Equal Employment Opportunity Commission
Meeting on Employer Testing and Screening

Statement of Shereen Arent

Good Morning, Madam Chair, Vice Chair, and Commissioners. I am honored to have the opportunity to speak to the Commission on the impact of employer testing and screening on people with disabilities.

My name is Shereen Arent. I am currently the Managing Director of Legal Advocacy at the American Diabetes Association (Association) and have practiced in the field of employment and civil rights law for over twenty years. In my current position, I lead the Association's efforts to end the discrimination that people with diabetes encounter at work, school, correctional institutions, and places of public accommodation. The Association works to end discrimination through a four-step process: educate, negotiate, litigate, and legislate. We begin with education because our underlying belief is that much of the discrimination that people with diabetes face is a result of ignorance of the disease and how it is medically managed today. Thus, I thank the Commission for opening up this opportunity for those representing employees and employers to discuss ways to fairly evaluate applicants with disabilities. Although my expertise is in diabetes – and I will focus on diabetes examples – I have consulted with my colleagues in the disability rights community in an effort to be able to present to you a broad perspective on the impact of screening measures on people with disabilities.

The Americans with Disabilities Act (ADA) prohibits discrimination against a "qualified person with a disability" who can perform the essential tasks required for the position "with or without reasonable accommodation"[1] The Act was passed because ignorance and stereotypes about people with disabilities often resulted in their exclusion from society, including employment. In order to isolate discrimination based upon disability from other employment considerations, the law separates medical questions from the evaluation of other qualifications. Thus, an employer's ability to ask about an individual's disability or to require medical examination is divided into three stages: pre-offer, post-offer, and during employment, with different rules applicable at each stage.[2] Prior to obtaining a job offer, an employer may not ask disability-related questions or require medical examinations. After an applicant is given a conditional job offer, but prior to commencing work, the employer may ask questions that reveal information about a disability and may require medical examinations, as long as the same process is applied to all employees in the same job category. However, the employer can withdraw the job offer only if it can show that the applicant is unable to perform one or more of the essential functions of the job (with or without reasonable

[1] 42 U.S.C. § 12112 (a) and (b).

[2] 42 U.S.C. § 12112 (d).

accommodation) or that the employee poses a significant risk of causing substantial harm to himself/herself or others.[3] After an employee is on the job, the employer may make disability-related inquiries and require medical examinations only if they are "job-related and consistent with business necessity."[4] This scheme is important in ferreting out employment decisions that are ostensibly based on factors other than disability, but that in fact are based upon an employer's fears of people with disabilities, their capabilities, or even the cost they might impose on the bottom line because of increased health care costs or the need for reasonable accommodations.

Pre-Employment Physicals

Perhaps in large part because an employer must make a conditional offer before it learns about the employee's disability (at least those that are not readily apparent), in many situations an employer explicitly admits that the reason an individual wasn't hired was because of his or her medical condition. When challenged, the employer has two potential responses. First, an employer may claim that the adverse action is not prohibited by the ADA because the individual does not have a disability as interpreted by the courts,[5] an issue that is beyond the scope of these remarks. Second, an employer may assert that its action is lawful because the individual is not able to do the job and/or would create a direct threat to the employee himself/herself or others.[6] Often the employer makes both responses, that is, the employee is too sick to be able to do the job but not sick enough to be covered by the ADA.[7]

This explicit rejection based upon a medical condition is most often made as a result of a pre-employment physical given after a conditional offer of employment has been made. What I would like to focus on is the substance of the screening that leads to these rejections.

The "screening" method for people with diabetes used to be simple: if you had diabetes, or needed to take insulin to manage your diabetes, you were disqualified, period. Jeff Kapche provides an excellent example. Kapche applied

[3] Equal Employment Opportunity Commission, Job Applicants and the Americans with Disabilities Act, question 13, accessible at www.eeoc.gov/facts/jobapplicant.html.

[4] Equal Employment Opportunity Commission, Questions and Answers: Enforcement Guidance on Disability-Related Inquires and Medical Examination of Employees under the American with Disabilities Act (ADA), accessible at www.eeoc.gov/policy/docs/quanda-inquiries.html.

[5] *See, e.g., Toyota Motor Mfg, Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 572 U.S. 516 (1999); and *Albertson's Inc. v. Kirkingberg*, 527 U.S. 555 (1999).

[6] *See, e.g., Chevron U.S.A. v Echazabal,* 536 US 73 (2002).

[7] *See, e.g., Branham v. Snow*, 392 F. 3d 896 (7th Cir. 2004).

for a position on the San Antonio police force in 1994. He passed the written test, background check, polygraph, and physical agility tests – all with flying colors. He received a conditional offer, but when he took the required medical exam he was immediately disqualified because, as someone with type 1 diabetes, he must administer insulin multiple times daily in order to survive.[8] San Antonio had a blanket rule: no one who used insulin could hold any job involving driving, and the police officer position required driving. There was absolutely no individual assessment of how diabetes affected Kapche. At the time, San Antonio could rely on a decision of the Fifth Circuit Court of Appeals that upheld a blanket ban prohibiting anyone with insulin-treated diabetes from any driving position.[9] As a result of two appellate decisions in the *Kapche* case, this is no longer the rule of the court.[10] Two things caused the court to change its mind. First, Kapche and the Association provided information about how diabetes is currently managed. While it is true that some people with diabetes have complications that would make driving and law enforcement positions unsafe, most (including Kapche) do not, and experts are able to individually assess those who can safely perform jobs such as driving.[11] Second, the Supreme Court had made it clear in a series of decisions that individual assessment is required under the ADA.[12]

---

[8] Diabetes is an incurable disease that affects the way the body uses food. It causes glucose (sugar) levels in the blood to be too high. In type 1 diabetes, the pancreas stops making insulin. In type 2 diabetes, the body makes some insulin, but either makes too little or has trouble using the insulin, or both. Insulin allows glucose to move from the bloodstream into the cells where it becomes the source of the energy needed for all of life's activities.

People with diabetes regulate their blood glucose levels through awareness of body signals, self-administration of blood tests, and self-administration of medication and food. All people with type 1 diabetes and about half of those with type 2 diabetes must administer insulin either through injections or through wearing an insulin pump. Taking insulin in this manner can result in blood glucose levels that are too low, a condition known as hypoglycemia. In addition some, but not all, oral medications used to treat type 2 diabetes can cause hypoglycemia. People with diabetes are also subject to high blood glucose levels (hyperglycemia) that can lead to a variety of long-term complications.

[9] *Chandler v. City of Dallas*, 2 F.3d 1385, *cert denied*, 511 U.S. 1911 (1994) (5th Cir. 1993).

[10] *Kapche v. San Antonio*, 176 F.3d 840 (5th Cir. 1999); *Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002).

[11] The major concern for an employee with diabetes in a safety-sensitive position is that his or her blood glucose level will become so low that it impairs the ability to perform the job. While this complication of diabetes occurs in a small minority of people, it does not occur in the vast majority of people who take insulin or oral medications. Other complications from diabetes such as neuropathy or retinopathy can also potentially impact safety. Using blood glucose records, medical history, and other clinical examinations, diabetes health care professionals can evaluate which employees can safely perform a given job.

[12] *See e.g. Chevron,* 536 U.S. at 86 (2002) ("The direct threat defense must be "based . . . upon an expressly 'individualized assessment of the individual's present ability to safely perform the

While the law seems clear that blanket bans are prohibited, the Association still receives calls from individuals facing blanket rules that say no one with diabetes need apply. Such blanket bans are most common in safety-sensitive jobs (such as law enforcement, fire fighting and the like). Accordingly, we would urge the Commission to redouble its efforts to educate employers that they are required to individually assess people with disabilities. The question then becomes: What types of individual assessments are valid?

Sometimes, as in San Antonio, a blanket ban is embodied in an official rule or policy. However, we have also seen a number of situations where a "de facto" blanket ban is in place. Here, the employer says that it individually assesses everyone, and goes through the motions of having a medical provider examine the applicant or employee, but then renders a disqualification decision based on nothing more than generalized information and stereotypes about diabetes, rather than on any meaningful assessment of the individual's capabilities. Gary Branham illustrates this situation. Branham was an IRS Agent and sought to be promoted to a Special Agent position, which required him to carry a gun. Like Kapche, he was conditionally offered the position, but things changed when his medical examination revealed that he has diabetes. He was rejected for the position, and the reasons given for his rejection are telling. The determination that he was not qualified because of his diabetes was made not because of the way diabetes affected him individually; he had never experienced any severe complications of diabetes and it had never interfered with his job performance. In making its assessment neither the Agency nor the doctors with which the Agency consulted ever examined Branham or even talked to his treating physician. No one with expertise in diabetes was consulted. Rather, the decision to reject Branham was based upon assumptions about the capability of all people with diabetes along with a misreading of his medical records – an assessment that would have eliminated virtually anyone with type 1 diabetes. After eight years, including a trip to the Seventh Circuit Court of Appeals[13] followed by a jury trial, Branham finally established that he was, indeed, qualified for the Special Agent position and would not pose a direct threat to himself or others. Eight years of government resources had been unsuccessfully devoted to trying to justify a decision that would never have been reached had experts in diabetes been consulted prior to the employment decision being made.

Even when an employer attempts to perform an individualized assessment, the effort can lead to discrimination when the employer or examining physician uses

---

essential functions of the job,' reached after considering, among other things, the imminence of the risk and the severity of the harm portended") (*citing* 29 CFR § 1630.2(r) (2001); *Kapche v City of San Antonio*, 304 F.3d 493 (5th Cir. 2002) (*citing Sutton v. United Air Lines, Inc.*, *supra*; *Albertson's, Inc. v. Kirkingburg*, *supra; PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001)).

[13] *Branham v. Snow*, 392 F. 3d 896 (7th Cir. 2004).

a screening criterion that is wholly inappropriate for the determining whether an individual can perform the job effectively and safely. In the context of diabetes, this can happen when employers misuse a hemoglobin A1C test. The A1C test measures blood glucose levels over a period of several months, and is valuable in helping people with diabetes prevent long term complications. However, diabetes experts agree that it is a complete misuse of the test to disqualify someone because an A1C test result falls above (or below) an arbitrary "cut-off score" set by the employer or the doctor. This is true because A1C scores have little correlation with short term problems related to low blood glucose levels, which is the chief safety-related concern for individuals with diabetes on the job.

The story of Gilberto Wise shows what can happen when an employer uses such "cut-off scores" in an arbitrary manner. After serving as an INS Special Agent for 30 years, Wise was hired as a Court Security Officer for the United States Marshall Service (USMS). Shortly before he was to assume his post he was diagnosed with type 2 diabetes. Yet, it was only after he had served successfully for over a year that USMS removed him from his position. This action was taken not because Wise had any problems performing his job, but because he had an A1C result above a cut-off point established by USMS. In fact, Wise was not utilizing medications that could have even theoretically caused him to be unsafe on the job.

An even more egregious example of faulty screening criteria involves urine glucose tests. Urine glucose test results may be available in the screening process because these tests are often performed as part of routine drug screens or other lab tests. However, urine glucose tests have no role in modern diabetes management and experts agree that they should not be used to assess an individual's ability to do a job. Rudy Rodriguez's story exemplifies this problem. Rodriguez worked as temporary employee at ConAgra's Ranch Style Beans plant in Fort Worth, Texas. He was so successful that he was asked to apply for a permanent position. However, a doctor under contract with ConAgra decided that Rodriguez could not safely perform this factory job, even though the only medical evidence about Rodriguez's diabetes before the doctor was a urine test result.

Rodriguez's story illustrates another troubling aspect of many screening decisions – that they can be based not on the actual medical evidence but on the doctor's subjective opinion of the patient. Too often, these subjective decisions are based on ignorance about diabetes and run counter to the actual medical evidence (which the doctors often do not obtain). In Rodriguez's case, ConAgra's doctor said that he relied on the fact that Rodriguez could not remember the name of the diabetes medication he was taking (along with the meaningless urine test mentioned above) to determine that his diabetes was "uncontrolled" and therefore a per se safety threat. The doctor made his misperceptions about diabetes clear when, based on this "evidence", he

determined that "'outside of a padded room where he could even then fall and break his neck from dizziness or fainting,' there is no working environment in which Rodriguez would be safe."[14]

Rodriquez illustrates that when employers and the doctors they hire attempt to make decisions about complex conditions like diabetes based on a short perfunctory examination, without inquiring further into the individual's medical history or performing follow-up tests on areas of concern, ignorance and misperceptions are allowed to take center stage. Rodriguez fought back, eventually prevailing on summary judgment at the Fifth Circuit Court of Appeals.[15] Yet, like all of the employees I have mentioned, his victory came only after years of expensive litigation for both employer and employee.

Something that all four of the examples I've discussed have in common is that people with diabetes were not evaluated based on knowledge about diabetes as it is currently treated as is required by the ADA.[16] Rather, decisions were based on ignorance, stereotypes, and the desire to make employment decisions based on simplified, supposedly objective standards that in no way reflected the current state of medical knowledge. Such a simplistic evaluation is not possible with diabetes or with many other disabilities, and the attempt to do so will run afoul of the ADA time after time. What is also clear is that an assessment of the whole picture including the individual's health history and work history, along with a dose of expertise in the medical condition, would have resulted in the employer gaining an excellent employee – instead of a long legal battle.

The three hallmarks of successful individual assessment are:

1. Looking at the individual job and the individual applicant with an eye toward truly assessing that situation, not making blanket rules that apply to all jobs or all people with a given disability. (In this regard, it bears noting that in *most* jobs there is no valid safety issue to consider even if, for example, a person with diabetes were to lose consciousness.)

2. Utilizing the expertise of both health care professionals with knowledge of occupational medicine and those with knowledge of the medical condition at issue. This expertise should include the treating physician.

---

[14] *Rodriguez v. ConAgra Grocery Products*, 436 F.3d 468, 476 (5th Cir. 2006).

[15] *Id.*

[16] *See e.g. U.S.A. v Echazabal,* 536 US 73, 86 (2002) (direct threat defence must be "based on a reasonable medial judgement that relies on the most current medical knowledge and/or the best available objective evidence.") (citing 29 CFR § 1630.2(r) (2001)); *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

3. Realizing that with medical conditions such as diabetes there simply is not going to be one test and one cut-off score that will meet the ADA's requirement for an individual evaluation. Rather, the employee's treatment regimen and medical history must be viewed as a whole by someone with expertise in that medical condition.

The solution, then, is that employers, occupational medicine experts, experts in the relevant disability, and employee advocates should work together to develop appropriate protocols for individual assessment, protocols that are reliable and easily implemented for employers and that protect the safety and legal rights of all involved.[17] The Association has worked with government agencies, other organizations, and defendants to establish such models.

Some models for fair individual assessment have been born out of settlement negotiations such as those in the Wise litigation. As a result of those efforts, USMS has instituted a program for individual assessment that ends the agency's reluctance to consult with the applicant or employee's treating physician, ends the use of a fixed A1C cut off, and provides for consultation with a board-certified endocrinologist – selected by the parties to the litigation – before firing or disqualifying an employee with diabetes. In other situations, detailed protocols for individual assessment have been developed such as the one utilized by the Department of Transportation in determining whether an individual who uses insulin can obtain a commercial drivers license[18] and the one developed by the National Fire and Protection Association, an organization that provides models used by fire departments around the country.[19] While these models are not perfect – and we hope to continue to work with agencies and organizations to refine them – they reflect the three basic principles set out above.

Although I have focused on medical testing in the context of diabetes, the lesson is the same for a multitude of other disabilities from epilepsy to multiple sclerosis to limited vision and impaired hearing: lack of a true individualized assessment that employs expertise on the medical condition at issue is a violation of the law. The solutions need not be complex, but are best reached before discrimination occurs through the collaborative approach discussed above.

Other Tests and Screening Devices

[17] It bears noting that such protocols are only necessary when the ability to safely perform a given position is legitimately at issue.

[18] 68 Fed. Reg. 52441 (Sept. 3, 2003).

[19] National Fire Protection Association, 1582 Standard on Comprehensive Occupational Medical Program for Fire Departments (2007) at §§ 6.18.1 - 6.18.2; 9.6.1 - 9.6.5; Annex A: A.6.18.1 - A.6.18.2, A.9.6.3.1) available at http://www.nfpa.org/aboutthecodes/AboutTheCodes.asp?DocNum=1582.

In addition to those medical tests that explicitly seek to evaluate candidates based on their physical and mental conditions, there are also myriad other tests and screening devices that may not be focused on evaluating a medical condition but that nonetheless have an adverse impact on people with disabilities.

Sharona Hoffman, in her article "Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace," describes numerous inappropriate pre-placement tests that have an adverse impact on people with disabilities, and concludes:

> Contemporary preplacement examinations may include genetic testing; inquiries about family medical histories; psychological testing; testing for susceptibility to workplace hazards that is of dubious predictive value; and tests for sexually transmitted diseases, HIV infection, and pregnancy. Many of these tests reveal highly personal information that has no impact on job performance. While employers have a valid interest in determining whether their applicants are medically qualified to perform the jobs for which they are applying, they have no legitimate interest in obtaining data regarding their applicants' psychological, sexual, and genetic secrets that are irrelevant to job performance. Unlimited preplacement testing can unjustifiably invade individual privacy, create opportunities for employers to discriminate against qualified workers based on predicted health problems, and damage the psychological welfare of those who receive unexpected test results that are not accompanied by appropriate counseling. In addition, preplacement testing that is not justified by business necessity can be costly for employers and can be challenged by applicants on numerous grounds, including common law invasion of privacy actions, state law, federal constitutional privacy guarantees, Title VII, and the ADA itself.[20]

Psychological and personality tests such as the Minnesota Multiphastic Personality Inventory (MMPI) are of particular concern. These tests are often used by employers prior to an offer being made, that is, when it is unlawful to make disability-related inquires, yet include questions that identify and evaluate individuals for various psychiatric disorders.[21] Such tests are inappropriate at the

---

[20] Sharona Hoffman, Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace, 49 KAN. L. Rev. 517, 591(2001).

[21] *See Karraker v. Rent-A-Center, Inc*., 411 F.3rd 831, 833 and n.1) (7th Cir. 2005) (listing the following questions from the MMPI: "Applicants were asked whether the following statements were true or false: '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 and crying that I cannot control.' 'My soul sometimes leaves my body.' 'At one or more

pre-offer stage, because they are designed, "at least in part, to reveal mental illness and ha[ve] the effect of hurting the employment prospects of one with a mental disability"[22] If required to be administered after a conditional offer, and an applicant with a disability is eliminated based on such a test, an employer must be able to somehow prove that the results of the test demonstrate that the employee is unable to perform the essential functions of the job safely, a task made difficult as these tests were not constructed for the purposes of identifying the best employees for a job.[23]

In other instances, a test developed for a completely different purpose can inadvertently lead to a disclosure of disability-related information. For example, a urine test for unlawful drug use is specifically allowed prior to an offer of employment.[24] Employees are sometimes asked to list all lawful medications they are taking prior to the test, as some medications may result in a false positive.[25] Such disclosure is tantamount to disclosing a disability for many people who use medications – like insulin – that would only be taken by someone with a specific medical condition. The privacy of such data must be strictly enforced and, in any event, questions about the use of medications only should be permissible in the case of positive test results, should require revealing only those medications that might have caused a false positive and, ideally, only should occur after a conditional job offer.[26] In all such cases, the best course of action for employers would be to avoid these problems entirely by waiting until after a position is offered to utilize any tests that may reveal information about a disability.

Finally, any screening devices that measure physical prowess, such as strength and agility tests, will adversely impact people with various disabilities. All such requirements must be strictly limited to those that are job-related and consistent with business necessity.

Proposals for EEOC Action

---

times 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.'"). *See also* Sujata 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, 81 N.C.L. Rev., 326, 333 and n. 44 (2003).

[22] *Karraker, supra* at 837 (holding that the MMPI is a medical examination that cannot be administered pre-offer). Hoffman notes that the MMPI also requires answers to questions about applicants' religious beliefs, sexuality, and family life. Hoffman, *supra* note 20 at 540.

[23] Menjoge, *supra* note 21 at 332.

[24] 42 U.S.C. § 12114 (d).

[25] Hoffman, *supra* note 20 at 543.

[26] Hoffman, *supra* note 20 at 545.

Given the ongoing discrimination that people with disabilities face because of screening and testing mechanisms, I would like to offer several proposed avenues for EEOC action.

The first is redoubling the Commission's efforts to educate employers about their obligation to individually assess people with disabilities rather than to rely on short-circuited processes that end up being de facto, if not de jure, blanket bans on individuals with certain disabilities. Guidance about how to construct reasonable protocols for individual evaluation, such as those set out above, would prove especially valuable to employers and employees alike. Similarly, internal guidance to EEOC investigators on assessing the expertise of those who make medical determinations would be very useful.

Second, as discussed above, inappropriate physical exams are especially prevalent in safety-sensitive positions such as law enforcement and transportation. Factual research focusing on the lack of credible medical evidence being used to make employment decisions in these areas could be used as a first step toward systemic litigation and/or guidance on the elements of an appropriate pre-employment physical under the ADA.

Third, the use of psychological/personality testing seems particularly fraught with uncertainty and would be an excellent area for EEOC guidance.

Fourth, I would strongly urge the Commission to become actively involved in other federal government efforts to develop employment standards for people with disabilities. For example, currently the Federal Motor Carrier Safety Administration (FMCSA) is reviewing the employment standards for commercial drivers having fifteen different types of medical conditions. FMCSA has established a Medical Review Board along with expert medical panels on specific medical conditions to advise the agency on potential regulatory reform. The EEOC should ensure that FMCSA looks beyond meta-analysis of group-based studies to include expertise on individual assessment in order to develop standards that fulfill the goals of the ADA.

Thank you for the opportunity to testify before you today. The American Diabetes Association stands ready to work with the Commission and with industry to eliminate the barriers that testing and screening place before people with disabilities.