

# Test Validation Litigation:

Legal Requirements and  
Lessons Learned

# Federal Law and Regulations

- Title VII of the Civil Rights Act of 1964, 42 USC 2000e
- Uniform Guidelines on Employee Selection Procedures
- Cases interpreting the foregoing

# Title VII

- Title VII of the Civil Rights Act of 1964 (as amended in 1991) prohibits basing employment decisions on race, gender, ethnicity, religion, or national origin
- Employment decisions include:  
Recruitment, Hiring, Promotion, Transfer, Wages, Leave, Training, Discipline, and Termination

# Title VII

Has been interpreted to require that an employer's selection procedures not result in disparate impact against a protected group, unless the procedure is demonstrated to be "valid and consistent with business necessity"

# Title VII

- Selection procedure that results in adverse impact is presumed to be discriminatory, unless it is shown to be valid pursuant to the Uniform Guidelines.

# Uniform Guidelines

- Issued jointly by the EEOC, DOJ, OFCCP and other federal agencies in 1978
- Set forth standards for determining adverse impact
- Set forth standards for demonstrating validity of selection procedures
- Include important record-keeping requirements

# Litigation

- Plaintiff or class of plaintiffs allege that selection procedures have adverse impact and are not valid
  - Plaintiffs must show, usually in a statistical fashion, that the proportion of the protected class hired or promoted was significantly less than would be expected
  - Raises a rebuttable inference of discrimination

# Litigation

- In general, plaintiffs can establish a *prima facie* case of adverse impact by relying upon:
  - The “80% rule” or
  - A statistically significant difference, usually expressed as standard deviations

# Litigation

- Disputes over statistical evidence
  - Applicant pools and applicant flow
  - Aggregation of data across jobs, facilities
  - Inclusion or exclusion of variables
  - What statistical tests to apply based on sample sizes, etc.

# Litigation

- Disputes over applicant data will be multiplied after adoption of the new Q&A:
  - Whether the employer acted to fill a position
  - Whether the putative applicant complied with employer's application process
  - Whether the advertised requirements were valid
  - Whether criteria mentioned in advertisement were covered requirements

# Litigation

- Once plaintiffs establish adverse impact, burden shifts to employer to demonstrate validity
  - Expert testimony in support of existing validity evidence
  - New retrospective validation study

# Litigation

- Plaintiffs counter with expert testimony attacking the validity evidence
  - Compliance with Uniform Guidelines
  - Compliance with professional standards
  - Alternatives with lesser adverse impact

# Litigation

- Aspects of the selection process that are subject to challenge
  - Recruiting and advertising
  - Application process
  - MQ or other preliminary screening
  - Examination, as a whole and by item
  - Scoring
  - Use of scores
  - Final decisionmaking process

# Litigation

- Aspects of validation that are subject to challenge
  - Sampling plan and selection of SMEs
  - Qualification of SMEs
  - Interaction with SMEs
  - Analysis of SME input
  - Qualifications of development staff
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# Litigation

- Design of test instrument and items
- Item ratings and item bias
- Consideration of alternatives
- Compensatory vs. non-compensatory
- Alternative use of scores
- Documentation
- Documentation
- Documentation

# Reynolds v. ALDOT

- Litigation concerning the validity of minimum qualifications for several job classes
- Pursuant to consent decree, defendants had the burden of demonstrating validity in response to objections made by plaintiffs

# Reynolds v. ALDOT

- Disputes concerning overall MQ development process
- Disputes concerning particular job classes
  - Engineering jobs (including mgmt)
  - “Right of Way” jobs

# MQ Development Process

- Gather and analyze background information
  - Prior selection procedures for same job
  - Data from other employers
  - O\*NET

# MQ Development Process

- Select subject matter experts
  - Job incumbents and supervisors with a minimum level of experience in the job
  - Representation of
    - Race
    - Gender
    - Functional areas
    - Geographic locations
    - Supervisors and incumbents

# MQ Development Process

- Draft MQ Development form
  - Used by SMEs as a tool for organizing thoughts about tentative MQ statements

# MQ Development Process

- SME Meeting
  - Review list of qualifying KSAs from job analysis
  - Define “minimum qualification” and discuss purpose
  - Develop and discuss tentative MQ statements

# MQ Development Process

- SMEs are instructed that
  - MQs are designed to identify the barely acceptable applicant
  - MQs are the minimal levels of education, training, prior work experience or other attribute that would be necessary to acquire the KSAs needed to perform at a minimally acceptable level on Day 1

# MQ Development Process

- SME-developed tentative MQ statements are “bracketed” with statements requiring lesser and greater amounts of the same type of qualification

# MQ Development Process

- SME rating session
  - SMEs rate the proposed MQ statements for suitability and link them to the surviving KSAs

# MQ Development Process

- Suitability rating
  - 0: not at all
  - 1: not enough to expect
  - 2: appropriately defines
  - 3: too much to expect

# MQ Development Process

- Linkage ratings
  - Dichotomous (yes/no) scale
  - Can the particular K, S, or A be acquired from the experience described in the proposed MQ statement?

# MQ Development Process

- SME supplemental information questionnaire
  - Solicits suggestions for any alternative MQs
  - Solicits SME input concerning substitution of experience for education, or vice versa

# MQ Development Process

- SME ratings analyzed by I/O Psychologists
  - Mean ratings closest to 2.0
  - Number of 2.0 ratings
  - Number of KSAs to which statement linked at .50 or higher
  - Mode of combined ratings
  - Adverse impact data
  - Supplemental SME info

# MQ Development Process

- Final MQ statements selected using professional judgment after consideration of all these factors

# Challenges

- Plaintiffs claimed
  - Education and experience MQs are not capable of content validation
  - The MQs were not sufficiently specific
  - “Compound” MQ statements are not permissible
  - SME ratings and rating scales were improper
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# Challenges

- Necessary at entry ratings didn't include those who said they didn't use the K, S, or A
- Use of the same SMEs to develop and rate tentative MQ statements was improper
- Documentation did not satisfy the requirements of the Guidelines

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# Challenges

- Defendants failed to properly consider alternatives with lesser adverse impact
- MQ development form was improper
- Low pass rates indicate MQs too difficult
- SMEs not properly instructed on how to identify “barely acceptable” applicant

# Defense

- Lay the foundation
  - Project manager testifies to establish procedures
  - Individuals responsible for development work testify about what was done
  - All necessary documentation introduced

# Defense

- Documentation is crucial
  - Demonstrates compliance with Guidelines and professional standards
  - Corroborates lay witness testimony as to what was done and why
  - Documentation should include professional literature supporting the methodology

# Defense

- Expert Witnesses
  - Experts file report before trial supporting validity
  - Following lay witnesses, experts testify that procedures and work done comport with Guidelines and professional standards
  - Experts stress the exercise of professional judgment

# Findings

- The MQ development process is consistent with the requirements of the Guidelines and leads to content valid MQs

# Findings

- The Uniform Guidelines operate, of necessity, at a general level. The specific mechanisms for complying with the requirements of the Guidelines are left to the professional judgment of those responsible for their implementation.

# Findings

- In making determinations concerning compliance with the Uniform Guidelines, it is appropriate for the Court to rely on the testimony of experts

# Findings

- Defendants documented their MQ development efforts in a manner consistent with the Guidelines

# Findings

- It was appropriate to validate “compound” MQ statements, where the requirements are designed to work together as a single statement.

# Findings

- It was appropriate to allow SMEs to rate more than one tentative MQ as “appropriately defining” the barely acceptable applicant, because the SMEs could judge that there was a range of acceptable MQs in the series

# Findings

- Alternative selection procedures must be considered only where they have
  - Lesser adverse impact, AND
  - Substantially equal validity

# Findings

- Plaintiffs must proffer specific alternatives that they claim should have been considered
- Plaintiffs have the burden of showing that any alternative proffered by them would be of substantially equal validity and have lesser adverse impact

# Findings

- It was appropriate to exclude from the calculation of necessary at entry ratings those SMEs who said they did not currently use a K, S, or A

# Findings

- Defendants' procedures for selecting SMEs were appropriate and in compliance with the Guidelines
  - Guidelines do not require the use of any particular sampling methods

# Findings

- The MQ Development Form was an appropriate tool for helping SMEs to organize their thoughts and begin thinking about MQ statements

# Findings

- SMEs were given a sufficient definition of the terms “minimum qualification” and “barely acceptable applicant”

# Findings

- There was ample evidence to support the defendants' use of a dichotomous rating scale

# Findings

- There was ample evidence to support the defendants' use of a .50 linkage screen

# Findings

- The existence of a validated selection procedure obviates the need for a separate consideration of “business necessity”

How to  
Avoid Trouble

# Documented Procedures

- Develop standardized procedures to be followed in development projects
- Document standardized procedures in a manual
- Leave room for exercise of professional judgment

# Documented Procedures

- In developing standard procedures, review literature
  - retain documentation of support for your procedures
  - If there is conflicting literature, consider and document reasons for departing from that literature

# Documented Procedures

- In developing standard procedures, consider legal precedent
  - Become familiar with case law
  - Consult with counsel

# Documented Procedures

- Don't go out on a limb
  - Take the most well supported route if possible
  - Don't use untested or experimental procedures unless there's no other reasonable choice

# Documented Procedures

- If litigation is ongoing or anticipated, involve outside expert early
  - Expert should contribute to, or review procedures
  - Expert should review own prior writings and testimony to ensure there is no significant conflict

# Documented Procedures

- Pay careful attention to the requirements of the Uniform Guidelines
  - The Uniform Guidelines are federal regulations, and they remain an important legal standard that courts may apply to determine compliance with the law

# Staffing Development Projects

- Limit the number of staff members
  - A small number of highly trained and well qualified people should perform most development work
  - To the extent that less experienced assistants are used, they should be very closely supervised and not make judgment calls

# Staffing Development Projects

- Carefully consider the background of each staff member
  - Prior development experience
  - Education

# Staffing Development Projects

- Carefully consider the ability of each staff member to act as a witness
  - Temperament
  - Articulateness
  - Attention to detail
  - Presence

# During Development

- Carefully document all work
  - The smallest, most seemingly insignificant detail may be raised as a problem by the other party
  - Meticulous record-keeping can carry the day

# During Development

- Exception to the meticulous documentation rule:
  - Don't correspond with staff in writing about questions and problems, if a telephone conversation or meeting will suffice
  - You can always document your resolution of a problem with a memo afterwards

# During Development

- When a deviation from your normal practices is called for, document it
  - Provide an explanation for the decision to change the process
  - Include any support in the professional literature

# During Development

- Beware of deadlines!
  - If you must agree to a deadline, decide how much time you are comfortable with, and then add some more time for the unanticipated
  - Let the court and/or other parties know of potential obstacles or delays as soon as you know
  - Ensure that ways to extend the deadline are set out

# During Development

- Establish a review procedure for all development work
  - One or two people provide final review of all completed work
  - Reviewers will be witnesses

# Be Prepared!

- Don't wait until the wolves are at your door to find out if your house is made of straw or bricks
  - Consider a legal compliance review to uncover vulnerabilities while you have the luxury of correcting them

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