Diane M. Juffras
School of Government
UNC-Chapel Hill
(919) 843-4926
juffras@sog.unc.edu

DON'T ASK THAT QUESTION: AVOIDING LIABILITY IN EMPLOYEE INTERVIEW AND SELECTION

Nurse Executives Legal Conference
October 29, 2007

Which of the following questions, asked at a job interview or on an application, are unlawful:

1. Are you married, single, divorced, or what?

2. Does your husband know that you are applying for this job?

3. Are you pregnant now or do you expect to get pregnant soon?

4. Will you go to the Holiday Inn with me right now?

5. What church do you attend?

6. When were you born?

7. That is an unusual last name. What country do your people come from?

8. Have you ever been arrested?

9. You are applying for a job as a backhoe operator at the landfill. We require all employees to have a high school diploma. Do you?

10. Do you have any physical impairments that would affect your job performance?

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
42 U.S.C. § 2000e et seq., as amended

A. **Title VII** makes it unlawful for employers to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment **because of his/her race, color, religion, gender or national origin**. These categories are referred to as "protected classes.

1. A disparate treatment claim alleges that the employer intentionally discriminated against the applicant, for example, refused to hire the applicant because s/he was African-American, or because she was a woman, or because s/he was a Muslim.

2**. A disparate impact claim** alleges that a facially neutral job requirement has an adverse effect on a protected group. When the job requirement has an adverse impact, **and cannot be justified by a business necessity**, discrimination will be found, irrespective of motive.

Subjective or discretionary employment practices (for example, interviews) may also be analyzed under the disparate impact approach. Where sufficient statistical disparities are shown, and causation proved, an employer must demonstrate the job relatedness of the subjective selection device.

3. Harassment claims may also be brought under Title VII. In the hiring context, harassment claims are usually allegations of **quid-pro-quo sexual harassment** ("sleep with me if you want this job"), but with respect to current employees, they may also be based on a theory of hostile or abusive work environment based on gender, race, color, religion or national origin.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)
29 U.S.C. §§ 621-634

The ADEA prohibits discrimination in hiring, discharge or compensation, terms, or privileges of employment because of age.

Exceptions: Discrimination is permitted where:

(i) age is a "bona fide occupational qualification reasonably necessary to normal operation of the particular business;" or (ii) the employment action is in observance of a bona fide seniority system or benefit plan.

The Most Complex Employment Discrimination Statute?:
The Americans with Disabilities Act and Employment Interviewing

The Americans with Disabilities Act says that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to **job application procedures**, the **hiring**, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." **See 42 U.S.C. § 12112(a)** [emphasis added].

A. Some Basic ADA Rules:

1. **The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities**. Persons who have a record of such an impairment or are regarded as having such an impairment are also covered by the ADA.

   An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities. Conditions that are temporary and have no permanent or long-term effect on major life activities are ***not*** substantially limiting, even if they require a leave of absence.

   A mental impairment is defined as "any mental or psychological disorder, such as . . . emotional or mental illness." Examples given by the EEOC include major depression, bipolar disorder, panic disorders, post-traumatic stress syndrome and schizophrenia. **See 29 CFR § 1630.2(h)(2)**.

   Stress can be a disability if it substantially limits a major life activity such as learning, thinking, interacting with others or sleeping, but it is not in and of itself a mental impairment.

- Examples of **major life activities**: **[see 29 CFR Part 1630 App. § 1630.2(i)]**
  - ✓ Caring for oneself
  - ✓ Performing manual tasks
  - ✓ Walking
  - ✓ Seeing, hearing, speaking
  - ✓ Breathing
  - ✓ Learning
  - ✓ Sitting
  - ✓ Standing
  - ✓ Lifting
  - ✓ Reaching
  - ✓ Thinking
  - ✓ Interacting with others
  - ✓ Working (use working only if nothing else fits)

→ **Note that to be substantially limited in the "major life activity" of working**, an employee must be restricted in his/her ability to perform a class of jobs or a broad range of jobs in various classes, not merely unable to perform a specific job for a particular employer. The United States Supreme Court has questioned in passing whether "working" is a "major life activity" within the meaning of the ADA, but has not decided the issue.

2. A number of conditions are excluded from coverage.

- Current drug users are excluded from coverage, but note that alcoholics and former drug users **are** covered. See 42 U.S.C. §§ 12114(c) and 12210.

- Also excluded from coverage are any *short-term or temporary disabilities* (including pregnancy and any work-related or recreational injuries from which a full recovery is expected) and short-term illnesses like colds or broken bones.

- Asymptomatic HIV-positive status is generally considered a disability under the ADA.

3. A qualified individual with a disability means one who, with or without reasonable accommodation, can perform the *essential functions* of the job.

4. Essential Functions: If the job applicant or employee cannot perform an essential function, the applicant or employee is not a qualified individual and the employer has no duty to accommodate him/her.

What is an essential job function?
Essential job functions are the basic, fundamental duties that the employee must perform. The term "essential functions" does not include the marginal functions of the position.

5. Reasonable Accommodations:

An employer must provide *reasonable accommodation* to the known physical or mental limitations of a qualified individual with a disability, unless doing so would impose an undue hardship on the employer's operations.

An employer must provide a reasonable accommodation to qualified applicants and employees regardless of whether they are applying for or working in a full-time or part-time position or — in the case of current employees — whether they have probationary or permanent status.

What is a reasonable accommodation?

- Any change or adjustment to a job or work environment that allows a qualified applicant or employee with a disability to enjoy equal employment opportunities. There are three kinds of "reasonable accommodations:"

  1. **changes to a job application process (for example, modifying examinations);**
  2. changes to the work environment, or to the way a job is usually done; or
  3. changes that allow an employee with a disability to enjoy equal benefits and privileges of employment (for example, access to training).

B. The ADA and the Hiring Process.

The ADA applies both to current employees and to job applicants.

Under the ADA, employers may not directly ask a job applicant about a disability or ask any other questions designed to ferret out a disability. There are separate rules for pre-offer medical inquiries and examinations and post-offer medical inquiries and examinations, and for inquiries and examinations of current employees.

A Summary of Do's and Don'ts for Pre-employment Medical Inquiries and Exams:

- Examples of illegal questions:

  -- "Do you need a reasonable accommodation to perform this job?"

  -- "Do you have any conditions that would prevent you from performing this job?

  -- "Been hospitalized lately?"

  -- "Have you ever filed a Workers' Comp claim?"

- Employers may ask:

  -- about an applicant's ability to perform specific job functions
  - e.g., ability to lift a certain amount of weight

  -- about an applicant's non-medical qualifications and skills
  - e.g., work history, education, required licenses and certifications.

  -- for applicants to describe or demonstrate how they perform job tasks.

- *But note* that employers should ask all applicants for a particular position the same questions.

- If a job applicant volunteers information about a disability, the employer may ask whether the applicant will need a reasonable accommodation to perform the job.

- Employers may not require applicants to take a medical examination before a job offer is extended.

  - *Exception*: When an employee asks for a reasonable accommodation to participate in the interviewing and selection process, the employer may ask for documentation of the disability and the type of accommodation needed.

- Employers may ask applicants pre-offer to take :

  - physical agility test
  - skills test
  - personality profile test
  - pre-employment drug test (but not a pre-employment alcohol test),

  provided all applicants for the same position are required to take the test.

- Once an offer has been extended, an employer may require the successful applicant to take a medical examination (provided that the employer requires medical exams of all employees).

- Post-offer, employers may also ask disability related questions, including questions about their workers' compensation history, attendance record at previous jobs, and about their health.

- Employers may also ask at this point whether the employee will need a reasonable accommodation to do the job.

- If a conditional offer is withdrawn after a post-offer medical examination or discussion of the applicant's medical history, the reasons for withdrawal of the offer must be job-related and consistent with business necessity.
  For example,

    - an essential job function is the ability to lift fifty lbs. and the medical exam reveals that lifting anything over 35 lbs. will unduly stress the employee's heart;

    - the applicant's medical history is such that s/he is uninsurable for workers' comp purposes (note than "uninsurable" *means* "uninsurable," not just that premiums will be higher).

If an employee asks for a reasonable accommodation after an offer is extended, the employer may ask for documentation of the disability and need for accommodation.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA): 39 U.S.C. §§ 4301 – 4333

The purposes of USERRA are two-fold:

(1) to allow Americans to serve in the United States armed forces with minimum disruption to their civilian careers; and

(2) to prohibit discrimination against those who have served in the uniformed services.

USERRA prohibits discrimination of any kind in employment against someone who is or shall be performing, has performed, or intends to perform military service. See 38 U.S.C.A. § 4311(a). Thus, a person's initial employment application cannot be rejected on the ground that he or she is a member of the military reserves and is therefore likely to be absent when called up for duty.

Similarly, an employee cannot be denied consideration for a newly available promotion simply because he is not present to apply for it.

USERRA applies to any employee serving in the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, as well as in the Army National Guard and Air National Guard, the commissioned corps of the Public Health Service, and to "any other category of persons designated by the President in time or war or national emergency," whether such persons are serving on a voluntary or involuntary basis. See 38 U.S.C.A. §§ 4303 (13), (16).