

No. 08-16656-JJ

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

John Harrison,
Plaintiff-Appellant

v.

Benchmark Electronics, Huntsville, Inc.,
Defendant-Appellee

**Appeal from the United States District Court
Northern District of Alabama**

**BRIEF OF THE EPILEPSY FOUNDATION
AS AMICUS IN SUPPORT OF APPELLANT IN URGING REVERSAL**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to this Court's Local Rules 26.1-1 through 26.1-3, the undersigned attorneys for the Epilepsy Foundation, as amicus curiae, certify that no parent corporation or any publicly held corporation owns more than 10% of the Epilepsy Foundation's stock, and further certify that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome in the above case:

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2. Benchmark Electronics, Inc., parent company of Defendant-Appellee
3. Benchmark Electronics, Huntsville, Inc., Defendant-Appellee
4. Epilepsy Foundation, Amicus Curiae
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8. Harrison, John, Plaintiff-Appellant
9. Johnson, Inge P., United States District Court Judge
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 at <http://www.eeoc.gov/policy/docs/preemp.html>

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STATEMENT OF THE ISSUES AND INTEREST OF AMICUS CURIAE

A central issue in this case is whether the District Court erred in ruling that Defendant-Appellee, Benchmark Electronics Huntsville, Inc. (“Benchmark”), in following up on Plaintiff-Appellant John Harrison’s (“Harrison”) positive pre-employment drug test did not violate the prohibition on pre-employment medical inquiries contained in the Americans with Disabilities Act (“ADA”). The District Court rejected Harrison’s assertion that, in investigating the cause of the positive test result, Benchmark intentionally sought to learn the nature of the medical condition for which Harrison took the medication, actually learned about the condition (epilepsy) and then denied Harrison an employment opportunity based on this information, and that such conduct violated the ADA. This Court’s disposition of this issue will impact the rights of many workers with epilepsy and other disabilities who may be subject to pre-employment drug testing.

The Epilepsy Foundation is a nonprofit corporation founded in 1968 to advance the interests of the more than three million Americans with epilepsy and seizures. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizures.

Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, the Epilepsy Foundation has, since its inception, worked to dispel the stigma associated with seizures, supported the development of laws, including the ADA, that protect individuals from discrimination based on these stereotypes and fears, and has engaged in related advocacy.

The Foundation is deeply concerned that the District Court's interpretation of the ADA's pre-employment medical inquiry restrictions will allow employers, when reviewing the results of pre-employment drug tests (which are widely practiced), to improperly acquire information about their prospective employees' epilepsy and other physical or mental conditions. This will result in denial of job opportunities to many qualified persons based on unfounded stereotyped views about epilepsy, seizures and other conditions, contrary to the mandate of the ADA. The Epilepsy Foundation relies on the statement of facts presented in Appellant's brief.

SUMMARY OF THE ARGUMENT

In this case, the District Court erroneously concluded that Benchmark's alleged intentional and successful effort to learn about the Harrison's medical condition did not violate the ADA's pre-employment medical inquiry prohibition,

and granted summary judgment on this issue to Benchmark. The ADA, which prohibits discrimination in employment against qualified persons with disabilities, contains various restrictions on disability-related inquiries, depending on the stage of employment. Although the ADA does permit an employer, in response to a positive pre-employment drug test, to ask questions about illegal drug use (such as whether the individual has a lawful prescription for medication that may have resulted in the positive test result), the law prohibits inquiries about disability or which are likely to elicit information about disability.

It is clear that a reasonable jury could conclude that when, as alleged below, Harrison's supervisor intentionally listened in on a confidential conversation between Harrison and a medical review officer who was seeking information to explain Harrison's positive pre-employment drug test, Benchmark violated the ADA's pre-employment medical inquiry prohibition. Harrison's supervisor surely knew that this conversation was likely to elicit from Harrison information about his medical condition and that by sitting in on the conversation, he would learn that information.¹ Thus, it was when Benchmark took steps to hear the answer to a

¹ It is also clear that there are genuine issues of disputed facts about whether Benchmark denied Harrison a job opportunity based on learning that Harrison had epilepsy, entitling Harrison to damages under the ADA; this issue is addressed in Appellant's brief.

question likely to elicit information about Harrison's disability that it violated the ADA's pre-employment medical inquiry prohibition.

The District Court's conclusion that Benchmark's conduct could not have violated the medical inquiry prohibition will encourage employers to attempt to learn about their prospective employees' disabilities in a similar manner and screen out applicants with undesirable medical backgrounds before consideration of their qualifications -- in conflict with the intent of the ADA. This would have a significant impact on persons with epilepsy, who frequently use legally prescribed medications containing barbiturates that may result in positive pre-employment drug tests. The Epilepsy Foundation urges this Court to reverse the lower court's decision and hold that Benchmark's alleged conduct, in seeking information about Harrison's epilepsy in this manner, raises a genuine issue of material fact as to whether the ADA was violated.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE ADA'S PRE-EMPLOYMENT INQUIRY PROHIBITION IS INTENDED TO PREVENT DISCRIMINATION BASED ON STEREOTYPED NOTIONS OF DISABILITY BEFORE CONSIDERATION OF AN APPLICANT'S JOB QUALIFICATIONS.

The ADA generally prohibits discrimination against "a qualified individual with a disability." 42 U.S.C. § 12112(a). With respect to medical examinations and inquiries, the ADA provides separate rules depending on whether the individual is

a job applicant, an applicant who has received an offer but has not yet begun working, or an employee. 42 U.S.C. § 12112(d). Subsection (d)(1) first states that "in general," "the prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). Subsection (d)(2), the provision at issue in this case, then provides that, with respect to job applicants who have not received an offer, an employer "shall not conduct a medical examination or make inquires of such applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A). Rather, at this stage of the employment process, an employer may only make an inquiry into the ability of an applicant to perform job-related functions. 42 U.S.C. § 12112(d)(2)(B).²

² Although not applicable here, under subsection (d)(3), which applies to applicants who have received a job offer but not yet started work, an employer may make disability-related inquiries, provided the responses are not relied on to deny job opportunities in violation of the ADA. 42 U.S.C. § 12112(d)(3). And under subsection (d)(4), which applies to employees, the employer may not inquire into whether an employee has a disability, unless any such inquiry is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). The court decisions discussed below interpreting these provisions should be equally applicable to the pre-offer provision at subsection (d)(2), given that the intent of the three provisions is identical -- to prevent discrimination based on unfounded concerns regarding an actual or perceived disability. *See, e.g., Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999).

The rationale for the pre-employment medical inquiries rule is fully explained in guidance on the rule issued by the Equal Employment Opportunity Commission. ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC Notice 915.002 October 10, 1995), *reprinted in* EEOC Compl. Man. (CCH) ¶ 6903, at 5371, available at <http://www.eeoc.gov/policy/docs/preemp.html> (hereinafter “Pre-Employment Guidance”). In relevant part, the Pre-Employment Guidance states:

In the past, some employment applications and interviews requested information about an applicant's physical and/or mental condition. This information was often used to exclude applicants with disabilities before their ability to perform the job was even evaluated.

For example, applicants may have been asked about their medical conditions at the same time that they were engaging in other parts of the application process, such as completing a written job application or having references checked. If an applicant was then rejected, s/he did not necessarily know whether s/he was rejected because of disability, or because of insufficient skills or experience or a bad report from a reference.

As a result, Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.

Id. at 5371.

This guidance further notes that:

Under the law, an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional job offer to the applicant. This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications.

Id.; see *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 841 (9th Cir. 2000) (the rationale behind 42 U.S.C. 12112(d)(2) “is that ‘[i]ndividuals with disabilities must be allowed a fair opportunity to be judged on their qualifications, ‘to get past that initial barrier’ where an employment judgment might be unfairly made based on disabilities rather than abilities.’”) (quoting 135 Cong. Rec. 10,768, Sept. 7, 1989) (statement of Sen. Harkin)).

II. THE DISTRICT COURT ERRED IN HOLDING THAT BENCHMARK DID NOT ENGAGE IN CONDUCT VIOLATING THE ADA’S PRE-EMPLOYMENT MEDICAL INQUIRY PROHIBITION

As is discussed *infra*, prior to making an offer of employment to Harrison, Benchmark intentionally listened into a confidential conversation between Harrison and a medical review officer that was likely to elicit information about Harrison’s medical condition. Thus, Benchmark improperly sought disclosure of information about disability in conflict with the ADA. The ADA provides a cause of action on this issue whether or not Harrison had a disability. Further, such

conduct is improper even if pursued as a follow up to a positive pre-employment drug test.

A. Benchmark Sought to Learn the Responses to Questions Likely to Elicit Information About Disability and Therefore its Conduct Amounted to a Violation of the ADA, Irrespective of Whether Harrison had an Actual or Perceived Disability.

It was undisputed in the action below that Harrison, who was seeking to move from a temporary employee position to a permanent position with Benchmark, was required to undergo a drug test as a condition precedent to receiving a job offer, and that the test indicated Harrison had used barbiturates. Further, it was undisputed that Benchmark required Harrison to speak to a medical review officer (“MRO”) by phone in order to allow the MRO to determine conclusively whether the test result was due to the legal or illegal use of drugs. The District Court noted that Harrison alleged that his supervisor actually made the call to the MRO and remained in the room during Harrison’s conversation with the MRO, and that the MRO asked Harrison about his disability and his use of medication. Slip op. at 3-4. Moreover, Harrison alleged that the supervisor overheard him explain to the MRO that he has epilepsy. Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 16. The District Court failed to acknowledge this allegation in its decision.

The District Court erroneously concluded that these facts cannot establish a violation of the pre-employment medical inquiry prohibition under the ADA. The Court reasoned that, even if, as alleged, Harrison’s supervisor was present when the MRO questioned him, the supervisor had no means of hearing the MRO’s questions to Harrison. But this overlooks the fact that MRO’s questions were likely to elicit from Harrison information about his medical condition – and that Benchmark intentionally sought, and did in fact, obtain, that information. Harrison’s responses to the MRO’s questions should have been expected by Benchmark to take a form such as “I take this medication to treat my condition, which is” Indeed, as noted above, Harrison alleged that he did in fact mention, in the presence of his supervisor, that he has epilepsy. The District Court’s conclusion conflicts with the clear language of the ADA’s pre-employment medical inquiry prohibition, and relevant legislative history and case law.

A “disability-related” question covered under the ADA’s medical inquiry provision is one that is likely to elicit information about a disability. *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88, 96 (2d Cir. 2003). Similarly, the EEOC’s Pre-Employment Guidance states that “At the pre-offer stage, an employer cannot ask questions that are likely to elicit information about a disability.” Pre-Employment Guidance, EEOC Compl. Man. ¶ 6903, at 5372.

This Guidance clarifies that “On the other hand, if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not ‘disability-related.’” *Id.*

It is clear that a reasonable jury could conclude that Harrison’s responses to the MRO’s questions were likely to produce information about a disability.³ The range of possible responses to inquiries about use of barbiturates is very limited – either that it was taken to treat a medical condition or that it was taken illicitly. This is not like the situation where an applicant is asked about his sneezing or coughing, which would not likely result in disclosure of information about disability. *See* Pre-Employment Guidance. The only logical explanation for the

³ An impermissible inquiry can be one which is likely to elicit information about a general medical condition or diagnosis, as compared to a condition which is necessarily a disability. *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88 (2nd Cir. 2003). In *Conroy*, the court found that an employer policy requiring employees to disclose information about their general diagnoses violates the ADA even where the diagnosis alone does not conclusively establish one has disability, because such a requirement may give rise to the perception of disability and expose individuals to employer stereotypes. *Id.* at 95-96. *See also, Roe v. Cheyenne Mountain Conference Resort*, 920 F.Supp. 1153, 1154-55 (D.Colo.1996), *aff’d*, 124 F.3d 1221 (10th Cir.1997) (an employer’s “policy that requires employees to disclose the prescription medication they use would force the employees to reveal their disabilities (or perceived disabilities) to their employer” in violation of 42 U.S.C. § 12112(d)(4)(A)); *Downs v. Massachusetts Bay Transp. Authority*, 13 F.Supp.2d 130 (D.Mass. 1998) (finding that questions about whether an applicant had joint pain before an offer of employment were impermissible); 29 C.F.R. pt. 1630, App. 1630.14(a) (“[a]n employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have”) (emphasis added).

supervisor being in the room was his intent to learn about the nature of the condition for which Harrison was taking medication, if any.

Further, the ADA establishes a cause of action for Harrison to challenge Benchmark's conduct whether or not he has an actual or perceived disability. *E.g.*, *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999) ("plaintiffs need not prove that they are qualified individuals with a disability in order to bring claims challenging the scope of medical examinations under the ADA."); *Roe v. Cheyenne Mountain. Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997) ("[I]t makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability."); *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) ("We are persuaded by the holdings of the Ninth and Tenth Circuits that a plaintiff need not be disabled to state a claim for the unauthorized gathering or disclosure of confidential medical information"); *accord Murdoch v. Wash.*, 193 F.3d 510, 512 (7th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000) (the ADA "does not require that an individual be disabled to state a claim" for unlawful employer inquiries). The EEOC also states that "[t]hese prohibitions [against unnecessary medical inquiries] protect an individual regardless of whether

s/he is a qualified individual with a disability.” *EEOC Compl Man.* § 2-H-B-8 (BNA n.d).⁴

The rationale for this approach was concisely stated in *Griffin v. Steeltek, Inc.*, 160 F3d 591, 594 (10th Cir. 1998), *cert. denied*, 526 U.S. 1065, 119 S. Ct. 1455 (1999): The ADA’s purpose, to end discrimination against individuals with disabilities, “is best served by allowing all job applicants who are subjected to illegal medical questioning and who are in fact injured thereby to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled.” *Id.* at 594. Clearly, in this area, the ADA goes beyond addressing discrimination against identifiable victims with a disability. It bans employer inquiries with a potential to harm disabled applicants and employees (and others perceived as such), and thus, is intended to prevent disability discrimination in this way.

⁴ Damages are available for Harrison under the ADA, even if he does not have an actual or perceived disability, if it can be shown that Benchmark denied him an employment opportunity based on information about his epilepsy it obtained through an impermissible medical inquiry. *E.g.*, *Cossette v. Minnesota Power & Light*, 188 F.3d 964 (8th Cir. 1999). As demonstrated in Appellant’s brief, there is a genuine issue of material fact on this matter.

B. Employers may not Seek Information About a Job Applicant's Disability Even in the Context of a Follow Up to a Positive Pre-employment Drug Test.

The District Court failed to properly analyze the issue and simply assumed, without any legal support, that an employer may seek information about a prospective employee's disability in the context of a positive pre-employment drug test. In this regard, the Court stated that Harrison's "argument that there was [a prohibited medical] inquiry is contradicted by the ADA itself, "which plainly states . . . 'a test to determine the illegal use of drugs shall not be considered a medical examination.'" Slip op. at 16 (quoting 42 U.S.C. § 12114) The court stated further that Harrison did not suggest what else Benchmark should have done differently in response to the positive drug test finding, and then noted that, logically, employers must be able to follow up with questions concerning such test results. *Id.* at 16-17.

While the ADA does permit follow up questions about positive drug tests, such questions may not directly ask about disability or be likely to elicit information about disability. This conclusion is clarified in the ADA's legislative history. The report for the ADA's House bill discusses the extent to which its pre-employment medical inquiry provision limits the ability of employers to learn about prospective employees' medical conditions in the context of their following

up on pre-employment drug tests. The report -- referring to section 102(c)(2), which was ultimately adopted into law as 42 U.S.C. § 12112(d)(2) (the provision at issue here) -- states:

Under section 104(d), applicants may be required to take a drug test before a conditional offer of employment has been given The Committee intends, however, that the application of this provision should not conflict with the right of individuals who take drugs under medical supervision [sic] not to disclose their medical condition before a conditional offer of employment has been given. See Sections 102(c)(2) and (3). Employers often use drug tests that detect the presence of a wide range of drugs, not simply illegal drugs. In addition, many legally prescribed medications taken under the supervision of a health care professional may register on a test as illegal drugs. . . . Section 102(c) is designed to ensure that, for example, a person who take [sic] dilantin is not identified as a person with epilepsy at early stages of the selection process.

H.R. REP. No. 485, 101st Cong., 2nd Sess., pt. II, at 79-80 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 362 (emphasis added).⁵

The House report, thus, finds unequivocally that the information allegedly sought by Benchmark as a follow up to Harrison's positive drug test -- about his epilepsy -- and actually disclosed to it, is precisely the type prohibited by the ADA pre-employment inquiry rule.

⁵ Dilantin, which is referenced in this report, is the trade name of a common medication used to prevent epileptic seizures. It is chemically very similar to barbiturates and its presence in the blood stream may result in a positive drug test for barbiturates.

The EEOC's Pre-Employment Guidance is in agreement with this point. It clarifies that an employer may only follow up a positive pre-employment drug test with questions about whether a lawfully provided prescription medication may have resulted in the positive result. Nowhere in the guidance is there any suggestion that the ADA's prohibition against disability-related disclosures is not applicable when such disclosures are sought as a follow up to a positive drug test. This makes perfect sense, given that such a disclosure is not necessary to confirm whether the drug use was unlawful.⁶ See *Connolly v. First Personal Bank*, 2008 WL 4951221, *3 (N.D. Ill. November 18, 2008) (“The [ADA's] exemption for drug testing was not meant to provide a free peek into a prospective employee's medical history and the right to make employment decisions based on the unguided interpretation of that history alone”).

Benchmark should not be excused from liability under ADA based on the argument that it may seek disability-related information when following up on a positive pre-employment drug test. Such a result would encourage employers to

⁶ Indeed, guidance for MROs carrying out responsibilities under the federal workplace drug testing programs provides that reporting on a test result must not include information obtained during the test review process about the subject's medical condition or diagnosis. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICAL REVIEW OFFICER MANUAL FOR FEDERAL DRUG TESTING PROGRAMS, Section 4.E. (2004). In the case where a result is positive, but upon review, the MRO determines that the subject has a valid medical explanation for the result, the MRO will deem the test to be negative and report only that fact to the federal agency employer. *Id.*

pursue similar methods to learn about their prospective employees' medical history and allow them to screen out, with impunity, those who are regarded as undesirable based on actual or perceived disabilities. This would conflict with the ADA, which is intended to both remedy and prevent discrimination based on unfounded concerns about disability.

CONCLUSION

For the above-stated reasons, this Court should reverse the trial court's order granting Appellee summary judgment and remand this case for further proceedings.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation set forth in Fed.R.App.P 32(a)(7)(B). This brief contains 3074 words, not including exempted portions, and is printed in Times Roman 14-point font. This brief was prepared using Microsoft Word for Microsoft Office Word processing system. See Fed.R.App.P. 32(5).

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing has been served upon all parties or their counsel of record listed below by placing same in the U.S. Mail, postage pre-paid, on this the 12th day of February, 2009, and that the foregoing was filed with the clerk by overnight mail this same date.

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