



Employment Screening: What's Legal, What's Not?

People with chronic illness often feel they are being unfairly discriminated against because of their disease. But, there are laws in place to protect against this, guidelines that patients can follow and even recourse they can seek.

By Jennifer Kester

When college student Tyler Sutton started his job hunt, he was confident. The exceptional student was in a top-rated program at a private university, where big firms recruit prospective employees before they graduate. He was practically guaranteed a job. But Sutton started to worry when the offers weren't coming in. "I would be interviewing for some of the same positions as someone else; I'd have a higher grade point average than they would, have better social skills than they would and they'd give them a job offer," he says. "No matter how well the job interview went, I wouldn't get asked for a second interview. I went back to one of the recruiters to find out what the interviewer had to say as to why I didn't get the job. The only feedback I got was to speak up louder."

Although Sutton couldn't pinpoint why he failed to get past the initial interview, he later found out that the companies do Internet searches on job candidates before the second interview. Then it made sense: An online search for Sutton, who has common variable immune disease (CVID), turns up his volunteer work with an immune deficiency charity, as well as stories about him featured in *IG Living* magazine. So he came to the logical conclusion: He was a victim of employment discrimination because of his disease.

The Americans with Disabilities Act: A Safeguard?

The Americans with Disabilities Act (ADA) prohibits workplace discrimination against people with disabilities, such as chronic illnesses, as long as they can perform the

essential functions of the job. The act also allows for disabled employees to receive reasonable accommodations, which can range from ergonomic chairs to frequent bathroom breaks. But for chronically ill patients who are looking to get hired, the ADA isn't a foolproof safeguard. "The problem with employment law cases in a failure to hire is it's almost impossible to prove," says Arizona healthcare lawyer Joel Wakefield. "It's difficult to show they just didn't have some other pretense, in absence of a specific statement, if they say, 'We found someone more qualified.'"

Title I of the Americans with Disabilities Act restricts the questions that prospective employers can ask about a disability before making a job offer, like how a person handles stress or whether they work well under pressure. "The stereotypical red flags for sickness-[related] or disability-related discrimination that could be proxies for finding out [about] people's health are: How active are you? Do you enjoy outdoor activities?" says Wakefield. He adds that questions of attendance from previous jobs should be ones to answer carefully as well: "Those could be very innocuous questions, but they could not be. It puts you on notice that they are paying attention to those things."

Another red flag is if the interviewer asks whether candidates have a physical condition that would interfere with their ability to do the job, says Jennifer C. Jaff, attorney and founder of Advocacy for Patients with Chronic Illness Inc. But even if they feel the question is inappropriate, calling out the interviewer on it may not be the best option. "If

someone asked me if I had a physical condition that would interfere with my job, if the answer is no, I would just say no," says Jaff. "My philosophy about a lot of this stuff is you could fight about it, but if you want a job, a lawsuit won't do you any good." Another problem, Jaff points out, is how the interviewee's reaction will read with the interviewer. "If you don't answer the question or assert you won't answer the question, you won't get the job, not because you're disabled but because you're argumentative. People are looking to hire individuals who are going to get along with others in the workplace," she says. "So if there's a way to answer the question without making a big deal out of it, I'd do it."

There is a stipulation in Title I that says it applies only to employers with 15 or more employees in 20 nonconsecutive workweeks, which basically gives small-business owners more

leeway in asking questions during an interview. "The fact that you can't sue someone for something doesn't mean they shouldn't do it," says Jaff. "I would still consider those questions inappropriate, and it might be a place you don't want to work."

To Tell or Not to Tell

Jaff says people don't have to disclose any illnesses to an interviewer. "You're not legally obligated to tell, unless it prevented you from doing your job," she says. "Or unless it's a safety hazard for them and other employees. If you have a problem that poses a safety hazard and don't tell anyone about it, you're liable." And if an individual gets a job, she advises keeping any illness under wraps, at least for a while. "At work, I pretty much showed people I'm a workaholic and then told, so that the employer never had a question that I was not

What Can and Cannot Be Asked During an Employment Interview

Many laws exist to protect people from being discriminated against during employment interviews. For the chronically ill, these laws can be especially important for patients to understand. The U.S. Equal Employment Opportunity Commission (EEOC) has specific guidelines for disability and medical questions and exams on its website. According to the U.S. EEOC:

- Under the law, employers generally cannot ask disability-related questions or require medical examinations until after an applicant has been given a conditional job offer. This is because, in the past, this information was frequently used to exclude applicants with disabilities before their ability to perform a job was evaluated.
- Employers are permitted to ask limited questions about reasonable accommodation if they reasonably believe that the applicant may need accommodation because of an obvious or voluntarily disclosed disability, or where the applicant has disclosed a need for accommodation.
- Employers may ask if the applicant will need an accommodation to perform a specific job duty, and if the answer is yes, the employer may then ask what the accommodation would be.
- The employer may not ask any questions about the nature or severity of the disability.

The U.S. EEOC also lists the American with Disabilities Act (ADA) restrictions on employers when it comes to asking job applicants to answer medical questions, take a medical exam or identify a disability:

- An employer may not ask a job applicant, for example, if he or she has a disability (or about the nature of an obvious disability). An employer also may not ask a job applicant to answer medical questions or take a medical exam before making a job offer.
- An employer may ask a job applicant whether they can perform the job and how they would perform the job. The law allows an employer to condition a job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same job have to answer the questions or take the exam.
- Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer has reason to believe an employee would not be able to perform a job successfully or safely because of a medical condition.
- The ADA also requires that the employers keep all medical records and information confidential and in separate medical files.

What Employers Cannot Ask

Do you have a disability?

Have you had any recent surgeries or illnesses that required hospitalizations?

How many sick days did you take last year?

How much do you weigh?

Do you take medications?

Have you had any major illnesses?

Do you have any children?

Or, do you have family members with health concerns?

What Employers Can Ask Instead

Are you able to perform certain tasks required of this job?
How would you perform the job functions?

Are you able to perform the required job duties with or without reasonable accommodations?

Can you meet our attendance requirements?

Are you able to lift up to 50 pounds?

Do you use illegal drugs?

Can you meet our attendance requirements?

Are you able to work overtime on occasion?

Can you travel?

going to be reliable, be absent, that I wasn't going to work hard, that type of thing," says Jaff, who has Crohn's disease.

Wakefield also had to face telling his employers about his chronic illness. He felt guilty after the law firm was told that someone in the group had a condition that was very expensive. "I assumed it was me. Ultimately, this was costing my partners money and that was troubling to me, so I went to one of them eventually," he says. "I didn't want to be the insurance burden, but they said, 'Absolutely not, this is what it is to be a human being.' So I stayed on, but I was faced with a decision of where I was going to work based on my condition. One has to be really, really careful."

But coming clean to employers about a health issue doesn't always end well. On *IG Living's* Facebook page, Lisa E. Hadden Smith revealed she had problems in her workplace. She wrote: "New boss told me people like me are a burden on companies. She asked why I would keep working." But while Hadden Smith missed only four days of work in a year, she said she felt targeted and that her boss might look for a way to fire her. It seemed timely, since her doctors had been talking about her leaving work due to her CVID and T cell failure. "I decided rather than fight the issue, it was time to leave the workplace," she wrote.

Submitting to Testing

Another gray area concerns health exams. Some employers are giving conditional job offers that depend upon the passage of a health exam, or even hair or urine samples to test for drugs. Although companies aren't allowed to misuse that information, it can be disconcerting to be forced to submit to these tests if a person has a chronic illness. "Those kinds of things are usually for law enforcement, people who have to operate heavy machinery or places where safety is an issue," says Jaff. However, she says, if candidates do find themselves with a rescinded job offer after something turns up on their health exam, and the finding has no relation to their future duties, they can file a complaint. Sutton does research before submitting to any tests. "I look into it to see if it's not on the company record and make sure it's not going to be in my employee file or anything of that nature," he says.

Beware of an Online Presence

The media poses another workplace problem for people with chronic illnesses. Patients regularly use social media forums, such as Facebook, as well as other websites, such as *IGLiving.com*, as resources. But as Sutton's case proves, it can backfire, and future employers can use the information against people. However, Sutton doesn't regret being interviewed for stories and participating in the online community

for those with immune deficiencies. "I am more passionate that it gets out there and people can hear about it," Sutton says. "It's something I keep in mind now, but it doesn't stop me from doing what I want to do."

Jaff says there are ways to protect personal online identity to ensure they have privacy. "First off, never use your work computer. People should know that anything you do on your work computer belongs to your employer. Anything you do on that computer, they own," she says. "People use fictitious names, some people only talk about illness on websites that require registration." The general rule of thumb for anything that is put on the Internet applies here. "You just have to be very careful about how you maintain your online presence," says Wakefield. "If you don't want there to be a possibility that someone will do something improper with your health information, you have to be careful [about] how you share it."

Is There Recourse?

Hiring cases are difficult to win, but if a person doesn't get the job and really feels that their interviewer was in the wrong, there are options. Wakefield recommends taking careful notes right after the interview and writing down verbatim what was said. He adds that consulting a human resources attorney, who can tell them if there's a potential for discrimination, is an option. "Usually they'll do a free consultation or a low-cost consultation and you'll get a pretty quick sense if the lawyer thinks there's something there or not," says Wakefield. Jaff adds that people can seek help at the National Health Law Program, a public interest law firm that protects the healthcare rights of low-income or underserved people, or her own organization, Advocacy for Patients with Chronic Illness Inc., which provides free information, advice and advocacy services to those with chronic illnesses.

Never Give Up

But job-seekers with chronic illnesses needn't lose hope. Sutton is set to graduate this spring and has a government job lined up. He offers this advice: "You have to keep applying. You just have to keep on working it. If you let yourself be a victim of these issues, then it never gets solved." ■

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Sources:

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