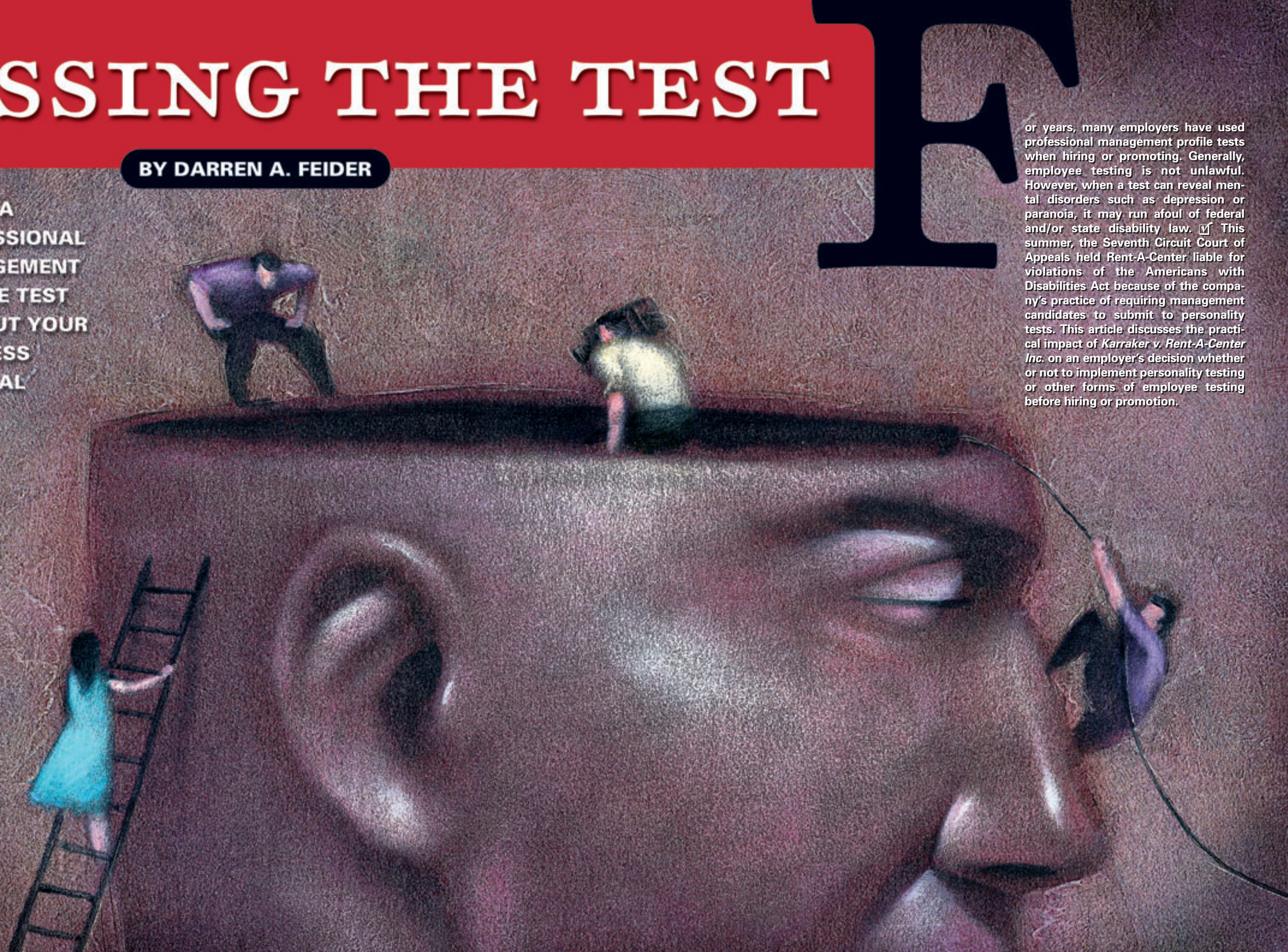


PASSING THE TEST

BY DARREN A. FEIDER

USING A
PROFESSIONAL
MANAGEMENT
PROFILE TEST
MAY PUT YOUR
BUSINESS
AT LEGAL
RISK

For years, many employers have used professional management profile tests when hiring or promoting. Generally, employee testing is not unlawful. However, when a test can reveal mental disorders such as depression or paranoia, it may run afoul of federal and/or state disability law. This summer, the Seventh Circuit Court of Appeals held Rent-A-Center liable for violations of the Americans with Disabilities Act because of the company's practice of requiring management candidates to submit to personality tests. This article discusses the practical impact of *Karraker v. Rent-A-Center Inc.* on an employer's decision whether or not to implement personality testing or other forms of employee testing before hiring or promotion.



As many employers have done in the past, Rent-A-Center required potential managers to submit to an APT Management Trainee-Executive profile before it would consider the employee for promotion. Rent-A-Center used the executive profile to identify employees who had personality traits that the company found in successful managers. The profile consisted of nine tests that focused on math and vocabulary skills. The profile also included a personality test known as the Minnesota Multiphasic Personality Inventory (MMPI).

The MMPI is often used by psychologists and psychiatrists to measure cognitive skills and personality traits and to assess symptoms of social and personal maladjustment. The MMPI can be used to diagnose mental disorders and measure personality traits for depression, hypochondriasis, hysteria, paranoia and mania. The MMPI is often administered to candidates for high-risk or public safety positions, such as police officers, firefighters and individuals who work with children or the elderly. These positions often involve high levels of stress, so the MMPI is used to identify individuals that would arguably be unable to handle such work environments.

According to *Karraker v. Rent-A-Center*, the MMPI used by Rent-A-Center consisted of 502 questions, many of which were true or false questions such as: "I commonly hear voices without knowing where they are coming from," "I see things or animals or people around me that others do not see," "[m]y soul sometimes leaves my body," and "[a]t times I have fits of laughing or crying that I cannot control." Rent-A-Center described the work environment for its managers as "fast-paced, high-stress environments," so it used the MMPI to identify those who could perform well under such conditions. In essence, Rent-A-Center, like many employers, used the MMPI as a forecasting tool. However, after the Karraker decision, employers should rethink use of such personality tests or be exposed to class action disability lawsuits by their employees.

Employers often associate unlawful disability discrimination with physical handicaps—e.g., wheelchair access with ramps

and toilets, elevators in small commercial buildings, telephones with Braille or TTY, etc. However, the Americans with Disabilities Act (ADA) also covers mental impairments and prohibits an employer from declining to hire or promote because a person has a mental disorder if that disorder does not prevent him or her from performing the essential functions of the job, with or without a reasonable accommodation. Many states have similar statutes or employment laws that mirror the ADA's prohibitions on disability discrimination and expose employers to similar legal remedies.

The ADA permits an employer to conduct a medical examination only after offering a position to an applicant whose offer is contingent upon the results of the medical examination. Rent-A-Center countered that what it had used was a "vocational scoring" protocol, which was focused on personality traits, not mental disorders, so it was not a "medical examination." The district court agreed, holding that the MMPI was not unlawful because Rent-A-Center had used the test to only assess personality traits and the test results were not interpreted by a psychologist. The district court dismissed the class action lawsuit.

However, the Seventh Circuit held that Rent-A-Center's use of the MMPI was an unlawful pre-employment medical examination that had the effect of screening out persons with mental disabilities regardless of whether or not they could perform the essential functions of the job with or without a reasonable accommodation. The court directed entry of judgment in favor of the Karraker brothers and the members of the class. In other words, Rent-A-Center lost the case without the benefit of a trial.

The court relied, in large part, on the enforcement guidelines published by the U.S. Equal Employment Opportunity Commission (EEOC) that prohibit pre-employment medical examinations. The court explained that the Rent-A-Center's test was "likely to have the effect of excluding employees with [mental] disorders from promotions" and because the test "is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability, we think the MMPI is best categorized as a medical examination."

On appeal, Rent-A-Center initially argued that the MMPI was not an unlawful because it was not a "medical examination," as no psychologist, psychiatrist or doctor reviewed the test results. The EEOC's guidelines identify many factors to determine whether a test is actually a "medical examination" or merely test: (1) whether a health care professional administered or interpreted the test; (2) whether the test was administered in medical setting using medical equipment; (3) whether the test was invasive; and (4) whether the test is designed to reveal an impairment of physical or mental health. The court rejected Rent-A-Center's argument, finding that whether a psychologist or psychiatrist reviewed the test results in a medical setting was irrelevant because the MMPI was a

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test specifically designed to reveal mental health issues and the effect of Rent-A-Center using the test was to exclude employees who had mental disorders from consideration for promotion.

In response, Rent-A-Center argued that the test results were only used to measure an applicant's "state of mood," not any particular mental disorder. Rent-A-Center explained that the test results helped identify those who could work in a high stress, fast-paced workplace environments. The federal appellate court was not swayed and in fact made light of Rent-A-Center's argument stating:

RAC argues in its brief that the MMPI does not test whether an applicant is clinically depressed, only "the extent to which the test subject is experiencing the kinds of feelings of 'depression' that everyone feels from time to time (e.g., when their favorite team loses the World Series). Although that particular example seems odd to us (can an Illinois chain really fill its management positions if it won't promote disgruntled Cubs fans?), the logic behind it does not seem to add up, either. (Karraker)

The court further stated: "[w]e see two possibilities: Either the MMPI was a very poor predictor of an applicant's potential as a manager...or it actually was designed to measure more than just an applicant's mood on a given day." The court thus held that Rent-A-Center violated the ADA when it administered the MMPI to employees seeking promotion to store manager.

Employers can learn several lessons from this case. First, an employer should not administer a personality test or require a medical exam until after it has made a conditional offer employment or promotion. Rent-A-Center had required employees to take the MMPI before they were considered for promotion.

Second, any personality test or other test designed to identify mental disorders is unlawful notwithstanding an employer justification or excuse. If any of the questions on a test can be deemed to elicit information about an applicant's mental illness, it is unlawful and the employer's intent is irrelevant. Although Rent-A-Center had used a special vocational scoring method designed to avoid revealing mental disorders and had submitted expert testimony from a psychologist to support its assertion, the court was not convinced because the MMPI results could have been used to discover those conditions. Thus, even if Rent-A-Center had not intended to screen out employees with mental disorders, its use of the MMPI was still likely to weed out those with disorders from promotions. That violated the ADA.

Third, an employer cannot circumvent the ADA's prohibition on pre-employment or pre-promotion medical examinations by not using a psychiatrist, psychologist or doctor. It seems that Rent-A-Center had hoped to avoid liability by not using a doctor. Many employers have received advice from counsel that a test is not an unlawful pre-employment medical examination if a physician is not involved in the process. That is not correct advice currently, whether or not it was before.

Finally, and most important, an employer should thoroughly evaluate whether it needs to test its employees. A test must be job-related and measure the applicant's ability to perform the job. Management should ask if there is a business necessity for the test. If a test is not reasonably related to the essential functions of the job, a court is more likely to hold that the test is unlawful.

The court clearly did not believe Rent-A-Center's explanation for administering the MMPI. When pressed for its explanation, Rent-A-Center stated that it had administered the test to only determine whether its employees were in a "good mood." The court noted, "why would RAC care if an applicant lost his keys the morning of the MMPI or took the test the day of another Cubs loss? Would RAC really want to exclude an employee from consideration for a promotion because he happened to feel sad on the wrong day?" The court did not believe Rent-A-Center partly because it could not articulate how the MMPI test was related to a managerial position. Thus, before using a personality test or any other test, an employer must have some specific need and that need must be related to the job at hand.

Also, an employer should consider whether the test screens out a disproportionate number of applicants or employees in a protected class—e.g., women, minorities or disabled individuals. In such a case, the employer must be able to show, at a minimum, that the test is job-related and consistent with business necessity.

Nonetheless, employers are not completely barred from using tests. If a job requires heavy lifting, an employer can test if the applicant can lift the appropriate weight. If the job requires an elevated intelligence, an employer can test for intelligence. In fact, the court did not reject Rent-A-Center's use of other parts of the executive test battery that were designed to measure honesty, preferences or habits. In the first paragraphs of the opinion, the court discusses how modern professional athletes are now being tested for their intelligence. Thus, an IQ test or similar tests that are not designed in part to discover mental disorders should be acceptable. An employer should, therefore, have a checklist of the essential functions of a position that it wants to test and then determine if the proposed test actually evaluates those functions.

The bottom line is that an employer cannot use a test for a hiring or promotion decision if the test was designed at least in part to discover or reveal mental illness. Such a test lowers the applicant's chance of hiring if he or she has a mental disability. ■

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