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Legal Considerations Involved in the Hiring Decision (Or "Do I Really Have to Hire That Person?")

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Municipal Technical Advisory Service

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LEGAL CONSIDERATIONS INVOLVED IN THE HIRING DECISION
(OR "DO I REALLY HAVE TO HIRE THAT PERSON?")

by

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LEGAL CONSIDERATIONS INVOLVED IN THE HIRING DECISION

(OR "DO I REALLY HAVE TO HIRE THAT PERSON?")

I. The Employment Contract In Tennessee

A. The relationship between an employee and an employer in Tennessee is a contractual one.

B. The Employment Contract

1. The employer-employee relationship is the product of an agreement or series of agreements between the employer and employee, including but not limited to:

a. The nature of the work to be performed;

b. The duration of employment;

c. The terms and conditions of employment.
(Hamby v. Genesco, Inc., 627 S.W.2d 373)
(Tenn. Ct. App. 1981)).

2. The Contract of Employment may be:

a. Written.

b. Implied from the conduct of the parties
(Delzell v. Pope, 200 Tenn. 641, 294 S.W.2d 690 (1956);
Seals v. Zollo, 205 Tenn. 463, 327 S.W.2d 41 (1959)).

C. The Problem of "Promises" Made in Employee Handbooks and Similar Employee Guides

1. An employee's handbook outlining a company's "Guaranteed Policies, Practices and Procedures" and providing that "the handbook is written so that each employee may know and get equal benefits from these policies that apply to all regardless of age, race, color, religion, sex, handicap, national origin or status as a veteran" was held to be a part of the employment contract in Hamby v. Genesco, Inc., 627 S.W.2d, 373 (Tenn. Ct. App. 1981). That case involved benefits payable to employees in a plant shut down.

2. Some state courts have gone even further, especially in cases involving job security. For example, the Michigan Supreme Court in Toussaint v. Blue Cross and Blue Shield, 408 Mich. 579, 292 N.W.2d 180 (1980) held that a personnel manual which stated that the disciplinary procedures it contained expressed the company's policy "To treat employees Blue Cross in a fair and consistent manner and to release employees only on just cause" was an employment contract not to release employees except for just cause.
3. However, Tennessee has not gone as far in this area. In Whittaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. Ct. App. 1981) a handbook which read

an employee may reasonably expect uninterrupted employment year in and year out. An employee doing his work in a satisfactory manner and working for the good of the organization has little to fear about job security,

was held by the Tennessee Court of Appeals not to constitute a job security contract, especially when read in connection with an employment application which provided that following a trial period of three months, the employee "may be terminated by either party at will upon two weeks notice to the other."

D. The Problem of Oral Statements Containing "Promises."

1. Oral statements by employers to employees regarding job security have even been held to be a jury question as to whether they are contractually binding in some states, including Kentucky (Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983)) and Alabama (Peters v. Alabama Power Co., S.2d 1028 (1983))
2. But Tennessee apparently has not gone as far as some other states in finding oral promises for job security contractually binding. The Tennessee Court of Appeals in Savage v. Spur Distributing Company, 33 Tenn. App. 27, 228 S.W.2d 122 (1949) held that unless the employer's promise to employ the plaintiff for as long as he worked satisfactorily was met by the counter-promise to work for a certain period the employment contract was for an indefinite hiring. The U.S. District Court for the Middle District of Tennessee, applying Tennessee law, came to the same conclusion in denying a plaintiff's claim that his employer was guilty of a breach of contract for terminating him after orally promising him he could work for the company until his retirement as long as he performed satisfactory work. (Marchant v. Schenley Industries, Inc., 572 F. Supp. 155 (1983)). In Olmstead v. Community Action Sources of Morgan County, 494 F. Supp. 699 (1981), a headstart

employee sued the CASMC under Sec. 1983 alleging that she was promised continual employment by the U.S. Dept. of Health, Education and Welfare and the CASMC under an oral contract. The headstart program for which the plaintiff worked as a teachers aide was the Mountain Valley Economic Opportunity Authority. However, MVEOA transferred sponsorship of the headstart program to CASMC. The plaintiff's argument was that she was told that when sponsorship was transferred, the program staff was usually transferred intact; however, when the transfer was made, CASMC did not employ her. She claimed that the failure to rehire her by CASMC was due to her outspoken criticism of the headstart program administration. The U.S. District Court held that there was no contract for employment. The statements were vague and general and not promises made to any individual, but merely represented an opinion, declared the Court.

II. State Employment Legislation Affecting Hiring

A. State Anti-Discrimination Statutes

1. Tennessee Human Rights Statute (T.C.A. 4-21-101 et seq.)

a. Makes it a discriminatory practice for an employer:

- (1) To fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin;
- (2) To limit, segregate or classify an employee or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, creed, color, religion, sex, age or national origin. (T.C.A. 4-21-401(a)-(b)).

b. Defines and restricts age discrimination

- (1) The prohibition relating to age discrimination covers persons between the ages of 40 through 69. (T.C.A. 4-21-407)
- (2) Provides that it is not unlawful
 - (a) To discriminate on the basis of age where age is a BFOQ, or where the differentiation is based on reasonable factors other than age.
 - (b) To observe the terms of a bona fide seniority system or employee benefit plan, provided the benefit plan is not a subterfuge for age discrimination, except that no such benefit plan shall excuse the failure to hire a person or require or permit the involuntary retirement of any person (with the exception of some policy-making executives who have certain attractive retirement benefits.) (T.C.A. 4-21-407)

c. Provides that it is not unlawful for an employer to discriminate on the basis of sex or religion where sex or religion are BFOQs. (T.C.A. 4-21-406)

- d. Authorizes affirmative action programs to eliminate or reduce imbalances with respect to race, color, creed, religion, sex, age or national origin. (T.C.A. 4-21-110)
- e. Defines "Employer" as including the state, or any political or civil subdivision thereof, and persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly. (Note that definition could include all municipalities whether or not they employed eight or more people.) (T.C.A. 4-21-102)
- f. Establishes a Human Rights Commission. (T.C.A. 4-21-201)
 - (1) Composed of fifteen (15) members appointed by the governor, five (5) from each grand division of the state, appointed for terms of six (6) years.
 - (2) Has broad powers to investigate complaints of discrimination, conciliate such complaints, or order a broad range of remedies, including the award of attorneys fees, and cooperate with the EEOC and other federal and state agencies to eliminate discrimination.
 - (3) Complaints of discrimination must be filed with the Commission within 180 days of the alleged discriminatory practice. (T.C.A. 4-21-302). However, the 180 days statute of limitation does not apply if the complainant bypasses the Commission and takes his complaint directly to chancery court. In Hoge v. Roy H. Park Broadcasting of Tennessee, 673 S.W.2d 157 (1984) the Tennessee Court of Appeals, Eastern Section, declared that there are three ways a person can file a complaint of discrimination: (1) Administratively, through the Human Rights Commission, which must be done within 180 days of the alleged discrimination; (2) Following the decision of the Human Right Commission, file a complaint with the chancery court to review the decision of the Commission; and (3) File a direct action in chancery court, to which the 180 day statute of limitations does not apply. This case involved an age discrimination complaint, the substance of which the Court decided alleged a federal civil rights complaint under the Federal Age Discrimination in Employment Act; therefore, said the Court, the one year state statute of limitations governing federal civil rights actions brought in state courts applied to the action.

2. Handicapped Discrimination (T.C.A. 8-50-103)

- a. Prohibits discrimination in hiring, firing and other terms and conditions of employment by the State of Tennessee and its political subdivisions against any applicant based solely upon any physical, mental or visual handicap, unless the handicap to some degree prevents the applicant from performing the duties of the job applied for or impairs the performance of the work involved. (T.C.A. 8-50-103)
- b. Prohibits discrimination in hiring against a person who uses a guide dog. (T.C.A. 8-50-103)
- c. Makes a violation of T.C.A. 8-50-103 a misdemeanor. In addition, the victim of discrimination is authorized to file a complaint with the Tennessee Human Rights Commission.
- d. Declares that the term "handicap" shall not include any disease or condition which is infectious, contagious or similarly transmittable to other persons.

3. Discrimination against non-resident local government employees prohibited. T.C.A. 8-50-107 provides that notwithstanding any public law, private act or municipal charter to the contrary, no person presently employed by any municipality, county or metropolitan government shall be discharged or penalized solely on the basis of non-residence in such local government. (Does not apply to Davidson or Knox County.)

- a. However, continuing residency requirements are apparently legal as to policemen, firemen and similar personnel (McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976)), and are probably legal as to other classes of municipal employees (Ector v. City of Torrance, 10 Cal.3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), cert. denied, 415 U.S. 935 (1974)), as long as they are not paid with federal funds.

III. Principal Federal Laws Affecting Hiring

A. Civil Rights Act of 1964

1. Title VI--Prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance. (sec. 601)
2. Title VII--The most significant of the federal laws establishing employee civil rights in both the public and private sectors.
 - a. The core provision makes it an unlawful employment practice for an employer to:
 - (1) 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; or
 - (2) Limit, segregate, or classify his employees or applicants for employment in any way which would 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. (sec. 703)

b. Coverage

- (1) A 1972 amendment to this Civil Rights Act of 1964 expanded the definition of "employer" to include state and local governments, governmental agencies and political subdivisions.
- (2) To be subject to Title VII as an employer the government, governmental agency or political sub-division must have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" (sec. 701) A government meeting that requirement is subject to Title VII for two calendar years.

c. Exemptions and Limitations on Coverage

- (1) An employee under Title VII does not include
 - (a) Any person elected to public office
 - (b) Any person chosen by an elected official to be on that official's personal staff

- (c) An appointee on the policy-making level or an immediate advisor with respect to the exercises of the constitutional or legal powers of the office.

But these exceptions do not include persons subject of the civil service laws of a state, governmental agency or political subdivision (sec. 201), and are otherwise to receive a very narrow construction to avoid diminishing the overall coverage of state and local government employees according to the legislative history of the 1972 amendment to the Civil Rights Act of 1964.

- (2) Title VII also provides that it is not an unlawful practice for an employer to "hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." (sec. 703) (But the bona fide occupational qualification exception does not apply to discrimination based on race or color.) This provision has been given extremely narrow construction by both the EEOC and the courts.

- d. It is not an unlawful practice for an employer under Title VII to establish different standards of compensation or different terms, conditions and privileges of employment under the following:

- (1) A bona fide seniority system;
- (2) A bona fide merit system;
- (3) A system which increases earnings by quantity or quality of production; or
- (4) To employees who work in different locations.

But none of the differences must arise from an intent to discriminate on the basis of race, color, religion, sex or national origin. (sec. 703)

- e. Sex-based wage differences based on nearly identical exceptions under the Equal Pay Act are also expressly authorized under Title VII. (sec. 703)

B. Equal Pay Act (EPA) of 1963

- 1. Amended the Fair Labor Standards Act of 1938 by making it an unlawful practice for an employer to:

discriminate . . . on the basis of sex by paying wages to employees . . . at a rate less than the rate he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions . . . (sec. 3)

2. Coverage

- a. A 1974 amendment to the EPA expanded the term "employee" to mean state and local workers employed in public agencies, hospitals, institutions and schools, which obviously covers virtually all state and local employees.
- b. The EPA is a part of the Fair Labor Standards Act. However, it is administered by the EEOC.
- c. In 1976, the Supreme Court in National League of Cities v. Usery, 426 U.S.833 (1976), declared unconstitutional the application of FLSA minimum wage and overtime provisions to state and local governments (Usery was expressly overruled in Garcia v. San Antonio Metropolitan Transit Authority, et al, ___ U.S. ___ (1985)). However, Usery did not affect the application of the EPA to state and local governments.

3. Exemptions and Limitations on Coverage

- a. The EPA applies only to sex-based wage discrimination. In other words, the only thing that will trigger an EPA violation is a wage differential between the sexes in a workplace. It does not apply to any other form of sex discrimination, to discrimination in hiring, promotion, discipline, firing based on race, color, religion, national origin or any other factor.
- b. Some wage differentials are specifically legal under the EPA. Those paid pursuant to
 - (1) A seniority system;
 - (2) A merit system;
 - (3) A system which measures earnings by quality or quantity of production; or
 - (4) Any other factor other than sex.
- c. Title VII provides that any wage differential permitted under the EPA will not constitute a violation of Title VII.

C. Age Discrimination in Employment Act of 1967 (ADEA)

1. Makes it unlawful for an employer to:

- a. Fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- b. Limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- c. Reduce the wage rate of any employee in order to comply with this Act. (sec. 4)

2. Coverage

- a. By a 1986 amendment to the Act, it covers all persons over the age of 40 and effectively eliminates mandatory retirement ages. However, the 1986 amendment also exempts firefighters, police officers and prison guards until 1994. Until then municipalities may determine the maximum hiring age and mandatory retirement age for such persons, provided that the limits cannot be any more restrictive than those in effect on March 3, 1983 (the day the U.S. Supreme Court decided EEOC v. Wyoming, 460 U.S. 226 (1983) which held that the application of the ADEA to state and local governments was constitutional).

The 1986 amendment also provided that a study was to be completed within seven years by the Secretary of Labor and the EEOC to determine if physical and mental fitness tests are valid measurements of the ability of public safety officers to perform their jobs, and that within five years the EEOC is supposed to develop guidelines for the use of physical and mental fitness tests.

- b. The ADEA applies to all "employers" having twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. (sec. 11)
- c. A 1974 amendment to the ADEA defined "employer" to include "a State or political subdivision of a State and any agency or instrument of a State or a political subdivision of a State . . .," (which includes state and local governments).

- d. The constitutionality of the application of the ADEA to state and local governments was upheld by the U.S. Supreme Court in EEOC v. Wyoming, (460 U.S. 226 (1983))

3. Exceptions and Limitations on Coverage

- a. An employee does not include the following persons for the purpose of the ADEA:
 - (1) Any person elected to public office;
 - (2) Any person chosen by an elected official to be on that official's personal staff;
 - (3) An appointee on the policy-making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.
- b. However, the exemption does not include persons subject to civil service laws of a State government, governmental agency, or political subdivision. (sec. 11)

D. The Immigration Reform and Control Act of 1986 (IRCA)

1. Makes it unlawful for an employer to

- a. Recruit, hire, employ or continue to employ, illegal immigrants, and establishes an elaborate system of employee identification and eligibility
- b. Prohibits employment discrimination based not only upon national origin but also upon citizenship

2. Coverage

- a. Employment verification provisions: All employees, public and private, regardless of size
- b. Employment anti-discrimination provisions:
 - (1) All employers of over three (3) people (except that all things being equal among applicants for a job, the employer can "prefer" the U.S. citizen over the foreign applicant.) (But see cautionary note below.)
 - (a) Employers of 3-15 employees: prohibited from employment discrimination based on national origin and citizenship

- (b) Employers of 15 and more employees: prohibited from employment discrimination based on citizenship
- (c) CAUTION: National origin discrimination by employers of over 15 employees is prohibited by Title VII.

PROBLEM: Is the IRCA-authorized "preference" for a U.S. citizen, all other things being equal (which they seldom are) national origin discrimination prohibited under Title VII? That is the position taken by the EEOC.

- (2) Covers U.S. citizens, refugees, asylees, permanent resident aliens, and legalized aliens who have filed notice of intent to become U.S. citizens

3. Standard of proof of discrimination

The ICRA requires the plaintiff to show "discriminatory intent" on the part of the employer; in theory, a showing of disparate impact will not suffice. However, the reality is that the Justice Department regulations provide that direct or circumstantial evidence, including statistical evidence, will be permitted to show that an employer is guilty of a "pattern or practice of knowing and intentional discrimination. (Emphasis mine)

- 4. The verification system. (See Richard L. Stokes, MTAS Technical Bulletin No. 7, November 16, 1987)
- 5. Anti-discrimination enforcement is the responsibility of the U.S. Justice Department.

D. Civil Rights Acts of 1866, 1870 and 1871.

Several important provisions of the United States Code stem from the Civil Rights Acts of 1866, 1870 and 1871 and are commonly referred to by their section number:

- 1. Sec. 1981. Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Sec. 1982. Property Rights. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
3. Sec. 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State and Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

E. U.S. Constitution

1. First Amendment (1791) Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
2. Fifth Amendment (1791) (Due Process Clause) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
3. Thirteenth Amendment (1865)¹ Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. Congress shall have power to enforce this article by appropriate legislation.
4. Fourteenth Amendment (1868) Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

IV. Advertising and Interviewing, Etc.

A. Advertising the Job

1. The EEOC dislikes both word-of-mouth advertising and a reliance upon walk-in applicants, particularly where the present work force is predominately white. In finding a company guilty of violating Title VII for recruiting through a word-of-mouth system that reached only the white community, it declared

a word-of-mouth recruitment policy conducted by a virtually all-white work force, without supplementary and simultaneous recruitment in the minority-groups' community (by means of newspaper-advertising and the like), constitutes a prima facie violation of Title VII. (EEOC Decision, June 4, 1969)

2. The EEOC Sex Discrimination Guidelines make it a violation of Title VII for help wanted advertisements to express a preference, limitation or specification based on sex unless sex is a bona fide occupational qualification. (Sec. 1604.5)
3. The EEOC interpretation of the Age Discrimination in Employment Act Guidelines prohibits age limitation language and such terms as "recent college graduates," "young," "boy," "girl," etc. in job advertisements except when age is a bona fide occupational qualification. (Sec. 1625.4)

B. Pre-employment Applications and Interviews

This is one of the most difficult areas of employment law. A writer who analyzed the employment application of all 50 state governments concluded that everyone of them contained "inappropriate" questions. She defined "inappropriate" as being not clearly job related, those with potentially discriminatory effects and those that could not possibly be justified under the cloak of business necessity. (Debra D. Burrington, "A Review of State Government Application Forms For Suspect Questions," Public Personnel Management Journal, May, 1982, p. 55-60). But that conclusion is not so shocking; it is nearly impossible to frame any written question that cannot be used for a discriminatory purpose. The framing of oral questions without "inappropriate" language is even more difficult.

1. Legally offensive questions
 - a. On page 4-2 is the list of inappropriate pre-employment inquiries found by Burrington.
 - b. On pages 4-3 through 4-8 are samples of pre-employment questions which have led to problems with EEOC or the courts and which may be used as a guide for planning legally inoffensive questions.

Inappropriate Pre-Employment Inquiries Made by the 50 States.

	No.	%
1. Are you known or have you been known by any other name(s)?	4	8%
2. Which title do you prefer? Mr., Mrs., Miss, or Ms.?	5	10%
3. What is your birthdate? (With EEO disclaimer)	16	32%
4. What is your birthdate? (Without EEO disclaimer)	23	46%
5. What is your birthplace? (Without EEO disclaimer)	2	4%
6. What was your age on your last birthday? (With EEO disclaimer)	12	24%
7. What was your age on your last birthday? (Without EEO disclaimer)	4	8%
8. What is your sex? (With EEO disclaimer)	37	74%
9. What is your sex? (Without EEO disclaimer)	7	14%
10. What is your race or ethnic group? (With EEO disclaimer)	35	70%
11. What is your race or ethnic group? (Without EEO disclaimer)	4	56%
12. Do you have any handicaps or physical defects? (With EEO disclaimer)	28	56%
13. Do you have any handicaps or physical defects. (Without EEO disclaimer)	7	14%
14. What is your marital status? (With EEO disclaimer)	3	6%
15. What is your marital status? (Without EEO disclaimer)	3	6%
16. How many dependents do you have?	1	2%
17. What is your height and weight?	4	8%
18. What are the dates of your education and/or degrees?	47	94%
19. Have you ever been convicted of a crime?	20	40%
20. Do you possess a valid driver's license?	24	48%
21. Do you have transportation to work?	5	10%
22. What were the dates of your military service?	22	44%
23. What was your rank when you left military service?	5	10%
24. If claiming veteran's preference, have you submitted the appropriate documentation?	27	54%
25. Do you read and write English?	2	4%
26. What is the lowest pay you will accept?	12	24%
27. Do you have any relatives employed by the State?	7	14%
28. Are you willing to travel?	8	16%
29. Are you willing to work shifts/overtime?	5	10%
30. Are you willing to lift heavy weights?	1	2%

Note: EEO survey detachable from application
EEO survey on separate sheet

Source: Debra D. Burrington, "A Review of State Government Application Forms for Suspect Questions," Public Personnel Management Journal, May 1982.

SUBJECT

LAWFUL INQUIRIES

UNLAWFUL 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."

Inquiries about the name which would indicate applicant's lineage; ancestry, national origin or descent. Inquiry into previous name of applicant where it has been changed by court order or otherwise. Indicate: Miss, Mrs., or Ms.

MARITAL
AND
FAMILY
STATUS

Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may hinder the meeting of work attendance requirements. Inquiries as to a duration of stay on job or anticipated absences which are made to males and females alike.

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

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 the applicant meets the minimum age requirements as set by law and requirements that upon hire proof of age 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 statement 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.

Requirements that applicants state age or date of birth. Requirement that applicant 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.

SUBJECT

LAWFUL INQUIRIES

UNLAWFUL INQUIRIES

HANDICAPS For employers subject to the provisions of the Rehabilitation Act of 1973, applicants may be "invited" to indicate how and to what extent they are handicapped. The employer must indicate to applicants that: 1. compliance with the invitation is voluntary; 2. the information is being sought only to remedy discrimination or provide opportunities for the handicapped; 3. the information will be kept confidential and 4. refusing to provide the information will not result in adverse treatment. Employers may ask about handicaps only if they are trying to remedy past discrimination or expand opportunities for the handicapped through an affirmative action program.

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.

Inquiry or restriction of employment is permissible only where a Bona Fide Occupational Qualification exists. (This Bona Fide exception is interpreted very narrowly by the courts and EEOC.) 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.

Sex of the applicant. Any other inquiry which 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 factor for determining whether or not an applicant will be satisfied in a particular job.

**RACE OR
COLOR**

General distinguishing physical characteristics such as scars, etc.

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 job.

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ADDRESS OR DURATION OF RESIDENCE Applicant's address. Inquiry into place and length of current and previous address. "How long a resident of this State of City?"

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

BIRTH-PLACE "Can you after employment submit a birth certificate or other proof of U.S. Citizenship?"

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.

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.

Applicant's religious denomination or affiliation, church, parish, pastor, or religious holidays observed. 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 education and experiences in service as it relates to a particular job.

Type of discharge.

PHOTO May be required after hiring for identification.

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 "Are you a citizen of the United States?" "If you are not a U.S. citizen, have you

"Of what country are you a citizen?" Whether applicant or his parents or spouse are

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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?

naturalized or native born U.S. citizens. Date when applicant or parents or spouse acquired U.S. citizenship. Requirement that applicant produce his naturalization papers. Whether applicant's parents or spouse are citizens of the U.S.

ANCESTRY
OR
NATIONAL
ORIGIN

Languages applicant reads, speaks, or writes fluently.

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

EDUCATION

Applicant's academic, vocational or professional education; school attended. Inquiry into language skills such as reading, speaking, and writing foreign languages.

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

EXPERIENCE

Applicant's work experience; including names and addresses of previous employers, dates of employment, reasons for leaving, salary history. Other countries visited.

Any inquiry relating to arrests. Asking or checking into a person's arrest, court, or conviction record if not substantially related to functions and responsibilities of the prospective employment.

CONVICTION

Inquiry into actual convictions which 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.)

RELATIVES

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

Name or address of any relative of adult applicant.

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NOTICE IN CASE OF EMERGENCY Names of persons to be notified in case of accident or emergency.

Name and address of relatives to be notified in case of accident or emergency.

ORGANIZATION 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 of the membership. What offices are held, if any?

"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 None

Any questions concerning credit rating, charge accounts, etc.

REFERENCES By whom were you referred for a position here? Names of persons willing to provide professional and/or character references for applicant.

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

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

ANY INQUIRY IS FORBIDDEN WHICH, ALTHOUGH NOT SPECIFICALLY LISTED AMONG THE ABOVE, 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.

2. The EEOC Sex Discrimination Guidelines specifically provide that:

A pre-employment inquiry may ask "Males, Females;" or "Mr., Mrs., Miss," provided that the inquiry is made in good faith for a non-discriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitations, specifications or discriminations as to sex shall be unlawful unless based upon a bona fide occupational qualification. (sec. 1604.7)

3. The EEOC's Religious Discrimination Guidelines provide that preselection inquiries which determine an applicant's availability have an exclusionary impact on people with certain religious practices; therefore, they violate Title VII unless the employer can show the inquiry (1) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practice; or (2) was otherwise justified by business necessity. (sec. 1605.3)
4. The EEOC's interpretation of the Age Discrimination Employment Act Guidelines specifies that while questions on an employment application from such as "Date of Birth" or "State Age" are not in themselves violations of the Act, they will be closely scrutinized to insure that the questions weren't asked for a discriminant purpose. Employment applications cover all inquiries, including resumes, etc. (sec. 16255.5)

C. Arrest, Conviction and Military Discharge Records

1. Refusal to hire a job applicant based on an arrest or criminal record must be based on business necessity.

Employer who refused to hire black arrested (but not convicted) 14 times violated Title VII in spite of general policy not to hire applicants with arrest records because blacks arrested substantially more than whites (disparate impact) and because there was no business necessity for the policy. (Gregory v. Litton Systems, Inc., 316 F.Supp. 401 (Cal. 1970)). But there was no Title VII violation when employer discharged a black employee convicted of theft and receiving stolen goods because he was employed in a position of access to the property of others which justified the hotel's policy of requiring such persons to have a record reasonably free from property crime. (Richardson v. Hotel Corp. of America, 332 F.Supp. (La. 1971))

2. Courts are split on whether person can be denied employment based upon less than an honorable discharge.

D. Educational Requirements:

Must be related to job performance. (See Griggs v. Duke Power Company)

E. Physical Fitness and Height and Weight Standards

1. Must be demonstrably job related.

Female police cadet in Knoxville Police Department dismissed for failing to pass a physical fitness test. Only three men and three women (counting the plaintiff) had ever failed the test; therefore, she did not carry burden of proof to establish disparate impact. In addition, court declared that test was related to physical traits needed in job as police officer. (Eison v. City of Knoxville, 570 F.Supp. 11 (E.D.Tenn. 1983))

The U.S. Supreme Court ruled that a state statute that limited the hiring of prison guards to persons 5 feet 2 inches tall and over and 120 or more pounds violated Title VII. Because 41% of women and only 1% of men would be disqualified by those standards that statute had a disparate impact on women and the state could not prove that standards were necessary for good job performance. (Dothard v. Rawlinson, 97 S.Ct. 2720 (1977))

V. Employee Testing

A. Title VII Testing Standards

1. Title VII authorizes the use of any professionally developed ability test, provided that such test, its administration or actions upon the result is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. (sec. 703 (h))
 - a. However, in Griggs v. Duke Power, the U.S. Supreme Court ruled that any test that has an adverse impact upon minority groups and women is illegal unless justified by business necessity.
 - b. Through the 60s and 70s the Griggs standard was virtually impossible to satisfy and most employment tests and other selection processes were found to have an adverse impact, thus were illegal. The Griggs standard is still extremely difficult to satisfy by all but the most sophisticated employers. The fact that an employer's selection process meets a general standard or practice will not satisfy the courts.

B. The Employer's Testing Burden

1. In a nutshell here is what an employer has to show:
 - a. The test or other employee selection process is necessary to the safe and efficient operation of the business (in this case, the government).
 - b. The test or other employee selection process is job related under very strict standards set by or resembling those established by professional associations, generally by an industrial psychologist or similar expert.
 - c. These standards require:
 - (1) Job Analysis--an examination of the actual tasks involved in the job in question--not the employers general business but the job itself.
 - (2) Test and scoring scheme designed to predict the ability to perform those tasks.
 - (3) VALIDATION--a demonstration that the employment test is related to success on the job, or a demonstration that the test represents an adequate sample of performance.

- d. Then, even if the selection system meets all the above tests it may still be held invalid if it had an adverse impact upon minority groups or women and there is a comparable valid system with less adverse impact.

C. Uniform Guidelines on Employee Selecting Procedures (1978)

1. In 1978, the EEOC, U.S. Civil Service Commission and the Department of Labor and Justice adopted the Uniform Guidelines. They are the standards by which those agencies will judge the employee selection processes of employers who are subject to EEOC investigations.
2. The Uniform Guidelines apply to:
 - a. All selection procedures: interviews, review of experience or education for application forms, work samples, physical requirements, and evaluations of performance; and
 - b. All selection procedures used in reaching employment decisions: hiring, retention, promotion, transfer, demotion, dismissal, or referral.
3. State and local government merit systems or laws requiring rank ordering of candidates and selection from a limited number of top candidates also fall under the Uniform Guidelines.
(EEOC---Questions and Answers on Uniform Guidelines or Employee Selection Procedures)

D. Adverse Impact under The Uniform Guidelines.

1. Adverse impact is defined by the EEOC as "a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of numbers of a race, sex or ethnic group." (Q and A, No. 10)
2. The 4/5's or 80% rule. Agencies which have adopted the Uniform Guidelines will generally consider a selection rate for any race, sex, or ethnic group which is less than 4/5's or 80% of the selection rate for a group with the highest selection rate as a substantially different rate of selection.

a. Example:

Applicants	Hires	Selection		
		Rate	% Hired	
80 White	48	48/80	60%	1/1 or 100%
40 Black	12	12/40	30%	1/2 or 50% of white rate

- b. In theory the 4/5 rule is not a law; rather, it raises an inference of adverse impact which requires additional information and investigation to determine whether there is actually adverse impact. The size of the sample and other variables obviously influence the results in the application of the 4/5 or 80% rule.
- c. Groups are compared to measure adverse impact.
 - (1) Selection rates for males and females.
 - (2) Selection rates for race and ethnic groups are compared with the selection rate of the race or ethnic group with the highest selection rate.
 - i. Blacks
 - ii. American Indians
 - iii. Asians
 - iv. Hispanics
 - v. Whites
 - vi. Totals

3. "Bottom Line" Concept

- a. If the 4/5 or 80% standard is met for the total selection process, then the government agencies which have adopted the Uniform Guidelines generally do not focus on the individual components in the selection process for the purpose of deciding which employers to prosecute for discriminatory employment practices; they look at the "bottom line."
- b. However, the practice of looking at the bottom line is only a policy of prosecutorial discretion. The EEOC also has significant administrative powers including investigation of complaints, finding of reasonable cause/no cause, and "voluntary" conciliation which make up a substantial portion of the EEOC's work. In the exercise of its administrative authority, the EEOC can focus on individual components in the selection process.
- c. "Bottom line" concept in action.

Fifty-four percent (54%) of the black candidates and 80% of the white candidates passed the test for a supervisory position. Four of the blacks who failed the test sued claiming that the test had an adverse impact upon blacks. However, the employer promoted 22.9% of the black candidates and only 13.5% of the white candidates from the eligibility list created by the exam. The bottom line was that the test generated no adverse impact in the total selection process.

However, in this case the Supreme Court ruled that the bottom line concept does not offer a justification to discriminate against some persons on the premise that other persons of the same race were hired. (Connecticut v. Teal, 454 U.S. 813 (1982)).

E. Test Validation

1. In the EEOC's own words in the Uniform Guidelines, "validation has become highly technical and complex, and yet is constantly changing as a set of concepts in industrial psychology." That is the understatement of the year. Test validation is impossible to understand without substantial training in industrial psychology or a similar field.
2. There are three validation concepts:
 - a. Content validity--A selection procedure which samples significant parts of a job (such as a typing test for a typist). The weight assigned to each sample must be in proportion to the demand for that skill on the actual job.
 - b. Construct Validity--Involves identifying the psychological traits (the construct) necessary for successful performance on the job, and a demonstration that the selection procedure measures the presence and degree of construct (such as a test of leadership ability).
 - c. Criterion-related validity--A selection procedure is justified by a statistical relationship between scores on the test or other selection procedures and measures a job performance of a sample of workers.
3. The Uniform Guidelines go into great detail about each validation concept, but the information is absolutely useless to the average person who makes a hiring decision, including many personnel officers
4. However, one way to avoid the validation trap is to simply not test prospective employees; especially where it can reasonably be calculated that the test will have an adverse impact upon minority groups, including women.
5. Test validation in action
 - a. A Boston firefighters test consisting of 15 questions covering current events, spelling, vocabulary, arithmetic, and 75 questions taken from firefighters' manual was declared invalid by the U.S. Court of Appeals. The 15 questions had nothing to do with firefighting and the 75 questions rewarded memorization of fire fighting terminology rather than

measuring traits related to actual fire fighter's performance, according to the court. A validation study had been done on the test, which found a correlation between the test performance and job performance, but not enough to satisfy the court. (Boston Chapter NAACP, Inc. v. Beecher, 371 F.Supp. 507 (D. Mass. 1974))

- b. A paper and pencil test consisting of 120 questions was given to firefighters and police officers in Birmingham, Alabama. Applicants who passed the test were placed on eligibility lists and ranked according to their scores. The pass rate for blacks was substantially lower than that for whites. The Court held that use of a test for ranking purposes is justified only if there is evidence that those with higher test scores do better on the job than do those with lower test scores. The city tried to justify the test by using criterion related studies to show that those with higher test scores made better academy grades, and had better efficiency ratings by their supervisors, etc. The Court declared that the validation studies showed that higher test scores did not predict better performance. (Ensley Branch v. Seibels, 616 F.Supp. 812 (1980))

F. Pre-Employment Drug Testing

1. Law in this area is in the development stage and is confused and unclear.
 - a. For the most part drug testing in employment law deals with the drug testing of individuals who are already employed as opposed to applicants for employment. However, probably basically the same standards the courts use to judge post-employment drug tests programs applies to pre-employment drug test programs. There is an important difference between employees and applicants for employment; the latter do not have a property interest in the job. Whether that difference is significant as far as pre-employment drug testing is concerned is not clear.

As to the drug testing of present employees, it has generally been held that the Fourth Amendment's prohibition against unreasonable search and seizure applies to drug testing, and that absent reasonable suspicion of drug usage on the job, such tests are unconstitutional. In Lovvorn v. City of Chattanooga, Docket No. CIV-1-86-389, November 13, 1986, the U.S. District Court for the Eastern District of Tennessee struck down the drug testing program used to detect drug use in the Chattanooga Fire Department as "overly intrusive and constitutionally infirm." The Court found no reasonable cause for suspicion of drug use in the Fire Department supporting the drug testing. The City, declared the Court,

has not pointed to any objective facts concerning deficient job performance or physical or mental deficiencies on the part of its firefighters, either in general or with respect to specific personnel, which might lead to reasonable suspicion upon which the test could be based.

In National Treasury Employees Union v. William Von Raab, Docket No. 86-3522, the U.S. District Court for the Eastern District of Louisiana struck down a drug testing plan applied to employees who sought promotion to certain sensitive drug enforcement jobs. There was no reasonable or probable cause justifying the test, according to the court; rather, the plan "uses a dragnet approach of testing all workers who seek promotion into so called covered positions [and is] repugnant to the United States Constitution."

A significant number of other drug testing cases, including those involving public safety personnel, have found such tests unconstitutional on the same or similar grounds.

- b. Some cases have upheld drug testing programs for government employees in sensitive or dangerous jobs. In National Association of Air Traffic Specialists v. Dole, Docket No. A-87-073, March 27, 1987, the U.S. District Court for the District of Alaska upheld an FAA drug testing program required as a part of an annual medical examination of for flight service specialists. While the test was a search within the meaning of the Fourth Amendment, declared the court, it was a search justified in the public's interest in air safety. The random as well as systematic drug testing of prison guards was upheld by the Eighth Circuit Court of Appeals in McDonnell v. Hunter, CA 8, No. 85-1019, 1/12/87, 40 CrL 2321 on the grounds that the state had an overriding interest in the security of its prisoners.

However, even among those cases which have upheld drug testing programs for public safety personnel or other employees who hold dangerous jobs, most require at least some reasonable suspicion of drug use on the part of the individual employee (a serious accident on the part of a school bus driver in one case) or some pattern of conduct on the part of individuals in the agency which denotes drug use.

2. There is a possibility that pre-employment drug testing is permissible as a part of a physical examination, at least for applicants of jobs as public safety personnel and others who hold hazardous occupations.

a. Notice that drug testing is required

Notice to job applicants that they are required to undergo drug testing may help such a test survive scrutiny. In Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) the U.S. District Court, in striking down a drug testing program for police officers and firefighters criticized the plan, in part, because nothing in the initial employment agreement or any other civil service rule gave notice to the officers that they might be required to submit to a drug test after their employment began. It is doubtful whether the court would have approved the plan even without that deficiency; however, notice that drug testing is part of pre employment screening at least removes that obstacle to the approval of a drug testing plan.

4. Accuracy of the drug test

A major problem in this area is the questionable accuracy of some drug tests. Several courts have struck down employment decisions based on drug tests either in whole or in part because of questions about the accuracy of the tests in question.

VI. Discriminatory Job Placement

A. Hiring a Person Is Not Good Enough

1. Opportunities for promotion and training cannot be denied to employees based on race, color, sex, religion or national origin.

A black janitor employed by a Tennessee Aerospace engineering firm "bid" unsuccessfully over a ten year period for promotion into vacant jobs and placement in job trainee programs, including jobs as truck driver and storekeeper. He was either held not to be qualified or told that a better qualified person was selected. The U.S. District Court held that although the engineering firm's promotion and training practices were nondiscriminatory on their face, the practices fell more harshly on black wage earners. The evidence:

29 of 40 janitors were black;
2 of 2 janitor leadmen were black;
29 of 63 laborers were black;
2 of 2 trash laborers were black;
0 of 15 chief storekeepers were black;
2 of 44 storekeepers were black;
45 of 45 machinists were white;
174 of 174 outside machinists were white.
Except for electrician trainee positions, 217 of
218 electrical group employees were white.
(Kennedy v. ARO, Inc., 447 F. Supp. 1090
(E.D. Tenn. 1977))

This case illustrates the courts will not limit their focus on the treatment of the person complaining of discrimination but will review the overall hiring and placement practices of an organization and will use statistical evidence to find evidence of employment discrimination.

B. Discriminatory Placement of Minority Groups in "Dirty" Jobs.

A black man applied for job in Tennessee hospital and asked for clerical job. He had had experience at Austin Peay State University as a typist and clerk. After he applied for the job at the hospital, he worked three months at Arnold Engineering as a clerk. He was discharged there for unsatisfactory work performance, but his supervisor told the personnel director at the hospital that he was one of the best typists he had ever seen.

The hospital hired the black man as a dishwasher. His performance as a dishwasher was good, and he was transferred to housekeeping department where he cleaned rooms. At the end of his first year, he

got an excellent job performance rating. He asked for transfer to job as a clerk in dietary department. He passed the typing test but a white woman was hired for the job. He was told his job performance was unsatisfactory based on disciplinary reports that he claimed he had never seen. He filed a complaint with the Tennessee Human Rights Commission which entered into a conciliation agreement with the hospital under which the hospital promised to promote the black man to the first position for which he was qualified.

No one ever contacted him about another job in the hospital. He noticed a job opening for a clerk in the business office but was told that the job might not even be filled. It was later filled by a white woman. The supervisor in the business office refused to accept him as an employee.

Court held that the black man was the victim of discrimination. The evidence in addition to his placement in the dishwashing job: no black had ever held a clerical job in the hospital.

But an interesting aspect of this case is that the hospital argued that the black man was denied a promotion because of poor job performance. He had been written up for various infractions, including tardiness (what the other infractions were is not clear in the case). However, the hospital was faced with its own excellent performance rating of the man. (Mosley v. Clarksville Memorial Hospital, 574 F. Supp. 224 (M.D. Tenn, 1983))

VII. Sex Discrimination

A. EEOC's Sex Discrimination Guidelines.

It is an unlawful employment practice under the EEOC Sex Discrimination Guidelines to:

1. Classify or advertise a job as "male" or "female";
2. Maintain separate seniority lists or lines of progression based on sex, unless sex is a bona fide occupational qualifications (BFOQ) for the job;
3. Limit or restrict the employment of married women but not of married men;
4. Provide different fringe benefits--including medical, hospital and life insurance, retirement, and merit pay--in a manner which has an adverse impact on women, such as limiting benefits to the "head of the household" or "principal wage earner";
5. Make benefits available for the wives and families of male employees but not for the husbands and families of female employees;
6. Exclude female applicants from employment consideration or female employees from employment opportunities because of pregnancy, or discriminate in any other manner, including the award of benefits, on the basis of pregnancy;
7. Refuse to hire or otherwise provide employment opportunities for women because of the alleged preferences of co-workers, clients, customers or the employer--except where sex is a BFOQ; and
8. It is also an unlawful practice for the employer to adhere to state "protective" laws for women which are in conflict with and superseded by Title VII.

B. Intentional Pretextual Discrimination

Storey v. City of Sparta Police Department, 667 F.Supp 1164
(M.D.Tenn. 1987)

In August, 1984 a 36 year old woman with an associate degree in administration of justice applied for a job as a police officer in the Sparta Police Department. A week later she was interviewed by the chief of police who told her that there were two vacancies and that she was the best qualified applicant for the job. He also told her that some of the members of the board of mayor and aldermen might have

an "attitude problem" about hiring a female police officer. He further told her that he might be able to hire her as early as the middle of October, 1984. However, on October 3, 1984 he told her that he could not hire her because she was a woman, and that women were not minorities for the purposes of affirmative action. According to testimony in the case, the city was concerned about responding to a HUD recommendation that its UDAG eligibility be decertified because of a minority under-representation in its workforce. She told the city administrator that she wanted to speak to the city council, but the city administrator advised her not attend the October 4 meeting of the council. While she did not attend that meeting, she attended the October 14 meeting where she presented her qualifications. The chief of police recommended a black male for the job as police officer, but apparently the council rejected him because he had earlier quit the same job. One aldermen suggested to the board that the city hire some minorities and employ them long enough to obtain the federal grant money and then dismiss them during their probationary period! The council decided to advertise the vacant police officer position and at its November meeting to hire an officer from among the three most qualified candidates selected by the chief of police and the city administrator.

On October 23, 1984 Storey filed a complaint of sexual and racial discrimination with the EEOC (she also claimed to be an Indian). On October 31, 1984 she was interviewed by both the chief of police and the city administrator. During that interview she was told that a female police officer would be a first for Sparta, and was asked how her husband would feel about her riding with male officers.

Several other applications for the job were received before the November 1 meeting of the city council, but no other applicants were interviewed for the job. However, at the November 1 meeting of the city council, no mention was made of hiring a new police officer, and the chief of police was never asked to report on his search for qualified applicants for the job and he made no attempt to address the council on the subject even though he had the right to bring business before the council.

Both the chief of police testified that there was a manpower shortage in the police department at the time he and the city administrator interviewed Storey. During the next sixteen months overtime hours were paid to Sparta police officers for every pay period except three, but no one was hired as a police officer until February 20, 1986. The police department also lost another two or three police officers, either permanently or temporarily, during that period.

When the chief of police office became vacant in January, 1986 Storey applied for the job, noting on the application that she was also interested in a job as a police officer. In its March 6, 1986

meeting, the city council, on the recommendation of the city administrator, decided to hire a temporary police officer. However, the council, for the first time, established the requirement that the police officer had to be certified, and declared that no preference would be given to the temporary officer for full-time employment. A female was given the temporary job; she worked until August, 1986 and was reemployed in December, 1986.

A few days after it hired its first female officer (as a temporary employee) the city council discussed hiring another police officer and at its March 20, 1986 meeting, the council decided to hire a permanent police officer. This time no mention was made of hiring only a certified officer. Storey was notified by mail of the vacancy and she telephoned her interest in the job. An experienced male police officer was hired in April, and another experienced male officer was hired in September, 1986. Storey was never offered a job as a police officer.

The U.S. District Court held that Storey was the victim of intentional sexual discrimination. The Court declared that the Mc Donnell Douglas Corporation v. Green test, adapted to sex discrimination, requires that for a female to make a prima facie case of discrimination, she has to show that

1. She is a female.
2. She applied for and was qualified for the job.
3. Despite her qualifications, she was rejected for the job.
4. After her rejection, the position remained open, and the employer continued to seek other applicants from persons of the applicant's qualifications.

The City of Sparta conceded the first two components to Storey, but contested the last two components on the grounds that Storey could not have been rejected because there was no vacancy in the job as police officer when she interviewed for the job in October, 1984. However, the court declared that a vacancy did exist. As evidence that the vacancy existed the Court pointed to: the decision of the city council that a vacancy existed; the advertisement of the job and the acceptance of applicants; the knowledge of the chief of police, communicated to the city council, that the police department was understaffed; the unappropriated fund balance in the city budget which was apparently set aside for the hiring of police officers; and the overtime worked by Sparta police officers during the eighteen months a police officer was not hired (which the chief of police testified could have funded an additional officer).

The Court got around the fourth component of the McDonnell Douglas test by declaring that the test was a variable one depending on the circumstances and that each element did not have to be satisfied in every case. An employer, said the court, could not pay overtime as a subterfuge to discriminate. "Title VII imposes no obligation on the employer to hire anyone unless the refusal is motivated by discrimination." (Emphasis the Court's) The Court announced that

...once an employer makes a conscious, deliberate decision to fill a position, advertises the vacancy, and accepts applications, it will be hard put to claim that a legitimate business judgment was thereafter made to eliminate the position, especially when the only significant intervening event is the appearance of a qualified minority applicant.

The Court did not stop there. It declared that even if Storey had not been able to make a prima facie case under the McDonnell Douglas test she would still not have been out of court because she presented direct evidence of discrimination, and the McDonnell Douglas test applies when only indirect evidence of discrimination is available, reasoned the Court. Storey's direct evidence was the statement of the chief of police that he wouldn't hire her because she was a woman and that there might be an attitude problem on the part of the city council towards a female police officer, the questions about her husband's attitude towards her riding around with male officers, comments made by the city council, and the hiring of a female police officer only on a temporary basis (which the Court also found represented illegal retaliation against Storey for her filing of a complaint with the EEOC).

The City's explanation that its solicitation of applications in October, 1984 was an effort to attract racial minorities to preserve its federal grants was not believed by the Court, which declared that police officers were sought because the police department was understaffed and overworked. "The plaintiff was rejected, not because of what she wasn't--a black--but, rather, because of what she was--a woman, concluded the Court.

C. Sex as a Bona Fide Occupational Qualification

1. The EEOC Sex Discrimination Guidelines interpret the BFOQ exception very narrowly. It will not find a BFOQ in the following situations:
 - a. The refusal to hire a woman because of her sex based on the assumption of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than men.

- b. The refusal to hire an individual based on stereotyped characteristics of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive selling techniques.
 - c. The refusal to hire an individual because of the preference of co-workers, the employer, clients or customers, except where it is necessary for the purpose of authenticity or genuineness--an actor or actress, for example. (Sec. 1604.2)
2. Proving that sex is a BFOQ is an almost impossible task. To establish a BFOQ an employer has to show that:
- a. The essence of the business operation would be undermined by not having members of one sex exclusively;
 - b. There are no alternatives that have a less adverse impact. (Dothard v. Rawlinson, 97 S.Ct. 2720 (1977))
 - (1) In Dothard a state regulation prohibiting females from holding "contact" guard positions in an all-male maximum security prison was held by the U.S. Supreme Court to be a BFOQ. The Court reasoned that Title VII rights must be balanced against the possibility of a disruption in the prison system, and that the balancing test in this case weighed in favor of the regulation because, "In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders, there are few visible deterrents to inmate assaults on women custodians."
 - (2) But in Gunther v. Iowa State Men's Reformatory, 612 F.2d, 1079, (1980), the Court of Appeals in a similar case ruled in favor of a female guard who sought a promotion from Corrections Officer I to Corrections Officer II. The CO Is did not perform many of the prisoner contact duties performed by the CO IIs. The plaintiff conceded that inmates right to privacy would suffer is she performed strip searches and surveillance of prison showers and toilets performed by the CO IIs, and that if the prison gave her limited duties someone else would have to perform the duties she didn't perform. However, the Court ruled that not only must the state show that, "the hiring of women would undermine the

essence of the prison administration," the state must "also demonstrate it could not reasonably rearrange job responsibilities in a way to minimize the clash between privacy interests of the inmates and the nondiscrimination principle of Title VII." The Court also relied on proof that there were CO IIs in a maximum security male institution in the state, and that more male COIIs had performed limited, single job functions for several years without undermining the institution.

D. Sex-plus Discrimination

1. Sex-plus discrimination is when the employer penalizes members of one sex because of their sex plus another factor or condition. (The most common example is refusing to hire women with children--a sex plus children condition.
 - a. The U.S. Supreme Court has ruled that an employer's policy of hiring men with pre-school children while refusing to hire women with pre-school children is illegal sex discrimination. However, an interesting aspect of that case is that the Court also said that such a policy would be legally justified if the employer could show that the child care obligations makes women substantially poorer workers. (Phillips v. Martin Marietta Corp., 400 U.S. 592 (1969)).
 - (1) Making such a showing would be a nearly impossible burden to carry for virtually any employer.
 - (2) But an employer can impose legitimate job requirements which apply to both sexes.

A female cable splicer was required to travel extensively as a part of her job. She objected to the travel because she had trouble arranging for child care. Her employer permitted her to reschedule job assignments and even offered her other jobs not requiring travel, but which paid considerably less. In the face of her continual objections and refusals to travel, she was eventually fired. The Court of Appeals held that the travel requirement was a legitimate one and that her employer did not discriminate against her for making her travel even if it interfered with her child care responsibilities. In addition, the travel assignments were made on the basis of a seniority system which insulated the employers action against a discrimination claim under Title VII. (Giocolchea v. Mountain States Telephone and Telegraph Company, ___ F.2d ___ (9th Cir. 1984)

b. Marital status:

The EEOC Sex Discrimination Guidelines provide that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is sex discrimination. (Sec. 1604.4)

D. Height, Weight and Physical Agility Requirements

1. Height, weight and physical agility requirements that have an adverse impact on women must be job related.

In a landmark U.S. Supreme Court case, Alabama's minimum height and weight requirements for prison guards were stuck down. A 22 year old woman with a college degree was denied a job as a prison guard in a maximum security prison because she did not meet the minimum physical standards of 5'2" in height and 120 lbs. in weight. The Supreme Court found that while those standards would respectively exclude 1.28% and 2.35% of men, they would respectively exclude 33.29 and 22.29% of women--a disparate impact. The state could not prove that the standards were job-related; to do so it would have had to show that there was a correlation between the height and weight requirement and strength. The standards were a violation of Title VII. (However, in the same case, a regulation prohibiting women from job assignments to "contact positions" was job related, thus a BFOQ, because 22% of the men in the maximum security prison were sex offenders where the presence of women would be a threat to the basic control of the prison.) (Dothard v. Rawlinson, 97 S.Ct 2720 (1977))

2. Like all tests, physical agility tests must be "validated" if they have an adverse impact upon women.

E. Sex Stereotyping

1. Two women had worked for Hertz Corporation in Memphis for several years as rental representatives. They unsuccessfully applied for promotion to station manager once in 1978, twice in 1979, and once in 1981. In response to their suit, Hertz alleged that the women were guilty of various kinds of misconduct including imperfect accounting, rudeness and hopping over the counter. The District Court's opening remarks indicate the direction this case went: "This case presented to the Court a disgusting saga of the ongoing activities in employer-employee relations in the Hertz Corporation in Memphis, Tennessee. The Court finds that the men were promoted into station manager jobs because a cadre of male management preferred men in management positions at Hertz and disallowed the promotion of women." Testimony in this case was that the city manager (for Hertz) stated on various occasions that women shouldn't be managers because:

1. They couldn't go away for training.
2. Women couldn't follow irate male customers into the restroom.
3. A woman's place is in the kitchen.

The hopping over the counter accusation against one female rental representative particularly caught the eye of the Court, which found that she locked herself out of the counter area by accident and when what appeared to be a stranger came up to the counter the woman, rather than make him wait for service until she could locate keys, said "to Hell with it" and jumped over the counter. But, said the Court, "The stranger turned out to be none other than a stuffy and pretextuous regional manager of the Hertz Corporation. He testified he was 'shocked' to see such behavior, which is ridiculous in the light of Hertz Corporation's national advertising campaign featuring O. J. Simpson hopping over suit cases and obstacles in airports." The city manager (for Hertz) could not defend hiring male managers over females except to say that they came to him highly recommended by high male officers of Hertz.

This case was also characterized by improper sexual remarks. The Court said it was the order of the day for male employees to address questions about sexual activities and preferences to women, such as "Did you get any this weekend?" The Court issued an injunction against such comments. (Morgan v. Hertz Corporation, 542 F. Supp. 123 (W.D.Tenn. 1981))

2. A black female was appointed to two year term as principal of a middle school in Knoxville City School System. At the end of two year term, she was reassigned as a classroom teacher. She sought and was rejected for several administrative positions. Her suit alleged that she was discriminated against on the basis of race as well as sex. However, the Court found that under Superintendent Hoffmeister blacks with proper credentials had "fared rather well." Fifty percent of qualified blacks held administrative or supervisory positions in 1981 and 75% of them held supervisory, administrative, or principalship positions in 1977-79 school years. But the Court found that she had been discriminated against on the basis of sex. The plaintiff had alleged that the Superintendent of schools had told her on several occasions that he liked to appoint men to principal staff positions because children needed a male image and did a better job maintaining control, etc., and the Superintendent did not deny that he made those statements. The Court also pointed out that no female had ever been a middle school principal until the time pertinent to

and elementary school principalships. In addition, the Court considered the following statistics related to the sex distribution of principals in the Knoxville City School system:

1976--54 principals, 16 females

14 asst. principals, 5 females

1979--48 principals, 9 females

18 asst. principals, 5 females

(Williams v. Hoffmeister, 520 F.Supp. 521 (E.D. Tenn, 1981))

F. Pregnancy and Childbirth

1. Title VII, as amended by the Pregnancy Discrimination Act, which became law on October 31, 1978, prohibits discrimination against women on the basis of pregnancy.

a. Basic provisions: An employer:

- (1) cannot refuse to hire, promote, or to terminate a woman because of pregnancy;
- (2) must treat pregnancy the same as any other disability under an employee benefit plan;
- (3) cannot compel a woman to take a pregnancy leave at some arbitrary point in her pregnancy; and
- (4) must provide the same reinstatement rights to pregnant women, credit of previous service and accrual of seniority and benefits, that it provides to other employees who experience a disability.

VIII. Age Discrimination

A. The Age Discrimination in Employment Act (ADEA)

The ADEA prohibits the following employment practices with respect to persons over the age of 40 (except that policemen, firemen and prison guards may be hired and retired in accordance with local rules and retirement plans until 1994, provided that the limits cannot be any more restrictive than those in place on March 3, 1983.)

1. To fail or refuse to hire, to discharge or to otherwise discriminate against an individual based on age, with respect to compensation, terms, conditions or privileges of employment;
2. To limit, segregate or classify an employee, in a way that would deprive the employee of job opportunities or otherwise adversely affect the employee's status based on age;
3. To indicate any "preference, limitation, specification, or discrimination" based on age in notices or advertisements for employment; and
4. To reduce the wage rate of an employee to comply with the Act.

B. The Bona Fide Occupational Qualification Exception

1. The ADEA contains as BFOQ exception; that is, discrimination is permitted if the employer can show that age is a BFOQ. However, the EEOC Age Discrimination Guidelines specifies that:
 - a. The exception shall be narrowly construed.
 - b. An employer asserting a BFOQ defense has the burden of proving that:
 - (1) The age limit is reasonably necessary to the essence of the business, and either
 - (2) That substantially all individuals excluded from the job involved are in fact disqualified, or
 - (3) That some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to ages.
2. Needless to say, it is extremely difficult to prove a BFOQ either to the satisfaction of the EEOC or the Courts. Most BFOQ cases involve aircraft crew positions, firemen, and police officers.

3. Two landmark U.S. Supreme Court decisions decided before the 1986 amendment to the ADEA which changed the class of person protected from those between the ages of 40 and 70 to those over the age of 40 had already punched a large hole in many age limitations imposed by state and local governments on those persons under the age of 70. Those cases are still current as to the BFOQ defense, except that now they must be read to apply to the hiring and retirement limitations placed on persons at any age over 40, including over the age of 70.

Criswell v. Western Airlines, Docket No. 83-1545 (Decided June 17, 1985); and Johnson et. al. v. Mayor and City Council of Baltimore, et. al., Docket No. 84-518 (Decided June 17, 1985)

- a. In Criswell, pilots employed by Western Airlines reaching their 60th birthdays applied for reassignment as flight engineers pursuant to a collective bargaining agreement which permitted cockpit crew members to "bid" for flight engineer jobs on the basis of seniority. FAA regulations prohibit pilots and copilots who have reached the age of 60 on commercial flights, but there are no like prohibitions for flight engineers. However, Western Airlines also prohibited flight engineers from serving beyond the age of 60. The pilots sued Western Airlines contending that the mandatory retirement age of 60 for flight engineers violated the ADEA. Western Airlines raised the defense that the mandatory retirement age was a BFOQ. The jury at the District Court level rendered a verdict for the pilots which was upheld by the Court of Appeals and the U.S. Supreme Court.

The Supreme Court in analyzing the proof in the case acknowledged that there was conflicting evidence over the, "actual capabilities of persons over 60 and the ability to detect disease or a precipitous decline in their faculties," but there is no doubt about which side of the proof the Court came down. It pointed out that, "flight engineers have rarely been a contributing cause or factor in commercial aircraft 'accidents' or 'incidents,'" that other airlines did not have an over 60 rule for flight engineers, that flight engineers do not handle the controls of the aircraft except in an emergency, and that both the FAA and the airlines had been able to deal with health problems of pilots on an individual basis to the extent that some who were grounded by alcoholism and cardiovascular problems had been recertified to fly as pilots and that some pilots who had been unable to pass the medical test for a pilot had been certified as flight engineers.

The Supreme Court established the standard in ADEA cases in the following language:

Under the Act, employers are to evaluate employees between the ages of 40 and 70 on their merits and not their age. In the BFOQ defense, Congress provided a limited exception to this general principle but required that employers validate any discrimination as 'reasonably necessary to the normal operation of the particular business.' It might well be 'rational' to require mandatory retirement at any age less than 70, but that result would not comply with Congress' direction that employers must justify the rationale for the age chose. Unless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age selected for mandatory retirement less than 70 must be an age at which it is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.

Look carefully at the standard. An employer who wants to establish age as a BFOQ must show:

- (1) That there is a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, or
 - (2) The age selected for mandatory retirement below 70 [since the 1986 ADEA amendment, at any age] must be an age at which it is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.
- b. In Johnson, six firefighters sued in a U.S. district court challenging a Baltimore municipal code provision mandatory retirement for firefighters under 70 years of age. Under the City's retirement system five of the firefighters had to retire at 60 and one at 55. The City raised age as a BFOQ for firemen. The District Court ruled in favor of the firemen, declaring that the city had shown neither, "that there is a factual basis for [it] to believe that all or substantially all Baltimore City firefighters between the ages of 60 and 65, other than officers would be unable to perform their jobs safely and efficiently . . . nor that it is impossible or impractical to deal with firefighters between 60 and 65 on an individualized basis."

However, the Court of Appeals held that the City was entitled to the BFOQ defense as a matter of law whether or not it could prove that age was a BFOQ. In doing so, it relied on the Supreme Court's decision in EEOC v. Wyoming, 460 U.S. 226 (1983) in which the court said that the ADEA allows a state the discretion to impose a mandatory retirement age "against a reasonable federal standard." Because the federal government had established a retirement age of 55 for federal firefighters, reasoned the Court of Appeals, the City was not required to make a factual showing at trial as to its need for the mandatory retirement age.

The retirement age for federal firefighters survived a 1978 amendment to the ADEA which eliminated most federal age limits on employment, but it left untouched those relative to firefighters, air traffic controllers, law enforcement officers, Foreign Service and the CIA.

The Supreme Court held that the "reasonable federal standard" to which it referred in EEOC v. Wyoming "is the standard supplied by the ADEA itself--that is, whether the age limit is a bona fide occupational qualification." The Court went on to say that the mere fact that some federal firefighters are required to cease work at age 55 does not provide an absolute defense to an ADEA action challenging local age limits for firefighters. Nothing in the civil service history preserving age limits on federal firefighters suggest a congressional determination that age 55 is a BFOQ for federal firefighters for ADEA purposes; rather, it indicates a congressional determination to maintain a youthful work force in some federal occupations, including firefighters. Therefore, concluded the Court "this civil service provision does not articulate a BFOQ for firefighters [and] its presence in the United States Code is not relevant to the question of a BFOQ for firefighters, [and] it would be an error for a court, faced with a challenge under the ADEA to an age limit for firefighters, to give any weight, much less conclusive weight, to the federal retirement provision."

The standards for BFOQ age limitations under the ADEA are the standards announced in Western Airlines, declared the Court.

4. Criswell raises the question of whether many of the laws, ordinances and policies of state and local governments which establish age limits for various occupations, including those traditionally covered by such limitations, such as policemen and firemen, will stand up to challenge under the ADEA. If Criswell does nothing else, it provides additional notice to employers, both public and private, that the standard of proof required to establish a BFOQ is extremely high.

Johnson makes it clear that reliance on the federal retirement age to support a BFOQ defense for firemen and by extension policemen, cannot be given any consideration by a court.

C. Factors Other Than Age

1. An employer may make employment decisions that adversely affect person 40--70 if the decisions are made on factors other than age.
 - a. The EEOC Age Discrimination Guidelines provide that
 - (1) When an employer uses age as a limit on employment opportunities, it cannot defend the practice on the grounds that it is justified by factors other than age.
 - (2) When an employment practice has an adverse impact upon persons between 40 and 70, it can be justified only as a business necessity.
 - (3) The burden is on the employer who raises the "factors other than age" defense of an employment practice to show that factors other than age actually exist.
 - (4) Difference in treatment of employees on the grounds that it is more expensive to employ older persons may not be used as a factor other than age defense for the employment practice. (Sec. 1625.8)

IX. Religious Discrimination

A. Reasonable Accommodation.

Title VII requires an employer to

1. Make reasonable accommodation for a current or prospective employees religious observance or practice, unless
2. Such accommodation would impose undue hardship on the employers business.

B. Accommodation Requires Only Minimal Costs

1. An employer need not bear more than minimal costs in accommodating religious beliefs or practices.

Case Examples

Transworld Airlines v. Hardison, 97 S.Ct. 2264 (1977) is the landmark case in this area. An employer belonged to the Worldwide Church of God, which observes a Saturday Sabbath. But when he chose to move to a new job in the company, he was placed on the bottom of the seniority list consistent with a collective bargaining agreement, so that he was unable to avoid some Saturday work. Numerous attempts were made by the company to accommodate his belief in a Saturday Sabbath by unsuccessfully attempting to get volunteers to substitute for him. When he refused to show up for work several Saturdays in a row, he was fired. He argued that under the reasonable accommodation provision, TWA was required to ignore the seniority rights of other employees under the collective bargaining agreement and assign them to work in his place, or that other employees should have been offered a premium to work in his place, or that he should be allowed to work a four day week. The Supreme Court rejected his argument and ruled that TWA had satisfied Title VII when it attempted without success to arrange a job swap with other employees. Further, an employee need not bear more than "diminimus costs" nor violate seniority rights of co-workers in accommodating the religious beliefs and practices of its employees. The seniority system itself represented a significant concession to both the religious and secular needs of all its employees, said the Court. (This case represented a setback for the EEOC which expected extensive accommodation by an employer under early EEOC Religious Discrimination Guidelines.)

C. Accommodation Under Present EEOC Religious Discrimination Guidelines,

An employer's refusal to accommodate is justified only when the employer can demonstrate that a hardship would result from each available alternative method of accommodation. The Guidelines list the following alternatives for accommodating religious practices which conflict with a work schedule:

1. Voluntary substitutes and swaps. However, the Guidelines are not satisfied with leaving it up to the employees to arrange the swap, the employer must "facilitate" the swaps. Some of the suggested means of facilitation are:
 - a. Publicize policies regarding accommodation and voluntary substitutions;
 - b. Promote an atmosphere in which substitutions are favorable regarded; and
 - c. Provide bulletin board, central file or other means for matching volunteer substitutes with position for which substitutes are needed.
2. Flexible scheduling of work, such as:
 - a. flexible arrival and departure times;
 - b. floating or optional holidays;
 - c. flexible work breaks;
 - d. use of lunch time in exchange for early departure;
 - e. staggered work hours; and
 - f. permitting employee to make up lost time due to observance of religious practices.
3. Lateral transfers and change of job assignments (Sec. 1605.2)

D. Employer Hardship Under Present EEOC Religious Discrimination Guidelines

1. Costs: The Guidelines provide that the "minimum costs" standards declared in Hardison will be measured with consideration of the "size and operating cost of the employer and the number of individuals who will in fact require a particular accommodation." However, the Guidelines go on to say that the EEOC will "assume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation."

2. Seniority rights: The Guidelines provide that voluntary substitutes or swaps do not constitute an undue hardship where those arrangements do not violate a bona fide seniority system. (Sec. 1605.2)

E. Selection Procedures Under Present EEOC Religious Discrimination Guidelines.

1. Tests and other selection procedures must be scheduled to accommodate religious practices if they do not create undue hardships.
2. Pre-hiring inquiries concerning the availability of an applicant to work during certain hours is prohibited unless the employer can show that they:
 - a. Did not have an exclusionary effect on present or prospective employees needing an accommodation;
 - b. Were justified as a business necessity.
3. The EEOC will infer that the need for an accommodation influenced a decision to reject an applicant when:
 - a. The employer makes an inquiry into the applicant's availability prior to making an offer for employment without having a business necessity justification;
 - b. After the employer has determined that the applicant made an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that the qualified applicant was rejected for factors other than the need for religious accommodation or that accommodation without undue hardship was not possible. (Sec. 1605.3)

X. National Origin Discrimination (Title VII and the Immigration Reform and Control Act of 1986)

A. Definition

1. Title VII does not define the term national origin, but the EEOC National Origin Discrimination Guidelines defines it as:

including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestors' place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

2. But the EEOC National Origin Discrimination Guidelines go on to provide that the EEOC "will examine with particular concern" allegations of the denial of equal employment opportunity for reasons which are grounded in national origin considerations, such as:

- a. Marriage to or association with persons of a national origin group;
- b. Membership in, or association with an organization identifying with or seeking to promote the interests of national origin groups;
- c. Attendance or participation in schools churches, temples or mosques, generally used by persons of a national origin groups; and
- d. Because an individual's name or spouse's name is associated with a national origin group. (Sec. 1606.1)

3. Standard of proof of discrimination

- a. The EEOC will apply general Title VII principals such as disparate treatment and adverse impact to national origin discrimination. (Sec. 1606.1)
- b. The IRCA requires proof of "discriminatory intent" in employment discrimination cases brought under that law. However, the U.S. Justice Department rules announce that for its purposes direct or circumstantial evidence, including statistical evidence, will be permitted to show that an employer is guilty of a "pattern or practice of knowing and intentional discrimination." (Emphasis mine) The courts will probably follow the same or a similar standard.

4. The EEOC has already informed employers that in its view the IRCA does not permit discrimination against employees of any ethnic background, and has cautioned employers that to avoid violations of both the IRCA and Title VII it should watch their employment practices in several areas:
 - a. Hiring practices based on place of origin, physical, cultural or linguistic characteristics common to certain national origin groups
 - b. Discrimination against persons based upon accent or speech manners peculiar to certain national origin groups
 - c. Harrassment based upon national origin, such as racial slurs
 - d. Requirements that employees speak only English, and English fluency requirements
 - e. Height or weight requirements
 - f. Employment tests
 - g. Citizenship requirements or preferences (What about the "preference" of U.S. citizens permitted under the IRCA?)

B. BFOQ Exceptions.

National origin may be a BFOQ but the exception, as with all other Title VII exceptions will be strictly construed. (National Origin Discrimination Guidelines, Sec. 1606.4)

C. Discrimination Against Aliens

1. The EEOC Guidelines on National Origin Discrimination provide that where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.
2. However, in Espinoza v. Farah Manufacturing Company, 414 U.S. 86 (1973)), the U.S. Supreme Court made it clear the Title VII does not protect aliens against discrimination. In this case, the Court ruled that a female, Mexican job applicant had been rejected not because of her national origin, but because she was an alien. (But the Supreme Court has also extended aliens some protection from discrimination in public employment through the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution and the Civil Rights Act of 1866.

CAUTION: While Title VII may not protect aliens against discrimination, the IRCA of 1986 does precisely that.

3. Exception for jobs involving "political functions"

- a. State laws excluding aliens from significant elective and non-elective jobs have been upheld by the U.S. Supreme Court on the basis of their "political function"--jobs whose performance goes to the heart of representative government. Such jobs have been held to include public school teachers, police officers, and probation officers.

Three permanent resident aliens applied for jobs as probation officers with the Los Angeles County Probation Department but were rejected on the basis of a California law that required such officers to be U.S. citizens. In upholding the legality of their rejection, the Supreme Court reviewed past rulings of upholding laws excluding non-U.S. citizens from holding jobs as police officers and school teachers. Because probation officers also had the power to exercise coercive power and control over people, U.S. citizenship is an appropriate limitation on those who exercise it. (Cabell v. Chavez-Salido, 102 S.Ct. 735 (1982))

- b. Tennessee restricts the job as police officer (T.C.A. 38-8-106) and public school teacher (T.C.A. 49-5-202) to U.S. citizens.
- c. But public jobs involving duties that do not require the exercise of policy making responsibility or broad discretion "that requires the routine exercise of authority over individuals" probably do not meet the political function test and cannot be restricted to U.S. citizens. (Bernol v. Fainter, ___ U.S. ___ (1984))

D. Employee Selection Procedures

1. The EEOC National Origin Discrimination Guidelines provide that the Uniform Guidelines for Employee Selection apply to an employer's selection procedures. (Sec. 1601.6)
2. Height and weight requirements
- a. The EEOC National Origin Guidelines say that the employer is required to evaluate height and weight selection procedures for adverse impact regardless of whether the total selection process has an adverse impact; they are an exception to the "bottom line" concept.

- b. The same standards and statistical methods that apply to establishing sex discrimination on the basis of height and weight requirements apply to establishing national origin discrimination on the basis of height and weight requirements.

E. English Language Requirements

1. Applied all the time: The EEOC will presume that such a rule violates Title VII and will closely scrutinize it. (National Origin Discrimination Guidelines, Sec. 1606.7)
2. Applied only at certain times: If an employer believes it has a business necessity for a part-time English only rule, the employer is required to so notify the employee both of the existence of the rule, and when it applies. (National Origin Discrimination Guidelines, Sec. 1606.7)
3. English proficiency may be justified on the basis of business necessity.