

Tests with Impact on Applicants from Protected Groups Can Still Impose Liability

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Employers have come a long way from the days of Griggs v. Duke Power, the Supreme Court decision in 1971 holding that an employer could violate Title VII, even without discriminatory intent, if that employer hires applicants based on a test or other criteria that has an adverse impact.¹ In that case, the employer excluded a large percentage of its African American applicants based on requirements that they have a high school diploma and score well on a professional aptitude test. This landmark decision established that a test or other hiring criteria with an adverse impact on members of a protected class must be job-related and consistent with business necessity.

Employers today typically rely on tests and other criteria that are more closely tied to the specific job duties of the position. However, adverse impact claims still succeed when such a test or criteria has an adverse impact on members of protected class but lacks adequate job-relatedness. One such test, given by Ford and the United Auto Workers as a requirement for entry into a skilled trade apprenticeship program, resulted in a \$1.6 million settlement in December 2007.² The aptitude test measured verbal, numerical, and spatial reasoning to evaluate mechanical aptitude, but had an adverse impact on African American applicants, and allegedly lacked job-relatedness.

Like the Ford test, a strength test used by a sausage plant had an adverse impact. A federal appeals court decided in November 2006 that the plant's pre-employment "strength test" discriminated against female applicants. The decision included an award of approximately \$3.3 million to 52 rejected female job applicants.³ The seven-minute test required an applicant to carry 35-pound weights back and forth, and to lift the weights to specific heights. More than 95% of male applicants passed the test, but fewer than 40% of female applicants passed it. While the test resembled the job in some respects, the lifting was more difficult than the actual job duties. In addition, the employer had not shown that the test had reduced injuries, as it had claimed.

Public employers have also been subjected to challenges of their use of tests that have an adverse impact. The claims of African American firefighters seeking promotion to the rank of fire department lieutenant went to a jury regarding the validity of the city's reliance on its lieutenant's exam.⁴ The city knew that the exam had an adverse impact, and failed to produce any proof that the exam was job-related and consistent with business necessity. The job analysis documents and testimony of state employees who created the exam were contradicted by the firefighters' expert's opinion that the test was not related to lieutenants' job duties.

¹ 401 U.S. 424 (1971).

² EEOC v. Ford Motor Co., Nos. 1:07-cv-00703 and 1:07-cv-00704 (S.D. Ohio, settlement approved 12/20/07).

³ EEOC v. Dial Corp. 469 F.3d 735 (8th Cir. 2006).

⁴ M.O.C.H.A. Soc'y v. City of Buffalo, 102 FEP Cases 338 (W.D.N.Y. Nov. 9, 2007).

Employers now have access to much more information about applicants who may have posted information about themselves on the internet, in a blog or a personal website. Use of this information as part of the selection process, however, could result in liability on the employer if reliance on that information to exclude applicants has an adverse impact on a particular protected group. If, for example, an employer used references to past alcohol use as a criteria for not interviewing an applicant, and that criteria had more of a negative effect on members of a particular protected group, then the employer would have to show that the criteria was directly relevant to the position being filled.

When using tests or other selection criteria that may have an adverse impact, keep in mind the following guidelines provided in the EEOC's Uniform Guidelines on Employee Selection Procedures,⁵ which have been in effect and enforced by the courts since 1978:

- 1) Each employer should maintain records or other information which will disclose the impact which its tests and other selection procedures have on employment opportunities of persons by identifiable race, sex, or ethnic group, as identified on the EEO-1 form.⁶

This requirement may be more difficult where the employer accepts applicants through its web site or e-mail. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce.⁷

- 2) A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5 or 80%) of the rate for the group with the highest rate will generally be regarded by the EEOC as evidence of adverse impact.⁸ For example, the sausage plant strength test was passed by 40% of the female applicants and 95% of male applicants. It fails the 80% rule because 40/95 equals about 42%, which is less than 80%.

Even differences of less than 80% in selection rates may show adverse impact, where the differences are significant in both statistical and practical terms, or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.

- 3) Whenever an employer knows of an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the employer should investigate it to determine the appropriateness of using or validating it.⁹
- 4) Tests or criteria with an adverse impact can be validated by one of the following methods:

⁵ 29 C.F.R. § 1607.1 et seq.

⁶ If there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size. 29 C.F.R. § 1607.4.

⁷ 29 C.F.R. § 1607.15.

⁸ 29 C.F.R. § 1607.4(D).

⁹ 29 C.F.R. § 1607.3.

- a. **Criterion-related validity:** selection procedure is predictive of important elements of job performance based on characteristics and performance of current employees. For example, a cognitive skills test given to current employees correlates with their performance of their job duties, and is then given to applicants for positions requiring those same skills.
- b. **Content validity:** content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. For example a typing test is predictive of an applicant's success in performing as a secretary.
- c. **Construct validity:** procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. For example, an applicant for a supervisor position is given a personality test designed to measure leadership skills.

The regulations specifically state that “under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of its validity be accepted in lieu of evidence of validity.”¹⁰

Given a desire to avoid litigation based on an employer's use of a test or other seemingly neutral hiring criteria, employers are advised to do the following:

- 1) Regularly review job descriptions and functions to ensure that hiring criteria are related to the actual job duties
- 2) Maintain data on the impact of tests or other selection criteria on applicants who are members of protected classes.
- 3) If a test or criteria has an adverse impact, ensure that it is directed related to or indirectly measures ability to perform actual job duties.
- 4) Administer tests and use other selection criteria in an unbiased way.

For more information, the EEOC issued in December 2007 a fact sheet on the application of federal anti-discrimination laws to employer tests and other selection procedures to screen applicants for hire and employees for promotion. The new technical assistance document is available on the agency's web site at

www.eeoc.gov/policy/docs/factemployment_procedures.html

¹⁰ 29 C.F.R. § 1607.9.