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Note

Karraker v. Rent-A-Center: Testing the Limits of the ADA, Personality Tests, and Employer Preemployment Screening

Maureen E. Mulvihill*

I. INTRODUCTION

True, False or Cannot Say:

I see things or animals or people around me that others do not see.

I commonly hear voices without knowing where they are coming from.

At times I have fits of laughing or crying that I cannot control.

My soul sometimes leaves my body.

At one time or more in my life I felt that someone was making me do things by hypnotizing me.

I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.¹

These are some questions taken from the Minnesota Multiphasic Personality Inventory (MMPI),² one of the most widely used psychological personality tests.³ The MMPI is a psychological personality test used not only in identifying individuals' personality strengths and weaknesses, but also in diagnosing individuals with mental illnesses.³ Recently, its use by an employer in determining

* J.D. expected May 2007. I would like to thank my family and friends for their enduring love, support, understanding, and encouragement.

1. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 833 n.1 (7th Cir. 2005). See also *infra* notes 100–07 and accompanying text (discussing the content and questions of the MMPI).

2. See ANNIE MURPHY PAUL, *THE CULT OF PERSONALITY*, at xii (2004) (stating that it is estimated that the MMPI is administered to approximately fifteen million Americans each year). See also *infra* notes 100–07 and accompanying text (examining MMPI's rise in popularity and use since its development in the 1930s).

3. See PAUL, *supra* note 2, at xii, 57 (noting that the MMPI's intended use was for the mentally ill, but that it has since become a template for personality questionnaires that are frequently given in the workplace). See also ANNE ANASTASI, *PSYCHOLOGICAL TESTING* 499 (4th ed. 1976) (discussing how since the initial publication of the MMPI numerous new measurement scales have been developed to assess not only psychiatric disorders, but also personality traits unrelated to pathology); *infra* notes 100–07 and accompanying text (examining

whether applicants were suitable for management positions was challenged for the first time in a federal circuit court in *Karraker v. Rent-A-Center, Inc.*⁴ In *Karraker*, the Seventh Circuit Court of Appeals faced the specific issue of whether an employer's use of a commonly used psychological personality test, the MMPI, constituted a prohibited psychological medical examination under the Americans with Disabilities Act of 1990 (ADA).⁵

The ADA prohibits medical examinations at certain stages of the employment process.⁶ The reason behind such a prohibition is that Congress wanted to discourage employers from using preemployment information to exclude applicants with disabilities, and in particular, individuals with "hidden" disabilities.⁷ Thus, in the preemployment phase, the ADA prohibits an employer from conducting certain medical examinations or making certain inquiries of an applicant.⁸

the MMPI's original and current uses).

4. *Karraker*, 411 F.3d at 834.

5. *Id.*

6. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d) (2000). The ADA specifically prohibits employers from conducting medical examinations or medical inquiries prior to an offer of employment. 42 U.S.C. § 12112(d)(2)(A). However, after a conditional offer of employment, an employer may require an employee to submit to a medical examination. 42 U.S.C. § 12112(d)(3). Moreover, the ADA does not prevent employers from conducting medical examinations and inquiries on current employees. 42 U.S.C. § 12112(d)(4). However, such examinations and inquiries must be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). See Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759, 790-94 (1992) [hereinafter *ADA Overview*], for a general discussion of the ADA and its prohibitions on employment medical examinations.

7. See *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 677 (1st Cir. 1995) ("[t]he central purpose of the prohibition on pre-offer inquiries generally is to ensure that an applicant's hidden disability remains hidden."); ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, U.S. Equal Employment Opportunity Comm'n No. 915.002 (rev. Oct. 10, 1995) available at <http://www.eeoc.gov/policy/docs/preemp.html> [hereinafter *EEOC, Preemployment Guidance*] ("This [prohibition on preemployment medical examinations] helps ensure that an applicant's possible hidden disability (including prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications."); see also *Armstrong v. Turner Indus., Ltd.*, 950 F. Supp. 162, 167 (M.D. La. 1996), *aff'd* 141 F.3d 554 (5th Cir. 1998) (stating that "[a] review of the legislative history [of the ADA] shows that the section on medical examinations and inquiries was . . . designed to prevent employers from using preemployment information obtained from forms and interviews to exclude applicants with disabilities, particularly persons with 'hidden' disabilities."); *Adler v. I & M Rail Link, L.L.C.*, 13 F. Supp. 2d 912, 935 (N.D. Iowa 1998) (noting that the legislative history of the ADA suggests that the section on medical examination was included to prevent employers from using preemployment information to exclude applicants with "hidden" disabilities).

8. See 42 U.S.C. § 12112(d)(2)(A) (stating that an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."). However, an employer may make inquiries into an applicant's ability to perform job-related functions. 42 U.S.C. §

While the ADA is clear regarding the stage at which an employer can examine an employee, it does not define what constitutes a medical examination.⁹ Rather, the most widely used interpretation comes from the Equal Employment Opportunity Commission (EEOC), the primary enforcement agency of Title I of the ADA.¹⁰ The EEOC defines medical examinations as procedures or tests that obtain information about an individual's physical or mental impairments.¹¹ With respect to psychological examinations, the EEOC states that tests designed to identify mental disorders or impairments qualify as psychological medical examinations, but tests that measure personality traits such as honesty, preferences, and habits do not.¹²

In particular, the issue regarding whether psychological personality tests qualify as psychological medical examinations under the ADA is "just beginning to be addressed by the judicial system."¹³ Prior to *Karraker*, only two federal district court cases considered whether psychological personality tests constitute psychological medical

12112(d)(2)(B).

9. 42 U.S.C. § 12112(d). The ADA's provisions contain no definition of what constitutes a medical examination. *Id.* However, while employers are prohibited from making medical examinations in the preemployment stage, they have a limited ability to do so once a conditional offer of employment has been extended and after employment commences. 42 U.S.C. § 12112(d)(3); see EEOC, Preemployment Guidance, *supra* note 7 (explaining that the provisions of the ADA allow an employer to ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer).

10. 42 U.S.C. § 12206(c)(2)(A) (requiring the EEOC to develop a plan for implementing Title I of the ADA); see *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 708 n.12 (9th Cir. 2005) (noting that when interpreting the ADA, courts look to the interpretations of the EEOC for guidance); see also *infra* Part II.C.3 (examining the role of the EEOC in interpreting the provisions of the ADA).

11. EEOC, Preemployment Guidance, *supra* note 7 (defining a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health."); see *Grenier*, 70 F.3d at 676 (stating that the EEOC defines medical examinations as "procedures or tests that seek information about the existence, nature, or severity of an individual's physical or mental impairment, or that seek information regarding an individual's physical or psychological health."); see also *infra* Part II.D.1 (discussing the EEOC definition of what constitutes a medical examination under the ADA).

12. See EEOC, Preemployment Guidance, *supra* note 7 (noting that a psychological examination should be considered a medical examination if it provides evidence that could lead to the identification of a mental disorder or impairment); see also ADA Enforcement Guidance: Disability-Related Inquiries and Medical Examinations Under the Americans With Disabilities Act (ADA), U.S. Equal Employment Opportunity Comm'n No. 915.002 (rev. July 2000) available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [hereinafter EEOC, Medical Examination Guidance] (explaining that psychological tests that measure personality characteristics are not generally considered medical examinations).

13. Keith A. Byers, *No One Is Above the Law When It Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977, 1042 (1997); see Gregory R. Vetter, *Is A Personality Test a Pre-Job-Offer Medical Examination Under the ADA?*, 93 NW. U. L. REV. 597, 598 (1999).

examinations under the ADA, and the decisions were inconsistent.¹⁴ The holding in *Karraker*, by contrast, sheds a bit of light on the complicated issue of the permissibility of psychological personality tests.¹⁵ Relying extensively upon the long-existing EEOC guidelines regarding psychological medical examinations, the Seventh Circuit Court of Appeals held that the MMPI was a medical examination prohibited by the ADA because, by design, it revealed and identified, at least in part, individuals with mental impairments.¹⁶ The court reasoned that because the test could potentially identify mental impairments, it would negatively affect the employment prospects of individuals with mental disabilities and therefore was prohibited by the ADA.¹⁷ The ruling thus calls into question whether employers can use any psychological personality tests to screen or evaluate employees under the ADA.¹⁸ A related question is whether *Karraker* prohibits employers from using personality profiles in hiring.¹⁹

Part II of this Note begins with a discussion of preemployment medical testing and specifically considers preemployment psychological testing.²⁰ Part II subsequently examines the ADA generally, and Title I of the ADA in particular.²¹ Next, Part II focuses on the prohibition of medical examinations under the ADA and concludes with a discussion of preemployment psychological testing precedent under the ADA.²² Part III then focuses on the district court²³ and Seventh Circuit

14. Vetter, *supra* note 13, at 598 (discussing how two federal district court cases have decided the question of whether psychological personality tests are medical examinations under the ADA); see *Barnes v. Cochran*, 944 F. Supp. 897, 905 (S.D. Fla. 1996), *aff'd* 130 F.3d 443 (11th Cir. 1997) (holding that a preemployment psychological evaluation was a prohibited preemployment medical examination under the ADA); *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996) (holding that a psychological personality test was not a prohibited preemployment medical examination under the ADA).

15. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837–38 (7th Cir. 2005).

16. *Id.*

17. *Id.*

18. See generally Wayne J. Camara & Peter F. Merenda, *Using Personality Tests in Preemployment Screening: Issues Raised in Soroka v. Dayton Hudson Corp.*, 6 Psychol. Pub. Pol'y & L. 1164, 1170 [hereinafter *Using Personality Tests*] (discussing how the EEOC's definition of a psychological medical examination conflicts with most psychological personality tests because most personality tests originate from clinical samples used to provide diagnostic evidence).

19. *Id.*

20. See *infra* Part II.A (outlining the history and use of preemployment screening).

21. See *infra* Part II.C.2–3 (examining the provisions of the ADA).

22. See *infra* Part II.D (examining psychological preemployment testing under the ADA).

23. See *infra* Part III.B (discussing the district court's opinion in *Karraker*).

opinions²⁴ in *Karraker*, where the Seventh Circuit held that a psychological personality test was a prohibited medical examination under the ADA.²⁵ Part IV analyzes this decision and argues that the court correctly interpreted the ADA's prohibition on medical examinations because: (1) the MMPI is a psychological test designed to identify mental impairments under the ADA and EEOC provisions, and (2) an employer cannot circumvent the requirements of the ADA by asserting that the employer is not using the test to identify mental disabilities.²⁶ Finally, Part V predicts the impact of the Seventh Circuit's decision by hypothesizing that *Karraker* will not have a dramatic effect on the future of psychological personality testing,²⁷ although employers must now take additional precautions before using a psychological personality test in preemployment hiring decisions.²⁸

II. BACKGROUND

This Part will first define and describe preemployment screening.²⁹ It will detail the history of preemployment screening and the methods that employers have utilized in screening applicants.³⁰ Next, it will specifically discuss preemployment psychological screening and the different types of psychological tests available.³¹ Following that discussion, this Part will examine the benefits and costs associated with preemployment psychological screening.³² Subsequently, this Part will generally outline the ADA and its provisions, while specifically discussing Title I.³³ Finally, this Part will examine the role of the ADA in limiting preemployment medical screening by employers.³⁴

24. See *infra* Part III.C (examining the Seventh Circuit opinion in *Karraker*).

25. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005).

26. See *infra* Part IV (analyzing the Seventh Circuit's opinion).

27. See *infra* Part V.A (examining the impact *Karraker* will have on employers).

28. See *infra* Part V.B (hypothesizing the steps employers will have to take because of *Karraker*).

29. See *infra* Part II.A (outlining preemployment screening).

30. See *infra* Part II.A (discussing the history of preemployment screening and the different methods of preemployment screening available to employers).

31. See *infra* Part II.B (examining psychological preemployment screening).

32. See *infra* Parts II.B.3.a–b (exploring the advantages and disadvantages of preemployment psychological screening).

33. See *infra* Part II.C (outlining the ADA and its provisions).

34. See *infra* Part II.D (discussing how the ADA limits employers' ability to conduct preemployment screening of applicants).

A. Employer Prescreening

Algernon: Oh! I am not really wicked at all, cousin Cecily. You mustn't think that I am wicked.

*Cecily: If you are not, then you have certainly been deceiving us all in a very inexcusable manner. I hope you have not been leading a double life, pretending to be wicked and being really good all the time. That would be hypocrisy.*³⁵

Many employers today would say that they know better than to accept an applicant based on a personal interview.³⁶ Specifically, employers tend to believe that job applicants regularly conceal or obscure their personal histories or behaviors to hide their unsuitability for employment.³⁷ Consequently, employers have frequently screened job applicants to confirm their character and abilities.³⁸

Employment screening, used for both new hire and promotional applicants, first became popular at the turn of the twentieth century.³⁹ Industrialization necessitated the need to assess large numbers of people quickly and accurately.⁴⁰ Thus, companies concerned with productivity began soliciting physicians to determine whether applicants had the physical capabilities to perform many of the demanding factory positions.⁴¹ For example, in 1909, Sears, Roebuck and Company began

35. OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST AND RELATED WRITINGS* 52 (Joseph Bristow ed., 1992).

36. Ariana Eunjung Cha, *Employers Relying on Personality Tests to Screen Applicants*, WASH. POST, Mar. 28, 2005, at A1 (providing an example of Universal Studios Hollywood Theme Park's usage of an on-line computer test to screen applicants before the initial personal interview); see Victor Schachter, *Privacy in the Workplace*, in 6TH ANNUAL INSTITUTE ON PRIVACY LAW: DATA PROTECTION—THE CONVERGENCE OF PRIVACY & SECURITY, at 153, 169 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 6080, 2005) (discussing an overview of employers screening job applicants).

37. Schachter, *supra* note 36, at 169. Recently, it was estimated that up to seventy percent of United States job applicants falsely represent themselves by embellishing their educational qualifications or work experience. Adrian Bathgate, *Check and Recheck*, Dominion Post (New Zealand), Aug. 12, 2005, at 4. Often, job applicants embellish facts to increase their chances of getting the position or lie to hide aspects of their past they would rather not discuss. *Id.* The types of discrepancies employers come across range from exaggerated salaries and previous positions, to falsely reporting university attendance or criminal convictions. *Id.*; see Thomas Fuller, *Jobs, Lies and CVs: How Far? The Workplace*, INT'L HERALD TRIB., Apr. 6, 2005, at 13 (discussing how job applicants exaggerate their credentials).

38. Schachter, *supra* note 36, at 169. A survey of human resources professionals in 2001 revealed that twenty-three percent had or intended to increase use of applicant hiring screening tools. *Id.* at 169 n.36.

39. See Vetter, *supra* note 13, at 610–11 (discussing how industrial developments in the early twentieth century sparked employee medical screening).

40. *Id.* at 600 n.19.

41. MARK A. ROTHSTEIN, *MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS* 1 (1989). For example, large industrial companies employed "factory surgeons" to determine

requiring employees to submit to physical examinations in an attempt to discover and isolate individuals with tuberculosis.⁴² In fact, employment screening increased substantially in popularity after World War II, when employers recognized that there were substantial benefits in hiring individuals who were currently healthy and would remain healthy in the future.⁴³ These types of tests included blood tests, urine tests, x-rays, pulmonary function tests, and other types of medical and laboratory procedures.⁴⁴

However, applicant screening has not been limited to determining whether an applicant is free from contagious diseases or is physically capable of performing the job.⁴⁵ Employers quickly recognized that an employee's character, in addition to his or her health, is a valuable asset to the company.⁴⁶ The reasoning behind this notion is that by hiring an employee with "good character," the employer reduces the chances of a costly negligent hiring lawsuit if an employee harms a customer or co-worker.⁴⁷ Thus, employers developed numerous screening methods, such as criminal record inquiries,⁴⁸ drug tests,⁴⁹ and psychological

whether applicants and employees were not only healthy, but also if they had the necessary strength, stamina, vision, hearing and physical attributes to carry out the functions of a particular position. *Id.* These "factory surgeons" turned into a new medical specialty: the occupational physician. Vetter, *supra* note 13, at 611. Companies continued to use these occupational physicians to ensure a healthy and productive work force. *Id.*

42. ROTHSTEIN, *supra* note 41, at 1.

43. Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 530 (2001). Often such companies gave applicants blood tests, urinalysis, and X-Rays to determine the health status of the applicant. *Id.* at 530-31.

44. ROTHSTEIN, *supra* note 41, at 1.

45. *Id.* Such testing is commonly referred to as "diagnostic" testing. *Id.*

46. Hoffman, *supra* note 43, at 530. In 1914, Henry Ford created a "Sociological Department" that investigated the home lives of Ford employees. *Id.* The investigators examined employees for "unacceptable behavior," such as gambling and drinking excessively. *Id.* If the investigation revealed that the man had integrity, Ford raised the employee's salary five dollars per day. *Id.*

47. Schachter, *supra* note 36, at 171.

48. *Id.* at 172-73. Most states permit employers to consider criminal convictions when making employment selections. *Id.* In fact, several states have held employers liable for negligent hiring when the employer failed to administer an adequate background check, which included investigating an applicant's prior criminal convictions. *See, e.g.,* Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 763-64 (Fla. Ct. App. 1991) (upholding a \$2.5 million jury award for negligent hiring where employer hired a furniture deliveryman without having the applicant fill out its standard job application, which inquired about mental illness and drug abuse; the hired employee, who had a long criminal record, history of paranoid schizophrenia, and cocaine abuse went on to violently attack a customer); Ponticas v. K.M.S. Inv., 331 N.W.2d 907, 916 (Minn. 1983) (holding an apartment owner liable for negligent hiring when it failed to adequately investigate the background of a resident manager who had previously been convicted of aggravated robbery, burglary and receipt of stolen goods and who, after being hired as a

tests,⁵⁰ to ascertain the “good character” of an applicant.⁵¹ These tests allow employers to ascertain not only the current health of an applicant, but also the personal history of an applicant.⁵²

B. Psychological Preemployment Screening

Psychological tests in particular have quickly spread throughout the business world as preemployment screening devices.⁵³ Numerous employers currently use various trait-testing techniques to evaluate candidates for employment or promotions.⁵⁴ Specifically, employers often use psychological tests to examine the spatial, verbal, and mathematical skills of an applicant, to measure the interest of a particular career path, to evaluate the potential for an upper level management position, and to make personality measurements.⁵⁵

resident manager, raped a tenant).

49. Schachter, *supra* note 36, at 174. The majority of state and federal jurisdictions permit employers to drug test applicants. *Id.*; see, e.g., *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034 (Ct. App. 1989) (upholding drug testing of publishing company’s applicants). However, some states do prohibit drug testing. Schachter, *supra* note 36, at 174. For instance, Rhode Island and Vermont prohibit drug testing of applicants, but allow an employer to administer a drug test upon a conditional offer of employment. *Id.* Similarly, Montana prohibits drug testing unless the applicant seeks a position that is safety-sensitive or involves an exercise of fiduciary duties. *Id.*

50. See *infra* Part II.B.2 (discussing psychological preemployment screening).

51. Schachter, *supra* note 36, at 174.

52. See *id.* at 171 (examining the different ways employers collect information from applicants). In fact, in 2003, approximately eighty-two percent of human resource professionals acknowledged conducting background checks on potential employees. Nialo Boodhoo, *From Help Wanted to You’re Hired: The Job Market’s Expanding, But Applicants Still Need to Mind Their Manners and Hone Their Interview Skills to Secure the Opening*, SUN-SENTINEL, May 9, 2005, at 14. That percentage is up from sixty-six percent in 1996. *Id.*

53. See Diane Stafford, *Heads-Up Hiring*, KAN. CITY STAR, May 31, 2005, at D (discussing how preemployment profiles are changing the way employers hire). A 2000 survey conducted by the American Management Association (AMA Survey) revealed that of responding firms, thirty-nine percent subjected job applicants to psychological testing. Hoffman, *supra* note 43, at 539. Moreover, current estimates suggest that there are more than 8,000 psychological tests on the market. Sojata S. Menjoge, *Testing the Limits of Anti-Discrimination Law: How Employers’ Use of Pre-employment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. REV. 326, 330 (2003).

54. Hoffman, *supra* note 43, at 539–40.

55. *Id.* The AMA Survey revealed that employers utilized the following types of psychological tests on applicants: roughly twenty percent used tests of cognitive ability tests; approximately eight percent used interest inventories; around fourteen percent used managerial assessments; around fourteen percent used personality measurements; and approximately twelve percent used physical simulation of job tasks. *Id.* at 540 n.66.

1. History of Preemployment Psychological Testing

Early in the twentieth century, a few employers, such as the American Tobacco Company and the Boston Elevated Company, began using tests developed by psychologists to measure employees' traits and aptitudes.⁵⁶ However, it was not until World War I that psychological testing and assessment began to grow in popularity and use.⁵⁷ The war spurred the need to assess and screen a large number of potential military recruits quickly.⁵⁸ Ultimately, this need to classify individuals quickly created one of the first group intelligence tests⁵⁹ and one of the first personality inventories.⁶⁰ These tests allowed the government to make quick administrative decisions, such as rejecting or discharging individuals from service, assigning individuals to different types of service, or admitting individuals to officer-training camps.⁶¹ Moreover, these tests attempted to identify severely neurotic men who would be unfit for military service.⁶²

Following World War I and the successes of psychological testing, numerous new psychological tests were developed.⁶³ In the ensuing decades, employers, such as factory executives and private companies, adopted many of these tests to measure employees' abilities in managerial and professional positions.⁶⁴ Moreover, new screening tests

56. Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 71 (1994). In the early 1900s, psychologist Hugo Munsterberg developed one of the first psychological tests that employers used. *Id.* It attempted to measure traits that were necessary and advantageous for certain job positions. *Id.* The American Tobacco Company used the test to select its traveling salesmen, while the Boston Elevated Company used the test to select its conductors. *Id.*

57. *Id.*

58. See ANASTASI, *supra* note 3, at 12 (explaining how World War I was a major impetus in expanding psychological testing). A committee, appointed by the American Psychological Association, considered the different ways psychological tests could be used to rapidly classify the million and a half recruits with respect to general intellectual level. *Id.*

59. *Id.* This test became known as the Army Alpha and Army Beta. *Id.* Army Alpha was used for general routine testing, while Army Beta was used for illiterates and foreign-born recruits who could not take a test in English. *Id.* at 12–13. Today, the Army Alpha and Army Beta tests, though revised, serve as a model for most group intelligence tests. *Id.* at 13.

60. *Id.* at 18. This test was called the Woodward Personal Data Sheet. *Id.* The test consisted of 116 items reflecting on common neurotic symptoms. ROGER L. GREENE, THE MMPI-2/MMPI: AN INTERPRETIVE MANUAL 2 (1991). The individual taking the test answered “yes” or “no.” *Id.*

61. ANASTASI, *supra* note 3, at 12.

62. *Id.* at 18.

63. GREENE, *supra* note 60, at 2.

64. See Hoffman, *supra* note 43, at 539 (noting that factory executives used psychological tests to select employees for production and clerical positions). One of the tests, the Strong Vocational Interest Blank (now the Strong-Campbell Interest Inventory), was originally developed in 1927 by comparing the interests of successful individuals in a variety of occupations. RICHARD I. LANYON & LEONARD D. GOODSTEIN, PERSONALITY ASSESSMENT 13–14 (2d ed. 1971) [hereinafter PERSONALITY ASSESSMENT]. Individuals were asked to express

continued to be developed by military psychologists, especially during World War II.⁶⁵ In fact, many of these types of tests are still used extensively in employment screening.⁶⁶

2. Types of Psychological Preemployment Tests

A psychological test observes a sample of human behavior made under normal, controlled conditions, which results in a measurable score.⁶⁷ Also known as inventories, measurements, questionnaires, and scales, psychological tests are formalized measures of mental functioning.⁶⁸ The tests often consist of written, visual, or verbal evaluations administered to assess the cognitive and emotional functioning of an individual.⁶⁹ Such tests often require individuals to reveal the most sensitive and private details of their lives.⁷⁰ The purpose of a psychological test is to assess a variety of mental abilities and attributes, including achievement and ability, integrity, and personality.⁷¹ Most psychological tests are objective and quantifiable; however, certain psychological tests may require subjective interpretation.⁷²

their preferences for activities such as "visit an art gallery" and "collect coins." *Id.* at 14. It was believed that successful individuals in a specific occupation would show similar interests. *Id.* Thus, job applicants would likely be more successful employees if they shared these similar interests. *Id.*

65. PERSONALITY ASSESSMENT, *supra* note 64, at 15. During World War II, the United States Office of Strategic Services used a battery of psychological tests to select individuals for intelligence and spying operations. *Id.* Individuals were gathered in small groups for several days of evaluation. *Id.* The individuals were evaluated using psychological tests, interviews, and participation in a variety of situational tests. *Id.* This type of assessment became known as the assessment center methodology. *Id.* at 15–16. Companies use such centers widely today as an accurate predictor for middle-level managers. *Id.*; see also PAUL, *supra* note 2, at xiii (noting that thousands of American companies use assessment centers that put applicants through simulated tasks). Moreover, close to two-thirds of police and fire departments, and state and county governments use assessment center tests. PAUL, *supra* note 2, at xiii.

66. ANASTASI, *supra* note 3, at 3–4. Today, there rarely exists a job for which a psychological test has not been developed or proven helpful in matters such as hiring, job assignment, transfer, promotion, or termination. *Id.* See also PERSONALITY ASSESSMENT, *supra* note 64, at 15 (discussing that within the fields of industrial and vocational psychology numerous procedures have been developed for use in business and industry).

67. ANASTASI, *supra* note 3, at 23.

68. See generally *id.* at 23–25 (discussing the nature of psychological tests).

69. See generally *id.* (examining the use of psychological tests).

70. Hoffman, *supra* note 43, at 540.

71. *Id.* at 539.

72. Vetter, *supra* note 13, at 621. For example, many projective personality tests, such as the Rorschach Inkblot Test and the Thematic Apperception Test, rely on the subjective interpretation of the examiner. *Id.*

Today, numerous types of psychological preemployment tests exist.⁷³ Generally, most tests fall into two major categories: ability tests and personality tests.⁷⁴ Each type of test has a particular purpose and use, and is designed to assess a battery of personal characteristics using a variety of methods.⁷⁵

a. Ability Tests

Ability tests, which include general intelligence, aptitude, and achievement tests, measure the level of development attained by an individual in one or more abilities.⁷⁶ Intelligence tests are designed to estimate an individual's general intellectual level or track the intellectual development in an individual.⁷⁷ Aptitude tests and achievement tests, in contrast to intelligence tests, measure specific aspects of intelligence.⁷⁸ However, aptitude and achievement tests differ in that achievement tests generally measure what the subject has achieved up to the administration of the test, while aptitude tests attempt to forecast an individual's future performance.⁷⁹ Often intelligence tests are used as the first screening device, and are then followed by specific aptitude and achievement tests.⁸⁰ Examples of ability tests used in employment screening include the Otis Self-Administering Test of

73. See generally ANASTASI, *supra* note 3, at 3–22 (describing origins of psychology tests).

74. See *id.* at 13–22 (examining the numerous different types of psychological tests, including achievement aptitude); see also Schachter, *supra* note 36, at 177–78 (describing two types of psychological tests: integrity and personality tests); PERSONALITY ASSESSMENT, *supra* note 64, at 42 (discussing ability tests as psychological tests).

75. See Vetter, *supra* note 13, at 612 (stating that there exist numerous personality tests that “measure motivational, emotional, interpersonal and attitudinal characteristics”) (internal quotations omitted).

76. ANASTASI, *supra* note 3, at 399–400.

77. *Id.* at 229–30. Such “intelligence tests” provide a “global estimate” of an individual's general intellectual ability. *Id.* These test are descendants of the original Binet-Simon scales. *Id.* at 229. The Binet-Simon scale consisted of problems or tests, which were arranged in ascending order of difficulty. *Id.* at 230. The test covered a variety of functions, but emphasis was placed on judgment, comprehension, and reasoning. *Id.* at 12. Through years of adaptation and revision, the Binet-Simon scale eventually evolved into the intelligence quotient (IQ), or a ratio between mental age and chronological age. *Id.*

78. *Id.* at 230, 398. Because intelligence tests sample a wide variety of abilities, psychologists developed tests that measured specific aspects of intelligence, called aptitude tests. *Id.* at 13. These tests measured clearly defined segments of ability, while “intelligence tests” created a global score of ability. *Id.* at 16. Standardized tests measure the effects of a specific program, instruction, or training. *Id.* at 398.

79. *Id.* 398–99. Achievement tests measure the effects of learning under controlled conditions, while aptitude tests measure the effects of learning under uncontrolled and unknown conditions. *Id.* at 398.

80. *Id.* at 230.

Mental Ability,⁸¹ the Wesman Personnel Classification Test,⁸² the Minnesota Clerical Test,⁸³ and the Law School Admission Test.⁸⁴

b. Personality Tests

An additional subset of psychological testing is personality testing.⁸⁵ Personality tests and inventories evaluate the thoughts, emotions, attitudes, and behavioral traits that comprise personality.⁸⁶ These tests fall into one of two categories: projective and objective.⁸⁷

Projective tests are unstructured tests that require a subject to interpret some ambiguous stimuli.⁸⁸ They present subjects with an unstructured task, which may evoke almost an unlimited variety of responses.⁸⁹ The subjects' responses provide insight into his or her thought processes and personality traits.⁹⁰ Projective tests are regarded as being effective at exposing the "*covert, latent, or unconscious*

81. *Id.* at 440. The Otis Self-Administering Test was used to screen applicants for positions as clerks, calculating-machine operators, assembly line workers, foremen, and supervisors. *Id.* The test proved to be successful in revealing who would learn or adapt easily to the job; however, it was not successful at predicting subsequent job achievement. *Id.*

82. *Id.* at 441. The Wesman Personal Classification Test is an intelligence test that results in Verbal, Numerical, and Total scores. *Id.* The mean score rises with increasing education and occupational level. *Id.* Generally, the Wesman Personal Classification Test is best suited for higher-level personnel. *Id.*

83. *Id.* at 449. The Minnesota Clerical Test is a clerical aptitude test. *Id.* An applicant is given 200 pairs of numbers, each containing between three and twelve digits. *Id.* at 450. If the pair of numbers is identical, the applicant must place a check next to them. *Id.* While deductions are made for errors, the resulting score is based predominantly on speed. *Id.* There is a moderate correlation between high scores on the test and successful performance of various clerical positions. *Id.* Moreover, this test has been adapted for use with various types of factory positions, including inspectors, checkers, and packers. *Id.* at 451.

84. *Id.* at 460. The Law School Admission Test (LSAT) has been administered to law school applicants since 1948. *Id.* The LSAT, when combined with prelaw grades, is intended as a device to predict law school grades. *Id.*

85. *Id.* at 493.

86. *Id.*

87. Black, *supra* note 56, at 72.

88. ANASTASI, *supra* note 3, at 558. The test stimuli are generally vague and ambiguous because the test seeks to have the subject indulge in the subject's own fantasies. *Id.*

89. *Id.* Relative to objective tests, projective tests require a greater degree of subjective judgment on the part of the test-administrator. See Vetter, *supra* note 13, at 621 n.164 (discussing how projective tests illustrate the subjective nature of personality tests because the evaluation relies solely on the interpretation by the administrator). Thus, some consider projective tests to be less reliable than objective personality tests because if the examiner is not well trained, subjective interpretations may affect the evaluation of these tests. *Id.*

90. ANASTASI, *supra* note 3, at 558-59. The hypothesis is that "the way in which the individual perceives and interprets the test material, or 'structures' the situation, will reflect fundamental aspects of his psychological functioning." *Id.* at 558. It is believed that the subject will "project" his own thought processes, needs, anxieties, and conflicts onto the test materials. *Id.* at 558-59.

aspects of personality.”⁹¹ An example of a projective test is the Rorschach Inkblot Test, which uses a series of inkblots that the test subject is asked to identify.⁹² Similarly, another projective assessment, the Thematic Apperception Test, asks the subject to tell a story about a series of pictures.⁹³

In contrast, objective tests are administered on a group basis.⁹⁴ They are referred to as “paper and pencil tests” or self-report inventories because they commonly require an individual to choose between two or more responses or answer true or false.⁹⁵ Some of the most common objective tests include the MMPI, the Myers-Briggs Type Indicator,⁹⁶ the Inwald Personality Inventory,⁹⁷ the Hilson Profile/Success Quotient,⁹⁸ and the California Psychological Inventory.⁹⁹

91. *Id.* at 559 (emphasis in original).

92. *Id.* The Rorschach test consists of ten pictures of inkblots. *Id.* at 560. The inkblots vary in shape and color, which vary from white to multicolored. *Id.* The inkblot shapes are suggestive of things ranging from animals to sexual organs. *Id.* at 561. The psychologist shows the inkblots in a particular order to an individual and then analyzes the response of the individual. *Id.* at 560–61. The examiner is generally looking for any unusual responses to a particular inkblot. *Id.* at 561. The inkblot, being a representation of ambiguity, is thought to be an ideal way to reach an individual’s habitual responses. *Id.*

93. *Id.* at 565. The Thematic Apperception Tests consist of cards containing pictures. *Id.* The examiner requests the individual to tell or write a story from each picture. *Id.* The examiner assesses the story for recurring themes that are abnormal. *Id.* at 566. Specifically, the examiner attempts to identify the “hero” or the individual in the story with whom the subject identifies. *Id.* Adaptations of the Thematic Apperception Test include use in vocational counseling and executive appraisal. *Id.* at 568.

94. *Id.* at 493.

95. Black, *supra* note 56, at 72. See also ANASTASI, *supra* note 3, at 493 (discussing paper-and-pencil or self-report inventories).

96. Black, *supra* note 56, at 74–76. The Myers-Briggs Type Indicator is a self-report instrument that helps to identify an individual’s strengths and personality preferences. *Id.* at 75–76. It specifically focuses on how an individual prefers to behave. *Id.* It consists of 100 questions and requires an individual to choose between descriptive terms or phrases. *Id.* From these answers the individual is divided into sixteen personality traits according to four dimensions: extroverted or introverted, sensing or intuitive, thinking or feeling, perceiving or judging. *Id.* Currently the Myers-Briggs indicator is given to up to 2.5 million people each year and is used by eighty-nine of the companies in the Fortune 100. PAUL, *supra* note 2, at xiii.

97. Hilson Research, Inc. – Employment Testing and Assessment Services, <http://www.hilsonresearch.com/testservicedetail.asp?testserviceid=56#159> (last visited Apr. 11, 2006). The Inwald Personality Inventory (IPI) is often used in law enforcement and security officer selection. *Id.* The IPI currently is used in over thirty-five percent of U.S. state police departments in post-conditional job offer screening. *Id.*

98. The Hilson Personnel Profile/Success Quotient (HPP/SQ) measures social/communication skills, work ethic, initiative, and loyalty to an organization. <http://www.hilsonresearch.com/news.asp> (last visited Apr. 11, 2006). It attempts to identify individual strengths, behavior patterns, and personality characteristics that lead to success in various work settings. *Id.*

99. ANASTASI, *supra* note 3, at 505. The California Psychological Inventory (CPI) measures normal personality functioning. *Id.* This test closely resembles the MMPI, containing 480

The MMPI¹⁰⁰—the test at issue in *Karraker*—consists of approximately 550 questions that can be answered “true,” “false,” or “cannot say.”¹⁰¹ The questions cover a wide range of topics, including opinions on religion and sexual practices, perceptions on health and political ideas, and thoughts on family, education, and occupations.¹⁰² The questions asked on the MMPI seek to evaluate the thoughts, emotions, attitudes, and behavioral traits that comprise personality.¹⁰³ The MMPI was originally designed to be used in the clinical setting, testing patients for mental disorders.¹⁰⁴

true/false questions. *Id.* It seeks to evaluate an individual’s general behavior, as well as management potential, work orientation, and leadership potential. *Id.* at 505–06.

100. PAUL, *supra* note 2, at xii. Starke Hathaway and J. Charley McKinley developed the MMPI in the 1930s. *Id.* at 49.

101. *Id.* at xii. See ANASTASI, *supra* note 3, at 497 (discussing how the MMPI is organized into affirmative statements to which the subject is to answer “True,” “False” or “Cannot say”). Originally, the MMPI consisted of 504 questions. GREENE, *supra* note 60, at 5.

102. ANASTASI, *supra* note 3, at 497. Other areas that the MMPI delves into include psychosomatic symptoms, neurological disorders, and motor disturbances. *Id.* It also covers many neurotic or psychotic behavior manifestations, such as obsessive and compulsive states, delusions, hallucinations, and phobias. *Id.* See also GREENE, *supra* note 60, at 5 (discussing the content categories for the MMPI). Questions on the MMPI include:

I have never had any black, tarry-looking bowel movements.

I have never indulged in any unusual sexual practices.

There is something wrong with my sex organs.

Everything is turning out just like the prophets of the Bible said it would.

I believe there is a Devil and a Hell in the afterlife.

I have a good appetite.

Often I feel like there were a tight band around my head.

I like to flirt.

I think Lincoln was better than Washington.

If the money were right, I would like to work for a circus or a carnival.

PAUL, *supra* note 2, at 53.

103. See GREENE, *supra* note 60, at 4–5 (explaining how the MMPI was developed to overcome the shortcoming of the previous personality inventories and accurately identify the personalities of individuals).

104. See PAUL, *supra* note 2, at 57 (noting how the MMPI was designed to sort a group of mental patients into diagnostic categories). Using the 504 items, Hathaway and McKinley constructed a series of quantitative scales that diagnosed abnormal behavior. GREENE, *supra* note 60, at 5. The ten scales are the Hs Scale, D Scale, Hy Scale, Pd Scale, Mf Scale, Pa Scale, Pt scale, Sc Scale, Ma Scale, and Si Scale. ANASTASI, *supra* note 3, at 498. The Hs Scale measures hypochondriasis. JOHN R. GRAHAM, *THE MMPI* 38 (2d ed. 1987). It identifies individuals who may be cynical, somewhat unhappy, or exhibit a general lack of ambition. *Id.* The D Scale identifies aspects of depression, such as pessimism, fatigue, or lack of confidence. *Id.* at 40–43. The Hy Scale refers to hysteria. *Id.* at 43–45. It identifies individuals who react to stress with physical problems or who are somewhat immature, but still socially involved. *Id.* However, individuals may also occasionally avoid responsibility through the development of physical symptoms, such as headaches or stomachaches. *Id.* The Pd Scale refers to Psychopathic Deviate. *Id.* at 46–50. This scale measures rebelliousness, impulse control, and frustration tolerance. *Id.* The Mf Scale measures masculine and/or feminine interests. *Id.* at 50–54. The Pa Scale refers to

Perhaps one of the most defining characteristics of the MMPI is how quickly it has transcended its original purpose of diagnosing individuals with mental disorders.¹⁰⁵ In fact, today, hundreds of tests on the market borrow the MMPI's format, language, and structure.¹⁰⁶ These tests are often used in the employment area, identifying not only candidates for high-risk public safety positions, but also lower level positions.¹⁰⁷

3. Psychological Personality Prescreening

Personality tests in particular have become a favorite tool of employers.¹⁰⁸ A 2003 survey by Management Recruiters International, Inc. indicated that about thirty percent of all companies use personality tests to assist in employment decisions.¹⁰⁹ Such personality tests are quickly becoming standard practice for many of the nation's largest

paranoia. *Id.* at 54–59. It measures an individual's awareness and sensitivity to the world around them. *Id.* The Pt scale refers to psychasthenia. *Id.* at 59–62. It measures tension, agitation, and worry and identifies individuals that are highly-strung, somewhat insecure, or perfectionists. *Id.* The Sc scale refers to schizophrenia. *Id.* at 62–65. It identifies individuals that desire to be isolated and withdrawn from social interaction with others. *Id.* It also identifies individuals who have delusions, hallucinations, or false beliefs. *Id.* The Ma Scale refers to hypomania. *Id.* at 65–68. It measures an individual's energy level and ambition. *Id.* It identifies individuals who are outgoing and ambitious, while also identifying individuals who have low energy levels and likely few interests and friends. *Id.* The Si Scale measures social introversion and extroversion. *Id.* at 68.

105. PAUL, *supra* note 2, at 56. Much of the success of the MMPI may be attributed to the fact that it can be easily administered to individuals or group subjects. GRAHAM, *supra* note 104, at 9. Its ease of use comes from its ability to be scored objectively by hand or by machine. *Id.* For instance, just a few years after its release to the public, a medical journal reported that the MMPI "is part of the personnel procedure in some of our largest corporations." PAUL, *supra* note 2, at 56. Moreover, by the 1960s, the MMPI was administered at least as often to "normal" people as to psychiatric patients. *Id.* at 58. It is used regularly to screen job applicants, offer vocational advice, settle custody disputes, and determine legal status. *Id.* at 58–59.

106. PAUL, *supra* note 2, at 65. These tests, in contrast to the MMPI, are generally cheaper, shorter, and more accessible. *Id.* However, instead of focusing on the original scales developed, these tests attempt to identify qualities such as dependability, honesty and friendliness. *Id.* These tests also attempt to screen out applicants who will be chronically late or absent, who will engage in theft, who will have "personal and/or transportation problems," and who will be counterproductive. *Id.* at 65–66. Some of these tests even assert that they can predict which employee will be injured on the job, file a false workmen's compensation claim, abuse drugs or alcohol, or be violent in the workplace. *Id.* at 66.

107. *Id.* at 63. Today, the MMPI (in an updated version) is administered to fifteen million Americans each year. *Id.* Some are mental patients, while many are doctors, psychologists, firefighters, airplane pilots, paramedics, nuclear power plant operators, and law enforcement agents. *Id.* For instance, the MMPI is used by sixty percent of police departments in selecting officer applicants and by ninety-one percent of psychologists screening applicants to Roman Catholic seminaries and religious orders. *Id.*

108. *Id.* at 66.

109. *Id.*

companies, such as Wal-Mart and General Motors.¹¹⁰ In fact, it is estimated that personality screening is a \$400 million industry.¹¹¹ Moreover, current estimates indicate that there are approximately 8,000 psychological personality tests,¹¹² administered by almost 2,500 firms,¹¹³ on the market and available to employers today.¹¹⁴

a. Benefits of Psychological Personality Testing by Employers

Use of psychological personality tests by employers is increasing in popularity because, in part, they purport to be legitimate and credible tools in predicting employee performance.¹¹⁵ Proponents of such tests maintain that there are definitive links between specific personality traits and various job performances.¹¹⁶ For instance, research suggests that calm, steady individuals make ideal supervisors and security officers, while individuals who are persistent and have a strong sense of self are well suited for commissioned sales jobs.¹¹⁷

The attraction of a simple quantitative test that may accurately predict performance is clear—bad hires are expensive to a company.¹¹⁸ First, on average, businesses spend the equivalent of one year's salary to recruit and train a new employee.¹¹⁹ This cost is accentuated when

110. *Id.* at xii.

111. *Id.* at xiv.

112. Menjoge, *supra* note 53, at 330; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1256 n.16 (1995).

113. PAUL, *supra* note 2, at xiv.

114. *Id.*

115. Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 279 (2002).

116. *See id.* at 289–90 (examining the purported benefits of personality tests).

117. *Id.* at 283. Another example is knowing that a firefighter will not freeze in an emergency. *McKenna v. Fargo*, 451 F. Supp. 1355, 1382 (D.N.J. 1978). In *McKenna*, the court permitted psychological testing of firefighters. *Id.* The court, in taking an interest-balancing approach, determined that the state's interest was "of the highest order," and therefore justified the procedure. *Id.* at 1381. The same reasoning has applied to police officers. *See Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (holding that a psychological personality test was permissible because police officers "demand unique qualifications").

118. Schachter, *supra* note 36, at 169. Employers today cannot afford to hire an unsuitable employee because employees represent a major investment and cost. *Id.* Specifically, a company will likely invest a substantial amount of time and money in an employee through not only wages and other employee benefits, but also training programs. *Id.* Essentially, it has become vitally important for employers to seek out employees that are the most suitable for the employment position. *Id.*

119. Stabile, *supra* note 115, at 283. According to one estimate, the average cost of replacing a bad hire is one-and-a-half times the worker's salary and benefits. *Id.* Thus, it could cost an employer up to \$45,000 to replace a bad hire making \$30,000 in salary and benefits. *Id.* The cost is so high because of recruiting costs, interviewing costs, processing costs, and training and re-training employee costs. *Id.*

hiring managers lack the time and training to interview applicants correctly or where there is a large volume of applicants.¹²⁰ Thus, an employment tool that can reduce the size of the applicant pool, or reinforce or overrule a job interviewer's instincts, is highly desirable for companies.¹²¹ Moreover, when hiring for positions of trust, such as management level positions, employers want to weed out applicants who are prone to dishonesty or who may otherwise prove to be unreliable.¹²² Thus, employers want some device that can accurately identify traits or behaviors that relate to an employer's specific job requirements, which will ultimately result in improved employee quality and reduce employee turnover.¹²³

b. Costs of Personality Testing by Employers

While personality tests offer many benefits to employers, they are not without their criticisms.¹²⁴ First, psychologists have long opined that personality tests minimize the complexity of the human brain and cannot accurately reduce personality to a quantitative number.¹²⁵ Many argue that the tests were developed for the purpose of diagnosing psychological disorders, not employee performance.¹²⁶ For example, the popular Myers-Briggs test was developed not for hiring, but for

120. Stafford, *supra* note 53, at D. "In real life, many hiring managers don't have the time or training to interview candidates correctly. When that's the case, hiring is a 'shoot-from-the-hip' thing." *Id.* "Traditional job interviews are proving to be poor predictors of success. . . because the questions asked are not standardized, so interviewers are not gauging the same things and in the same ways in every candidate." Wallace Immen, *Prospective Hires Put to Test*, *GLOBE AND MAIL*, Jan. 26, 2005, at C1. Moreover, reference checks can often fail to provide employers with sufficient information. Stabile, *supra* note 115, at 283. Reference checks are often considered insufficient screening devices because employers may be hesitant to reveal negative information about a past employee in an effort to avoid defamation lawsuits. *Id.*

121. See Stafford, *supra* note 53, at D (discussing how preemployment profiles are changing the way employers hire).

122. See Stabile, *supra* note 115, at 282–84 (discussing a variety of reasons why employers use personality tests). It is estimated that five to six thousand U.S. organizations administer honesty or integrity tests with close to five million Americans taking these tests. PAUL, *supra* note 2, at 67.

123. Stafford, *supra* note 53, at D. "Doing the testing is a good business decision that cuts costs." *Id.*

124. See generally PAUL, *supra* note 2 (examining the drawbacks of personality testing).

125. See Cha, *supra* note 36, at A1 (stating that personality tests do a "disservice to the complexity of human individuality"). Critics argue that "the best predictor of how someone will behave on the job is usually what they've done before—their record of achievements—and not how they answer a test." Barbara Rose, *A Perfect Fit? – Tests Help Tell If Personalities Match Positions*, *VA. PILOT & LEDGER STAR*, Nov. 13, 2005, at K1.

126. See Stabile, *supra* note 115, at 291–92 (noting that many researchers doubt the capacity of clinical psychological tests to accurately predict employee performance).

training and development, making its application to employment screening questionable.¹²⁷

Additionally, critics contend that tests purporting to measure personality and future performance are not truly accurate.¹²⁸ First, while certain occupations might have easily identifiable traits that will predict good performance, others do not.¹²⁹ In fact, a survey by the Aberdeen Group, a Boston-based technology research firm, found that forty-nine percent of companies using psychological personality tests in the hiring process recognized no impact on employee turnover.¹³⁰ This suggests that the tests did not (1) predict the desirable traits for the positions or (2) predict the right mix of desirable traits.¹³¹

Finally, because psychological personality testing is largely an unregulated industry, many of the tests lack rigorous review by professionals in the field.¹³² Many times the traits being tested for are subjective and require a great deal of interpretation by an expert.¹³³ The limited rules governing the creation of personality tests and validation procedures accentuate these concerns.¹³⁴ In addition, with the advent of the Internet, the proliferation of psychological personality tests on the

127. *Id.* at 292–93. Critics question the applicability of these tests because often employment is situational. *Id.* Ultimately, an employee's environmental situation at work has a large influence on how an employee will behave and perform. *Id.* See also *supra* note 96 for a general discussion of the Myers-Briggs test.

128. *Id.* at 290. Conflicting evidence exists about the extent to which personality measures correctly predict employee performance. *Id.*

129. *Id.* at 291.

While it may be intuitive to say that tendencies to agreeableness and patience, as well as to some (but not too much) aggressiveness, will make someone a good sales person, it may not be so easy to identify what personality characteristics will make someone a good pilot, mechanic, or computer programmer.

Id.

130. Cha, *supra* note 36, at A1.

131. Stabile, *supra* note 115, at 291. Though tests that reveal traits of courtesy and aggressiveness are desirable, they often do not indicate what degree and mix is the most beneficial. *Id.*

132. *Id.*

133. *Id.* at 293–94. Specifically, because projective psychological personality tests require an additional degree of interpretation, their validity in predicting employee performance is highly questionable. *Id.* For instance, “slight differences in the phrasing of verbal instructions, the use of different tones in conveying identical instructions, and the examiner-examinee relationship can have a significant effect on test performance.” *Id.*

134. *Id.* at 294–95. The U.S. Senate observed, even as early as 1965, that “[i]n spite of the best efforts of the American Psychological Association and responsible test publishing houses, a great many psychological instruments are put on the market without proper refinement and development.” *Id.*

market is expansive and reduces the likelihood that a professional will properly interpret the test.¹³⁵

C. *The Americans with Disabilities Act*

As demonstrated in *Karraker*, the psychological personality tests discussed above often must operate in accordance with the Americans with Disabilities Act (ADA). Congress enacted the ADA to provide a “clear and comprehensive national mandate” against the discrimination of individuals with disabilities.¹³⁶ To carry out this goal, Congress provided that individuals with disabilities, whether physical or mental, could not be discriminated against in employment.¹³⁷

1. History of the ADA

Prior to the ADA, the most comprehensive federal legislation prohibiting disability discrimination was the Rehabilitation Act of 1973.¹³⁸ The Rehabilitation Act required federal contractors and federal executives to take active steps to promote and employ qualified persons with disabilities.¹³⁹ However, the Rehabilitation Act protected only federal employees, employees of federal contractors, and individuals involved in programs or activities that received federal financial assistance, such as colleges and universities, from disability discrimination.¹⁴⁰

Though the Rehabilitation Act promoted vocational training and social services for the disabled, while outlawing federal employment discrimination, disability discrimination continued to be pervasive,

135. Cha, *supra* note 36, at A1. The proliferation of the Internet dangerously suggests that “anyone can make up a test and put it on the Internet and make claims they choose about the test.” *Id.* “There’s no licensing or registration in [personality testing]. It’s really caveat emptor . . . buyer beware.” Stafford, *supra* note 53, at D. In fact, many personality tests may be taken online. See Humanmetrics: Jung Typology Test, <http://www.humanmetrics.com/cgi-win/JTypes1.htm> (last visited Apr. 11, 2006), for an example of a personality test that may be taken online.

136. 42 U.S.C. § 12101(b)(1) (2000); *see also infra* Part II.C.1 (examining the history and enactment of the ADA).

137. *See infra* Part II.C.2 (discussing the provisions of Title I of the ADA).

138. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794(a) (1994)). The Rehabilitation Act states that no individual with a disability “shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency” 29 U.S.C. § 794(a).

139. 29 U.S.C. § 794(a). The Rehabilitation Act prevents discrimination against disabled contractors, government employees, and recipients of federal grants by denying federal aid to any activity that discriminated or discriminates against the disabled. *Id.*

140. 29 U.S.C. § 794(b).

especially in the private sector.¹⁴¹ Specifically, Congress found that individuals with disabilities continued to encounter discrimination in areas such as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.¹⁴²

To combat this continued discrimination, on July 26, 1990, Congress passed and President George H. W. Bush signed into law the ADA.¹⁴³ The ADA was passed to extend to the private sector the essential substantive provisions of The Rehabilitation Act of 1973 and to equalize the status of people with disabilities.¹⁴⁴ The ADA intended to provide individuals with disabilities equal opportunity, full participation, independent living, and economic self-sufficiency.¹⁴⁵ Simply, through the ADA, Congress intended for the federal government to have a significant role in enforcing clear, strong, and consistent standards regarding the treatment of individuals with disabilities.¹⁴⁶

141. *Id.* The severity of the disability discrimination can be seen in the legislative history of the ADA:

Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Louis Harris poll "not working" is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the ages of 16 and 64 are met [sic] working at all; yet, a large majority of those not working say that they want to work. . . . Despite the enactment of Federal legislation such as the Education for all Handicapped Children Act of 1975 and the Rehabilitation Act of 1973, a U.S. Census Bureau Report issued in July, 1989 reported the following findings: (A) The percentage of men with a work disability working full time fell 7 percent from 20 percent in 1981 to 23 percent in 1988. (B) The income of workers with disabilities dropped sharply compared to other workers. In 1980, men with disabilities earned 23 percent less than men with no work disability, and by 1988 this had dropped to 36 percent less than their counterparts. In 1980, women with disabilities earned 30 percent less than women with no disabilities, and by 1988 this had dropped to 38 percent less than their counterparts. . . . In 1984, fifty percent of all adults with disabilities had household incomes of \$15,000 or less. Among non-disabled persons, only twenty-five percent had household incomes in this wage bracket.

H.R. REP. NO. 101, 485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 314 (testimony of U.S. Attorney General Dick Thornburgh before House Subcommittee on Civil and Constitutional Rights, Oct. 11, 1989) (internal citations omitted).

142. 42 U.S.C. § 12101(a)(3) (2000). Congress also found that individuals with disabilities occupy an inferior status in society. 42 U.S.C. § 12101(a)(6).

143. 42 U.S.C. § 12101.

144. 42 U.S.C. § 12101(a)(8); *ADA Overview*, *supra* note 6, at 761.

145. 42 U.S.C. § 12101(a)(8).

146. 42 U.S.C. § 12101(b). The ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

2. Terms of Title I of the ADA

The ADA protects all individuals with a qualified disability.¹⁴⁷ A disabled person, as generally defined by the ADA, is either an individual with a current or previous history of a substantially limiting physical or mental impairment, or an individual who is regarded as having a substantially limiting physical or mental impairment.¹⁴⁸ Thus, one essential component of an ADA claim is the existence, history, or perception of a physical or mental impairment.¹⁴⁹ Though the ADA neither defines “impairment” nor gives examples, the EEOC provides guidance as to what an impairment is under the ADA.¹⁵⁰ Generally, a physical impairment is a condition that affects a body system,¹⁵¹ while a mental impairment is a condition that affects the psychological well-being of an individual.¹⁵² However, so-called normal physical characteristics, such as height or weight, do not constitute impairments.¹⁵³ Similarly, personality traits, such as poor judgment, dishonesty, or quick temper are not covered unless they are symptoms of a mental or psychological disorder.¹⁵⁴

147. 42 U.S.C. § 12112(a).

148. 42 U.S.C. § 12102(2). The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” *Id.*

149. *See* *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (noting that the first step in an ADA inquiry is to determine whether a plaintiff’s condition constitutes an impairment).

150. 29 C.F.R. § 1630.2(h)(1) (2003).

151. *Id.* Under the EEOC, a physical impairment is “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.” *Id.*

152. *See* 29 C.F.R. § 1630.2(h)(2) (stating that a mental impairment is “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities”). Emotional or mental illnesses can include depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders. EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Equal Employment Opportunity Comm’n No. 915.002 (March 25, 1997), available at <http://www.ipmaac.org/files/eeoc-psych.pdf> [hereinafter EEOC, Psychiatric Disabilities Guidance]. However, certain conditions are specifically excluded by the text of the ADA. 42 U.S.C. § 12211. These conditions include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorder resulting from current illegal drug use. *Id.*

153. *Section 902 Definition of the Term Disability*, Eq. Empl. Compl. Man. (CBC) § 902.2(c)(5) available at <http://www.eeoc.gov/policy/docs/902cm.html> [hereinafter EEOC, Compliance Manual]. *See also* *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985) (noting that characteristics such as average height and strength are not impairments under the ADA).

154. EEOC, Compliance Manual, *supra* note 153, at § 902.2(c)(4). For instance the EEOC

Under the ADA, an impairment only constitutes a disability if it substantially limits one or more of an individual's major life activities.¹⁵⁵ Again, the text of the ADA does not define what a major life activity is, and thus the EEOC provides guidance.¹⁵⁶ Under the EEOC, major life activities include caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, walking, learning, and working.¹⁵⁷ Moreover, under the EEOC, an impairment will substantially limit a major life activity if it restricts the individual from performing an activity that an average person in the general population would normally be able to perform.¹⁵⁸

gives several examples of whether personality traits should be considered an impairment under the ADA:

Example 1—CP is a lawyer who is impatient with her co-workers and her boss. She often loses her temper, frequently shouts at her subordinates, and publicly questions her boss's directions. Her colleagues think that she is rude and arrogant, and they find it difficult to get along with her. CP does not have an impairment. Personality traits, such as impatience, a quick temper, and arrogance, in and of themselves are not impairments.

Example 2—Same as Example 1, above, except CP's behavior results from bipolar disorder. CP has an impairment, bipolar disorder.

Id. Thus, "[t]raits or behaviors are not, in themselves, mental impairments." EEOC, Psychiatric Disabilities Guidance, *supra* note 152. For example, the EEOC states that stress is, by itself, not necessarily a mental impairment. *Id.* Stress, may however, be related to a mental or physical impairment. *Id.* Similarly, traits such as irritability, chronic lateness, and poor judgment are not alone mental impairments. *Id.* However, they may be symptomatic of mental impairments. *Id.*

155. 42 U.S.C. § 12102(2)(A). *See also* Bragdon v. Abbott, 524 U.S. 624, 637 (1998) (stating that "[t]he [ADA] is not operative, and the definition [of disability] not satisfied, unless the impairment affects a major life activity").

156. *See* 42 U.S.C. § 12102 (failing to define what constitutes a major life activity).

157. 29 C.F.R. § 1630.2(i) (2003); *see Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999) (noting that eating and drinking are major life activities). Major life activities may also include thinking, concentrating, interacting with others, and sleeping. EEOC, Psychiatric Disabilities Guidance, *supra* note 152; *see Amir*, 184 F.3d at 1027 (noting that getting along with others may be considered a major life activity); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) (noting that sleep is a major life activity, though concentration is not); *Taylor v. Phoenixville Schools*, 184 F.3d 296, 307 (3d Cir. 1999) (noting that thinking is a major life activity). However, the ability to move around is not necessarily a major life activity. *See Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 151 (2d Cir. 1998) ("everyday mobility" is not a major life activity even when agoraphobia restricts an individual's ability to cross bridges and overpasses, enter tunnels, and board trains).

158. 29 C.F.R. § 1630.2(j)(1)(i). However, a mild restriction will not substantially limit an individual. EEOC, Psychiatric Disabilities Guidance, *supra* note 152. Moreover, an impairment will not substantially limit an individual merely because it affects a major life activity. *See Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (holding that "not every impairment that affected an individual's major life activities is a substantially limiting impairment"); *see also Hamm v. Runyon*, 51 F.3d 721, 726 (7th Cir. 1995) ("Many impairments do not impact an individual's life to the degree that they constitute disabling impairments.") (citing 29 C.F.R. § 1630.2(j)). To be a substantially limiting impairment, the impairment must "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily

Finally, the ADA's definition of "disability" is not limited to individuals who have present physical or mental impairments.¹⁵⁹ Rather, the ADA also protects individuals who have a record of an impairment that has substantially limited a major life activity, and it even protects individuals who may be incorrectly regarded by another individual, such as an employer, as having a physical or mental impairment that substantially limits a major life activity.¹⁶⁰

Title I of the ADA specifically addresses disability discrimination in employment.¹⁶¹ It prohibits employers with fifteen or more employees, labor organizations, employment agencies, and joint labor management committees from discriminating against disabled individuals in job application procedures, hiring, promotion, termination, compensation, training, and all other conditions and benefits of employment.¹⁶² The underlying principle of Title I is that it protects qualified individuals with a disability.¹⁶³ A qualified individual with a disability is an individual who, with or without reasonable accommodation of his impairments, can perform the essential functions of the position.¹⁶⁴ If the individual can perform the essential functions, the employer may not bar the individual from the employment opportunity merely because of his disability.¹⁶⁵ Thus, when bringing a Title I claim, an employee must show that (1) the employee is or was disabled under the meaning of the

lives." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002). The impairment must also be permanent or long term. *Id.* Factors promulgated by the EEOC to consider if an impairment substantially limits a major life activity include: "[t]he nature and severity of the impairment," (2) "[t]he duration or expected duration of the impairment," and (3) "[t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

159. 42 U.S.C. § 12102(2).

160. 42 U.S.C. § 12102(2)(B)–(C). Congress wanted to protect individuals who were recovering from disabling conditions or have a history of medical problems. *ADA Overview*, *supra* note 6, at 770–71. For example, individuals with a history of cancer, heart disease, or mental illness are protected based on their past conditions. *Id.* This provision was enacted to reflect Congress' belief that the myths and fears of disabilities can handicap an individual just as much as an actual physical or mental disability. *Id.* at 771. These "attitudinal" disabilities often show up in employment situations, where employers perceive an impairment as more severe than it really is. *Id.*

161. 42 U.S.C. § 12112(a). "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

162. 42 U.S.C. § 12111(2).

163. 42 U.S.C. § 12111(8).

164. *Id.* Though the ADA does not clarify what the "essential functions" of a job are, the EEOC defines it as the "fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1) (2003).

165. 42 U.S.C. § 12112(a).

ADA, (2) the employer was aware of the disability, (3) the employee was able to perform the essential activities of the job and, (4) the employee was discriminated against in an employment decision due to their disability.¹⁶⁶

3. Interpreting the Definitions and Provisions of the ADA

The EEOC is the federal administrative agency in charge of administering and enforcing the provisions of the ADA.¹⁶⁷ Congress authorized the EEOC to issue procedural regulations to clarify any ambiguities present in the ADA.¹⁶⁸ After conducting sixty-two public meetings around the country with representatives from disability rights and employer organizations, the EEOC issued regulations and an interpretive appendix in 1991, one year before the effective date of the ADA's employment discrimination provisions.¹⁶⁹ In addition to the implementation of the regulations and interpretative appendices, between 1991 and 1992, the EEOC issued a Technical Assistance Manual, which provided employers and individuals with disabilities guidance on the newly enacted ADA.¹⁷⁰

However, the complexity of issues arising under the ADA requires the EEOC to continuously develop policy guides.¹⁷¹ Since 1993, the EEOC has issued numerous enforcement guides, which have provided interpretations on key ADA issues, including preemployment inquiries and medical examinations,¹⁷² and psychiatric conditions.¹⁷³ The

166. *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999). However, the elements of a *prima facie* case vary and may be stated in different ways. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973).

167. See 42 U.S.C. § 12206(c)(2)(A) (requiring the EEOC to develop a plan for implementing Title I of the ADA); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS IN EMPLOYMENT DISCRIMINATION* 710 (6th ed. 2003) (discussing the EEOC's role in the implementation of the ADA).

168. ZIMMER, *supra* note 167, at 711. Title I of the ADA gives the EEOC substantive rule-making authority. *Id.* The ADA states "[n]ot later than one year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter . . ." 42 U.S.C. § 12116.

169. The U.S. Equal Employment Comm'n: EEOC and Title I of the ADA: Overview and History, <http://www.eeoc.gov/ada/adahistory.html> (last visited Apr. 11, 2006). Congress provided that Title I would not take effect until two years after its initial enactment. *Id.* This was because Congress wanted to: (1) allow the EEOC time to develop regulations and assistance procedures; (2) conduct public education laws on the newly enacted disability law; and (3) give employers adequate time to adapt to the requirements of the ADA. *Id.*

170. *Id.*

171. *Id.*

172. See EEOC, *Preemployment Guidance*, *supra* note 7 (discussing preemployment disability and medical questions); EEOC, *Medical Examination Guidance*, *supra* note 12 (discussing medical examinations under the ADA).

EEOC's interpretation of the ADA is not binding law, although it does serve as a solid foundation for construing the ADA.¹⁷⁴

D. The ADA and Preemployment Medical Screening

Congress' enactment of the ADA was described as a "declaration of independence" for the estimated forty-three million disabled individuals living in the United States.¹⁷⁵ As part of this effort, the ADA restricts an employer's ability to conduct medical examinations and inquiries of job applicants, including psychological examinations, in an effort to discover disabilities.¹⁷⁶ However, identifying medical examinations, and specifically psychological examinations, under the ADA is not always easy, as evidenced by the ongoing difficulty in classifying psychological personality tests.¹⁷⁷

The statutory provisions of Title I of the ADA severely limit the circumstances in which an employer may require medical examinations or medical inquiries.¹⁷⁸ Drawing on the Rehabilitation Act of 1973, Title I prohibits employers from using preemployment medical information to exclude applicants.¹⁷⁹ The ADA creates three categories of medical inquiries and examinations by employers, each with its own separate restrictions on the permissibility of medical tests.¹⁸⁰ The categories are medical examinations and inquiries conducted: (1) prior to an offer of employment or preemployment inquiries;¹⁸¹ (2) after an

173. See EEOC, *Psychiatric Disabilities Guidance*, *supra* note 152 (discussing psychiatric disabilities under the ADA).

174. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)) (EEOC guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

175. 136 CONG. REC. H2430 (daily ed. May 17, 1990) (statement of Rep. Conte); 136 CONG. REC. S9690 (daily ed. July 13, 1990) (statement of Sen. Simon). See also 42 U.S.C. § 12101(a) (2000) (finding that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older").

176. 42 U.S.C. § 12112(d) (2000).

177. See *supra* Part II.C (examining the ADA).

178. 42 U.S.C. § 12112(d)(2).

179. 42 U.S.C. § 12112(d). The principal purpose of this restriction "is to prohibit employers from making adverse employment decisions based on stereotypes and generalizations associated with the individual's disability rather than on the individual's actual characteristics." *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1097 (6th Cir. 1998) (citing 29 C.F.R. § 1630 (2003)). In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that where Congress does not address a specific issue or a statute is ambiguous, the Court will give deference to an agency's interpretation of a statute that the agency was entrusted to administer. *Id.* at 844. Legislative regulations are controlling unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* The court will reject an agency's construction if it is contrary to congressional intent. *Id.* at 843 n.9.

180. 42 U.S.C. § 12112(d).

181. 42 U.S.C. § 12111(d)(2).

offer of employment, but prior to the commencement of employment duties;¹⁸² and (3) during employment.¹⁸³

1. Preemployment Medical Testing

In the preemployment stage, the ADA generally allows an employer to inquire about an applicant's qualifications for a position.¹⁸⁴ However, though an employer may inquire into the education, training, skills, and experience of the applicant and his or her applicability to the position, the employer may not subject an applicant to any medical examination or inquiry prior to an offer of employment.¹⁸⁵

Unfortunately, the ADA does not specifically define what constitutes a medical examination.¹⁸⁶ The EEOC has acknowledged that it is often difficult to determine what constitutes a medical examination.¹⁸⁷ However, the EEOC guidelines prohibit medical examinations that are intended to reveal the existence of an individual's impairment(s) rather than measure an individual's performance of a task.¹⁸⁸ To clarify this definition, the EEOC provides factors that typify a medical examination: (1) whether the test is administered by a health care professional; (2) whether the results of the test are interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or the state of an applicant's physical or psychological health; (4) whether the employer is attempting to discover an applicant's physical or mental impairments; (5) whether the test is invasive; (6) whether the test measures physiological responses (as opposed to performance of a task); (7) whether the test is normally done in a medical setting; and (8) whether medical equipment or devices are

182. 42 U.S.C. § 12112(d)(3). Generally, after an employer offers an applicant employment, the ADA does not restrict an employer's right to require entrance medical examinations. 42 U.S.C. § 12112(d)(3). The entrance examinations are unlimited in their scope and need not be related to the position of employment. *Id.* However, to be permissible under the ADA, an employer must subject all entering employees to the same medical testing. *Id.*

183. 42 U.S.C. § 12112(d)(4)(A). Generally, the ADA does not prevent an employer from requesting a medical examination from a current employee when the medical examination serves to determine an employee's ability to perform a job-related function or serve a business need. *Id.*

184. 42 U.S.C. § 12112(d)(2). Although employers may not require medical examinations at the preemployment stage, they may evaluate whether an applicant is qualified for the job. 42 U.S.C. § 12112(d)(2)(B). The ADA allows employers to ask about an applicant's ability to perform specific job functions. *Id.*

185. 42 U.S.C. § 12112(d)(2); see EEOC, Preemployment Guidance, *supra* note 7 (stating that an employer may make inquiries of an applicant, such as if they hold the required licenses or certifications for the position).

186. See 42 U.S.C. § 12111 (neglecting to define what constitutes a medical examination).

187. EEOC, Preemployment Guidance, *supra* note 7 ("It is not always easy to determine whether something is a medical examination").

188. *Id.*

used for the test.¹⁸⁹ While listing eight factors, the presence of one factor may be sufficient for a test or procedure to be considered medical.¹⁹⁰

2. Difficulties with Defining a Medical Examination

Although the EEOC provides some guidance on what constitutes a medical examination, it is often difficult to distinguish between medical and non-medical examinations.¹⁹¹ For example, the EEOC states that a physical agility test, such as where an employer tests an applicant's ability to perform actual or simulated job tasks, is not a medical examination under the ADA.¹⁹² Moreover, a physical fitness test, where an applicant is required to run or lift, is not a medical examination.¹⁹³ However, if an employer measures an applicant's physiological or biological responses, the test would be medical.¹⁹⁴ Similarly, testing an applicant's ability to read labels or distinguish objects is not a medical examination if it is a necessary function of the position.¹⁹⁵ However, requiring an individual to read an eye chart would be a medical examination.¹⁹⁶

3. Psychological Testing as a Medical Examination

Psychological personality testing is one type of testing that has recently proven difficult to classify.¹⁹⁷ The difficulty arises because the EEOC guidelines state that psychological tests that identify mental disorders or impairment qualify as medical examinations, but tests that evaluate personality traits such as honesty, preferences, and habits do not.¹⁹⁸ Thus, the EEOC factors that typify a medical examination are critical to the determination.¹⁹⁹ Specifically, the following inquiries are

189. *Id.*

190. *Id.* ("In some cases, one factor may be enough to determine that a procedure or test is medical.").

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. See *infra* Parts II.D.3.a–c (discussing how courts have classified similar psychological personality tests differently).

198. EEOC, Preemployment Guidance, *supra* note 7.

199. *Id.*

Example: A psychological test is designed to reveal mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide

critical: (1) is the test designed to reveal a mental impairment; (2) is the test normally given in a medical setting; (3) is the test administered by a health care professional; and (4) is medical equipment used.²⁰⁰ Since the enactment of the ADA, relatively few cases have addressed the issue of whether a particular psychological personality test is a medical examination and those few decisions are in conflict with each other.²⁰¹

a. *Barnes v. Cochran*: A Psychological Personality Test Constitutes a Medical Examination Under the ADA

In *Barnes v. Cochran*, a federal district court in Florida held that a preemployment psychological evaluation, which consisted in part of several personality tests, was a preemployment medical examination prohibited under the ADA.²⁰² In *Barnes*, the plaintiff alleged that the defendant, the county sheriff, violated the ADA by refusing to hire the plaintiff as a corrections deputy.²⁰³ The plaintiff alleged that the defendant's required preemployment psychological evaluation violated the ADA's prohibition on medical examinations prior to an offer of employment.²⁰⁴ Prior to employment, the defendant required all job applicants to submit to a psychological evaluation.²⁰⁵ The evaluation, performed by a licensed psychologist, consisted of a psychological clinical evaluation of the plaintiff, a review of the plaintiff's medical records, and several personality tests, including the MMPI,²⁰⁶ the

evidence that would lead to a diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies, or is depressed). Under these facts, the test is a medical examination.

Example: An employer gives applicants the RUOK Test (hypothetical), an examination which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM-listed conditions). This test is medical.

Example: An employer gives the IFIB Personality Test (hypothetical), an examination designed and used to reflect only whether an applicant is likely to lie. This test, as used by the employer, is not a medical examination.

Id.

200. *Id.*

201. See *infra* Parts II.D.3.a–c (discussing how only two courts have faced the issue of whether a psychological personality test is a medical examination under the ADA).

202. *Barnes v. Cochran*, 944 F. Supp. 2d 897, 904–05 (S.D. Fla. 1996), *aff'd* 130 F.3d 443 (11th Cir. 1997).

203. *Id.* at 900.

204. *Id.* at 903.

205. *Id.* at 904.

206. See *supra* notes 100–07 and accompanying text (explaining the MMPI).

Inwald Personality Inventory,²⁰⁷ the Hilson Profile/Success Quotient Test,²⁰⁸ and the California Psychological Inventory.²⁰⁹

The defendant asserted that the examination was not a prohibited medical examination under the ADA because its purpose was to determine if the plaintiff was qualified for the position, not to discover an underlying disability.²¹⁰ The defendant contended that it refused to hire the plaintiff because the plaintiff's preemployment psychological evaluation revealed that the plaintiff previously had experienced flashbacks, nightmares, blackouts, and hallucinations when under stress—conditions that would make the plaintiff unsuitable for the position of corrections officer.²¹¹

The district court, disagreeing with the defendant's contention, held that the defendant's preemployment psychological evaluation of a corrections deputy applicant constituted a prohibited preemployment medical examination under the ADA.²¹² The court reasoned that the psychologist's evaluation was not the type the EEOC described as a permissible preemployment psychological examination.²¹³ The court found that the evaluation was medical because a licensed psychologist performed the exam, reviewed the plaintiff's medical records, compiled the plaintiff's medical history, and performed a variety of personality tests.²¹⁴

Moreover, the court determined that the preemployment evaluation would provide the defendant with evidence that could identify an applicant with a mental disorder or impairment.²¹⁵ The court reasoned that because the evaluation not only extensively inquired into the plaintiff's life, but also probed into areas that were likely to disclose specific psychological disorders, it could identify an applicant with a mental disorder.²¹⁶ Thus, the defendant's preemployment evaluation was medical in its nature and prohibited by the ADA.²¹⁷

207. See *supra* note 97 (explaining the Inwald Personality Inventory).

208. See *supra* note 98 (explaining the Hilson Personnel Profile/Success Quotient Test).

209. See *supra* note 99 (explaining the California Psychological Inventory).

210. *Barnes*, 944 F. Supp. at 904.

211. *Id.* at 901. The defendant also contended that the defendant did not hire the plaintiff because he had a criminal record for driving under the influence of alcohol. *Id.* at 902.

212. *Id.* at 904.

213. *Id.* at 905 (noting that the ADA prohibits pre-offer medical examinations, which includes psychological examinations).

214. *Id.* at 904–05.

215. *Id.* at 905.

216. *Id.* at 904.

217. *Id.*

b. *Thompson v. Borg-Warner Protective Services Corporation*: A Psychological Personality Test Is Not a Medical Examination Under the ADA

Contrary to *Barnes*, a federal district court in California held that a preemployment psychological personality test was not designed to elicit information about an applicant's mental impairment and thus was not a medical examination prohibited by the ADA.²¹⁸ In *Thompson v. Borg-Warner Protective Services Corporation*,²¹⁹ the plaintiff challenged the defendant's use of a multiple-choice test called the PASS-III D.A.T.A. Survey ("PASS-III") during the application process for a security guard position.²²⁰ The applicants were applying for security guard positions and had to take the PASS-III personality test as part of their application for employment.²²¹ The results of the PASS-III test were subsequently used as an interviewing tool in the applicant's full interview.²²²

The plaintiff contended that the PASS-III test elicited information about a subject's mental impairment or psychological health, and thus was a prohibited medical examination under the ADA.²²³ The plaintiff claimed that statements in the PASS-III administration and evaluation materials suggested that the test sought to discover mental impairments.²²⁴ Specifically, the Pass-III materials made statements about identifying "behavior problems" and "emotional instability" in applicants.²²⁵ Thus, the plaintiff asserted that the PASS-III was designed to discover mental impairments.²²⁶

The defendant, on the other hand, contended that the PASS-III was not an unlawful pre-offer medical examination because it did not ask about the existence, nature, or severity of a disability, but merely elicited opinions about work-related subjects.²²⁷ The defendant noted

218. *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at *6 (N.D. Cal. Mar. 11, 1996).

219. *Id.* at *1.

220. *Id.* The PASS-III Survey is a character attitude survey designed to evaluate employment applicants. PASS-III Survey, <http://www.hrprograms.com/PASSIII.html> (last visited Apr. 11, 2006). PASS-III consists of 100 statements to which an applicant must respond by marking boxes labeled "yes," "?," or "no." *Thompson*, 1996 WL 162990, at *1. The PASS-III broke down the applicant's responses into three sections: the Alienation index, the Trustworthiness Attitudes index, and the Drug Attitudes index. *Id.*

221. *Thompson*, 1996 WL 162990, at *1.

222. *Id.*

223. *Id.* at *5.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

that the testing company's materials contained no mention that the PASS-III could determine whether or not an applicant had a disability.²²⁸ Moreover, the defendant contended that there was no evidence that the defendant actually used the survey to ascertain or attempt to ascertain whether the plaintiff had a disability.²²⁹

The court held that the ADA prohibits any pre-offer inquiry or medical examination designed to reveal the existence, nature, or severity of a disability, whether directly or indirectly.²³⁰ Thus, though the PASS-III did not ask directly about an applicant's disabilities, the court held that it still could constitute an unlawful pre-offer inquiry if it was designed and used to elicit information intended to diagnose a disability.²³¹

However, after examining the PASS-III, the court held that no reasonable jury could find that the test was an unlawful pre-offer medical examination.²³² First, the court noted that a number of the EEOC's factors that help in determining whether a test constitutes an unlawful medical exam weighed against the argument that the PASS-III survey was a medical exam.²³³ The court specifically noted that there was no evidence that the survey was administered or interpreted by a health care professional, that it was physically invasive, that it was normally given in a medical setting, or that medical equipment was used.²³⁴

Furthermore, the court determined that the PASS-III was not designed to reveal an impairment in an applicant's mental health.²³⁵ The court found that there was no evidence showing that the PASS-III elicited information about mental impairments as opposed to merely revealing disfavored mental or personality characteristics.²³⁶ For the court, that the test revealed "behavioral problems" and "emotional instability" did not necessarily make it a prohibited medical examination.²³⁷ Specifically, the court noted that there was no evidence in the record that the "behavioral problems" and "emotional instability"

228. *Id.*

229. *Id.*

230. *Id.* at *6.

231. *Id.*

232. *Id.* See also *supra* Parts II.C–D (discussing what constitutes a mental impairment and psychological medical examination under the ADA).

233. *Thompson*, 1996 WL 162990, at *6.

234. *Id.*

235. *Id.*

236. *Id.* at *7.

237. *Id.*

were disabilities or were characteristics that identified impairments in an applicant.²³⁸ Therefore, weighing the EEOC's multiple factors, the court held that no reasonable jury could find that the PASS-III was an unlawful pre-offer medical exam.²³⁹

The court also disagreed with the plaintiff's contention that the ADA *per se* prohibits pre-offer questions about mental health.²⁴⁰ The court explained that the statutory language of the ADA does not limit employers' inquiries into personality attributes, such as honesty or ability to get along with others, but rather disabilities.²⁴¹ The court observed that if mental health were defined as broadly as the plaintiff desired, the ADA would prohibit employers from asking any questions about an applicant's preferences, habits, or behavioral patterns.²⁴² Simply, the court believed that the ADA permitted employers to inquire into an applicant's personal flaws when hiring.²⁴³ The court recognized that such questions could potentially be intrusive and used to identify mental impairments; however, the potential for intrusion did not mean that the ADA prohibited all questions inquiring into the mental health of an applicant.²⁴⁴

c. The Lessons of *Barnes* and *Thompson*

Both *Barnes* and *Thompson* demonstrate the fact that classifications of psychological personality tests rely heavily on the interpretation of the EEOC factors and the design of the psychological personality test.²⁴⁵ Specifically, both courts focused on whether the examination could identify mental impairments in applicants.²⁴⁶ For instance, in

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* For example, an employer could inquire into an applicant's organization and time-management skills, which could affect an employee's ability to be on time to work. *Id.* The court reasoned that such questions are not normally indicative of a mental impairment. *Id.* The court believed that, in general, poor time-management skills suggest to an employer that a person is likely to be late or has a propensity for tardiness, which is not protected by the ADA. *Id.*

244. *Id.*

245. *Compare Barnes v. Cochran*, 944 F. Supp. 897, 904-905 (S.D. Fla. 1996) (reasoning that because the test was performed by a licensed psychologist, consisted of a psychological clinical evaluation of the plaintiff, reviewed the plaintiff's medical records and several personality tests, these factors weighed heavily in the finding of a medical examination), *with Thompson*, 1996 WL 162990, at *7 (reasoning that because the test was not performed by a licensed psychologist, nor administered in a clinical setting that it was not a medical examination under the ADA).

246. *Compare Barnes*, 944 F. Supp. at 905 (finding that the psychological personality evaluation identified mental disabilities), *with Thompson*, 1996 WL 12990, at *6 (finding that the psychological personality test did not identify mental disabilities).

Barnes, a psychological personality test was considered a medical examination because it found that the preemployment evaluation asked questions that probed into areas identifying psychological disorders.²⁴⁷ The fact that a psychologist administered the examinations furthered this finding.²⁴⁸ However, in *Thompson*, the court found that a similar psychological personality test did not identify mental health conditions, in part because a psychologist did not administer the test.²⁴⁹

The distinction between the tests in *Barnes* and *Thompson* appears minimal and demonstrates how the courts interpreted the provisions of the EEOC differently.²⁵⁰ Ultimately, the distinction poses significant problems and leaves an important issue undecided: whether psychological personality tests, originally designed to reveal impairments in mental health and administered in a medical setting, are medical examinations when adopted for employment purposes.²⁵¹ These tests often are not administered or interpreted by a health care professional and do not require medical equipment.²⁵² Further, when they are used in employment, employers often use them to discover employment suitability, not to reveal mental health conditions.²⁵³ Thus, the question is—are psychological personality tests, adopted from psychological tests designed to identify mental disorders, medical examinations under the ADA, even if a health professional does not administer the test and the employer's intent is not to identify mental disorders?²⁵⁴

247. *Barnes*, 944 F. Supp. at 904.

248. *Id.*

249. *Thompson*, 1996 WL 162990, at *6.

250. See *supra* notes 245–46 for explanation of why *Barnes* and *Thompson* differ.

251. See *generally Using Personality Tests*, *supra* note 18, at 1170 (discussing how the EEOC's definition of a psychological medical examination conflicts with most psychological personality tests because most personality tests originate from clinical samples used to provide diagnostic evidence).

252. *Thompson*, 1996 WL 162990, at *7.

253. EEOC, Preemployment Guidance, *supra* note 7. An EEOC example illustrates this issue:

A psychological test is designed to reveal a mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide evidence that would lead to diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies or is depressed). Under these facts, this test is a medical examination.

Id.

254. See *Using Personality Tests*, *supra* note 18, at 1170 (discussing how the EEOC's definition of a psychological medical examination conflicts with most psychological personality tests because most personality tests originate from clinical samples used to provide diagnostic evidence).

III. DISCUSSION

In *Karraker v. Rent-A-Center*, the Seventh Circuit became the first federal circuit court of appeals to face the question of whether a psychological personality test, the MMPI, constituted a medical examination under the ADA.²⁵⁵ The court determined that when a psychological personality test asks questions that could reveal a mental disability, the test is a medical examination under the ADA, regardless of the facts that a health care professional did not administer the test and that the employer's intent was not to identify individuals with mental disabilities.²⁵⁶ This case is the first in which a federal circuit court addressed the permissible use of a psychological personality preemployment test under the ADA.²⁵⁷

A. Background on Karraker v. Rent-A-Center, Inc.

Karraker involved disability discrimination brought by the plaintiffs on behalf of a class of persons employed at approximately 106 Rent-A-Center (RAC)²⁵⁸ retail stores in Illinois between 1997 and 2005.²⁵⁹ The three named plaintiffs, Steven, Michael, and Christopher Karraker, were all brothers employed by RAC.²⁶⁰ All three plaintiffs attempted to obtain management positions with RAC, but were denied after taking RAC's mandatory APT Management Trainee-Executive Profile (APT Test).²⁶¹

From approximately 1986 to July 31, 2000, RAC administered the APT Test to evaluate the management skills of employees who sought promotion to a management position.²⁶² The APT Test consisted of nine component parts,²⁶³ one being the administration of the MMPI.²⁶⁴

255. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005).

256. *Id.*

257. See *supra* Parts II.D.3.a–b for a discussion on the only two other cases, *Barnes*, 944 F. Supp. 897 (S.D. Fla. 1996) and *Thompson*, 1996 WL 162990, at *1, dealing with whether a personality test is a permissible preemployment medical examination under the ADA. Neither case was before a federal circuit court of appeals. See *Barnes*, 944 F. Supp. at 897 (proceeding before a federal district court in Florida); *Thompson*, 1996 WL 162990, at *1 (proceeding before a federal district court in California).

258. *Karraker*, 411 F.3d at 834. RAC is engaged in the business of offering consumer goods, such as appliances, furniture and electronics, on a rent-to-own basis. *Id.* at 833.

259. Brief and Required Short Appendix of Plaintiffs-Appellants Steven L. Karraker, Michael A. Karraker and Christopher M. Karraker, *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2004) (No. 04-2881) [hereinafter *Karraker Brief*].

260. *Id.*

261. *Id.*

262. Brief of Defendant–Appellee Rent-A-Center, Inc. at 4, *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2004) (No. 04-2881) [hereinafter *RAC Brief*].

263. *Id.* at 4–5. The battery of tests included: (1) The Bernreuter Personality Inventory; (2)

RAC adapted the MMPI by using 502 of its 566 questions.²⁶⁵ After taking the exam, each applicant received a statistical score, which listed the applicant's number of deviations.²⁶⁶ The APT Test materials concluded that an individual who scored more than twelve deviations on the APT Test did not have enough of the skills and attributes exhibited by successful managers.²⁶⁷ RAC used the APT-recommended threshold (no more than twelve deviations) as a guideline for eligibility for promotion to a management position.²⁶⁸ Plaintiffs took the APT Test and all three scored more than twelve deviations, removing much of the likelihood for advancement through the management ranks of RAC.²⁶⁹

B. District Court: Motion for Summary Judgment

At the district court level, the plaintiffs contended that RAC denied their promotion because they failed the APT Test.²⁷⁰ The plaintiffs filed their suit under the premise that the portion of the APT Test that required an applicant to take the MMPI constituted a prohibited

Mathematical Thinking; (3) Language Comprehension; (4) The Bennett Mechanical Comprehension Test; (5) The Minnesota Clerical Test; (6) The Wide Range Vocabulary Test; (7) the Minnesota Multiphasic Personality Inventory; (8) The Wonderlic Personnel Test; and (9) The Strong Interest Inventory. *Id.*

264. *Id.* See *supra* notes 100–07 and accompanying text (discussing the MMPI).

265. *Karraker v. Rent-A-Center, Inc.*, 316 F. Supp. 2d 670, 680 (C.D. Ill. 2004).

266. RAC Brief, *supra* note 262, at 9. After an RAC applicant took the APT Test, his or her scoring sheet was forwarded to an independent company, to score the test results. *Karraker Brief*, *supra* note 259. No psychologist ever interpreted the APT examination. RAC Brief, *supra* note 262, at 15 n.6.

267. RAC Brief, *supra* note 262, at 5. The determination of what constituted a successful manager was determined by administering the battery of tests to 213 executives who had a history of being successful at managing others, called the “Success Group,” and sixty-seven individuals who had not been successful in upper management, called the “Non-Success Group.” *Id.* Using the mean score and standard deviation of the “Success Group,” a profile was created detailing the strengths, weaknesses, and personality traits of a successful manager. *Id.* Then, by comparing the results of the “Non-Success Group” against the “Success Group,” the APT Test measured how far removed the “Non-Success Group” results were from the “successful manager profile.” *Id.* The APT test determined that the “Non-Success Group” averaged 11.2 deviations from the profile, and concluded that an individual who scored 12 deviations on the APT Test did not exhibit the attributes of the “Success Group” and would thus “have a poor chance of succeeding as a manager.” *Id.*

268. *Id.* at 5, 10.

269. *Karraker Brief*, *supra* note 259. The parties dispute if RAC required less than twelve deviations in order for an applicant to be promoted. *Id.* RAC stated that “passing” the APT Test was not an absolute requirement for promotion.” RAC Brief, *supra* note 262, at 10. However, the plaintiffs contended that “RAC had a well-established policy that in order be considered for a position higher than account manager (the lowest entry level position) an employee must have 12 or fewer ‘weighted deviations.’” *Karraker Brief*, *supra* note 259, at 13.

270. *Karraker*, 316 F. Supp. 2d at 680.

preemployment medical examination under the ADA.²⁷¹ The plaintiffs argued that the MMPI was a medical examination because it was a clinical test used by medical and psychological professionals to measure pathological functioning.²⁷² Specifically, the plaintiffs identified eight mental disorder scores measured by the MMPI: hypochondriasis, depression, hysteria, psychopathic deviate, paranoia, psychasthenia, schizoid tendencies, and mania.²⁷³ Thus, the plaintiffs asserted that the MMPI was a psychological medical examination intended to identify medical disorders, and therefore was prohibited by the ADA.²⁷⁴

In response to the plaintiffs' claims, RAC did not contest the fact that medical professionals use the MMPI to assist in the treatment of individuals with mental disorders.²⁷⁵ Rather, RAC asserted that its use of the MMPI was not medical because the scores measured personality traits, not psychological disorders.²⁷⁶ Moreover, RAC asserted that its scoring of the MMPI was a "vocational" scoring protocol.²⁷⁷ It asserted that its "vocational" scoring protocol differed from the "clinical" protocol because it only measured the personality traits of potential employees.²⁷⁸ Specifically, RAC maintained that its "vocational" protocol gave no indication of whether an applicant's score on a particular MMPI scale was either high enough or low enough to reveal a symptom of psychiatric illness.²⁷⁹

In granting summary judgment for RAC, the district court applied the EEOC's eight-factor test for determining if an examination is medical and rejected the plaintiffs' argument.²⁸⁰ Although the court acknowledged that the MMPI is often used in a clinical setting, it found that RAC's use of the MMPI closely resembled a psychological test used for measuring personality traits.²⁸¹ Specifically, the court found

271. *Id.* at 679.

272. *Id.* at 680.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 680–81. A clinical psychologist described the MMPI depression scale as measuring "the extent to which a subject has feelings of depression-unhappiness, pessimism, fatigue, and worry." *Id.* at 681. Thus, the psychologists contended that the score did not refer to any psychological disorder or diagnose a person as being clinically depressed. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* RAC maintained that its MMPI depression scale did not determine if an applicant was clinically depressed. *Id.* Rather, it measured the extent to which an applicant had feelings of depression, unhappiness, pessimism, fatigue, and worry. *Id.*

280. *Id.* at 680–81. See *supra* note 199–200 and accompanying text (discussing the EEOC factors for what constitutes a medical examination).

281. *Id.* at 680.

persuasive the fact that RAC's use of the MMPI did not include an interpretation by a psychologist with the intent of diagnosing mental impairments.²⁸² Rather, it held that RAC used the MMPI solely for the purposes of discerning personality traits of its employees and applicants.²⁸³ Thus, the court found that the MMPI did not qualify as a medical examination for purposes of the ADA.²⁸⁴

C. Seventh Circuit Opinion

In an unanimous opinion, the Seventh Circuit reversed the ruling of the district court and held that the MMPI was a medical examination under the ADA.²⁸⁵ In their appeal, the plaintiffs again asserted that the MMPI was a medical examination, while RAC argued that the MMPI portion of the management test measured only personality traits.²⁸⁶ RAC did not argue that the MMPI was "job-related and consistent with business necessity."²⁸⁷ Instead, it only argued that the test was not a medical examination and therefore was not prohibited by the ADA.²⁸⁸ Thus, the sole issue before the court was whether the MMPI, by revealing a mental impairment, fit the ADA and EEOC's definition of a medical examination.²⁸⁹

In holding that the MMPI was designed to reveal a mental impairment, the court first critically examined RAC's explanation for its use of the MMPI in its promotional decisions.²⁹⁰ Specifically, the court questioned why RAC, for promotional purposes, would need to use a test that revealed mental disorders or impairments, such as depression.²⁹¹ In response, RAC argued that the MMPI did not test for clinical depression.²⁹² Rather, RAC argued that the MMPI tested only for normal feelings of depression.²⁹³ RAC asserted that the MMPI

282. *Id.* at 681.

283. *Id.*

284. *Id.*

285. *Karraker v. Rent-A-Center*, 411 F.3d 831, 837–38 (7th Cir. 2005). Circuit Judge Evans wrote the opinion in which Chief Judge Flaum and Circuit Judge Williams joined. *Id.* at 833.

286. *Id.* at 835.

287. *Id.*

288. *Id.*

289. *Id.* In its decision, the Seventh Circuit, like the district court, began its analysis of the MMPI by first examining the EEOC's factors that determine if a test is a medical examination. *Id.* It acknowledged that the case hinged on whether the design of the MMPI revealed a mental impairment. *Id.* See *supra* notes 199–200 and accompanying text (discussing the EEOC factors for what constitutes a medical examination).

290. *Karraker*, 411 F.3d at 836.

291. *Id.*

292. *Id.*

293. *Id.* RAC asserted that the MMPI only tested "the extent to which the test subject is

merely tested for personality characteristics, such as a “state of mood.”²⁹⁴

The court found RAC’s explanation unpersuasive.²⁹⁵ The court could find no reason why RAC would need or want to inquire into a promotion applicant’s everyday feelings of depression.²⁹⁶ As the court stated, “why would RAC care if an applicant lost his keys the morning of the MMPI or took the test the day after another Cubs loss?”²⁹⁷ The court found it incredulous that RAC would want to exclude an employee from consideration for promotion because “he happened to feel sad on the wrong day.”²⁹⁸ Thus, the court stated that either (1) the MMPI was a very weak predictor of an applicant’s potential as a manager or (2) the design and use of the MMPI measured more than just an applicant’s mood on a particular day.²⁹⁹

The court ultimately held the latter of the two possibilities more plausible.³⁰⁰ Using the EEOC’s examples of preemployment psychological tests as a starting point,³⁰¹ the court found that the MMPI was a psychological test designed in part to reveal mental illness.³⁰² The court specifically noted that RAC not having a psychologist interpret the MMPI³⁰³ was not dispositive in determining that the MMPI was not a medical examination.³⁰⁴

experiencing the kinds of feelings of ‘depression’ that everyone feels from time to time.” *Id.* at 835. RAC provided the court with an example of the type of normal feelings of depression it was testing for: “when [the test subject’s] favorite team loses the World Series.” *Id.*

294. *Id.* at 836. RAC suggested that an applicant might score high on the depression scale because “he lost his keys in the morning.” *Id.*

295. *Id.* at 836. The court noted that RAC’s “logic behind it doesn’t seem to add up.” *Id.* at 835.

296. *Id.* at 836.

297. *Id.* The court took specific issue with RAC caring if a promotion applicant felt depressed when his favorite team lost the World Series, noting specifically, could RAC “really fill its management positions if it won’t promote disgruntled Cubs fans?” *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* See *supra* note 199 and accompanying text (giving examples of what constitutes a psychological medical examination under the EEOC guidelines).

302. *Karraker*, 411 F.3d at 836.

303. *Id.* The court found that example 1 of the EEOC guidelines closely paralleled the facts of *Karraker*. *Id.* Specifically, the court noted that like example 1, the MMPI is a psychological test that was initially designed to reveal mental illness. *Id.* Moreover, similar to example 1, the employer, RAC, claimed that it only used the MMPI to test for personality traits, not to disclose mental illness. *Id.* However, the court distinguished example 1 from the MMPI used in *Karraker* because in *Karraker* a psychologist did not interpret the results of the test. *Id.*

304. *Id.* at 836–37. This holding directly addresses the district court’s conclusion that the MMPI was not a medical examination as used by RAC because a psychologist did not interpret it. *Id.* at 837.

Specifically, the court held that merely because RAC did not use a “clinical” protocol to score the MMPI did not mean that the MMPI was not a medical examination.³⁰⁵ The court reasoned that while RAC’s “vocational” protocol score did “not detect any psychological disorders,” ultimately an elevated score was symptomatic, although not conclusive, of an individual with mental disabilities.³⁰⁶ The court foresaw that the real harm came not to those applicants who did not suffer from mental disabilities, but to those who did.³⁰⁷ The court reasoned that if a mentally disabled applicant, who is protected by the ADA, was forced to take the test, they would likely receive an elevated score, which may cost the applicant any chance of promotion.³⁰⁸ Simply, the practical effect of the use of the MMPI, whether interpreted by a psychologist or not, and regardless of how it was scored, was that it would tend to exclude employees with mental disorders from promotions.³⁰⁹ Thus, the court determined that the MMPI, as a test that revealed mental illnesses and had the effect of hurting the employment prospects of individuals with mental illnesses, was a medical examination.³¹⁰ Therefore, RAC’s use of the MMPI as part of a promotional test violated the ADA.³¹¹

IV. ANALYSIS

In *Karraker v. Rent-A-Center*, the Seventh Circuit correctly concluded that an employer’s use of a psychological personality test is a medical examination and is prohibited by the ADA during preemployment inquiries.³¹² This Part will demonstrate that the court correctly interpreted the provisions of the ADA and the EEOC when it held that the MMPI is a medical examination,³¹³ regardless of the employer’s intentions or the employer’s use of the test.³¹⁴

305. *Id.* at 836. The district court concluded that because RAC used a “vocational” protocol to score the test, RAC use of the MMPI was “solely for the purposes of discerning personality traits.” *Id.* at 836.

306. *Id.*

307. *Id.* at 837.

308. *Id.*

309. *Id.* at 836–37.

310. *Id.* at 837.

311. *Id.*

312. *See infra* Parts IV.A–B (examining the holding of the Seventh Circuit in *Karraker*).

313. *See infra* Part IV.A (discussing how the Seventh Circuit correctly interpreted the provisions of the ADA and the EEOC in *Karraker*).

314. *See infra* Part IV.B (detailing how the employer’s intent behind the use of a preemployment psychological personality test is irrelevant to a court’s analysis).

A. A Psychological Personality Test Designed to Identify Mental Disorders Is a Medical Examination Under the ADA

The Seventh Circuit correctly concluded that when an employer uses a psychological personality test, originally designed to identify mental disabilities, it is violating the ADA.³¹⁵ The ADA provides that at the preemployment stage, an employer cannot conduct medical examinations or inquiries of a job applicant to discover an applicant's disability or determine the severity of an applicant's known disability.³¹⁶ Moreover, the EEOC recognizes that psychological examinations designed to identify mental disorders or impairments are prohibited under the ADA.³¹⁷

The court correctly held that the MMPI is a psychological examination under the provisions of the ADA and EEOC because the MMPI can potentially identify individuals with mental disabilities.³¹⁸ The MMPI is routinely used in clinical settings, often assisting health care professionals in diagnosing and treating individuals with mental disorders or impairments.³¹⁹ While today less emphasis is placed on the MMPI's ability to diagnose discrete psychiatric types, it is used frequently to generate descriptions of and inferences about individuals' characteristics or behaviors.³²⁰ Thus, it is clear that the MMPI is designed, in part, to identify mental disorders.³²¹

Furthermore, the court correctly held that regardless of how RAC scored the MMPI, whether by a "vocational" scoring protocol or a "clinical" protocol, the MMPI still identified individuals with mental

315. *Karraker*, 411 F.3d at 837.

316. 42 U.S.C. § 12112(d)(2)(A) (2000).

317. See EEOC, Medical Examination Guidance, *supra* note 12 (explaining ADA provisions governing disability-related questions and medical examinations of applicants); see also EEOC, Preemployment Guidance, *supra* note 7 (defining a medical examination as a "procedure or test that seeks information about an individual's physical or mental impairments").

318. *Karraker*, 411 F.3d at 837.

319. See GRAHAM, *supra* note 104, at 93 (noting that the MMPI was created in a psychiatric hospital and that a significant portion of the research done with the MMPI has been with subjects in clinical settings). "The MMPI can provide reliable indications of psychological treatments that will or will not work for specific patients." *Id.* at 71. "The MMPI remains matchless as the objective instrument for the assessment of psychopathology . . . and still holds the place as the sine qua non in the psychologist's armamentarium of psychometric aids." *Id.* (citing G. D. KING, *Minnesota Multiphasic Personality Inventory*, in EIGHTH MENTAL MEASUREMENTS YEARBOOK, 938 (O. K. Buros ed., 1978) (alteration in original)).

320. GRAHAM, *supra* note 104, at 7–8.

321. *Id.* at 4 (noting how the primary goal of the MMPI, when designed, was for it to be used in routine diagnostic assessment of patients.) See PAUL, *supra* note 2, at 53, 57 (noting how the MMPI was designed to sort a group of mental patients into discrete psychiatric diagnostic categories).

disabilities.³²² This is because the MMPI, by its very nature, probes into applicants' psychological conditions by asking questions of applicants that will detect emotional abnormalities.³²³ Moreover, besides detecting emotional abnormalities, the scales used by RAC were the exact same as those used by health care professionals to diagnose patients' psychiatric illnesses, such as depression, bi-polar disorders, and anxiety disorders.³²⁴ Thus, the court correctly held that regardless of how it is scored or administered, the MMPI provides evidence that would lead to the identification of a mental disorder or impairment, and is thus prohibited by the ADA.³²⁵

B. The Employer's Intent Behind the Use of a Psychological Personality Test Is Irrelevant to a Court's Analysis

In addition to properly concluding that the MMPI is a psychological personality test that could identify individuals with mental disorders, the court was correct in holding that the MMPI is a medical examination even if an employer only intends to measure personality traits.³²⁶ An employer's intent behind the use of the psychological personality tests is irrelevant to a court's analysis because by identifying mental disorders, the test ultimately reveals medical conditions that employers are forbidden to learn about in the preemployment stage under the ADA.³²⁷ This is because the EEOC specifically provides that an employer cannot utilize a test in the preemployment stage that will lead to identifying a mental disorder or impairment.³²⁸ This provision holds true, regardless of whether the employer intends to use the information or not.³²⁹

322. *Karraker*, 411 F.3d at 836–37.

323. See GREENE, *supra* note 60, at 5 (indicating, for instance, that the MMPI contains thirty-one questions about delusions, hallucinations, and the like). See also *Barnes v. Cochran*, 944 F. Supp. 2d 897, 905 (S.D. Fla. 1996) (holding that the MMPI, as part of a battery of psychological tests, was a prohibited preemployment medical examination under the ADA).

324. *Karraker*, 411 F.3d at 836–37.

325. *Id.* at 837.

326. *Id.*

327. See 42 U.S.C. § 12112(d) (2000) (stating that no entity shall conduct a medical examination or make inquiries of a job applicant as to the nature of any disability). See *supra* Part II.D (discussing the ADA and preemployment medical examinations).

328. See EEOC, Preemployment Guidance, *supra* note 7 (“At the pre-offer stage, an employer cannot ask questions that are likely to elicit information about a disability. This includes directly asking whether an applicant has a particular disability. It also means that an employer cannot ask questions that are closely related to disability.”).

329. 42 U.S.C. § 12112(d)(2). The ADA explicitly prohibits any examinations or inquiries of job applicants. *Id.*

Moreover, individuals with psychiatric disabilities suffer from unfounded stereotypes and prejudices,³³⁰ while also having a dramatically lower employment rate than other types of disabilities.³³¹ To combat these issues, Congress enacted the ADA to prevent employers from discovering these disabilities and then making adverse employment decisions based on stereotypes and generalizations associated with a mental disability.³³² If the court had ruled that an employer's intent was relevant, it would suggest that an employer could circumvent the requirements of the ADA by simply stating that it was using a psychiatric examination only to determine whether the applicant has a tendency to lie.³³³ Such a policy would diminish the effectiveness of the ADA, while also contradicting the Congressional reasons for enacting the ADA.³³⁴ Thus, even when an employer adapts the MMPI for its own employment purposes, the MMPI will nonetheless still serve to reveal individuals with mental disabilities.³³⁵ Accordingly, it is a medical examination and not permitted prior to employment under the ADA.³³⁶

V. IMPACT

In *Karraker v. Rent-A-Center, Inc.*, the court opened by noting that National Football League teams "test aspiring professional football players' ability to run, catch, and throw. But that's not all. In addition

330. See 42 U.S.C. § 12101(a)(2) (stating that "historically, society has tended to isolate and segregate individuals with disabilities . . .").

331. *Karraker*, 411 F.3d at 834; Lita Jans, Susan Stoddard & Lewis Kraus, *Chartbook on Mental Health and Disability in the United States*, U.S. Dep't of Education, National Institute on Disability and Rehabilitation Research, at 16, figure 11 (2004), available at <http://www.infouse.com/disabilitydata/mentalhealth/mentalhealth.pdf>.

332. 42 U.S.C. § 12112(d). See also *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1097 (6th Cir. 1998) (stating that the principal purpose of the restrictions is "to prohibit employers from making adverse employment decisions based on stereotypes and generalizations associated with the individual's disability rather than on the individual's characteristics").

333. EEOC, *Preemployment Guidance*, *supra* note 7. The EEOC states that while it is permissible for employers to make inquiries that reflect on an applicant's honesty and preferences, they may not seek information that identifies an individual's disabilities. *Id.*

334. 42 U.S.C. § 12101(b)(1). Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.*

335. See GRAHAM, *supra* note 104, at 7 (explaining that while the MMPI scales are not exact measures of the psychiatric disorders, individuals with a susceptibility to a particular psychiatric disorder (e.g., depression) will likely obtain a high score on the corresponding scale). Thus, while each MMPI scales does not diagnose discrete psychological disorders, an elevated score on a scale is potentially one of several symptoms, which may contribute to a diagnosis of mental disorder. *Id.* Thus, a person with severe depression, who is protected under the ADA, would likely register a high score on the depression scale. *Id.*

336. *Karraker*, 411 F.3d at 837.

to the physical tests, a draft prospect also takes up to 15 personality and knowledge tests”³³⁷ As the reference to the NFL implies, a large number of private sector employers administer psychological personality tests to job applicants.³³⁸ The reference implies some question into the future legality of many psychological personality tests.

Though *Karraker* held that a popular psychological personality test was a medical examination under the ADA, the holding is ultimately narrowly tailored.³³⁹ Nonetheless, it will have an impact on the majority of employers using psychological personality tests.³⁴⁰ Thus, *Karraker* does require employers, especially those in the Seventh Circuit, to take several additional steps to avoid significant litigation exposure.³⁴¹

A. *Karraker* Will Impact Employers

In *Karraker*, the Seventh Circuit limited employers’ use of psychological personality tests in employment screening.³⁴² Although the holding is limited, it will have an impact on many of the numerous employers who use psychological personality tests in the employment process.³⁴³

First, *Karraker* stands for the basic proposition that any psychological personality test designed to reveal an impairment of mental health is a medical examination under the ADA.³⁴⁴ It suggests that if any question on a test is found to elicit information about mental illness, the test is unlawful and the employer’s purpose for and method of analyzing the test is irrelevant.³⁴⁵ For example, although RAC used a special “vocational” protocol in *Karraker* designed to avoid revealing mental disorders, the court nevertheless felt that the examination could identify individuals with mental disabilities.³⁴⁶ This is a sweeping holding, since many psychological personality tests are developed from

337. *Id.* at 833. The court notes that NFL prospects are asked questions such as, “[w]hat is the ninth month of the year?” *Id.*

338. Black, *supra* note 56, at 69 (noting that of a survey of 208 companies, forty-six percent employed psychological personality tests).

339. *See infra* Parts V.A–B (discussing how the holding in *Karraker* will have an impact on how employers screen job applicants).

340. *See infra* Part V.A (examining the impact of *Karraker* on employers).

341. *See infra* Part V.B (hypothesizing what steps employers will have to take after *Karraker*).

342. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005).

343. *See infra* Part V.B (discussing the holding in *Karraker* and how it will affect employers).

344. *Karraker*, 411 F.3d at 837.

345. *Id.*

346. *Id.* at 836–37.

clinical samples almost always originally designed to assist in diagnosing individuals with mental impairments.³⁴⁷ Thus, *Karraker* suggests that employers can no longer use or adapt clinical psychological personality tests to determine employment suitability—a far-reaching impact in today's world where employment screening has become so extensive.³⁴⁸

However, while the court's decision in *Karraker* affects employers' ability to use psychological personality tests, the holding is nonetheless limited to employers using such psychological personality tests in preemployment decisions.³⁴⁹ In *Karraker*, the court held that it is unlawful under the ADA to pre-screen for promotional consideration anyone who suffered from a mental disability.³⁵⁰ Thus, if an employer makes a conditional offer of employment, it can make inquiries that would potentially disclose whether some individuals have medical conditions, including mental disabilities.³⁵¹ Moreover, an employer may administer medical examinations that identify disabilities of current employees as long as the examination is job-related and consistent with business necessity.³⁵²

Thus, ultimately, employers are not prohibited from using preemployment personality tests.³⁵³ In fact, in *Karraker*, the court did not reject the other tests used by RAC in its management assessment, which were designed to measure honesty, preferences, or habits.³⁵⁴ Moreover, the court's reference to the NFL suggests that IQ or other similar tests are still permissible.³⁵⁵ Thus, the holding, while significant, is narrowly tailored to preemployment tests that are designed, at least in part, to identify mental disabilities in individuals.³⁵⁶

347. *Using Personality Tests*, *supra* note 18, at 1169.

348. *See supra* Part II.A (discussing how employment screening has become very pervasive).

349. *See infra* notes 350–56 (examining how the holding in *Karraker* is narrowly tailored).

350. *Id.*

351. 42 U.S.C. § 12112(d)(3)(2000). Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category. *Id.*

352. *See Miller v. Champaign Cmty. Unit School Dist.*, 983 F. Supp. 1201, 1206 (C.D. Ill. 1997) (holding that a school district's request that an elementary school custodian submit to a psychiatric examination did not violate the ADA because the custodian had exhibited paranoid and agitated behavior).

353. *See Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005) (holding only that the MMPI is a prohibited medical examination under the ADA).

354. *See id.* (declining to invalidate the other tests used by RAC).

355. *See id.* at 833–34 (acknowledging that the psychological battery tests still exist and not per-se invalidating them).

356. *Id.*

B. What Should Employers Do Now?

After *Karraker*, employers do need to take several steps to ensure that they avoid future litigation.³⁵⁷ This is particularly true for employers in the Seventh Circuit.³⁵⁸ First, employers need to survey their own employment screening practices to determine exactly which, if any, psychological personality tests they are using.³⁵⁹ This begins with asking recruiters, staffing agencies, and test providers that provide the employer with applicant or employee screening.³⁶⁰ Next, if an employer discovers that it is using a psychological personality test in employment screening, it should ascertain how the test is being utilized and for what purpose.³⁶¹ Employers should determine whether the test could be used to identify people who have certain medical disabilities.³⁶² If the test is found to identify mental disabilities, it is prohibited by the ADA in preemployment screening.³⁶³ However, if the test is used on current employees, the test will be permissible under the ADA as long as the test is job-related and measures the ability to perform the job in question.³⁶⁴

Moreover, given the increased legal risks associated with psychological personality tests, employers may be better served by avoiding such tests altogether in preemployment screening.³⁶⁵ This may be an especially persuasive alternative given the availability of other less risky measures.³⁶⁶ For example, a number of techniques exist that are designed specifically for employment screening.³⁶⁷ Specifically, biographical data, assessment centers, and structured interviews that measure personality traits associated with specific job positions are available and allow an employer to screen an applicant

357. See *supra* Part V.A (discussing the impact of the *Karraker* decision).

358. John D. Canoni, Nixon Peabody LLP, Employment Alert: Widely Used Psychological Test Found to Violate ADA (June 16, 2005), http://www.nixonpeabody.com/linked_media/publications/ELA_06162005.pdf.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. 42 U.S.C. § 12112(d)(2) (2000). See also *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005) (holding that psychological examinations that identify mental disabilities are medical examinations under the ADA, regardless of the intent of the employer or the administration of the examination).

364. 42 U.S.C. § 12112(d)(4) (2000).

365. See *Using Personality Tests*, *supra* note 18, at 1170 (noting that development of alternate testing methods would decrease likelihood of costly litigation).

366. *Id.*

367. *Id.*

without likely violating the ADA.³⁶⁸ These tests would probably not be considered medical examinations under the ADA because they do not inquire about mental health or disabilities, were not originally developed for diagnostic uses, and do not appear to violate any EEOC factors.³⁶⁹

Thus, with the increased potential for litigation, employers may benefit more by not engaging in psychological personality testing.³⁷⁰ However, if employers do choose to use psychological personality tests, they will need to take several steps to ensure that the test they use—especially at the preemployment stage—does not seek to identify individuals with mental impairments.³⁷¹

VI. CONCLUSION

In *Karraker*, the Seventh Circuit Court of Appeals correctly held that the MMPI, a psychological personality test, was a medical examination prohibited prior to employment under the ADA. The EEOC's interpretations of medical examinations and the purpose behind Congress' enactment of the ADA support the court's holding. Although *Karraker* questions the ability of employers to use psychological personality tests originally intended to identify mental disorders, the holding is limited and only applicable to preemployment testing. Finally, employers who do intend to utilize psychological personality tests must take several precautionary steps in order to limit any potential litigation that could stem from the holding in *Karraker*.

368. *Id.* For example, biographical data has proven to be a very powerful predictor. PERSONALITY ASSESSMENT, *supra* note 64, at 120. One useful approach in occupational selection has been the weighted biographical data sheet. *Id.* at 120–21. The items on the data sheet can be: demographic (such as age, sex, or marital status), experiential (such as number of schools attended or number of jobs held), or behavioral (such as recreational activities or hobbies). *Id.* at 121. Items that typify success are identified statistically. *Id.* However, employers must be wary because these tests often closely resemble the MMPI. *Id.* Thus, employers must make sure that the test they use is not derived from the MMPI or a similar clinical psychological personality test. *Id.*

369. *Id.*; *see also* EEOC, Preemployment Guidance, *supra* note 7 (noting that employers may make inquiries of job applicants as long as they do not ask information regarding physical or mental impairments).

370. 42 U.S.C. § 12112(d)(2) (2000). *See also* *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005) (holding that psychological examinations that identify mental disabilities are medical examinations under the ADA, regardless of the intent of the employer or the administration of the examination).

371. *See* 42 U.S.C. § 12112(d) (2000) (stating that no entity shall conduct a medical examination or make inquiries of a job applicant as to the nature of any disability). *See supra* Part II.D (discussing the ADA and preemployment medical examinations).