

USE OF PERSONALITY TESTS MAY VIOLATE THE AMERICANS WITH DISABILITIES ACT

A recent ruling by the U.S. Circuit Court of Appeals may limit an employer's ability to use personality tests as screening tools for prospective or current employees.

The case involved a company that required candidates for promotion to take a series of tests that included the Minnesota Multiphasic Personality



Discrimination against workers with psychiatric disorders, and not just physical disabilities, may be illegal under the Americans with Disabilities Act

Inventory, a test used to help diagnose certain psychiatric disorders. When some applicants did not score well enough on the overall management profile to gain promotions, they sued the company primarily on grounds that the company's use of the MMPI violated the Americans with Disabilities Act's general prohibition against using "medical tests" that tend to screen out people with disabilities.

The company argued that it had not used the test to examine the psychological well-being of employees, and that it was not even possible to do so based upon the way the test was administered and scored. The company said that the results of the test merely reflect how closely the tested employees' personality traits match those most commonly found in successful managers and supervisors.

The problem, according to the court's decision, is that the use of the MMPI likely had the effect of excluding employees with psychiatric disorders

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from promotions, because it is designed, at least in part, to reveal mental illness. As a result, it violated the provisions of the ADA that prohibit tests that are used to screen out people with disabilities.

Employers using personality test such as the MMPI need to be careful because there is a fine line between using these tests to predict desirable personality traits and using them to identify personality disorders.■

SUPREME COURT UPHOLDS EMINENT DOMAIN FOR DEVELOPMENT

In *Kelo v City of New London*, the Supreme Court issued a sharply-divided opinion upholding the use of eminent domain to acquire private homes for transfer to a private developer as part of an overall plan to improve economic development.

In the opinion, the Court rejected arguments that this use of the eminent domain power violates the federal constitutional limitations on the taking of private property for public use and that the Constitution limits the use of eminent domain to those situations where the public would be able to use the property directly, such as parks, irrigation system, roads, or railroads.

Instead, the Court recognized that "promoting economic development is a traditional and long accepted function of government." The Court emphasized that it should defer to the judgments that legislatures make about the best way to promote

economic development, especially when the legislature pursues it through creation of a comprehensive plan.

In a concurring opinion, Justice Kennedy emphasized the importance of the lower court's finding that the redevelopment plan was not intended to favor a particular private party. His opinion left open the possibility that the Court might adopt a stricter standard of review for a subset of takings cases



A recent Supreme Court ruling upheld the use of eminent domain for private development

where there was a much higher risk of "undetected impermissible favoritism of private parties."

Justice O'Connor's dissenting opinion argued that takings solely for economic development violate the constitutional requirement that the takings be limited to a public use. Her opinion warned that the broad reach of the majority ruling would significantly expand the use of eminent domain to permit a taking wherever some private party could find some better use for the property. In particular, she wrote that nothing prevents a government from "replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

Although the majority opinion upheld the use of eminent domain in this case, the concurring opinion and separate efforts in a number of states provide a basis to challenge an eminent domain proceeding.■

FORMER GENERAL COUNSEL TO PAY \$3.9 MILLION

On June 27, 2005, the SEC announced that a federal court ordered the former general counsel (GC) of the now-defunct U.S. Wireless (USW) is liable for approximately \$3.9 million in disgorgement of ill-gotten gains and pre-judgment interest. Further, the GC was permanently enjoined from future violations of federal securities laws, prohibited for ten years from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, and suspended from appearing or practicing before the SEC as an attorney. The GC consented to the order without admitting or denying the allegations, and the amount of any civil penalties will be determined at a later hearing.

The GC and USW's former CEO were indicted in 2003 on three counts of securities fraud, as well as 16 and 33 counts of wire fraud, respectively. While part of the GC's case is

completed, civil and criminal charges against the CEO are still pending.

According to the allegations, from August 1997 to January 2000, the defendants arranged for USW to transfer common stock worth approximately \$3.2 million and cash totaling approximately \$428,000 to

"THE MESSAGE FROM THIS... SHOULD BE LOUD AND CLEAR: TO CORPORATE EXECUTIVES WHO ENRICH THEMSELVES ILLEGALLY, THE US ATTORNEY'S OFFICE, FBI, AND SEC WILL BE VIGOROUS AND AGGRESSIVE IN PROSECUTING INDIVIDUALS WHO ENGAGE IN CRIMINAL ACTS."

- US ATTORNEY KEVIN V. RYAN, MEMBER OF PRESIDENT BUSH'S CORPORATE FRAUD TASK FORCE

multiple offshore entities that they secretly owned and controlled, despite representing in at least one public filing that they were not associated with these entities. These transfers were represented as compensation for services or the sale of stock for valid consideration, but they were allegedly part of a scheme to take USW assets without providing consideration in return. In order to conceal their actions, the defendants caused USW to make materially false and misleading statements in its 1998, 1999, and 2000 annual and periodic financial reports to the SEC.

After the fraud was discovered, USW significantly restated its financial results. Months after this occurred, USW declared bankruptcy.

This case is yet another example that illustrates the need to be vigilant to protect against fraud, even within your own company.■

OCC SUES NEW YORK ATTORNEY GENERAL

The Office of the Comptroller of the Currency (OCC) recently filed suit against the New York Attorney General (NYAG) claiming that his probe of mortgage lending by national banks was interfering with the OCC's fair lending examination and supervision processes.

In the probe, the NYAG has requested both public and non-public information about the mortgage lending practices of certain national banks that do business in New York. At the same time, the OCC is in the process of assessing new data collected as part of its fair lending evaluations.

The OCC has taken the position that the NYAG's probe creates uncertainty concerning the OCC's authority and its supervisory

expectations which undermines its ability to carry out its supervisory responsibilities. In general, federal law provides that lending activities of national banks and their subsidiaries are under the jurisdiction of the OCC.

The agency asked the court to declare that the NYAG may not demand, examine, or inspect the books and records of national banks, and to enjoin him from pursuing enforcement actions against national banks "and from any further usurpation of the OCC's exclusive authority."

Assuming that the court agrees with the OCC, this case will confirm the

OCC's exclusive authority over national banks and reduce any uncertainty concerning its supervisory expectations.■



The OCC's dispute with the New York Attorney General focuses on whose jurisdiction mortgage lending by national banks falls under

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