

PRE-EMPLOYMENT TESTS OF “FIT” UNDER THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

(1) An individual with low vision applies for a management position. The employer uses a “gamified” assessment—an assessment that requires the applicants to play video games—to measure applicants’ decision-making speed, ability to focus under pressure, and impulsiveness. Because the applicant has difficulty seeing the screen, he is unable to complete the test. His application is not advanced to the next round.

(2) An employer uses video interviewing software to screen applicants for its computer programming positions. The software analyzes the applicants’ verbal inflections, word choices, eye contact, and facial expressions to measure personality traits that are statistically associated with high performance in the employer’s current workforce. An individual with partial facial paralysis applies and is given the assessment. Because her facial expressions and speech patterns differ significantly from those of typical high performers, the results show that she does not have personality traits that correlate with success in computer programming. She is not hired.

(3) A successful finance specialist who takes Prozac for depression is asked to take a personality assessment when applying for a financial auditor position. Data show that the most successful financial analysts at the company have an “optimism” score of between four and seven out of ten. Because the applicant only scores a three, she is not hired.

In these examples, the candidates could easily have been the best choice for the job. Their medical conditions do not preclude high performance—individuals with low vision may be successful managers, people who have partial facial paralysis may be successful computer programmers, and people with depression may be successful financial advisors. Yet, in all three cases, the condition affected the results of a computer-based assessment that resulted in the applicant’s non-selection.

The examples are fictional, but events very similar to these may already be occurring. Advances in computer processing power and data

storage, together with the emergence of “machine learning” and other forms of artificial intelligence (“AI”), have spurred the development of sophisticated pre-employment tests like the ones described above.

Because these assessments typically favor applicants who are similar to successful incumbents, some have raised the concern that these assessments may be biased against historically disadvantaged groups. Almost always, this worry has focused on bias against women and racial minorities.¹ Accordingly, the legal literature contains a growing body of research on whether use of these tests might violate Title VII of the Civil Rights Act of 1964 (“Title VII”),² the federal statute banning employment discrimination on the basis of race, color, national origin, sex, and religion.³

By contrast, little to no attention has been paid to whether the use of these tests might disadvantage individuals with disabilities in violation of the Americans with Disabilities Act (“ADA”).⁴ Individuals with disabilities also are significantly disadvantaged with respect to employment: in 2017, the employment rate for non-institutionalized working-age individuals with disabilities in the United States was 37.3 percent,⁵ as compared to 79.4 percent for individuals without disabilities;⁶ the median earnings of non-institutionalized working-age individuals with disabilities who worked full-time was \$40,400 compared to \$47,500 for like individuals without disabilities;⁷ and the poverty rate for non-institutionalized working-age individuals with disabilities was 26.1 percent, as compared to 10.4 percent for like individuals without disabilities.⁸

¹ See, e.g., MIRANDA BOGEN & AARON RIEKE, UPTURN, HELP WANTED: AN EXAMINATION OF HIRING ALGORITHMS, EQUITY, AND BIAS 29–36 (2018) (suggesting that pre-employment testing may be biased with respect to race, sex, and cultural background, and similar characteristics).

² 42 U.S.C. §§ 2000e–2000e-17 (2018).

³ See, e.g., Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671 (2016); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017); Roger W. Reinsch & Sonia Goltz, *Big Data: Can the Attempt to Be More Discriminating Be More Discriminatory Instead?*, 61 ST. LOUIS U. L.J. 35 (2016); Timothy M. Snyder, *You’re Fired! A Case for Agency Moderation of Machine Data in the Employment Context*, 24 GEO. MASON L. REV. 243 (2016); Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395 (2018).

⁴ 42 U.S.C. §§ 12101–12117 (codifying Title I of the Act, prohibiting discrimination in employment).

⁵ The following statistics come from the 2017 American Community Survey (“ACS”). The ACS definition of “disability” is different than the ADA definition. There are, however, no statistics available for employment of individuals with “disabilities” as that term is defined by the ADA.

⁶ W. ERICKSON ET AL., YANG-TAN INST., 2017 DISABILITY STATUS REPORT: UNITED STATES 31 (Cornell Univ. 2019), https://www.disabilitystatistics.org/StatusReports/2017-PDF/2017-StatusReport_US.pdf [<https://perma.cc/5Z2H-QUHG>].

⁷ *Id.* at 37.

⁸ *Id.* at 41.

This Article seeks to begin the discussion of whether, and under what circumstances, the ADA prohibits employers from using computer-based assessments to make selection decisions. Part II describes the kinds of tests at issue, which I have called “tests of fit”—that attempt to measure personality traits, aptitudes, cognitive skills, values, motivations, and other similar characteristics that are said to predict how well a candidate will “fit” with a given position. Part III provides an overview of the ADA provisions that are most likely to be relevant in cases challenging pre-employment tests. Part IV argues that tests of fit likely do, under some circumstances, unfairly exclude qualified individuals with disabilities in violation of the ADA.

This Article does not address whether or how the ADA’s restrictions on an employer’s access to medical information⁹ apply to tests of fit. Both the testing¹⁰ and legal¹¹ communities appear already to have some familiarity with those issues. Moreover, the ADA’s restrictions on access to medical information only indirectly relate to the core problem of unfair exclusion of individuals with disabilities from employment. I therefore leave discussion of how the ADA’s privacy provisions apply to tests of fit for another time.

⁹ The ADA strictly limits the circumstances under which employers may require job applicants and employees to answer disability-related questions or undergo medical examinations. See 42 U.S.C. § 12112(d)(1), (2)(A), (3), (4)(A) (2018); 29 C.F.R. § 1630.13 (2021). It also imposes strict confidentiality requirements on any medical information obtained by the employer. See 42 U.S.C. § 12112(d)(3)(B), (4)(C); 29 C.F.R. § 1630.14(b)(1), (c)(1). Employers should also be aware that Title II of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff–2000ff-11, strictly prohibits the acquisition of a job applicant’s or employee’s genetic information, which is defined to include all family medical history. See 42 U.S.C. §§ 2000ff(4)(A) (defining “genetic information”), 2000ff-1(b) (generally prohibiting employers from acquiring genetic information).

¹⁰ See, e.g., Arturia Melson-Silimon et al., *Personality Testing and the Americans with Disabilities Act: Cause for Concern as Normal and Abnormal Personality Models Are Integrated*, 12 *INDUS. & ORGANIZATIONAL PSYCH.* 119 (Cambridge Univ. Press 2019) (discussing whether newer models of personality disorders convert personality tests into “medical examinations” for purposes of the ADA). This piece, written by a psychologist, was featured as a Focal Article in the journal, and several authors provided commentary. See *id.*

¹¹ See, e.g., Alan M. Goldstein & Shoshanah D. Epstein, *Personality Testing in Employment: Useful Business Tool or Civil Rights Violation?*, 24 *LAB. LAW.* 243 (2008) (primarily discussing whether traditional personality tests are “medical examinations for purposes of the ADA”); Scott P. Kramer, *Why Is the Company Asking Me About My Fear of Spiders? A New Look at Evaluating Whether an Employer-Provided Personality Test Constitutes a Medical Examination Under the ADA*, 2007 *U. ILL. L. REV.* 1279 (2007) (same); see also *Karraker v. Rent-A-Center*, 411 F.3d 831, 838 (7th Cir. 2005) (awarding summary judgment to the plaintiffs on their claim that the employer’s use of the Minnesota Multiphasic Personality Inventory (“MMPI”) constituted a “medical examination” for purposes of the ADA).

II. TESTS OF FIT

A. GENERAL DESCRIPTION

Tests of fit are perhaps best thought of as two separate assessments, one performed after the other. The first assessment, administered directly to the applicant, is intended to measure individual traits such as personality traits or cognitive abilities. The results of this first assessment are then used as data for the second assessment, an assessment of "fit." For example, the first assessment might measure an applicant's extroversion, openness, and attention to detail, and subsequently assign the applicant a score of six, three, and eight for these traits, respectively. The second assessment then would determine how well someone with an extroversion score of six, an openness score of three, and an attention to detail score of eight would "fit" with the particular position in which the applicant is interested. A separate "fit" score might be generated at this point. I will call the first type of assessment an "attribute assessment" and the second a "fit assessment." Because the process for generating the results of a fit assessment is carried out automatically by a computer, it often is called an "algorithm." It also is sometimes called a "model" because it contains information about (it contains a "model of") the type of person who would fit with the position.

A personality test offered by vendor Traitify is illustrative. In the first stage of the Traitify assessment, applicants are shown a series of images on a computer, phone, or tablet screen.¹² In response to each image, the subject is required to select either "Me" or "Not Me," depending on whether the person identifies with the individual or activity depicted in the image.¹³ Based on the applicant's responses to each image, Traitify assigns the applicant a score for each of the following five personality traits the test measures: "openness," "conscientiousness," "extroversion," "agreeableness," and "emotional stability."¹⁴

To develop the model or algorithm, Traitify first administers the same assessment that is used to assess applicants to a sample of the employer's current employees. At the same time, it collects data on each employee's work performance from the employer. Traitify then looks for correlations between the employees' personality traits, as measured by the attribute

¹² See *The New Gold Standard in Personality Assessment*, TRAITIFY, <https://www.traitify.com/science> [<https://perma.cc/LZ29-Q3FL>].

¹³ See *id.* ("Test-takers not only answer quickly but are more likely to be honest through our rapid series of images and 'me' / 'not me' choice.").

¹⁴ See *Platform*, TRAITIFY, <https://www.traitify.com/platform> [<https://perma.cc/A53B-BCNW>].

assessment, and performance, as measured by the employer-provided data.¹⁵ Finally, these correlations are used to construct a model or algorithm that is designed to assign the highest “fit score” to applicants with the personality traits that were found to correlate most strongly with performance in the sample of incumbent employees.¹⁶

Once the model or algorithm has been developed, it is applied to applicants’ test results. The highest scores will be assigned to the applicants who are most similar to the employer’s current high performers with respect to the traits that were found to correlate with performance in the sample. By choosing the applicants with the highest scores, employers thus are able to “clone [its] best people.”¹⁷

B. DIFFERENCES

There is considerable variation between tests within this basic two-part framework along four main dimensions: (1) which traits are measured, (2) testing format, (3) methodology of test development, and (4) method of communicating the results of the assessment to the employer.

1. Traits Measured

Tests vary with respect to the traits measured by the attribute assessment. Some tests, like the Traitify test, measure personality traits. They do not all measure the same traits, however. A test offered by Berke, for example, measures “adaptability,” “assertiveness,” “responsiveness,” “intensity,” “optimism,” “sociability,” and “structure.”¹⁸ Prevue HR characterizes the traits measured by its personality test with pairs of descriptors representing opposite extremes on a continuum.¹⁹ Test-takers are scored on a scale of one to ten for each trait, depending on how closely their responses match those of individuals at either extreme of the

¹⁵ *A.I to Make Hiring More Human*, TRAITIFY, <https://www.traitify.com> [<https://perma.cc/7GLG-XLNW>] (“Traitify designed a machine learning algorithm that combines employee performance data and personality data to prioritize applicants who match top performers.”).

¹⁶ *Id.* (displaying a rank-ordered list of candidates).

¹⁷ *Id.* (“I wish I could clone my best people. We hear this from customers all the time.”).

¹⁸ *See Assessment*, BERKE, <https://www.berkeassessment.com/features/assessment> [<https://perma.cc/PL9T-RGMH>].

¹⁹ *See Assessment Suite*, PREVUE HR, <https://www.prevuehr.com/products/the-assessment-suite> [<https://perma.cc/B7DR-EE5S>].

continuum in the general working population.²⁰ A score of one on the “excitable vs. relaxed” scale, for example, indicates that the subject is among the 2.5 percent most “excitable” people in the general working population, and a score of ten indicates that the subject is among the 2.5 percent most “relaxed.”²¹ Other Prevue scales include the “cooperative vs. competitive,” “reactive vs. organized,” and “reserved vs. outgoing” scales.²²

Some tests measure traits that are more akin to aptitudes or cognitive abilities, rather than traditional personality traits. Pymetrics’ pre-employment tests, for example, measure traits such as “attention duration,” “processing consistency,” “planning speed,” “flexibility in multi-tasking,” “distraction filtering agility,” and “memory span.”²³ Berke offers employers the option of measuring, in addition to the test’s initial seven personality traits,²⁴ the following four “problem solving traits”: “logical problem solving,” “rapid problem solving,” “spatial visualization,” and “vocabulary.”²⁵ A test offered by Plum measures ten “talents”: “adaptation,” “communication,” “conflict resolution,” “decision making,” “embracing diversity,” “execution” (setting goals and monitoring progress), “innovation,” “managing others,” “persuasion,” and “teamwork.”²⁶

Tests of fit also sometimes measure a third category of trait. Often, these traits are relevant to detecting whether the applicant will be a good “cultural fit.”²⁷ Harver’s cultural fit test, for example, uses the Organizational Culture Assessment Instrument, which classifies organizations into four cultures: the “clan” culture, which is described as being “family like,” and as emphasizing “mentoring and nurturing employees”; the “adhocracy” culture, which encourages risk taking and innovation; the “hierarchy” culture, which is structured with a clear focus on efficiency and stability; and the “market” culture, which is results-

²⁰ See PREVUE HR, JOHN JOHNSON JOB FIT REPORT 3–4 (Jan. 6, 2020) [hereinafter PREVUE REPORT], https://www.prevuehr.com/drive/uploads/2020/01/JobFit_John_Johnson-2020.pdf [<https://perma.cc/R65V-8JXX>]

²¹ See *id.*

²² *Id.* at 4.

²³ See Sarah Butcher, *Remember This Before You Play JPMorgan’s New Pymetrics Games*, EFINANCIALCAREERS (Aug. 19, 2019), <https://news.efinancialcareers.com/uk-en/3001873/jpmorgan-pymetrics> [<https://perma.cc/872L-R6CQ>].

²⁴ See *supra* note 18 and accompanying text.

²⁵ *Assessment*, *supra* note 18.

²⁶ Neil Christiansen & Leann Schneider, PLUM, THE SCIENCE BEHIND ULTRAVIOLET 4, <https://www.plum.io/hubfs/Resources/The%20Science%20Behind%20Ultraviolet.pdf> [<https://perma.cc/K36F-26NJ>].

²⁷ *Cultural Fit Assessment*, HARVER, <https://harver.com/assessments/cultural-fit-assessment> [<https://perma.cc/CUG7-Y3GE>].

oriented and focuses on competition and achievement.²⁸ Applicants' preferences between these four cultures are measured and subsequently compared to the company's actual or preferred culture. Other tests claim to measure "values,"²⁹ "motivations,"³⁰ "ideal work environment,"³¹ and "life priorities,"³² to much the same effect.

2. Test Format

Tests of fit may vary with respect to testing format. A test offered by Cappfinity, for example, uses a traditional self-assessment survey to measure personality traits.³³ Modern Hire asks applicants to provide free-form answers to open-ended questions.³⁴ Another company, Pymetrics, relies on data gathered while applicants play video games.³⁵ In one Pymetrics game, red and green dots appear on a screen and applicants are asked to click when only the red dot is displayed.³⁶ The data gathered while applicants play this game are used to measure "impulsivity," "attention span," and "ability to learn from mistakes."³⁷

²⁸ *Id.*

²⁹ *See, e.g., id.* ("The Harver cultural fit assessment compares a candidate's personal values and preference for organizational culture with the actual culture at your organization or culture you are aiming to have.").

³⁰ *See, e.g., Hire People Who Actually Think Their Job Is Cool*, PREVUE HR, <https://www.prevuehr.com/products/motivations-assessment> [<https://perma.cc/5D5E-7KDE>] ("Prevue's Motivations & Interests assessment uncovers candidates' intrinsic motivation and how likely they are to stick around if they're hired.").

³¹ *See Measure, Manage & Hire for Culture*, HUMANTELLIGENCE, <https://humantelligence.com> [<https://perma.cc/Q25X-37S8>].

³² *See* HUMANTELLIGENCE, <https://us.humantelligence.com/products/talent-fit-recruiting> [<https://perma.cc/T5CV-BB3D>] (displaying an applicant evaluation listing the life priorities of freedom, personal development, pleasure, creativity, and adventure).

³³ *See* BOGEN & RIEKE, *supra* note 1, at 30.

³⁴ *See* Virtual Job Tryout, *A Better Way to Handle Pre-employment Assessment Testing*, MODERN HIRE, <https://modernhire.com/platform/assessments> [<https://perma.cc/4V9S-HYRT>].

³⁵ *See* Science, PYMETRICS, <https://www.pymetrics.ai/science> [<https://perma.cc/JJL7-9KUW>].

³⁶ *See* BOGEN & RIEKE, *supra* note 1, at 32.

³⁷ *See id.*

HireVue emphasizes that it uses more than one type of data to assess applicants.³⁸ In addition to data gathered while the applicant plays games,³⁹ HireVue relies on data gathered from video of the applicant answering job interview questions.⁴⁰ Particular data points gathered from the recording may include, for example, facial expression, eye contact, vocal indications of enthusiasm, word choice and complexity, topics discussed, and word groupings.⁴¹

3. Test Development

Tests of fit also differ with respect to their methodology for developing the model or algorithm that is used to predict the applicant’s degree of fit. Many use a methodology similar to that used by Traitify: a sample of the employer’s current employees is given the base-level assessment; the vendor looks for correlations between the measured traits and performance; and the vendor constructs the model or algorithm in such a way that it will assign the highest scores to the applicants who have the traits that correlate most strongly with performance in the sample of current employees.⁴²

Other vendors use general information about the type of position being filled to create trait profiles. HR Avatar describes its process as follows:

HR Avatar uses the job analysis performed by the U.S. Department of Labor’s Occupational Information Network (O*NET). This continually updated database estimates the relative importance of various knowledge elements, skills,

³⁸ See *About Us*, HIREVUE, <https://www.hirevue.com/about> [<https://perma.cc/4LGL-KBEK>] (“By combining video interviews with predictive, validated IO science and artificial [sic] intelligence (AI), HireVue augments human decision-making in the hiring process and delivers higher quality talent, faster.”).

³⁹ See *Online Gamified Assessments*, HIREVUE, <https://www.hirevue.com/products/assessments> [<https://perma.cc/2ESY-K7QE>].

⁴⁰ See Maria Bartiromo, *The Hiring Power of AI*, HIREVUE, <https://www.hirevue.com/resources/the-hiring-power-of-ai> [<https://perma.cc/KSF6-YQM3>].

⁴¹ BOGEN & RIEKE, *supra* note 1, at 36.

⁴² See, e.g., *Benchmark Studies*, BERKE, <https://www.berkeassessment.com/features/benchmark-studies> [<https://perma.cc/VQJ5-JMWT>] (“Invite your team members in a specific job to complete the assessment and ask their managers to rate their job performance. Berke’s research team statistically analyzes the data and identifies the traits that separate your top performers from everyone else. The result is a finely tuned hiring profile that shows you who to hire next and who to avoid.”); *Science*, *supra* note 35 (“We build custom, cross-validated profiles for each role and company based on top performers.”); *Virtual Job Tryout*, *supra* note 34 (“Predictive analytics require two forms of data: assessment responses and your performance metrics. Your metrics precisely differentiate your employees, and our assessment is designed to predict those metrics with a high degree of accuracy and treat your diverse candidate pool fairly.”).

and abilities for more than 900 occupations. We use this data to determine which traits to measure within each test and to set the relative importance or ‘weight’ of each of them.⁴³

4. Results

Lastly, tests of fit may vary with respect to the way they communicate the results of the fit assessment—that is, the degree to which the applicant fits with the open position. Prevue, for example, reports the applicant’s scores for each trait measured by the attribute assessment, along with a range of “preferred” scores for each of those traits.⁴⁴ This allows the employer to judge the degree of fit on a trait-by-trait basis. Other vendors provide a single summary score, often between one and one hundred, indicating the overall degree of fit.⁴⁵ The results also may include a narrative report that translates the scores into a description of the individual.

III. LEGAL BACKGROUND

This Part provides a brief overview of the ADA, with a particular focus on the two provisions that are most likely to be relevant in cases challenging pre-employment tests: (1) the provision governing employment tests, 42 U.S.C. § 12112(b)(7) (“Section (b)(7)”), and (2) the provision governing selection criteria, 42 U.S.C. § 12112(b)(6) (“Section (b)(6)”).

A. GENERAL FRAMEWORK

The ADA generally prohibits disability-based discrimination in employment. It applies to private employers with fifteen or more employees, state and local governments, employment agencies, labor unions, agents of the employer, and joint management labor committees.⁴⁶

⁴³ *The Science of Pre-employment Testing*, HR AVATAR, <https://www.hravatar.com/ta/help/testing-science.xhtml> [<https://perma.cc/F5MC-C8RE>].

⁴⁴ See PREVUE REPORT, *supra* note 20, at 4 (identifying preferred scores in the shaded regions of each scale).

⁴⁵ See, e.g., *Koru7 Impact Skills*, CAPPINITY, <https://www.cappfinity.com/us/koru/> [<https://perma.cc/B46Z-723D>] (stating that each candidate is assigned a numeric “Candidate Fit” score); BOGEN & RIEKE, *supra* note 1, at 36 (stating that each applicant who undergoes a HireVue assessment is assigned an “insight score” between zero and one hundred, depending on how similar he/she is to the employer’s current high performers).

⁴⁶ 42 U.S.C. § 12111(2) (2018).

Although the federal government is not subject to the ADA, the same protections are extended to federal workers through Section 501 of the Rehabilitation Act of 1973.⁴⁷

The ADA prohibits various kinds of discrimination in employment, including “disparate treatment,” which occurs when an employer intentionally takes adverse action against a job applicant or employee on the basis of disability;⁴⁸ disability-based harassment;⁴⁹ and retaliation for engaging in protected activity.⁵⁰ The ADA also requires employers to provide “reasonable accommodations” to certain individuals with disabilities.⁵¹ A reasonable accommodation is a change in the way things are ordinarily done that enables a person with a disability to do perform a job, apply for a job, or enjoy equal access to the benefits and privileges of employment.⁵² They may include, for example, modifications of workplace policies,⁵³ specialized equipment,⁵⁴ changes in work location,⁵⁵ and modified working conditions.⁵⁶

The ADA’s core protections against discrimination do not extend to everyone in the workplace—most⁵⁷ ADA protections only apply to individuals with “disabilities.” Because the ADA’s definition of “disability” is much broader than the ordinary definition, however, the protections extend further than most initially suspect.

⁴⁷ 29 U.S.C. § 791 (2018).

⁴⁸ 42 U.S.C. § 12112(a).

⁴⁹ *Id.*

⁵⁰ 42 U.S.C. § 12203(a). “Protected activity” includes opposition to conduct that is prohibited by the ADA and participation in investigations, proceedings, or hearings under the ADA.

⁵¹ 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9 (2021).

⁵² 29 C.F.R. § 1630.2(o)(1).

⁵³ *See* 42 U.S.C. § 12111(9)(B) (2018) (providing that reasonable accommodations may include “appropriate adjustments or modifications of . . . policies”); 29 C.F.R. § 1630.2(o)(2)(ii) (same).

⁵⁴ *See* 42 U.S.C. § 12111(9)(B) (providing that reasonable accommodations may include “acquisition or modification of equipment or devices”); 29 C.F.R. § 1630.2(o)(2)(ii) (same).

⁵⁵ *See* 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii). For additional information on working remotely as a reasonable accommodation, see U.S. EQUAL EMP’T OPPORTUNITY COMM’N [EEOC], EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (Feb. 3, 2003) [hereinafter TELEWORK GUIDANCE], <https://www.eeoc.gov/facts/telework.html> [<https://perma.cc/LD43-V4FS>].

⁵⁶ *See* 42 U.S.C. § 12111(9)(A) (providing that reasonable accommodations may include making existing facilities accessible to and usable by individuals with disabilities); 29 C.F.R. § 1630.2(o)(2)(i).

⁵⁷ The ADA provisions governing disability-related inquiries, medical examinations, and confidentiality protect all job applicants and employees regardless of disability. *See supra* note 9 and accompanying text.

To have a current⁵⁸ ADA disability, an individual must have a “mental or physical impairment that substantially limits a major life activity.”⁵⁹ “Impairments” are simply medical conditions.⁶⁰ They may include any condition that has a medical diagnosis, including, for example, an injury such as a sprain, broken bone, bulging disc, or torn ligament; a mental health condition such as panic disorder, anorexia nervosa, alcohol use disorder, or borderline personality disorder; an infection such as the H1N1 virus, or common cold; major diseases such as cancer, diabetes, epilepsy, or HIV infection; and losses of sensory function such as blindness or deafness. Note that this is not the definition of “impairment” used by the medical community, which requires “a significant deviation, loss, or loss of use of any body structure or body function”⁶¹ ADA impairments need not involve any such “deviation, loss, or loss of use.”⁶²

“Major life activities” are everyday functions such as walking, lifting, seeing, communicating, and concentrating.⁶³ They also include “major bodily functions” such as functions of the brain and endocrine system.⁶⁴ To say that a major life activity is “substantially limited” by an impairment is to say that the impairment *would*, in the absence of any treatment, assistive devices, or other “mitigating measures,” negatively affect the performance of that function.⁶⁵ An individual’s back injury meets this definition, for

⁵⁸ The ADA definition includes three kinds of disabilities, past or “record-of” disabilities, and perceived or “regarded-as” disabilities. See 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(g)(1) (2021). Because “record-of” and “regarded-as” disabilities are unlikely to be relevant in a case challenging a test of fit, I do not discuss them further here.

⁵⁹ See 42 U.S.C. § 12102(1)(A) (2018); 29 C.F.R. § 1630.2(g)(1)(i).

⁶⁰ See 29 C.F.R. § 1630.2(h).

⁶¹ The American Medical Association (“AMA”) defines the term “impairment” to mean “a significant deviation, loss, or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease.” See CHRISTOPHER R. BRIGHAM, *AMA GUIDES—SIXTH EDITION: EVOLVING CONCEPTS, CHALLENGES AND OPPORTUNITIES* 11 (Impairment Res. 2011), <https://www.6thedition.com/Training/SixthEditionSyllabus2008-01-23.pdf> [<https://perma.cc/L85G-WB5D>].

⁶² 29 C.F.R. § 1630.2(h).

⁶³ See 42 U.S.C. § 12102(2)(A) (providing examples of major life activities, including those listed here); 29 C.F.R. § 1630.2(i)(1)(i) (providing examples of major life activities, including those listed here).

⁶⁴ See 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(i)(2)(ii) (2021).

⁶⁵ See 42 U.S.C. § 12102(1)(A) (2018) (defining current “disability”), (4)(E)(i) (providing that the determination of whether an impairment “substantially limits” a major life activity shall be made without regard to the ameliorative effects of mitigating measures); 29 C.F.R. § 1630.2(g)(1)(i) (defining “disability”), (j)(1)(vi) (providing that the determination of whether an impairment “substantially limits” a major life activity shall be made without regard to the ameliorative effects of mitigating measures). For additional examples of “mitigating measures,” see 29 C.F.R. § 1630.2(j)(5).

example, if the injury would substantially limit a major life activity (such as standing or lifting) in the absence of assistive devices, surgical intervention, physical therapy, or any other method of mitigating the effects of the condition. Thus, even when well-controlled by medication, a medical condition can qualify as a “disability.”⁶⁶

The degree of functional limitation required for an impairment (medical condition) to qualify as a “disability” is not high.⁶⁷ A condition does not need to permanently or severely restrict a major life activity to qualify. It may qualify, for example, by making activities more difficult, painful, or time-consuming to perform compared to the way that most people perform them.⁶⁸ Moreover, if the effects of the condition are transitory, the relevant factor is how limiting they would be during an active episode (again, without mitigating measures).⁶⁹ Although there is no definitive list of ADA disabilities, the Equal Employment Opportunity Commission (“EEOC” or the “Commission”), the federal agency that enforces the employment provisions of the ADA, has published a list of conditions that should *easily* qualify as ADA disabilities, including epilepsy, diabetes, HIV infection, major depressive disorder, and posttraumatic stress disorder (“PTSD”).⁷⁰ Many other conditions will qualify as well.

Much more could be said about the ADA’s definition of “disability,” but additional detail is not necessary. The central point for purposes of this Article is that the ADA’s protections extend not only to those with

⁶⁶ The fact that the ADA disability determination turns on the functional limitations that an individual would experience under hypothetical circumstances is not at all apparent from the language of the definition, and is the source of much confusion.

⁶⁷ See 42 U.S.C. § 12102(4)(A), (B); 29 C.F.R. § 1630.2(j)(1)(ii) (“An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.”), (iv) (“[T]he term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the [Americans with Disabilities Act Amendments Act (“ADAAA”).]”). The ADAAA, which became effective in 2009, significantly broadened the ADA’s definition of “disability.” See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁶⁸ See 29 C.F.R. § 1630.2(j)(4) (providing that, in determining whether a major life activity is “substantially limited,” it may be useful to consider “the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function”).

⁶⁹ 42 U.S.C. § 12102(4)(D) (providing that a medical condition that is episodic is a disability if it would substantially limit a major life activity when active); 29 C.F.R. § 1630.2(j)(1)(vii) (same).

⁷⁰ 29 C.F.R. § 1630.2(j)(3)(iii) (2021).

paradigmatic disabilities, such as blindness, deafness, or paraplegia, but also to individuals with a wide range of medical conditions.

B. SECTION (B)(7)

Section (b)(7) specifically governs the use of employment tests. Congress observed that qualified individuals are sometimes unfairly excluded from employment because a disability prevents successful performance on the *test*, but not successful performance on the *job*.⁷¹ For example, an applicant who is unable to hear may be unfairly excluded from a position that the applicant is able to perform if an employment test requires applicants to respond to verbal prompts. Section (b)(7) provides that an employer must—

select and administer tests concerning employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employe or applicant⁷²

Although this provision does not use the term “accessible,” it clearly is intended to address the problem of inaccessible tests—having a disability that impairs sensory, manual, or speaking skills required to take a test will render the test “inaccessible,” as that term is normally understood. When a test is inaccessible, it will fail to “accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure.”⁷³ Consider again the person who is unable to hear the verbal prompts given in a test—because the applicant is unable to provide meaningful responses to prompts that the person cannot hear, the test will not assess the applicant as it was designed, but will instead merely reflect “the impaired . . . manual . . . skills of such . . . applicant[.]”⁷⁴

⁷¹ See 29 C.F.R. pt. 1630 app. § 1630.11 (“The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job.”).

⁷² 42 U.S.C. § 12112(b)(7) (2018); 29 C.F.R. § 1630.11.

⁷³ 29 C.F.R. § 1630.11.

⁷⁴ 42 U.S.C. § 12112(b)(7).

If an individual informs the employer that a pre-employment test is inaccessible because of a medical condition,⁷⁵ Section (b)(7) requires the employer to consider whether it is possible to change the test or the testing conditions in a way that enables the applicant to take the test.⁷⁶ Examples include administering the test in an accessible location or in a format that does not require use of the affected sensory, manual, or speaking skills.⁷⁷ So, if an applicant is unable to hear verbal prompts, the employer must consider whether it is possible to change the test or the testing conditions so that it is accessible to the applicant, for example, by providing the prompts in written form. If it is possible, the employer is required to make the change as a reasonable accommodation, unless doing so would impose “undue hardship,” meaning significant difficulty or expense relative to the employer’s resources.⁷⁸

If it is not possible to adapt the test in a way that makes it accessible, the employer must consider alternative means of evaluating the skills or attributes being tested, such as by conducting an interview or asking for letters of recommendation.⁷⁹ Again, Section (b)(7) requires such alternatives be provided as reasonable accommodations to applicants who need them because of a disability, absent undue hardship.

⁷⁵ An individual is not required to use the terms “ADA,” “reasonable accommodation,” or “disability” to trigger the employer’s obligation to provide a reasonable accommodation. See EEOC, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (Oct. 17, 2002) [hereinafter ACCOMMODATION GUIDANCE], <https://www.eeoc.gov/policy/docs/accommodation.html> [<https://perma.cc/4RWE-8JVC>]. However, an employer is not obligated to provide a reasonable accommodation to everyone who asks for one—only individuals with current or past ADA disabilities are entitled to reasonable accommodations. See 29 C.F.R. § 1630.2(o)(4). If a requester’s right to get a reasonable accommodation is not obvious, the employer may request medical documentation that is sufficient to establish that he/she has a current or past disability and needs a reasonable accommodation because of it. See ACCOMMODATION GUIDANCE, *supra*.

⁷⁶ See 29 C.F.R. pt. 1630 app. § 1630.11 (2021).

⁷⁷ See *id.*

⁷⁸ See 42 U.S.C. § 12112(b)(5)(A) (2018) (providing that prohibited discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”); 29 C.F.R. pt. 1630 app. § 1630.2(p) (defining “undue hardship”). See generally ACCOMMODATION GUIDANCE, *supra* note 75.

⁷⁹ See 29 C.F.R. pt. 1630 app. § 1630.11 (“Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (*e.g.*, through an interview, or through education license, or work experience requirements).”).

C. SECTION (B)(6)

Section (b)(6) specifically governs the use of selection criteria. It provides that it is unlawful for an employer to use “qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities” unless a defense applies.⁸⁰ Unlike Section (b)(7), this provision “is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, [and] lifting requirements” in addition to employment tests.⁸¹

1. Screen Out

By the provision’s plain language, use of a selection criterion will be unlawful under two sets of circumstances, unless a defense applies. First, it will be unlawful if it “screens out” an individual with a disability. A selection criterion “screens out” an individual with a disability if the individual was subjected to an adverse employment action (for example, not hired, disciplined, terminated, or denied a promotion) because a disability prevented that person from meeting the criterion.⁸² For example, if a candidate is unable to meet a seventy-pound lifting requirement because that candidate has paraplegia, and therefore is not selected for the position, the lifting requirement has “screened out” the individual with a disability.

Second, use of a selection criterion will be unlawful if it “tends to” screen out a “class of individuals with disabilities.” EEOC regulations provide that plaintiffs alleging this type of violation must show that the challenged criteria “have . . . a disproportionately negative impact on a class of individuals with disabilities,”⁸³ but provide no additional clarification.

Section (b)(6) is a significant provision because it does not require intent or knowledge on the part of the employer—to establish screen out, a plaintiff need not show that the criterion *expressly* excludes individuals with

⁸⁰ 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a).

⁸¹ 29 C.F.R. pt. 1630 app. § 1630.10.

⁸² See, e.g., Peggy Mastroianni, EEOC, Off. of Leg. Couns., Informal Discussion Letter on ADA: Qualification Standards; Hiring Discrimination Title VII: Pre-employment Inquiries (Jan. 19, 2001), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-45> [<https://perma.cc/F45N-TXQD>] (discussing the use of Model Selection Criteria as selection criteria, explaining that “if an applicant could demonstrate that, because of a disability, s/he was unable to obtain a high enough score on the Model Selection Criteria to participate in the apprenticeship program, [the employer] would need to show that use of the score was job-related and consistent with business necessity”).

⁸³ 29 C.F.R. pt. 1630 app. § 1630.15 (b), (c) (2021).

disabilities, that the employer adopted the criterion *because* it screens out individuals with disabilities, or even that the employer was *aware* that the criterion might screen out individuals with disabilities.⁸⁴ As long as there is a causal nexus between an individual’s disability and that person’s failure to meet the criterion, the criterion has “screened out” the individual because of the disability. In this respect the ADA’s prohibition against screen out is akin to Title VII’s prohibition against “adverse impact” or “disparate impact” discrimination.⁸⁵ Notably, a selection criterion does not need to result in both types of screen out in order to violate Section (b)(6)—a violation occurs if *even a single individual* is unable to meet a criterion because of a disability (absent a defense).

2. The Business Necessity Defense

If a plaintiff establishes that a selection criterion screens out or tends to screen out an individual with a disability or class of individuals with disabilities, an employer may still avoid liability by establishing the “business necessity” defense.⁸⁶ To establish the defense, an employer must show that—(1) the challenged criterion is “job related and consistent with

⁸⁴ 29 C.F.R. § 1630.10(a) (“Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless [a defense applies].”).

⁸⁵ An employer is liable for “adverse impact” or “disparate impact” discrimination under Title VII if a policy or practice has a disparate impact, meaning a disproportionately large negative effect, on applicants or employees of a particular race, sex, ethnicity, color, or religion, unless a defense applies. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018). An employer may be liable for disparate impact discrimination even if it is unaware that the challenged policy or practice has a disparate impact on the basis of a Title VII-protected characteristic. *See, e.g.*, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive . . . is not required under a disparate-impact theory.”).

⁸⁶ Note that two other defenses are available in selection criteria claims. The “other federal laws” defense applies when the challenged selection criterion or adverse action is required by a federal law other than the ADA. *See* 29 C.F.R. § 1630.15(e) (“It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.”). The “direct threat” defense is the appropriate defense where the challenged qualification standard is designed to measure safety rather than the ability to perform job functions. The defense is when the excluded individual has been shown to pose a “direct threat” to safety that cannot be eliminated by reasonable accommodation. *See* 29 C.F.R. § 1630.15(b)(2) (“the term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.”). Because neither of these two defenses is likely to be relevant in the context of algorithm-based selection decisions, they are not discussed in detail here.

business necessity;” and (2) “such performance” cannot be accomplished with reasonable accommodation.⁸⁷

a. Job Related and Consistent with Business Necessity

Vendors may be under the impression that they are already familiar with the idea that the use of a test must be “job related and consistent with business necessity” because they are familiar with the EEOC’s Uniform Guidelines on Employee Selection Procedures (“UGESP”),⁸⁸ which address the meaning of that term for purposes of Title VII.⁸⁹ However, ADA regulations expressly state that those guidelines do not apply to the ADA.⁹⁰

The central question in determining whether a selection criterion is “job related and consistent with business necessity” for purposes of the ADA is whether the criterion is “carefully tailored to accurately measure [an individual’s] actual ability to [perform an] essential function of the job.”⁹¹ Essential functions of the job are “fundamental job duties”⁹²—“they are the *duties* of a job—i.e., the outcomes that must be achieved by the person in the position.”⁹³

Unfortunately, there is little to no case law on how to apply this standard, as very few selection criteria cases have been litigated under Section (b)(6),⁹⁴ and most of the published decisions in such cases fail to

⁸⁷ See 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1).

⁸⁸ 29 C.F.R. § 1607.

⁸⁹ See 29 C.F.R. § 1607.14 (2021) (providing “technical standards” for validity studies that are intended to show that the selection procedure is job related and consistent with business necessity).

⁹⁰ 29 C.F.R. pt. 1630 app. § 1630.10.

⁹¹ See, e.g., Gwendolyn G. v. Donahoe, Appeal No. 0120080613, 2013 WL 8338375, at *8 (E.E.O.C. Dec. 23, 2013) (quoting H.R. REP. No. 101-485, pt. 2, at 36 (2d Sess. 1990), as reprinted in 1990 U.S.C.C.A.N. 303, 353–55). Some courts break this element of the defense into two parts. See, e.g., Bates v. United Parcel Serv., Inc., 511 F.3d 974, 996 (9th Cir. 2007) (explaining that a qualification standard or other selection criterion is “job related” if it “fairly and accurately measures the individual’s actual ability to perform the essential functions of the job,” and that it is “consistent with business necessity” if it “substantially promote[s] the business’s needs” (citations omitted)); Cripe v. City of San Jose, 261 F.3d 877, 890 (9th Cir. 2001) (explaining that a qualification standard or other selection criterion must “substantially promote the business’s needs” and that it must be “necessary and relate to the specific skills and physical requirements of the sought-after position” (citations omitted)).

⁹² 29 C.F.R. § 1630.2(n).

⁹³ Donahoe, 2013 WL 8338375, at *7 (emphasis in original).

⁹⁴ At the time of publication, a Westlaw search for “12112(b)(6)” returned 211 decisions. Ten of these did not contain the term “12112(b)(6),” and forty-two were not selection criteria cases.

address the business necessity defense.⁹⁵ Further, a majority of the decisions that do address the defense contain only minimal discussion.⁹⁶ Several aspects of the standard are therefore unsettled, including, for example, how accurate a selection criterion must be before courts will accept that the standard has been met.

⁹⁵ Of the 159 decisions in selection criteria cases litigated under Section (b)(6), see *supra* note 94, seventy-seven failed to reach the defense. Fifty-nine were cases in which the challenged qualification standard was safety-based. As explained in *supra* note 86, the relevant defense in such cases is not the business necessity defense, but rather the “direct threat” defense. Four cases concerned selection criteria mandated by federal law. A further ten were cases in which the real issue in dispute was whether a job function that the plaintiff could not perform was an “essential” job function, and therefore whether the plaintiff was “qualified” for purposes of the ADA. See 29 C.F.R. § 1630.2(m) (defining “qualified” to mean an individual who “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, *can perform the essential functions of such position*” (emphasis added)). The selection criteria and essential functions issues are often conflated, especially when the selection criterion at issue is characterized as “the ability to perform” a particular job function. See generally E. Pierce Blue, *Job Functions, Standards, and Accommodations Under the ADA: Recent EEOC Decisions*, 9 ST. LOUIS U. J. HEALTH L. & POL’Y 19 (2015). In such cases, because the selection criterion is *defined* as the ability to perform the relevant function, it is trivial to show that it “accurately measures the ability to perform” the function, and the only real issue is whether the function is essential.

⁹⁶ See *Cremeens v. City of Montgomery*, 427 F. App’x 855, 858 (11th Cir. 2011) (concluding without analysis that physical fitness requirements for a Fire Investigator position were permissible because they “directly related to a Fire Investigator’s duty to fight fires, and [] are necessary to ensure that Fire Investigators are able to perform that function when called upon to do so”); *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 863 (9th Cir. 2009) (denying summary judgment to the employer on the issue of whether a respirator certification requirement was job related and consistent with business necessity because there was evidence that the position in question did not require the use of a respirator); *Fuzy v. S&B Eng’rs & Constructors, Inc.*, 332 F.3d 301, 303 (5th Cir. 2003) (finding without analysis that a one hundred pound lifting requirement was job related and consistent with business necessity for a Pipefitter position); *Chi. Reg’l Council of Carpenters v. Thorne Assocs., Inc.*, 893 F. Supp. 2d 952, 960 (N.D. Ill. 2019) (holding that Plaintiff adequately pleaded that a one hundred pound lifting requirement was not job related and consistent with business necessity for a Carpenter position because he alleged that he was able to perform the required work despite an inability to lift one hundred pounds); *EEOC v. Aurora Health Care, Inc.*, No. 12–CV–984–JPS, 2015 WL 2344727, at *18 (E.D. Wis. May 14, 2015) (holding without analysis that the defendant failed to offer evidence that the challenged criterion was job related and consistent with business necessity); *Ruiz v. Mukasey*, 594 F. Supp. 2d 738, 741 (S.D. Tex. 2008) (upholding without analysis the jury’s verdict that a hearing requirement was not job related and consistent with business necessity for a Court Security Officer position); *Hoehn v. Int’l Sec. Servs. & Investigations, Inc.*, 120 F. Supp. 2d 257, 264–66 (W.D.N.Y. 2000) (finding that there was a material issue of fact as to whether a binocular vision requirement was job related and consistent with business necessity for a Security Guard position because there was evidence that Plaintiff could perform the essential functions of the job despite having monocular vision); see also *Cripe*, 261 F.3d at 890–93 (stating that the correct defense in a selection criterion case is the business necessity defense, but resolving the issue using the “undue hardship” analysis applicable in reasonable accommodation cases).

We are not totally without guidance, however. EEOC regulations provide that “[s]election criteria that . . . do not concern an essential function of the job would not be consistent with business necessity,”⁹⁷ and that “[t]he use of selection criteria that are related to an essential function of the job may be consistent with business necessity.”⁹⁸ Additionally, the Commission reached the defense in *Gwendolyn G. v. Donahoe*.⁹⁹ In *Donahoe*, the complainant was rejected for a Sales, Services, and Distribution Associate (“SSD Associate”) position in the Denver Post Office because a shoulder injury prevented her from meeting a seventy-pound lifting requirement.¹⁰⁰ The Commission found that the lifting requirement was not “carefully tailored to accurately measure” the ability to perform the relevant essential job function—collecting and distributing mail at the Denver branch in question—because SSD Associates in that location “only rarely” need to lift seventy-pound packages while performing this function and only “frequently” need to lift packages between twenty and thirty pounds.¹⁰¹

b. “Such Performance” Cannot Be Accomplished

Even if an employer is able to show that a challenged criterion is job related and consistent with business necessity, it will still be unable to establish the business necessity defense if “such performance cannot be accomplished by reasonable accommodation.”¹⁰² For obvious reasons, this element of the defense is a source of confusion—the term “such performance” lacks a clear referent.

Fortunately, legislative history provides some needed clarification. The “such performance” clause originated in an early draft of the provision:

It shall not be considered [handicap] discrimination . . . to exclude or otherwise deny . . . job opportunities . . . based on a legitimate application of qualification standards, selection criteria, performance standards, or eligibility criteria that are both necessary and substantially related to the ability to perform or participate in the essential

⁹⁷ 29 C.F.R. pt. 1630 app. § 1630.10(a) (2021).

⁹⁸ *Id.*

⁹⁹ *Donahoe*, 2013 WL 8338375, at *7. The EEOC performs appellate-level review of federal sector complaints of discrimination.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 42 U.S.C. § 12113(a) (2018); 29 C.F.R. § 1630.15(b)(1).

components of the particular job . . . or opportunity, and such performance or participation cannot be accomplished by reasonable accommodation.¹⁰³

Here, the term “such performance” clearly refers back to the prospective employee’s “perform[ance of] . . . the essential components of the particular job.” Later versions of the provision substituted “has been shown to be job-related and consistent with business necessity” for “are both necessary and substantially related to the ability to perform or participate in the essential components of the particular job . . . or opportunity,” leaving the “such performance” clause dangling and obscuring the intended meaning.¹⁰⁴ The view that the intended type of performance is job performance has been further reinforced through regulation,¹⁰⁵ EEOC guidance,¹⁰⁶ and case law.¹⁰⁷ The business necessity defense therefore cannot be established if the individual who is screened out by the test is able to perform the essential functions of the job, even with a reasonable accommodation (provided that the person is entitled to one).

The EEOC, moreover, has clarified that the business necessity defense is inapplicable if the “screened out” individual is able to satisfy the selection criterion with a reasonable accommodation.¹⁰⁸ Thus, if an individual is

¹⁰³ Americans with Disabilities Act of 1988, S. 2345, 100th Cong. § 5(b)(2) (1988).

¹⁰⁴ Compare *id.*, with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 103(a), 104 Stat. 333–334 (codified at 42 U.S.C. § 12113).

¹⁰⁵ See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (2021) (“[E]ven if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met *or job performance accomplished* with a reasonable accommodation.” (emphasis added)).

¹⁰⁶ See, e.g., Aaron Konopasky, EEOC, Off. of Leg. Couns., Informal Discussion Letter on ADA: Qualification Standards; Disparate Impact (Nov. 17, 2011), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-228> [<https://perma.cc/DN3R-LTCA>] (“Even if the [] requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation.”).

¹⁰⁷ See *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 79 (2002) (characterizing the defense as requiring a showing that “reasonable accommodation would not cure the difficulty posed *by employment*” (emphasis added)).

¹⁰⁸ See, e.g., EEOC, EEOC-NVTA-2008-3, APPLYING PERFORMANCE AND CONDUCT STANDARDS TO INDIVIDUALS WITH DISABILITIES n.11 (Sept. 3, 2008), <https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities#fn11> [<https://perma.cc/HKN8-ZHSX>] (“Employers may have to provide a ‘reasonable accommodation’ to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of her position.”); see also 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (explaining that the defense would not apply where an applicant with a hearing impairment is rejected because he/she is unable to do

screened out by a selection criterion, such as an employment test, but could have satisfied the criterion with a reasonable accommodation, then the defense does not apply.

The business necessity defense, therefore, applies in a Section (b)(6) case if:

- (1) the challenged selection criterion is carefully tailored to accurately measure an individual's ability to perform an essential function of the job;
- (2) the individual¹⁰⁹ who is screened out is unable to perform the essential functions of the job, even with a reasonable accommodation; and
- (3) the individual who was screened out is unable to meet the challenged selection criterion, even with a reasonable accommodation.

IV. TESTS OF FIT UNDER THE ADA

This Part considers whether employers may be liable under Section (b)(7) or (b)(6) for using tests of fit. It argues that all tests of fit, when used as intended, will be inaccessible to some individuals with disabilities and will screen out some individuals with disabilities. Employers who use such tests are therefore vulnerable to litigation under both ADA provisions.

A. TESTS OF FIT UNDER SECTION (B)(7)

As explained in Part II.B, Section (b)(7) is intended to address the problem of employment tests that are inaccessible to applicants with disabilities because they require the use of a sensory, manual, or speaking skill that is impaired by the disability.

It is beyond question that tests of fit will sometimes be inaccessible to individuals with disabilities for this reason. Recall, for example, that Traitify's personality test requires applicants to select "Me" or "Not Me" in response to a series of images displayed on a computer screen or other digital device.¹¹⁰ Because this test requires applicants to select "Me" or

an interview if providing an interpreter as a reasonable accommodation would enable him/her to do the interview).

¹⁰⁹ The business necessity defense is available both in claims alleging that a selection criterion screens out an individual with a disability and in claims alleging that a selection criterion tends to screen out a class of individuals with disabilities. For ease of presentation, however, I have formulated the defense so as to address a claim of individual screen out.

¹¹⁰ *The New Gold Standard in Personality Assessment*, *supra* note 12.

“Not Me,” presumably using a trackpad, keyboard, or other standard input device, the test will be inaccessible to individuals who have disabilities that impair their manual skills sufficiently to preclude the use of such a device. And because the test requires applicants to see, visually process, and react to images displayed on a computer screen or other digital device, it will be inaccessible to individuals who have significant visual impairments.¹¹¹ With respect to these applicants, the test will fail to “accurately reflect” the personality traits measured by the test, but, instead, will merely reflect “the impaired . . . manual . . . skills of such . . . applicant[.]”¹¹²

Pymetrics’ game-based assessments are likely to be inaccessible, at minimum, to the same individuals. Pymetrics assessments require applicants to play a number of video games while the computer collects data on, for example, reaction time in addition to the number of right and wrong answers.¹¹³ Individuals who are unable to operate the necessary input devices or are unable to see and react to the on-screen game graphics and instructions will not be able to provide test answers that reveal anything meaningful about the applicant’s personality, cognitive, or emotional traits.

This reasoning may similarly reveal that other tests discussed in Part II are inaccessible to certain individuals with disabilities. There is no need to examine each test one-by-one, however, for tests that are administered directly to the applicant necessarily require the use of at least one of an applicant’s senses—if the test does not engage the applicant’s senses, he/she will not be able to respond to any of the test items. Because each sense may

¹¹¹ It is unclear whether Traitify tests are inaccessible in the sense intended here. In a blog post, a representative of the company stated that captions were added to the images used in the test, making them accessible to screen readers, in response to the Supreme Court’s denial of certiorari in the case *Robles v. Domino’s Pizza LLC*, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019). See Rachel Stewart Johnson, *Traitify Brings Accessibility to Assessments*, TRAITIFY BLOG (Oct. 14, 2019), <https://blog.traitify.com/traitify-brings-accessibility-to-assessments> [<https://perma.cc/ZSA4-9MS4>]. In *Robles*, the Ninth Circuit found that Title III of the ADA applied to Domino’s public website and app, and that the website and app therefore were required to provide full and equal enjoyment of its products and services to the plaintiff, who was blind. *Robles*, 913 F.3d at 911. Although adding captions to the images used in the Traitify personality assessment may make it accessible for purposes of Title III of the ADA, it is not clear that, so modified, the test would be “select[ed] and administer[ed]” by an employer “in the most effective manner to ensure that . . . [it] accurately reflect[s] the skills, aptitude, or whatever other factor . . . that such test purports to measure” when administered to an individual who is unable to see the images. Traitify did not respond when asked by the Author whether the test had been validated for individuals who are unable to see.

¹¹² 42 U.S.C. § 12112(b)(7) (2018); 29 C.F.R. § 1630.11.

¹¹³ Martin Reeves et al., *Your Capabilities Need a Strategy: Choosing and Developing the Right Ones for Each Environment*, BCG HENDERSON INST. (Jan. 11, 2019), <https://bcghendersoninstitute.com/your-capabilities-need-a-strategy-choosing-and-developing-the-right-ones-for-each-environment-570a18feb59b> [<https://perma.cc/BA38-QSDX>].

be significantly impaired by disability, tests of fit that are administered directly to the applicant will be inaccessible to at least some individuals with disabilities.

If an applicant requests an accommodation because a test is inaccessible, the applicant must be provided with one unless doing so would involve undue hardship. In some cases, it will be sufficient to administer the test in an alternative format. A question-and-answer test that is usually administered in written format, for example, may be administered verbally to make it accessible to an applicant who is unable to read because of a disability.

In other cases, however, it will not be possible to administer the very same test in an accessible format. Consider, for example, HireVue's video-based assessment, which requires the applicant to respond verbally to interview questions while the computer tracks the applicant's facial expressions, eye contact, and word choice, among other things. A test such as this is not easily converted into a format that is accessible to someone who cannot speak—the test is based entirely on speech behavior. Under these circumstances, the applicant is entitled to an alternative test or means of measuring the applicant's performance on HireVue's selection criteria, such as an interview or professional assessment, unless doing so would constitute undue hardship.

Some vendors appear to be at least aware of the obligation to provide testing accommodations. Pymetrics' website, for example, includes a page informing potential applicants that accommodations are available for people who have dyslexia, attention deficit hyperactivity disorder ("ADHD"), and colorblindness.¹¹⁴ Plum implies that it provides accommodations, stating that it "accounts for varying types of ability to ensure protected groups aren't self-selecting themselves out of your hiring process," and that its assessment "does not disadvantage people who . . . experience test anxiety, people with visual impairments, and more."¹¹⁵

In general, however, it does not appear that vendors have invested a considerable degree of time or effort in developing accessible formats for their tests. Pymetrics and Plum are the exceptions to the rule—most vendors' websites do not even mention testing accommodations. And even

¹¹⁴ Elizabeth Burkly, *What Gameplay Accommodations Do You Provide?*, PYMETRICS, <https://pymetrics.zendesk.com/hc/en-us/articles/360028437591-What-gameplay-accommodations-do-you-provide-> [<https://web.archive.org/web/20200526214014/https://pymetrics.zendesk.com/hc/en-us/articles/360028437591-What-gameplay-accommodations-do-you-provide->].

¹¹⁵ *Optimize Every Stage of the Employee Journey for Diversity, Equity, and Inclusion*, PLUM [hereinafter *Diversity*, PLUM], <https://www.plum.io/diversity> [<https://perma.cc/TG59-QA3M>].

those vendors that do mention accommodations do not appear to offer them for every disability that makes the test inaccessible. Pymetrics, for example, only offers accommodations for the three conditions listed above; it does not provide accommodations for other disabilities such as blindness or impaired manual ability, for example. It is therefore reasonable to assume that, in many cases, vendors are not providing accommodations to applicants who are entitled to them. Use of a test of fit thus is likely to expose the employer to liability under Section (b)(7) unless that employer takes responsibility for providing testing accommodations—including alternative formats and assessments—to applicants who are entitled to them.

B. TESTS OF FIT UNDER SECTION (B)(6)

As explained in Part II.C, a test of fit will violate Section (b)(6) if it screens out or tends to screen out an individual or class of individuals with disabilities, subject to the business necessity defense. This Part argues that all tests of fit will screen out some individuals with disabilities, and that, when they do, the employer will not always be able to establish the business necessity defense. It follows that tests of fit, thus, expose employers to liability under Section (b)(6) separate and apart from any liability under Section (b)(7).

1. Screen Out

Recall that a testing requirement “screens out” an individual with a disability if the person is unable to meet the requirement because of the disability, and that it “tends to” screen out a class of individuals with disabilities if it has a disproportionately negative effect on members of the class.¹¹⁶ This section identifies two reasons why using a test of fit might lead to screen out: (1) because the test is inaccessible, or (2) because the disability has a significantly negative effect on one of the traits measured by the test.

a. Screen Out Due to Inaccessibility

Part II.B demonstrated that inaccessible tests will lead to violations of Section (b)(7) if an employer does not make testing accommodations available to applicants who request and need them because of a disability, unless providing such accommodations would impose undue hardship on the employer.

¹¹⁶ See *supra* Part II.C.1.

Inaccessible tests may also screen out individuals with disabilities. Consider again the applicant who is unable to take the Traitify test because a manual disability precludes the use of an input device. Because this applicant is unable to provide any test responses in the absence of an accommodation, the applicant will necessarily fail to meet the employer's testing criteria, regardless of what those criteria may be. When such failure results in the loss of an employment opportunity, the applicant has been "screened out" by the test.

Perhaps the most likely way in which an inaccessible test will result in screen out is through a policy of rejecting incomplete applications. If the employer requires applicants to take a test of fit in order to complete an application, "test completion" functions as a selection criterion. In this example, the applicant who cannot operate the input device would be unable to meet this criterion because of the applicant's disability—that is, the resulting loss of employment opportunity therefore is attributable to the disability. The same would be true if a disability prevents an applicant from taking a test and loses an employment opportunity as a result.

b. Screen Out Because a Disability Has Affected a Trait Measured by the Test

A test of fit may also screen applicants out for reasons unrelated to inaccessibility. Specifically, it may screen out applicants whose disabilities affect one of the traits measured by the test. Suppose that a job applicant is asked to take the Berke personality test. For a given job, Berke identifies ranges of scores on each assessed trait that correspond to a high level of fit.¹¹⁷ Testing might show, for example, that an applicant's assertiveness score falls within the "high-fit" range for that trait, but also that the applicant's optimism score falls below the "high-fit" range for that trait. The applicant's overall level of fit is calculated on the basis of the level of fit for each trait.¹¹⁸ If an applicant's disability causes the applicant's score

¹¹⁷ See *Sample Berke Job Fit Report*, BERKE, <https://www.berkeassessment.com/features/reports/sample-job-fit-report> [<https://perma.cc/JAH9-M8F3>].

¹¹⁸ Berke Job Fit ratings are represented graphically by a line broken into three sections. A portion of the line, starting from the far left, is colored, while the remaining portion appears gray. The longer the colored portion of the line, the higher the candidate's assessed level of Job Fit. If only the first of the three sections contains a colored portion of the line, the candidate is said to have a "Low" level of Job Fit; if only the first and second sections contain a colored portion of the line, the candidate is said to have a "Medium" level of Job Fit, and if all three sections contain a colored

on one of the traits measured by the test to fall outside of the “high-fit” range, the applicant’s overall level of fit will suffer. This in turn may affect the employer’s overall hiring decision, resulting in a “screen out.”

Although the legal determination of whether a particular applicant has been screened necessarily depends on the particular facts of the case, it is reasonable to suspect that disabilities sometimes have a negative effect on applicants’ test scores in this way. Consider the Berke test again. Berke defines “optimism” to mean “[a] natural tendency to think positively about other people and the future, no matter what is happening.”¹¹⁹ Certain mood disorders, such as persistent depressive disorder (“PDD”), may affect an individual’s ability to achieve a high score on a test of optimism.¹²⁰ To meet the diagnostic criteria for PDD, an individual must, among other symptoms, experience at least two of the following while depressed: poor appetite or overeating; insomnia or hypersomnia; low energy or fatigue; low self-esteem; poor concentration or difficulty making decisions; and feelings of hopelessness.¹²¹ Particularly when an individual’s PDD involves feelings of hopelessness, it seems reasonable to expect that the condition will sometimes result in a lowered optimism score. And if the effect of a lowered score is significant enough, the applicant ultimately could be screened out as a result of the applicant’s disability.¹²²

For another example, consider Pymetrics’ assessment, which reportedly includes a game that requires applicants to match images of faces

portion of the line, he/she is said to have a “High” level of job fit. *See, e.g., id.* Berke does not offer an explanation of precisely how it arrives at a candidate’s Job Fit rating on the basis of his/her assessed traits.

¹¹⁹ *See Assessment, supra* note 18.

¹²⁰ *See generally* PERSONA (HBO Max 2021) (addressing whether pre-employment personality tests may exclude individuals with disabilities).

¹²¹ *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 160–68 (5th ed. 2013), <https://dsm.psychiatryonline.org/doi/abs/10.1176/appi.books.9780890425596.dsm14> [<https://perma.cc/JZX6-LH39>].

¹²² Prior to writing this Article, the Author took Berke’s personality test. The test is available at no cost through the Berke website. *See Free Personality Test*, BERKE, <https://www.berkeassessment.com/features/assessment/free-personality-test> [<https://perma.cc/5BFJ-CELP>]. The Author has PDD, and, consistent with the hypothesis that PDD sometimes causes lowered optimism, he received the lowest possible optimism score. *Aaron Konopasky Personality Test*, BERKE (on file with author). Assuming that the lower bound of the preferred range of scores for an attorney position is anything higher than the lowest possible score, these results would appear to suggest—contrary to abundant evidence—that the Author is a poor fit for an attorney position. Had he taken the test as part of an application for a real job, it might easily have resulted in the loss of an employment opportunity.

to emotions.¹²³ Autistic individuals, as a group, tend to perform less well than non-autistic individuals on this type of test.¹²⁴ Pymetrics does not say which trait is assessed through this game, but regardless of which trait it is, the applicant's score on the facial recognition trait will be compared to the average scores of highly performing employees. To the extent that the two scores differ, the applicant will receive a lowered fit rating on this criterion. Again, if the lowered level of fit ultimately results in the applicant's non-selection, the applicant will have been screened out as a result of a disability, that is autism. Additional plausible examples of this type of screen out include:

- (1) individuals with generalized anxiety disorder who are screened out because of lowered scores on Prevue's "excitable vs. relaxed" scale (indicating high levels of "excitability");
- (2) individuals with social anxiety disorder ("SAD") who are screened out because of lowered scores on Prevue's measure of outgoingness, Berke's measure of sociability, Traitify's measure of extroversion, or Cappfinity's measure of teamwork;
- (3) individuals with various forms of depression who are screened out for lowered scores on Berke's measure of assertiveness or Prevue's measure of emotional stability;
- (4) autistic individuals who are screened out for low scores on Berke's measure of adaptability, Pymetrics' measure of flexibility in multitasking, or various measures of emotional intelligence;
- (5) individuals with posttraumatic stress disorder ("PTSD") who are screened out for lowered scores on Pymetrics' measure of distraction filtering agility; and
- (6) individuals with ADHD who are screened out for lowered scores on Pymetrics' measures of impulsivity or attention duration.

¹²³ See Chris Ip, *To Find a Job, Play These Games*, ENGADGET (May 4, 2018), <https://www.engadget.com/2018-05-04-pymetrics-gamified-recruitment-behavioral-tests.html> [<https://perma.cc/DE6S-EQQ4>].

¹²⁴ See, e.g., Keiran M. Rump et al., *The Development of Emotion Recognition in Individuals with Autism*, 80 CHILD DEV. 1434, 1435–36 (2009).

Remember that the claim here is not that the test of fit will allow an employer to discover the applicant’s diagnosis. This Article does not assert, and a Section (b)(6) plaintiff would not have to show, that everyone who has a low “outgoingness” score, for example, has SAD. Rather, the claim is that SAD may in some cases cause an individual to have a relatively low outgoingness score.

Vendors may argue that the examples offered above are unrealistic because employers seldom reject applicants for having low levels of fit on individual traits. Indeed, some vendors caution employers to not rely exclusively on their tests—let alone on individual traits measured by their tests—when making employment decisions. For example, Traitify advises employers that the results of its assessment should “comprise no more than one-third of the selection decision process,”¹²⁵ and Criteria Corp states that “pre-employment tests should only be one element within a comprehensive set of criteria used to evaluate applicants, including resumes, interviews, job experience, education, and anything else that is relevant for a position.”¹²⁶

But vendors cannot have it both ways. They consistently represent their tests as providing valuable information that helps employers make better hiring decisions.¹²⁷ Presumably this means that, when used as intended, the results of those tests will sometimes make a difference in the hiring decision¹²⁸—if the test results never made any difference in the employer’s decision, they would be hardly worth the purchase price. But if they do sometimes make a difference, then, in those cases, screen out is

¹²⁵ See PREVUE REPORT, *supra* note 20, at 4.

¹²⁶ *What Are Pre-employment Tests?*, CRITERIA CORP, <https://www.criteriacorp.com/resources/definitive-guide-validity-of-preemployment-tests/what-are-pre-employment-tests> [https://perma.cc/66JA-94EX].

¹²⁷ See, e.g., *Let the Perfect Talent Fall into Place*, PYMETRICS, <https://www.pymetrics.ai/solutions> [https://perma.cc/89DL-LXV8] (“Identify the highest potential candidates to move forward in your hiring process”); *Cross-functional innovation*, *supra* note 42 (“[W]e perform job analyses and local job validation to ensure our models predict success on the job.”); *Our Science*, HIREVUE, <https://www.hirevue.com/why-hirevue/our-science> [https://perma.cc/PSY9-WLDP] (“We’ve delivered over 17 million interviews to help identify which candidates would be the best fit for a specific job.”); *Assessments Built for the Modern Age*, TRAITIFY, <https://www.traitify.com/platform/index.html#hire> [https://perma.cc/6Z5E-6RGE] (“Identify the best fit applicants quickly with minimal overhead, so you can spend more time with the right people and bring them in faster.”).

¹²⁸ In fact, Criteria Corp, immediately after cautioning employers not to rely too heavily on test results, see *What Are Pre-employment Tests?*, *supra* note 126, states that “[p]re-employment tests provide the most value when applied at the top of the hiring process to *screen out* candidates who aren’t a good fit,” *id.* (emphasis added).

possible.¹²⁹ More specifically, this will occur when the applicant’s disability makes enough of a difference to measured traits to affect the employer’s ultimate decision.

c. All Tests Screen Out

Thus far this Article has argued that tests of fit *may* screen out or tend to screen out individuals with disabilities or classes of individuals with disabilities. Some claims made by vendors appear to suggest that their tests will not screen out individuals with disabilities because those tests have been designed to comply with federal equal employment opportunity law. Traitify, for example, once stated that it “go[es] beyond EEOC compliance,”¹³⁰ and Humantelligence claims that its testing service “allow[s] hiring managers to hire candidates . . . in an EEOC compliant way.”¹³¹ Other vendors claim more generally that their tests are “bias-

¹²⁹ The “default” standard of causation in employment discrimination is “but-for” causation, meaning that causation is found where the adverse action would not have occurred “but for” the prohibited basis. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013) (“Causation in fact—*i.e.*, proof that the defendant’s conduct did in fact cause the plaintiff’s injury—is a standard requirement of any tort claim This includes federal statutory claims of workplace discrimination. . . . In the usual course, this standard requires the plaintiff to show ‘that the harm would not have occurred’ in the absence of—that is, but for—the defendant’s conduct.” (citations omitted)); *Babb v. Wilke*, 140 S. Ct. 1168, 1172 (2020) (stating that the “default rule” in employment discrimination cases is that “recovery for wrongful conduct is generally permitted only if the injury would not have occurred but for that conduct”) (citing *Nassar*, 570 U.S. at 346–47). This standard is satisfied where an applicant with a disability that affects his/her test scores is not hired, but would have been hired had he/she not had the disability and achieved higher test scores as a result. “But-for cause” does not mean “sole cause.” *See, e.g.*, *Burrage v. United States*, 571 U.S. 204, 211 (2014) (“Thus, ‘where *A* shoots *B*, who is hit and dies, we can say that *A* [actually] caused *B*’s death, since but for *A*’s conduct *B* would not have died.’ The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel’s back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.” (citations omitted and emphasis added)).

¹³⁰ *The New Gold Standard in Personality Assessment*, TRAITIFY [<https://web.archive.org/web/20200608005548/https://www.traitify.com/science/>] (“Designed for everyone: Images make us mobile friendly for those who don’t have access to large screen devices, more accessible to imperfect readers, and easier to translate. We go beyond EEOC compliance and tackle socio-economic bias head-on.”).

¹³¹ *See Culture Fit, Culture Add, and Diversity of Thought*, HUMANTELLIGENCE (Mar. 10, 2020), [<https://humantelligence.com/index.php/culture-fit-culture-add-and-diversity-of-thought>] [<https://perma.cc/RJR9-RR9E>].

free,”¹³² that they increase fairness,¹³³ or that they increase diversity and inclusion.¹³⁴ HireVue has made the elimination of bias part of its mission:

[O]ur mission is not just to avoid bias in the inferences and employment decisions made based on our technology, but to use the technology to actively promote diversity and aid in the achievement of equal opportunity for everyone regardless of gender, ethnicity, age, or disability status.¹³⁵

Unfortunately, these claims do not indicate that the relevant tests comply with Section (b)(6). When vendors claim that a test complies with federal equal employment opportunity law, they generally mean that their tests meet standards articulated in UGESP.¹³⁶ Those standards explain what employers must do to ensure that “employee selection procedures,” which may include employment tests,¹³⁷ do not result in “adverse impact” discrimination.¹³⁸ Adverse impact discrimination (also known as or “disparate impact” discrimination) occurs when an employee selection procedure or other practice has a disproportionately large negative effect on a particular group, such as a racial group.¹³⁹ To prevent this type of discrimination, vendors must take steps to ensure that different demographic groups all perform equally well on the test. HireVue describes its process of removing bias this way:

If we see that one group passes the assessment at a significantly different rate compared to another group,

¹³² See, e.g., #1 Pre-hiring & Pre-employment Assessment Software, HARVER, <https://harver.com> [<https://perma.cc/EN46-RANE>]; Talent Matching Platform, PYMETRICS, <https://www.pymetrics.ai> [<https://perma.cc/CUK8-KTCD>].

¹³³ See, e.g., Talent Matching Platform, PYMETRICS [<https://web.archive.org/web/20200706162346/https://www.pymetrics.ai/>] (“pymetrics helps companies better understand their workforce while making better & fairer people decisions with behavioral science and ethical AI technology.”).

¹³⁴ See, e.g., Diversity, PLUM, *supra* note 115 (“Optimize every stage of the employee journey for diversity, equity, and inclusion.”); Solutions, CAPPINITY, <https://www.cappfinity.com/us/Solutions/> [<https://perma.cc/4F5F-YQH9>] (“Inclusive assessment by design using context, language and imagery that is inclusive of gender, ethnicity, sexuality and social background.”).

¹³⁵ *Bias, AI Ethics, and the HireVue Approach*, HIREVUE, <https://www.hirevue.com/why-hirevue/ethical-ai> [<https://perma.cc/YM3F-L35Q>].

¹³⁶ See, e.g., *Modern Hire’s Statement Regarding AI in Hiring*, MODERN HIRE, <https://modernhire.com/newsroom-article/ai-in-hiring-statement> [<https://perma.cc/3FAT-MWMH>] (“Modern Hire closely adheres with the authoritative guidelines and laws that govern employee selection, including the Uniform Guidelines on Employee Selection Procedures . . .”).

¹³⁷ See 29 C.F.R. § 1607.1(A) (2021).

¹³⁸ 29 C.F.R. § 1607.3(A).

¹³⁹ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

known as adverse impact or algorithmic bias, we drill in and determine why. We then remove or minimize any data points that lead to that bias to ensure proportional outcomes for all groups and protected classes. For instance, if we see that a disproportionate number of men score higher than women, we determine what's causing the bias and mitigate for it. We repeat the mitigation process until men and women perform similarly enough to confirm that the bias is minimized.¹⁴⁰

A similar process is used to protect against adverse impact on the basis of race.

There is no readily apparent indication that vendors have attempted to eliminate disability bias in a similar way.¹⁴¹ Even if they have, however, it does not follow that they have succeeded in shielding patronizing employers against Section (b)(6) liability. Although this strategy for eliminating bias will prevent “adverse impact” discrimination, it will not prevent screen out.¹⁴²

The reason why this strategy prevents adverse action discrimination is that the determination of whether a pre-employment test has an adverse impact depends on facts about *average group performance* on the test. For example, suppose that an applicant alleges that a pre-employment test has an adverse impact on the basis of race. To prevail, the applicant would need to show that the challenged practice has a disproportionately negative effect

¹⁴⁰ Nathan Mondragon & John Slifka, *Creating AI-Driven Pre-employment Assessments*, HIREVUE (Dec. 19, 2019), <https://www.hirevue.com/blog/creating-ai-driven-pre-employment-assessments> [<https://perma.cc/H2LR-M2XB>]; see also Pymetrics, *Audit-AI*, GITHUB (July 29, 2020), <https://github.com/pymetrics/audit-ai> [<https://perma.cc/H2LR-M2XB>] (“[Pymetrics’ bias auditing algorithm] takes data from a known population . . . and runs them through the model in question. The proportional pass rates of the highest-passing demographic group are compared to the lowest-passing group for each demographic category (gender and ethnicity). This proportion is known as the bias ratio.”).

¹⁴¹ Practical considerations call into question whether a vendor could use this method to reduce disability bias. To do so, the vendor would need to administer the test to various groups according to disability status in order to determine whether one group tended to perform differently on the test than others. But it is not clear that vendors would be able to obtain the disability status of test participants. If the participants were employees of the client (the employer), the vendor would be prohibited from inquiring about their disability status, because it would be doing so on behalf of the client. Such inquiries therefore would be imputed to the employer, see 42 U.S.C. § 12111(5)(A) (defining “employer” to include “any agent of” entities otherwise covered by the definition), and would therefore be prohibited from asking employees to disclose their disability status under the ADA’s privacy provisions, see generally *supra* note 9 and accompanying text (discussing ADA restrictions on disability-related inquiries).

¹⁴² Note that ADA regulations state specifically that UGESP does not apply to the ADA. See 29 C.F.R. § 1630.10.

on the members of the complainant’s racial group. Because the challenged practice is the use of a pre-employment test, the complainant would need to show specifically that members of the complainant’s racial group tend to perform less well on the test than members of other racial groups. Applicants are unable to make this showing when vendors ensure that members of all racial groups perform equally well on given pre-employment tests.

Determining whether a test screens out an individual with a disability, by contrast, does not depend on facts about average group performance or other facts contingent upon group membership.¹⁴³ Rather, it depends on facts concerning the plaintiff as an individual and how that person relates to the challenged test. Consider a person who is screened out because of an inability to see test questions that are displayed on a computer screen. If this applicant is removed from consideration because the applicant could not complete the test or otherwise achieve satisfactory results, a court may conclude that this person has been screened out. In this case, a plaintiff need not prove how other applicants in the plaintiff’s group performed on the test, or whether individuals in one group tended to perform better than individuals in other groups. A vendor’s efforts to ensure that various groups perform equally well on this test, therefore, are largely irrelevant—it makes no difference in a Section (b)(6) claim whether *other* individuals tend to perform well on the pre-employment test if the court is aware that the plaintiff performed poorly because of a disability.

In fact, the discussions in Parts III.A and III.B.1 have already provided sufficient reason to conclude that this sort of effort to eliminate the possibility of screen out could not succeed: this Article has shown that all tests of fit will be inaccessible to some individuals with disabilities, and that inaccessible tests screen out individuals with disabilities. It follows directly that all tests of fit will screen out some individuals with disabilities, thereby exposing employers to liability under Section (b)(6) subject to the business necessity defense.

2. The Business Necessity Defense

As explained in Part II.C.2, the business necessity defense applies in a particular case if the challenged test is job-related and consistent with

¹⁴³ Although the claim that a test screens out an individual with a disability does not depend on facts about average group performance, the claim that it tends to screen out a class of individuals with disabilities would do so. As explained in Part II.C.1, a selection criterion tends to screen out a class of individuals with disabilities if it has a disproportionately negative impact on the class.

business necessity, meaning that it is “carefully tailored to accurately measure an individual’s ability to perform an essential function of the job,” and the screened-out applicant is unable to perform the essential functions of the job or meet the challenged selection criterion with a reasonable accommodation. Thus, for the defense to apply in *every* case, the pre-employment test:

- (1) must be carefully tailored to accurately measure an individual’s ability to perform an essential function of the job;
- (2) must *never* screen out an individual who is able to perform the essential functions of the job, even with a reasonable accommodation; and
- (3) must *never* screen out an individual who is able to meet the testing standard, even with a reasonable accommodation.

If a test fails to meet any one of these conditions, the business necessity defense will be unavailable when screen out occurs. In those cases, the employer will be liable for disability discrimination under Section (b)(6).

The remainder of this Part argues that tests of fit do not meet *any* of conditions (a)–(c), although the conclusion is somewhat less certain for (a) than it is for (b) or (c). It therefore concludes that use of such tests will give rise to liability under Section (b)(6) in some cases in which screen out occurs. The three conditions are addressed in reverse order below.

a. Ability to Meet the Testing Requirements with a Reasonable Accommodation

It is simply not plausible that all individuals who are screened out by a test of fit would be unable to meet the employer’s testing criteria with a reasonable accommodation. Recall that there are two groups of individuals who may be screened out by a test of fit: those whose disabilities make the test inaccessible and those whose disability affects one of the traits measured by the test. Consider just the first group. The reason that these applicants are unable to meet the employer’s testing criteria is not that they lack the personality or other traits that mark the individual as a “good fit” for the job. Rather, it is that the activity of taking the test itself requires the use of a sensory, motor, or speaking skill that is impaired by a disability. Therefore, if these applicants are given testing accommodations, there is every reason to expect that some of them will have traits that result in high overall levels of fit as measured by the test. Indeed, this is presumably why these individuals have been given the right to get testing accommodations

under Section (b)(7)—because some of them, if given such accommodations, may be able to demonstrate that they meet the employer's testing criteria and are therefore a good fit for the position according to the test.

If an individual who finds a test inaccessible applies for a position, is rejected based on the person's inability to complete the test, but would have been able to meet the employer's testing criteria with a reasonable accommodation, the employer is liable under Section (b)(6). Screen out will have occurred in such a case, because the individual's disability is the reason that the person was unable to complete the test. And the business necessity defense would be unavailable because the individual is able to meet the employer's testing criteria with a reasonable accommodation. Application of the testing criteria in these cases therefore would constitute an ADA violation.

b. Ability to Perform Essential Functions with a Reasonable Accommodation

It also is not plausible that all persons who are screened out by a test of fit would be unable to perform the essential functions of the job, even with a reasonable accommodation. Consider once again those applicants who are screened out because the test is inaccessible. Again, these individuals are unable to meet the employer's testing criteria because of a disability, not because they lack certain traits that the test was designed to measure. The test results (or lack thereof) therefore do not provide the employer with any legitimate basis on which to conclude that the excluded individuals are unable to perform the essential functions of the job.

An applicant who is screened out because a disability has affected a trait measured by the test nonetheless may be able to perform the essential functions of the job. Not even vendors claim that tests of fit are precise enough to identify traits that are *necessary* for the ability to perform the essential functions of the job:

Tests are not a crystal ball, and anyone who claims otherwise is not being honest. When some testing companies advertise "99.9% accuracy" or claim that employers who use their tests will "never make a bad hire again," they are either ignorant of how the science behind testing works, or are misrepresenting it to sell their tests. Incorporating tests into the hiring process does not mean employers will never make another bad hire, only that they will make fewer of them. No test is a perfect predictor.

*Some people who don't test well may be exemplary employees, and some that test well may be terrible employees.*¹⁴⁴

To illustrate just how implausible it would be to claim that all individuals who are screened out by a test of fit are unable to perform the essential functions of the job, consider an example. Suppose that a considerable number of people apply for a Customer Service Representative position, and twenty of them score between one and three on Prevue's "reserved vs. outgoing" scale because they have SAD. According to a sample Prevue applicant report, the "preferred" score for this trait among Customer Service Representatives is between four and seven.¹⁴⁵ Because these applicants all scored below the preferred range, resulting in relatively low Benchmark Suitability Scores,¹⁴⁶ they are rejected for the position.

For the employer to avoid liability under these circumstances, it must be true that *not even one* of the twenty excluded individuals is able to perform the essential functions of the Customer Service Representative position. These functions presumably include things like talking with customers over the telephone, recording complaints, and issuing refunds. The view that applicants who did not receive preferred scores are unable to perform these functions, but that applicants who did receive preferred scores are able to perform them, appears to place far too much significance on the distinction between scoring a one, two, or three on the "reserved vs. outgoing" scale (all of which fall below the preferred range), and scoring a four on that scale (which falls within the preferred range). The assumption that all of the excluded applicants are unable to perform the essential functions of the job is therefore questionable at best.

This assumption becomes even more questionable when one accounts for the fact that some of the excluded applicants may be entitled to reasonable accommodations on the job. Suppose, for example, that one of the applicants with SAD scores a three on this "reserved vs. outgoing" scale. The applicant experiences significant symptoms under normal conditions, but relatively mild or nonexistent symptoms when she is accompanied by an emotional support animal. If this individual is entitled to bring an

¹⁴⁴ *What Are Pre-employment Tests?*, *supra* note 126 (emphasis added).

¹⁴⁵ See PREVUE REPORT, *supra* note 20, at 4. The report states that this is the preferred range of scores for Customer Service Representatives at Prevue HR Systems. *Id.* at 3. The preferred score for this position may be different at a different workplace.

¹⁴⁶ Prevue provides each applicant with a Benchmark Suitability Score in the form of a percentage. See *id.* at 4. The fictional applicant in the sample report received a score of seventy-nine percent.

emotional support animal to work as a reasonable accommodation,¹⁴⁷ any work-related limitations associated with the person’s condition may be significantly reduced or even eliminated as a result. Similarly, some individuals who have SAD may experience a significant reduction in symptoms if they are allowed to work from home as a reasonable accommodation.¹⁴⁸

If an individual is rejected because the applicant is unable to meet the employer’s testing criteria—either because a disability renders the test inaccessible or because a disability affects a trait that is measured by the test—again, the employer would be liable. Under such circumstances the person will have been “screened out” because a disability dispositively affected the applicant’s ability to satisfy the employer’s testing criteria. And the business necessity defense would be inapposite because the individual would have been able to perform the essential functions of the job (with a reasonable accommodation if entitled to one). Application of the testing criteria under these circumstances therefore will constitute a violation of Section (b)(6).

c. Carefully Tailored to Accurately Measure an Individual’s Ability to Perform an Essential Function

There is little to no case law or agency guidance on how to apply imprecise terms such as “carefully tailored” and “accurately measures” under this prong of the business necessity defense. It therefore is difficult to reach any conclusions about whether a given test or other selection

¹⁴⁷ Department of Justice regulations provide that Titles II and III of the ADA require state and local governments, businesses, and nonprofit organizations that serve the public to allow animals to accompany people with disabilities into public areas only if they are “service animals,” meaning that they are dogs that are “individually trained to do work or perform tasks for people with disabilities.” See U.S. DEP’T OF JUST., ADA REQUIREMENTS: SERVICE ANIMALS (Feb. 24, 2020), https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/N8ZP-TMGW>]. “Dogs whose sole function is to provide comfort or emotional support” are not service animals. *Id.* These regulations do not extend to Title I of the ADA, however. There is nothing in Title I of the ADA, its implementing regulations, or EEOC guidance that specifically exempts employers from the responsibility of allowing an employee to bring an emotional support animal to work, even if it is not a “service animal,” as a reasonable accommodation. As with any reasonable accommodation, however, an employer would not be required to allow an employee to bring an emotional support animal to work if doing so would impose undue hardship, see 29 C.F.R. § 1630.9(a), .15(d) (2021), if doing so would pose a direct threat to safety, see 29 C.F.R. § 1630.15(b)(2), if the employee did not have a current or past disability, see 29 C.F.R. § 1630.9(e), or if the emotional support animal did not help the employee to overcome a workplace barrier imposed by the disability, see 29 C.F.R. § 1630.2(o)(1).

¹⁴⁸ See generally TELEWORK GUIDANCE, *supra* note 55.

criterion would be able to meet this standard if challenged in court. Notwithstanding this uncertainty, there are good reasons to doubt that tests of fit are able to meet the standard. Considering how unclear the meanings of terms like “carefully tailored” and “accurately measures” may be, the EEOC has at least made it perfectly clear *what* the test must measure for the defense to apply: it must measure *the ability to perform an essential function of the job*.

Tests of fit do not appear to do that.¹⁴⁹ Recall that the essential functions of the job are “the *duties* of a job—that is, the outcomes that must be achieved by the person in the position.”¹⁵⁰ In *Gwendolyn G. v. Donahoe*, for example, the essential job function at issue was the collection and distribution of mail at the relevant branch of the Denver Post Office.¹⁵¹ The traits measured by tests of fit—personality traits, aptitudes, and cultural preferences, on the other hand—are much broader and less context-specific than this. Tests of fit therefore do not appear to be targeted or job-specific enough to even come close to meeting the job-related and consistent with business necessity standard.

Some vendors might assume that tests of fit measure the ability to perform an essential job functions because they “predict success” or “predict performance.” Most, if not all, vendors make the claim that their tests of fit do one of these things.¹⁵²

But ability is not the same thing as success. There are any number of reasons why highly competent employees might nevertheless perform poorly, including: being subjected to discrimination or harassment; being excluded from important projects because a supervisor prefers working with other employees; and being denied the tools and supports necessary to do

¹⁴⁹ Indeed, vendors do not even appear to *claim* that their tests of fit measure the ability to perform job functions. Interestingly, some vendors—especially those offering “cultural fit” tests—affirmatively assert that their tests do *not* measure ability, arguing that an exclusive focus on ability leads to poor hiring decisions. See, e.g., Neelie Verlinden, *7 Ways to Assess Organization Fit*, HARVER (Oct. 26, 2020, 5:20 PM), <https://harver.com/blog/organizational-fit> [<https://perma.cc/D7GJ-L6VX>] (“[F]inding the best person for the job entails more than simply identifying who is the best fit for the actual job. It’s just as important—if not more so—to recruit people who truly fit in the organization.”). This would appear to preclude users from establishing the first prong of the business necessity defense.

¹⁵⁰ *Gwendolyn G. v. Donahoe*, Appeal No. 0120080613, 2013 WL 8338375, at *7 (E.E.O.C. Dec. 23, 2013).

¹⁵¹ *Id.* at *8.

¹⁵² See, e.g., *What are Pre-employment Tests?*, *supra* note 126 (“Our science speaks for itself. We rigorously validate our assessments to ensure that they predict what matters most: job performance, long-term retention, and organizational performance.”); *Science*, *supra* note 35 (“[W]e perform job analyses and local job validation to ensure our models predict success on the job.”).

the job. Employment tests that are validated to predict success might be measuring traits that correlate with these other determinants of success rather than with ability.

To see how this might occur, consider once again the example of an individual who is rejected for a position because the person’s PDD resulted in a low optimism score on Berke’s personality test. Berke provides the employer with a “Job Fit Report” for each applicant. The report provides the applicant’s test scores, along with a “target range” for each trait representing the best level of “fit” with the job.¹⁵³ To determine a given trait’s target range, Berke first administers the test to current employees in the employer’s workforce.¹⁵⁴ At the same time, it asks managers to rate each of these employees and then correlates the test score and manager ratings.¹⁵⁵ It then looks for correlations between test scores and manager ratings. Finally, Berke’s fit assessment algorithm is created using those correlations.

A sample Job Fit Report, available on Berke’s public website, provides an evaluation of “Elizabeth,” a fictional applicant for a Service Advisor position.¹⁵⁶ The report shows that Elizabeth scored in the bottom third of the range for optimism, and that the target range for this trait spans the upper-middle portion of the scale.¹⁵⁷ Elizabeth’s level of optimism thus falls “well below” the target range.¹⁵⁸ For the sake of discussion, assume that Elizabeth’s score was low because she has PDD. Together with other factors, the low level of fit on this trait has resulted in a low level of overall fit for the Service Advisor position.¹⁵⁹

Does Elizabeth’s low level of fit with respect to optimism indicate that she is unable to perform the essential functions of the Service Advisor position? It is not obvious that it does. Because the target range for each trait is determined through manager ratings, rather than through any objective investigation of the traits that are necessary to perform the

¹⁵³ See, e.g., *Sample Berke Job Fit Report*, *supra* note 117.

¹⁵⁴ See BERKE, <https://www.berkeassessment.com/features/benchmark-studies> [<https://perma.cc/8PCB-V49M>].

¹⁵⁵ *Id.* (“Invite your team members in a specific job to complete the assessment and ask their managers to rate their job performance. Berke’s research team statistically analyzes the data and identifies the traits that separate your top performers from everyone else.”).

¹⁵⁶ *Sample Berke Job Fit Report*, *supra* note 117.

¹⁵⁷ Berke’s Job Fit Reports do not provide numerical scores. Rather, the applicant’s score for each trait is represented as a point along a one-dimensional continuum. Target ranges are represented as spans along the continuum. See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *id.*

essential functions of the Service Advisor position, Elizabeth’s low optimism score means only that her level of optimism is lower than is typically present in current Service Advisors who are rated highly by their managers. Although it is possible that the managers rated the current employees purely in terms of their ability to perform the essential functions of the Service Advisor position, it is also possible that the ratings were influenced by other factors, such as personal preference,¹⁶⁰ prevailing cultural norms,¹⁶¹ or even reprisal for previous equal employment opportunity-related activity such as opposition to discrimination or harassment¹⁶² or a request for reasonable accommodation.¹⁶³

The report’s narrative description of Elizabeth also suggests that the test’s central concern is not whether she has the skills to perform the essential functions of the job. With respect to optimism, the report states:

Elizabeth is not outwardly effusive or gregarious and tends to maintain a healthy skepticism in her approach and outlook. She has the ability to visualize things and

¹⁶⁰ Berke argues for the value of cultural fit testing by saying that “no matter how talented a person is, if they irritate their colleagues, can’t work on a team, or otherwise fail to fit in, productivity will suffer.” See Meredith Stack, *The Science of Culture Fit*, BERKE (Oct. 26, 2020, 5:28 PM), <https://www.berkeassessment.com/blog-articles/the-science-of-culture-fit> [<https://perma.cc/6G4V-4C34>]. If Berke’s testing does indeed amount to an assessment of how “irritating” the candidate would be, and if Elizabeth’s optimism score falls below the target range for optimism because of her PDD, the upshot of the test results is essentially that managers would find Elizabeth’s disability to be “irritating.” Even if this were true, it would not provide the employer with a legitimate reason to reject Elizabeth for the position. The ADA does not permit employers to exclude individuals with disabilities from employment because managers or coworkers would find the effects the disability irritating. That is exactly the sort of bias the ADA was intended to prohibit.

¹⁶¹ Some workforces have reportedly adopted cultural norms related to the expression of negative emotions and thoughts. See, e.g., Salvador Rodriguez, *Inside Facebook’s “Cult-Like” Workplace*, CNBC.COM (Jan. 8, 2019, 12:00 PM), <https://www.cnbc.com/2019/01/08/facebook-culture-cult-performance-review-process-blamed.html> [<https://perma.cc/ZAF4-S8AQ>].

¹⁶² Retaliation for opposition to harassment or discrimination is prohibited under the ADA. 42 U.S.C. § 12203(a) (2018). Retaliation may include lowered performance appraisals. See, e.g., EEOC, EEOC-CVG-2016-1, ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, at pt.II.a.2.e & n.113 (Aug. 25, 2016) [hereinafter RETALIATION GUIDANCE], https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#_ftnref155 [<https://perma.cc/WQH5-UAJ8>] (citing Walker v. Johnson, 798 F.3d 1085, 1095 (D.C. Cir. 2015); Porter v. Shah, 606 F.3d 809, 817–18 (D.C. Cir. 2010); Halfacre v. Home Depot, U.S.A., Inc., 221 F. App’x 424, 432–33 (6th Cir. 2007); Parikh v. N.Y.C. Transit Auth., No. 06-CV-3401-NG-KAM, 2010 WL 364526, at *9 (E.D.N.Y. Feb. 2, 2010)).

¹⁶³ Retaliation for protected “opposition” includes retaliation for requesting a reasonable accommodation is prohibited by the ADA. See, e.g., RETALIATION GUIDANCE, *supra* note 162, at sec.II.B.2 (citing Solomon v. Vilsack, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014); 9 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 154.10, at 154–105 & n. 25 (Matthew Bender 2d ed. 2014)).

anticipate what might go wrong or may not turn out as planned. She may not connect with new people very quickly.¹⁶⁴

Further, the potential problems arising from the “mismatch” between Elizabeth’s level of optimism and the requirements of the job, as identified by the report, are ones that relate to interpersonal style rather than to the ability to perform essential job functions: the report states that Elizabeth “may not connect with new people very quickly” and that “[o]thers may see her as not being very friendly.”¹⁶⁵ All of these considerations suggest that the test is measuring determinants of success other than ability (such as managers’ preferences or cultural norms).

Because the standards for determining whether a selection criterion is job related and consistent with business necessity are unsettled, it is difficult to reach any conclusions about whether a test of fit would meet those standards. For the very same reason, however, and because vendors appear not to even attempt to ensure that their tests of fit meet those standards, employers should be particularly cautious in concluding that they would be able to meet the standards if required to do so in court.

V. CONCLUSION

Contrary to vendors’ claims, tests of fit are not “bias-free”—tests that require applicants to read or react to images are biased against applicants who are unable to see; tests that require applicants to manipulate input devices are biased against applicants with limited manual function; and, depending on how the fit assessment algorithm is constructed; tests that measure facial expressions may be biased against applicants with facial paralysis; tests that measure vocal inflection may be biased against people who are unable to speak and autistic applicants with unusual prosody; tests that measure optimism may be biased against individuals with depressive disorders; and tests that measure extroversion may be biased against applicants with social impairments, to name a few examples. In some cases, these biases will result in the loss of job opportunities, either because the applicant’s disability prevents the person from taking the test or because it results in a low “fit” score.

Some applicants who lose job opportunities for reasons similar to the ones above will be unsuited to the job—but not all of them will be. There

¹⁶⁴ *Sample Berke Job Fit Report*, *supra* note 117.

¹⁶⁵ *Id.*

are multiple reasons why someone with a low “fit” score might nevertheless have a high level of ability to do the job: whether it is because the applicant is entitled to an on-the-job reasonable accommodation that would reduce the effects of the disability, because the test generally predicts manager preferences or cultural norms rather than the ability to perform essential job functions, or simply because the individual is statistically unusual. For these individuals who are perfectly able to perform essential functions of the job at a high level, the test represents yet another artificial barrier to employment that cannot be overcome because of a disability.

When tests of fit unfairly exclude individuals with disabilities, they expose the employer to liability under the ADA. Specifically, an employer will be liable under Section (b)(7) if (1) the applicant requests a testing accommodation that is needed because of a disability; (2) the employer is able to provide an effective accommodation, such as an alternative format or an alternative test, without incurring significant difficulty or expense; and (3) the applicant does not receive an accommodation. And the employer will be liable under Section (b)(6) if the applicant loses an employment opportunity because a disability prevented adequate test performance and (a) the applicant is able to perform the essential functions of the job with a reasonable accommodation (if entitled to one), (b) the applicant could have met the employer’s testing criteria with a reasonable accommodation, or (c) the test is not “carefully tailored to accurately measure an individual’s actual ability to perform an essential function of the job.” Notably, Section (b)(6) liability attaches under these circumstances regardless of whether the applicant requests an accommodation or otherwise puts the employer on notice of the disability.

Vendors’ efforts to remove bias from their tests have not prevented violations of Section (b)(6) or (b)(7). Even if vendors were aware of these provisions, current methods of eliminating bias from tests of fit do not avoid violating these provisions because those methods are designed to prevent a different type of discrimination. Hopefully, wider recognition of the ADA’s restrictions on test selection, test administration, and selection criteria will cause vendors to develop new and innovative ways of preventing test-based disability discrimination. Until that time, employers who are considering whether to use tests of fit should recognize that these tests will unfairly exclude some individuals with disabilities, and for that reason, likely expose employers to liability under the ADA.