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NEW ORLEANS, LA

Employment Testing  
“What Could Go Wrong”



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# Employment Testing

## What Could Go Wrong

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# The RULES for a successful presentation

**K.I.S.S.--- I will try my best but its about the law.**

**Not too many slides --- The slides are for your reference!**

**Make a memorable quote --- “Don’t call me if you’re sued”**

**Make it interesting --- Don’t fall asleep or you may get sued**

**Finish on Time --- We will**

# **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**

# **Uniform Guidelines on Employee Selection Procedures**

## **CFR-20 Chapter 60-3**

### **US Department of Labor**

**Established in 1978.**

**Designed to comply with Federal law prohibiting employment practices which discriminate on the grounds of race, color, religion, sex, and national origin. 60-3.1 (B)**

**Apply to tests and other selection procedures which are used as a basis for any employment decision. 60-3.2 (B)**

## **Uniform Guidelines on Employee Selection Procedures (Continued)**

**Employment decisions include but are not limited to hiring, promotion, demotion, membership, referral, retention, licensing, certification (does not apply to recruitment). 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)**

## 60-3.6 The use of Selection Procedures which have not been validated

### *Use of Alternative selection procedures to eliminate adverse impact.*

Alternative procedures should eliminate the adverse impact in the total process.

*When validity Studies cannot/need not be performed*  
Use selection procedures which are as *job related as possible and which minimize or eliminate adverse impact.*

## 60-3.6 The use of Selection Procedures which have not been validated (Continued)

***Where informal or un-scored procedures are used;***

Which has an adverse impact,

***modify the procedure to a formal, scored or quantified measure or combination of both, then validate.***

***Where formal and scored procedures are used;***

When a user cannot or need not validate the test,

***the user should modify the procedure to eliminate the adverse impact or justify continued use of the test in accord with Federal Law***

## LEGAL REQUIREMENTS

- Job Relatedness
- Essential Job Functions
- Reasonable Accommodation
- Objective Testing
- Predictive of Job Performance **“VALIDATION”**

## Validation Studies (Three Types)

### 60-3.5 General Standards for Validity Studies

- Criterion-related Validity
- Content Validity
- Construct Validity

## Why Do Companies Use Physical Ability Test?

### ROI Example Calculation

**\$ 550,000/100 injuries = \$5500 average cost/injury**

**100 x 40% injury reduction = 40 injuries saved**

**40 x \$5500 = \$220,000 cost savings**

**1000 x 30% turnover = 300 annual hires + 20% fail**

**360 x \$110 = \$39,600 testing costs**

**\$220,000 - \$39,600 = \$180,400 net cost savings**

**\$180,400/\$39,600 = 18.79 to 1 ROI**

## Case Studies

**EEOC v Dial Corporation 2005 – No Business Necessity**

**Indergard v Georgia-Pacific Corp 2010 - Medical exam**

**EEOC v AutoZone 2011- Job functions must be essential**

**Sandy v Kroger or EEOC v Kronos - Third-Party Subpoena**

**Jacobs Field Services (JFS) v Michael Cannon – ADA**

**DOL v Gordon Food Service – Invalid Isokinetic Testing**

## EEOC v Dial Corp

**52 Women rejected Armour jobs due to a strength test.**

***Repeated lifting of 35 pounds to 65 inches.***

***Approx 40% of female applicants passed the test.***

***Virtually all male applicants passed the test.***

***Women successfully performed the job in the past.***

## **EEOC v Dial (cont.)**

**Dial Corp ordered to pay \$3.4 M “Sex Discrimination”**

**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.**

## **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 65 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:

Medical history, medication, use of 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 does allow an employer to “make inquiries into the ability of an employee to perform job-related functions.”

## **Indergard v Georgia Pacific Corp (Continued)**

The issue before the Ninth Circuit was:

Did Georgia-Pacific require 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 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."

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.

## **EEOC v AutoZone**

**Jury returned a verdict that AutoZone failed to reasonably accommodate John Shepherd, an auto parts Sales Manager.**

**The facts:**

**Shepherd had back and neck injuries**

**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)**

**Shepherd 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

\$200,000 in punitive damages

\$9,000 in litigation costs

Total \$309,000

The punitive award was based on grounds that mopping and buffing is not an essential job function for a sales manager.

Punitive award was reduced from \$500,000 to \$200,000 to be in line with limitations on compensatory and punitive damages awards in the Civil Rights Act of 1991.

Additionally, a the EEOC's request for an additional award of \$115,000 in back pay.

The basis of this suit is a refusal to reasonably accommodate.

## **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 begin in May 2007.**

**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.**

**The EEOC sought the following from Kronos:**

**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.**

**This would 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

### The importance of this case:

*It serves notice of potential vulnerability for companies and/or consultants that develop tests as well as companies that use these tests.*

## 2016 case JFS v Cannon

**Jacobs Field Services (JFS), a construction company, offered Michael Cannon a job as a field engineer at a Colorado mining site.**

**(JFS) quickly revoked the offer after learning that Cannon had a rotator cuff impairment that prevented him from lifting his right arm above the shoulder.**

## 2016 case JFS v Cannon

### Bases of Litigation

**The doctor cleared Cannon for the position so long as JFS offered the following accommodations for the rotator cuff injury:**

**No driving company vehicles;**

**No lifting, pushing, or pulling more than ten pounds;**

**No working with his hands above shoulder level.**

## 2016 case JFS v Cannon

**JFS did not agree to the proposed accommodations.**

**The same day JFS received the “Medical Clearance” form with the list of accommodations.....**

**JFS determined???????????**

**That Cannon was physically incapable of performing the job.**

## **2016 case JFS v Cannon**

**Human resources notified the technical services manager about the doctor's proposed accommodations and sought approval to proceed with Cannon's hiring**

**The technical services manager stated that Cannon would "not be able to meet the project needs and required job duties".**

**He explained that the job required an employee "capable of driving, climbing, lifting, and walking" as the job site was located "in the mountains with rough/rocky terrain" and "spread over several miles."**

## Poor Communication

**A human resources representative contacted Cannon:**

**Did not mentioning the position taken by the manager that Cannon could not do the job,**

**The HR representative informed Cannon only that JFS had concerns that he could not reach above his head with his right arm.**

## JFS Request

**Cannon was told that JFS needed him to clarify whether:**

**(1) Could he climb a ladder and**

**(2) Was still taking Ultram.**

## Cannon's Response

**There was no indication that the job offer had been rescinded.**

**Cannon took the requests for additional information to mean that satisfactory responses would eliminate the concerns.**

**Cannon provided the requested information, submitting documentation from his doctor stating that he was “specifically cleared for climbing vertical ladders and maintaining 3-point contact with either arm” and was being weaned from Ultram.**

## NO Follow Up from JFS

**No one from JFS followed up with Cannon** to discuss the doctor's notes he had submitted.

Instead, during a call on July 20, the same day Cannon submitted the clearance forms from his doctor, **JFS informed Cannon that it was rescinding the offer based on his inability to climb a ladder.**

**Cannon continued to try to prove** to JFS **that he was capable of climbing a ladder** in an effort to have his offer **reinstated—**  
**sending a video of himself climbing a ladder while maintaining 3-point contact.**

**JFS did not respond.**

## The EEOC Concluded

**JFS engaged in disability discrimination because:**

- (1) JFS failed to engage in the interactive process.**
- (2) Providing Cannon with the requested accommodations would not have imposed an undue hardship on JFS.**
- (3) JFS did not demonstrate that Cannon would have posed a “direct threat to himself or to his coworkers”**

**JFS refused to engage in the EEOC-directed conciliation process, so the EEOC issued a Notice of Right to Sue. Cannon filed this lawsuit.**

***Cannon's shoulder injury is a qualifying disability if it "substantially limits" his ability to perform such tasks.***

The ADA includes:

"lifting" in its list of major life activities.

42 U.S.C. § 12102(2)(A)

**(stating that "major life activities include, but are not limited to . . . lifting, bending, speaking, [etc.]" );**

29 C.F.R. § 1630.2(i)

**(also including "reaching" as a major life activity).**

**JFS believed Cannon’s injury resulted in substantial impairment even if that view were mistaken:**

**This is why the 2008 amendments to the ADA support a finding that Cannon was disabled.**

**The ADA now covers not just someone who is “regarded as having . . . an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity.”**

## What Went Wrong

- 1) Poor communication between HR and Field**
- 2) Poor communication between HR and Connor**
- 3) No formal process to test employees**
- 4) No policy to determine how/when to accommodate**
- 5) No Interactive Process after rescinding an offer.**

## **Gordon Food Service 1.85 million Settlement**

**May 2016, Settlement**

**Federal investigation results in:**

**\$1.85 million settlement for Gordon Food Service for discriminatory hiring practices at the company's warehouses.**

## No Applicant Complaint

It was during a *routine* evaluation of the company's "Functional Affirmative Action Plan".

Investigators noticed the hiring rate for female applicants was significantly lower than male applicants.

## Adverse Impact

**Investigators determined the company used discriminatory hiring practices resulting in the hiring of only 6 females out of a pool of 926 applicants from January 2010 to September 2012. During that same period, GFS hired nearly 300 male workers.**

## Settlement Agreement

**The \$1.85 million settlement amount.**

**The company is required to hire 37 women from the pool of women who applied for warehouse positions.**

## Investigation Findings

**Majority of women failed the Isokinetic Testing**

The strength and agility test, **isn't administered or interpreted by a healthcare professional.**

**The test isn't valid because** the company failed to complete a full study of it, and the requirements are **based on the criteria for workers in the coal mining industry.**



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## DOL Statement

**“We believe the test was more stringent than the actual job requirements.”**

Department of Labor spokesman

## What Went Wrong

- 1. Adverse Impact**
- 2. Invalid test design**
- 3. Medical Equipment was used but test was not administered by or interrupted by healthcare professional**
- 4. Test was more stringent than the actual job requirements**

## **7<sup>th</sup> Circuit vs Human Performance Systems and the Chicago Fire Department and EMS**

**October 2016 Test discriminates against women.**

**Human Performance Systems designed a test for Chicago EMS new hires at the academy training level.**

**The test was found to have questionable validation that was not job specific.**

**Problem: Work samples were flawed and not representative of job demands thus cut off scores for Pass/Fail were not valid.**

***Dial case referenced several times.***

## 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 all the laws pertaining to employment testing, including Uniformed Guidelines.**

**Your job descriptions must be up to date and reflect the essential physical demands of the job.**

**If there is a challenge, they will ask for the Moon**

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## Contact Information

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Thank you for attending!

Please remember to  
submit an evaluation on  
the mobile app.