

# IMPROPER JOB APPLICATION QUESTIONS PUT FLORIDA EMPLOYER IN JEOPARDY OF LOSING WORKPLACE DISABILITY CLAIM

Insights  
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A Florida federal court just denied an employer's effort to dismiss a disability discrimination claim filed by a legally blind applicant who alleges the employer asked improper pre-offer questions on its standard job application. The December 8 decision from the U.S. District Court for the Middle District of Florida means that the public library in Lee County will need to continue defending the litigation and could one day face a jury trial over its hiring practices. What can all employers learn from this court ruling – and what can you do to minimize the chances of facing similar allegations in the future?

## 2 Questions Lead to Disability Lawsuit

The Pine Island Public Library's job application contained two questions that led to the dispute at issue:

- One question was whether the applicant had a valid driver's license.
- The second question was whether the applicant was "disabled."

As hard as it is to believe in the year 2021, these two questions were included in the application that was completed and submitted twice by applicant Michael Phelps (no, not the swimmer) in 2019 and again in 2020.

Mr. Phelps suffers from "acute bilateral atrophy," which has caused him to be visually impaired since birth. He is legally blind in both eyes. Despite his circumstances, Phelps was

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valedictorian of his high school class, graduated cum laude with an associate degree in Business Administration, and is currently pursuing a bachelor's degree in Business Administration. Between 2013 and 2019, Phelps worked at a public library in Cabell County, West Virginia where, with reasonable accommodation, he was able to perform his job at a "satisfactory level."

After filling out the application and answering those two questions listed above, Phelps alleges that he was rejected from job openings at the library for which he was otherwise qualified and could have performed with reasonable accommodation. He filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) and the U.S. Equal Employment Opportunity Commission (EEOC) in September 2020, and later filed a lawsuit in a Florida federal court in February 2021.

### **Library's Defenses Fall Flat**

Phelps asserted two claims under the Americans with Disabilities Act (ADA) and one FCHR claim. First, he asserted the library asked impermissible pre-employment screening questions in violation of the ADA. Second, he alleged disparate impact claims under both Title I of the ADA and the FCRA, claiming that the questions had an inappropriate impact on him even if they had originally been intended to be innocent and non-discriminatory and not crafted with any sort of discriminatory motive.

In its initial Statement of Position, the library asserted that having a valid driver's license and the ability to drive were conditions of employment because the Library Associate position it was hiring for required "that the employee make bank deposit runs on a regular basis and attend multiple off-site meetings." These arguments, however, weren't sufficient to convince the court to dismiss the case at the early stages of the litigation.

### ***Court Says Phelps's Complaint Was Sufficient***

The court first denied the library's motion to dismiss for failure to state a claim. It said that to survive a motion to dismiss, a complaint does not have to contain "detailed factual allegations." Rather, it only needs to contain "enough facts to state a claim to relief plausible on its face," and must raise a right to relief that is more than speculative. The court found Phelps had done so.

### ***Damages Showing Not Necessary – Yet***

The court then denied the library's motion to dismiss for failure to state a claim for violation of the ADA section governing certain pre-employment inquiries. The library said this claim should be dismissed because Phelps failed to show he suffered damages. Phelps responded that there is no requirement at the motion to dismiss stage to show damages, and the court agreed. The court found that Section 12112(d)(2)(A) of the ADA prohibits employers from asking a job applicant whether the applicant is disabled or the nature and severity of the disability, and that the library's job application may have violated that provision of the ADA.

### ***Injury in Fact Established***

Further, the court found that Phelps's allegation that he was not hired because of his responses to illegal questions indeed sufficiently alleged an "injury in fact," sufficient to deny the Motion to Dismiss.

### ***Disparate Impact Claim Survives as Well***

Finally, the court also denied Defendant's Motion to Dismiss Phelps' disparate impact claim. While the library argued that Phelps provided no statistical data to prove his argument that sight-impaired applicants were more likely to be hurt by the two application questions than other applicants, the court said that such evidence was not necessary at this early stage of the litigation. It kept the claim alive to allow Phelps to build his case through discovery and determine whether those statistics existed backed up his claim.

### ***Library Also Faulted for Technical Litigation Errors***

Interestingly, the court initially granted an earlier Motion to Dismiss filed by the library but did so "without prejudice," meaning that Phelps could re-file his complaint (which he did). In the library's second Motion to Dismiss, it also alleged other deficiencies: that Phelps failed to exhaust administrative remedies because he did not "verify" his charge of discrimination, failed to include disparate impact allegations in the charge, and that some of his claims were time-barred. However, Phelps responded that these defenses were waived when the library did not raise them in its first Motion to Dismiss. The court agreed and waved away these arguments.

## 2 Big Takeaways for Employers

The takeaways from this case are two-fold:

1. First, defendants must be thorough in their pleadings and motions, making certain they raise all potential bases for dismissal at the outset and leave no stone unturned. In this case, the employer did not make certain key arguments right off the bat and thus wasted its chance to do so. Employers should work with their attorneys at the outset of any claim to make sure you capture any and all valid defenses.
2. Second, this case should serve as a reminder that you need to scrutinize your job application regularly – and update it timely. Candidly, it should be a no-brainer to NOT ask whether an applicant is disabled and if so, to what extent. Leave those questions for a post-offer, pre-employment questionnaire, when such questions are permissible. If you do ask them, you should also ask the follow-up questions of what essential life function does the disability impair, what essential job duty does the disability impair, and what reasonable accommodation could be implemented to allow the applicant to perform the essential functions of the position.

We will monitor developments in this area and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in any of [our Florida offices](#) or our [Employee Leaves and Accommodations Practice Group](#).