

## Pre-Employment Physical Exam: Court Says Applicants' Rights Were Violated.

***A prospective employer may not conduct a medical examination or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or severity of such disability.***

***However, a prospective employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions.***

***An employer may require a medical examination after an offer of employment has been made to a new employee and prior to the commencement of the employment, and may condition the offer of employment on the results of such examination, if all entering employees are subject to such an examination regardless of disability.***

***Drug testing is permitted prior to an offer of employment, if the testing is limited to screening for illicit substances.***

***A lab test which reports the applicant's general lab values or which delves into the prescriptions being taken is more likely to be viewed by a court as an illegal pre-employment exam.***

UNITED STATES DISTRICT COURT  
PENNSYLVANIA  
March 6, 2014

The US Equal Employment Opportunity Commission filed suit in the US District Court for the Western District of Pennsylvania on behalf of twenty-six applicants for nursing and other direct-care positions at a nursing facility.

### **Ruling Implicates Nurses' Rights / Potential Liabilities**

The Court ruled the twenty-six, and two hundred others who were actually hired and were not involved in the legal case, were all subjected to illegal pre-employment physical examinations conducted by a nurse practitioner.

### **Medical Exams Were Required Before Offers of Employment**

Before an offer of employment, an employer may not ask an applicant to undergo a medical examination or inquire whether the applicant has a disability or do any investigation that could identify an applicant with a disability and preclude the applicant from further consideration.

After an offer of employment, an entrance examination is permitted if all entering employees get the same examination. The results of the examination can only be used to withdraw an offer of employment if an impairment is revealed that would preclude the employee from performing the essential functions of the job.

### **Illegal Pre-Employment Exam Applicant Can Sue Who Is Not Disabled**

The Americans With Disabilities Act was meant to stamp out employment practices which historically have restricted the rights of disabled persons in the workplace.

However, an applicant who is denied employment based on information gleaned from an illegal pre-employment medical examination does not have to prove he or she is disabled to be able to sue.

### **Drug Testing**

Applicants were required to list their current prescription medications for cross-checking with the results of urine toxicology screens. The Court said that was illegal, as it went beyond simple screening for illicit drugs that is permitted before an offer of employment. ***EEOC v. Grane***, \_\_ F. Supp. 2d \_\_, 2014 WL 896820 (W.D. Penna., March 6, 2014).

## Uneven Discipline: Court Turns Down Minority's Race Bias Case.

An African-American housekeeper was fired after what he believed was an innocent interaction with an elderly patient. The facility's investigation revealed that the patient was seriously upset by what happened.

While cleaning it up he asked her if she was playing a joke on him by "pooping" in her wastebasket and then covering it up with candy wrappers.

In his lawsuit against his former employer he alleged race discrimination, based on the fact another employee, a Caucasian, was not fired after she was accused of being rough with some of her full-care patients.

***There is basically no difference between one employee being fired and another employee being allowed to resign in the face of proven accusations that would result in dismissal.***

UNITED STATES DISTRICT COURT  
ILLINOIS  
March 17, 2014

The US District Court for the Central District of Illinois dismissed his case.

The Court agreed in principle that harsher discipline toward a minority employee compared to a non-minority employee for basically the same offense or an offense of comparable seriousness is grounds for a discrimination lawsuit.

A non-minority nursing assistant who was accused of being rough with her patients was confronted and it was made clear to her she was going to be terminated. She asked for and was given permission to resign.

The Court said the facility overreacted when it fired this man for a trivial offense. However, there was no proof that he, a minority, was treated differently than a non-minority just because he was fired and the non-minority was allowed to resign. ***Harrington v. Petersen Health***, 2014 WL 1013878 (C.D. Ill., March 17, 2014).