

has not held that mentally ill persons are not subject to the death penalty.

Discussion

In 1972 the U.S. Supreme Court, in *Furman v. Georgia*, 408 U.S. 238 (1972), ruled that the then-existing death penalty laws led to the arbitrary and inconsistent imposition of the death penalty, violating the Eighth and Fourteenth Amendments, and that the death penalty was cruel and unusual punishment. This created a brief hiatus during which the death penalty could not be imposed. The hiatus ended in 1976 when, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the U.S. Supreme Court held that the death penalty did not violate the Eighth and Fourteenth Amendments under all circumstances and upheld the constitutionality of Georgia's death penalty. The Georgia statute assured several protections to prevent the arbitrary and capricious application of the death penalty.

Since *Gregg*, the U.S. Supreme Court has provided some constitutional protection for those who are mentally impaired. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the U.S. Supreme Court ruled on the mentally impaired person's competence to be executed. Alvin Ford was convicted in 1974 of the murder of a police officer and sentenced to death. While on death row, Ford developed a paranoid psychotic disorder.

The Supreme Court ruled that the Eighth Amendment prohibits the execution of an insane prisoner and that Ford had the right to a judicial hearing to determine his competence to be executed.

The U.S. Supreme Court ruled in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that mental retardation did not automatically preclude a death sentence, though it could be a mitigating factor. In *Atkins v. Virginia*, 536 U.S. 304 (2002), "applying the Eight Amendment in the light of our 'evolving standards of decency,'" the U.S. Supreme Court ruled that the execution of mentally retarded individuals is "cruel and unusual punishment" prohibited by the Eighth Amendment. The Court found no reason to disagree with the legislatures that have debated the issue and have overwhelmingly prohibited the execution of the mentally retarded. The Court was not persuaded that execution of the mentally retarded would further the deterrent or retributive purpose of the death penalty.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court ruled that the Eighth and Four-

teenth Amendments forbid imposition of the death penalty on criminals who committed their offenses when they were under 18 years of age. The Court identified a national and international consensus rejecting the juvenile death penalty and reasoned that juveniles' susceptibility to immature and irresponsible conduct results in diminished culpability that requires a sentence less severe than death.

The death penalty continues to remain an area under intense scrutiny. At this time, unlike the mentally retarded offender and the juvenile offender, the mentally ill offender is not categorically excluded from being sentenced to death. One wonders what the outcome will be when the U.S. Supreme Court confronts this issue in the future.

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ADA and Medical Examinations

Use of the MMPI in Employee Screening for Promotions Violates the ADA

In *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005), the United States Court of Appeals for the Seventh Circuit found that the use of the MMPI, as a part of a series of tests relied on when deciding the promotion of employees, violates the Americans with Disabilities Act of 1990.

Facts of the Case

Rent-A-Center, a chain of stores that rents furniture, appliances and other household items on a rent-to-own basis, required employees to take the APT Management Trainee-Executive Profile to be promoted. The APT profile consists of nine separate tests that evaluate math and language skills as well as personality traits and interests. Included in the test are 502 questions from the MMPI.

The three Karraker brothers, employees of Rent-A-Center, took the test and received poor scores.

They were denied promotions and brought a class action suit against Rent-A-Center alleging that the use of the MMPI as part of the test violated the Americans With Disabilities Act of 1990 (ADA). The district court granted summary judgment in favor of the employer and ruled that the use of the MMPI did not violate the ADA. The Karrakers appealed to the United States Court of Appeals for the Seventh Circuit.

Ruling

The court of appeals found that the MMPI was designed, at least in part, to reveal mental illness and could hurt the employment prospects of someone with a mental illness. The administration of the MMPI to the employees constituted a violation of the ADA.

The court of appeals reversed and remanded the judgment so that summary judgment could be entered in favor of the employees on their claim that the MMPI is a medical test under the ADA.

Reasoning

The MMPI as used by Rent-A-Center as part of the APT Management Trainee Executive profile is a medical test under the ADA. The Equal Employment Opportunity Commission (EEOC) defines a medical examination as “a procedure or test that seeks information about an individual’s physical or mental impairments or health.” Psychological tests that are used in the diagnosis of a mental illness qualify as a medical examination but psychological tests used to identify personality traits such as honesty and habits do not qualify as medical tests.

Rent-A-Center argued that it used the MMPI to disclose habits and personality traits and not to diagnose a mental disorder. Rent-A-Center asserted that the test does not reveal whether an individual is clinically depressed but only measures the extent to which the test taker feels depressed.

The MMPI can be scored by two different protocols: a clinical protocol used for medical purposes and a vocational protocol, to discern personality traits. Rent-A-Center did not have a psychologist interpret the test results and used the vocational profile to identify personality traits of its employees. The district court determined that, since the test was not interpreted by a psychologist and it was scored by using a vocational protocol, it was not a medical test as defined by the ADA.

The appeals court determined that not having a psychologist interpret the MMPI did not exclude its being a medical examination. The court found that no matter how the MMPI is used or scored, it will have the effect of hurting employees with mental disorders and “is best categorized as a medical examination.”

Rent-A-Center could have argued (but did not) that even if the MMPI was a medical examination, it was properly given, because its use was job related and consistent with business necessity. However, the defense never raised that issue and the court did not address it.

Discussion

Congress passed the Americans With Disabilities Act (ADA) in July 1990 to

... provide a national mandate for the elimination of discrimination against individuals with disability, to provide clear strong consistent enforceable standards, to ensure a central role for the federal government in enforcing the act, and to use the regulation of commerce to protect persons with disability from discrimination [Parry J: Overview of the Americans with Disabilities Act, in *Mental Disabilities and the Americans With Disabilities Act: A Practitioner’s Guide to Employment, Insurance, Treatment, Public Access and Housing*, Edited by Parry J. Washington, DC: American Bar Association, 1994, p 1].

The ADA definition of disability has three components: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such impairment; and (3) being regarded as having such an impairment. A mental impairment includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The ADA has five titles, two of which deal with employment. Title I of the ADA applies to employers with 15 or more employees and prohibits employers from discriminating against a qualified individual with a disability. All employees of public entities are covered under Title II, regardless of the number of employees.

Before making a genuine job offer, an employer may ask questions only about the applicant’s ability to perform job-related functions and may not ask whether the applicant has a disability or about the nature and severity of such a disability. The employer may require a medical examination once an applicant has been offered a job but only if such an examina-

tion is administered to all new employees and the information is kept separate and confidential.

The ADA also prohibits medical examinations inquiring about the employee's health once the employee has started working, unless such examinations are job related and consistent with business necessity. According to the EEOC, the following factors should be taken into account to determine whether the test is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment of physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing a task; (6) whether the test is normally given in a medical setting; and (7) whether medical equipment is used. Any one of the above may be sufficient to determine that the test is a medical examination.

This case reflects the fact that the EEOC and the courts have increased their scrutiny of personality tests in the workplace. Employers may wish to determine if tests they use to elicit personality traits may in fact elicit information regarding an applicant's possible mental illness. It will also be helpful for employees to ensure that any personality tests are job related and measure the applicant's ability to perform the job.

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Mental Illness and *Miranda* Rights

How Should the Court Deal With a Confession Made Spontaneously by a Mentally Ill Individual?

In *Commonwealth v. Hilton*, 823 N.E.2d 383 (Mass. 2005), the Supreme Judicial Court of Massachusetts upheld a lower court finding that a mildly re-

tarded and mentally ill defendant was not competent to waive her *Miranda* rights. The court also held that the information that the defendant volunteered to a court officer about her involvement in the crime was admissible; however, subsequent statements made in response to questions were properly suppressed.

Facts of the Case

On February 24, 1999, at approximately 11 p.m., the Lynn, Massachusetts, fire department responded to a fire at a three-family dwelling. Five people were killed in the fire. Charles Loayza's girlfriend Kristina Sutherland and their two children lived in the building. Earlier that day, Mr. Loayza had argued with Ms. Sutherland and threatened to set fire to the building. Two months earlier, Mr. Loayza had set fire to a wreath on the door of his girlfriend's apartment.

The Lynn police went to Mr. Loayza's house and told his mother, Kathleen Hilton, that they were investigating a fire and looking for Mr. Loayza. Hilton told them that her son had become upset that evening after speaking with Ms. Sutherland, with whom he had recently broken up, and had left for work at 7:30 p.m.

Sergeant Cronin requested that Ms. Hilton come to the police station for further questioning about her son. She voluntarily went to the police station where she was interviewed for approximately one-half hour. Later the next day, police found and arrested Mr. Loayza. He provided an alibi that the police were able to confirm. The police received information that Ms. Hilton had a history of fire-setting behavior and the investigation shifted focus from Mr. Loayza to Ms. Hilton.

Three days after the fire, on February 27, 1999, Sergeant Cronin returned to Ms. Hilton's apartment and asked her to go to the police station to provide an additional statement. At the station, Cronin gave Ms. Hilton her *Miranda* warnings. The defendant said that she understood the warnings and signed the appropriate form. Ms. Hilton was not informed that she was a suspect in the arson. The interview proceeded and Ms. Hilton repeated essentially the same facts that she had stated in her earlier interviews. The officers suggested that perhaps she had set the fire. She denied it and added she had no idea who set the fire.

After a brief break, Ms. Hilton was upset. The officers used a sympathetic tone, encouraging her to "just tell them exactly what happened." The defen-