



Commemorating 40 Years
Of Disability Advocacy
1973-2013

Testimony of Jennifer Mathis
Director of Programs, Bazelon Center for Mental Health Law
On Behalf of the Consortium of Citizens with Disabilities

EEOC Public Meeting: Wellness Programs
May 8, 2013

Chair Berrien and Commissioners Barker, Feldblum and Lipnic:

Thank you for inviting the Consortium of Citizens with Disabilities (CCD) to testify at this public meeting. CCD is a coalition of national disability-related organizations working together to advocate for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. My organization, the Bazelon Center for Mental Health Law, is a member organization of CCD, and I submit this testimony on behalf of CCD.

While CCD believes that wellness programs can be useful tools to promote health and well-being, we have significant concerns about their potential to discriminate against individuals with disabilities.¹ As you know, the employment rate of people with disabilities is far lower than that of any other group tracked by the Bureau of Labor Statistics, and people with disabilities have been disproportionately impacted by the economic downturn. Against this backdrop, we are concerned that employer-based health programs which penalize people with disabilities for not being as “well” as others – and for failing to disclose disability-related information that the Americans with Disabilities Act (ADA) permits them to keep confidential in order to avoid discrimination – make it even more difficult for individuals with disabilities to obtain employment on fair and equal terms.

As these programs become more widespread, it is imperative that the Commission issue regulations or guidance to help employers and employees understand the ADA’s application in this area. Moreover, the need for clarity about the ADA’s application has become even more urgent in order to avoid confusion as the Departments of Labor, Health and Human Services, and

¹ Wellness programs also raise concerns under Title VII and the Age Discrimination in Employment Act, which are addressed by other witnesses and commenters.

Treasury finalize their regulations implementing the Affordable Care Act's provisions concerning wellness programs.

The ADA Imposes Requirements on Employer-Based Wellness Programs in Addition to those Imposed by Other Federal Laws

The Commission has recognized that the ADA imposes requirements on employer-based wellness programs *in addition to* those imposed by other federal laws, such as the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and the Affordable Care Act (ACA). The Commission's regulations implementing GINA state that nothing in the GINA regulation concerning inducements to participate in wellness programs "limits the rights or protections of an individual under the Americans with Disabilities Act (ADA) . . ." 29 C.F.R. § 1635.8(b)(2)(iv) (providing examples of circumstances in which the ADA requires employers to make reasonable accommodations to avoid disability discrimination in wellness programs).

The ADA's separate application to wellness programs was also recognized in the wellness programs review sponsored by the Departments of Labor and Health and Human Services in anticipation of their proposed rule implementing the ACA's wellness program provisions ("The Affordable Care Act does not, however, supersede other federal requirements relating to the provision of incentives by group health plans, including requirements of the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA))."²

Congress chose to enact the ACA's provisions concerning wellness programs without stating that these provisions applied "notwithstanding any other provision of law." Indeed, Congress considered *and rejected* amendments concerning wellness programs that would have provided, for example, that:

Nothing in the Americans with Disabilities Act of 1990, title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Genetic Information Non-discrimination Act of 2008 shall be construed to prohibit a covered entity from adopting, sponsoring, administering, or providing products or services in connection with, or relating to, programs of health promotion or disease prevention that requests individuals to participate in medical examinations, answer medical inquiries, or complete health risk assessments or questionnaires, if such requirements are otherwise authorized under this Act.

Congress' decision to pass the ACA without such language demonstrates its intent that the ADA have separate and concurrent applicability to wellness programs.

² Soeren Mattke *et al.*, RAND Health, "A Review of the U.S. Workplace Wellness Market," at 7, available at <http://www.dol.gov/ebsa/pdf/workplacewellnessmarketreview2012.pdf>.

The ADA's Requirements Concerning Wellness Programs

1) *The ADA requires reasonable accommodation of employees with disabilities in wellness programs.*

The ADA prohibits covered entities from discriminating based on disability in fringe benefits and other terms, conditions and privileges of employment. 42 U.S.C. § 12112(a)-(b), 29 C.F.R. § 1630.4. Among other things, it requires employers to reasonably accommodate employees with disabilities to ensure that they have rights and privileges in employment equal to those of nondisabled employees, including the right to participate equally in workplace activities like wellness programs. 42 U.S.C. § 12112(b)(5). The ADA's reasonable accommodation provisions apply to both participatory wellness programs (programs that do not require an individual to meet a health-related standard in order to obtain a reward, or do not offer a reward at all) and health-contingent wellness programs (programs that require an individual to meet a health-related standard in order to obtain a reward or avoid a penalty).

Health-contingent wellness programs: Health-contingent wellness programs pose the most significant concerns for people with disabilities. These programs reward individuals for meeting health targets or penalize them for failing to meet those targets. There is no logical difference between imposing a penalty and offering a reward; offering a reward only to those individuals who meet a health standard means denying the reward to those individuals who do not meet the standard – that is, penalizing the latter individuals.

The Commission has already recognized that reasonable accommodations are required to afford employees with disabilities equal opportunity in wellness programs:

. . . if an employer offers a financial inducement for participation in disease management programs or other programs that promote healthy lifestyles and/or require individuals to meet particular health goals, the employer must make reasonable accommodations to the extent required by the ADA, that is, the employer must make “modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities” unless “such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.” 29 CFR [1630.2\(o\)\(1\)\(iii\)](#); 29 CFR [1630.9\(a\)](#).

29 C.F.R. §1635.8(b)(2)(iv).

We urge the Commission to clarify that an employer who offers its employees a health-contingent wellness program must ensure that if an employee cannot meet the standard due to a disability, the employee is afforded the reasonable accommodation of having the opportunity to meet an alternative standard that is feasible for the individual to meet given his or her disability –

or waiver of the standard if there is no feasible alternative standard (unless the employer demonstrates that doing so is an undue hardship).³

In addition, health targets that actually define a disability (for example, high blood glucose levels that indicate diabetes) should not be permitted to be used as the basis for penalties or rewards; doing so would mean using participants' disabilities as the basis for adverse treatment.

Participatory wellness programs: We recommend that the Commission clarify that employers must also make reasonable accommodations to avoid disability-based discrimination in participatory wellness programs. Regardless of whether rewards or penalties are attendant upon the outcome of the program, reasonable accommodations may be necessary to afford equal opportunity to people with disabilities. For example, an employer-based wellness program offering reimbursement for membership at a fitness center that does not offer physical accessibility or universally designed fitness equipment, or that does not permit a person with a disability to bring a personal attendant without an extra admission fee, may need to make accommodations in order to provide equal opportunity to participants with disabilities. A wellness program must also ensure effective communication with participants – for example, by providing print materials in alternative formats, providing sign language interpreters when required by deaf and hard-of-hearing individuals, and ensuring that websites meet current accessibility standards.

2) The ADA limits disability-related inquiries by participatory and health-contingent wellness programs.

As you know, the ADA sets out careful limitations on disability-related inquiries pre-employment as well as post-employment. 42 U.S.C. § 12112(d). The purpose of these limitations is to guard against discrimination and ensure that disability-related inquiries are limited to those where there is a need to know for purposes of determining whether an individual can do the job (that is, inquiries that are job-related and consistent with business necessity).⁴ As the Commission noted in its guidance concerning disability-related inquiries of employees:

Historically, many employers asked applicants and employees to provide information concerning their physical and/or mental condition. This information often was used to exclude and otherwise discriminate against individuals with disabilities -- particularly

³ While the ACA permits individuals to request an alternative standard when their medical conditions make it “unreasonably difficult” to meet a health standard, it is unclear how this language will be interpreted. In any event, it does not limit the ADA’s reasonable accommodation mandate.

⁴ Typically health risk assessment inquiries concern participants’ health rather than their ability to do the job, and are therefore not job-related.

nonvisible disabilities, such as diabetes, epilepsy, heart disease, cancer, and mental illness -- despite their ability to perform the job. The ADA's provisions concerning disability-related inquiries and medical examinations reflect Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs.⁵

The ADA exempts workplace wellness programs from these limitations to the extent such programs include "voluntary medical examinations, including voluntary medical histories." *Id.* at § 12112(d)(4)(B). The Commission has stated in guidance that medical exams or inquiries conducted as part of workplace wellness programs are not "voluntary" under the ADA where they are mandatory or include penalties for failing to complete such exams or inquiries.⁶

Some employers have wellness programs that use "health risk assessments" offering significant financial rewards for providing disability-related information that the ADA would otherwise prohibit the employer from requesting. Other employers have required all employees to provide disability-related information as part of such "health risk assessments" – whether or not they choose to participate in a wellness program – or face financial penalties. Still others use health risk assessments that ask disability-related questions (for example, questions about the participant's mental health) that seem to be unrelated to any actual wellness services provided to wellness program participants.

The Commission should address the ADA's application to such practices. First, the Commission should address what constitutes a "voluntary" wellness program. If a wellness program imposes financial penalties for not participating in the program, the program is not voluntary. Similarly, the program is not voluntary if individuals who choose not to participate are denied financial rewards. If a voluntary wellness program includes a health risk assessment that asks disability-related questions, an individual cannot be penalized for refusing to answer those questions or given financial rewards for answering them.

In addition, the Commission should address the circumstances under which disability-related questions may be considered *part of* a wellness program. If disability-related questions are asked as part of a health risk assessment, in order to be part of a wellness program, those questions must be necessary for the wellness services actually provided. For example, a health risk assessment that asks questions about a participant's mental health should not be considered part of a wellness program that focuses on management or improvement of other health conditions and does not offer mental health services. Second, there must actually be wellness

⁵ EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA at ¶ 22 (July 27, 2000) (available at www.eeoc.gov/policy/docs/guidance-inquiries.html).

⁶ *Id.*

services offered; a voluntary wellness program cannot simply consist of a health risk assessment. While one court rejected an ADA challenge to an employer's imposition of penalties on employees who failed to answer disability-related questions as part of a "wellness program" consisting only of a biometric screening and a health risk assessment questionnaire,⁷ we believe that court's analysis was incorrect. That court held that the ADA imposed no liability because the wellness program fell within the ADA's "safe harbor" for bona fide benefit plan terms that are based on underwriting or classifying risks. The court did not consider, however, the differences between wellness programs -- which are designed to promote health or prevent disease -- and underwriting practices.

Finally, the Commission should also clarify that information obtained as a result of a workplace wellness program's voluntary medical exam, health risk assessment or other inquiry -- whether in a participatory or health-contingent wellness program -- must be "collected and maintained on separate forms and in separate medical files and [] treated as a confidential medical record" in accordance with the ADA. 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C).

Thank you for the opportunity to provide testimony on this important issue. The Consortium of Citizens with Disabilities appreciates the Commission's interest in this issue and stands ready to assist the Commission in any effort to provide further guidance concerning the ADA's application to wellness programs.

⁷ *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012).