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Legal Issues Surrounding Preemployment Physical Examinations in the Coal Industry

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LEGAL ISSUES SURROUNDING
PREEMPLOYMENT PHYSICAL EXAMINATIONS IN
THE COAL INDUSTRY

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I. INTRODUCTION

Because of the physical nature of most jobs in a coal mine, many coal companies require applicants to satisfactorily complete preemployment physical examinations. These examinations are generally one part of an application process designed to obtain an employee that is best suited for the job. With the increasing costs associated with workers' compensation and absenteeism, it is understandable that employers are concerned about an individual's physical condition. Moreover, an individual's inability to perform the job due

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to physical limitations could endanger the safety of other employees in the mine.

For many years, applicants accepted preemployment physical examinations without legal challenge. Recently, however, applicants have begun to challenge both the procedures used by employers in conducting these examinations and the results of such examinations. Two factors have contributed to applicants becoming more aggressive in challenging the legality of preemployment physical examinations. First, the passage of handicap discrimination laws during the 1970s has restricted an employer’s ability to deny employment to applicants suffering from physical limitations. Second, our society has become more conscious about the rights of the individual over the last two decades. Employees have begun suing their employers for invasions of workplace privacy, and juries have been willing to punish employers for what they perceive to be unreasonable intrusions into employees’ privacy.¹

This Article examines the legal issues that arise when employers require job applicants to complete preemployment physicals as a condition of employment. Federal and selected state statutes and regulations which limit the scope of preemployment physicals will be discussed. Additionally, the legal problems will be discussed which may arise when an employer refuses to hire an applicant because of the applicant’s physical condition. Finally, state common law claims that impact preemployment physical examinations will be reviewed.

II. STATE AND FEDERAL LAWS REGULATING PREEMPLOYMENT EXAMINATIONS

A. Federal Handicap Discrimination Laws

There are two federal acts which prohibit employers from discriminating against handicapped or disabled individuals. The Re-

¹ I. M. Shepard & R. Duston, Workplace Privacy 1-2 (1987). Their study stated:
The nationwide average jury verdict during the 1985-1987 period in workplace privacy cases brought by employees against their employers was $316,000.
The average verdict — $316,000 — is even more significant when compared with the average for the 1979-1980 period — $0. During the latter period, there were no reported workplace privacy jury verdicts.
The total number of reported workplace privacy jury verdicts against employers nationwide increased twenty-fold between the 1981-1984 period and the 1985-1987 period.
habilitation Act of 1973\textsuperscript{2} and the Americans With Disabilities Act of 1990 ("ADA"),\textsuperscript{3} the latter of which becomes effective July 26, 1992.

The Rehabilitation Act of 1973 is more limited in scope than the ADA. Whether an employer is covered under the Rehabilitation Act depends upon an employer’s relationship with the federal government. Section 503 of the Rehabilitation Act extends only to federal contractors, \textit{i.e.}, employers who have entered into federal prime contracts or subcontracts for an amount in excess of $2,500.\textsuperscript{4} A coal company is covered by Section 503 only if it has a coal supply contract with a department or agency of the federal government. Under Section 503, federal contractors are required to take affirmative action to employ individuals with handicaps.\textsuperscript{5} Section 504 of the Rehabilitation Act covers employers who are the recipients of federal funds.\textsuperscript{6} Recipients of federal funds are prohibited from discriminating against individuals with a handicap.\textsuperscript{7}

In 1990, Congress enacted the ADA which is largely modeled after the statutory provisions of the Rehabilitation Act and the regulations promulgated by executive agencies under Section 504 of the Rehabilitation Act.\textsuperscript{8} The ADA, however, varies in several sig-

\begin{itemize}
\item \textsuperscript{2} 29 U.S.C. §§ 701-96(i) (1988).
\item \textsuperscript{3} 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991).
\item \textsuperscript{4} 29 U.S.C. § 793 (1988). Congress vested the Office of Federal Contract Compliance Programs (OFCCP) with the power to enforce Section 503. Employees aggrieved by violations of Section 503 have no private right of action in court but must resolve their complaint through an administrative procedure administered by the OFCCP. 41 C.F.R. § 60-741.26(a) (1990); \textit{see also} Hodges v. Atchison, T & S.F. Ry., 728 F.2d 414, 416-17 (10th Cir. 1984), \textit{cert. denied}, 469 U.S. 822 (1984); D’Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1482 (7th Cir. 1985).
\item \textsuperscript{5} 29 U.S.C. § 793(a) (1988); 41 C.F.R. § 60-741.4 (1990). The Section 503 regulations provide various policies and practices that a contractor must follow to comply with the “affirmative action” requirement. For example, contractors must adopt a schedule to review physical or mental job qualification requirements to see that they do not screen out qualified handicapped individuals and are consistent with business necessity. \textit{See} 41 C.F.R. § 60-741.6(c) (1990). Contractors are also required to engage in outreach and positive recruitment activities in an effort to employ handicapped individuals. \textit{Id.} § 60-741.6(f).
\item \textsuperscript{6} \textit{See} 29 U.S.C. § 794 (1988). Until 1988, the reach of Section 504 was somewhat limited. Courts had held that the statute’s restrictions did not apply to an entire institution but only to the program or activity that was actually receiving the federal funds. \textit{See} Grove City College v. Bell, 465 U.S. 555, 573 (1984). Congress, however, passed the Civil Rights Restoration Act of 1987 which expanded the definition of program or activity to include the entire institution or entity. \textit{See} Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).
\item \textsuperscript{7} 29 U.S.C. § 794 (1988).
\item \textsuperscript{8} \textit{See} HENRY PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK vii (1990).
\end{itemize}
nificant aspects from the Rehabilitation Act of 1973. Due to the limited scope of this Article, however, only two areas of variance between the Acts will be discussed. First, a private employer’s relationship to the federal government is of no consequence in determining whether an employee is covered by the ADA. Instead, the ADA covers all private employers having 15 or more employees on each working day for 20 calendar weeks in the current or preceding year. Second, Congress substituted the word “disability” for “handicap” in the ADA because Congress perceived that individuals with disabilities objected to the term “handicapped.” Congress, however, intended that the term “disability” have the same meaning as the term “handicap” has under the Rehabilitation Act.

These two federal statues regulate the employers ability to require and use preemployment physical examinations. It should be noted that neither Section 503 nor Section 504 of the Rehabilitation Act of 1973 contain any express language relating to preemployment physical examinations. However, preemployment physical examinations are covered in regulations promulgated pursuant to the authority granted in Sections 503 and 504. Although there is only one set of administrative regulations issued for Section 503, Section 504 permits the head of any federal executive agency or department to promulgate regulations for programs funded by that agency or department. Twenty-four agencies have issued final regulations un-

9. Another difference between the ADA and the Rehabilitation Act is the standard of proof required to establish a violation. Under the Rehabilitation Act, a plaintiff must prove that the sole reason that he was discriminated against was because of his handicap. See Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1989) (dismissing school principal's claim of handicap discrimination under Section 504 because principal alleged that his contract was not renewed since he was a recovering alcoholic and because of dissatisfaction with his job performance). On the other hand, the ADA, like Title VII and the Age Discrimination in Employment Act, only requires the plaintiff to show that he was discriminated against because of his disability. See 42 U.S.C.A. § 12112(a) (West Supp. 1991).

10. 42 U.S.C.A. § 12111(5)(A) (West Supp. 1991). For the first two years after the ADA becomes effective, employers are covered only if they employ 25 or more employees for each working day for 20 calendar weeks in the current or preceding year. Id.


12. Id.


under Section 504. Although the regulations issued by most of these agencies are nearly identical, some agencies, such as the Department of Labor, have promulgated more comprehensive regulations.

Unlike the Rehabilitation Act, the ADA specifically addresses preemployment physical examinations in the text of the Act. The ADA's provisions which relate to preemployment physicals are largely patterned after the regulations promulgated by executive agencies under Section 504 of the Rehabilitation Act of 1973.

The regulations issued under the Rehabilitation Act of 1973 and the ADA expressly permit preemployment physical examinations. Although the Section 504 regulations and the ADA limit an employer's ability to question applicants about a physical disability or handicap, neither the Section 504 regulations nor the ADA limit

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16. Compare 29 C.F.R. § 32.15 (1991) (regulations promulgated by Department of Labor) with 45 C.F.R. § 84.14 (1991) (regulations promulgated by Department of Health and Human Services). With regard to preemployment physical examinations, the Department of Labor (DOL) requires any recipient of its funds to use a physician for preemployment examinations that is "qualified to make functional assessments of individuals in a form which will express residual capacity for work or training." 29 C.F.R. § 32.15(c)(1) (1991). The physician must provide officials with information about any functional limitations of the applicant which are relevant to job placement. Id. The DOL regulations further provide that the results of the medical examination must be specific and objective and must be sent to both the applicant and employing official at the same time. Id. § 32.15(c)(2). The employing official using the information should be familiar with the activities involved in performing the job. Id. § 32.15(c)(3). No employing official may look at the results of the examination until a conditional decision to make an offer of employment to the applicant has been made, id. § 32.15(c)(5)(ii), and the results of the medical examination will be the last factor used by the employing official in deciding whether to make a job offer. See id. at § 32.15(c)(5), (6).
19. See 29 C.F.R. § 32.15(a) (1991) (regulations promulgated by Department of Labor); 45 C.F.R. 84.14(a) (1991) (regulations promulgated by Department of Health and Human Services); 28 C.F.R. § 42.513(a) (1991) (regulations promulgated by Department of Justice); 42 U.S.C.A. § 12112(c)(2)(A) (West Supp. 1991). Section 504 and the ADA prohibits employers from requesting job applicants to answer questions about the existence, nature, or severity of any disability or handicap. However, employers may make preemployment inquiries about an applicant's ability to perform job related functions. Id. § 12112(c)(2)(B); 29 C.F.R. § 32.15(a) (1991). Moreover, employers may request all applicants to describe or demonstrate how, with or without reasonable accommodation, they could perform the job. 56 Fed. Reg. 35,737 (1991) (to be codified at 29 C.F.R. § 1630.14(a)). One federal court has construed the Section 504 regulations to prohibit employers from inquiring specifically about particular physical or mental illnesses. See Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D. N.Y. 1981) (enjoining employer from requesting applicants to identify whether they had ever been treated for mental illness because question was not job related). The court noted that the employer would not have violated the law if it had asked applicants whether they were capable of dealing with emotionally demanding situations. Id. at 337.
the type of information that a physician may request of applicants during the course of a preemployment physical examination. In this regard, the ADA provides that preemployment physical examinations do not have to be job-related and consistent with business necessity.\textsuperscript{20} However, if the employer uses the criteria to disproportionately exclude individuals with disabilities, then the test criteria must be job-related and consistent with business necessity.

The ADA and Section 504 regulations do limit the timing and manner of examinations in three ways. First, the employer can require a preemployment physical examination only after an offer has been made to the applicant. The offer, however, can be made contingent upon the applicant passing the preemployment physical examination. Second, the employer must require all applicants from a given job category who have been made offers to take the physical examination.\textsuperscript{21} Third, the employer must collect information obtained by preemployment physical examinations on separate forms, maintain the records in separate files and treat the information as confidential medical records.\textsuperscript{22} The ADA and Section 504 regulations, however, provide that supervisors and managers may be informed about any applicable work restrictions of an employee.\textsuperscript{23}

Like the ADA, the Section 503 regulations require that test results be held in confidence\textsuperscript{24} and that the procedures used do not disparately impact against handicapped individuals.\textsuperscript{25} However, unlike the ADA, Section 503 regulations do not require employers to give physical examinations to all entering employees or require that the physical examination be given only after an offer of employment has been made to the applicant.

Neither the Rehabilitation Act nor the ADA expressly prohibit any specific testing procedure. The ADA, however, does make spe-

\begin{itemize}
\item \textsuperscript{22} 29 C.F.R. § 32.15(d) (1991); 42 U.S.C.A. § 12112(c)(3)(B) (West Supp. 1991).
\item \textsuperscript{24} 41 C.F.R. § 60-741.6(C)(3) (1990).
\item \textsuperscript{25} 41 C.F.R. § 60-741.6(C)(2) (1990).
\end{itemize}
cific reference to drug testing. The ADA provides that a drug test is not to be considered a medical examination.\textsuperscript{26} The ADA also provides that no provision of the ADA shall be construed either to authorize or to prohibit drug testing.\textsuperscript{27} The regulations under Section 503 and 504 of the Rehabilitation Act do not, in any fashion, refer to drug testing.

\textbf{B. Federal Mine Laws}

Federal mine laws do not contain any provisions relating to pre-employment physical examinations. After an individual begins employment, however, a mine operator is required, at its own expense, to give the miner a chest x-ray to determine if the miner has pneumoconiosis.\textsuperscript{28}

\textbf{C. State Laws}

Almost all states have enacted some form of handicap discrimination laws.\textsuperscript{29} Many of these state handicap laws regulate preemployment physical examinations. For example, the West Virginia Human Rights Commission regulations require that preemployment physical examinations must relate to minimum physical standards necessary to the job and all applicants must be subjected to the examination.\textsuperscript{30} Maryland law forbids an employer from requiring medical examinations unless the information requested has a direct relationship to the ability to do the job.\textsuperscript{31}

\begin{flushright}
\footnotesize
28. 30 U.S.C. § 843(a) (1988). If the miner's chest x-ray shows evidence of the development of pneumoconiosis, the miner has the right to transfer to work in a less-dusty area of the mine without a decrease in compensation. See 30 U.S.C. § 843(b) (1988). Moreover, an operator cannot discriminate against a miner because he has pneumoconiosis. See 30 U.S.C. § 938(a) (1988); \textit{see also} Goff v. Youghiogheny & Ohio Coal Co., 3 Mine Safety & Health Cas. (BNA) 2002 (1985) (holding that miner who alleged that he was discharged because of pneumoconiosis stated claim under Section 105(c)(1) of Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(1) (1988)).
29. \textit{Arthur L. Larson, 3A Employment Discrimination} § 107.31 (1990); \textit{see also 7 Empl. Coordinator (Research Inst. Am.) EP-12,100 to -12,153 (overview of each state handicap discrimination law)}.
\end{flushright}
employers to pay for the cost of any medical examinations.\textsuperscript{32} 

Moreover, some states have enacted laws prohibiting certain types of medical examinations. Some states prohibit tests for sickle cell trait\textsuperscript{33} or for Acquired Immune Deficiency Syndrome ("AIDS").\textsuperscript{34} Oregon prohibits applicants from undergoing genetic screening or brain-wave testing.\textsuperscript{35} Oregon also prohibits employers from requiring prospective employees from taking a breathalyzer test unless the employer has reasonable grounds to believe the applicant is intoxicated.\textsuperscript{36}

Drug testing is the most regulated area of employment testing. Several states have passed statutes regulating employer drug testing of applicants or employees in the private sector.\textsuperscript{37} Although these state statutes generally limit the circumstances under which current employees may be tested,\textsuperscript{38} the limitations do not always extend to


\textsuperscript{34} See, e.g., FLA. STAT. ANN. § 760.50(3)(a) (West Supp. 1992) (no person may require an individual to take a human immunodeficiency virus (HIV) related test as a condition of hiring unless the absence of a HIV-virus is a \textit{bona fide} occupational qualification for the job); MASS. ANN. LAWS ch. 111, § 70F (Law. Co-op Supp. 1991) (no employer may require a test for HIV as a condition of employment); WIS. STAT. ANN. § 103.15 (West 1988) (no employer may solicit or require test for presence of HIV as a condition of employment); see also 7 Empl. Coordinator (Research Inst. Ann.) EP 18,448 (1992) (discussion of state laws relating to testing applicants and employees for HIV); see infra note 48 (cases holding AIDS as a handicap under federal and state law).


\textsuperscript{38} See, e.g., IOWA CODE ANN. § 730.5 (West Supp. 1991) (employer can only test current employee where there is probable cause to believe that the employee is impaired on job); R.I. GEN. LAWS § 28-6.5-1(A) (Supp. 1991) (employer may require drug test if it "has reasonable grounds to believe, based on specific objective facts, that the employee's use of controlled substances is impairing his or her ability to perform his or her job").
applicants for employment. Nevertheless, a few states do limit testing of applicants. For example, Montana permits employers to test applicants only for positions involving hazardous work or safety, security, or fiduciary responsibility. Some states require that an employer may test an applicant only after giving the applicant an offer of employment. Other states permit employers to test applicants only if they have stated this fact in all advertisements and applications for employment. A small number of states require applicants to be provided with copies of any positive test results.

Statutes also regulate the testing procedures used in the drug testing of applicants. Often statutes provide the testing must be conducted pursuant to a written drug and alcohol testing policy, prepared by the employer, and that employers confirm the results of a positive drug test to ensure accuracy. Some states forbid employers from using a test during which the employer directly observes an applicant providing a urine sample for drug testing.

III. PREEMPLOYMENT PHYSICAL EXAMINATIONS AND DISCRIMINATION

A. Federal and State Handicap Discrimination Laws

The Rehabilitation Act and the ADA are more concerned with how employers use information gained during preemployment phys-

44. See, e.g., MONT. CODE ANN. § 39-2-304 (1991) (employer must use reliable confirmation test); R.I. GEN. LAWS § 28-6.5-1 (Supp. 1991) (employers must confirm positive drug test results by gas chromatography/mass spectrometry or its equivalent); CONN. GEN. STAT. ANN. § 31-51u (West Supp. 1991) (positive test result must be confirmed by two separate drug tests, including gas chromatography and mass spectrometry methodology or a methodology more reliable).
45. See, e.g., CONN. GEN. STAT. ANN. § 31-51w (West Supp. 1991). Courts have also been concerned with employers directly observing individuals providing urine samples. The First Circuit Court of Appeals affirmed a $125,000 jury verdict based on the fact that the employer negligently inflicted emotional harm on the employee by observing him providing a urine specimen. See Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988).
ical examinations than with the actual procedures used. It can be anticipated that courts will carefully scrutinize any instance where an employer rejects an applicant because of a physical condition since the main focus of these statutes is to prevent employers from discriminating against disabled individuals. The purpose of this section is not to comprehensively describe handicap discrimination law under federal or state law; instead, this section will address a few of the issues that may arise in handicap litigation after an applicant is refused employment because of the applicant’s physical condition.

To understand the potential issues involved in a discrimination claim, it is important to review those circumstances where an employer would refuse employment to an individual based upon the results of a preemployment physical examination. Employers generally refuse to employ applicants because of the results of a physical examination for one of three reasons or a combination of the three. First, the examination shows that the applicant is unable to perform the functions of the job. Second, the examination indicates that the applicant is likely to suffer a job-related injury due to his physical condition. Third, the physical examination shows that the applicant may pose a threat to the health and safety of other employees as a result of his physical condition.

Before an applicant can challenge any adverse hiring decision, there must first be a showing that the applicant is “handicapped” or “disabled” as those terms are defined under the Rehabilitation Act of 1973 or the ADA. The ADA defines “disability” as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.46

Individuals with the following conditions have been held to be handicapped: tuberculosis; 47 AIDS; 48 dyslexia; 49 epilepsy; 50 chronic bron-

PREEMPTIVE EXAMINATIONS

chitis; severe depression and anxiety; congenital back problem; total hearing loss; and drug addiction. As one would anticipate, when an employer rejects a job applicant because of the results of a preemployment physical examination, the applicant will generally have little problem establishing that the rejection resulted from some physical impairment disclosed in the physical examination.

The applicant, however, may have a more difficult time establishing that he or she has a physical impairment which substantially limits a major life activity. For example, individuals may not be handicapped if they are suffering from an impairment which is transitory in nature because the physical impairment may not "substantially limit" an individual's major life functions. The ADA

Va. 1990) (asymptomatic carrier of human immunodeficiency virus (HIV) antibodies is handicapped under the West Virginia Human Rights Act).


52. McWilliams v. AT&T Info. Sys., 728 F. Supp. 1186 (W. D. Pa. 1990) (holding that employee had stated claim for mental impairment under state handicap law when she claimed that she was diagnosed by psychiatrist as suffering from severe depression and anxiety).


55. See Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988); Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985). The ADA excludes current uses of illegal drugs from protection under the Act. 42 U.S.C.A. § 12111(a). The ADA also amends Section 504 of the Rehabilitation Act to exclude illegal drug users from its protection. See Pub. L. No. 101-336, § 512, 104 Stat. 327, 376-77 (1990). Before this amendment, current users of drugs were protected by the Rehabilitation Act only if they could perform their job and were not a threat to the health and safety of others. See 29 U.S.C. § 706(8)(B) (1988); Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986) (court held that a New York City police officer who was addicted to heroin and who tested positive for current heroin use was lawfully terminated under the Rehabilitation Act because his current use made him unfit for his job).


56. See Fuqua v. Unisys Corp., 716 F. Supp. 1201 (D. Minn. 1989) (holding that employee who was not permitted to work as general laborer for one year was not disabled under state act because he was able to continue with active life and secure alternative employment); Evans v. City of Dallas, 861 F.2d 846 (5th Cir. 1988) (holding that employee with knee injury requiring surgery was not handicapped under Rehabilitation Act of 1973 because knee condition was transitory in nature).
regulations define major life activities in the following manner: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." To determine whether an applicant’s impairment limits his or her ability to obtain other employment, courts have analyzed an individual’s education, training, job expectations, and the number of jobs that the individual is disqualified from because of his or her impairment. In general, an applicant is not substantially limited from performing a major life function merely because the applicant cannot do a specific job. In this regard, one state court has found that an applicant for a job in an underground coal mine was not handicapped merely because she failed a hearing test. In that case, the court noted that the applicant’s hearing problem did not substantially limit her employment. Courts, however, have held that the impairment need not limit the employability for many or most jobs in order to constitute a handicap.

If the applicant can show that he or she is handicapped or disabled, the question then turns to whether the applicant can perform the essential functions of the job in question. As noted above, a common reason that employers give for refusing to employ an ap-
Applicant is that the examining physician does not believe that the applicant can perform the basic functions of the job. To be protected under the Rehabilitation Act of 1973 or the ADA, the applicant must show that he or she is not only handicapped but also that he or she is a "qualified handicapped individual" under the Rehabilitation Act of 1973 or a "qualified individual with a disability" under the ADA. An individual meets these standards if he or she can perform the essential functions of the job with or without reasonable accommodation.\(^{62}\) In determining what are the essential functions of the job, the ADA provides that:

... Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.\(^{64}\)

The legislative history of the ADA shows that "functions of the job" are essential only if they are "job-related and consistent with necessity."\(^{64}\)

Even if unable to perform the essential functions of the job, the applicant may still be protected if he or she can perform the essential functions of the job with reasonable accommodation. Generally, whether reasonable accommodation is available is a fact-specific inquiry and the employer has the burden of showing that it could not accommodate the applicant without undue hardship.\(^{65}\) The ADA defines reasonable accommodation as:

(A) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate

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\(^{65}\) 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1991); see also Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981) (under Rehabilitation Act, employer has burden of persuasion on the issue of reasonable accommodation).
adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.\footnote{66}

In making reasonable accommodation, an employer need not consider employees for jobs for which they did not apply.\footnote{67}

Accommodation is not reasonable if it would cause the employer an undue hardship.\footnote{68} Nor is the employer required to accommodate the employee by eliminating an essential function of the job.\footnote{69}

As noted previously, employers will sometimes refuse to hire applicants because of the risk of future injury. In those situations, the employer usually does not claim that the applicant cannot currently perform the job; but rather the employer asserts that the applicant is likely to injure himself in the future when performing the job. Because of the rising costs associated with absenteeism and workers' compensation claims, employers have legitimate reasons for being concerned with the likelihood that employees may become injured. Courts, however, have generally viewed with disfavor the rejection of an applicant because he was likely to injure himself in the future.\footnote{70} These decisions uniformly hold that the potential cost associated with the risk of future injury is not a legitimate reason for not hiring an applicant.\footnote{71}

On the other hand, in limited circumstances, courts have held that the probability that an applicant may become hurt in the future

\begin{footnotes}
\item[66.] 42 U.S.C.A. \S\ 12111(9) (West Supp. 1991). Section 504 regulations have a similar definition. See, e.g., 45 C.F.R. \S\ 84.12(b) (1991) (Department of Health and Human Services regulations).
\item[67.] See Dexler v. Carlin, 40 Fair Empl. Prac. Cas. (BNA) 633 (D. Conn. 1986); Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981). \textit{Cf.} Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) (The case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment.).
\item[70.] See Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 622 (9th Cir. 1982) (noting that "[a]ny qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries.").
\end{footnotes}
is a legitimate consideration. To prevail on such a claim, the employer must establish by competent medical evidence that there is a reasonable probability that the applicant will incur substantial harm if he performs the job.\textsuperscript{72} In \textit{Mantolete v. Bolger},\textsuperscript{73} the Ninth Circuit Court of Appeals, construing the Rehabilitation Act of 1973, articulated the analysis that an employer must undertake before refusing to hire an applicant because of the risk of future injury:

Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.

Such an evaluation necessarily requires the gathering of substantial information by the employer.

* * *

In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.\textsuperscript{74}

Although the ADA does not specifically refer to risk of future injury, the House Report by the Committee on Education and Labor noted that in limited instances this may be a legitimate ground for refusing to hire an applicant:

A candidate, undergoing a post-offer, pre-employment medical examination may not be excluded, for example, solely on the basis of an abnormality on an x-ray. However, if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm and such accommodation would not cause an undue hardship.\textsuperscript{75}

At least one state court has considered whether a coal company properly refused to hire an applicant because of the possibility that


\textsuperscript{73} 767 F.2d 1416, 1421 (9th Cir. 1985).

\textsuperscript{74} \textit{Id.} at 1422-23.

the applicant would injure herself in the future. The West Virginia Supreme Court in *Ranger Fuel Corp. v. West Virginia Human Rights Commission*,76 held that an employer did not violate the West Virginia Human Rights Act when it refused to hire an applicant suffering from psoriatic lesions for a job as a general inside laborer in low coal, *i.e.*, a coal seam less than forty-eight inches in height. The employer refused to hire the individual on the basis of a recommendation by a physician who believed that the applicant would aggravate her psoriatic lesions by crawling around in low coal and that this would lead to secondary infection. The court found that the coal company’s failure to hire the applicant was justified because the applicant’s handicap created a reasonable probability of a materially enhanced risk of harm to her if she worked in low coal.

The “risk of future injury” defense has been used most frequently by employers to justify refusals to hire applicants with asymptomatic back conditions. In deciding these cases, courts have considered the material fact to be the likelihood that the applicant would develop a back injury if he or she performed the job in question. In this regard, the Minnesota Court of Appeals in *State v. Metropolitan Airport Commission*77 affirmed a finding of an administrative agency that an applicant’s lower back condition would pose a serious risk to his health if he performed the job of a building service worker. Relying upon medical testimony, the court concluded that a job applicant had a 50% to 75% chance of developing a herniated disc if he performed the job. On the other hand, in *In re State Division of Human Rights*,78 the New York Court of Appeals held that an employer had violated state handicap law by rejecting an applicant for employment as a police officer because he had spondylolisthesis79 and widening of the lumbosacral angle. The employer failed to hire the applicant because its physician had stated

76. 376 S.E.2d 154 (W. Va. 1988).
77. 358 N.W.2d 432 (Minn. Ct. App. 1984).
79. Courts have generally rejected employer’s contentions that it is reasonably probable that an applicant with spondylolisthesis will hurt himself or herself in the future through performing manual labor. See *Western Weighing Bureau v. Wisconsin Dep’t of Indus., Labor, & Human Relations*, 21 Fair Empl. Prac. Cas. (BNA) 1733 (Wis. Cir. Ct. 1977); *Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335 (Me. 1980).
that the applicant had a 25% chance of developing back disability within 10 to 20 years. The court held that the employer had failed to demonstrate a reasonable expectation that the applicant would be unfit to perform his job in the future.

Finally, there are instances when an employer will reject an applicant because it believes that the applicant is a risk to the safety of others. Because of dangers inherent in coal mining, coal companies have reason to be concerned about whether employees can safely perform mine-related jobs. In School Board of Nassau County v. Arline,\(^{80}\) the United States Supreme Court held that under the Rehabilitation Act an employer can exclude a handicapped individual from the workplace if that individual poses a direct threat to the health or safety of others. The ADA specifically includes a provision that permits employers to refuse to hire applicants who pose a direct threat to the health or safety of others.\(^{81}\) The ADA defines direct threat to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."\(^{82}\)

Of critical importance in these cases is the nature of the evidence the employer must present in order to support a claim that an applicant cannot perform an essential function of the job or is a threat to the safety of others or himself. At a minimum, in order to prevail on this issue, the employer must show that it relied upon competent medical testimony concerning the effects of the applicant's physical impairment.\(^{83}\)

Courts, however, will not find an employer immune from claims of handicap discrimination merely because the employer has relied upon a physician's opinion.\(^{84}\) For example, in Wilks v. Taylor School

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District, a Michigan Court of Appeals provided two reasons why employers should not be able to immunize themselves from handicap suits by relying upon a physician’s opinion. First, the court noted that the employer and physician could “collude, connive, or conspire” to eliminate a handicapped individual’s chances of employment. Second, the court noted that an employer could designate a physician who was predisposed against handicapped individuals.

Moreover, the House Report of the Education and Labor Committee noted that the complainant can challenge the company physician’s determination. In this regard, the House Report noted:

Any determination by a company physician can be challenged by evidence from the complainant’s physician. Company doctors often are unfamiliar with certain disabilities and assume that there are barriers to employment which, in fact, do not exist. The complainant’s own physician often has more knowledge about the effects of the disability on the individual being considered. An employer is not shielded from liability merely by a statement from the employer’s physician that a threat of imminent, substantial harm exists by hiring an applicant with a particular disability.

B. Federal Mine Laws

The extent to which an applicant is protected under federal mine health and safety laws from discrimination is not clear. An applicant for employment is included among those classes of persons protected from discrimination under Section 105(c) of the Federal Mine Safety and Health Act. (hereinafter “Mine Act”). Section 105(c)(1) of the Mine Act provides that applicants are protected from discrimination for the following activities: (1) he has exercised a statutory right; (2) he has filed or made a complaint under or relating to the Mine Act; (3) he is the subject of a medical examination and potential transfer under Section 811 of the Mine Act; (4) he instituted a proceeding under or related to the Mine Act, or has testified, or is about to testify, in a proceeding under the Mine Act. The only

provision that appears to apply to preemployment examinations is where an applicant is the subject of a medical examination and potential transfer under Section 811 of this title. MSHA developed the Part 90 transfer program under Section 811(a)(7) of the Mine Act. The Part 90 program provides that miners who have evidence of developing pneumoconiosis may transfer to a less dusty part of the mine without a loss in pay. Several applicants have made claims under this section asserting that they were not hired because the employer learned during a preemployment chest x-ray that the applicant had pneumoconiosis. However, no case has proceeded to a decision on the merits in this area.

C. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act prohibits employers from discriminating against employees or applicants on the basis of race, color, religion, sex, or national origin. The questions asked of applicants for employment during a preemployment medical examination may violate Title VII. In this regard, one state court, construing a state civil rights statute analogous to Title VII, held that an employer committed sex discrimination when it required female employees, but not male employees, to answer questions about urogenital health.

An employer may also violate Title VII when it uses otherwise neutral criteria if the criteria disproportionately impact against individuals in protected classes. To date, litigation in this area has most frequently arisen in challenges to drug tests.

The United States Supreme Court in New York Transit Authority v. Beazer held that an employer did not violate Title VII by refusing to hire methadone users. The plaintiffs had claimed that the employer’s policy adversely impacted protected groups of African Americans and Hispanics. The plaintiffs claimed that 62 to 65% of methadone users in New York City were African American or His-

panic. Because the plaintiffs had not shown how many methadone users had applied for jobs, the Court held that the plaintiff had not introduced sufficient statistical information to show that the policy had a disparate impact against minorities. Moreover, and more importantly, the Court held that the employer had shown that the policy was job-related.

On the other hand, the Eleventh Circuit Court of Appeals in Chaney v. Southern Railway Co.\textsuperscript{95} reversed a district court’s judgment for an employer on a claim that an employer used drug test results to discriminate against African Americans. The circuit court found that the district court had failed to consider plaintiff’s claim that EMIT tests, a commercial test widely used to screen for certain controlled drugs, disparately impacted African Americans. The plaintiffs had presented expert testimony that African American persons disproportionately obtained false positives through EMIT tests because the test misread melanin fragments, the substance responsible for African Americans’ darker skin color, as ingested THC fragments (THC is the predominant substance found in marijuana). The circuit court remanded the case for the taking of further evidence. It should be noted that many experts do not believe that melanin fragments interfere with the results of an EMIT test.\textsuperscript{96}

IV. PREEMPLOYMENT PHYSICAL EXAMINATIONS AND COMMON LAW CLAIMS

A. Invasion of Privacy

State laws may provide an applicant the opportunity to pursue a claim under the tort of invasion of privacy. The \textit{Restatement (Second) of Torts}, which has been adopted by most states since its publication in 1977, recognizes four types of invasions of privacy. These “four torts,” all of which have been applied in the workplace context, include: (1) appropriation, which prohibits the use of another individual’s name or likeness for commercial purposes without per-
mission; (2) *unreasonable intrusion*, which prohibits intentional intrusions upon the solitude or seclusion of another person; (3) *public disclosure of private facts*, which prohibits the disclosure of matters in the private life of a person if the publicity is highly offensive and of no public concern; and, (4) *false light*, which prohibits publicity that places a person in a "false light" in the public eye.97

To date, plaintiffs in refusal-to-hire cases have generally limited challenges in this area to drug testing. The gravamen of these suits is that drug tests constitute an unreasonable intrusion into their seclusion. Because of the circumstances under which job applicants are tested for drugs, a claim of invasion of privacy has not been particularly effective. Where an employer tests applicants as a condition of employment, the applicant has two options. The applicant may consent to the test, or the applicant may refuse to take the test and not be considered for employment. When the applicant refuses to take the test, courts have generally found that no "invasion" has taken place, even if the applicant’s refusal has lead to an adverse result concerning employment.98 If the applicant consents to the test, however, no matter how reluctantly, and is not hired because of positive test results, courts have generally found that the applicant is barred from claiming invasion of privacy because consent is an absolute defense.99


98. See Luedtke v. Nabors Alaska Drilling Inc., 768 P.2d 1123 (Alaska 1989) (holding that employees discharged for refusing to take a urinalysis test did not have any claim for invasion of privacy since no intrusion took place); cf. Gretencord v. Ford Motor Co., 538 F. Supp. 331 (D. Kan. 1982) (holding that plaintiff who was disciplined for refusing to permit a random search of his vehicle pursuant to company policy had no claim for an invasion of privacy because no intrusion took place); Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987) (holding that plaintiff did not state claim for invasion of privacy when he was discharged for refusing to allow his automobile to be searched). But see Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618 (Cal. Ct. App. 1990), cert. denied, 111 S. Ct. 344 (1990) (holding that employee discharged for refusing to take urinalysis test suffered impermissive privacy intrusion).

99. See Restatement (Second) of Torts § 583 (1977); Jevic v. Coca Cola Bottling Co., 5 Individual Empl. Rights Cas. (BNA) 765, 771 (D. N.J. 1990) ("Jevic, having consented to the drug test has no more standing to assert a violation of privacy than had he lit a marijuana cigarette during his interview."); Casse v. Louisiana Gen. Servs. Inc., 531 So. 2d 554 (La. Ct. App. 1988) (dismissing employees’ claim of invasion of privacy under Louisiana Constitution because employees consented to the test); Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497 (Tex. Ct. App. 1989) (holding that employer’s testing program did not violate applicant’s right to privacy because applicant had to consent before any testing).
A few courts have actually considered the merits of the claim that a drug test of an applicant violates the applicant's right to privacy. A California Court of Appeals in *Wilkinson v. Times Mirror Corp.* held that an employer did not violate an applicant's constitutional right to privacy by requiring a drug test as a condition of employment. The court based this holding on three points. First, the court noted that applicants can generally expect to be required to pass a preemployment physical with a urinalysis test as a condition of employment. Second, the court noted that the employer had informed job applicants of the testing program. Third, the court stated that the employer took the specimen in a manner designed to minimize the intrusiveness, i.e., applicants were not observed while providing the specimen. However, the court noted that:

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\text{We do not hold that all preemployment drug and alcohol testing by private employers is constitutional, or that a private employer's hiring practices are absolutely immune from judicial scrutiny. There may be preemployment inquiries and requests of a personal nature which are so intrusive as to be constitutionally unreasonable.}^{102}
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A different result may be reached where current employees are required to submit to random drug tests. In this regard, the West Virginia Supreme Court of Appeals in *Twigg v. Hercules Corp.* held that an employer violated an employee's "legally protected interest in privacy" when it required the employee to submit to random drug testing. The court carved out two exceptions to this rule. First, employers may require a random drug test where the employer has "reasonable good faith objective suspicion of an employee's drug usage." Second, the employer may randomly test

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101. The California Constitution provides that the right to privacy is among one of the people's inalienable rights. CAL. CONST. art. I, § 1. California courts have held that a purely private action may cause a violation of this clause. See Porten v. University of San Francisco, 134 Cal. Rptr. 839 (Cal. Ct. App. 1976).
105. *Id.* at 55.
106. *Id.*
an employee when "an employee's job responsibility involves public safety or the safety of others." The court did not state whether this rule would apply to the drug testing of applicants.

In addition to claims that an employer has intruded on an applicant's solitude, an applicant may also have a claim for invasion of privacy if the employer disseminates any information that it learns about the applicant through testing. Unlike defamation, an employer is not immune from liability because what it publishes is true. However, an employer enjoys a limited immunity from suit if it publishes information to only a small group of individuals who have an interest in the information. Communicating information about an applicant's medical condition beyond this limited group can constitute an invasion of privacy. One court has held that it is not an invasion of privacy for an employer to communicate to a union confidential information concerning an employee's psychiatric condition where the safety of other employees was involved.

One area that has spawned litigation concerns a company physician's communications about an employee's medical condition to an employer. One code of medical ethics provides that occupational physicians should only release information learned in preemployment physical examinations to the employer upon the applicant's written consent. Where the employee has not provided the physician employed by the company with authorization to release information to the employer, employees may sue both the employer and the phy-

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107. Id.
108. See, e.g., Miller v. Motorola, Inc., 5 Individual Empl. Rights Cas. (BNA) 885 (Ill. Ct. App. 1990) (holding that plaintiff's claim that employer had disclosed to numerous co-workers that plaintiff had a mastectomy stated claim for invasion of privacy).
110. See Principles of Medical Ethics and Current Opinions of the Council on Ethical and Judicial Affairs, § 5.09. This section provides, in pertinent part, "Where a physician's services are limited to preemployment physical examinations or examinations to determine if an employee who has been ill or injured is able to return to work, no physician-patient relationship exists between the physician and those individuals. Nevertheless, the information obtained by the physician as a result of such examinations is confidential and should not be communicated to a third party without the individual's prior written consent, unless it is required by law. If the individual authorized the release of medical information to an employer or a potential employer, the physician should release only that information which is reasonably relevant to the employer's decision regarding that individual's ability to perform the work required by the job."
sician for invasion of privacy or breach of confidence.\textsuperscript{111} It is questionable whether the same result would occur if a job applicant was involved.

V. CONCLUSION

Because of the high costs associated with health care, absenteeism, and workers' compensation, coal companies are likely to continue requiring job applicants to pass preemployment physical examinations as a condition of employment. Legal challenges to these preemployment physical examinations will continue to increase. Although a significant part of the American workforce has been protected by some type of handicap discrimination law, the publicity that has surrounded the promulgation of the Americans With Disabilities Act will lead to more applicants challenging their failure to be hired. To avoid handicap discrimination suits, coal companies will have to be more cautious about how they use the results obtained from preemployment physical examinations.