

You Can't Ask That! Unmasking the Myths About "Illegal" Pre-Employment Interview Questions

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Introduction

In my class on Employment Discrimination, we often discuss cases that mention, in the mix of many other facts, a question that was asked during a pre-employment interview. While many bright students miss the main legal issue raised in the case, several will invariably shout out "That is an illegal question!" Most of the time, they are wrong. I tell them that the question may be ill advised and probably of little use in identifying a good prospective employee, but is not "illegal". Often, students triumphantly (they become uncharacteristically energized if they think I have made an error) pull out textbooks and readings assigned for other courses that do, in fact, refer to a laundry list of interview questions as being illegal.¹

Many of the works students cite are part of the plethora of materials written to train managers to avoid lawsuits arising from violations of federal laws that prohibit discrimination in the workplace.² The authors of these works are likely trying to spare their readers an explanation of the nuanced difference between actions that are per se violations of the law from those that are evidence of discrimination. This discourages employers from asking interview questions that, while not illegal, could be used as evidence of a discriminatory intent and hence unlawful conduct. Nonetheless, mischaracterization of certain interview questions as being illegal is troubling. We should not be giving students or human resource professionals incorrect information, even if the correct analysis requires some hair splitting. The myth that an employment interview is a legal minefield of questions to be avoided distracts employers from utilizing the interview in ways key to a successful employee selection process. Managers, anxiously preoccupied with what questions they are *not* supposed to ask applicants, miss the opportunity to develop the types of questions they should be asking to get the best employee for the job.

This article looks at pre-employment interview questions in three ways. Part I identifies those five types of interview questions that are per se unlawful. Part I also examines cases in

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¹ See, e.g., Herbert Heneman, III & Timothy Judge, STAFFING ORGANIZATIONS 401-409 (4th ed. 2003) (using the term "unlawful" to describe questions); *30 Interview Questions You Can't Ask and 30 Sneaky, Legal Alternatives to Get the Same Info*, HRWorld (Nov. 15, 2007); Patricia M. Buhler, *Interviewing Basics: A Critical Competency for All Managers*, SuperVision, March 2005 at 20 (stating that interviewers must be aware of the illegal questions to avoid such as asking age, marital status, religious orientation, or number of children); *Illegal Interview Questions*, UsaToday.com, January 29, 2001, <http://www.usatoday.com/careers/resources/interviewillegal.htm> (online career column for USA Today providing erroneous examples of "illegal" such as "What is your date of birth?", "To what social clubs or organizations do you belong?").

² See generally Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999) (examining employers' lawyers attempts to safeguard their clients against antidiscrimination and other employment related litigation); Captain Daniel J. Bugbee, *Employers Beware: Violating USERRA*, 12 CHAP. LAW REVIEW 279 (2008) (arguing that asking certain questions regarding an applicant's reservist status will presumptively establish a violation of the Uniformed Services Employment and Reemployment Rights Act).

which the prohibited questions were asked during the employee selection process, and the judicial relief that was awarded, if any. Part II splits hairs by explaining the distinction between questions that are unlawful to ask from those that are permissible but may be used as evidence of an unlawful motive. Part III discusses the types of job related questions an interviewer should be asking to improve the employee selection process, and how such questions protect an employer from claims of discrimination. In short, Part III addresses how an employer can make the notion of whether a question is illegal, irrelevant.

Part I. Illegal Pre-employment Interview Questions

Despite the anxiety caused by the fear of asking an illegal question, there are only five circumstances when asking specific questions during pre-employment interviews may, without more, violate federal employment laws.³ These circumstances arise when the questions are designed to restrain or interfere with employees' right to organize guaranteed by the National Labor Relations Act,⁴ when the question expresses any limitation, specification, or discrimination as to sex, unless based upon a bona fide occupational qualification,⁵ disability related inquiries prohibited by the American with Disabilities Act,⁶ when an employer requests genetic information from an applicant,⁷ and when a request is made for a prospective employee to take or provide the results of a polygraph exam.⁸ A discussion of the prohibited questions follows.

A. Interview questions that constitute unfair labor practices

The National Labor Relations Act (the NLRA) was enacted by Congress to guarantee workers the right to join unions without fear of management reprisal.⁹ The NLRA prohibits employers from committing unfair labor practices that might discourage workers from

³ In addition to those federal statutes discussed in this article, certain state or local laws may more expansively regulate an employer's interview questions. *See, e.g.*, Haw. Rev. Stat. §§ 378.2-378.2.5 (1998) (prohibiting most Hawaii employers from asking potential employees about their criminal history on an initial written job application). Additionally, some federal laws in areas other than employment, e.g. housing or lending, prohibit certain questions during the application process. *See* Helen Norton, *You Can't Ask (or Say That): The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727 (2003). Additionally, certain questions that are otherwise lawful may be prohibited by a consent decree or other court order. *See, e.g.*, *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980) (prohibiting any pre-employment interview "conducted with respect to women, blacks and Latins [to] include, nor shall any woman, black or Latin be rejected for employment on the basis of, any inquiry which is not routinely made of white Anglo males.").

⁴ National Labor Relations Act, 29 U.S.C.S. § 158(a) (1) (2007).

⁵ EEOC Guidelines on Discrimination Because of Sex, 29 CFR §1604.7 (2007).

⁶ Americans with Disabilities Act, 42 U.S.C.A. §12112(d)(2) (2000).

⁷ Genetic Information Nondiscrimination Act, 42 U.S.C.A. § 2000ff-1 (b) (2010).

⁸ Employee Polygraph Protection Act, 29 U.S.C. §§2001 – 2009 (2007).

⁹ National Labor Relations Act, 29 U.S.C. §§ 151–169 (2007).

organizing or prevent them from negotiating a union contract.¹⁰ Most private employers are covered under the NLRA.¹¹

Congress created the National Labor Relations Board (NLRB), an administrative agency, to enforce the NLRA¹² and empowered it to bring and adjudicate matters when it believes an unfair labor practice has occurred.¹³ The basic test the NLRB has developed for evaluating whether a pre-employment interview question violates the NLRA is whether, under all circumstances, the question reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.¹⁴ The NLRB has ruled that questioning employees during job interviews violates the NLRA when the questions are designed to elicit information about organizational activities and contain threats of unfavorable consequences if employees dealt with a named union organizer.¹⁵ Even in cases when the interviewee was later hired, the NLRB strictly construed the statute and found that questions during the job interview concerning former union membership and union preference are inherently coercive and therefore unlawful.¹⁶ Historically, courts that have reviewed the decisions of the NLRB have not agreed and required something more than the mere questioning of potential employees concerning union membership to violate the NLRA.¹⁷ However, in *NLRB v. Bighorn Beverages*,¹⁸ the most recent case to decide the issue, the court found that the use of oral pre-employment interview questions, along with a printed application form that inquired about union membership was "inherently coercive" and in violation of the NLRA.

B. Interview questions that express any limitation, specification, or discrimination as to sex, unless based upon a bona fide occupational qualification

The most comprehensive employment discrimination statute, Title VII of the Civil Rights Act of 1964 (Title VII) does not specifically prohibit any pre-employment interview questions.¹⁹

¹⁰ *Id.*

¹¹ The NLRA specifically excludes the United States or any wholly owned Government corporation, any Federal Reserve Bank, any State or political subdivision thereof, or any person subject to the Railway Labor Act, any labor organization (other than when acting as an employer), employers of agricultural laborers, or persons who employ domestic workers in their home. 29 U.S.C. § 152(2)(3) (2007).

¹² *Id.* § 153.

¹³ *Id.* § 160.

¹⁴ *KDF Constr., Inc.*, 272 NLRB 891 (1984).

¹⁵ *Hyster Co.*, 198 NLRB 192 (1972).

¹⁶ *Rochester Cadet Cleaners, Inc.* 205 NLRB 773 (1973); *Bendix-Westinghouse Automotive Air Brake Co.*, 161 NLRB 789, 791-792 (1966); *P. B. and S. Chemical Company*, 224 NLRB 1, 2 (1976); *Catholic Health Care*, 2000 WL 33665482 (N.L.R.B Div of Judges 2000).

¹⁷ *NLRB v Sellers*, 346 F.2d 625 (9th Cir. 1965) (citing *Salinas Broadcasting v. NLRB*, 334 F.2d 604 (9th Cir. 1964)).

¹⁸ 614 F.2d 1238, 1241-1242 (9th Cir. 1980).

¹⁹ Title VII of the Civil rights Act, 42 U.S.C. §§ 2000e(1)-2000e(17) (2000).

However, the Equal Employment Opportunity Commission (EEOC), the administrative agency charged with enforcing Title VII, has interpreted parts of Title VII²⁰ to prohibit covered employers²¹ from asking applicants certain questions relating to gender.²² Even though the regulation proscribes gender based questions, courts have not found the mere asking of prohibited questions to be a violation of Title VII.²³ Instead, most have considered the unlawful questions to be evidence of gender discrimination but insufficient, standing alone, to constitute a violation of the law. Once direct evidence of discrimination is established by the asking of prohibited questions, courts have used the mixed motive analysis articulated by the Supreme Court in *Price Waterhouse v. Hopkins*²⁴ and allowed the employer to show by a preponderance of the evidence that they did not rely on the discriminatory questions in making the adverse decision. This analysis was used in *Barbano v. Madison County*.²⁵ Barbano was interviewed by a county board committee for a position as the director of the county's veterans' service agency. Early in the interview, a committee member said that he would not consider "some woman" for the position. The same member then asked Barbano whether she planned to have a family and whether her husband would object to her transporting male veterans. Barbano objected to the questions because they were irrelevant and discriminatory. The committee member replied that the questions were relevant because he did not want to hire a woman who would get pregnant

²⁰ The EEOC has interpreted sections 2000e-2 and 2000e(k) to prohibit certain interview questions. § 2000e-2 states in pertinent part: (a) it shall be an unlawful employment practice for an employer- (1) 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 such individual's race, color, religion, sex, or national origin. § 2000e(k) states in pertinent part: The terms "because of sex" or "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work.

²¹ The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees any agent of such a person. § 2000e(b). Employment agencies and labor unions are also bound by Title VII. §2000e(1)(b). Exemptions include the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service; and a bona fide private membership club which is exempt from taxation under section 501(c) of title 26 of the Internal Revenue Code. §2000e(b).

²²EEOC Guidelines on Discrimination Because of Sex, 29 CFR §1604.7 (2007). The regulation in its entirety states: A pre-employment inquiry may ask "Male....., Female.....?" or "Mr. Mrs. or Miss?" provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

²³ *But cf.* King v. Trans World Airlines, 738 F.2d 255 at 258 (8th Cir. 1983) (stating in a footnote that questions posed to the plaintiff during an interview regarding child care, pregnancy and childbearing would be unlawful per se in absence of a bona fide occupational qualification).

²⁴ 490 U.S. 228 (1989) (plurality), *superseded by statute*, Civil Rights Act of 1991, overruled *Price Waterhouse*, insofar that ruling absolved an employer from all liability if the evidence established that the employer would have taken the same employment action absent the unlawful motive. 42 U.S.C. § 2000e-2(m).

²⁵ 922 F.2d 139 (2nd Cir. 2000).

and quit.²⁶ After being rejected for the position, Barbano successfully sued the County under Title VII and was awarded damages. On appeal, the County argued that Barbano failed to sustain her burden of proof because the only evidence of discrimination involved the committee's interview, with no evidence that the County relied on the discriminatory questions when making its employment decision. Upholding the award for damages, the appellate court noted that there was little doubt that the interview questions were discriminatory, and unrelated to a bona fide occupational qualification.²⁷ However, the court found that Barbano sustained her burden of proof because the hiring decision was based on the committee's discriminatory recommendation.²⁸ The court did not conclude that the interview questions were per se unlawful and in themselves a basis for an award of damages.

Less offensive, but nonetheless prohibited interview questions failed to support an award of damages in *Ford v. St. Elizabeth Hospital*.²⁹ In that case, a pregnant employee sought a promotion at the hospital where she was employed as an occupational therapist. When not chosen for the job, Ford sued, claiming that the defendant hospital failed to promote her due to her pregnancy in violation of Title VII. She argued that, among other things, a coworker's questions during the formal interview including, "How are you feeling?" and "When are you due?" were direct evidence of discrimination based on sex. The district court concluded that even between acquaintances, such questions are inappropriate and perhaps unlawful during an interview, but not actionable.³⁰ Also relying on *Price Waterhouse v. Hopkins*³¹ the court found that "despite the smoke, there is no fire," since the hospital did not reject Ford because of her pregnancy but because the chosen applicant had superior recommendations.³²

In *Stukey v. United States Air Force*,³³ a district court refused to view improper interview questions as per se violations of Title VII constituting direct evidence of discrimination. The female plaintiff in *Stukey* interviewed for a teaching job at the defendant's Air Force Technical Institute. The interview committee asked her certain questions that it did not ask the male

²⁶ *Id.* at 141.

²⁷ *Id.* at 143. See *infra* note 85 and accompanying text for a discussion of the meaning of a bona fide occupational qualification.

²⁸ *Id.* Plaintiff was awarded back pay, attorney fees and prejudgment interest in the amount of \$55,000. Her claims for front pay and injunctive relief ordering her appointment to the position at the next vacancy were denied.

²⁹ 1993 U.S. Dist. Lexis 11868 (1993).

³⁰ *Id.*

³¹ 460 U.S. at 266 (1989) (O'Connor, J., concurring).

³² *Ford v. St. Elizabeth Hospital*, 1993 U.S. Dist. Lexis 11868 at *20 (1993). See also *Bruno v Crown Point, Ind.*, 950 F.2d 355 (7th Cir. 1991) (explain that an interviewer's questions about child-bearing and child rearing plans asked only of women did not violate Title VII where interviewer was reassured by plaintiff's answers and she could not otherwise show that the decision not to hire was based on sex stereotypical beliefs., *cert. denied*, 505 U.S. 1207 (1992)).

³³ 790 F. Supp 165 (S.D. Ohio 1992).

applicants, including questions about her "marital status, her ability to work with men, her opinions on traveling with men, and her child arrangements when she traveled".³⁴ After learning that the job was awarded to a male, Stukey sued, arguing that the interview committee's gender-based questions provided direct evidence of gender discrimination.³⁵ The court denied her motion for summary judgment, stating that even an undisputed discriminatory interview is not a per se violation of Title VII and is insufficient proof of intentional discrimination.³⁶ The court reasoned that in order to sustain her "direct evidence" case, Stukey had to show that the defendant relied upon her gender in making its employment decision. Because no direct evidence was presented on how the selection committee actually arrived at its decision, she failed to meet this burden.³⁷

The case proceeded to a bench trial. The court found that Stukey established a prima facie case of discrimination.³⁸ This finding shifted the evidentiary burden of persuasion to the defendant to articulate a legitimate, non-discriminatory reason for not hiring her. The defendants claimed that Stukey was not hired because she did poorly on her mock teaching exercise and because she did not have much teaching experience. Assuming these facts to be true, the court found that the defendants met their burden and shifted the burden back to Stukey to demonstrate that the reasons offered by the Defendants were not the true reasons for their actions, but rather served as a pretext for discrimination. Here, the court reconsidered the interview questions in the context of pretext. The court noted that prior to the interview, committee members asked her improper questions about her divorce and child care arrangements and that following the mock teaching presentation she was asked questions that male candidates were not asked. The court found that the impropriety and sheer number of gender-based questions made it reasonable to conclude that the selection committee gave Stukey a low rating because of her sex. The court concluded that gender was a factor in the defendants' decision not to hire Stukey, and the legitimate reasons offered by the Defendants for her non-selection were not the true reasons for their actions, but rather served as a pretext for discrimination. Stukey was awarded \$89,371.24 in lost wages.³⁹

C. Interview questions regarding the existence or nature of a disability

Title I of the Americans with Disabilities Act of 1990 (ADA)⁴⁰ prohibits covered employers⁴¹ from discriminating against qualified individuals with disabilities.⁴² The ADA is

³⁴ *Id.* at 167.

³⁵ *Id.* at 168.

³⁶ *Id.* at 169-170 (citing *Bruno v Crown Point, Ind.*, 950 F.2d 355 (7th Cir. 1991)).

³⁷ *Id.*

³⁸ *Stukey v. United States*, 809 F. Supp 536 (S.D Ohio 1992) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802-804 (1973)).

³⁹ *Id.* at 546.

⁴⁰ Americans with Disabilities Act, 42 U.S.C. 12101-12213 (2008).

⁴¹ *Id.* §12111(5)(A).

⁴² *Id.* §12112(a).

enforced by the EEOC.⁴³ Unlike Title VII, the ADA expressly prohibits employers from asking certain pre-employment interview questions. Specifically, employers may not ask questions that are likely to reveal the existence of a disability before making a job offer (the pre-offer period).⁴⁴ This prohibition covers written questionnaires and inquiries made during interviews, as well as medical examinations.⁴⁵ Examples of prohibited questions during the pre-offer period include: "Do you need a reasonable accommodation to perform this job?", "How many days were you sick last year?", "Have you ever filed for workers' compensation?" and "What prescription drugs are you currently taking?"⁴⁶

An employer may make the prohibited inquiries and other inquiries that are likely to reveal the existence of a disability *after* extending a job offer, as long as it asks the same questions of other applicants offered the same type of job.⁴⁷

It is important to note that while the only pre-employment interview questions prohibited by the ADA are disability-related inquiries and requests for medical examinations, the prohibited inquiries apply to all applicants, not just those who are disabled.⁴⁸

Courts have generally found that ADA claimants must present evidence of actual harm arising from the asking of a prohibited question in order to recover damages. In *Green v. Joy Cone Co.*, a non-disabled applicant was asked to sign a release form giving the prospective employer broad access to her medical records.⁴⁹ Prior to being informed of whether she was

⁴³ *Id.* §12117.

⁴⁴ *Id.* §12112(d)(2)(A). The ADA also limits an employer's ability to make disability related inquiries during the post offer and employment stages, *id.* at §12112(d)(4). However, a covered entity may make pre-employment inquiries into the ability of an applicant to perform job related functions, *id.* at §12112(d)(2)(B). See *infra* notes 100-111 and accompanying text.

⁴⁵ *Job Applicants and the Americans with Disabilities Act*, <http://www.eeoc.gov/facts/jobapplicant.html> (last visited January 13, 2010).

⁴⁶ EEOC, No. 915.002, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (July 27, 2000).

⁴⁷ Americans with Disabilities Act, 42 U.S.C. §12112(d)(3)(A).

⁴⁸ According to the EEOC, unlike other provisions of the ADA which are limited to qualified individuals with disabilities, the use of the term "employee" . . . reflects Congress's intent to cover a broader class of individuals and to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose. Requiring an individual to show that s/he is a person with a disability in order to challenge a disability-related inquiry or medical examination would defeat this purpose. Any employee, therefore, has a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity. See EEOC ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (July 27, 2000); *Roe v. Cheyenne Mountain Resort*, 124 F.3d 1221 (10th Cir. 1997); *Griffin v. Steeltek*, 964 F. Supp. 317 (N.D. Okla. 1997); *Armstrong v. Turner*, 950 F. Supp. 162 (M.D. Lo 1996); *Cossette v. Minn. Power & Light*, 188 F.3d 964 (8th Cir.1999); *Fredenburg v. Contra Costa County Dept. of Health Servs.*, 172 F.3d 1176 (9th Cir.1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir.1998); *Karraker v. Rent-A-Center, Inc.*, 239 F.Supp.2d 828 (C.D.Ill. 2003).

⁴⁹ No: 03-3859, 2004 U.S. App. LEXIS 16612 (3rd Cir. 2004) The release form stated "I understand that, after an offer of employment is made by Joy Cone Company, or at any time during my employment with the Company, I

hired, the applicant filed a complaint with the EEOC, which dismissed her charge based on its inability to find a statutory violation. The trial court granted summary judgment for the employer, and Green appealed. Affirming the trial court, the appellate court held that, even assuming *arguendo* that requiring applicants to sign a medical release form as part of an employment application is a *per se* violation of § 12112(d), there was no cognizable injury to Green. Any violation of the ADA was merely technical. The court found that there was no indication in either the text of the ADA or in its history that a technical violation § 12112(d) was intended to give rise to damages liability. Consequently, the court found that Green did not suffer the injury necessary for the standing.⁵⁰

Similarly, in *Griffin v. Steeltex*,⁵¹ the Plaintiff filled out an application for employment pursuant to a newspaper advertisement for the position. The application form asked various questions regarding the Plaintiff's education and work experience and also included the following questions: "Have you received Workers' Compensation or Disability Income payments?" and "Have you any physical defects which preclude you from performing certain jobs? If yes, describe." On the application form, Griffin disclosed the nature and amount of his worker's compensation disability income payment. He did not describe any physical defects which would preclude him from performing any jobs. Ultimately, Griffin was informed that someone else was hired for the position, and he sued. After a trial, a jury concluded that Griffin suffered no injury from being asked the prohibited questions and found for the employer.⁵² On appeal, Griffin argued that because the two prohibited questions undisputedly violated § 12112(d)(2)(A), he was entitled to an award of nominal damages as a matter of law and to a jury determination on the issue of punitive damages. The appellate court disagreed, holding that to recover damages under the ADA, the plaintiff must establish that the employer not only technically violated the statute by asking a prohibited question, but also that by doing so it actually "engaged in unlawful intentional discrimination."⁵³ Because Griffin failed to establish injury by intentional discrimination, the court concluded that he was not entitled to an award of either nominal or punitive damages.

may be required to submit to and pass a physical examination in accordance with our policy. . . . I further understand and agree that, when requested to do so by the Company, I will execute documents authorizing the Company to obtain, for its internal use, medical records and information pertaining to any physical examination.... [The applicant must list his/her health care provider and physician(s)]. If the applicant does not have a regular physician, he/she must list the names of any doctors, clinics, and/or medical facilities at which he/she received treatment within the previous 10 years. As a matter of policy, Joy Cone does not request an applicant's medical records until the applicant has received an offer of employment."

⁵⁰ *Id.* at 280 (citing *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 520 (3rd Cir. 2001) that held an ADA claimant must present evidence of actual harm arising from technical violation of § 12112(d)). *See also* *Cossette v. Minn. Power & Light*, 188 F.3d 964, 971 (8th Cir. 1999) (holding that ADA claimant must establish a "tangible injury" caused by technical violation of § 12112(d) in order to recover compensatory damages); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998) (holding that "damages liability under § 12112(d)(2)(A) must be based on something more than a mere violation of that provision").

⁵¹ 261 F.3d 1026 (10th Cir. 2001).

⁵² *Id.*

⁵³ *Id.*

Interestingly, two years earlier the same court that decided *Griffin v. Steeltex*, upheld a punitive damages award of \$100,000, for an improper inquiry against Wal-Mart without proof of actual damages. In *EEOC v. Wal-Mart*,⁵⁴ John Otero, whose lower right arm was amputated as a result of an automobile accident, applied for a job as a receiving clerk at one of the defendant's stores. The interviewer, who was unaware of his disability because Otero wore a cosmetic prosthesis, asked him "What current or past medical problems might limit your ability to do a job?" Angered by her question, Otero told the interviewer about his arm and asked her if she knew about the ADA. Otero was ultimately not hired, purportedly due to his agitated response to the prohibited inquiry and not because he was disabled. Otero sued and the jury awarded him nominal damages on the improper inquiry claim, but \$100,000 in punitive damages.

Wal-Mart challenged the award, arguing that the damages were excessive, unsupported by the evidence and in violation of the due process clause of the federal Constitution. Upholding the award, the court found that punitive damages are justified in an ADA case where there is evidence that the employer "engaged in a discriminatory practice . . . with . . . reckless indifference to the federally protected rights of an aggrieved individual."⁵⁵ The court further found that the amount of punitive damages awarded by the jury on the "improper inquiry" claim was supported by the facts and neither "so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial," nor so excessive to violate the due process clause of the fourteenth amendment.⁵⁶

The *Griffin* court made no reference to *EEOC v. Wal-Mart* and no attempt to distinguish it. This may be due to some notable differences between *Griffin* (and *Green*) and *Wal-Mart*. Neither of the plaintiffs in *Griffin* and *Green* was disabled, unlike Otero. Further, the plaintiffs in *Griffin* and *Green* were asked the improper questions in an application form, rather than in a face-to-face interview by a manager as occurred in *EEOC v. Wal-Mart*. Finally, unlike Otero, *Green* did not wait to be denied the job before filing her claim, possibly undercutting any claim for damages.

D. Requests for genetic information from a job applicant

The Genetic Information Non Discrimination Act (GINA) makes it illegal to discriminate against employees or applicants because of genetic information.⁵⁷ During the pre-employment period, GINA prohibits a covered employer⁵⁸ from requesting genetic information from a job applicant or about an applicant's family member.⁵⁹ There are six narrow exceptions to the

⁵⁴ *EEOC v. Wal-Mart*, 202 F.3d 281 (10th Cir. Dec. 21, 1999).

⁵⁵ *Id.* at *15 (citing *Kolstad v. American Dental Assn.*, 119 S. Ct. 2118, 2125 (1999)).

⁵⁶ *Id.* (citing *Wal-Mart Stores*, 187 F.3d 1241, 1249 (quoting *Malandris v. Merrill Lynch*, 703 F.2d 1152, 1168 (10th Cir. 1981)).

⁵⁷ Genetic Information Nondiscrimination Act, 42 U.S.C.A. § 2000ff-1 (2008).

⁵⁸ 29 CFR 1635.2(d) (2010).

⁵⁹ Genetic Information Nondiscrimination Act, 42 U.S.C.A. § 2000ff-1(b) (2008).

prohibition, and only one that applies to the pre-employment period.⁶⁰ Genetic information that is inadvertently requested during the interview is not punishable.⁶¹ While no cases have interpreted GINA since its effective date in November 2009, the EEOC's final rule discusses several situations in which the acquisition of genetic information may be inadvertent. These include when an interviewer receives genetic information in response to a question about an applicant's general well-being ("How are you?")⁶² or learns genetic information from a social media platform which she was given permission to access by the creator.⁶³ However, GINA does prohibit requesting information about an individual's current health status in a way that is likely to result in an employer obtaining genetic information.⁶⁴ How courts will make the distinction between inadvertent inquiries about an applicant's general health and those designed to elicit genetic information is yet to be seen.

E. Interview questions regarding a prospective employee's willingness to take, or the results of, a polygraph exam

The federal Employee Polygraph Protection Act of 1988 (EPPA) bans polygraph testing as a pre-employment screening device in the private sector.⁶⁵ In an attempt to balance the competing interests of employees' privacy rights, employers' right to protect their businesses and the need for crime detection, the EPPA makes it unlawful for covered employers⁶⁶ to ask any prospective or current employee to take a polygraph test or to use the results of such a test in making an employment decision.⁶⁷ Rights under the EPPA cannot be waived, and any discrimination against a prospective employee for refusal to take a test or on the basis of the

⁶⁰ *Id.* §2000ff-1(b)1-6.

⁶¹ *Id.* §202(b)1.

⁶² 29 CFR 1635.8(b)(1)(ii)(B).

⁶³ 29 CFR 1635.8(b)(1)(ii)(D).

⁶⁴ 29 CFR 1635.8(a).

⁶⁵ Employee Polygraph Protection Act of 1988, 29 U.S.C.S. §§ 2001-2009 (2007).

⁶⁶ *Id.* § 2001(2).

⁶⁷ *Id.* §2002. The EPPA provides exemptions to its general broad prohibition against an employer's use of lie detector tests. It does not apply to federal, state or local government employers, *id.* at §2006(a). The federal government is also exempt when in engaging in matters of national security or defense may administer polygraph tests to consultants and employees of private employers under contract with the government, *id.* §2006(b). Private employers may utilize polygraphs for ongoing investigations when the employer has a reasonable suspicion that an employee or prospective employee was involved in an economic loss suffered by the employer, *id.* §2006(d). Private employers engaged in certain security services, *id.* at §2006(e), and certain employers engaged in the manufacture or distribution of controlled substances are exempt in limited circumstances, *id.* §2006(f). More than one-half of the states have also enacted statutes limiting the use of polygraphs for employment purposes. Some of these statutes are even more restrictive than the EPPA. Iowa's law, for example, prohibits employers, including most public employers, from asking an applicant or employee to take a polygraph test under any circumstances, Iowa Code § 730.4 (2008). *See also* N.J. Stat. § 2C:40A-1 (2008). Both Iowa and New Jersey criminalize employers' requests for polygraphs and classify violations as misdemeanors.

results of a test is actionable.⁶⁸ The EPPA is enforced by the Wage and Hour Division of the Department of Labor's Employment Standards Administration⁶⁹ but provides employees the private right to file a lawsuit.⁷⁰ Non-economic damages are available under EPPA,⁷¹ and at least one court held that punitive damages are available to private litigants who were terminated in violation of the Act.⁷² Civil penalties of up to \$10,000 can also be assessed, depending upon the employer's record of compliance with the EPPA and the gravity of the violation.⁷³

A number of cases have found employers liable for violating the EPPA by asking a current employee to take a polygraph test in the absence of a statutory exemption.⁷⁴ However, no reported cases have been brought by prospective employees who claimed damages based on the mere asking the prohibited questions.⁷⁵

Part II. The Distinction between Illegal and Ill-advised Pre-employment Interview Questions

The fact that few types of interview questions are expressly prohibited under the law does not mean that employers should be casual about the questions they ask job applicants. Employers need to be aware that although most interview questions are not illegal, a discriminatory motive behind a question is actionable when the result is a denial of employment. Since it is reasonable to assume that all questions in an interview are asked for some purpose and that hiring decisions are made on the basis of the answers given, any question asked during the interview can be used as circumstantial evidence of a prohibited discriminatory motive. Consequently, interview

⁶⁸ *Id.* §2005(d). See also *Harmon v. CB Squared Services, Inc.*, 2009 WL 234892 (E.D. Va. Jan 29, 2009) (holding an arbitration agreement that waived the employee's right to bring suit on in federal court was unenforceable because an employee cannot contract away her rights under the EPPA).

⁶⁹ *Id.* §2005(b).

⁷⁰ *Id.* §2005(c)(1).

⁷¹ *E.g.*, *Albin v. Cosmetics Plus, N.Y., Ltd.*, 2001 U.S. Dist. LEXIS 1617, 2001 WL 15676 (S.D.N.Y. Jan. 5, 2001) (jury awarded plaintiff \$ 75,000 in lost wages and \$ 5,000 for emotional distress; court upheld award and granted plaintiff's request for prejudgment interest on the lost wages award, calculated at a 6% rate); *Mennen v. Easter Stores*, 951 F. Supp. 838 (N.D. Ia. 1997)(court awarded plaintiff \$ 18,225.35 in lost wages, \$ 4,098.22 in prejudgment interest on lost wages award, and \$ 15,000 for emotional distress); *Jones v. Confidential Investigative Consultants, Inc.*, 1994 U.S. Dist. LEXIS 4586, 1994 WL 127261 (N.D. Ill. April 12, 1994) (jury awarded plaintiff \$ 90,000; court declared judgment to be void because it was obtained in violation of Bankruptcy Code's automatic stay).

⁷² *Deetjan v. V.I.P.*, 287 F. Supp. 2d 80 (D.Me. 2003).

⁷³ 29 U.S.C.S. §2005(d).

⁷⁴ *Polkey v. Transtecs*, 404 F.3d 1264 (11th Cir. 2005); *Worden v SunTrust Banks*, 549 F.3d. 334 (4th Cir. Nov.24, 2008).

⁷⁵ For a discussion of recent cases and employer guidelines for complying with the EPPA see Amy Onder and Michael Britton, *Recent Case Law Under the Employee Polygraph Protection Act: A Practical Review*, PRIVACY AND DATA SECURITY L.J. 458-503 (2009) available at <http://www.njlawblog.com/uploads/file/MJB%20-%20Privacy%20Law%20Journal%20-%2009.pdf>.

questions are closely scrutinized by plaintiffs' lawyers and enforcement agencies to make sure that they were asked for a lawful purpose, rather than for a reason prohibited by federal law.⁷⁶

Even if an interviewer's motive is benign, lawful questions about marital status⁷⁷ like "Are you married?" or "What is your maiden name?" can be misunderstood by a rejected applicant to be evidence of discrimination based on sex.⁷⁸ Questions like, "How old are you?" or "When did you graduate from high school?" are not expressly prohibited by federal law⁷⁹ and may be asked by interviewers as attempts at small talk to find common ground and put the applicant at ease. However, those questions may be perceived to be, and ultimately used as, evidence of age discrimination by an applicant over forty who is disgruntled when turned down for a job.

Proof of a discriminatory motive is not the only way to establish a successful claim of discrimination. Even seemingly unbiased questions can be unlawful if they have discriminatory impact on applicants with a protected characteristic and the practice is unrelated to successful job performance.⁸⁰ For example, inquiries about arrest and conviction records used to screen

⁷⁶ Gregory v. Litton Systems, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (pre-employment information which is obtained is likely to be used), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). The EEOC recognizes that employers may legitimately need information about their employees' or applicants' protected class characteristics for affirmative action purposes and/or to track applicant flow. The agency suggests that one way to obtain such information and simultaneously guard against discriminatory selection is for employers to use "tear-off sheets" for the identification of an applicant's race. After the applicant completes the application and the tear-off portion, the employer separates the tear-off sheet from the application and does not use it in the selection process. EEOC, FACTS ABOUT RACE/COLOR DISCRIMINATION (2002), <http://www.eeoc.gov/facts/fs-race.html>.

⁷⁷ Federal antidiscrimination laws do not prohibit discrimination on the basis of marital status, but several states do. *See, e.g.*, Illinois (Il. St. Ch. 775, 5/1-102); Michigan (Mi. St. 37.2202).

⁷⁸ For an example of such a case see *supra* notes 30-33 and accompanying text.

⁷⁹ Federal regulations provide that, "A request on the part of an employer for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant, either by a reference on the application form to the statutory prohibition in language to the following effect: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age, or by other means," 29 CFR § 1625.5 (2007).

⁸⁰ Such occurrences invoke a "adverse impact" analysis by the courts or the EEOC, which was first approved as a judicial analytical technique by the United States Supreme Court in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). *Griggs* involved an employer's requirement of a high school education or passing of a standardized general intelligence test as a condition of employment in, or transfer to, higher-level jobs. The Court held that this practice violated Title VII because the requirements were not related to successful job performance, and further that the employer's lack of discriminatory intent was not controlling because Title VII required a look to the consequences of employment practices. In 1991 Title VII was amended to specifically cover adverse impact claims. 42 U.S.C. §§ 2000e(2)(k)(1)(A) (2000). While not expressly allowed in the language of the ADEA, the Supreme Court found that plaintiffs can claim adverse impact in age discrimination cases. *See Smith v. City of Jackson*, 125 S.Ct. 1536 (2005).

applicants have been found to violate Title VII when they disproportionately eliminate minority applicants and are irrelevant to one's ability to do the job.⁸¹

As a result of these legal nuances, employers may feel daunted by the prospect of distinguishing those interview questions that are unlawful from those that are ill-advised from those that will help them identify the right employee for the job. It is in these environments of fear and apprehension that myths (You can't ask that!) take hold.

Part III. Benefits of Focusing on Performance Based Questions in the Pre-employment Interview

When employers abandon preoccupation with avoiding questions they fear will get them sued, and embrace focusing on questions that are performance based, several important benefits occur in the interview process. Performance based questions can defend employers from claims of discrimination, result in a less biased employee selection process, and improve the predictive value of the interview.

No federal law that protects employees from discrimination requires employers to hire people who are unqualified or unable to perform the job. Therefore, employers who make employment decisions based on the job qualifications and performance criteria will be shielded from claims of discrimination, even if those qualifications or criteria have a discriminatory motive or intent.

Title VII allows employers to screen and select employees on the basis of sex (and national origin or religion) if the employer can establish that the characteristic is a bona fide occupational qualification (BFOQ) reasonably necessary to the operation of that particular business or enterprise.⁸² Not surprisingly, the BFOQ exception is narrow and applies only in limited circumstances.⁸³ To successfully utilize the BFOQ defense, employers must demonstrate that the qualification or criteria relates to job related skills and aptitudes. Under this standard, an

⁸¹ The EEOC takes the position that that since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment. See EEOC, No.915.061, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS,(1990) http://www.eeoc.gov/policy/docs/arrest_records.html. See also, Gregory v. Litton Systems, 472 F.2d 631(9th Cir. 1972) (determining that employer's questionnaire discriminated against black applicants by requiring information about arrest records) *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972), Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977) (deciding employers subject to Title VII could not impose a policy barring all persons with criminal convictions from employment, absent the showing of a business necessity for such policy), El v SEPTA, (3rd Cir 2007) (declining to hold that bright line policies the criminal conviction context are *per se* invalid, but noting that an employer with an extremely broad exclusionary policy that fails to offer any empirical justification for it is unable to make out a successful business necessity defense). Some states have expressly prohibited employers from asking about arrests that did not lead to a conviction. See e.g. New York State Human Rights Law, EXEC. § 296(16).

⁸² See 42 U.S.C. § 2000e-2(e)(1) (Title VII's "bona fide occupational qualification" (BFOQ) exception applies to all Title VII cases except race and color); § 2000e-2(k)(2) ("business necessity" defense available in disparate impact cases is not available in intentional discrimination cases).

⁸³ 29 C.F.R. §1604.2(a).

applicant can be excluded from consideration for a job because of their sex, national origin or religion if that individual's protected characteristic prevents them from being able to safely or efficiently perform job related activities that fall within the essence of the employer's business.⁸⁴ Like Title VII, the ADEA also allows discrimination based on age if age is a BFOQ, but adds additional requirements on the employer to prove it.⁸⁵

Title VII also allows employers to use employment criteria that have discriminatory impact on protected classes in certain situations. Once the adverse impact is established, an employer may dispute the claim by demonstrating that the challenged practice is job related, consistent with a business necessity and that no alternative practice is available.⁸⁶ For example, even though inquiries regarding arrest and conviction records have a disparate impact on African American males, employers may inquire into an applicant's criminal history if such records are evidence of job related conduct that may render the applicant unsuitable for a particular job.⁸⁷ Like the BFOQ defense, a mere assertion that the challenged criterion is job related is not enough. To successfully utilize the defense, employers must demonstrate that the requirement or policy is performance based. The Supreme Court explained that job selection criteria that have a discriminatory impact on a group protected by Title VII would be "impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'"⁸⁸ The Court relied on the regulations developed by the EEOC to determine if a selection procedure is job related.⁸⁹

The court in *Zottola v. City of Oakland*⁹⁰ provided a road map of how performance based interview questions can successfully be used as a defense against discrimination. In *Zottola*, the

⁸⁴ Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

⁸⁵ See 29 CFR § 1625.6 (stating, An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative.). The possibility of age as a BFOQ most commonly arises in jobs directly involving public safety or public transportation personnel. See Adam Bruce Rowland, *Age Discrimination in Retirement: In Search of an Alternative*, 8 Am. J. L. and Med. 433 (1983).

⁸⁶ The employer can also challenge the statistical evidence that protected groups truly are affected negatively by the policy to a more disproportionate degree than nongroup members.

⁸⁷ See *supra* note 82 and accompanying text.

⁸⁸ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (citing 29 CFR § 1607.4(c)).

⁸⁹ Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607 (1978). The Guidelines are predicated upon a finding of adverse impact. When there is no charge of adverse impact, the Guidelines do not require that an employer show the job relatedness of their assessment procedures. The Guidelines incorporate a set of principles governing the use of employee selection procedures according to applicable laws. They provide a framework for employers and other organizations for determining the proper use of tests and other selection procedures. In reviewing the testing practices of organizations under Title VII, the courts generally give great importance to the Guidelines' technical standards for establishing the job-relatedness of employee selection procedures.

⁹⁰ 32 Fed.Appx. 307, 2002 WL 463695 (9th Cir. March 2, 2002).

plaintiff alleged that the oral interview used by the City of Oakland (the City) for the selection of fire fighters discriminated against Caucasian males, thus violating Title VII. Specifically, he argued the trial court wrongfully denied his motion for judgment as a matter of law because the City failed to show that its pre-employment interview selection process had been properly validated,⁹¹ thus precluding the City from establishing the affirmative defense of a business necessity.⁹² The court explained that in cases involving a scored interview, the selection procedure must be 'job related' – that is, that the interview actually measures skills, knowledge, or ability required for successful performance on the job.⁹³ The court went on to explain the three-step process needed to demonstrate job relatedness. The employer must first specify the particular trait or characteristic which the selection device is being used to identify or measure. The employer must then determine that the particular trait or characteristic is an important element of work behavior. Finally, the employer must demonstrate by "professionally acceptable methods" that the selection device is "predictive of or significantly correlated" with the element of work behavior identified in the second step.⁹⁴

The plaintiff conceded that the City's job analysis satisfied the first two steps, but challenged the third requirement -- that it had demonstrated by professionally accepted methods that its oral interview process was predictive of or significantly correlated with the knowledge, skills, and abilities identified in its job analysis. The evidence the City presented to validate its interview process included pre-testing results collected as part of the job analysis, statistical studies conducted to ensure that the interview scores were reflective of the candidate rather than the rater, anecdotal evidence about the candidates who had been hired and were performing well in the academy, and expert testimony regarding the appropriateness of open-ended oral interview questions.⁹⁵ The court found that the evidence presented by the City was sufficient proof that the questions were job related to send the question to the jury and that the district court did not err in denying the plaintiff's motion.

⁹¹ The EEOC recognizes three types of validation: criterion, construct and content validity. Criterion-related validity is established by a statistical demonstration of a relationship between scores on a selection procedure and the job performance of a sample of workers. For example, valid criterion related tests used by employers to screen and promote employees to leadership positions will match the test scores with the traits displayed by successful team leaders.⁹¹ Construct validity is a demonstration that a selection procedure measures a construct (something believed to be an underlying human trait or characteristic, such as honesty) and the construct is important for successful job performance. Intelligence tests as a selection procedure are one example of measurement instruments that should have construct validity. Content validity is a demonstration that the content of a selection procedure is representative of important aspects of performance on the job.

⁹² *Zottola v. City of Oakland*, 32 Fed.Appx. 307, 2002 WL 463695 (9th Cir. March 2, 2002).

⁹³ *Id.* (citing *AMAE v. California*, 231 F.3d 572, 585(9th Cir. 2000)(en banc); *Contreras v. City of Los Angeles*, 656 F.2d at 1267, 1271 (9th 1981)).

⁹⁴ *Id.* (citing *Craig v. County of Los Angeles*, 626 F.2d 659, 662 (9th Cir.1980) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362 (1975)).

⁹⁵ *Id.*

Like Title VII and the ADEA, the ADA allows employers to consider the employee's protected characteristic when the consideration is sufficiently performance based. The ADA prohibits discrimination only against qualified individuals.⁹⁶ The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position.⁹⁷ While an employer is prohibited from asking applicants whether they are disabled, the statute expressly states in three separate provisions that an employer may make pre-employment inquiries into the ability of an applicant to perform job related functions.⁹⁸

*Russell v. Seacor Marine*⁹⁹ illustrates the permissibility of asking interview questions that would be otherwise prohibited under the ADA. In the case, a maritime employee argued that he was entitled to maintenance and cure¹⁰⁰ for an injury suffered while working on the employer's ship. The employer argued that Russell's intentional failure to disclose a prior low back injury on the job application form was a material omission of a prior related injury that precluded his recovery.¹⁰¹ Russell argued that the employer's questions about prior back pain impermissibly screened out individuals with a disability and that such questions were prohibited by the ADA. Ruling for the employer, the court found that the disputed questions were relevant job related inquiries and thus allowed under the ADA.¹⁰²

In contrast, a question Wal-Mart asked an applicant was found to violate the ADA and cost the company \$100,000.¹⁰³ In that case, the interviewer asked, "What current or past medical problems might limit your ability to do a job?" The court acknowledged that the law is clear that an employer may make pre-employment inquiries into the ability of an applicant to perform job related functions. However, because Wal-Mart never explained to the applicant the duties and

⁹⁶ 42 U.S.C. 12112(a) (2000).

⁹⁷ *Id.* § 12111(8).

⁹⁸ *Id.* §12112(d)(2)(B) Acceptable inquiry. - A covered entity may make pre-employment inquiries into the ability of an applicant to perform job related functions; §12112(d)(4)(B) Acceptable examinations and inquiries. - A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job related functions, §12113(a). a) In general. - It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

⁹⁹ Not Reported in F.Supp.2d, 2000 WL 1514712, (E.D.La., 2000).

¹⁰⁰ Maintenance and cure are maritime remedies for seamen who are injured while in the service of a ship or vessel. *See*, 46 USCS §§ 10101 – 30104 (2008).

¹⁰¹ *Russell v. Seacor Marine, Inc.*, Not Reported in F.Supp.2d, 2000 WL 1514712, (E.D.La., 2000).

¹⁰² *Id.* (citing *Thomas v. Mississippi State Dept. of Health*, 934 F.Supp. 768, 774 (S.D.Miss.1996) (questions "go to the core of whether the applicant is qualified"); *EEOC v. Texas Bus Lines*, 932 F.Supp. 965, 981 (S.D.Tex.1996) (inquiries about back trouble for prospective bus driver "relevant" and "consistent with business necessity").

¹⁰³ *EEOC v Wal-Mart*, 202 F.3d 281 (10th Cir. Dec. 21, 1999); see discussion of case *supra* notes 55-57 and accompanying text.

responsibilities of a night receiving clerk, the question could not have concerned the applicant's ability to perform specific job related functions and was thus prohibited by the ADA.¹⁰⁴

The EEOC emphasizes the value of performance based questions by advising employers concerned about their obligations under the ADA to focus interview questions on job qualifications, and assuring them that under the ADA they may ask a wide range of questions designed to determine an applicant's qualifications for a job.¹⁰⁵ For example, an employer may ask questions about an applicant's ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability.¹⁰⁶ An employer may even ask applicants to describe or demonstrate how they will perform a job, with or without an accommodation.¹⁰⁷

Finally, while not a discrimination statute, the EPPA also protects employers who ask otherwise prohibited questions when the inquiry is sufficiently job related. While broadly prohibiting most private employers from asking job applicants to take polygraphs, the EPPA (the Act) does permit employers to inquire about their willingness to take a polygraph test when the jobs for which they are applying are particularly vulnerable to criminal or unethical activity and trustworthiness is an essential job requirement.¹⁰⁸ For example, pharmaceutical manufacturers, distributors, and dispensers of drugs are exempt from the Act.¹⁰⁹ Additionally, employers who provide armored car personnel or personnel engaged in designing, installing, and maintaining security alarm systems may ask prospective employees to take a polygraph without violating the EPPA.¹¹⁰

In addition to avoiding claims of discrimination, performance based questions can result in a less biased employee selection process. Although most employers try to ignore immutable characteristics during the interview process, employment decisions are thought to be largely influenced by unconscious bias.¹¹¹ It is likely that unconscious bias may be even more common today than conscious bias.¹¹² Unconscious bias describes an established belief system

¹⁰⁴ *Id.*

¹⁰⁵ *The Americans with Disabilities Act: A Primer for Small Business*, <http://www.eeoc.gov/eeoc/publications/adahandbook.cfm> (last visited January 14, 2011).

¹⁰⁶ A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act January, EEOC (1992).

¹⁰⁷ *Id.*

¹⁰⁸ Employee Polygraph Protection Act of 1988, 29 U.S.C.S. § 2006(a)-(f) (2007). See *infra* note 68 for list exceptions to the EPPA. See also 29 CFR §§801.1 – 801.75(2007) (federal regulations regarding application of the Act).

¹⁰⁹ *Id.* § 2006(f).

¹¹⁰ *Id.* § 2006(e)(1). However, even in jobs exempt from the Act, the use of the results of a polygraph, or the refusal to take a polygraph test as the sole basis upon which to deny employment is prohibited *Id.* § 2007(a).

¹¹¹ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (explaining underpinnings of unconscious bias).

¹¹² David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 960 (1989).

characterized by racist or biased feelings or judgments of which people are typically unaware, despite their motivation to experience themselves as nonprejudicial.¹¹³ No matter how carefully pre-employment interview questions are redlined in fear of violating federal law, unconscious sex, race, or disability bias can result in unfair hiring decisions. Lani Guinier and Susan Sturm, law professors at Harvard and Columbia, argue that use of performance-based criteria, rather than conventional selection methods, including affirmative action plans, would result in employment practices that better include marginalized groups and minimize bias.¹¹⁴

Finally, performance based questions improve the predictive value of the pre-employment interview. The selection process is a vital business practice for any organization. The use of personal interviews is the most popular, age-old selection method. Nonetheless, studies have shown that it is the least reliable method in terms of ultimate employee success.¹¹⁵ The predictive value of pre-employment screening depends upon linking the selection plan with an accurate assessment of the qualifications relevant to successful job performance. Reorienting managers' focus on the job to be done, rather than on the questions to be avoided would result in more proficient candidates being hired and proficient employees are the key to any business's success.

Conclusion

Employers today have an increasing amount of ways to screen prospective employees. In addition to pre-employment interviews, technology enables employers to access a plethora of background information on applicants including their criminal records, credit histories and social lives. Simply Googling a prospective employee's name or requesting "friend" status on Facebook can result in copious amounts of information. Information about applicants available to employers is only likely to become more abundant and easier to obtain. To avoid drowning in this information, employers will have to carefully discern pre-employment screening information that will help them select the best applicant for the job from information that is less relevant and the use of which can result in claims of discrimination.¹¹⁶ Employers can achieve this discernment by switching their focus to learning all they can about the job, rather than the applicant. Pre-employment interviews that are focused on the specific criteria needed to perform the job will yield the most able employees and will not be found to be discriminatory.

It is beyond scope of this article to instruct employers how to develop their performance based inquiries. However, it is evident that the first step should be a careful analysis of the functions performed in the job in question.¹¹⁷ Unless these functions are first identified, a

¹¹³ *Id.*

¹¹⁴ LANI GUINIER & SUSAN STURM, WHO'S QUALIFIED? 21-34, Beacon Press (2001).

¹¹⁵ Patricia M. Buhler, *Interviewing Basics: A Critical Competency for All Managers*, SUPERVISION, March 2005 at 20.

¹¹⁶ Cindy Hanson & Kali Wilson Beyah, *You Wanna Background Check Me? Be Careful Where You Look...*, CORPORATE COUNSEL, Jan. 4, 2010, <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202437243854>.

¹¹⁷ An employer may want to begin with a look at the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607 (1978).

meaningful pre-employment interview is unlikely. Fortunately, this process is already undertaken by many employers to enhance compliance with the ADA.

While the thrust of this article is to encourage employers to focus on performance based employee selection techniques, Congress could also improve the interview process by amending Title VII. The ADA and Title VII take dissimilar approaches to pre-employment inquiries. The ADA substantially bars both the inquiry and the use of information relating to physical or mental impairments. Title VII, in contrast, does not restrict the pre-offer acquisition of information relating to protected class status, but does ban discriminatory employment decisions made on the basis of such information. This dissimilar approach adds needless confusion to the job selection process.

The preferable approach is that taken by the ADA. The ADA prohibits inquiries about disability status because such information was frequently used to exclude people with disabilities from jobs they are able to perform. The ADA takes an "out of sight, out of mind" approach to pre-offer inquiries to focus the hiring decision on ability rather than status. Title VII should be amended to do the same. Even without any intentional ill will, employers who have knowledge concerning the protected class status of applicants may make biased assumptions about their capabilities or work habits.

In our competitive economy, employers would likely acknowledge that they do not lose sleep wondering if their employees are married, disabled, or of a particular national origin or religion. What keeps them awake at night are thoughts about whether the work is getting done correctly and efficiently (and hopefully, thoughts about the general health and safety of the employees doing the work). Reminding our managers to focus on the performance based criteria that will get the job done when developing interview questions, rather than the fear of lawsuits, will help both bosses and employees get a good night's sleep.