



Counseling as an ADA-Protected Medical Examination

[The Americans with Disabilities Act prohibits](#) employers from “requir[ing] a medical examination” or “mak[ing] inquiries of an employee as to whether such employee is an individual with a disability ... unless such examination or inquiry is shown to be job-related and consistent with business necessity.” For this reason, an employer can only compel a current employee to undergo a medical examination in limited circumstances, confined by job-relatedness and business necessity.

The scope of what qualifies as a “medical examination” lies at the heart of [Kroll v. White Lake Ambulance Authority \(6th Cir. 8/22/12\) \[pdf\]](#). When Emily Kroll, an EMT, showed on-the-job distress over an affair with a married co-worker, which included several outbursts at work, her employer tried to do something about it—compelling her to obtain psychological counseling, on her own terms and with any counselor she wished. Kroll refused, never returned to work, and sued for disability discrimination.

In concluding that counseling qualifies as medical examination under the ADA, the Sixth Circuit principally relied on the EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees](#). That Guidance defines a “medical examination” as “a procedure or test that seeks information about an individual’s physical or mental impairments or health.” The Court focused on the employer’s intent in requiring the counseling:

[T]he fact that an employer’s intentions are disability neutral does not save from falling within [the ADA]’s purview a test routinely used and administered by psychologists to uncover mental illness....

[W]e conclude that Kroll has presented sufficient evidence such that a reasonable jury could conclude that the “psychological counseling” Kroll was instructed to attend did constitute a “medical examination” under the ADA. We reach this conclusion ... because the “psychological counseling” in question was likely to probe and explore whether Kroll suffered from a mental-health disability, regardless of whether this was WLAA’s intention.

The dissenting opinion, however, believes that intent is irrelevant, instead focusing on the issue of who chose the nature and type of the counseling:

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By any definition, compelled counseling does not compel a medical examination. As the EEOC guidelines recognize, some “psychological tests” amount to medical examinations, and others do not.... No evidence shows that White Lake Ambulance insisted that Kroll’s psychological counseling involve one type of test or another. No evidence, indeed, shows that the ambulance service insisted she submit to any test while obtaining counseling....

The breadth of services encompassed by a psychological-counseling requirement resolves this claim. For it means that Kroll, not the company, controlled her destiny—controlled in other words whether she sought counseling that included a medical examination or did not. No doubt, she might meet this requirement by seeing a psychologist or psychiatrist who used a medical examination. But, if so, that was her choice, not the company’s. If a trying boss insists that an employee arrive at work by eight o’clock the next morning, it is not the boss’s fault if the employee opts to meet the requirement by staying overnight in the office. So it is here. Kroll had the right to meet this counseling requirement on her own terms, some of which could lead to a medical examination and others of which would not.

While I believe the dissent has the better of the argument, the fact remains that, for now, counseling *is* a medical examination covered by the ADA. Employers cannot compel employees to undergo counseling unless it is job-related and consistent with business necessity.

Thus, if counseling qualifies as a covered medical exam, then employers, like WLAA, will have to rely on the statute’s defense of job-relatedness and business necessity if an employee needs counseling. What is the best practice for employers going forward? Create of record of job-relatedness and business necessity. If an employee is acting erratically, document the behavior. Take photographs. Obtain statements from co-workers. Explain, in writing, how the employee’s behavior is impacting your business. Otherwise, you will have a difficult time demonstrating that a specific employee’s needs meet the statute’s requirements for a permissible medical examination.