

## EMPLOYMENT TESTS AND PERSONNEL SELECTION AUGUST 2013 CASE LAW UPDATE<sup>1</sup>

### Employment and Civil Rights Litigation and Counseling Practice Group

#### Senior Counsel

R. Lawrence Ashe  
Email: rla@phrd.com

#### Partners

Ronald T. Coleman  
Email: rtc@phrd.com

G. Wayne Hillis, Jr.  
Email: gwh@phrd.com

J. Marbury Rainer  
Email: jmr@phrd.com

Eric Jon Taylor  
Email: ejt@phrd.com

Trishanda L. Treadwell  
Email: tlt@phrd.com

#### Associates

Paul R. Barsness  
Email: prb@phrd.com

Tiffany R. Johnson  
Email: trj@phrd.com

Jared C. Miller  
Email: jcm@phrd.com

Lawrence Ashe

Trishanda L. Treadwell

Paul R. Barsness

Parker, Hudson, Rainer & Dobbs LLP

Atlanta, Georgia

(404) 523-5300

www.phrd.com

### **Recent study highlights significant skills gap for individuals in the United States. The study highlights the need for skills testing and the inadequacy of reliance simply on an applicant's educational background.**

A recent study by the not-for-profit assessment organization ACT indicates that there is a significant gap in necessary foundational skills for jobs that require either a low or high level of education. The study analyzed data from three cognitive assessments provided to approximately 4 million examinees from 2006-2011. Although ACT tracks data on over 1,100 occupations, the study focused on occupations that are projected, based on data from the US Bureau of Labor Statistics, to have (for the 2010-2020 time period): (1) higher-than-average employment growth; (2) higher-than-average openings, or (3) higher-than-average median wages.

The three cognitive skills ACT deemed essential foundational skills for a broad range of jobs were reading, applied mathematics, and locating information (the "ability to locate, synthesize, and use information from workplace graphics such as charts, graphs, tables, forms, flowcharts, diagrams, floor plans, maps, and instrument gauges"). According to the study, only 45% of examinees with a high level of education (Bachelor's, Master's, or Doctoral/Professional degrees) met the "locating information" skills requirements for most targeted occupations requiring a high level of education. Examples of occupations lacking necessary skills include sales managers, financial managers, sales and manufacturing representatives, accountants, electrical engineers, and CEOs. Less than 20% of examinees with a low level of education (some college, high school diploma, or less) met or exceeded the minimum locating information skills for targeted occupations requiring a low level of education. Examples of occupations in this category include electricians, first-line supervisors or construction trades workers and transportation, storage, and distribution managers.

While there was not a significant gap found overall between the skills needed for middle level education jobs (Associate's degree or some postsecondary non-degree training), less than 30% of aircraft mechanics and service technicians had the requisite minimum ability to locate information.

<sup>1</sup> This update covers decisions from May - July, 2013.

**Background checks: while the EEOC emphasizes national statistics, courts may insist on localized data. *Manley v. Nat'l ProSource, Inc.*, 2013 WL 3480385 (S.D. Tex. July 10, 2013)**

With its *Enforcement Guidance on the Consideration of Arrest and Conviction Records*, the EEOC warned employers that it will rely on national statistics to justify investigations:

National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.

Guidance No. 915.002 (April 25, 2012).<sup>1</sup> This aspect of the Guidance was troubling because, depending on the type of job, applicant population, and geographic location, certain background-check-based exclusions might not in fact have a disparate impact on specific applicants. At least one court, however, has insisted on localized data. In *Manley*, the plaintiff sued two staffing agencies alleging that a criminal history screening had an unlawful disparate impact on African-American male applicants. In support of his allegations, he relied on an expert opinion by Devah Pager, Ph.D., which concluded that African-American applicants were more likely to have criminal records and less likely to be hired than Caucasian applicants. The Court excluded the report and granted summary judgment to the defendants in part, because it relied on nationwide data and field studies from other areas of the country. As the Court noted, “[t]here is no explanation or analysis of the racial makeup or employment success of individuals with criminal records in Houston; Harris County, Texas; Texas as a whole; or even in states bordering Texas.” *Id.* at \*8. Because this decision is at odds with the EEOC’s Guidance, employers may need to be prepared to present both local and national statistics.

**Sixth Circuit clarifies that job applicants cannot link multiple hiring steps that share common characteristics and instead must demonstrate that an individual step causes unlawful disparate impact (or that the entire process is incapable of separation). *Davis v. Cintas*, — F.3d —, 2013 WL 2343302 (6th Cir. May 30, 2013).**

In *Davis v. Cintas*, a female job applicant (seeking a service-sales-representative position, “SSR”) brought a class action challenging Cintas’s multi-step hiring process. The Sixth Circuit affirmed the denial of class certification. The Court also affirmed summary judgment for the employer because the applicant could not identify the specific step in the hiring process that caused the disparate impact. For the SSR position, Cintas has a policy requiring or preferring a series of objective and subjective qualifications. Objectively, applicants must achieve a minimum score on a standardized test, have a driver’s license and high school diploma (or GED), and be able to lift 40 pounds. Cintas also prefers candidates who score between 21 and 27 on the Wonderlic-WPT intelligence test. Subjectively, applicants must demonstrate a series of traits, such as integrity and dependability. Cintas prefers candidates with certain sales and customer-service experience.

<sup>2</sup>Available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

Cintas uses a 16-step process to evaluate whether applicants meet the established criteria. Applicants must clear each hurdle to progress to the next step. For example, an applicant must pass the screening interview to take the pre-employment test, then turn in sufficient application materials to take the Wonderlic test. If successful in each of these steps, the applicant moves on to other rounds of interviews. Hiring managers have discretion with regards to the weight given to certain subjective elements, and these can vary depending on the needs of the location. SSRs were historically male, but implementation of this hiring process increased the number of female hires from 7 percent to 20.8 percent. *Id.* at \*2.

#### Class certification

Relying on the Supreme Court's decision in *Dukes*, the District Court denied class certification. Because Cintas's hiring process contained objective elements, the court concluded that it would not support a finding of "a general policy of discrimination." *Id.* at \*9. Further, because individual managers at different locations could exercise discretion in different ways, applicants did not share common questions of law or fact. The Sixth Circuit affirmed the denial of class certification, noting that the gravamen of the plaintiff's claim is not the objective criteria, but the subjective decision-making elements of the hiring process.

#### Disparate impact

Turning to the plaintiff's (now individual) disparate impact claim, the Sixth Circuit clarified the requirement that a plaintiff must identify a specific employment practice to establish a prima facie case of discrimination. According to the District Court, the fact that the plaintiff advanced to different points in the hiring process "demonstrates that the hiring process is capable of separation." *Id.* at \*17. On appeal, the plaintiff argued that the statutory term "particular employment practice" was broad enough to "comprise many different steps of a multi-step process, as long as those steps share a common characteristic: subjectivity." *Id.* The Sixth Circuit disagreed, concluding that the language in the statute "suggest[s] specificity, not amalgamation." *Id.* at \*18. Because the plaintiff failed to demonstrate that the exercises of discretion by managers at various points in the hiring process were incapable of separation, she was required to identify the specific part that created a disparate impact on female applicants, which the Court found she had failed to do.

*This memorandum is provided to clients and friends of Parker, Hudson, Rainer & Dobbs LLP with the express understanding that it does not constitute the rendering of legal or other professional advice by any attorney of Parker, Hudson, Rainer & Dobbs LLP. This memorandum is instead intended to summarize reported decisions in areas of law that may be of interest to clients and friends of the firm. The firm undertakes no responsibility to advise recipients of this memorandum of the reversal, modification or overruling of any of the cases reported in this memorandum or prior or subsequent decisions of other courts that may be at variance with any decisions summarized in this memorandum.*