a jury could find that the psychological counseling Plaintiff was instructed to attend was the type designed to uncover a mental-health defect as WLAA did not dispute that it was concerned Plaintiff suffered from depression. The EEOC has said that any one of the factors may be enough to make a determination.

This decision is an important reminder that the ADA protects individuals from inquiries into both their physical health and mental health. Employers must be careful to balance their concern regarding an employee's mental health with the ADA's prohibition against requiring a medical examination. As this case demonstrates, conditioning continued employment on an employee receiving counseling can easily run afoul of the "medical examination" prohibition. Employers, however, will have a defense if the examination is job related and consistent with business necessity.