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Timing Can Be Everything: Court Holds That Applicants May Set Forth a Claim Based Upon the Timing of a Pre-Employment Medical Examination

In *Leonel v. American Airlines*, the United States Court of Appeals for the Ninth Circuit held that American Airlines' pre-employment medical test may have violated the Americans With Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA"). The Court also held that American Airlines' testing of blood samples may violate the right to privacy guaranteed by the California Constitution. The case is significant because it emphasizes the importance of ensuring that pre-employment medical examinations are conducted at the very last stage of the hiring process.

In this case, the Plaintiffs applied for flight attendant positions with American Airlines. American Airlines extended offers of employment to the Plaintiffs that were conditioned upon "successful completion of a drug test, a medical examination, and a satisfactory background check." After making the conditional offers, American Airlines representatives directed the Plaintiffs to go immediately to the company's medical department for medical examinations. The Plaintiffs were instructed to fill out various forms including a detailed medical questionnaire and, at some point in the process, the American Airlines nurses drew blood samples. Plaintiffs did not initially reveal that they were HIV positive.

Plaintiffs' blood tests subsequently indicated signs of HIV infection and the Plaintiffs then disclosed their HIV-positive status. American Airlines rescinded the offers of employment on the ground that the applicants had failed to disclose their HIV status at the time of the medical examination.

Plaintiffs sued claiming violations of the ADA and the FEHA. Both the ADA and the FEHA prohibit medical examinations and inquiries until after the employer has made a "real" job offer to an applicant. According to the Court, a job offer is only "real" if the employer first completes all non-medical components of its application process or is able to demonstrate that it could not reasonably have done so before issuing the offer.

In this case, the Ninth Circuit found that because American Airlines administered the medical questionnaire and took the blood sample *before* it conducted the background check, the medical test was not the very last stage of the hiring process. The Court rejected American Airlines' argument that it did not *evaluate* the medical information prior to conducting the background check and held, "the statutes regulate the sequence in which employers collect information, not the order in which they evaluate it."

Importantly, the issue of whether or not Plaintiffs failed to disclose their HIV status was not discussed by the Court. Moreover, it appears that the Plaintiffs passed the background check component of the hiring process. The Ninth Circuit instead based its ruling entirely on the fact that the medical examination took place before the background check was completed.

The Ninth Circuit also held that the blood test conducted by American Airlines may have violated the Plaintiffs' right to privacy. The Court began the analysis by noting that an applicant does not have a reasonable expectation of privacy in the mere drawing of blood. However, an applicant does have a reasonable expectation that an employer will not retrieve private medical information "by performing blood tests outside of the ordinary or accepted medical practice regarding general or pre-employment medical exams." The Court held that, particularly because American Airlines failed to provide notice regarding the medical tests that would be run, the Plaintiffs presented a triable issue of fact as to whether American Airlines violated their right to privacy.

The ADA and the FEHA have many detailed and complex requirements. Employers should consult with their labor counsel in order to ensure that pre-employment medical screenings are compliant with California and federal law.

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