



31st

International Congress On
Assessment Center Methods

MAKING LEGAL SELECTION DECISIONS: A LAWYER'S PERSPECTIVE

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The Typical Selection Process

- Vacancy Identified
- Job Requirements Determined
- Candidates Recruited
- Job Seekers Registered
- Seekers Screened
- Demographic Data Obtained
- Qualifications Ascertained
- Candidates Prioritized
- Tests Administered
- Interview(s) Conducted
- Selection Decision Made
- Offer Extended
- Background / Drug Test Administered
- Vacancy Filled

Goal Today

- Appropriate Information Collected
- Correct Criteria Employed
- Selection Process Fair
- Evidence Exists

Statistics

- Statistics Presume Equal Distribution and Random Selection
- Real World
- Challenge
- Need - Information

Ten Factors

- Applicable Law
- Theory Of Recovery
- Fact Finder
- Plaintiffs
- Challenged Criteria
- Selection Methodology
- Selection Results
- Appropriate Candidate Pool
- Implementation Strategy
- Relevant Evidence



Applicable Laws Governing Selection Decisions

Federal Laws

Title VII

E.O. 11246

§ 1981

ADEA

ADA

VRA

IRCA

USERRA

VEVRAA

Bankruptcy Act

Protected Group

Race, Sex, Religion, N.O.

Race, Sex, Religion, N.O.

Race, Color

Age (40 & over)

Disability

Disability

N.O., Citizenship

Military Service

Vietnam Vet Status

Bankrupt

State Laws

Age (18+)

Marital Status

Sexual Orientation

Arrests

Physical Appearance

Smoking

Off Duty Conduct

Ancestry

Family Responsibilities

Matriculation

Political Affiliation

Appearance

The Theory of Recovery

Disparate Treatment

- Subjective Judgments
- Intent Necessary
- Jury
- Compensatory & Punitive Damages

Adverse Impact

- Objective Facially Neutral
- Intent Irrelevant
- Judge
- Make Whole Relief

The Theory of Recovery *(Cont.)*

- Burden of Proof
 - Prima Facie Case
 - Legitimate Reason
 - Pretext
- Certification Harder
- Burden of Proof
 - Adverse Impact
 - Job Related
 - Better Alternative
- Certification Easier

The Fact Finder

- Administrative Agency
- Judge
- Jury

The Plaintiff

- Individual
- Multiplaintiff
- Class Action

The Criteria

- Scored Objective Criteria
- Non-Scored Objective Criteria
- Subjective Criteria

The Selection Methodology

- Objective vs. Subjective
- Cut Score v. Ranking
- Multiple Hurdle vs. Bottom Line
- Qualified Pool vs. Vacancy Specific

Results

- Adverse Impact
 - Proof of Adverse Impact
 - Validation Study
- Disparate Treatment
 - Attack Plaintiff's Statistics
 - Supply Alternative Analysis

The Appropriate Candidate Pool

- Hiring
- Promotion
- Selection for Qualification Tests/Training

Consistency of Implementation

- Same Criteria Applied
- Criteria Applied Same Way

The Evidence

- What do I need to make my case?
- Do I have the evidence I need?
 - Statistics
 - Documents
 - Witnesses

Ten Rules of Defensibility

Notice of Opportunity Should Be
Appropriately Disseminated, And Any
Interested Person Should Be Permitted
To Register Interest In Being
Considered

The Minimum and Desired
Qualifications (Criteria) Should Be
Articulated For All Jobs

Client Should Ensure That The Job Eligibility/Qualification Elements Are Legal, Job-Related and Consistent With Business Necessity

The Selection Criteria And Process
Should Be as Simple, Straightforward
And Intuitively Fair As Possible

Any Criteria That Is Likely To Have Adverse Impact Should Be Carefully Studied And Steps Taken Either To Eliminate The Adverse Impact, To Validate The Criteria, Or To Adopt A Substitute Criteria/Instrument That Has Less/No Adverse Impact

The Selection Criteria & Process Should Be As Objective As Possible

The Process Should Be Structured To Ensure That All Selection Decision Makers Are Required To Use the Stated Criteria And Are Employing A Consistent Methodology/Process To Assess Every Candidate's Qualifications In A Similar Fashion

The Reasons For The Disposition Of
All Candidates Need To Be Stated By
The Selection Decision Makers

Every Step In The Winnowing Process
Must Be Documented -- Ideally
Electronically

The Client Should Collect, Preserve and Be Able To Search A Database That Will Allow It To Analyze Hires, Promotions and Pay In An Effective Manner.

Goal: Design a system that electronically documents

- The criteria for each job
- The validity/justification for each criteria
- The identity, demographic data, job choices and qualifications of each candidate
- The explanation for each candidate's elimination

Goal: Design a system that electronically documents *(Cont.)*

- The reasons why the decision maker believed the person selected was better qualified than the unsuccessful candidates
- Useful information for each new hire that can be used later for pay analysis