

## **LEGAL ISSUES OF EMPLOYMENT TESTING**

Employers often use testing in the hiring process. Sometimes the testing is challenged by those who have been eliminated from consideration due to the test results.

Legal challenges can be brought under:

- Title VI of the Civil Rights Act of 1964
- Americans With Disabilities Act
- Polygraph Protection Act of 1988
- Privacy Laws

### **Civil Rights Act of 1964**

This is the major federal anti-discrimination law and prohibits discrimination on the basis of gender, national origin, race and religion. **Title VII** is the employment component of this law and was the first statute under which hiring tests were challenged.

The Equal Employment Opportunity Commission (EEOC) issued Guidelines on Employment Testing Procedures, which defined a “professionally developed ability test” to mean “a test which fairly measures the knowledge or skills required by the particular job or class of jobs . . . or which fairly affords the employer a chance to measure the applicant’s ability to perform a particular job or class of jobs.”

In the landmark case of *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), the Supreme Court held that Title VII permits “only the use of job-related tests” and held that Title VII prohibited an employer from requiring job applicants to pass a standardized, general intelligence test where this requirement operated to disqualify black applicants at a substantially higher rate than whites and where success on the test was not significantly related to successful job performance.

Cases have asserted “personality tests” or “right fit tests” discriminate against culturally disadvantaged groups on the basis of national origin, race or gender. *Reynolds v. State of Arizona* (9th Cir., 1993).

The challenges require a “legally significant disparate impact” often called the Four-Fifths Rule or 80% Rule. Under this rule, if an employee selection method results in a selection rate for any minority group that is less than 80 percent of the selection rate for the group with the highest rate, the EEOC will consider this to be evidence of disparate impact.

Once a four-fifths impact is shown, the employer must defend the test by proving “*validity*.” There are three basic sorts of validity models used to assess tests.

Criterion-related validity: Relationship between test scores and later job performance.

Content validity: Content of a test represents important aspect(s) of performance on the job.

Construct validity: Test measured a “construct” (something believed to be an underlying human trait or characteristic such as honesty) and that the construct is important for successful job performance.

[For more information on the components of validity, see the article “Validity” by Bob Gregg, Boardman Law Firm.]

### **Gender Issues**

A number of personality tests and honesty tests have shown that men and women score differently. The answers of the average “honest woman” are different from those of the average “honest man.” So, different scoring systems were set, by gender.

This may be a problem under Title VII. The 1991 Amendments to that law make it a violation to “adjust the scores of, use different cutoffs for, or otherwise alter the results of employment related tests on the basis of race, color, religion, sex, or national origin.”

### **Americans With Disabilities Act**

The ADA forbids medical inquiries in the hiring process except as the last step after a conditional offer of employment. A test which can reveal medical or psychological information can violate the ADA.

The ADA also prohibits discrimination against those with disabilities. So, if a candidate asserts that they were disadvantaged by a test, or the manner in which it was given, there is an ADA challenge available.

The defense of this claim is also “validity” of the test and/or its manner of administration. Personality, right fit, and honesty tests have often been challenged under the ADA. The Minnesota Multiphasic Personality Inventory (MMPI) has been used by numerous employers,

and over the years been found in violation of the ADA. *Karraker v. Rent-a-Center, Inc.* (7th Cir., 2005); *Soroka v. Dayton Hudson Corp. d/b/a Target Stores* (Cal., 1991).

“Personality” tests are not “psychological” and are not covered by the ADA. However, if a “personality” test can reveal psychological information, then it is a “medical inquiry.” In *Karraker*, the court found that the right fit/personality assessment also could be used to measure mood and traits such as depression, hypochondria, anxiety, etc., which are covered conditions under the ADA. Some key issues the court focus on are (1) whether the test can reveal an impairment of physical or mental health and (2) does it measure the candidate’s performance of job duty or does it measure the psychological response to performing a job duty?

### **Polygraph Protection Act of 1988**

Both federal law and many state laws regulate the use of lie detectors and other “honesty devices.” The Federal PPA prohibits the use of lie detector tests for hiring in most jobs (except government employment, national defense and security).

Written honesty tests are not prohibited and have proliferated after passage of the PPA.

Written honesty tests are generally challenged under other laws: ADA, Title VII and privacy.

Validity/Reliability Concerns. There is evidence that a high percentage of those who fail honesty tests are in fact honest people. A report by the U.S. Office of Technology Assessment found that as many as 70% of those who failed were not dishonest. The tests were overbroad in weeding out.

Too good to be true? Conversely, a high percentage of skilled dishonest people pass the tests with high marks. “Con Men” know how to “read” the test and are skilled at convincing people and testers of their integrity; that is why they are successful at dishonesty.

Some test companies have suggested the “remedy” of failing anyone who scores very high on the honesty scale. It would be seen as a “suspect” test result.

### **Privacy**

Privacy challenges to tests have been brought over “intrusive” questions. These questions have inquired into religious beliefs, religious practices, sexual practices, sexual orientation and political beliefs. In the *Soroka* case, the company agreed to settle the litigation by paying \$1.3 million to the 2,500 class members who had taken the test.

Breach of Confidentiality. Employers have also been sued for disclosure of the testing information. *Hawkins v. Pepsico, Inc.* (4th Cir., 2004) involved allegations that managers were told the contents of personality tests used for promotions, and then “mocked” people about their scores or the traits revealed by the tests.

### **MAJOR FEDERAL REGULATIONS ON EMPLOYMENT TESTING**

1. Four Agencies Uniform Guidelines on Employee Selection Procedures, EEOC, Civil Service Commission, Department of Labor, Department of Justice, 1978
2. Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, EEOC, Office of Personnel Management, Department of Labor, Department of Justice, Department of Treasury, 1979
3. Employee Polygraph Protection Act, 29 U.S.C. 2001 and Guidelines, 29 Code of Fed. Regs. 801
4. Employee Polygraph Protect Act Standards of Administration, U.S. Department of labor, Wage and Hour Division, 1988
5. ADA Enforcement Guidance/Pre-Employment Disability-Related Questions and Medical Examination, U.S. EEOC, 1995
6. Fair Credit Reporting Act, 15 U.S.C. 1681
7. Equal Employment Opportunity Commission Uniform Guidelines on Employee Selection Procedures, 29 Code of Fed. Regs. 1607 (2004)

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