

THE SECRETS OF EMPLOYMENT TESTING

By Thomas S. Gill

In the late 1950's and early 1960's, testing was a common way to screen applicants. Testing was, and is, much more effective than interviews in determining skills and abilities. Shortly after the Civil Rights Act of 1964 was passed, testing came under attack as discriminatory. By the 1970's employment testing had all but disappeared. Tests were still used for government civil service jobs, but discrimination suits against states, cities, and other government agencies multiplied.

In *Guardians Association Of The New York City Police Department, Inc. v Civil Service Commission of the City Of New York*, 630 F.2d 79 (2d Cir. 1980) the Second Federal Circuit established new standards for civil service testing. That case was cited by 4 federal courts this year alone. The battle over employment testing, at least in the government sector, rages on.

Can private employers still make any use of tests to select new hires or promotions? Yes they can. In fact, tests have started making a come back in part because of cases like *Guardians*. Typing tests are used almost universally for jobs requiring typing. Companies also test for computer literacy and the ability to use spread sheet or other programs. Many employers use specific tests to measure knowledge, skills, or abilities needed on a job. Tests of "personality" have also become popular.

Testing raises discrimination issues because some tests screen out protected group members without any proof that a high test score means a better employee. In *Griggs v Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held that a test which screened out minorities could be illegal even if there was no discriminatory intent. In that case, Duke Power used the Wonderlic, a test of reading, math skills, and reasoning, to select maintenance workers. In North Carolina at that time, minorities were much less likely to have the opportunity to finish high school. As a result, the Wonderlic screened out most minorities. The Court held that Duke Power could not use the test unless they could show it was "job related". Duke Power was unable to show that people with better reading comprehension made better maintenance workers.

After 1971, court battles over tests involved statisticians and industrial psychologists. The EEOC weighed in by creating the Uniform Testing Guidelines (29 CFR Sec. 1607). After years of courtroom battles, and some controversial decisions, the US Congress decided to lay out how testing cases should be decided. The current law is as follows:

An unlawful employment practice based on disparate impact is established under this title only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; ... 42 USC § 2000e-2(k)(1).

There is much more to this statute, but the key part is quoted.

In practical terms, the statute says that unless a plaintiff can prove that significantly fewer minorities pass, the employer can use the test. Personality profiles, for example, may or may not be related to job performance. If they do not screen out more protected group members, they can be used for selection. The value of the test is a business question, not a legal one.

If you create a simple, practical test for one job, any impact on protected group members is unlikely to be statistically significant. Suppose you create a manual dexterity test for someone who sorts mail scored pass/fail. If you give the test to 5 people not in a protected class and one in that class, a statistician would probably use chi square to test for significance. Under that statistical test, the results would only be significant if all 4 non-class people passed, and the one class member failed. Any other result would not raise an issue of discrimination.

Even if a test screens out class members at a higher rate, a company can use it. In that case, the company must show that the test is job related. For example, the test for a pilot might be that he can land an airplane without crashing. Even if this test excludes a large number of class members, it is clearly necessary. In *Guardians*, the court said that an employer could prove job relatedness by creating a well researched job description, and by showing that the test measured key elements of the job. The New York Police Department sent police officers questioners about first day job activities. From these, they constructed task groups. Test questions tried to measure tasks like filling out forms. The court found the effort was good enough to create a pass/fail test but not to use scores for selection.

In this fog of testing rules, a few things are clear. If you have a test that does not screen out protected group members, you can use it. This is true even if the test does not pick good performers. If your test screens out protected group members, you must prove it is job related and a business necessity. Typing tests are obviously job related and necessary. More complex tests must be created by someone who can convince a court that the test measures knowledge, skills, or abilities needed to perform key elements of the job. Someone like an industrial psychologist.

Can you cure a discriminatory test by setting two pass rates, one for protected group members and one for others? In a word, no. This technique is reverse discrimination. Courts have sometimes found dual tracks legal to rectify past discrimination, but only based on court order. The solution is a different test.