

Police Hiring:

Municipalities cannot blindly rely on psychological evaluations to reject applicants

By: Brian P. Gabriel, Esq. and Hobart J. Webster, Esq.

The Third Circuit Court of Appeals recently reversed a decision granting the City of Pittsburgh's motion to dismiss in *Christopher Gibbs v. City of Pittsburgh*, holding that the results of a pre-employment psychological evaluation will not insulate a municipality from discrimination claims and that the allegations were sufficient for the case to proceed.

When Gibbs applied to be a Pittsburgh police officer, he "aced the written test and got a conditional job offer." As required by 37 Pa. Code § 203.11(a)(7), Gibbs had to be "examined by a Pennsylvania licensed psychologist and found to be psychologically capable [of] exercis[ing] appropriate judgment or restraint in performing the duties of a police officer." Because two of the three psychologists said Gibbs was unfit to serve, Pittsburgh did not extend a final offer.

Gibbs alleges that these psychologists were biased against him because of his ADHD diagnosis. According to the Complaint, after learning that he had been diagnosed with ADHD as a child, the psychologists never explored whether it would interfere with his ability to do the job or they would have learned it was under control. Five other police departments had found Gibbs to be mentally fit, and there was no indication of misconduct as a police officer or as a Marine. While Gibbs concedes misbehavior "as a child, before he was treated for ADHD," he alleges that Pittsburgh hired other applicants with similar childhood issues not caused by ADHD. Thus, Gibbs says he was rejected because of anti-ADHD bias.

Gibbs sued under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (the analysis is identical). The District Court granted Pittsburgh's motion to dismiss, finding that Gibbs was not qualified to be a Pittsburgh police officer because "[p]assing [the psychological test] was a 'prerequisite,' regardless of how able Gibbs was to perform the essential functions of the job." The District Court suggested that pleading "bias in the statutorily-required psychological examination" might be sufficient, but Gibbs had alleged only that the "psychologists, not the City" were biased. Gibbs was required to plausibly allege three elements to survive dismissal: (1) that he was disabled, (2) that he was qualified for the job, and that (3) he suffered discrimination because of his disability. The Third Circuit concluded that Gibbs had sufficiently alleged all three.

Gibbs plausibly alleged that he was disabled. The ADA protects a job applicant not only if mentally impaired, but also if an employer wrongly regards him as impaired. 42 U.S.C. § 12102(1)(C). The test is whether the employer "perceived" the applicant to be impaired, irrespective of whether the perceived "impairment limits or is perceived to limit a major life activity." § 12102(3)(A). Although Gibbs's ADHD was under control, the psychologists thought it was a disability and focused on it in rejecting him. Thus, the Third Circuit concluded that he had plausibly alleged that the psychologists regarded him as disabled.

Gibbs plausibly alleged that he was qualified. Gibbs claimed that he was qualified because five other departments had hired him, and even Pittsburgh made a conditional job offer. Pittsburgh argued that Gibbs lacked a qualification – passing the psychological test. The Third Circuit rejected Pittsburgh’s argument because a plaintiff claiming that a specific job criteria was applied discriminatorily need only show that they were qualified based on all other, nondiscriminatory criteria. Gibbs sufficiently alleged that he failed because the test was applied in a discriminatory way by the psychologists, so the Third Circuit concluded that he had plausibly claimed to be qualified for the job. The Court, however, cautioned that its decision should not be read too broadly: “we will not excuse a plaintiff from missing qualifications just because he says they were discriminatory. He must plausibly allege (and later prove) that they were.”

Gibbs plausibly alleged that he suffered discrimination. To plausibly allege discrimination, Gibbs did not have to have detailed evidence. At the pleading stage, Gibbs need only give Pittsburgh fair notice of his claim and “raise the reasonable expectation that discovery will uncover evidence of discriminatory motive.” The Third Circuits found that Gibbs had done just that. He claimed that once the psychologists learned that he had ADHD, they fixated on his childhood misbehavior without considering whether it was currently under control as he alleges it to be. Five other police departments had agreed. Gibbs also claimed that Pittsburgh hired other police officers who had likewise misbehaved as children but did not have ADHD. The Third Circuit held that Gibbs had thus explained why he thinks he suffered discrimination.

Pittsburgh’s reliance on third-party experts does not shield it from liability. The District Court concluded that Gibbs had to allege that Pittsburgh itself was biased against him on the basis of his disability, not just the psychologists that it had hired to perform his evaluation. The Third Circuit disagreed. Discrimination includes “participating in a contractual or other arrangement or relationship that has the effect of subjecting a ... qualified applicant with a disability to the discrimination” prohibited by the ADA. 42 U.S.C. § 12112(b)(2). Thus, an employer will not avoid ADA obligations by contracting out personnel functions to third parties, including a preemployment examination that determines an applicant’s mental capacity. If the psychologists discriminated against Gibbs, Pittsburgh would be liable for relying on them.