Protecting Your Agency Against Equal Employment Opportunity (EEO) Litigation Related to Selection and Promotion Practices

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Introduction

Virtually every major law enforcement agency has been sued for some type of employment discrimination. The types of cases range from entry-level testing practices to promotional processes and can be filed by government agencies such as the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice, or various plaintiff members represented by private counsel. The EEOC files between 200 and 300 Title VII lawsuits every year,[1] and sometimes law enforcement agencies are the preferred target. The authors are aware of periods in which the Department of Justice has "set up camp" at central locations and systematically sued every police and fire department within a radius of their temporary location. Should an agency lose an EEO suit, judgments can include significant financial consequences (e.g., back pay to the adversely affected group, with interest) or having the court carefully monitor the agency's recruiting, testing, and hiring practices, not to mention hiring quotas or goals for the adversely affected group (sometimes lasting for several years).

Plaintiff advocates believe that many challenged agencies "had it coming" because of recruiting, testing, or hiring practices that were unfair in some way. Many agencies, however, are diversity-oriented and well-intentioned in their personnel practices; they regularly practice "good faith efforts" to include a wide representation of individuals in their workforce, but they *still* get sued. How can an agency guard against such litigation? What steps can be taken after a lawsuit has been filed? This article will review some of the different types of EEO litigation that typically occur in the law enforcement arena, provide steps for preventing such litigation, and offer help for taking action after a lawsuit has been filed.

Types of EEO Litigation Common to Law Enforcement Agencies

Broadly speaking, there are two types of employment discrimination cases: (1) those that pertain to *disparate treatment* and (2) those that involve a *disparate impact* approach. Plaintiffs can prevail in a disparate *treatment* case in which they can show that an individual or several individuals have been treated differently because of their race, sex, religion, age, or national origin. Thus, disparate treatment involves some type of deliberate act(s) that implies a discriminatory intent. Plaintiffs can prevail in a disparate *impact* case in which they can show that an agency's practice, procedure, or test (hereinafter abbreviated "PPT") has a disparate impact on their group (usually one or more minority groups or women), even if everyone was treated

identically. So, disparate impact involves the use of a PPT that is neutral on its face but has a (seemingly) discriminatory outcome. Notice that the primary difference between these two types of discrimination is that disparate treatment requires plaintiffs to show intent (which can come from either direct evidence or can be inferred from the circumstances), and disparate impact does not require intent.

Since the passage of the 1964 Civil Rights Act, the courts have wrestled to define, interpret, and re-interpret the criteria for establishing these two types of discrimination. The state courts often base their legal guidelines on federal standards, which in turn rely on the U.S. Circuit Courts of Appeal to describe the steps and criteria regarding EEO litigation. Then, the U.S. Supreme Court takes an occasional case from one of the 11 Circuits and reworks the Circuit's decision to be more closely aligned with its viewpoints. The decisions recorded by the U.S. Supreme Court represent "landmark precedence" on the issues pertaining to EEO litigation. Also, Congress occasionally intervenes to redirect the judicial developments surrounding EEO litigation. Such was the case when Congress passed the 1991 Civil Rights Act, which was passed (at least in part) to stop the practices of race-norming (applying different standards based on ethnicity) on employment tests[2] and to dismantle litigation precedence established by the U.S. Supreme Court in *Wards Cove Packing Co. v. Atonio*.[3]

With such a complex legal mosaic, it is difficult for most agencies without a large legal staff to know where the potential landmines exist when going about day-to-day business. Because an agency can potentially engage in discrimination through disparate treatment in a virtually unlimited number of ways (both overt and covert), this article will only focus on disparate impact civil rights issues.

Disparate Impact Discrimination

Before discussing "disparate impact" and "disparate impact discrimination," an important distinction needs to be made about these two terms. *Disparate impact* is a term that simply means that an agency's PPTs have "substantially different passing rates" between groups (e.g., whites versus Hispanics). Proving that the agency's PPTs have a disparate impact is the first burden that occurs in employment discrimination litigation, and its proving falls squarely on the shoulders of the plaintiffs. If the plaintiffs meet this burden, the burden "shifts" to the agency to show that the PPT in question is "job-related and consistent with business necessity" (see further discussion below). If the employer fails to carry this burden of proof, a judge can then draw a conclusion of *disparate impact discrimination*. This brief explanation should be considered the "plain and simple" version; some of the related concepts are discussed more below. The disparate impact analyses discussed below are relevant to the "first burden" of disparate impact litigation.

The federal "Uniform Guidelines on Employee Selection Procedures"[4] (Uniform Guidelines) defines disparate impact as "A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." Since this classic definition was presented in 1978, the courts have used various statistical and quantitative methods to define what is meant by a "substantially different rate." Three of the most "conventional" methods are the 80% test, statistical significance tests, and practical significance tests.

The *80% test* (originally derived from the Uniform Guidelines), involves making a mathematical comparison between the passing rates of the comparison group (e.g., Hispanics) to the reference group (e.g., whites). For example, if 50% of the whites passed a written test, and only 30% of the Hispanics passed, an 80% test would show a "violation" because the Hispanic passing rate was less than 80% of the white passing rate (30% divided by 50% = 60%). *Statistical tests* employ the use of advanced inferential statistical tests that answer the question "is the difference in passing rates so great that it cannot be attributed to chance?" In other words, statistical tests will identify whether chance, or something beyond chance, is the likely cause for the difference. *Practical significance tests*, while they vary based on the circumstances of the case, typically investigate the stability and practical impact of the statistical test results (e.g., what would happen to the statistical test findings if just two additional persons from the disadvantaged group "happened to pass the test"?).

It is important to note that these three methods have been presented within the context of an agency's testing practices (i.e., whether the agency's PPTs have disparate impact). This is an important distinction because, under most circumstances, the only way a plaintiff can make a showing of disparate impact in a litigation setting is to identify a *particular employment practice* (e.g., a written test, interview panel, physical ability test, etc.) that is causing the disparate impact. While the courts went back and forth on the question of whether an employer's "entire selection or promotion practice" or "distinct selection or promotion practice" would be subject to scrutiny in a disparate impact case, Congress settled the matter with the passage of the 1991 Civil Rights Act, which states . . .

> An unlawful employment practice based on disparate impact is established under this title only if a complaining party demonstrates that a respondent uses a **particular employment practice** that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity (emphasis added).[5]

When evaluating an agency's "particular employment practice," the three tests discussed above constitute the most common methods used by plaintiffs in discrimination cases. Other types of arguments can be used to shift the burden in disparate impact cases (i.e., besides just proving that an agency's specific employment practices have disparate impact). Some of these methods are reviewed below.

An important requirement for each of these alternative methods is that the agency must have a "manifest imbalance" or a "statistically significant underutilization" in the at-issue job. These terms are typically used in litigation to simply mean that there is a "statistically significant" gap[6] between the comparison group's availability for employment or promotion (typically derived from a group's representation in the qualified applicant pool for entry-level positions and the "feeder" positions for promotional positions[7]) and the group's current representation in the at-issue job or group of jobs. When such a statistically significant "imbalance" or "underutilization" exists, any of the five circumstances listed below can possibly lead to a court's finding of disparate impact:

1. **The agency failed to keep applicant records (sometimes referred to as an "adverse inference"—see Section 4D of the Uniform Guidelines).** If an agency fails to keep applicant data, the government has reserved the right to

infer disparate impact on the selection or promotion process if the agency has an imbalance in a job or group of jobs.

2. **The agency failed to keep disparate impact data on the selection or promotional processes (Section 4D of the Uniform Guidelines).** Similar to #1 above, if agencies have an imbalance in a job or group of jobs and do not have information regarding the disparate impact of the various PPTs used in the selection or promotion process, an adverse inference can be made. Agencies should maintain passing rate data for their various selection and promotional processes, and PPTs that have disparate impact should be justified by evidence of job-relatedness and business necessity (see below).

3. **The agency's recruiting practice was discriminatory toward the protected group (see Section 4D of the Uniform Guidelines and *Hazelwood School District v. United States*[8]).** For example, if the agency recruits for certain jobs only by "word of mouth," and the only employees who are informed about the job opportunities are a certain race and/or gender group, the agency can fall prey to a discrimination lawsuit. The authors are aware of countless such allegations in litigation settings (proving them, however, is a difficult task for the plaintiffs to accomplish).

   Plaintiff groups may also argue that minorities and/or women were "funneled" by the agency's systems and processes into filling only certain position(s) in the agency.

4. **The agency maintained a discriminatory reputation that "chilled" or "discouraged" protected group members from applying for the selection process (Section 4D of the Uniform Guidelines).** This argument has successfully been made in several discrimination cases[9] and is a viable argument for plaintiffs to make in some instances. Making your agency transparently open to all qualified members of the community may help to lessen the likelihood of this claim. For example, appropriately showing employees who are typically under-represented in your agency in your recruiting literature or as representatives at community functions, may help to convince under-represented members of the community to apply.

5. **The agency failed to conduct a formal selection process for the position and instead hired or promoted individuals through an "appointment only" process.** While the authors are aware of only one case in which this might have been a possibility, this "promotion by appointment" practice would certainly lend itself to a viable plaintiff argument because the practice was exclusionary to qualified individuals who were not allowed an equal opportunity to compete for a position. Furthermore, this type of promotional practice could make the use of conventional disparate impact analyses impossible (because there are no clear "promotional processes" or "events" that can be analyzed by comparing the passing rates between two groups). This practice could limit such analysis to a comparison between the disadvantaged group's representation in the promotional position to the availability of that group in the "feeder" positions. While informal selection procedures are not directly prohibited under the various civil rights laws, they are much more difficult to defend against claims that they were used unfairly than are more standardized selection processes.

Unless one of these five situations exists within an agency, a plaintiff group will be required to pinpoint the specific PPT that caused the disparate impact (using the 80% test, statistical significance test, and/or practical significance test). The only exception is when the agency's practices cannot be separated for analysis purposes.[10]

Tactics for Defending Disparate Impact Discrimination Suits

PPTs may have a disparate impact against a protected group of employees (e.g., women or minorities) and may still not be illegally discriminatory if that PPT is valid. Validity in regards to civil rights issues typically refers to whether the PPT is job-related and there is a "business necessity" for its use.

Validation Studies

Job-relatedness and business necessity are typically demonstrated through one of three court-approved methods: (1) content, (2) criterion, and (3) construct-related validity studies. The Uniform Guidelines provide minimum requirements for conducting validation studies; however, there appears to be no, one correct method for conducting these types of studies. Agencies must often rely on the training and professional judgment of experts to determine which validation method is appropriate and how to properly carry out a validation study in a particular setting.

When asked where a user (agency) can obtain professional advice concerning validation of selection procedures, the EEOC states, "Many industrial and personnel psychologists validate selection procedures, review published evidence of validity, and make recommendations with respect to the use of selection procedures."[11] Many competent test development practitioners can be found through the *Society of Industrial and Organizational Psychology* (Division 14 of the American Psychological Association) and local colleges and universities. Competent test developers can also be found in many consulting firms.

While explicit and complete definitions of the three validation methods (content, criterion, and construct) are beyond the scope of this article, brief (practical and not technical) definitions of each are provided below:

1. **Content validity** evidence is gathered by showing that the content of the job is sufficiently related to the content of the test. This type of evidence is typically gained by completing a job analysis with incumbents of the target position (which involves documenting the duties and knowledges, skills, and abilities, or "KSAs," of the job) and then linking the parts of the PPTs to those duties and KSAs.

2. **Criterion-related validity** evidence is obtained by statistically comparing test scores with job performance. If test scores statistically correlate with one or more measures of job performance (e.g., training scores, supervisor ratings, performance review ratings, objective criteria, etc.), criterion-related validity evidence can be documented.

3. **Construct validity** evidence is a complex validation method and is typically obtained by demonstrating a "triangular" relationship between a specific trait or characteristic, a test said to measure such a trait, and measures of job performance.

Due to its complex nature, this type of validation method is seldom used in practice and litigation.

Sometimes, employers blindly rely on assertions of validity made by companies that produce or sell PPTs without making certain that such assertions are true. This can result in unnecessary liability for the employer. The Uniform Guidelines state that it is the ". . . user's responsibility to determine that the validity evidence is adequate to meet the Guidelines" and that "Users should not use selection procedures which are likely to have a disparate impact without reviewing the evidence of validity to make sure that the standards of the Guidelines are met."[12] In other words, it is the agency who is liable if a PPT does not address the applicable validity standards, not the test publisher or developer. It is therefore suggested that all PPTs that agencies use be reviewed by an independent EEO expert for both validity and potential disparate impact before they are used for employment purposes.

Alternate Selection Procedures

Fairness should also be considered when validating a selection procedure. According to the Uniform Guidelines, an agency that is validating a PPT should also conduct an investigation of suitable alternative selection procedures or methods that have less disparate impact. Section 3B of the Uniform Guidelines states, "Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser disparate impact." One of the best methods to inoculate an agency from potential EEO lawsuits is to have conducted an alternative selection procedure investigation, and then have made an informed decision about using such a procedure, before a PPT is used for employment purposes (e.g., hiring). It can be rather embarrassing, and sometimes potentially fatal in litigation, to defend against a civil rights complaint if it is determined that there were readily-available alternative selection methods with lower disparate impact that equally serve the interests of the agency that were not considered. This does not mean, however, that an agency is always required to use a PPT with less disparate impact, but it does indicate that the agency should explore and consider alternatives before using a PPT.

Standardization

Another way in which agencies might inoculate themselves from potential lawsuits is to consistently use identical PPTs in the same way for all applicants who are applying for the same job. While this may be difficult at times, it sends a message that everyone will be treated similarly, which is referred to as "procedural justice." Even if a person does not agree with a decision, he or she is less likely to feel slighted if the process used to make that decision was procedurally fair and used consistently for all cases. For employment selection and promotion, this typically means that both the administration of PPTs and the decisions made based on those devices should be standardized across administrations and persons. Of course, standardization is meaningless in this context if the selection devices used by your agency cause non-job-related disparate impact against protected groups of applicants.

Outside Certifying Agencies

Agencies might also consider asking outside certifying agencies to review their selection practices and procedures. For example, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) has recommended guidelines for many human resource issues, such as hiring and promotion. While certification by CALEA does not guarantee that your agency is in compliance with state or federal civil rights laws, it does indicate to potential job applicants (and the community) that your agency is willing to have an impartial organization review your practices. Also consider having outside EEO consultants, who are thoroughly familiar with the applicable civil rights requirements, review your PPTs to make certain that legal exposure is minimized.

"Face" Validity

Finally, if an agency must use a PPT that is likely to have disparate impact against one or more protected groups of employees to measure an important KSA, it should attempt to use a PPT that has a *transparent relationship* to the job. This will help increase "applicant perception of fairness" because applicants can easily infer that if they do not perform well on the test they will not perform well on the job. This is most commonly found in "work sample" style tests, for which the applicant is required to perform tasks that are similar to tasks performed on the job. The U.S. Department of Labor indicates that test takers "generally view these tests as fairer than other types of tests."[13]

What to Do if Your Agency Receives an Employment Discrimination Complaint

One mistake that is commonly made when potential civil rights issues are brought forth is a failure to immediately take these issues seriously. Often, potential plaintiffs attempt to work within an agency's grievance system and only pursue a lawsuit when other avenues appear to fail or when the agency fails to take the grievant's claims seriously. Furthermore, labeling grievants as "complainers" or "malcontents" often serves to reinforce negative perceptions that they might have about their ability to be treated fairly by the agency and may signal to other employees that similar claims will not be dealt with appropriately. Many applicants are inclined to "expect injustice" unless they are provided clear, objective evidence to the contrary. For this reason, we urge agencies to make every effort to take these issues seriously at the earliest stages and to treat persons who claim they are being treated unfairly with dignity and respect during all aspects of the process. Also, we suggest that every effort be made to resolve the issue at the lowest possible level, using the agency's standard operating procedures or other rules as a guide.

Also, agencies often fail to admit early in the process when they have truly treated someone unfairly. While the failure to admit fault will typically only delay the process, a sincere apology, accompanied by an offer to rectify the wrong, can frequently lead to a quick resolution. The authors are very familiar with a civil rights case in which the plaintiffs approached a law enforcement agency that was discriminating against female employees in 1984 with an offer to settle for less than $25,000 and a promise from the agency to discontinue their unfair practices. Instead, rather than admit to any wrongdoing, the agency chose to fight the charges for over

15 years, despite overwhelming evidence that they had violated the civil rights of many of their female employees who were applying for promotion. Millions of dollars in legal and settlement fees later, the agency is still attempting to rectify discriminatory practices that it should have rightfully resolved decades before.

Let us assume, however, that a grievant has exhausted all internal grievance procedures and files a legal action against an agency for a civil rights violation. It is a good idea to consult with attorneys who are thoroughly familiar with EEO issues as soon as possible. The plaintiff will likely seek out an attorney who is an expert in EEO issues, and agencies should do the same. Local government attorneys sometimes do not have extensive experience in this area, so it is often a good idea to seek outside expert legal assistance. The legal team should be backed up with EEO and test development experts who have successfully dealt with similar issues in the past. These experts can identify what information and data needs to be collected during the preparation of the case and conduct the statistical analyses necessary to refute a claim. They can also prepare rebuttals to plaintiffs' arguments or theories about alleged discriminatory practices and otherwise aid in the defense of these claims. Failing to take early action in preparing for a civil rights case can make the difference between winning, losing, or settling.

Presenting a strong case in the early stages of the process can often result in the case being dismissed before it gets beyond the opening round. Also, allowing EEO experts to become involved at the early stages in the process will help in case preparation, ensure that the right questions are asked, and ensure that the most strategic issues receive focus. Once the case goes to court, it is often up to these experts to present the issues to a judge or jury in a way that is understandable, while successfully defending the actions of the agency.

We recommend that the EEO experts you choose have a wide range of experience in dealing with EEO issues from both a defendant's and plaintiff's point of view. It is relatively easy for the plaintiffs to portray an expert as a "hired gun" if he or she has testified only for the defense. A well-rounded expert who has experience of working for both plaintiff and defense can be more easily perceived as someone who is not pursuing an "agenda."

Your defense should be based on strong legal and scientific arguments without getting personal. Everyone in the agency should treat the grievant with dignity and respect, even if you do not agree with his or her complaints. Many interested parties both within and outside of the agency are often viewing the agency's actions and how the agency treats the grievant. If grievants are treated with dignity and respect (even while agencies vehemently disagree with his or her complaint), agencies are more likely to be considered as "fair and reasonable" and are less likely to be sued by other employees at some later time.

Finally, if agencies have followed all of this advice and still lose, they should be graceful in the loss and only appeal for strategic, rather than reactionary, reasons. Animosity that is held towards a plaintiff after a suit is settled can lead to ill will within your agency and lower your agency's reputation in the eyes of the community.

Conclusion

It is almost axiomatic that if your agency has not yet been sued for a civil rights violation, it will be. However, there are actions that can be taken to lessen the likelihood that, if such a complaint were to occur, your agency will be held liable. Agencies that proactively make certain that the selection PPTs they use are job related and fair for all applicants before a lawsuit is filed are much less likely to be the subject of civil rights litigation. Also, agencies that treat all of their job applicants and employees with dignity and respect are setting up a foundation of fairness that may make it less likely that they will be subject to a lawsuit.

Endnotes

[1] See <www.eeoc.gov/stats/litigation.html>.

[2] Greenlaw, P. S., & Jensen, S. S. (1996, March). Race-norming and the Civil Rights Act of 1991. *Public Personnel Management, 25*, 13-24.

[3] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[4] Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor and Department of Justice. (1978, August 25). *Uniform guidelines on employee selection procedures*. *Federal Register, 43*(166), 38290-38315.

[5] 42 USC §2000e-2(k).

[6] The common procedure for this type of analysis uses a two-tail "exact binomial" statistic.

[7] If the target position is *not* underutilized when compared to the relevant feeder position(s), yet the relevant feeder position(s) is underutilized when compared to those with the requisite skills in the relevant labor area (called an "outside proxy group"), then, it can be argued that the proxy group can be used to compare to the target position. This process is referred to as a "barriers analysis."

[8] Hazelwood School District v. United States, 433 U.S. 299 (1977).

[9] Donnel v. General Motors Corp, 576 F2d 1292 (8th Cir 1978); Dothard v. Rawlinson, 433 U.S. 321 (1977); Williams v. Owens-Illinois, Inc, 665 F2d 918 (9th Cir), Cert denied, 459 U.S. 971 (1982).

[10] 1991 Civil Rights Act [42 U.S.C. §2000e-2(k)(ii)(B)].

[11] Equal Employment Opportunity Commission. (1978). The Office of Personnel Management, U.S. Department of Justice and U.S. Department of Labor. (1979). *Questions and answers clarifying and interpreting the uniform guidelines on employee selection procedures.* 29 CFR Part 1607 (1988), Question 42.

[12] Equal Employment Opportunity Commission. (1978). The Office of Personnel Management, U.S. Department of Justice and U.S. Department of Labor. (1979). *Questions and answers clarifying and interpreting the uniform guidelines on employee selection procedures.* 29 CFR Part 1607 (1988), Question 35.

[13] U. S. Department of Labor. (1999). *Testing and assessment: An employer's guide to good practices* (p. 4-2). Washington, DC: Author.

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