THE UNIVERSITY of TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League

TECHNICAL bulletin

August 2, 2008

INTERVIEWING AND THE LAW

Richard L. Stokes, Human Resources Consultant

Congress provided federal legal enforcement for equal employment in the Civil Rights Act of 1964, with strengthening amendments added in 1972.

Title VII of the Civil Rights Act
Makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.

(2) to limit, segregate, deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.[1]

Congress established the Equal Employment Opportunity Commission (EEOC), a bi-partisan five-person board, to enforce Title VII.[2] The president appoints the members, who then must be confirmed by the senate. Although the muscle behind the EEOC's enforcement power lies in its right to file lawsuits against private employers in federal court, the commission's primary importance for public employees centers on the guidelines it issues to clarify Title VII's reach.

PRE-EMPLOYMENT PRACTICES

Pre-employment selection procedures, including tests and inquiries used to screen out prospective applicants, can be particularly vulnerable to adverse impact charges. Title VII allows the use of "professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin.[3]" The EEOC requires employers using selection tests to justify them with "data demonstrating that the test is predictive of or significantly correlates with important elements of work behavior which comprise or are relevant to the job or jobs which candidates are being evaluated.[4]" The EEOC has also published very technical and complicated standards for validating such test.[5] In most circumstances, if an employer cannot statistically tie a pre-employment test to specific characteristics necessary for successful job performance and the employer does not desire to perform a validity study, the test should be discontinued or changed.

Pre-employment screening procedures such as job application forms, interviews, and background investigations should be reviewed for their job relatedness. Employers should limit their questions to matters relevant to determining an applicant's competence. Title VII does not prohibit questions regarding an applicant's race, color, religion, sex or national origin, but these may be used as evidence of discrimination if an employer cannot explain their presence. In addition, these questions may be prohibited by state law. Questions about association or marriage with a particular racial or ethnic group also may be used as evidence of discrimination. Employers should avoid questions about marital status, the age and number of children, plans for pregnancy or arrangements for child care.[6]

Pre-employment investigations for the purpose of examining an applicant's "fitness" or "character" or to verify statements made on the application should be carefully reviewed by employers for job relatedness. The criteria used to qualify applicants in background investigations should be precise, well defined and should clearly state the information that will disqualify an applicant; if not, at least some courts refuse to find them job related. For example, a police department's investigations to seek disqualifying evidence of "bad character, dissolute habits, and immoral conduct" violated Title VII primarily because the criteria were so poorly defined.[7]

Employers also must conduct investigations using the same procedures and thoroughness, regardless of the applicant's sex, race, ethnic origin or religion. Proof that an employer compared the results of an in-depth investigation of a member of a protected class with a limited investigation of a non-minority one will defeat an employer's claim that the procedure was public business related. When no proof of business necessity has been shown, courts have found that background investigations by police[8] and fire departments[9] into an applicant's financial history violate Title VII because they disqualify disproportionate numbers of Blacks. In addition, using a less than honorable discharge from the military as a criterion for rejecting an applicant also may violate the act because statistics reveal a higher incidence of such discharges among minorities.[10] Unless solid proof of public business necessity can be shown, employers also should avoid use of arrest records to reject applicants. But, if a conviction would render an applicant unsuitable for a particular job, it might be a valid justification for rejecting the applicant. For example, a conviction for bank robbery would probably justify a bank's refusal to hire an individual as a teller or loan officer, but perhaps not as a janitor. If an employer questions an applicant about prior convictions, inquiries should be accompanied by a statement that a conviction record will not necessarily be a bar to employment and that factors such as age and time of the offense, seriousness and

nature of the violation, and rehabilitation will be taken into account.

INAPPROPRIATE PRE-EMPLOYMENT INQUIRES

Listed below are examples of inappropriate pre-employment inquiries found on employment.[11]

Without EEOC Disclaimer

1. What is your birth date?
2. What is your birthplace?
3. What was your age on your last birthday?
4. What is your sex?
5. What is your race or ethnic group?
6. Do you have any handicaps or physical defects?

With or Without EEOC Disclaimer

1. Are you known or have you been known by any other name(s)?
2. Which do you prefer: Mr., Mrs., or Ms.?
3. What is your marital status?
4. How many dependants do you have?
5. What is your height and weight?
6. What are the dates of your education and/or degrees?
7. Have you ever been convicted of a crime?
8. Do you posses a valid driver's license?
9. Do you have transportation to work?
10. What were the dates of your military service?
11. What was your rank when you left military service?
12. If claiming veteran's preference, have you submitted the appropriate documentation?
13. Do you read and write English?
14. What is the lowest pay you will accept?
15. Do you have any relatives employed by the state?
16. Are you willing to travel?
17. Are you willing to work shifts/overtime?
18. Are you willing to lift heavy weights?

LAWFUL AND UNLAWFUL INQUIRIES DURING PRE-EMPLOYMENT INTERVIEWS

Any inquiry is forbidden that, although not specifically listed among those below, is designed to elicit information as to race, color, ancestry, age, sex, religion, or arrest and court record, unless based upon a bona fide occupational qualification.

LAWFUL INQUIRIES

NAME

- Have you worked for this company under a different name?
- Is any additional information relative to change of name, use of an assumed name or nickname necessary to enable a check on your work and educational record? If yes, explain.

MARITAL/FAMILY STATUS

- Whether applicant can meet work schedules or activities; commitments that may hinder the meeting of work attendance requirements
- Inquiries as to duration of stay or anticipated absences that are made to males and females alike

August 2, 2008
INTERVIEWING AND THE LAW

AGE
- If a minor, require proof of age in the form of a work permit or a certificate of age.
- Require proof of age by birth certificate after being hired.
- Inquiry as to whether or not applicant meets the minimum age requirements as set by law must be submitted in the form of a birth certificate or other forms of proof of age.
- If age is a legal requirement: "If hired, can you furnish proof of age?", or that hire is subject to verification of age.
- Inquiry as to whether or not an applicant is younger than the employer's regular retirement age.

Under the Americans With Disabilities Act, an employer may ask questions to determine whether an applicant can perform specific job functions. The questions should focus on the applicant's ability to perform job, not a disability.

UNLAWFUL INQUIRIES

NAME
- Inquiries about the name that would indicate applicant's lineage, ancestry, national origin or decent
- Inquiry into previous name of applicant, whether it has been changed by court order or otherwise
- Indicate: Miss, Mrs., or Ms.

MARITAL/FAMILY STATUS
- Any inquiry indicating whether an applicant is married, single, divorced, engaged, etc.
- Number and age of children
- Information on child-care arrangements
- Any questions concerning pregnancy
- Any such questions which directly or indirectly result in limitation of job opportunity in any way

AGE
- Requirements that applicants state age or date of birth
- Requirements that applicants produce proof of age in the form of a birth certificate or baptismal record

The Age Discrimination in Employment Act of 1967 forbids discrimination against persons over the age of 40.

DISABILITIES
- The Rehabilitation Act of 1973 forbids employers from asking job applicants general questions about whether they are handicapped or asking them about the nature and severity of their handicap.
- An employer must be prepared to prove that any physical and mental requirements for a job are due to "business necessity" and the safe performance of the job.
- Except in cases where undue hardship can be proven, employers must make "reasonable accommodations" for the physical and mental limitations of an employee or applicant.

August 2, 2008

INTERVIEWING AND THE LAW

LAWFUL INQUIRIES

DISABILITIES

The applicant could be asked:

1. Are you able to perform these tasks with or without an accommodation? (If the applicant indicates that she/he can perform the tasks with an accommodation, she/he may be asked)
2. How would you perform the task, and with what accommodation(s)?

SEX

- Inquiry or restriction in employment is permissible only where a bona fide occupational qualification exists. The bona fide exception is interpreted very narrowly by the courts and the EEOC and is defined as being based on the need for the individual to be a particular sex.
- The burden of proof rests on the employer to prove that a bona fide occupational qualification does exist, and that all members of the affected class are incapable of performing the job.

APPLICANT'S RACE

- General distinguishing physical characteristics such as scars, etc.

ADDRESS OR DURATION OF RESIDENCE

- Applicant's address
- Inquiry into place and length of previous address
- "How long a resident of this state or city?"

BIRTHPLACE

"Can you, after employment, submit a birth certificate or other proof of U.S. citizenship?"

UNLAWFUL INQUIRIES

DISABILITIES

- An interviewer may not ask questions about a disability.
- Where an applicant has a visible disability or volunteered information about a disability, the interviewer may not ask questions about:
  1. the nature of the disability.
  2. the severity of the disability.
  3. the condition causing the disability.
  4. any prognosis or expectation regarding the condition or disability.
  5. whether the individual will need treatment or special leave because of the disability.
  6. whether the applicant needs accommodations.

SEX

- Sex of the applicant
- Any other inquiry that would indicate sex
- Sex is not a bona fide occupational qualification because a job involves physical labor (such as lifting) beyond the capacity of some women, nor can employment be restricted just because the job is traditionally labeled 'men's work' or 'women's work.'
- Sex cannot be used as a factor for determining whether or not an applicant will be satisfied in a particular job.

August 2, 2008

INTERVIEWING AND THE LAW

APPLICANT'S RACE
- Color of applicant's skin, eyes, hair, etc., or other questions directly or indirectly indicating race or color
- Applicant's height or weight where it is not relative to the job

ADDRESS
- Specific inquiry into foreign addresses that would indicate national origin
- Names or relationship of persons with whom applicant resides
- Whether applicant owns or rents home

BIRTHPLACE
- Birthplace of applicant
- Birthplace of applicant's parents, spouse or other relatives
- Requirement that applicant submit a birth certificate, naturalization or baptismal record before employment
- Any other inquiry into national origin

LAWFUL INQUIRIES

RELIGION
An applicant may be advised concerning normal hours and days of work required by the job to avoid possible conflict with religious or other personal conviction.

MILITARY
Type of education and experience in service as it relates to a particular job.

PHOTO
A photo may be required after hiring for identification.

CITIZENSHIP
- "Are you a citizen of the United States?
- "If you are not a U.S. citizen, have you the legal right to remain permanently in the U.S.?"
- "Do you intend to remain permanently in the U.S.?"
- Statement that if hired, applicant may be required to submit proof of citizenship
- "If not a citizen, are you prevented from lawfully becoming employed because of visa or immigration status?"

ANCESTRY OR NATIONAL ORIGIN
- Languages applicant reads or writes frequently

EDUCATION / EXPERIENCE
- Applicant's academic or professional education, school attended
- Inquiry into language skills such as reading, speaking and writing foreign languages
- Applicant's work experience, names and addresses of previous employers, dates or reasons for leaving and salary history
- Other countries visited

CONVICTION
- Inquiry into actual convictions that relate reasonably to fitness to perform a particular job. (A conviction is a court ruling where the party is found guilty as charged. An arrest is merely the apprehending or detaining of the person to answer the alleged crime.)

THE UNIVERSITY of TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

August 2, 2008

INTERVIEWING AND THE LAW

UNLAWFUL INQUIRIES

RELIGION

- Applicant's religion denomination observed (affiliation, church, parish, pastor or religious holidays)
- Applicants may not be told that any particular religious groups are required to work on their religious holidays
- Any inquiry to indicate or identify religious denomination or customs

MILITARY

Type of discharge

PHOTO

- Request photograph before hiring
- Requirement that applicant affix a photograph to his application
- Request that applicant, at his option, submit photograph
- Requirement of photograph after interview, but before hiring

CITIZENSHIP

- "Of what country are you a citizen?"
- Whether applicant or his parents or spouse are naturalized or native-born U.S. citizens
- Date when applicant or parents or spouse acquired a U.S. citizenship
- Requirement that applicant produce his/her naturalization papers
- Whether applicant's parents or spouse are citizens or the U.S

ANCESTRY OR NATIONAL ORIGIN

- Inquiries into applicant's lineage ancestry, national origin, descent, birthplace or mother tongue
- National origin of applicant's parents or spouse

EDUCATION

- Any inquiry asking specifically the nationality, racial or religious affiliation of a school
- Inquiry as to what is the applicant's mother tongue or how foreign language ability was acquired

CONVICTION

- Any inquiry relating to arrests
- Asking or checking into a person's arrest

LAWFUL INQUIRIES

RELATIVES

- Names of applicant's relatives employed by this company
- Names and addresses of parents or guardians of minor applicants

NOTICE IN CASE OF EMERGENCY

- Names of persons to be notified in case of accident or emergency

ORGANIZATIONS

- Inquiry into the organizations of which an applicant is a member, providing the name or character of the organization does not reveal the race, religion, color, or ancestry or the membership
- "What offices are held, if any?"

August 2, 2008
INTERVIEWING AND THE LAW

CREDIT RATING
None

REFERENCES
- "By whom where you referred for position here?"
- Names of persons willing to provide professional and/or character references of applicant

MICELLANEOUS
- Notice to applicants that any misstatements or omissions of material facts in the application may be cause for dismissal

UNLAWFUL INQUIRIES
CONVICTIONS
Court or conviction record if not substantially related to functions and responsibilities of the prospective employment.

RELATIVES
- Name or address of any relative of adult applicant

NOTICE IN CASE OF EMERGENCY
- Name and address of relatives to be notified in case of accident or emergency

ORGANIZATIONS
- "List all organizations, clubs, societies and lodges to which you belong."
- The names of organizations to which the applicant belongs if such information would indicate, through character or name, the race, religion, color or ancestry of the membership.

CREDIT RATING
- Any questions concerning credit rating, charge accounts, etc.

REFERENCES
- Require the submission of a religious reference
- Request reference from applicant's pastor

DAMAGES
There are a number of remedies available to employees violated Title VII or allowed others they employ to violate it. Cases under the act are tried without juries, and judges have much discretion in shaping each remedy to fit the particular situation. Depending on the circumstances, remedies such as reinstatement, injunction, back pay and other related damages have been considered appropriate. In addition, a judge may award attorney's fees to the winner in a Title VII suit with the passage of the Civil Rights Act of 1991. Punitive damages and awards for pain and suffering may be granted.

1. 42 U.S.C. § 2000e.
2. 29 U.S.C. § 161; 49 Stat. 455.
3. 42 U.S.C.A. § 2000e-2(h).
4. Guidelines on Employee Selection Procedures 29 C.F.R. § 1607.4(c), 35 Fed Reg. 12333 (Aug. 1, 1970).
5. 29 C.F.R. § 1607.5.
6. Romine, 518 F.2d at 332.
7. United States v. Chicago, 549 F.2d 415 (7th Cir. 1977) *affurnedm* 567 F2d. 730 (7th Cir. 1977).
8. Id.
9. Dozier v. Chupka, 395 F.Supp, 836 (S.D. Ohio, 1975).
10. Id.
11. Debra D. Burrington, "A Review of State Government Application Forms for Suspect Questions," *Public Personnel Management Journal*, May 1982.

MUNICIPAL TECHNICAL ADVISORY SERVICE

Knoxville (Headquarters). . . . . (865) 974-0411
Johnson City . . . . . (423) 854-9882
(423) 282-0416
Jackson. . . . . (731) 423-3710
Nashville . . . . . (615) 532-6827
Martin . . . . . (731) 881-7055

The Municipal Technical Advisory Service (MTAS) is a statewide agency of The University of Tennessee Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League to provide technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, ordinance codification, and water and wastewater management.

MTAS *Technical Bulletins* are information briefs that provide a timely review of topics of interest to Tennessee municipal officials. *Technical Bulletins* are free to Tennessee local, state, and federal government officials and are available to others for $2 each. Photocopying of this publication in small quantities for educational purposes is encouraged. For permission to copy and distribute large quantities, please contact the MTAS Knoxville office at (865) 974-0411.

www.mtas.tennessee.edu

The University of Tennessee is an EEO/AA/Title VI/Title IX/Section 504/ADA/ADEA institution.
MTAS1300 • E14-1050-000-009-09