



Legal Issues Surrounding Physical Ability Test

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EMPLOYMENT LAWS

Title VII of the Civil Rights Act of 1964

Age Discrimination Act of 1967

**Uniform Guidelines on Employee Selection
Procedures – 1978**

Americans With Disabilities Act 1992, 2008/2011

Apply to tests and other selection procedures which are used as a basis for any employment decision.

60-3.2 (B)

The use of any selection procedure that has an adverse impact on the hiring, promotion, or other employment opportunities of members of any sex, age, or ethnic group will be considered to be discriminatory unless it has been validated or the provisions of section 6 of this part are satisfied. 60-3.3 (A)

LEGAL REQUIREMENTS

- Job Relatedness
- Essential Job Functions
- Reasonable Accommodation
- Objective Testing
- Predictive of Job Performance

“VALIDATION”

60-3.9 (A) Unacceptable Substitutes for Evidence of Validity

- Marketing material
- A letter from an Attorney stating validity
- Validity documents for other jobs or employers
- Job task analysis
- Anything other than a proper Validation document

VALIDATION DOCUMENTATION

- 60-3.15
- How the job's physical demands were analyzed
- A detailed description of the test battery
- How the tests measure the physical abilities of an individual
- A review of alternative tests that might reduce "Adverse Impact" 60-3.3 B
- How the pass/fail criteria relate to job requirements
- How the test battery is intended to be used
- Steps taken to assure accuracy and completeness

Appropriate Industry Types

- Distribution – Retail Merchandise, Grocery, Beverage, Furniture, etc.
- Transportation – Trucking, Airlines, etc.
- Manufacturing – Steel, Large parts or heavy components
- Hospitals – Patient lifting
- Nursing Homes – Patient lifting
- Ambulance/EMT – Patient lifting
- Utility/Public Works – Lifting and Cardiovascular
- Others – Is lifting > 35lbs? Do workers fatigue?

Case Studies

EEOC v Dial Corporation 2005

Why was the test not validated

Indergard v Georgia-Pacific Corp 2010

What makes a test a medical exam

EEOC v AutoZone 2011

Why essential job functions must be truly essential

Sandy v Kroger or EEOC v Kronos 2011

EEOC Protests Court Modification of Its Third-Party Subpoena

EEOC v Dial Corp

52 Women Rejected for Armour jobs because of a strength test, which required the repeated lifting of 35 pounds to a height of 65 inches, discriminated against women, since only approx 40% of female applicants passed the test, while virtually all male applicants passed the test but women had successfully performed the job in the past.

EEOC v Dial (cont.)

- The case was based on a charge of discrimination filed by Paula Liles in 2000.
- Liles alleged that she had successfully completed the seven-minute test, but was rejected because **she had to, at times, stand on her tiptoes**, and that she was told that she had failed because, at 5'2", she was too short.
- Dial Corp **ordered to pay \$3.4 M** to resolve the “sex discrimination” suit.

What Went Wrong

EEOC v Dial --- What Went Wrong

Test required 6 lifts per minute / job 1.25 per minute and the height of the lift was greater during the test than actual work.

Court concluded the test was more difficult than the job, thus it did not demonstrate “Content Validity” and lacked empirical data to sufficiently demonstrate it was predictive of job performance.

Pass / Fail determinations were subjective with out consideration for accommodations or changes to reduce adverse impact.

Dial also failed to demonstrate a “Business Necessity”

Indergard v Georgia Pacific Corp

- Indergard’s employer, Georgia-Pacific Corp., required all employees returning from medical leave to undergo a physical capacity examination.
- Indergard’s job **required an ability to lift sixty-five pounds**. The “physical capacity examination” consisted of a series of tests and questionnaires monitored by an occupational therapist over two days.

Indergard v Georgia Pacific Corp (Continued)

- Test included recording Indergard's medical history, her use of medication, alcohol, tobacco, medical devices, and her weight, blood pressure, and pulse, palpation and manipulated of the knees, and recorded Indergard's ability to lift various amounts, crawl, kneel, squat, sit, stand, and climb stairs. The occupational therapist also recorded Indergard's heart rate both before and after Indergard performed a treadmill test.

Indergard v Georgia Pacific Corp (Continued)

- Under the ADA, an employer may not require an employee to submit to a medical examination unless the examination "is shown to be job-related and consistent with business necessity."
- However, the ADA's does allow an employer to "make inquiries into the ability of an employee to perform job-related functions."

Indergard v Georgia Pacific Corp (Continued)

- Thus, in *Indergard*, the issue before the Ninth Circuit was whether Georgia-Pacific had required Indergard to undergo a medical examination, or only inquired into her ability to perform the physical requirements of her job.
- The Ninth Circuit found that the series of tests Georgia-Pacific required Indergard to take constituted a “medical examination” under the ADA.

What Went Wrong

The court listed the following seven factors:

- Is the test administered by healthcare professional
- Is the test interpreted by a healthcare professional
- Is the test designed to reveal an impairment of physical or mental health
- Whether the test is invasive
- Whether the test measures an employee’s performance of a task or measures his/her physiological response to performing the task
- Whether the test normally is given in a medical setting
- Whether medical equipment is used

Decision

- The Ninth Circuit agreed with the EEOC's guidelines that "one factor may be enough to determine that a test or procedure is medical." i.e. measuring Indergard's heart rate and breathing after she had performed physical ability tests was by itself enough to turn the test into a medical examination.

Side Note: Indergard could not lift the 65 pounds

EEOC v AutoZone

- Jury returned a verdict that AutoZone failed to reasonably accommodate John Shepherd, an auto parts sales manager.
- The facts of the case are that Shepherd had back and neck injuries, and due to his condition, he took several leaves from the company between January of 2001 and September of 2003. In April of 2003, after returning from a month long leave, he produced a doctor's note indicating that he could not mop or buff the floor.

EEOC v AutoZone (Continued)

- When he was advised that he could not return to work with such a restriction, he produced a revised note indicating that he could perform these duties “occasionally.”
- In September of 2003, he was mopping the floor and was injured. He was placed on leave until December, when he underwent an independent medical examination.

EEOC v AutoZone (Continued)

- The examination cleared him to return with his previous restrictions, but his own personal doctor placed additional lifting, standing and twisting restrictions on his return.
- He thus remained on leave and was ultimately terminated under the company’s disability policy.

Decision

On June 3, 2011, a jury awarded Shepherd \$100,000 in compensatory damages and \$500,000 in punitive damages.

Award based on grounds that mopping and buffing is not an essential job function for a sales manager.

Punitive Damages likely to be reduced to \$300,000 in line with limitations on compensatory and punitive damages awards in the Civil Rights Act of 1991.

EEOC v AutoZone What Went Wrong

- The 7th Circuit used the ADAAA to fortify its ruling on caring for oneself as a major life activity.
- Equally as important, employers need to ensure “essential job functions” are based on evidence (e.g., job analysis data) that they truly are essential, and not marginal, as the jury concluded in this case.

EEOC v Kronos

- The case began in May 2007 when Ms. Sandy applied for the cashier/checking job and was rejected after oral administration of a personality assessment instrument created by Kronos.
- The EEOC sued Kroger on July 3, 2007 claiming that Sandy was rejected because she is hearing and speech impaired.

As part of its investigation, the EEOC sought the following from Kronos to produce:

- Any and all documents and data constituting or related to validation studies or validation evidence pertaining to Unicru [Kronos' predecessor] and/or Kronos assessment tests purchased by The Kroger Company including but not limited to such studies or evidence as they relate to the use of the tests as personnel selection or screening instruments.
- The user's manual and instructions for the use of the Assessment Tests used by The Kroger Company.

Potentially including most of Kronos' business documents, covering its entire client base

Any and all documents and data, including but not limited to correspondence, notes, and data files, relating to The Kroger Company, its use of the Assessment Tests; results, ratings, or scores of individual test-takers; and any validation efforts made thereto.

Any and all documents discussing, analyzing or measuring potential adverse impact on individuals with disabilities and/or an individual's race.

EEOC v Kronos (continued)

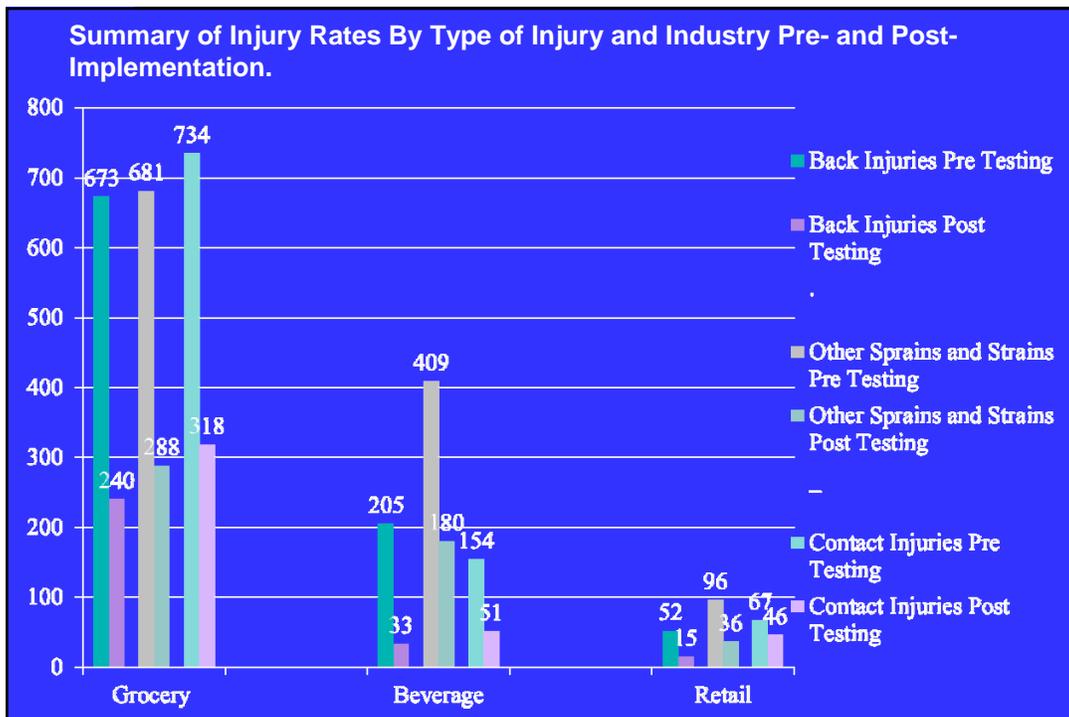
- Any and all documents related to any and all job analyses created or drafted by any person or entity relating to any and all positions at The Kroger Company A catalogue which includes each and every assessment offered by Unicru/Kronos. Additionally provide descriptions of each assessment.
- The original subpoena was revised but still burdensome.

EEOC v Kronos What Went Wrong

- Collectively, these rulings have implications beyond the 50-50 monetary split between the EEOC and Kronos.
- It serves notice of potential vulnerability for companies and/or consultants that develop tests as well as companies that use these tests

Testing

Is it worth it?



Summary

- If you are utilizing any type of physical ability test, make sure it is appropriate for its intended purpose and is job specific.
- Make sure you follow the ADA and ADAAA guidelines.
- Your job descriptions must be up to date and reflect the essential physical demands of the job.

Contact Information

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