Pre-Employment Medical Screening - a Class Action Opportunity

a plaintiffs'-side perspective

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Particularly after *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011), it helps when filing a class action to identify an employer policy to challenge. In the context of disability rights, employers' pre-employment screening policies provide fertile ground for class claims.

Examples of policies which may warrant class action claims include when: employers routinely engage in pre-employment offer reviews of applicants' medical history; applicants are required by employer requirements to undergo medical examination, before real job offers are made; and, when employers have medical clearance requirements, without accounting for possible reasonable accommodations or engaging in undue hardship analysis. Unlike ordinary disability cases, which may entail heavily fact-intensive (and thus, individualized) inquiries into the nature of an employee's condition (*i.e.,* whether he/she is a qualified person with a disability), what types of accommodations may/may not be suitable, the nature of the interactive dialogue, and extensive data regarding the employer's undue hardship defense, pre-employment medical screening cases are policy-driven. At what point in the process does the employer routinely review medical records? At what point in the pre-employment screening does the employer introduce medical testing? What is the employer's policy and practice with respect to consideration of reasonable accommodations, as part the medical qualification process? How is the employer set up to evaluate, person-by-person, whether accommodating a particular applicant would pose an undue hardship? If the employer's policy is deficient in answering any of these inquiries, a class action may be the superior method of addressing violations of the Americans with Disabilities Act, Rehabilitation Act. or parallel state law statutes.

1. Policies Calling for Pre-Offer Review of Medical Information Provide the Basis for Class Claims.

Class claims may be warranted not only when policies tend to limit hiring of job applicants with disabilities, but when pre-employment screening policies subject applicants to inappropriate review of their medical history before they have received offers of employment. *See Leonel v. American Airlines, Inc.* 400 F.3d 702, 708 (9th Cir. 2005) *opinion amended on denial of reh'g*, 03-15890, 2005 WL 976985 (9th Cir. Apr. 28, 2005) ("[T]he ADA and FEHA not only bar intentional discrimination, they also regulate the *sequence* of employers' hiring processes. Both statutes prohibit medical examinations and inquiries until *after* the employer has made a 'real' job offer to an applicant. *See* 42 U.S.C. § 12112(d) (1999); Cal. Gov't Code § 12940(d) (1999).") (emph. in orig.); *Conroy v. N.Y. State Dep't of Corr. Servs.,* 333 F.3d 88, 96 (2d Cir. 2003) ("Plaintiff need not provide evidence of any adverse employment action as a result of the inquiry on the application form.").

Even non-disabled applicants, who are not perceived as disabled, may (in most circuits) recover based upon a policy that improperly subjects people to pre-offer medical inquiries. *See Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998), *cert. denied*, 526 U.S. 1065, 119 S.Ct. 1455, 143 L.Ed.2d 542 (1999) ("[T]he policy of the ADA is to eliminate disability discrimination....This policy is best served by allowing *all* job applicants who are subjected to illegal medical questioning and who are in fact injured thereby to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled.") (emph. in orig.) (internal citation and quotation omitted); *Conroy,* 333 F.3d at 95 ("It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability."); *Lee v. City of Columbus,* 636 F.3d 245, 252 (6th Cir. 2011) ("A plaintiff need not prove that he or she has a disability in order to contest an allegedly improper medical inquiry under 42 U.S.C. § 12112(d)."); *Harrison v. Benchmark Elecs. Huntsville, Inc.,* 593 F.3d 1206, 1216 (11th Cir. 2010) ("Normally, as part of his prima facie case of discrimination under the ADA, a plaintiff must show that he is a

qualified individual with a disability. Since we have held that such a requirement is not a prerequisite to suit under § 12112(d)(2), such a showing cannot be required."); *Garlitz v. Alpena Reg'l Med. Ctr.*, 834 F. Supp. 2d 668, 675-77 (E.D. Mich. 2011) (same). *But see O'Neal v. City of New Albany*, 293 F.3d 998, 1010 (7th Cir. 2002) (affirming summary judgment, stating, "O'Neal concedes that he does not have a disability; nor does he argue that the defendants regarded him as having one. He therefore has not shown that the defendants used his medical examination results in violation of the ADA.").

Largely freed from the requirements of proving that they are qualified individuals with disabilities or that they suffered any adverse employment actions, class members establishing a class-wide violation of pre-employment medical inquiry law based upon improper employer policies are left only to prove damages. This is ordinarily a question treated *post*-certification, frequently in a bifurcated proceeding after class-wide liability is established. *See generally In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013) *cert. denied*, 13-431, 2014 WL 684065 (U.S. Feb. 24, 2014) ("Because '[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal,' [citations] in 'the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.'").[1]

As to damages for pre-employment medical records review, the actionable harm occurs once an applicant's medical records are accessed - regardless of the results or response. *Cf. Green*

[1] Though an in-depth survey of recent class action jurisprudence is beyond the scope of this brief article, the *In re Whirlpool* case is illustrative in this regard - *i.e.,* as to treatment of damages questions - in how it distinguished the Supreme Court's decision in *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). The Sixth Circuit explained: "This case is different from *Comcast Corp.* Here the district court certified only a liability class and reserved all issues concerning damages for individual determination; in *Comcast Corp.* the court certified a class to determine both liability and damages. Where determinations on liability and damages have been bifurcated, *see* Fed.R.Civ.P. 23(c)(4), the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis—has limited application. " *In re Whirlpool*, 722 F.3d at 860.

v. Joy Cone Co., 107 Fed. Appx. 278, 280 (3d Cir. 2004). In *Katz v. Adecco USA, Inc.*, 845 F. Supp. 2d 539, 544-47 (S.D.N.Y. 2012), the court denied summary judgment as to the employment agency which facilitated a prohibited medical inquiry for its client, the would-be employer of the plaintiff. The court found that although the corporate client "created the application, Adecco delivered it to Plaintiff and [Adecco's official] repeatedly directed Plaintiff to complete the application over her protests that it was possibly unlawful and certainly improper." *Id.* at 544-545. Following *Conroy,* 333 F.3d at 96, the *Katz* court held that a plaintiff "need not provide evidence of any adverse employment action as a result of the inquiry on the application form." *Id.* at 545. While recognizing that a "technical violation of the ADA 'will not in and of itself give rise to damages liability' (citing *Giaccio v. City of N.Y.,* 502 F.Supp.2d 380, 387 (S.D.N.Y.2007), *aff'd* 308 Fed.Appx. 470 (2d Cir.2009); *see also Armstrong v. Turner Indus. Inc.,* 141 F.3d 554, 562 (5th Cir.1998) ('[D]amages liability under section 12112(d)(2)(A) must be based on something more than a mere violation of that provision.')," the court denied summary judgment as to the plaintiff"s claimed damages, where the plaintiff testified to "increased anxiety and depression," among other symptoms. *Katz,* 845 F.Supp.2d at 546. Adecco disputed the source of some of the many symptoms identified, "arguing that they arose out of Plaintiff's failure to obtain the position rather than the inquiry itself," but the court found "a genuine dispute of material fact regarding whether Plaintiff suffered damages as a result of the medical inquiry" on the application form, and denied Adecco's summary judgment motion. *Id.*

In separate damages proceedings after a liability finding, where a policy calls for prohibited medical records review concerning applicants, class members could, like the plaintiff in *Katz,* establish their individualized entitlement to damages. *See generally Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 543-44 (N.D. Cal. 2012), appeal dismissed (Jan. 16, 2013) (citing *Butler v. Home Depot, Inc.,* 1996 WL 421436, at *6 (N.D. Cal. Jan. 25, 1996)) ("Courts have routinely adopted the approach advocated by plaintiffs in which the first phase of the proceedings focuses exclusively on classwide claims, *e.g.,* whether a defendant has in fact

engaged in discriminatory employment practices. A jury verdict in favor of plaintiffs at this phase would result in injunctive and declaratory relief, and possibly, punitive damages. Individual compensatory damages would be resolved in the second phase of the proceedings which, since they would adjudicate individual claims, would not involve the 'same issues' as did the first phase."). If there were an unlawful pre-employment medical inquiry policy, even if "hundreds of separate trials [would] be necessary to determine which class members were actually adversely affected by...the practices and if so what loss each class member sustained....at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 338, 184 L. Ed. 2d 157 (2012).

Moreover, pre-employment medical inquiry class actions may be perfectly suited to class actions under Fed.R.Civ.P. 23(b)(2) (injunctive or declaratory relief) and 23(c)(4) (the latter allowing certification as to particular issues), if they entail no compensatory damages, but exclusively or largely equitable relief claims, challenging an unlawful policy likely to impact future applicants. *See Ellis,* 285 F.R.D. at 544 (citing *McReynolds*, 672 F.3d at 491). Under Rule 23(b)(2), an employer requiring a pre-offer of employment medical inquiry is one as to which "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," making class certification appropriate. *Wal-Mart Stores,* 131 S. Ct. at 2557. *Wal-Mart* left open the possibility of "incidental" monetary relief in such a case. *Id.* at 2560.

2. Improperly-Timed Medical Screening Examinations May Give Rise to Class Claims.

For much the same reasons as with pre-employment medical inquiry (*e.g.,* required submission of medical records or information), the timing of pre-employment medical screening (*e.g.,* a medical test or clearance requirements) pursuant to an employer policy, before a "real" offer, may readily give rise to class-wide liability. In *Leonel v. American Airlines, Inc.,* 400 F.3d

at 708-11, the Ninth Circuit explained that medical examinations are prohibited until after a "real" job offer to an applicant is made - which presupposes that an "employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer." *Id.* at 708 (citing Equal Employment Opportunity Commission, ADA Enforcement Guidance: Preemployment Disability–Related Questions and Medical Examinations, 17 (1995) ("EEOC's ADA Enforcement Guidance")). The court explained that to issue a "real" offer, "an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer." *Id.* at 708-709. The requirement creates transparency and accountability: "When employers rescind offers made conditional on both non-medical and medical contingencies, applicants cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial." *Id.* at 709. The requirement also protects privacy - individuals need only be willing to disclose personal medical information at last stage of the hiring process, once they have been "assured that as long as they can perform the job's essential tasks, they will be hired." *Id.*

Accordingly, a class-wide challenge to the timing of a pre-employment medical screening requirement may be apt when offers are contingent not just on the medical component, but on any non-medical component, *e.g.,* "undergoing background checks, including employment verification and criminal history checks[;...] upon a polygraph test, personal interview and background investigation, *see Buchanan v. City of San Antonio,* 85 F.3d 196, 199 (5th Cir. 1996)[;] or upon completion of an application form, criminal background check and driver's test. *See Downs v. Mass. Bay Transp. Auth.,* 13 F.Supp.2d 130, 138 (D. Mass. 1998)." *Leonel,* 400 F.3d at 709. *See also Malone v. Greenville Cnty.*, 2008 WL 4557498, **5-6 (D.S.C. Aug. 11, 2008) *report and recommendation adopted as modified,* 2008 WL 4458868 (D.S.C. Sept. 30,

2008) (a future credit check and fitness test rendered the conditional offer not “real" and medical exam thus premature).

An employer's defense - asserting that it could not reasonably have completed some other requirement (*e.g.,* background checks) before subjecting applicants to medical examinations and questioning - would likewise tend to be a predominant, common question. *See generally Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191, 185 L. Ed. 2d 308 (2013) ("Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."). In *Leonel,* American Airlines attempted to defend by arguing that it merely *gathered, but did not review* medical information before background checks were complete, but the Ninth Circuit rejected the defense on this basis. "Whether or not it looked at the medical information it obtained from the appellants, American was not entitled to get the information at all until it had completed the background checks, unless it can demonstrate it could not reasonably have done so before initiating the medical examination process." *Id.* at 711. Where an employer's policy requires premature medical exams or clearances and medical information gathering, a class action may well be the superior means to challenge it.

3. Employer Policies that Require Post-Offer Medical Clearance, but Fail to Include Provisions to Ensure Consideration of Appropriate and Effective Reasonable Accommodations, Are Susceptible to Class-Wide Challenge.

Once an employer has made an offer of employment to an applicant, the employer “may require a medical examination ... and may condition an offer of employment on the results.” 42 U.S.C. § 12112(d)(3). A post-offer examination does not have to be job-related. *See* 29 C.F.R. § 1630.14(b)(3). "However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions *cannot be accomplished with reasonable accommodation*." *Id.* Accordingly, a class-wide

challenge may yet be appropriate, if the employer does not, as a matter of policy, take into account reasonable accommodations in subjecting applicants to medical clearance or fitness requirements, even if the requirements are otherwise proper. This is true even where an employer seeks to assert a "direct threat" or "blanket safety-based qualification standard beyond the essential job function" — *i.e.,* the employer, not the employee, bears the burden of showing that the higher qualification standard is job-related and consistent with business necessity, *and that performance cannot be achieved through reasonable accommodation. See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988-98 (9th Cir. 2007) (citing 42 U.S.C. § 12113(a)); *Cripe v. City of San Jose,* 261 F.3d 877, 889-890 (9th Cir. 2001). *See also Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998) ("Even when 'physical fitness' is a selection criterion that is related to an essential function of the job, ...it 'may not be used to exclude an individual with a disability *if that individual could satisfy the criteri[on] with the provision of a reasonable accommodation.*'" (emph. in orig.); *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (explaining that the ADA generally requires individualized assessment of whether a qualified individual is able to perform essential functions with or without reasonable accommodation, rather than use of blanket qualification standards, like a "100% healed" or "fully healed" policy, as substitute for such individualized determination). As such, if an employer has no policy to undergo an appropriately individualized, reasonable accommodation process with applicants, then a medical qualification standard may subject an employer to class-wide liability.

In multiple class actions against the United States government, I am challenging the Department of State's so-called "worldwide availability" policy on this basis. Government agencies, from the State Department, to U.S. Agency for International Development (USAID), to the Department of Homeland Security (DHS), process medical clearances for employees and their families seeking to be stationed in federal posts abroad through the State Department's Office of Medical Services (MED). MED's policies include: 16 FAM 221, "Medical Examination

and Clearance For Foreign Service Candidates and Eligible Family Members (Pre-Employment)" ("If the candidate does not receive a class 1 (Unlimited Clearance for Worldwide Assigment) classification, the candidate will be issued a class 5 (Disqualified for Medical Reasons) classification."); and 16 FAM 224, "Medical Clearance Classifications for Applicants, Employees, and Eligible Family Members" ("Class 1 – UNLIMITED CLEARANCE FOR WORLDWIDE ASSIGNMENT – Issued to examinees who have no identifiable medical conditions that would limit assignment abroad.…Class 5 – NOT CLEARED FOR ASSIGNMENT ABROAD – Issued to examinees who have a medical condition which is incapacitating or for which necessary specialized medical care is best obtained in the U.S. Employees or eligible family members with a Class 5 medical clearance may not be assigned outside the U.S.").

Under these policies, the "worldwide availability" requirement (Class 1 clearance) has required any applicant for the State Department's Foreign Service to be able to work, without accommodations, in "every single solitary" location where the State Department has a post, according to testimony from a MED official. Thus, the requirement foregoes any of the individualized consideration and interactive dialogue required under the Rehabilitation Act, eliminating from consideration all those with disabilities, records of disabilities, and perceived disabilities. A fully-qualified applicant, like my client, Doering Meyer, who has multiple sclerosis in remission, and who could – by the State Department's own estimation - work without accommodations in more than 80% of locations, and with accommodations in any location, could not receive Class 1 clearance, and could not be hired for *any* post in the agency, absent a special "waiver" based upon extraordinary qualifications (*e.g.,* fluency in a rare language) not required of non-disabled applicants. The EEOC certified Ms. Meyer's class-wide challenge to the worldwide availability policy in 2010, which the State Department appealed to the EEOC's Office of Federal Operations. The appeal remains pending. *See Meyer v. Kerry (Dept. of State),* EEOC No. 570-2008-00018X.

Likewise, other federal agencies employ MED to issue "Class 2," post-specific clearances for limited-term foreign posts, or for families members going with government officers to

particular locations abroad. Even where only post-specific clearance is required (*i.e.,* clearance to go to one place for USAID, the DHS, the Department of Agriculture, or other agencies), MED's policy is not to consider reasonable accommodations or the individualized nature of each person's condition, but to determine whether a particular condition "as a disease entity" is compatible with the location for which clearance is sought. My client, Karen Saba, with cerebral palsy, was determined by MED to be incapable of being stationed by USAID in Afghanistan, without consideration of whether she could perform the essential functions of the position sought with accommodations (which her doctor certified she could), and without consideration of her particular condition - which had allowed her to work in numerous war zones around the world. Rather, MED's standard policy and practice was to determine that she had a particular disease and determine that someone with that disease could not be stationed in Afghanistan. The case, also pending at the EEOC, is *Saba v. Shah (USAID),* EEOC No. 570-2012-00754X.

My cases are only examples of a kind that are ripe for class-wide challenge, where the employers' standard pre-employment, medical clearance processes do not incorporate sufficient consideration of reasonable accommodations (including any undue hardship analysis) or individualized consideration of particular applicants. Unless an employer with fitness or medical prerequisities for certain positions ensures a process in which each applicant is being treated according to these ADA (and Rehab. Act) requirements, that employer's policies are, and should be, vulnerable. In this manner, class litigation can vindicate the core statutory disability protections, designed to combat employment decisions based upon stereotypes of people's conditions and to ensure each person has opportunities according to his or her own abilities, with employers providing assistance in the workplace where needed.

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