

# **COGNITIVE DECLINE AND THE WORKPLACE**

Prof. Sharona Hoffman

Case Western Reserve University School of Law



## MY ARTICLES

- “Cognitive Decline and the Workplace,” 57 *Wake Forest Law Review* 115- 72 (2022)
- “Physicians and Cognitive Decline: A Challenge for State Medical Boards,” 108 *Journal of Medical Regulation* 19-28 (2022)



# IN THE NEWS

- <https://www-nytimes-com.cdn.ampproject.org/c/s/www.nytimes.com/2022/11/28/opinion/doctors-aging-competency-test.amp.html>



# COGNITIVE DECLINE

- 16.9% of population (56 million) are 65+
- 77 million seniors by 2035 (21% of population)
- By age 85, 32% have Alzheimer's dementia
- 25% of physicians are over 65
- 15% of attorneys are over 65
- Average age of federal judge is 69





# NEW TECHNOLOGIES

- Can detect potential signs of dementia long before symptoms emerge
- Abnormal clumps of proteins in brain – amyloid and tau
- PET scans
- Spinal taps
- Blood tests





# MANDATORY RETIREMENT POLICIES

- Prohibited by Age Discrimination in Employment Act
- Statutory exceptions – e.g. firefighters & law enforcement officers
- Federal laws for public safety jobs – e.g. pilots and air traffic controllers



# ROUTINE COGNITIVE TESTING BEGINNING AT PARTICULAR AGE

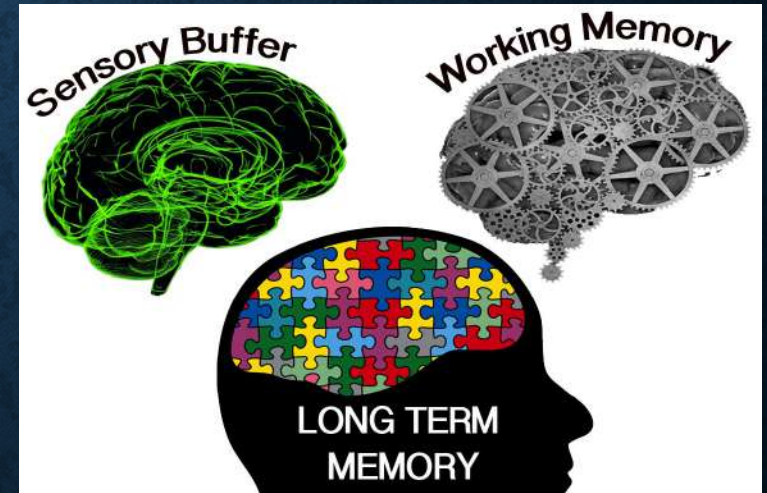
- ADEA violation
- ADA violation
  - Testing of employees must be job related and consistent with business necessity
- Disparate impact on racial minorities





# ROUTINE COGNITIVE TESTING OF ALL EMPLOYEES

- ADA violation
- Disparate impact concern





# ALZHEIMER'S DISEASE BIOMARKER TESTING

- ADA: Job necessity means testing must relate to current ability to perform job
- Statutory gaps:
  - ADA does not prohibit discrimination based on predictions of future disease
  - Prior to commencement of employment testing need not be job-related



# LAWFUL CONDUCT

- Carefully evaluate employees' work
- Test those whose job performance suggests cognitive decline
- Provide reasonable accommodations as appropriate
- Can terminate those who cannot be accommodated and who perform job



# STATE MEDICAL BOARDS

- ADEA doesn't apply
- ADA testing provision doesn't apply
- ADA Title II applies (public entities)
- Restrict investigation to whether applicants have current cognitive deficits that could impair job performance



# RECOMMENDATIONS



- Establish testing program beginning at particular age
- Experts must determine appropriate initial cognitive test or substantive test & age
- Thorough follow-up investigation when necessary
- Due process & reasonable accommodation