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Employment Tests and the EEOC

Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including the following:

- Cognitive tests.
- Personality tests.
- Medical examinations.
- Credit checks.
- Criminal background checks.

The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal antidiscrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal antidiscrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

The U.S. Equal Employment Opportunity Commission (EEOC) governs Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), which prohibit the use of discriminatory employment tests and selection procedures.

Types of Tests and Selection Procedures

Many employers use the following employment tests and other selection procedures in making employment decisions:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension as well as knowledge of a particular function or job.
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups as well as strength and stamina in general.
- Sample job tasks (for example, performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks.
- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health.
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (for example, dependability, cooperativeness, or safety) or aim to predict the likelihood that a person will engage in certain conduct (for example, theft or absenteeism).
- Criminal background checks provide information on arrest and conviction history.
- Credit checks provide information on credit and financial history.
- Performance appraisals reflect a supervisor's assessment of an individual's performance.
- English proficiency tests determine English fluency.

Title VII and Employment Tests

Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. According to 42 U.S.C.A. § 703 and with respect to tests in particular, Title VII permits employment tests as long as the tests are not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. Title VII also imposes restrictions on how to score tests. For example,

employers are not permitted to adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin.

Disparate Treatment and Disparate Impact Discrimination

Title VII prohibits both disparate treatment and disparate impact discrimination. Title VII disparate treatment discrimination occurs where the discrimination is intentional and based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their Caucasian counterparts. Disparate treatment cases typically involve the following issues:

- Whether people of a different race, color, religion, sex, or national origin are treated differently.
- Whether there is any evidence of bias, such as discriminatory statements.
- The employer's reason for the difference in treatment.
- Whether the evidence demonstrates that the employer's reason for the difference in treatment is untrue, and that the actual reason for the different treatment is race, color, religion, sex, or national origin.

Title VII disparate impact discrimination occurs where employers use neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin where the tests or selection procedures are not job related and consistent with business necessity. Disparate impact cases typically involve the following issues:

- Whether the employer implements a particular employment practice that has a disparate impact on the basis of race, color, religion, sex, or national origin. For example, if an employer requires that all applicants pass a physical agility test, the test may disproportionately screen out women or another group. Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.
- Whether the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, and whether the employer can demonstrate that the selection procedure is job related and consistent with business necessity. An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.
- Whether the employer can demonstrate that the selection procedure is job related and consistent with business necessity, and whether the person challenging the selection procedure can demonstrate that there is a less discriminatory alternative available; for example, whether there is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group.

Note: In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures (UGESP) under Title VII. The UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory. The UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job related and consistent with business necessity. These methods of demonstrating job-relatedness are test validation. The UGESP provides detailed guidance about each method of test validation.

EEOC Enforcement Actions and Employment Testing

Title VII and Cognitive Tests: Less Discriminatory Alternative for Cognitive Test with Disparate Impact

EEOC v. Ford Motor Co. and United Automobile Workers of America involved a court-approved settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants.

Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure to be designed by a jointly-selected industrial psychologist that would predict job success and reduce adverse impact. Additionally, Ford paid \$8.55 million in monetary relief.

Title VII and Physical Strength Tests: Strength Test Must Be Job Related and Consistent with Business Necessity if the Test Disproportionately Excludes Women

In *EEOC v. Dial Corp.*, women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women — prior to the use of the test, 46 percent of hires were women; after use of the test, only 15 percent of hires were women. Dial defended the test by noting that it looked like the job and use of the test had resulted in fewer injuries to hired workers. However, the EEOC established through expert testimony that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures.

On appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination.

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities. The ADA specifies when an employer may require an applicant or employee to undergo a medical examination — specifically, a procedure or test that seeks information about an individual's physical or mental impairments or health. The ADA also specifies when an employer may make disability-related inquiries, which are inquiries that are likely to elicit information about a disability. The ADA regulates the following:

- When hiring, an employer may not ask questions about disability or require medical examinations until after the employer makes a conditional job offer to the applicant.
- After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for all individuals entering the same job category.
- With respect to employees, an employer may ask questions about disability or require medical examinations only if doing so is job related and consistent with business necessity. For example, an employer could request medical information when the employer has a reasonable belief — based on objective evidence — that a particular employee will be unable to perform essential job functions or

will pose a direct threat because of a medical condition, or when an employer receives a request for a reasonable accommodation and the person's disability and/or need for accommodation is not obvious.

The ADA also makes it unlawful to:

- Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, is shown to be job related and consistent with business necessity.
- Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude, or whatever other factor that such test purports to measure, rather than reflecting an applicant's or employee's impairment.
- Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship.

EEOC Enforcement Action and Employment Testing

ADA and Test Accommodation: Employer Must Provide Reasonable Accommodation on Pre-employment Test for Hourly, Unskilled Manufacturing Jobs

The EEOC settled *EEOC v. Daimler Chrysler Corp.*, a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotape providing the same information.

Age Discrimination in Employment Act

The ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age. The ADEA also prohibits disparate treatment discrimination (intentional discrimination based on age). For example, the ADEA forbids an employer from giving a physical agility test only to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants.

The ADEA also prohibits employers from using neutral tests or selection procedures that have a discriminatory impact on persons based on age (40 or older), unless the challenged employment action is based on a reasonable factor other than age. Consequently, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.

Employer Best Practices

Employers must:

- Administer tests and other selection procedures without regard to race, color, national origin, sex,

religion, age (40 or older), or disability.

- Ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under the UGESP.

If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.

To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.

Employers should also ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.