

WHY IS THE COMPANY ASKING ABOUT MY FEAR OF  
SPIDERS? A NEW LOOK AT EVALUATING WHETHER AN  
EMPLOYER-PROVIDED PERSONALITY TEST  
CONSTITUTES A MEDICAL EXAMINATION UNDER THE  
ADA

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*This note explores whether a personality test constitutes a medical examination under the Americans with Disabilities Act of 1990 (ADA). Many modern-day employers use personality tests as a recruiting tool to save time and money in the hiring process. Unfortunately, some personality tests jeopardize the rights of individuals under the ADA. Specifically, certain tests threaten to reveal disabilities that should otherwise remain confidential. The judicial response to the question of whether personality tests constitute a prohibited medical examination under the ADA has been mixed. Some courts employ an intent-based approach that focuses more on the employer's intended use of the examination. More recently, in *Karraker v. Rent-A-Center, Inc.*, the Seventh Circuit developed an effect-based approach that takes seriously the threat to the rights of the disabled.*

*After conducting a thorough analysis of the ADA's language, the Equal Employment Opportunity Commission's Enforcement Guidance, the purpose of the ADA, and the relevant case law, the author concludes that both the intent-based and effect-based approaches currently employed reach improper results. The intent-based approach undermines the disabled individual's interest in job opportunity and equality while the effects-based approach undervalues the employer's interest in making efficient, accurate employment decisions. Thus, the author ultimately proposes the Medical Field Test, which appropriately balances the interests of employers and disabled applicants/employees and remains true to the letter and spirit of the ADA.*

I. INTRODUCTION

What makes an examination medical? Is intrusive behavior necessary? Must a medical professional administer the examination? Such questions are becoming increasingly relevant for the thousands of com-

panies utilizing personality tests to evaluate applicants or employees.<sup>1</sup> Despite its popularity, the practice of employment-related personality testing is in jeopardy.<sup>2</sup> In *Karraker v. Rent-A-Center, Inc.*, the Seventh Circuit became the first court to hold that an employer's use of a personality test to evaluate applicants or employees, regardless of the employer's intention or whether the test is reviewed by a medical professional, represents a medical examination under the Americans with Disabilities Act of 1990 (ADA).<sup>3</sup> Although the company in *Karraker* did not utilize the personality test results to diagnose a mental disorder, the court explained that the test was nonetheless a medical examination due to the exclusionary effect the test *could* have had on individuals with mental disorders.<sup>4</sup>

Earlier courts avoided *Karraker's* effect-driven approach and instead considered both the potential effect of the examination along with the employer's intended use of the examination.<sup>5</sup> How future courts will grapple with the discord between the *Karraker* effects-based approach versus concerns of actual intent remains to be seen, but companies are sure to anxiously await the resolution. Once a test is deemed a "medical examination" under the ADA, employers are prohibited from using such examinations in the hiring process.<sup>6</sup>

This note seeks to provide guidance in determining whether a personality test constitutes a medical examination under the ADA. Part II provides background on personality testing and the ADA, while also introducing the potential conflict. Part III further examines the ADA and the surrounding interpretations of the "medical examinations" provisions to illustrate that neither a purely intent-based approach nor a purely effects-based approach will provide an appropriate solution to the person-

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1. See Annie Murphy Paul, Op-Ed., *The Cult of Personality Tests: A Flawed but Trendy Management Tool*, BOSTON GLOBE, Feb. 13, 2005, at F12 (noting that personality tests are used by eighty-nine percent of the companies in the Fortune 100 and thirty percent of 1,149 executives surveyed).

2. See Larry R. Seegull & Emily J. Caputo, *When a Test Turns into a Trial: Things to Keep in Mind About Psychological Testing*, 1 BUS. L. TODAY, Feb. 2006, at 13 ("Today, employers who administer tests to employees in the hiring or promotion process may find themselves feeling anxious or nervous. Why? The legal obstacles and risks to employment testing are significant.").

3. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 838 (7th Cir. 2005) (holding that the employer's use of Minnesota Multiphasic Personality Inventory, the most popular personality test in the United States, for evaluating employees constituted a "medical examination" under the ADA and was therefore subject to the relevant ADA restrictions); cf. *Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996) (holding that extensive examinations performed by a clinical psychologist constituted a medical examination under the ADA); *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at \*1 (N.D. Cal. Mar. 11, 1996) (holding that a personality test, unreviewed by a medical professional, is not a medical examination under the ADA when the test results merely identify whether the applicant has "behavioral problems" or "emotional instability").

4. *Karraker*, 411 F.3d at 837.

5. See *Barnes*, 944 F. Supp. at 904-05; *Thompson*, 1996 WL 162990, at \*1, \*9.

6. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112(d)(2) (2000) (prohibiting preemployment medical examinations). Besides prohibition in the preemployment stage, which is probably of greatest import to employers, medical examinations are subject to other special rules under the ADA as well. See *id.* § 12112(d)(3) (regulating post-offer medical examinations); *id.* § 12112(d)(4) (regulating post-employment medical examinations).

ality test dilemma. An approach focusing on the employer's intent poses too significant of a risk to the disabled applicant/employee. For example, employers could circumvent an intent-based approach by providing personality tests that tend to exclude disabled applicants under the guise of gauging "fit" within office culture. Meanwhile, an effects-based approach would likely remove all personality tests from the reach of employers in the hiring process, thereby ignoring the employer's interest in making efficient and accurate employment decisions. The proper solution does not lie with either of these two extremes. As Part IV explains, the best solution occupies the middle ground. In particular, this note proposes a "Medical Field Test," wherein the relevant consideration is whether the personality test in question is typically used in the medical field to diagnose mental disorders. By adopting the Medical Field Test, courts would not only honor the letter and spirit of the ADA, but would also improve the quality of employment-provided personality tests as well.

## II. BACKGROUND

### A. Overview of Personality Tests

Professionals have utilized various forms of personality tests since the early 1900s.<sup>7</sup> The popularity of such tests, however, did not explode until World War I.<sup>8</sup> Military leaders found personality tests particularly useful for discovering which soldiers possessed a tendency to become tense during battle or for targeting soldiers for specific missions.<sup>9</sup> Today, the initial military-based motivation has developed into an entire industry of personality tests, utilized in both the public and private spheres.<sup>10</sup> Personality test examiners can avail themselves of over eight thousand psychological and personality tests.<sup>11</sup>

As a form of psychological testing, a personality test measures various characteristics of the individual test taker.<sup>12</sup> Although personality test providers may have different motivations for using the exam, personality tests generally measure "motivational, emotional, interpersonal and attitudinal characteristics."<sup>13</sup> Despite the nuances of each examination, personality tests often fall into one of two major categories—

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7. Kimberli R. Black, Note, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 71 (1994).

8. *Id.*

9. *Id.*

10. *Id.* at 69.

11. Sujata S. Menjoge, Comment, *Testing the Limits of Anti-Discrimination Law: How Employers' Use of Pre-Employment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. REV. 326, 330 (2003).

12. Black, *supra* note 7, at 69.

13. *Id.*

objective or projective.<sup>14</sup> Objective tests, otherwise known as “paper and pencil tests,” often contain various true or false questions.<sup>15</sup> The answers then reveal certain personality traits.<sup>16</sup> For example, the Minnesota Multiphasic Personality Inventory (MMPI) contains over five hundred true or false questions involving issues such as religion, sex, politics, health, phobias, and family traits.<sup>17</sup> Individuals may use the MMPI to diagnose psychological disorders as well as personal traits.<sup>18</sup> Unlike the general nature of MMPI results, other objective personality tests seek information for more specific purposes. For example, the Strong-Campbell Interest Inventory provides narrower results such as the test taker’s occupational interests.<sup>19</sup>

Projective tests, which can also be used for medical or nonmedical purposes, do not seek finite answers or true/false responses.<sup>20</sup> Rather, projective personality tests subject the test taker to various “ambiguous stimuli,” and the results follow from the test taker’s response to such stimuli.<sup>21</sup> Moviegoers and television buffs are probably familiar with the famous Rorschach Test, where the examiner instructs the test taker to respond to ten different ink blots. The examiner then judges the test taker’s personality based on such responses.<sup>22</sup> In short, although personality tests may vary in type and other specifics, they all may provide insight into an individual’s psychological characteristics or potential mental disorders.

### B. *The Employer’s Use of Personality Tests*

Utilized in almost thirty percent of all companies,<sup>23</sup> personality testing has become an extremely lucrative industry.<sup>24</sup> Despite the many potential uses for personality tests, employers often benefit from personality tests in recruiting, hiring, promoting, or other employment-related decisions.<sup>25</sup> Numerous factors explain the popularity of personality tests among employers. For example, effective personality tests aid recruiters

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14. *Id.* at 72.

15. *Id.*

16. *Id.*

17. *Id.* at 74.

18. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 833–34 (7th Cir. 2005) (explaining that the MMPI not only measures personality traits but also “considers where an applicant falls on scales measuring traits such as depression, hypochondriasis, hysteria, paranoia, and mania [and that] elevated scores on certain scales of the MMPI can be used in diagnoses of certain psychiatric disorders”).

19. Black, *supra* note 7, at 72.

20. *Id.* at 78–79.

21. *Id.* at 78.

22. *Id.*

23. See Paul, *supra* note 1.

24. Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 280 (2002) (“[P]ersonality assessment has grown to a \$400 million-a-year industry.”).

25. See generally *id.* at 281–86 (reviewing the various benefits employers gain via personality tests).

in determining an applicant's fit within office culture.<sup>26</sup> Also, effective personality tests help to determine the likelihood of an applicant's success.<sup>27</sup> Thus, rather than dealing with a complicated process of résumé review, screening interviews, and interview reports, personality tests offer an efficient, short-cut alternative. In addition, effective personality testing minimizes the otherwise expensive cost of hiring decisions gone awry.<sup>28</sup> To be sure, some researchers question the ability of personality tests to achieve the aforementioned goals, but employers have continued to embrace the potential benefits.<sup>29</sup> Unfortunately for these employers, however, their embrace of personality testing may be short lived. Numerous questions regarding the legitimacy of personality examinations arise in light of the Americans with Disabilities Act.

### C. Overview of the Americans with Disabilities Act

Enacted in 1990, the Americans with Disabilities Act sought "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>30</sup> Given that our a society is comprised of over forty-three million individuals with disabilities who have endured a history of discrimination and isolation, Congress introduced the ADA to redress such ills.<sup>31</sup> Title I of the ADA, dedicated solely to employment discrimination, directs the ADA's guiding principles of equality and inclusion toward the employment arena.<sup>32</sup>

Guarding against discrimination based upon real and perceived disabilities, the ADA's definition of disability extends not only to individuals currently suffering from particularly debilitating impairments, but also to individuals with a history of such impairments and to individuals

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26. Menjoge, *supra* note 11, at 329 ("Employers often use the [personality] tests during the hiring process in order to determine which applicants would fit well into the office culture and which applicants have the 'right personality' to perform certain tasks.").

27. Stabile, *supra* note 24, at 284.

28. *Id.* at 281–83 (explaining that the cost of one poor hiring decision includes not only the cost of replacing the "bad hire," but could also include economic losses resulting from theft or legal liability). Stabile continues by illustrating the problem: "According to one estimate, the average cost of replacing a bad hire is 1.5 times the worker's salary and benefits, meaning that it could cost \$45,000 to replace someone making \$30,000 in salary and benefits." *Id.* at 283.

29. *See id.* at 292–98 (questioning not only the ability of personality tests to accurately reflect identity traits, but also doubting the ability of personality tests to play a meaningful role in the workplace). Some problems include that many personality tests were not designed with job evaluation in mind. *Id.* at 292. Moreover, motivation is a highly influential factor influencing behavior, yet personality tests often fail to account for its influence. *Id.* at 293. Finally, there is evidence indicating not only that people can cheat the tests but also that the tests themselves may screen out good candidates. *Id.* at 295–97.

30. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(b)(1) (2000).

31. *See id.* §§ 12101(a)(1), (2).

32. Overall, Title I contains a broad prohibition on employer discrimination against an applicant or employee with a disability. *See id.* § 12112(a) ("No [employer] shall discriminate against a[n] individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

“regarded as” having such impairments.<sup>33</sup> The ADA covers a vast number of impairments. Specifically, the ADA protects a variety of physiological disorders, ranging from mental or psychological disorders to physical complications and disease, so long as the requisite effects on the individual are present.<sup>34</sup> Thus, various mental and psychological disorders that can be identified by personality tests fall within the protection of the ADA.<sup>35</sup> To date, however, the ADA’s record of protecting individuals with mental disabilities is less than stellar.<sup>36</sup> Depending on the resolution of the personality test debate, disabled individuals may have a novel and viable ADA claim on the horizon.

#### D. *The Conflict Between Personality Tests and the ADA*

Specifically included in the ADA’s general prohibition of discrimination against individuals with disabilities are the particular limitations on “medical examinations.”<sup>37</sup> In an attempt to “ensure that an applicant’s possible hidden disability is not considered prior to the employer assessing the applicant’s non-medical qualifications,” the ADA places various restrictions on the ability of employers to utilize medical examinations.<sup>38</sup> Perhaps most notably for employers, the ADA completely prohibits preemployment medical examinations.<sup>39</sup> Despite the potential importance of this prohibition, the ADA does not define the term “medical examinations.”<sup>40</sup> In an age where almost every Fortune 100

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33. *Id.* § 12102(2) (providing three possible means to fall within the category of disability: “a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . [having] a record of such impairment . . . [or] being regarded as having such an impairment”).

34. 29 C.F.R. § 1630.2(h) (2006) (providing various examples of physical or mental impairments that could underlie disabilities including “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities”).

35. *See id.*

36. *See* Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 722–24 (2004) (“While the ADA has succeeded in implementing change for many disabled individuals . . . it has been less successful in assisting individuals who suffer from more complicated illnesses that do not fit comfortably within the Act’s narrow boundaries.”). Parikh goes on to note, “[b]y and large, mentally ill individuals who attempt to gain protection under the ADA are unsuccessful.” *Id.* at 745.

37. 42 U.S.C. § 12112(d) (“The prohibition against discrimination . . . shall include medical examinations . . .”).

38. *See* Stacy Bagley, Comment, *Enough is Enough! Congress and the Courts React to Employers’ Medical Screening and Surveillance Procedures*, 99 DICK. L. REV. 723, 729 (1995).

39. 42 U.S.C. § 12112(d)(2). The prohibition on preemployment medical examinations is probably most important for a few reasons. First, personality tests will presumably have their greatest exclusionary effect in the preemployment stage where potential employees are screened. Moreover, the ADA still allows regulation of other types of medical examinations—post-offer and post-employment examinations. Thus, the provision regarding preemployment medical examinations is most significant because it is the only point in the employment process where medical examinations are absolutely prohibited.

40. *See* 42 U.S.C. § 12111 (defining various terms used in Title I, yet not defining “medical examinations”).

company utilizes some form of personality test in making employment decisions,<sup>41</sup> the necessity of determining whether personality tests fall within the ADA's definition of "medical examination" is apparent.<sup>42</sup>

In the absence of a specific definition, courts have turned to the Equal Employment Opportunity Commission (EEOC) and analysis of the ADA's purpose to determine the scope of regulated medical examinations. Early cases focused on the nature and extent of the test in question. These cases readily found pervasive, extensive examinations reviewed by medical professionals to be medical examinations.<sup>43</sup> However, the mere potential for an exam to be used to identify mental disorders, and thereby cause exclusion of individuals with disabilities, was not enough to declare a personality test to be a medical examination.<sup>44</sup> On the whole, the early courts appeared to focus more on the employer's intent or motivation for using the personality test.<sup>45</sup>

Taking a broader view of the term "medical examinations," the Seventh Circuit in *Karraker v. Rent-A-Center, Inc.* abandoned the intent-driven analysis.<sup>46</sup> Despite the employer's lack of intent to use the personality test for medical purposes or for identifying mental disorders, the Seventh Circuit explained that the mere potential exclusionary effect that personality tests could have on disabled applicants was sufficient for the test to fall within the definition of medical examination.<sup>47</sup> Advocating a purely effect-based approach, *Karraker* threatens the viability of personality tests in employment. The lucrative personality test industry, and the employers who have become increasingly dependant upon the tests in making hiring decisions, stand at a crossroads.<sup>48</sup> To find the most equi-

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41. Paul, *supra* note 1 (explaining that the Myers-Briggs Type Indicator, one popular personality test, by itself is used by eighty-nine percent of Fortune 100 companies).

42. The importance of the personality debate is further amplified upon consideration of the potential reach of a resolution. Specifically, "[s]tudies indicate that 28% of adults in the United States have a diagnosable mental or addictive disorder." See Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 587 (2003).

43. *Barnes v. Cochran*, 944 F. Supp. 897, 900-06 (S.D. Fla. 1996) (rejecting an employer's extensive preemployment medical inquiry including the use of psychologist-provided examinations, along with psychologist review of medical records, and psychologist provision of five different personality tests).

44. *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at \*7 (N.D. Cal. Mar. 11, 1996) ("Of course, it is possible that [certain] questions . . . could be so intrusive as to be tools for diagnosing a mental impairment. This *possibility*, however, does not mean that any question on the subject is prohibited by the ADA." (emphasis added)).

45. See *id.*; see also *Barnes*, 944 F. Supp. at 904-05.

46. See generally *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005) (rejecting an employer's preemployment provision of the MMPI not because of employer's intent, but due to the potential exclusionary effect of the exam).

47. *Id.* at 836-37 ("The mere fact that a psychologist did not interpret the MMPI is not, however, dispositive. [T]he practical effect of the use of the MMPI is similar no matter how the test is used or scored . . . its use . . . likely had the effect of excluding employees with disorders from promotions.").

48. See Maria Greco Danaher, *Pre-offer Use of Psychological Test Violates ADA*, HR MAG., Sept. 2005, at 143 ("The wider implication of [the *Karraker* decision] is that an employer's use of any test that may diagnose psychological disorders can lead to violations of the ADA.").

table and effective approach, a thorough analysis of the ADA and surrounding interpretations is imperative.

### III. ANALYSIS

Despite the prevalence of personality tests in the business world, academics and courts have just recently begun to consider the ADA and personality tests.<sup>49</sup> Presumably, the success of the plaintiff in *Karraker* will spark further litigation and attention. As a result, the time for analysis is ripe. A thorough examination of the language of the ADA, the EEOC's Enforcement Guidance, the purpose of the ADA, and the relevant case law reveals the impropriety of both a purely effects-based approach and a purely intent-based approach. While a strictly effects-based approach undervalues the employer's interest in making efficient, accurate employment decisions, the intent-based approach undermines the disabled individual's interest in job opportunity and equality. Only an approach that appropriately balances the interests of employers and disabled applicants/employees should prevail.<sup>50</sup>

#### A. *The Language of the ADA*

The language of the ADA, although far from comprehensive, does not plainly contemplate the inclusion of all personality tests under the rubric of "medical examinations." Specifically, section 12112(d)(1) provides, "[t]he prohibition against discrimination . . . shall include medical examinations and inquiries."<sup>51</sup> No definition of medical examinations follows. Despite the lack of linguistic complexity here, the starting point for any issue of statutory interpretation is the plain language.<sup>52</sup> Standing alone, the term "medical examinations" is neither controversial nor ambiguous. The plain and ordinary understanding of the term "medical examination" most likely elicits thoughts of doctor involvement, blood tests, and invasive procedures. It is unlikely that personality tests would initially come to mind. Absent further Congressional instruction, the plain and ordinary understanding of "medical examinations" controls.<sup>53</sup>

The list of other terms defined by the ADA enhances the importance of considering the plain and ordinary meaning of "medical exami-

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49. See *Stabile*, *supra* note 24, at 281 (explaining another plausible reason for the recent increase in employer-provided personality tests—in 1988, federal law banned the use of polygraphs by employers, a previously utilized hiring tool).

50. How the issue of personality tests is handled by courts in resolving ADA cases is particularly important. According to Susan Stabile, "[a]part from the ADA, there is very little that interferes with an employer's ability to utilize personality tests." *Id.* at 288.

51. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112(d)(1) (2000).

52. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. Here it is not necessary to look beyond the words of the statute.").

53. See *id.*

nations.” Title I begins with the definition of various terms that one might find elementary.<sup>54</sup> For example, Congress took time to define words such as “Commission,”<sup>55</sup> “Employer,”<sup>56</sup> and “Employee.”<sup>57</sup> That Title I defines such seemingly simple terms but not “medical examinations” further suggests a plain interpretation of “medical examinations.” Thus, although one could argue that certain personality tests may fall within a more nuanced view of medical examinations, Congress’s decision to leave out an explicit definition indicates that simpler is better.

Nonetheless, under certain circumstances, personality tests could fall within even a basic definition of a medical examination. For example, imagine a psychologist provides an official personality test (Test A) to determine whether a patient has bipolar disorder. Imagine further that the American Medical Association recommends the use of Test A to diagnose bipolar disorder, and medical professionals routinely use Test A for such purposes. Such a situation, although not likely within one’s initial conception of a medical examination, probably comports with common understandings of a medical examination. In other words, personality tests need not be removed automatically from the definition of “medical examinations.”

Applying the language becomes more difficult, however, when the situations become more complex. What if the psychologist above is not a doctor, but a hiring partner at a law firm with no medical background? What if the hiring partner uses the same Test A (commonly used to diagnose bipolar disorder) not to search for mental disorders but to determine an applicant’s fit within office culture? The plain language may not offer a conclusive answer, but it does make one point clear—any interpretation or analytical framework should remain simple. A complex approach to defining “medical examinations” would be at odds with the simple language of the provision. Beyond this basic interpretive guide, however, the language itself does not provide a more definitive answer. Thus, further analysis beyond the basic language is necessary.

#### *B. The Equal Employment Opportunity Commission’s Stance*

The EEOC is the federal agency charged with enforcing the ADA. As such, the EEOC also offers interpretations of the ADA.<sup>58</sup> For example, the EEOC has published a specific “Enforcement Guidance” dedicated solely to disability-related inquiries and medical examinations of

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54. See 42 U.S.C. § 12111.

55. *Id.* § 12111(1).

56. *Id.* § 12111(5).

57. *Id.* § 12111(4).

58. EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000), available at <http://eeoc.gov/policy/docs/guidance-inquiries.html>.

employees.<sup>59</sup> Although these interpretations are not binding upon courts, they are particularly useful when the plain language of the statute fails to offer clear, workable standards.<sup>60</sup>

Overall, the Enforcement Guidance provides a definition of medical examination that focuses more on the intent behind the exam than the potential effect. The EEOC defines a medical examination as a “procedure or test that *seeks* information about an individual’s physical or mental impairments or health.”<sup>61</sup> Using the word “seeks,” the EEOC emphasizes the importance of intent in the medical examination inquiry. Rather than defining a medical examination based upon the test’s potential to reveal impairments, the EEOC definition limits itself to tests that affirmatively “seek” such information. Thus, an employer’s use of personality tests for purposes unrelated to identifying an individual’s mental impairment does not appear to be implicated.

Considering the scope of current medical knowledge, the sensibility of this intent-based definition is apparent. Many inquiries and examinations *could* be utilized to discover information about the employee. Doctors can diagnose disorders by merely peering over a patient. Psychologists may be able to suggest certain mental disorders after only a conversation with an individual. By focusing on the intent behind the exam, the EEOC’s definition avoids the risk of all inquiries being labeled as medical examinations.

Moreover, the EEOC relies on more common understandings of medical examinations by providing additional factors to help determine whether a particular examination is medical. Analyzing the medical nature of an examination, the EEOC lists the following factors that “should” be considered:

- (1) whether the test is administered by a health care professional;
- (2) whether the test is interpreted by a health care professional;
- (3) whether the test is designed to reveal an impairment or [sic] physical or mental health;
- (4) whether the test is invasive;
- (5) whether the test measures an employee’s performance of a task or measures his/her physiological responses to performing the task;
- (6) whether the test normally is given in a medical setting; and
- (7) whether medical equipment is used.<sup>62</sup>

Applying the EEOC factors, one would be hard pressed to fit an employer-provided personality test into the definition of medical examina-

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59. *Id.*

60. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 835 n.2 (7th Cir. 2005) (“We frequently look to EEOC guidelines for guidance in discrimination cases, which, ‘while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986))).

61. EEOC, *supra* note 58 (emphasis added).

62. *Id.* (“In many cases, a combination of factors will be relevant in determining whether a test or procedure is a medical examination. In other cases, one factor may be enough to determine that the test or procedure is medical.”).

tion. Each of these factors focuses on intent or comports with the basic understanding of medical examinations.<sup>63</sup> Unless the employer provides the results to a medical professional for interpretation, there is nothing plainly medical about personality tests under the EEOC factors. The tests are not invasive. Pencil and paper most likely will not qualify as medical equipment. The tests are usually given in an employer's office rather than a medical setting.

The only factor suggesting that personality tests may be categorized as medical examinations is the determination whether the examination is "designed to reveal" an impairment. A particularly problematic, and common, situation arises when an employer utilizes a test that was originally designed to reveal mental disorders for some other employment-related purpose.<sup>64</sup> In such instances, the original purpose of the particular personality test suggests that the test is a medical examination. In contrast, the employer's purpose suggests otherwise. Another problematic situation arises when a personality test was designed for multiple purposes—occupational and medical.<sup>65</sup> Which purpose should be determinative? The "designed to reveal" factor does not offer a conclusive answer. Regardless, "designed to reveal" is still only one of many EEOC factors. Meanwhile, almost all of the other factors considered would not confer medical examination status upon personality tests. With such inconsistency and inconclusiveness, the EEOC factors alone do not provide a satisfying solution to the personality test debate.<sup>66</sup>

The Guidance also provides specific examples of medical examinations, none of which appear to directly implicate employer-provided personality tests.<sup>67</sup> Although the list is not exhaustive, the general character of the examinations is dissimilar from personality tests. For example, the Guidance lists vision tests, blood tests, cholesterol tests, and pulmonary function tests.<sup>68</sup> Again, these examples coincide with the more common understanding of medical examinations. The only example that potentially implicates personality tests is "psychological tests that are *designed* to identify a mental disorder or impairment." As illustrated above, how employer-provided personality tests fit into this example is not readily

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63. Menjoge, *supra* note 11, at 349 ("It would not appear too difficult for an employer to avoid classification of most psychological and personality tests as medical tests. Even the tests that are mostly likely to be administered by health care professionals . . . are not physically invasive, do not require medical equipment, do not measure physiological responses, and do not need to be administered in medical settings.")

64. *See, e.g., Karraker*, 411 F.3d at 836 (explaining that the MMPI has a clinical protocol that can be used for medical purposes and a vocational scoring protocol that focuses more on personality traits of potential employees).

65. *See supra* note 64.

66. EEOC, *supra* note 58.

67. *Id.*

68. *Id.*

apparent.<sup>69</sup> Therefore, the EEOC's multifactor method provides at best an unclear answer to the personality test problem.

### C. *The Purpose of the ADA*

The strongest argument for placing personality tests within the definition of "medical examinations" lies in the purpose of the ADA. As mentioned, the overarching purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>70</sup> Similarly, the ADA explicitly mentions the importance of stimulating the ability of individuals with disabilities to achieve full political, social, civic, and economic participation in society.<sup>71</sup> Based on such broad principles of equality and inclusion, a purposive approach would be quick to eliminate *any* potential impediment to these goals. To be sure, a complete focus on the potential use or effect of personality tests (rather than their intended use) would probably better effectuate a broad view of the purpose of the ADA. If a personality test had even the slightest potential of decreasing a disabled individual's ability to attain a certain position, then defining the test as medical, and thereby prohibiting its use in the preemployment stage, would be beneficial. Undoubtedly, the argument is persuasive from a purposive standpoint. The idea of employers screening out people with disabilities contradicts the ADA's underlying motives of equality and opportunity.

However, the more specific purpose of the provisions regarding medical examinations does not mandate such a broad effects-based approach. The main purpose of the ADA's stance on medical examinations is to ensure that a "hidden disability remains hidden."<sup>72</sup> This goal may be accomplished without eliminating all examinations that could potentially be used to identify a disability and thereby screen out the individual with such disability. In fulfilling this privacy-based purpose, an approach focusing on the employer's motivation would prove effective. If the employer does not use the exam to identify disorders in fulfilling its employment-related purpose, then the disability is never exposed. The possibility of the examination being used to identify mental disorders is never realized. With the employer's lack of desire and ability to

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69. This problem is further complicated by the fact that the Guidance also includes personality tests in the category of tests that are not considered medical examinations. According to the EEOC, "psychological tests that measure personality traits such as honesty, preferences, and habits" are not medical examinations. *Id.* Thus, the EEOC illustrates the tension between revealing mental illnesses versus revealing basic personality traits.

70. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(b)(1) (2000).

71. See 42 U.S.C. § 12101(a)(8) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.").

72. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 677 (1st Cir. 1995); see *supra* note 38 and accompanying text.

procure medical information from the personality test, the hidden disability remains hidden.

Furthermore, the ADA does not completely ignore the employers' interests. In particular, Congress did not intend for the ADA to impede an employer's ability to select a qualified workforce.<sup>73</sup> If Congress's only concern were maximizing the hiring potential of individuals with disabilities, the ADA would mandate an affirmative action approach. The ADA does not take such steps, but instead embraces a more balanced approach.<sup>74</sup> In the specific context of medical examinations, a purely effect-based approach lacks an appropriate balance. A broad reading of the term "medical examination" could include almost any inquiry in today's world. Every question an employer asks, with or without a personality test, has the potential effect of revealing disabilities and thereby screening out individuals with disabilities.

However, the dubious reliability of personality tests may undermine the concern for the employer's supposed interest in using such tests. Various critics have argued that personality tests are not effective in helping businesses achieve their stated goals.<sup>75</sup> Thus, if we remove personality tests from employers' quiver of hiring tools, perhaps employers are not too disadvantaged. Perhaps the employer's interest at stake in the personality test debate is minimal. If the tests themselves are ineffective, then the term "medical examination" need not be parsed in a way to allow employers to use personality tests.

Despite the nebulous contention that personality tests do not aid recruiting success, the fact nevertheless remains that businesses continue to use personality tests at an extraordinary rate.<sup>76</sup> Critics may doubt the efficacy of these tests, but businesses are obviously finding some value in them.<sup>77</sup> Again, Congress did not intend for the ADA to interfere with an employer's ability to select a qualified workforce.<sup>78</sup> Therefore, the business interest, while diluted, is still a consideration in forging an equitable solution. In fact, an ideal interpretation of medical examinations would

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73. Bagley, *supra* note 38, at 723–24 (“Congress has specifically stated that [the ADA is not] intended to limit the ability of employers to choose and maintain a qualified workforce.”).

74. See Parikh, *supra* note 36, at 728 (“Congress intended the ADA to act as an equal opportunity statute, not an affirmative action statute.”).

75. See, e.g., Stabile, *supra* note 24, at 292–98.

76. See *id.* at 280 (“While some employers are convinced that personality tests are akin to astrology and tell no more than an interviewer could learn during a standard interview, other employers swear by them and are convinced that they are hiring better workers as a result of their use.”); see also Gregory R. Vetter, Comment, *Is a Personality Test a Pre-Job-Offer Medical Examination Under the ADA?*, 93 NW. U. L. REV. 597, 598 (1999) (“Whatever their effectiveness, personality tests are being used more frequently . . .”).

77. Sid Steinberg, *Personality Test Violates Americans with Disabilities Act*, LEGAL INTELLIGENCER, Aug. 10, 2005 (“While it is difficult to imagine that questions [appearing on various personality tests] would bear any relations to whether an applicant would be a successful candidate, employers must see their value on a certain level.”).

78. See *supra* note 73 and accompanying text.

improve the efficacy of personality tests by prohibiting those that fail to serve business purposes.

To be sure, the ADA's underlying principles of equality and opportunity may justify an automatic inclusion of personality tests in the definition of medical examinations. However, the more specific purpose of the medical examinations provisions and the countervailing concerns for employer interests do not demand such a harsh approach. The ideal resolution would attempt to reach a more equitable result.

#### D. *Relevant Case Law*

There is relatively little case law surrounding the issue of personality tests and medical examinations. Considering that the use of personality tests in employment has increased only recently, the lack of previous judicial attention is not surprising. The case law, though scarce, illustrates the struggles with the delicate balance between the employer's intent and the potential exclusionary effect of the personality test. Until the Seventh Circuit decided *Karraker v. Rent-A-Center, Inc.* in August 2005, courts previously addressing the personality test issue considered both the actual, intended use of the exam and the potential exclusionary effect.<sup>79</sup> Personality tests alone, apart from medical professional supervision or other pervasive testing, were not held to be medical examinations.<sup>80</sup> Breaking with these previous interpretations, *Karraker* developed its own effects-based approach.<sup>81</sup> Analyzing the courts' varying approaches further illustrates that neither a purely effects-based nor a purely intent-based approach will suffice.

##### I. *Thompson v. Borg-Warner Protective Servs. Corp.*

In 1996, the U.S. District Court for the Northern District of California became the first federal court to address the question of whether personality tests are medical examinations under the ADA.<sup>82</sup> In *Thompson*, the plaintiff brought a class action against his employer to challenge the employer's use of a personality test, the Pass-III D.A.T.A. Survey (Pass-III), during the application process.<sup>83</sup> The Pass-III involved one hundred statements requiring yes or no answers.<sup>84</sup> After taking the exam, the employee received a score that evaluated his responses according to an "Alienation index," a "Trustworthiness Attitudes index," and a "Drug

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79. See *Barnes v. Cochran*, 944 F. Supp. 897, 902, 904 (S.D. Fla. 1996); *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at \*6 (N.D. Cal. Mar. 11, 1996).

80. See *Thompson*, 1996 WL 162990, at \*5.

81. See *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005).

82. See *Thompson*, 1996 WL 162990, at \*5.

83. *Id.* at \*1.

84. *Id.*

Attitudes index.”<sup>85</sup> The employer then used these answers as an interviewing tool during a full interview that followed.<sup>86</sup> Rather than reveal specific mental disorders, the Pass-III revealed certain characteristics such as “behavioral problems” or “emotional instability.”<sup>87</sup>

In holding that the Pass-III did not constitute a medical examination under the ADA, the court began by focusing on the purpose and intent of the test.<sup>88</sup> In doing so, the court first distinguished tests designed and used to identify personality attributes, such as honesty and friendliness, and tests designed and used to identify specific mental disorders. As the court explained, “[t]he ADA protects disabilities, not any characteristic which an employer may consider to be a personal flaw or undesirable aspect of an applicant’s personality.”<sup>89</sup> According to the court, the PASS-III, which was designed to reveal only general traits such as “behavioral problems” and “emotional instability,” was not a medical examination.<sup>90</sup>

The second part of the opinion focused more on the potential exclusionary effect of the exam, regardless of the employer’s intent. In particular, the court explained that a personality test could still be unlawful if “it is designed and used to elicit information that *can* be used to diagnose a disability.”<sup>91</sup> The use of the word “can” suggests that an employer’s intent is not determinative. Regardless of whether an employer intended to use the test to diagnose mental disabilities, the opinion suggests that perhaps it would be sufficient that the exam itself “can” be used in such a manner.

Unfortunately, the court never directly answered the question of whether the mere *possibility* that a personality test could be used to reveal mental disorders would be sufficient to render the test medical. According to the court, the Pass-III, which only revealed information regarding behavioral problems and instability, could not be used to identify whether the test taker has an impairment.<sup>92</sup>

However, other evidence in the court’s opinion suggests that the potential effect of the exam would not be enough to categorize a personality test as medical. Despite the court’s reasoning above, even nonphysicians know that mental disorders can underlie various behavioral and emotional problems. To assert, as the *Thompson* court did, that the Pass-III could not be used in any manner to reveal mental disorders is

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85. *Id.*

86. *Id.*

87. *Id.* at \*6.

88. *Id.* at \*5–7.

89. *Id.* at \*7.

90. *Id.*

91. *Id.* at \*6 (emphasis added).

92. *Id.* at \*7 (“Evidence that the test is designed to reveal ‘behavioral problems’ and ‘emotional instability’ is insufficient; there is no evidence in the record that . . . [these] are characteristics that can lead to identifying whether an applicant has an impairment . . .”).

most likely a stretch.<sup>93</sup> The Pass-III may not reveal specific disabilities (depression, mania, and so on), but by revealing characteristics that coincide with many mental disorders, the personality test could still have the potential effect of excluding applicants with disabilities. Thus, by refusing to designate medical examination status upon the Pass-III, the court implicitly rejected a broad, effect-based interpretation of the term medical examination.

*Thompson* then illustrated the problem of relying too heavily on the potential effect of an exam. As the court noted, many questions regarding personality are important for employers.<sup>94</sup> For example, employers may want to learn more about an applicant's time management and organization skills. As the court explained, "[o]f course, it is possible that questions about personal organization could be so intrusive as to be *tools* for diagnosing a mental impairment. This *possibility*, however, does not mean that any question on the subject is prohibited by the ADA."<sup>95</sup> This statement illustrates the court's concern over a purely effect-based approach. Many questions could be used to diagnose mental disorders and therefore to exclude individuals. If the definition of medical examination depended solely on this potentiality, employers would be left with few if any questions to ask applicants.

Thus, the court's opinion in *Thompson* reveals its struggle with the importance of intent and effect. On the one hand, a personality test that "can be used" to diagnose a mental disorder should be prohibited.<sup>96</sup> On the other, the mere "possibility" that questions regarding certain personality traits could reveal mental disorders is insufficient.<sup>97</sup> The struggle between these two schools of thought persisted, as future courts would similarly fail to resolve the tension.

## 2. Barnes v. Cochran

The U.S. District Court for the Southern District of Florida addressed an easier case only a few months after *Thompson*. In *Barnes v. Cochran*, an employer required applicants to submit to extensive preemployment psychological evaluations.<sup>98</sup> Specifically, the employer required the applicants first to receive a "clinical evaluation" performed by a psychologist.<sup>99</sup> The evaluation not only contained specific questions aimed at disclosing mental disorders,<sup>100</sup> but also required a review of the

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93. *See id.*

94. *Id.* at \*7.

95. *Id.*

96. *Id.* at \*6.

97. *See id.* at \*7.

98. *Barnes v. Cochran*, 944 F. Supp. 897, 904-05 (S.D. Fla. 1996).

99. *Id.*

100. *Id.* at 904 ("Dr. Stock's questions covered not only a wide range of incidents in Plaintiff's life, but probed areas tending to disclose *specific psychological disabilities*, such as Post Traumatic Stress Disorder." (emphasis added)).

applicant's medical records. Finally, the psychologist provided the applicant with five different personality tests.<sup>101</sup>

In holding that the required evaluations constituted prohibited medical examinations under the ADA, the court failed to address the personality tests specifically. Rather, the evaluation as a whole was invalidated based on its extensive nature and medical character.<sup>102</sup> On its face, the holding appears warranted. It is difficult to argue that such extensive examination by a psychologist does not constitute a medical examination.

Unlike *Thompson*, however, the court in *Barnes* concerned itself more with the intended use of the examination than the potential effect. In fact, the employer's intended use of the exam dominated the entire opinion. Explaining that the decision rests on the extent and medical nature of the examinations performed, the court suggested that *Barnes* was not a case of mere potential identification of mental disorders.<sup>103</sup> Rather, these extensive examinations illustrated that the employer manifestly intended to identify mental disorders. That much was clear from the fact that the psychologist even evaluated whether the applicant had post-traumatic stress disorder and determined that the applicant did indeed have various "adjustment disorders."<sup>104</sup> The facts of *Barnes* revealed an examination replete with evidence of the employer's actual intent to identify mental disorders.

Moreover, in defining the medical nature of the examination, the court seemed to focus on the intended use of the examination. "[Medical examinations provide] evidence that *would* lead to identifying a mental disorder or impairment."<sup>105</sup> The use of "would" implies more inevitability than the use of "can" in *Thompson*. In other words, *Barnes* viewed the examination as medical not because it *could* lead to identifying mental disorders but because it *actually would* identify them. The medical nature of the extensive examination in question was therefore apparent. Unfortunately, however, the court did not explain whether the personality tests alone would have constituted medical examinations. Thus, the question still remained whether a personality test, by itself, that could definitively be used to diagnose specific medical disorders would constitute a medical examination.

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101. *Id.* at 905 (explaining that the employer provided the applicant with the MMPI, the Inwald Personality Inventory, the Otis Lennon School Ability Test, the Hilson Profile/Success Quotient Test, and the California Psychological Inventory).

102. *Id.* at 904 (declaring that the court's conclusion was "compelled by the nature and extent of the examination performed, as reflected in [the Doctor's] Report, and by the fact that the examination was performed by a licensed psychologist").

103. *See id.*

104. *Id.* at 905.

105. *Id.* (emphasis added).

### 3. *Karraker v. Rent-A-Center, Inc.*

In August 2005, the Seventh Circuit became the first court to directly grapple with a personality test typically used by doctors to diagnose medical disorders but not used by the employer for that purpose.<sup>106</sup> In *Karraker v. Rent-A-Center, Inc.*, the employer required the plaintiffs to take the MMPI before securing a promotion.<sup>107</sup> As the court noted, the MMPI did not merely gauge an employee's fit within firm culture. Rather, the exam could be (and was) used in the medical field to diagnose psychological disorders.<sup>108</sup> However, the test in *Karraker* was not interpreted by a psychologist.<sup>109</sup> Moreover, the employer did not use the test results to diagnose mental disorders, but instead utilized the MMPI's option of "vocational scoring" to focus on the applicant's employment-related personality traits.<sup>110</sup>

Nonetheless, in declaring the MMPI a medical exam under the ADA, the court disregarded the actual use of the personality tests by the employer and focused almost exclusively on the potential exclusionary effect. According to the court:

[T]he practical effect of the use of the MMPI is similar no matter how the test is used or scored—that is, whether or not [the employer] used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotion.<sup>111</sup>

In other words, the employer's intent is completely irrelevant in the analysis. In fact, even if an employer uses the test results purely for business purposes rather than to identify mental disorders, the result would be the same under *Karraker*—the personality test is medical.

Without citing a single case, the *Karraker* opinion appeals to a broad, purposive analysis of the ADA. The court even began its analysis by quoting the various documented purposes of the ADA.<sup>112</sup> At the

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106. See *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005).

107. *Id.* at 833.

108. *Id.* at 833–34 (“[T]he MMPI does not simply measure such potentially relevant traits such as whether someone works well in groups or is comfortable in a fast-paced office. Instead, the MMPI considers where an applicant falls on scales measuring traits such as depression, hypochondriasis, hysteria, paranoia, and mania. In fact, elevated scores on certain scales of the MMPI can be used in diagnosis of certain psychiatric disorders.”).

109. *Id.* at 836.

110. *Id.*

111. *Id.* at 836–37.

112. After recounting the facts, the court explained, Americans with disabilities often face barriers to joining and succeeding in the workforce. These barriers were not limited to inaccessible physical structures. They also included attitudinal barriers resulting from unfounded stereotypes and prejudice. People with psychiatric disabilities have suffered as a result of such attitudinal barriers, with an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities. *Id.* at 834. With this purposive-minded introduction, the court continues by citing from the general provisions of the ADA, further emphasizing its antidiscriminatory purpose. *Id.* at 834 (citing Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 (2000)).

heart of the opinion lie two purposes in particular: eliminating discrimination against and promoting integration of individuals with disabilities. From this purposive standpoint, the opinion is justified. After all, if the goal is complete integration, any possible exclusionary effect on individuals with disabilities must be eliminated.

However, *Karraker* takes the purposive approach too far. As mentioned, the ADA does not promote integration at all costs.<sup>113</sup> This overemphasis on the effect of a personality test creates various application problems. Again, almost any personality test, even one concerned with strictly work-related questions, could screen out individuals with disabilities. Moreover, this approach neglects the interests of employers. Such a purely effects-based approach is not consistent with Congress's desire to avoid interfering with the ability of an employer to select a high quality workforce. A purely effects-based approach leaves employers with little room for personality tests in recruitment.

Despite the opinion's reliance on potential effects, the court's reasoning suggested that the mere existence of a potential exclusionary effect would not be sufficient. The court implied that the real problem was that the MMPI in particular suffered from certain flaws that rendered the test medical. Specifically, the court questioned the effectiveness of the exam by querying what interest an employer would have in asking questions relating to the "depressive mood" of an applicant or employee.<sup>114</sup> Noting the awkward nature of the questions, the court explained that either the personality test was a "poor predictor" of an applicant's work-related skills or was designed to measure mental disorders.<sup>115</sup> Not surprisingly, neither answer was particularly satisfying to the court. The mere presence of such questions likely suggested that the exam was at least partly designed to identify mental disorders. Although the court did not explicitly say as much, the nonbusiness nature of the questions probably raised questions of the employer's intent. While the employer argued that the test was not used to identify medical conditions, the nature and relevance of the questions suggested otherwise.<sup>116</sup> In the end, however, *Karraker* represents a radical departure from prior decisions. The specific language of the opinion relies too heavily on the potential

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113. See *supra* note 73 and accompanying text; see also *supra* note 74 and accompanying text.

114. *Karraker*, 411 F.3d at 835 ("[The employer] argued that the MMPI merely tested a 'state of mood' and suggested that an applicant might, for example, score high on the depression scale because he lost his keys that morning. But why would [the employer] care if an applicant lost his keys in the morning of the MMPI or took the test after another Cubs loss?").

115. *Id.*

116. *Id.* at 834 ("Applicants were asked whether the following statements were true or false: 'I see things or animals or people around me that others don't see.' 'I commonly hear voices without knowing where they are coming from.' 'At times I have fits of laughing and crying that I cannot control.' 'My soul sometimes leaves my body.' 'At one or more times in my life I felt that someone was making me do things by hypnotizing me.' 'I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.'").

exclusionary effect of the personality tests, jeopardizing the viability of all such employer-provided tests.

#### IV. RESOLUTION

As illustrated, the proper way to deal with the issue of personality tests under the ADA is highly contestable. The statute's language, the EEOC, and the case law fail to provide a definitive, satisfying approach. In order to resolve the confusion, while remaining true to the letter and spirit of the ADA, the most suitable approach is the Medical Field Test, which focuses on the personality test's general use in the medical field.

The Medical Field Test begins by inquiring whether the particular personality test is generally used in the medical field to identify mental or psychological disorders. If so, the personality test would be a *per se* medical examination under the ADA, thereby prohibiting employers from providing such tests in the preemployment stage. In the case of examinations with dual purposes, the fact that the examination is typically used in the medical field is sufficient for its designation as a *per se* medical examination. Thus, regardless of the employer's justification or intended use, the employer would be prohibited from using such an examination in the preemployment stage.

If, on the other hand, the personality test is not generally used in the medical field, then there would be a rebuttable presumption that the personality test is not a medical examination. The burden would then be on the employee to prove that the personality test, despite its non-use in the field to identify mental disorders, should still be considered a medical examination. In doing so, the employee would use the EEOC factors and other evidence to prove that the examination was actually used to identify such disorders.<sup>117</sup>

The Medical Field Test is responsive to the needs of all parties and the requirements of the ADA. First, the Medical Field Test comports with the language of the ADA. As mentioned, Title I merely uses the words "medical examination" without defining them.<sup>118</sup> Thus, courts should evaluate personality tests in a way that comports with common notions of medical examinations. On a broad level, the Medical Field Test remains consistent with the language by offering a simple analytical framework. The ADA's basic definition of medical examination demands an easily comprehensible solution.<sup>119</sup> By concentrating the analysis on one factor, the Medical Field Test obeys this overarching concern with simplicity.

Beyond offering a straightforward, efficient analysis, the substance of the Medical Field Test also falls within the reach of the plain meaning

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117. *See supra* note 61 and accompanying text.

118. *See supra* Part III.A.

119. *See supra* Part III.B.

of the ADA's language. If medical professionals consistently use an examination to identify mental disorders, the medical nature of the test is not especially controversial. Under the Medical Field Test, medical professionals, rather than attorneys, would determine what constitutes a medical examination. Clearly, they are better suited to make such a determination than judges, attorneys, or lawyers. Thus, the Medical Field Test offers a solution to the personality test dilemma while remaining consistent with the language of the ADA.

In addition, the Medical Field Test utilizes the EEOC Guidance.<sup>120</sup> Although EEOC interpretations are not binding, courts still defer to the interpretations.<sup>121</sup> Therefore, an ideal evaluation of personality tests under the ADA should consider the Guidance. Here, the Medical Field Test first comports with the EEOC's overall definition of medical examination. As mentioned, the EEOC defines a medical examination as a "procedure or test that *seeks* information about an individual's physical or mental impairments or health."<sup>122</sup> Under the Medical Field Test, a particular personality test could be said to *seek* information about an individual's mental health when the test is used in the medical field to obtain such information. Thus, the Medical Field Test gives conclusive force to an otherwise debatable EEOC definition.<sup>123</sup>

In addition, the Medical Field Test utilizes the EEOC factors relating to medical examinations.<sup>124</sup> Under the Medical Field Test, the EEOC factors provide the main guidance in the case where the personality test is not generally used in the medical field to identify mental disorders. Moreover, by automatically conferring medical examination status upon personality tests generally used in the medical field to identify mental disorders, the test gives meaning to the factor regarding whether the test is "designed to reveal an impairment o[f] physical or mental health."<sup>125</sup> Because many of the other factors do not come into play for employer-provided personality tests, the design factor should be more influential in the analysis.<sup>126</sup> Focusing on the use of personality tests in the medical field, the Medical Field Test acknowledges the importance of the "designed to reveal" factor.

Furthermore, the Medical Field Test fulfills the overarching purpose of the ADA without unduly sacrificing the interests of employers.<sup>127</sup> Limiting the unjust exclusion of and discrimination against individuals with disabilities, the Medical Field Tests removes particularly troubling tests from use. If an examination is deemed medical under the Medical

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120. See *supra* Part III.B.

121. See *supra* note 52 and accompanying text.

122. EEOC, *supra* note 58 (emphasis added); see *supra* note 61 and accompanying text.

123. See *supra* note 61 and accompanying text.

124. See *supra* note 62 and accompanying text.

125. EEOC, *supra* note 58.

126. See *supra* note 63 and accompanying text.

127. See *supra* Part III.C.

Field Test, its potential ability to identify mental disorders is documented, as doctors use the exam for exactly that purpose. Most likely, if any personality test would have the potential to discriminate against or exclude individuals with disabilities, tests generally used to identify disorders would have such potential.

Under the Medical Field Test, unlike the intent-based approach, personality tests would not be free from inquiry merely because the employer did not personally use the test to identify mental disorders. Under an intent-based approach, employers could create a hiring system that systematically excludes disabled employees by using personality tests under the guise of maintaining office culture.<sup>128</sup> The Medical Field Test places certain examinations, those likely to be most capable of exclusion, outside the purview of employers regardless of their alleged intent. Moreover, even if the examination is not traditionally used in the medical field, the applicant/employee still may present evidence to discount the employer's alleged motivations.

To be sure, the effects-based analysis would provide maximal protection for individuals with disabilities, but it does so at significant costs to employers. Employers are left uncertain as to which personality tests the court will determine could have the effect of excluding individuals. The broad, potential exclusionary effect of personality tests makes it unlikely that courts will provide a consistent, reliable source of guidance under an effect-based approach. Worse yet, there is a real possibility that the effects-driven approach will eliminate all personality tests. Thus, the effects-driven approach threatens to obliterate the interest of employers by prohibiting them from using a valued hiring tool.

Meanwhile, the Medical Field Test eliminates the uncertainty and recognizes a concern for the employer's interests. An employer's choice becomes simple with the Medical Field Test—avoid tests used in the medical field to diagnose mental disorders. Thus, the Medical Field Test allows employers to continue to reap the benefits of personality testing. Although the employer's options are more limited, personality tests in general remain a viable option.

In fact, the Medical Field Test encourages more effective personality tests in employment situations. Rather than using tests with questions that have no bearing on employability,<sup>129</sup> employers under the Medical Field Test have an incentive to adopt personality tests that are not used in the medical field and that assess strictly employment-related traits such as timeliness, organization, and motivation. To be sure, even employment-related personality tests not used in the medical field may still

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128. Menjoge, *supra* note 11, at 349–50 (“The most commonly used questionnaires . . . incorporate so many different types of questions that it would be difficult for plaintiffs to argue that the actual purpose of such tests is to reveal the status of their health, as opposed to general character traits, including their overall fitness for the job.” (emphasis omitted)).

129. See *supra* note 115 and accompanying text.

contain some information that could be used to identify a mental disorder. Nonetheless, the basis for this concern is much less compelling where an exam is not used by medical professionals to diagnose diseases. Therefore, by adopting the Medical Field Test, courts would eliminate concerns over potential exclusion of disabled applicants while improving employer-provided personality tests in the process.

## V. CONCLUSION

Modern-day employers have become preoccupied with personality tests. A potentially effective recruiting tool, personality tests have allowed some employers to save both time and money during the hiring process. However, certain tests have jeopardized the rights of individuals with disabilities by subjecting them to tests that may lead to their exclusion. Nonetheless, the variety of personality tests on the market is vast and to exclude all tests on mere prospect of discrimination does not do justice to the potential value of such tests to employers.

Courts have struggled with the determination of when personality tests constitute impermissible medical examinations under the ADA. With little guidance from the language of the ADA, courts have been left to apply the EEOC factors and the general purpose of the statute. The result has been inconsistency and uncertainty. The courts' analysis began by focusing on the actual use of the examination, only to eventually evolve into *Karraker's* effects-driven approach. The Medical Field Test not only removes the confusion, but provides a thoughtful and effective response to personality tests as well. Given the pervasive use of personality tests in the contemporary corporate world, the Medical Field Test provides employers and employees with the clear and equitable response they deserve.

