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EMPLOYMENT TESTS AND PERSONNEL SELECTION
APRIL 2014 CASE LAW UPDATE

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

Jared C. Miller
Email: jcm@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

Lawrence Ashe
Trishanda L. Treadwell
Paul R. Barsness
Parker, Hudson, Rainer & Dobbs LLP
Atlanta, Georgia
(404) 523-5300
www.phrd.com

Lawsuit Waiting To Happen?

As the Wall Street Journal recently reported, a growing number of employers are asking at least some job applicants for their SAT scores—even applicants who took the test decades ago. *See* Melissa Korn, *Job Hunting? Dig Up Those Old SAT Scores; Employers Still Want Candidates' Test Results—Sometimes Decades Later*, WALL STREET JOURNAL, Feb. 25, 2014 (click here for article). Practices vary, and scores are often only part of the evaluation, but some companies set minimum scoring standards. The publicity, including coverage on Comedy Central's *The Colbert Report*, will undoubtedly receive the attention of the EEOC. If investigated, a company relying even in part on test scores could face potential litigation. Cognitive skill tests especially have adverse impact on some minority groups, and the SAT is no exception. According to the article, African-American test-takers in 2013 scored approximately 100 points lower than white test-takers on each subsection of the SAT. Validating employment use would be very difficult, if not impossible. The SAT is designed to predict first-year success in college. According to Kyle Ewing, the head of global staffing programs at Google, internal studies showed "very little correlation between SAT scores and job performance." Unless a company has internal studies to show otherwise, current practices to require, encourage, or even permit, hiring managers to rely on SAT scores as an evaluative criterion are simply inviting an investigation, and could result in serious potential liability and adverse publicity.

EEOC And FTC Join Forces On Background Checks

On March 10, 2014 the EEOC and FTC issued joint guidance on background checks. *See Employment Background Checks: FTC, EEOC Offer Tips for Employers and Job Applicants*. Guidance for employers is available here, and guidance for employees and applicants is available here. While many employers are already familiar, or are becoming familiar, with disparate-impact challenges to background checks, there is generally less familiarity with the requirements of the Fair Credit Reporting Act ("FCRA"). The Federal Trade Commission enforces the FCRA, and class actions under this Act are on the rise. This litigation is not limited to consumer reporting agencies, and employers should review internal practices, as well as those of their contractual partners, to minimize risks of exposure.

Why Following The Law Is Not Always The Best Course Of Action

Compliance efforts must account for the fact that federal employment law trumps state law. As a recent Second Circuit decision shows, state requirements—such as background checks and licensing standards—can result in Title VII liability if those requirements have a disparate impact. *See Gulino v.*

Bd. of Educ. of New York City Sch. Dist. of City of New York, 2014 WL 402286, *2 (2d Cir. Feb. 4, 2014). In *Gulino*, the Board of Education appealed for the second time its Title VII liability for requiring public school teachers to pass the Liberal Arts and Sciences Test ("LAST") in order to obtain or retain permanent teaching positions. While the Board's failure to raise the proposed defense during the first appeal precluded it from prevailing on the issue, the Second Circuit nonetheless reiterated "in no uncertain terms" that state law requirements will not justify a discriminatory practice: "Title VII explicitly relieves employers from any duty to observe a state hiring provision which purports to require or permit any discriminatory employment practice." *Id*. at *2. The Board also argued that reversal was required, because the test development company hindered its defense by failing to "adequately document the processes by which the test was developed." *Id*. at *3, n.2. It is unclear if this is a valid legal argument. The Second Circuit refused even to consider the argument, because the Board raised it for the first time in its reply brief.

Heightened Pleading Requirements, And Issue Preclusion, For Disparate-Impact Claims

In *Adams v. City of Indianapolis*, 2014 WL 406772 (7th Cir. Feb. 4, 2014), the Seventh Circuit held that conclusory allegations were insufficient to state a Title VII claim against the City. The plaintiffs, police and firefighters, challenged a series of promotional exams under both disparate-treatment and disparate-impact theories. The district court dismissed the disparate-impact claims, concluding erroneously that intentional-discrimination claims barred a plaintiff from pursuing disparate-impact claims from a "neutral" policy. The Seventh Circuit clarified that disparate-impact claims are not limited to neutral practices, but separately concluded that the plaintiffs failed to state a claim of discrimination under the heightened pleading requirements of *Iqbal* and *Twombly*. According to the Seventh Circuit, disparate-impact allegations are complex claims, and the "required level of factual specificity [required by *Iqbal* and *Twombly*] rises with the complexity of the claim." *Id*. at *9 (citations omitted). The complaint lacked any facts regarding "the number of applicants", "the racial makeup of the applicant pool", or any other factual support showing a causal link between the testing protocols and alleged racial imbalances.

Interestingly, the Seventh Circuit also affirmed the dismissal of a second lawsuit on the basis of claim and issue preclusion. The second suit challenged subsequent promotional decisions from the same promotion-eligibility list. The Seventh Circuit acknowledged that the claims were not time barred, as each employment decision premised on an unlawful eligibility list is separately actionable under Title VII. *Id*. at *13, n.8 (citing *Lewis v. City of Chicago*, 560 U.S. 205 (2010)). But claim and issue preclusion can still bar litigation. The City secured summary judgment on the first lawsuit. The plaintiffs were represented by the same attorney in both and, according to the Seventh Circuit, "cannot now relitigate issues that were decided against them in the earlier litigation." *Id*. at *13.