



## Leonel v. American Airlines

400 F.3d 702 (2005)

**Country:** United States

**Region:** Americas

**Year:** 2005

**Court:** 9th Circuit Court of Appeal

**Health Topics:** Disabilities, Health information, HIV/AIDS, Infectious diseases

**Human Rights:** Freedom from discrimination

### Facts

The Appellants, Leonel and others, were persons living with HIV. They applied for and were granted offers for flight attendant positions with American Airlines (American). Upon discovery of their HIV-positive status, American rescinded Appellants' job offers, citing their failure to disclose information during their medical examinations.

The Appellants had originally been given conditional offers of employment contingent upon passing both background checks and medical examinations. Prior to conducting background checks, American sent the Appellants to its on-site medical history department for medical examinations. The Appellants were required to give blood samples and disclose their HIV status and related medications they were taking through medical history questionnaires.

Appellants claimed American's medical inquiries and examinations were prohibited by the Americans with Disabilities Act (ADA), 42 U.S.C. Â§ 12101 et seq. (1999), and California's Fair Employment and Housing Act (FEHA). Appellants argued that American could not require them to disclose their personal medical information prior to the completion of the background checks, as this meant the medical examination would be the only contingency and thus their nondisclosures could be used to disqualify them. Appellants also argued that American violated their right to privacy under the California Constitution by conducting complete blood count (CBC) tests on their blood samples without notifying them or obtaining their consent.

### Decision and Reasoning

The court held that American's medical examinations were unlawful under both the ADA and FEHA. It held that in addition to intentional discrimination the ADA and FEHA regulate the sequence of employers' hiring processes by prohibiting medical examinations and inquiries until after the employer has made a "real" job offer to an applicant. The court concluded that "to issue a real offer under the ADA and FEHA, [] an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer." The court noted that the ADA's two-step structure serves to (1) enable applicants to determine the reason for rejection, and (2) protects applicants who wish to keep their personal medical information private.

The court held that in this case the Appellant's offers were not "real," as they were subject to both medical and non-medical conditions and because American required the medical examinations to be undertaken immediately. The court stated that American's "medical examination process was therefore premature" and American "could not penalize the appellants for failing to disclose their HIV-positive status" unless the company could establish that it could not reasonably have completed the background checks before subjecting the appellants to medical examinations and questioning. The court further held that American failed to show that it could not reasonably have completed the background checks and notified the Appellants before initiating the medical examination process.

The court rejected American's argument that the accelerated medical examinations were justified based on the convenience they afforded applicants and the fact that they minimized the length of the hiring process, making the process more competitive for applicants.

The court held that the CBC tests conducted by American violated the Appellants' right to privacy under the Constitution of California. The Court noted that the right to privacy under the Constitution of California was broader than its federal constitutional counterpart in that it protected individuals from "invasion of their privacy

not only by state actors but also by private parties. To prove a claim under the California right to privacy, Appellants had to demonstrate three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounted to a serious invasion of the protected privacy interest.

The court found that the Appellants demonstrated the first and third elements: the drawing and testing of blood clearly implicated a legally protected privacy interest and such an intrusion upon the Appellants' privacy was not insignificant or de minimis.

As to the reasonableness of Appellants' expectations of privacy, the court considered the customs, practices and physical settings surrounding the blood tests. The court considered that:

American's representatives ushered the Appellants to the medical department immediately after their interviews;

Once at the medical department, the Appellants completed multiple forms, none of which indicated that the medical examinations would include blood tests or, if so, what the scope of such blood tests would be;

The Appellants received no comparable consent form for the blood tests as they did for the urinalysis;

No information was provided by the nurses who administered the blood tests, though in the case of one of the Appellants the nurse provided incomplete and possibly misleading information that his blood sample would be used for anemia, only one of many conditions potentially revealed by the CBC.

The court held that American had failed to demonstrate the absence of a material issue of fact as to the reasonableness of the Applicants' expectations that American would not, without first notifying them or obtaining their consent, perform CBC tests on their blood samples.

## Decision Excerpts

The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job pre-requisites . . . This two-step requirement serves in part to enable applicants to determine whether they were rejected because of disability, or because of insufficient skills or experience or a bad report from a reference. When employers rescind offers made conditional on both non-medical and medical contingencies, applicants cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial. 400 F. 3d, p. 709.

The two-step structure also protects applicants who wish to keep their personal medical information private. Many hidden medical conditions, like HIV, make individuals vulnerable to discrimination once revealed. The ADA and FEHA allow applicants to keep these conditions private until the last stage of the hiring process. Applicants may then choose whether or not to disclose their medical information once they have been assured that as long as they can perform the job's essential tasks, they will be hired. 400 F. 3d, p. 709.

If the blood tests infringed upon a reasonably held expectation of privacy, the infringement would not be considered de minimis. The disclosure of ... private information through testing a bodily substance obtained from an individual ... constitute[s] an intrusion upon the applicant's constitutional privacy interests that [is] not insignificant or de minimis an intrusion that would not be permissible in the absence of reasonable justification. 400 F. 3d, p. 712.

By consenting to preemployment blood tests, the appellants did not consent to any and all medical tests that American wished to run on their blood samples. Under the California right to privacy, an applicant has a reasonable expectation that an employer will not retrieve private medical information by performing blood tests outside of the ordinary or accepted medical practice regarding general or pre-employment medical exams. 400 F. 3d, p. 713.

American offers no evidence, however, to demonstrate that conducting a CBC without notice or consent is standard practice, either in a traditional medical setting or, more to the point, in a preemployment medical examination in which the applicants do not share a typical medical patient's interest in having his blood subjected to a comprehensive screening. 400 F. 3d, p. 714.