



TABLE OF CONTENTS

INTRODUCTION	1
Directions for Completing Chapter Quizzes	2
CHAPTER 1 - OVERVIEW	3
History.....	3
CHAPTER 2 - LEGAL PARAMETERS	5
Federal Law	5
Colorado State Law	10
Legal Parameters Quiz	12
CHAPTER 3 – PROFESSIONAL STANDARDS	13
Uniform Guidelines on Employee Selection Procedures	13
Standards for Educational and Psychological Testing.....	17
Professional Standards Quiz	18
CHAPTER 4 – LANDMARK COURT CASES	19
Griggs v. Duke Power Company (1971)	19
McDonnell Douglas v. Green (1973)	19
Albemarle Paper v Moody (1975)	20
Washington v. Davis (1976).....	21
University of California Regents v. Bakke (1978)	21
United Steelworkers of America v. Weber (1979).....	22
Connecticut v. Teal (1982).....	22
Wards Cove Packing Co. v. Atonio (1989)	23
Landmark Court Cases Quiz	24
APPENDIX A	A
LEGAL & PROFESSIONAL PARAMETERS for SELECTION	A-1
APPENDIX B	B
RESOURCES	B-1
APPENDIX C	C
WHAT IS “OPEN” IN EXAM RECORDS?	C-1
Sayvetz Opinion on Examination Materials and Public Records Law.....	C-2
Gregory K. Chambers Opinon on Release of Employment or Promotional Applications to the Public	C-10

LEGAL PARAMETERS & PROFESSIONAL STANDARDS

INTRODUCTION

This training manual is written in a format and style designed to help you learn the material more easily and retain what you have learned longer than other manuals you may have used in the past. You will need to answer questions about what you read, as you read. The questions will help you to be sure that you understand the important ideas in the text before you go on. Answering the questions is simple. We provide the correct answers so you can check your responses.

On each page you will find information you will need to know to be effective in selection work. Numbered blanks scattered through the text mark the places where you need to fill in the missing word to make the sentence correct. The best word for some blanks will be obvious, for other blanks, you may need to read the rest of the sentence or even the next sentence to get the meaning and know the word to fill in the blank. The correct answers are in the shaded areas at the bottom of the page.

The best way to use this manual is to cover the answers as soon as you turn to a new page. Write the answers in the blanks as you read. When you reach the bottom of the page, remove the cover and check your answers with the correct answers in the shaded area. You may change any wrong answers you filled in, so that you can review the material knowing that the answer in the blank makes the sentence correct.

At the end of each chapter you will find a review quiz, with questions that can be answered in two to four sentences each. Use the space provided to write your answer to each question.

The SPCP Administrator or designated representative will score the quizzes. The scoring is based on evidence that students can:

- express thoughts clearly in writing
- demonstrate knowledge of the principles and concepts in the chapter
- support opinions with facts

After the review you will be notified of the results of your quizzes.

Directions for Completing Chapter Quizzes

At the end of each chapter you will find a quiz which can be answered in four to six sentences each. Write enough to demonstrate your knowledge on the subject.

Use your computer to complete the quizzes, recording your name, department/institution, date and answers. When you have completed all quizzes for the manual e-mail them to Jennifer.Clayman@state.co.us. A "report card" will be issued when all quizzes for all manuals have been completed.

Ms. Clayman will notify you of the results of your quizzes. Do not be surprised if you are requested to rewrite an answer and be more specific or elaborate. *Putting ideas and concepts in written form which can be communicated to readers* is an important competency for human resource practitioners.

CHAPTER 1 - OVERVIEW

The purpose for Equal Employment Opportunity legislation, regulations and standards is to provide an equal employment opportunity for all and prevent unfair discrimination practices. Unfair discrimination occurs when employment decisions are made based on something other than job-relevant (1) _____.

Employee selection in Colorado is conducted in accordance with the state constitution and state law as well as federal law and the *State Personnel Board Rules and Personnel Director's Administrative Procedures*. A number of other publications and documents exist which provide guidance and assistance in the selection process. Some of these professional standards and administrative guidelines are: *Uniform Guidelines on Employee Selection Procedures*, (1978), *Standards for Educational and Psychological Testing and Department of Personnel Operational Guidelines*.

This manual will discuss federal constitution, laws and guidelines; the state constitution, laws, rules and procedures and guidelines; as well as professional standards which provide the foundation for selection practices.

Appendix A contains a table which identifies the Legal & Professional Parameters for Selection in Colorado. Functions in the selection process have been identified as well as the legal or professional document which supports or identifies the need to perform the function.

History

Although employment law has been around for a long time it really came into the forefront until the 1960s. The Equal Pay Act of 1963 (EPA) began the employment legislation. EPA was the first of the major statutes to be passed related to employment law. Additional important legislation followed. Following is a brief description of some major employment laws that have had a great impact on selection/hiring of employees.

- **Title VII of the Civil Rights Act of 1964 (CRA)** (42 U.S.C. Section 2000 (e)) prohibits discrimination in employment based on race, color, religion, sex (including pregnancy), and national origin. Title VII protects not only in regard to hiring but also firing and maintaining employees.
- **Age Discrimination in Employment Act of 1967 (ADEA)** (29 U.S.C. Section 621) protects individuals who are at least 40 years old from age discrimination.
- **The Rehabilitation Act of 1973, 1975 (Title V)** was designed to “promote and expand employment opportunities in the public and private (recipients of Federal aid and contracts) sectors for handicapped individuals” through the use of affirmative action programs to eliminate discrimination.

(1) knowledge, skills, abilities, and other characteristics

- **Americans with Disabilities Act (ADA) of 1990 – Section I** (42 U.S.C. Section 12101) prohibits discrimination against those with disabilities related to job application procedures and hiring as well as a number of other employment related areas.

The Equal Employment Opportunity Commission (EEOC) was established by Title VII to interpret and enforce the Equal Pay Act, Age Discrimination in Employment Act, Title VII, Americans with Disabilities Act and sections of the Rehabilitation Act.

CHAPTER 2 - LEGAL PARAMETERS

This chapter will focus on laws and regulations concerning employee selection. The legal aspect of employment is the most dominant issue in human resources management today. The underlying concept of the law and other legal boundaries discussed in this chapter is the principle that equal employment opportunity is a fundamental right regardless of race, color, sex, religion, national origin, age, limiting handicap, marital status, or political affiliation.

Federal Law

The following federal laws and their relationship with the selection process will be addressed:

- United States Constitution
- Civil Rights Act of 1964 (CRA) as amended in 1972 and Civil Rights Act of 1991
- Age Discrimination in Employment Act of 1967 (ADEA) as amended in 1978
- Rehabilitation Act of 1973
- Americans with Disabilities Act (ADA) of 1990
- Veterans' Preference in Employment - Title 5 United States Code

The United States Constitution stands as the supreme law of the land. Certain powers and limitations are prescribed to the federal government by the (1) _____. Those powers not given to the federal government are considered to be reserved for the (2) _____. The states in turn have their own constitutions which are subject to and must remain consistent with the United States Constitution.

In the event of a conflict between a state law and the United States Constitution (or the laws enacted by Congress in accordance with the Constitution) the (3) _____ law takes precedence. Thus any state or local law that violates constitutional or federal law is (4) _____.

The Fifth and Fourteenth Amendments of the U.S. Constitution are of relevance in the employment context. The Fifth Amendment, 1791 requires that any individual not be deprived of "life, liberty, or property." In the employment context, the right of equal protection limits the power of the state and federal governments to discriminate in employment practices by treating employees, former employees, or job applicants differently because of a group with which they are associated.

The Fourteenth Amendment, 1868 prohibits states from violating an individual's rights of due process and equal protection. The Fourteenth Amendment guarantees that all individuals similarly situated are treated alike.

1. U.S. Constitution 2. states 3. federal 4. unconstitutional
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The Civil Rights Act of 1964 contains several sections or titles, which deal with a particular facet of discrimination. Title VII as amended has been the principal body of federal legislation in the area of fair employment. The Equal Employment Opportunity Commission (EEOC) was created by (5)_____ to ensure compliance by employers, employment agencies, and labor organizations. The EEOC is the regulatory agency charged with enforcing the (6)_____.

Employers are bound by the provisions of Section 703(a), as amended, of Title VII that states:

(a) It shall be an unlawful employment practice for an employer –

- (1) to fail or to refuse to refer, 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) to 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.*

There are two basic concepts of discrimination covered in case law relevant to Title VII: Disparate treatment and disparate impact. **Disparate treatment** involves intentional discrimination where one class of employees or applicants is treated differently from other employees or applicants. **Disparate impact** occurs when there is unintentional discrimination caused by employment practices which appear to be neutral but have an adverse impact on a protected class.

Title VII was written with several specific exceptions to the provisions to the law. Some of these which relate to selection are:

- Bona Fide Occupational Qualifications (BFOQs) – Discrimination in employment according to race, religion, sex or national origin is permissible when the qualification _____ is _____ a _____ (7) “reasonably necessary to the operation of that particular business or enterprise.” The employer must bear the burden of proof to demonstrate that the EEOC interpretation is met.
- Pre-Employment Inquiries such as sex and race are permitted if they are not used as a basis for discrimination. Certain inquiries are necessary to meet federal regulatory agencies’ reporting requirements and to ensure compliance with federal law.

5. Title VII	6. Civil Rights Act of 1964 (as amended)	7. bona fide occupational qualification
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- Testing – Any professionally developed ability test that is job related may be given even though the test may have adverse impact on protected groups. Federal standards for testing will be discussed in the Uniform Guidelines on Employee Selection Procedures section of the manual.
- Preferential Treatment – Title VII does not allow the granting of preferential treatment to individuals or groups because of their race, color, religion, sex, or national origin to correct existing imbalances.
- National Security – Discrimination is permitted under Title VII when it is deemed necessary to protect the national security; for example, against a member of the Communist Party.

Prior to 1972 Title VII was primarily aimed at private employers or labor organizations with 25 or more (8) _____ or members, and private employment agencies. The Equal Employment Opportunity Act of 1973 lowered the requirements to 15 employees or members. In addition, it expanded coverage to both public and private employers, including both state and local governments and public and private educational institutions as well as public and private employment agencies.

The Civil Rights Act of 1991 prohibits score adjustments such as the use of different cut-off scores for different groups of test takers or modification of employment-related test results based on the demographics of the test takers. These practices which are used to avoid adverse impact are referred to as “race norming” or “in-group norming.” Scores were compared with the scores of members of the same (9) _____ group. Candidates were then ranked within their group according to their scores. The Civil Rights Act of (10) _____ declared this process unconstitutional and mandated ranking all employment candidates by score on the same list.

The Age Discrimination in Employment Act (ADEA) of 1967 prohibits employers from discriminating based on age. ADEA protects individuals who are at least 40 years old from age discrimination provides guidelines for benefit, pension and retirement plans. ADEA applies to companies with 20 or more employees, labor unions, and employment agencies as well as government agencies. Certain groups of employees, such as public law enforcement personnel and uniformed military personnel, are exempt from ADEA coverage. As with Title VII the EEOC is responsible for enforcing this law.

Rehabilitation Act of 1973, as amended 1978, prohibits discrimination against handicapped individuals. It was designed to expand and promote employment opportunities for handicapped individuals in both public and private sector through the elimination of discrimination. The general provisions of the Act are:

- ☐ Prohibits (11) _____ against handicapped individuals by employers with federal contracts and subcontracts in excess of \$2,500.
- ☐ Employers with 50 or more employees and federal contracts of \$50,000 or more are required to have a written affirmative act plan.
- ☐ Prohibits discrimination against the handicapped by federal agencies.
- ☐ Requires affirmative action by federal agencies to provide (12) _____ for the handicapped.
- ☐ Requires federal buildings to be accessible to the handicapped.
- ☐ Prohibits discrimination against the handicapped by recipients of federal financial assistance.¹

Section 706(8)(c) of the Vocational Rehabilitation Act defines a handicapped individual as:

any person who:

1. has a physical or mental impairment which substantially limits one or more of such person's major life activities,
2. has a record of such impairment, or
3. is regarded as having such an impairment . . . Such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.²

The Department of Labor, Department of Justice and the EEOC are responsible for enforcing different parts of the Act. The EEOC is responsible for promulgating regulations related to the employment of the disabled.

The Americans with Disabilities Act (ADA), 1990 is an example of fine-tuning the body of federal civil rights legislation. This Act covers employers in the private sector, state and local governments, employment agencies, and labor unions, with 15 or more employees.

Title I of the ADA prohibits discrimination against individuals with disabilities in all employment practices which would include such things as (13) _____, advertising, job application procedures, hiring, firing, job assignment, advancement, compensation, training, and other terms, conditions, and privileges of employment. More specifically the law prohibits an employer from:

- Discriminating against disabled individuals who are qualified for a job.
- Inquiring whether an applicant has a disability. The employer can only ask about the individual's ability to perform the job.
- Limiting opportunities for disabled employees to advance.
- Using assessment tools or job requirements that tend to screen out disabled applicants.

ADA has major implications for applicant assessment and hiring practices. Three concepts from ADA, which should be remembered in your assessment program are:

- The individual with the disability is responsible for informing you that an accommodation is needed. Advanced notice of the requirement of an accommodation necessary for the hiring process may be requested so appropriate adjustments may be made to the testing plan or facilities. If the need for an accommodation is not obvious you may request documentation of the applicant's disability and functional limitations requiring the accommodation.
- A (14) _____ may be to make the test site accessible or to use an alternate examination process. ADA prohibits you from administering tests to an individual which requires the individual to use his/her impaired abilities unless the tests are intended to measure one of these abilities which is essential to the job.
- Making medical inquiries or administering medical examinations prior to a job offer is prohibited by ADA. A job offer must be made before inquiries are made or medical exams are performed, then any medical inquiries or exams may be done only if they are work related and justified by business necessity.

Veterans' Preference in Employment - Title V United States Code – Preference, to some degree, has been given to veterans in appointments to Federal jobs since the time of the Civil War. The Veterans' Preference Act of 1944, as amended, and as it appears in various sections of Title 5, United States Code is responsible for the present form of veterans' preference. Title 38 of the United States Code as well as Title V addresses veterans' employment requirements. The Office of Personnel Management (OPM) administers and oversees statutory employment requirements for both Title V and Title 38.

Veterans' preference does not guarantee a job for a veteran but does entitle a veteran, who is disabled or who served on active duty in the Armed Forces during certain specified time periods or in military campaigns, to have preference over others in hiring from (15) _____. The impact of the Federal Veterans' Preference law on selection in Colorado will be discussed in greater detail in the state law section of this manual.

Equal Employment Opportunity Commission (EEOC) - Title VII of the Civil Rights Act of 1964 established the Equal Employment Opportunity Commission. It began operating on July 2, 1965. EEOC was created to enforce the federal statutes prohibiting employment discrimination. The EEOC also develops and issues guidelines which enforce nondiscriminatory practices for the laws it enforces. The laws which are included are:

- Title VII of the Civil Rights Act of 1964 as amended
- Equal Pay Act of 1963 (EPA)
- Age Discrimination in Employment Act of 1967 (ADEA), as amended
- Rehabilitation Act of 1973, Sections 501 and 505
- Titles I and V of the Americans with Disabilities Act of 1990 (ADA)
- Civil Rights Act of 1991

The commission is made up of five members appointed by the president of the United States, by and with the advice and consent of the Senate for a five-year term. The commission also has a general counsel appointed by the president of the United States, with advice of the Senate for a four-year term. The general counsel conducts all the litigation for the laws the counsel is responsible for enforcing. EEOC is responsible for receiving, investigating and processing charges of (16) _____ of employers filed by individuals, a group of individuals, or one of its commissions. It has the authority to sue on behalf of the charging individual(s) or itself, if it determines there is "reasonable cause" that unlawful employment practices have occurred.

Office of Federal Contract Compliance Programs (OFCCP) is an office within the U.S. Department of Labor. It was established by Executive Order 11246 to monitor and ensure that federal contractors and subcontractors do not use discriminatory employment practices. Prior to 1978, 11 different government agencies had contract compliance sections with responsibility for administering and enforcing Executive Order 11256. The OFCCP supervised and coordinated the 11 compliance sections activities. In 1978 the administration and enforcement functions were consolidated and assigned to the OFCCP by Executive Order 12086.

The OFCCP is responsible for enforcing the following laws:

- Executive Order 11246, as amended
- Americans with Disabilities Act of 1990 (ADA)
- Section 503 of the Rehabilitation Act of 1973, amended
- 38 USC 4212 – The Vietnam Era Veterans' Readjustment Assistance Act of 1974
- Immigration Reform and Control Act of 1986 (IRCA)

Colorado State Law

In addition to federal laws there are a number of Colorado State laws as well as the State Constitution, which address employment. If there is a conflict between a state law and the United States Constitution (or the laws enacted by Congress in accordance with it), the federal requirements take precedence. The argument that one is acting in accordance with a state or local law would not be an acceptable defense. A state or local law, which violates constitutional or federal law, is (17) _____.

Article XII, Sections 13 –15 of the Colorado Constitution address the State Personnel System, State Personnel Board and Veterans' Preference. These sections of the Constitution provide the foundation for the personnel system, as we know it. The following concepts are found in the Constitution:

- Department of Personnel is created as a principal department of the executive department and the head of the department shall be the State Personnel Director.
- Appointments and promotions are made according to (18)_____ and fitness ascertained by competitive testing of competencies.
- Selection shall be made without regard to race, creed, color or political affiliations.

- Top three persons are referred to the appointing authority.
- Appointees shall be residents of the state. Applications may be accepted from outside the state as determined by the State Personnel Board (residency waiver).
- Temporary appointments may not exceed six months.
- Initial appointees shall serve a probationary period.
- The State Personnel Board is created and duties defined.
- Veterans' preference is defined for appointment and layoff.

These sections of the Constitution create the Department of Personnel and Personnel Board as well as establish the system as a merit system, define the (19) _____, _____, _____, establish the residency requirement and define veterans' preference.

The State Constitution takes precedence over the state laws. State laws which pertain to selection/hiring may be found in State Statutes Sections 24-50-101 and 112.5. These statutes expound and clarify the concepts in the State Constitution related to selection. The Open Records Law is another State Statute that is of importance. The law may be found in Sections 24-72-202 – 24-72-206. Appendix C – "What is 'open' in the exam record?" provides information on what may or may not be released and to whom.

The Personnel Board Rules and Personnel Director's Administrative Procedures are very important in the administration of the (20) _____ within the state. Although it is not a part of the Constitution or Statutes it carries the force of law for state agencies. Board rules and administrative procedures are adopted through a formal rule making process. The process requires that a written notice be submitted to the Secretary of State's Office announcing the date, time and location of a public rulemaking hearing and the subjects to be considered. The proposed rules and administrative procedures are made available to the public and written comments are solicited. At the time of the public hearing individuals have the opportunity to testify about the proposals.

The rules and procedures related to selection are contained in Chapter 4 – Employment and Status. This chapter provides direction on such areas as: announcements, applications, eligible lists, examination plans, job analysis, and minimum qualifications. There are three other chapters that have areas of interest. Following are the chapter number, rule/procedure site and the area it pertains to: Chapter 1, P-1-3 - examinations records; Chapter 8, P-8-1 – P-8-12 - appeals; and Chapter 12 – P-12-3, R-12-11, R-12-12, P-12-14 and P-12-27 – definition of terms.

Operational guidelines for Chapters 1 and 4 and interpretative guidelines have been developed to provide assistance in the use and application of the Board Rules and Director's Procedures. These documents as well as the Rules and Procedures may be found on the Department of Personnel Human Resource Services Rules homepage.

Name: _____

Department or Institution: _____

Date: _____

Legal Parameters Quiz

1. The Civil Rights Act of 1964, Section 703(a), as amended, covers two basic areas of discrimination: Disparate Treatment and Disparate Impact. Briefly define, discuss and provide examples of each type of discrimination as covered by case law related to Title VII.

2. The Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities in all employment practices.
 - a) How does the law “define” an individual with a disability?

 - b) What are some of the concepts from ADA that should be remembered as you develop your assessment and hiring practices?

3. The Colorado Constitution is the foundation for the State Personnel System.
 - a) Identify what areas of the constitution “define” the Personnel System.

 - b) What are the major concepts related to Selection found in the Constitution?

CHAPTER 3 – PROFESSIONAL STANDARDS

There are a number of professional standards that exist to provide a set of principles that govern the use of employee selection procedures which comply with the applicable laws. There are two major publications that this section will focus on: *Uniform Guidelines on Employment Selection Procedures* and the *Standards for Educational and Psychological Testing*.

Uniform Guidelines on Employee Selection Procedures

Before 1978, various federal agencies enforced different aspects of the Civil Rights Act of 1964. Often the areas of interest overlapped and employers received conflicting orders on the same topic from two or more federal compliance officers representing different agencies.

Four federal (21)_____ : Equal Employment Opportunity Commission, Civil Service Commission (predecessor of the Office of Personnel Management), Department of Labor, and Department of Justice adopted and published the ***Uniform Guidelines on Employment Selection Procedures***. The *Guidelines* provide a framework for determining the proper use of tests and other selection procedures used for any employment decision. They provide a set of principles governing the use of selection procedures according to applicable laws. When testing practices of organizations covered under Title VII are under review the courts have generally given great importance to the (22) _____ for job-relatedness established by the *Guidelines*. Federal and state agencies, which would include EEOC, apply the *Guidelines* in the enforcement of Title VII and related laws.

The *Uniform Guidelines on Employee Selection Procedures* were adopted on August 25, 1978 and appeared in the Federal Register. Following is a list of the agencies that adopted the *Guidelines* and the Code of Federal Regulations cites:

Equal Employment Opportunity Commission (29 CFR 1607)

Office of Personnel Management (5 CFR 300)

Department of Justice (28 CFR, Ch. 1, Part 50)

Office of Federal Contract Compliance Programs (41 CFR, Ch. 60, Part 68-3)

U.S. Treasury Department (31 CFR, Ch. 1, Part 51)

The SPCP Job Analysis manual discusses a number of the concepts found in *Uniform Guidelines* such as validity, characteristics of legal defensibility. Adverse impact is an important concept also covered in the *Uniform Guidelines*.

Adverse Impact

The *Guidelines* state “Procedures having adverse impact constitute discrimination unless justified.” What causes (23)_____ to occur? When there is a substantially different rate of selection in employment decisions that works to the disadvantage of members of a race, sex, or ethnic group the procedure is said to have “adverse impact.” Federal enforcement agencies use the “four-fifths rule” as evidence of adverse impact. According to the “four-fifths rule” adverse impact occurs whenever a particular sex or ethnic group has a selection rate which is less than 80% (4/5) of the rate for the group with the highest rate. Variations in sample size may affect the interpretation of the calculations. If the sample is very large or very small the “four-fifths rule” may not be

accurate in detecting substantially different rates of selection. For very large or very small samples a more sensitive test for statistical significance should be used.

Adverse impact may be assessed by completing the following steps:

- ▶ Determine the total number of candidates within each of the following groups: (a) non-minorities, (b) minorities, (c) males, and (d) females. (Assessment of adverse impact is not meaningful if fewer than ten members of any comparison group are involved. For protected groups with ten or more members represented in the test-taking group, separate comparisons may be made). It is not a legal requirement to calculate adverse impact for any protected group that represents less than 2% of the qualified labor market.
- ▶ Determine how many of the candidates within each of these groups passed the exam.
- ▶ Determine the passing rate for each group by dividing the number of candidates passing in the group by the total number in the group taking the exam. Identify the group with the highest pass rate (HPR) and use that as the group against which all protected groups are compared.
- ▶ To assess adverse impact for minorities, compare the passing rates received by each group with the 80% rate calculated by multiplying the HPR by .8. If the passing rate for the HPR group, after being multiplied by .8, is larger than the passing rate for any protected minority group, then adverse impact for that protected rate is evidenced. The same process should be used when comparing the passing rate of males (multiplied by .8) with that of females, if males have the higher passing rate.

Table 1 table illustrates one relatively easy way to calculate the adverse impact of a selection process by applying the steps outlined above to examination data.

Table 1

	Ethnicity	
	Non-minorities	Minorities*
Number of Applicants Taking Test	30	20
Number of Applicants Passing Test	19	16
Passing Rate	.63	.8
Passing Rate of Group with Highest Passing Rate X .8		.64

*Separate calculations should be performed for each ethnic minority group where there are a sufficient number of candidates (e.g., 10 or more) in each group.

As the data in the Table 1 illustrates the passing rate for non-minorities is less than the passing rate for minorities, there is no adverse impact on minorities. Note that in this example the group with the HPR is the protected group.

Table 2

	Sex	
	Males	Females
Number of Applicants Taking Test	25	25
Number of Applicants Passing Test	23	12
Passing Rate	.92	.48
Passing Rate of Group with Highest Passing Rate X .8	.74	

Table 2 illustrates the calculation for adverse impact based on gender. As the data illustrate the exam creates adverse impact against women. The rate for men (.92) is higher than that for women (.48). Applying the 80% rule and examining the pass rate for females indicates that it was less than the .74 passing rate necessary to meet the 80% test.

The following data were collected after the administration of a test. Use the data to complete Table 3 and determine if the test had adverse impact.

	White	Black	Hispanic	Asian	American Indian
Number Passing	3864	309	878	100	75
Number Failing	1339	464	999	64	64

Table 3

	Ethnicity				
	White	Black	Hispanic	Asian	American Indian
Number of Applicants Taking Test	(24)	(25)	(26)	(27)	(28)
Number of Applicants Passing Test	(29)	(30)	(31)	(32)	(33)
Passing Rate	(34)	(35)	(36)	(37)	(38)
Passing Rate of Group with Highest Passing Rate X .8	(39)	(40)	(41)	(42)	(43)

(24) 5203 (25) 773 (26) 1877 (27) 164 (28) 139
 (29) 3864 (30) 309 (31) 878 (32) 100 (33) 75
 (34) .74 (35) .40 (36) .47 (37) .61 (38) .54 (39) .59
 (40), (41), (42), & (43) BLANK

Reviewing the data in Table 3, the data illustrate that the exam possesses (44) _____ against Blacks, Hispanics and American Indians. The highest passing rate (HPR) was for Whites (.74). Using the 80% rule, the passing rate for the group with the HPR was .59. and after examining the passing rate for each of the other ethnic groups it can be seen that only one group, Asians (.61) has a passing rate greater than .59 (80% of passing rate of Whites).

Since the examination process in the previous example resulted in adverse impact, the *Guidelines* require the elimination of the adverse impact or the justification of continued use of the process. The following actions are recommended by the *Guidelines* when adverse impact occurs:

- 4 Modify the examination or procedure causing adverse impact.
- 4 Exclude the examination or procedure causing adverse impact from the process.
- 4 Use an alternative procedure that causes little or no adverse impact, assuming that the alternative procedure is equally valid.
- 4 Use the examination or procedure which has adverse impact if the procedure has been shown to be job related and is valid for selecting better workers, and there is no equally effective procedure available which has less adverse impact.

If an examination or procedure that causes adverse impact continues to be used, courts have required both justification by (45) _____ necessity (Title I Civil Rights Act of 1991) and validity for a specific use. To demonstrate business necessity of using a particular examination it must be shown that its use is essential to the safe and efficient operation of the business and there are not alternative procedures available that are equally valid to achieve the business objectives with a lesser adverse impact.

Demonstrating job-relatedness of a test is the same as establishing a test may be validly used as a selection device for the job. It must be shown that relationship exists between performance on the test and performance on the job. The *Guidelines* assume that there are at least three ways an employer may use examination scores: 1) To screen out those who are not likely to be able to perform the job successfully; 2) to group applicants in accordance with the likelihood of their successful performance on the job; and 3) to rank applicants and select those with the highest scores for employment.³

When an examination is used to rank order applicants the employer must have evidence of (46) _____ which is sufficient to justify that method of use. The *Guidelines* identify three concepts that can be used to validate a selection procedure. "These concepts reflect different approaches to investigating the job relatedness of selection procedures and maybe interrelated in practice. They are (1) criterion-related validity, (2) content validity, and (3) construct validity. In criterion-related validity, a selection procedure is justified by the statistical relationship between scores on the test or other selection procedure and measures of job performance. In content validity, a selection procedure is justified by showing that it representatively samples significant parts of the job, such as a typing test for a typist. Construct validity involves identifying the psychological trait (the construct) which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct. An example would be a test of 'leadership ability.'" ⁴

For more detailed discussion of the three types of validity please refer to the Test and Testing PCP Manual. The preceding discussion hits just a few of the highlights of the *Guidelines* that should be reviewed in detail. The *Guidelines* also provide the human resource practitioner with the technical standards for validity studies and documentation of impact and validity evidence that is critical if a selection process is challenged.

The *Uniform Guidelines on Employee Selection Procedures* are available on the Internet at a number of sites. See Appendix B – Resources for Internet addresses to the appropriate sites.

Standards for Educational and Psychological Testing

The American Educational Research Association (AERA), American Psychological Association (APA), and National Council on Measurement in Education (NCME) jointly developed the *Standards for Educational and Psychological Testing*. The *Standards* are an authoritative and comprehensive source on how to develop, evaluate, and the use of tests and assessment procedures in education, employment, counseling and clinical settings. There have been five earlier documents developed by the three organizations which related to the development and use of tests. The *Standards* published in 1999 are the third and most recent version.

“The standards do not attempt to repeat or to incorporate the many legal or regulatory requirements that might be relevant to the issues they address.”⁵ The *Standards* are divided into three parts: 1) Test Construction, Evaluation and Documentation; 2) Fairness in Testing; and 3) Testing Applications. Although the *Standards* do not carry the weight of the law they provide criteria for evaluation of tests, testing practices and the effects of test use. Professional judgment is still required to make appropriate decisions in test use and development.

The table, LEGAL & PROFESSIONAL PARAMETERS FOR SELECTION, which appears in Appendix A identifies the standards and the area to which they apply. Although only a limited number have been associated with specific functions in the selection process it is important to review and become familiar with all the standards.

Date: _____

CHAPTER 4 – LANDMARK COURT CASES

Laws are broad in nature and are refined as they are applied to specific situations. Court decisions are not law but interpretations of the laws, when they are applied to a specific or given situations in which the law is not explicit. There are several landmark Supreme Court decisions that provide guidance in the interpretation of equal employment and discrimination laws. The following sections describe some of the more important decisions.

Griggs v. Duke Power Company (1971)

In a class action suit, African-American employees of Duke Power Company, Dan River Steam Station, argued that the transfer and promotion employment practices of the company violated Title VII. The company policy permitted incumbents who lacked a high school education to transfer from an “outside” job to an “inside” job but to receive a promotion they must have a high diploma and pass the Wonderlic Personnel Test (purported to measure general verbal aptitude) and the Bennett Mechanical Aptitude Test. The passing score was approximately the national median for high school graduates. Both tests disqualified a higher percentage of blacks than whites. It was argued that successful performance on the indicated jobs was not related to having a high school education nor passing the tests.

In 1971, a unanimous Supreme Court decision ruled in favor of the African-American employees. “The decision established several significant points concerning equal employment opportunity:

1. The consequences of employment practices, not simply the intent or motivation of the employer, are the thrust of Title VII in that practices that discriminate against one group more than another or continue past patterns of discrimination are illegal regardless of the nondiscriminatory intent of the employer
2. The **disparate impact doctrine** provides that when the plaintiff shows that an employment practice disproportionately excludes groups protected by Title VII, the burden of proof shifts to the defendant to prove that the standard reasonably relates to job performance.
3. the EEOC’s guidelines that permit the use of only job-related tests were supported.”⁶

This case established the requirement to demonstrate (47) _____. Tests used to measure applicants must be reasonable measures of job performance. There is no general or standard way to define what constitutes “business necessity” for all jobs. Each case requires review on its own merits.

McDonnell Douglas v. Green (1973)

The McDonnell Douglas v. Green ruling set forth standards for the burden of proof in discrimination cases. “These standards were as follows:

1. The complainant in a Title VII case carries the initial burden of proof in establishing a *prima facie* case of discrimination. This can be done by showing:
(a) that he or she belongs to a racial minority; (b) that he or she applied and was

qualified for a job for which the employer was seeking applications; (c) that, despite his or her qualifications, the applicant was rejected; and (d) that, after the rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

2. If the complainant establishes a *prima facie* case, the burden shifts to the employer to provide some legitimate, nondiscriminatory reason for the employer's rejection.
3. The burden then shifts to the employee to prove that the employer's allegedly legitimate reason was pretextual (i.e., that the offered reason was not the true reason for the employer's action)."⁷

Albemarle Paper v Moody (1975)

The Albemarle Paper Company required applicants for the various skilled lines of progression to take the Beta examination (purported to measure nonverbal intelligence) and the Wonderlic test (purported to measure general verbal aptitude). No attempt was made to determine the (48) _____ relatedness of the tests and the company adopted the national norm score as a cutoff for new job applicants.

African-American workers were allowed to transfer to the skilled lines if they could pass the two tests, but few were successful. Incumbents in the skilled lines, some of whom had been hired prior to the adoption of the tests, were allowed to retain their jobs or promotion rights without passing the tests. This case, as with the Duke Power case was a claim that the use of tests led to discrimination against blacks.

Four months prior to the trial an expert in industrial psychology was hired by Albemarle to validate the relatedness of the testing program. The psychologist spent half a day at the plant and designed a study which was conducted by plant officials without his supervision. The results of the study indicated the tests were job related.

In 1975 the Supreme Court found the validation study to be materially defective. Albemarle's study failed to comply with EEOC guidelines for (49) _____ employment tests. This decision reaffirmed the concepts of tests used in employment decisions must be related to the job for which they are used and that EEOC guidelines are used to validate tests.

The decision issued for this case extended the decision from the Griggs v. Duke Power case. The following were results of the Albemarle decision:

1. Discriminatory tests are impermissible unless shown, by professionally accepted methods, to be predictive or correlated to job performance for which the applicant is being evaluated.
2. The EEOC Guidelines although they are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress the Supreme Court noted they do constitute the administrative interpretation of the Act by the enforcing agency, and consequently are entitled to great deference.
3. The use of tests must not only be valid but employers must also seek tests with the least adverse impact among those demonstrating with comparable validity.
4. Tests may be used for jobs other than the job for which use was validated only if there are no significant differences between studied and unstudied jobs.

Washington v. Davis (1976)

The District of Columbia Police Department rejected the applications of two black individuals, who in turn filed a suit against the officials of the District. The suit alleged that the Department's recruiting procedures included a written test (purported to measure verbal communications) which discriminated against racial minorities. It was also claimed that the test was not related to job performance and excluded a disproportionate number of black applicants.

The District Court, noting the absence of a claim of intentional discrimination, found the supporting evidence showed that: 1) the number of black police officers was not proportional to the city's population mix; 2) a higher percentage of blacks fail the test than whites; and 3) the test had not been validated to establish its reliability for measuring subsequent job performance. This evidence was sufficient to shift the burden of proof to the defendants, but the court ruled that no relief be granted based on the following facts:

1) 44% of new police recruits were black, were in the same proportion as the blacks on the total force and equal to the number of 20- to 29- year old blacks in the recruiting area; 2) the Police Department had recruited blacks, many of whom had passed the test but failed to report to duty; and 3) the test was a useful indicator of training school performance which precluded the need to show validation in terms of job performance and was not designed to and did not discriminate against otherwise qualified blacks.

This case addresses the Constitutional standard for disparate impact under the 14th Amendment rather than Title VII. It established that for constitutional claims of discrimination, there must be a discriminatory purpose or intent.

University of California Regents v. Bakke (1978)

The University of California Medical School at Davis had twice rejected Allan Bakke, a white male. UC-Davis had set aside 16 of the 100 openings in the medical school for "qualified" minorities, as part of the university's affirmative action program. Bakke had higher MCAT scores than the minority applicants that were admitted. His contention was that he was not admitted solely on the basis of race in violation of the Equal Protection Clause of the 14th Amendment, a provision of the California Constitution and, 601 of Title VI of the Civil Rights Act of 1964.

This case raised the issue of (50) _____, the alleged preferential treatment of one group (minority or female) over another group rather than equal opportunity.⁸ There was no majority opinion in the case but Bakke won the case by a 5 to 4 vote. The medical school was ordered to admit Bakke and it was found that the school's two-track admission system was illegal. But at the same time in another 5 to 4 vote it was found that some forms of race-conscious admissions procedures are constitutional.

United Steelworkers of America v. Weber (1979)

The United Steelworkers of America signed a collective bargaining agreement in 1974 with the Kaiser Aluminum and Chemical Corporation that had an affirmative action plan designed to reduce racial imbalances in Kaiser's workforce which was almost exclusively white. The plan included hiring goals and the establishment of an on-the-job training program to teach craft skills to unskilled workers. Fifty percent of the positions in the training program were reserved for African-Americans.

Brain F. Weber, a white male, filed a class action suit because African-American employees with less seniority than he were accepted into the program while he was not. He claimed to be the victim of reverse discrimination. Weber lost the case. "The Court ruled that Kaiser's affirmative action plan was permissible because it:

- (1) was designed to break down old patterns of segregation
- (2) did not involve the discharge of innocent third parties
- (3) did not have any barriers to the advancement of white employees
- (4) was a temporary measure to eliminate discrimination.⁹

Connecticut v. Teal (1982)

Black employees of a Connecticut state agency were provisionally promoted to supervisors with the stipulation that they participate in the selection process. The selection process was a multi-step process beginning with receiving a passing score on a written examination. The individuals who had been provisionally promoted failed to pass the examination and alleged that Connecticut violated Title VII by requiring an absolute condition that applicants pass a written test which disproportionately excluded Blacks and was not job related. The passing rate for Blacks was 68% of the passing rate for whites.

In the past, trial promotions had been made from the eligibility list. The overall result was that 22.9% of the Black candidates were promoted while only 13.5% of the white candidates received promotions. The District Court agreed with the "bottom-line" defense, presented by Connecticut, where the overall results were more favorable to Blacks than whites which precluded a Title VII violation. "The (51)_____ concept is based on the view that the government should generally not concern itself with individual components of the selection process if the overall effect of that process is nondiscriminatory. However, the Supreme Court, on June 21, 1982, held that the nondiscriminatory bottom line results of the employer's selection process did not preclude the employees from establishing a *prima facie* case of discrimination and did not provide the employer with a defense in such a case. Thus, the conclusion reached from this case is that bottom line percentages are not determinative."¹⁰ Each test must be reviewed or examined by the EEOC or a court to determine whether it by itself has a disparate impact on a protected group.

Wards Cove Packing Co. v. Atonio (1989)

Jobs at the Alaskan salmon canneries of the Wards Cove Packing Co. are of two general types:

1. Unskilled “cannery jobs”, jobs on the cannery lines predominantly held by non-whites
2. “Non-cannery jobs” which are mostly classified as skilled positions and filled predominantly with white workers and almost all pay more than the cannery positions.

A group of the non-white cannery workers filed a suit under Title VII of the Civil Rights Act of 1964. One of the allegations was that the hiring/promotion practices of the company were responsible for the racial stratification of the work force and employment as noncannery workers had been denied on the basis of race. It was argued that discrimination by the Company had not been proved just because statistics showed that minorities held most of the lower-paying seasonal jobs and fewer better positions.

The Supreme Court’s decision stated that when statistics show minorities are the victims of discrimination the employer need only produce evidence that there is a legitimate reason for the business practice. Their decision also limited the statistical evidence that may be used to prove discrimination. “It ruled that an absence of minorities in skilled jobs is not evidence of discrimination if the absence reflects a dearth of qualified minority applicants for reasons that are not the employer’s fault. The Civil Rights Act of 1991 in effect reversed this Supreme Court decision.”¹¹

Name: _____

Department or Institution: _____

Date: _____

Landmark Court Cases Quiz

1. Discuss the impact that each of the court cases discussed in this chapter had on employment law.

Notes

¹Byars, Lloyd L. and Rue, Leslie, Human Resource Management, Fifth Edition, Irwin/McGraw-Hill, Boston, 1997, p. 29

²Ibid., p. 30.

³Federal Register, Vol. 43, No. 166, Office of the Federal Register, National Archives and Records, Administration, Friday, August 25, 1978, p. 38291.

⁴Ibid., p. 38292.

⁵Standards for Educational and Psychological Testing. American Education Research Association, American Psychological Association and National Council on Measurement in Education, American Education Research Association, 1999, p. 4.

⁶Byars, p. 38.

⁷Ibid., p. 39.

⁸Ibid., p. 40.

⁹Ibid., p. 40-41.

¹⁰Ibid., p. 41.

¹¹Ibid., p. 43.

APPENDIX A

LEGAL & PROFESSIONAL PARAMETERS for SELECTION

A

LEGAL & PROFESSIONAL PARAMETERS FOR SELECTION

TOPIC	FEDERAL	STATE				
	Law/Admin Guidelines	Constitution	Statutes	Rules/Director's Procedures	Professional Standards	Operational Guidelines
Announcements Types Content Distribution Residency Requirement		Article 12 - 13(6)		P-4-1, P-12-3		Announcements
Applications Form Acceptance Review Notification Director's Review			24-50-112.5(1)(a) 24-50-112.5(3)(a) 24-50-142	P-4-2 P-4-10 P-8-20 to P-8-23		App. Forms App. Acceptance App. Review Director's Review of App. Rejection
Core Classes						Core Classes
Eligible List		Article 12 - 13(5)	24-50-112.5(3)(a) & 24-50-112.5(2)(a-b) 24-50-302	P-4-13, R-12-9, R-12-11		
Equal Opportunity	Title VII (1964), as amended	Article 12 – 13(1)	24-50-101(3a) 24-50-141 24-34-402	R-4-1, P-4-11		
Examination (Item) Bank						Exam Bank
Examination Plan Testing Exam Construction Admission to exam Scheduling/Notice to applicant Conduct Test accommodations	Uniform Guidelines on Employee Selection Procedures (1978) ¹ Title VII (1964) ADA (Title I)	Article 12-13(1) Article 12-13(5)	24-50-101(3)(a) 24-50-112.5(1)(b) 24-50-112.5 (3)(b) 24-50-112.5(1)(a) 24-50-112.5(4)(a-c) 24-50-112.5(2)(b) 24-50-125.3 24-50-125.4	P-4-11, P-4-12, Director Appeals: P-8-1 to P-8-12, R-12-12, P-4-11,	Standards for Educational & Psychological Testing, 5.1 – 5.10, 5.14, 5.16	

TOPIC	FEDERAL	STATE				
	Law/Admin Guidelines	Constitution	Statutes	Rules/Director's Procedures	Professional Standards	Operational Guidelines
Appeal, Test-taker rights Results Make-up Exams Reexamination Notice for Non-accept to exam	Rehabilitation Act, Sec. (503, 504) Uniform Guidelines		24-50-112.5(6) 24-50-133			
Examination Records Test Analysis Length of retention Method of record keeping Documents	Uniform Guidelines		24-50-127 24-50-130	P-1-3	Standards for Educational & Psychological Testing 5.15	
Test Analysis Methods (Z-scores, Percent) Pass Points Errors Adverse Impact Validity Reliability	Uniform Guidelines Sec 4 (H) and others	Article 12 - 15	24-50-112.5(1)(a) 24-50-112.5(3)(a)	P-4-14, P-4-11	Standards for Educational & Psychological Testing 4.19, 4.21, 5.8, 5.14, 8.11	
Interviewing				P-4-17		
Job Analysis	Uniform Guidelines		24-50-112.5(3)(a)	R-4-2	Standards for Educational & Psychological Testing 14.4, 14.6, 14.8 – 14.11	Job Analysis

TOPIC	FEDERAL	STATE				
	Law/Admin Guidelines	Constitution	Statutes	Rules/Director's Procedures	Professional Standards	Operational Guidelines
Minimum Qualifications/Job Profiles Substitutions, BFOQs Exams Transfers, Reemployment, Reinstatement, Reappointments	Uniform Guidelines		24-50-112.5(1)(a) 24-50-112.5(3)(a)	R-4-2, P-4-10. P-12-14, P-12-27		
Open Records/Security of materials			24-50-127 24-72-201 – 206	P-4-11	Standards for Educational & Psychological Testing 5.7, 5.16, 8.6	
Recruitment Employment Lists Departmental Reemployment Promotional Open-Competitive Methods of filling Order of use: Transfer Voluntary demotion Reappointment Reinstatement Temporary Appointments Department Reemployment Promotional Open-competitive	Uniform Guidelines (not recruitment)	Article 12 – 13(6) Article 12 - 13(9)	24-50-101 (3)(a) 24-50-112.5(3)(b) 24-50-114 24-50-112.5(2)(a-b) 24-50-121 24-50-112.5(5)(a) 24-50-126(2)	R-4-3, R-4-4, R-4-5, P-4-3, P-4-4 P-4-5, P-4-6, P-4-7 P-4-8, P-4-9, R-4-6 R-4-7, R-4-8, P-4-13, P-4-14, P-4-20, P-4-21, P-4-22, R-12-9, R-12-11, R-12-20 P-20-24		Recruitment

TOPIC	FEDERAL	STATE				
	Law/Admin Guidelines	Constitution	Statutes	Rules/Director's Procedures	Professional Standards	Operational Guidelines
Referrals Notice Time limits Notice of selection/non-selection		Article 12 - 13(5)	24-50-112.5(2)(b) 24-50-141	P-4-17, P-4-18		Referrals
Removal of names from list Notice Appeal			24-50-112.5(1)(a) 24-50-133	P4-15, P-4-16, Director's Review Process: P-8-20 to P-8-23		Removal of Names
Uniform System of Personnel Management and Administration			24-50-101			
Veterans= Preference	Title 5 Title 38	12-15	24-50-112.5(2)(b) 24-50-511	R-4-8		Veterans' Preference

¹Uniform Guidelines on Employee Selection Procedures (1978) have been adopted by the following Federal agencies. The specific agency regulation follows the agency name.

Equal Employment Opportunity Commission: 29 CFR part 1607

Department of Labor Office of Federal Contract Compliance Programs: 41 CFR part 60-3

Department of Justice: 28 CFR 50.14

Civil Service Commission: 5 CFR 300.103(c)

These guidelines are used in the enforcement of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, and Civil Rights Act of 1991.

*House Bill 01-1085 was signed into law on March 11, 2001 and went into effect August 9, 2001. This bill repealed 24-50-111, 24-50-112, 24-50-113, 24-50-115 and 24-50-121 and replaced them with 24-50-112.5.

APPENDIX B

RESOURCES

Resources

ADA Resources

www.afb.org -The American Foundation for the Blind - (202) 408-0200, (800) 232-5463

www.usdoj.gov/crt/ada - Americans With Disabilities Act Information on the Web -

Industry-Labor Council on Employment and Disability - (516) 747-6323

www.adata.org - Disability and Business Technical Assistance Centers: - (800)949-4242

www.usdoj.gov/crt/ada/adahoml.htm - U.S. Department of Justice – ADA Home Page -
(800) 514-0301 (voice), (800) 514-0383 (TDD)

www.cdhs.state.co.us/dvr/ - Colorado Department of Human Services, Division of Vocational Rehabilitation

Reference Books

Human Resource Management – Seventh Edition, Robert L. Mathis & John H. Jackson

Human Resource Management – Fifth Edition, Lloyd L. Byars and Leslie W. Rue

Handbook of Human Resource Management in Government, Stephen E. Condrey, Editor

Websites

<http://www.opm.gov/veterans/index.htm> – U.S. Office of Personnel Management – Veteran's Information

<http://www.gpo.gov> – National Archives and Records Administration

<http://www.ipmaac.org/> - International Personnel Management Association – Assessment Council. Site contains a very good on-line library.

<http://www.eeoc.gov/index.html> – U.S. Equal Employment Opportunity Commission (EEOC)

<http://www.hr-guide.com/> - HR-Guide.Com - This web site contains links to other Internet - based resources for HR professionals and students.

<http://www.mapnp.org/library/staffing/staffing.htm> - Free, On-Line Guide to Staffing. Assembled by Carter McNamara, MBA, PhD - Applies to nonprofits and for-profits unless noted.

<http://www.apa.org/> - American Psychological Association.

<http://www.uniformguidelines.com/uniformguidelines.html> - Uniform Guidelines on Employee Selection Procedures and Uniform Employee Selection Guidelines: Interpretation and Clarification (Questions and Answers).

<http://www.law.cornell.edu> – Cornell Law School – Legal Information Institute. Excellent site for information on legal issues.

<http://www.fwlaw.com/> – Fairfield and Woods, P.C. – Articles related to a number of legal issues related to employment.

<http://www.dol.gov/> – Office of Federal Contract Compliance Programs.

<http://www.findlaw.com> – Find Law Library

<http://www.usa.gov> – Fed Law - assembled references of use to people doing Federal legal research and which can be accessed directly through "point and click" hypertext connections.

<http://www.lectlaw.com/temp.html> - The 'Lectric Law Library Lawclopedia's Employment & Labor

<http://www.mtsu.edu/~pmccarth/> - Resource Center / Playground in Industrial & Organizational Psychology – contains sites for interesting I/O-related information.

APPENDIX C

WHAT IS “OPEN” IN EXAM RECORDS?

WHAT IS “OPEN” IN EXAM RECORDS?

The following information/documents are “open” for inspection and may be release under the Public Records (Open Records) Law found in C.R.S. 24-72-202 – 24-72-206.

Job Analysis

Official job announcement

Examination plan which includes the test type(s) and test weight(s), and KSAs (not the factor weights within the test)

Subject Matter Expert (SME) information sheets

Applications excluding the individual’s SSN, address, telephone number(s), birth date, gender, ethnicity, veteran status or any protected HIPAA information.

The candidate’s portion of the rating panel tape or digital recording, and the briefing of the rater panel.

Summary rater panel comments related to the candidate without identification of the rater or the actual numeric score of the candidate.

Sayvetz Opinion on Examination Materials and Public Records Law

The following is the opinion received from the Attorney General's Office (J.D. MacFarlane, Attorney General) in response to questions related to examination materials and the open records law.

December 13, 1978

M E M O R A N D U M

TO: Jerome C. Davies
Associate Personnel Director

FROM: Ann Sayvetz
Assistant Attorney General
Human Resources Section

RE: Examination materials and public records law
PE-AD-IJBZ
AG File No. DHR/IJBZ/1MK

You have asked an extensive series of questions regarding the inspection or denial of inspection of test questions, scoring keys and other examination data under the Public Records Law, which is found at C.R.S. 1973, 24-72-101 et seq. The relevant section is 24-72-204(2)(a)(II), which provide as follows:

(2)(a) The custodian may deny the right of inspection of the following records unless otherwise provided by law on the ground that disclosure to the applicant would be contrary to the public interest:

(II) Test questions, scoring keys and other examination data pertaining to administration of the licensing examination, examination for employment or academic examination except that written promotional examinations and the scores or results thereof conducted pursuant to the state personnel system or any similar system shall be available for inspection but not copying or reproduction by the person in interest after the conducting and grading of any such examination.

It should be noted that the language cited above (relating to test questions and scoring keys and other examination data) falls within that portion of the statute which permits, but does not mandate, denial within the discretion of the custodian on the ground that disclosure would be contrary to the public interest. Therefore there is a two-part test which must be applied to each of the items you have set forth in your opinion request. First, it must be

determined whether the item is a test question, a scoring key or form of examination data. If it is not, that is the end of the inquiry, and the material would be disclosable under the Public Records Act unless some other section permits denial of inspection.

If the answer to the first question is yes, then the custodian has the discretion and the authority to deny disclosure so long as it is based on public policy grounds. The matter of cost (both in money and in labor) involved in the redesign and reproduction of exams should they be disclosed is one important factor in your policy determination. Further, the need for fairness and equal opportunity to compete on state personnel exams is another factor to be considered. You ask whether the Department should establish guidelines with regard to disclosure or non-disclosure of these items or should handle requests on a case by case basis. I strongly recommend the development of guidelines based on some of the reasons which I have just listed above. Not only are guidelines necessary for uniform responses to disclosure requests by both the Department and any agency which may have the custodial function under a decentralization agreement, but they are important in order to avoid any potential finding of arbitrary and capriciousness under section 204(5) of the statute in the event that someone seeks disclosure by a court order and court costs for that action.

You also ask whether, and if so how, your obligation to disclose may change based on the circumstances in which the request is made, i.e. a request pursuant to the Public Records Act, one made prior to a Personnel Board preliminary hearing or a discovery request made by subpoena for records or testimony in a formal hearing. The treatment of requests in the first two situations should be treated the same. A preliminary hearing is an informal one, and discovery rights under the Rules of Civil Procedure do not apply until a case has been set for a formal administrative hearing. The rights of the parties in preparation for such a hearing are governed by different standards than those set forth in the Public Records Act. Questions about material discoverable under subpoena must be evaluated in light of the specific information sought and resolved on a case by case basis and for this reason I cannot provide you with generalized advice at this time.

Further there is the issue of access to records by investigators. Federal and State investigators may seek access to examination material because of a challenge to the testing process. The policy reasons which you have expressed as a basis for nondisclosure of the type of material to members of the public (potential examinees) do not apply to investigators. Their inspection of the material would not lead to unfair competitive advantage or the need to redesign examinations. Therefore where public records fall within section 2 of the statute, which permits nondisclosure where justified by public policy, there does not appear to be any reason to distinguish between CCRC investigators and those from other agencies.

However, where records fall within section 3, which prohibits disclosure except to the party in interest, the distinction between CCRC investigators (acting as neutral agents of the Board and the Department under the memorandum of understanding) and others is appropriate. If the person in interest designates an investigator as his or her representative, it would be proper to disclose records under part 3.

I now turn to each of the items that you have described and will evaluate whether or not these items may be designated as test questions, scoring keys or other examination data.

I.

A. Job Analysis Rating Sheet

The Job Analysis Rating Sheet is a list of job factors which are used to analyze job skills in order to design an examination for that particular job. Since this is primarily descriptive and does not in any way indicate which factors will ultimately be covered by the examination, this rating sheet does not fall within the definition of other exam data and would therefore not be covered under this section of the Public Records Act permitting discretionary denial of inspection.

B. Job Analysis Member Information Sheet

This sheet contains information about the person from whom you have obtained material listed on your Job Analysis Rating Sheet. Again, this information does not give any indication of what job factors will or will not be covered on examination and for that reason does not constitute examination data.

C. Job Analysis Summary Rating Sheet

This sheet contains the same information as the Job Analysis Rating Sheet with the addition of a scale which designates more important or less important factors of the job in question. Since the examination is designed to test for those skills which are more heavily weighted or more important in the performance of the particular job, this sheet, at least insofar as the rating scales are concerned, would be considered examination data. Denial of inspection of these rating scales together with the factors would be appropriate in order to avoid giving an unfair competitive advantage based on knowledge of the important job skills as designated by your technicians prior to the examination.

D. Exam Summary Rating Sheet

This sheet contains a list of the important factors for examination purposes extracted from the Job Analysis Summary Rating Sheet. This list provides the specific factors which will be covered on an examination, and therefore constitutes examination data.

E. Oral Rating Form Containing Factors and Questions

This form is the scoring key for an oral examination and for that reason comes within this section of the statute.

F. Oral Question Sheet

This sheet contains the actual test questions and therefore also falls within this section of the statute.

G. Performance Test Sheet

See F. above.

H. Written Test Question Sheet

See F. above.

I. All Punch Cards Generated from the Above Procedure

Punch cards are used for computer storage and must be analyzed with reverence to the material contained on them. If the materials is that covered in A and B above, the material would properly be disclosable. If material which I have designated as being exam material within the meaning of the statute is found on these cards, then the custodian may properly deny inspection.

II.

Background Questionnaire for Use in Evaluation of Training Experience

This form requests information which already exists as opposed to a test of someone's skills or aptitudes. An applicant's background and experience is fixed and cannot be changed or altered at the time this questionnaire is filled out, unlike the situation where one can study and increase his knowledge of a particular job so as to have an advantage on a competitive examination. For this reason disclosure of the questionnaire form would be proper because it does not constitute examination material.

However, a second question arises as to whether a completed questionnaire should be subject to disclosure. One must first determine whether the questionnaire is the same as the application form because completed application forms must be disclosed under an exception to section 3(a)(II) or section 204. If it is not the same as the application form, it should be treated the same as tests which have been answered and not be disclosed except to the person in interest after he/she has taken that examination.

The rating scales and criteria for evaluating the training experience would fall under the category of scoring keys and therefore would appropriately be confidential under the statute.

III.

EXAM METHODOLOGIES

A. Oral Exams

1. SME's who provided content validity. I assume this is the same as the job analysis member information sheets discussed above and therefore see discussion under I.B.

2. through 5. which list factors, factor weights, questions and suggested responses clearly fall within the definition of test questions and scoring keys and inspection may be denied.
6. Board Member Information Sheets are not examination data. See I.B.
7. Tapes. The statute provides an exception for inspection of exams, scores and results of written promotional examinations by the person in interest. Since an oral examination does not fit within that exception, the custodian could properly deny access to those tapes. You have described your policy on tape which permits the candidate to listen to his or her portion of the tape as well as the briefing of the Oral Board. Since denial of inspection under this section of the statute is discretionary and you have chosen to allow disclosure to the individual candidate of his/her taped exam, the continuation of that policy is appropriate.
8. and 9. Oral Board members' written comments, and the scoring method are part of the scoring procedure, and therefore the Department's policy of summarizing the responses for the candidate but not identifying the particular Oral Board member is proper.
10. Inspection of behavioral anchors which are used to distinguish a superior candidate from an acceptable or unacceptable one may appropriately be denied since they are part of the scoring key.

B. Written Exams

All of the items listed under written examinations referencing those in I. as well as questions and answers, scoring method, establishment of pass point, conversion of raw score to converted score, answer sheets and result punch cards fall within the statute.

C. Performance Examinations

All of the items in this category would likewise be covered by the statute and therefore subject to discretionary guidelines on disclosure.

D. Training and Experience Tests

All items in this section excluding Training and Evaluation Questionnaires and Panel Member Information would be covered by the statute and therefore need not be disclosed. Panel Member Information is similar to the job analysis member information sheets which have been discussed above and are not examination data. The Training and Experience Questionnaire even where used as a test, solicits the same kind of information as an application does, and for this reason does not constitute examination data. See II.

E. Departmental Promotional Ratings

All of the items under this heading are examination data. Departmental Promotional Ratings are evaluations of the employer's past performance made by the applicant's supervisor together with an evaluation of projected performance in the job sought. This is a scoring or

evaluation process and is therefore very similar to the actual scoring of an examination or other type of evaluation method.

F. Application Form Containing Medical, Psychological, Sociological Background and Scholastic Achievement Data

This question arises because application forms are disclosable under the Public Records Act based on the exception to the personnel file provision in (3)(A)(III), but on the other hand medical, psychological, and sociological information is not to be disclosed except to the person in interest under (3)(A)(I). The specific bar against disclosure of medically related information is an exception to the disclosure of application forms and therefore if application forms request and contain information of this kind, the custodian should deny disclosure of that specific data except to the person in interest. If disclosure of a group of application forms is sought, the custodian would be obligated to mask out those sections of the application that contain this information.

G. Polygraph Containing Medical, Psychological, Sociological and Educational Achievement Data

This should be treated in the same way as material discussed above in section F. The method by which information is obtained (by test or by application form) does not affect the statutory prohibition against disclosure of that information.

H. Personality Tests

Information obtained by a personality test, if it falls within the categories discussed under F, should be treated in the same way.

I. Assessment Center

My understanding is that assessment center tests a person's ability to perform in a simulated job situation. The items under 1 have already discussed. The assessor qualifications are the qualifications of the person evaluating the simulated situation and would not be part of the examination materials. The assessor training procedures which teaches the assessor what to look for, the specific exercises which constitute the test itself, the required answers, the scoring procedure, the rating forms are all part of the actual test and therefore fall within the statute. The video and audiotape is similar to the tape recording of an oral exam and could be treated in the same way. The assessee evaluation and the follow-up questionnaire would be examination material if the critiques of the simulated situation are then used by technicians to improve or refine this kind of examination.

Role player instructions relate to the specific situation to which the applicant must respond and would therefore be examination data.

J. Performance Appraisals for use in Validating Selection Devices

This information is collected from a person performing on the job following examination in order to relate adequacy of job performance to a particular testing device. Although this is not strictly material used in the composition of an exam, it is used for the evaluation of examination procedures. Based on the need for candor in the appraisal and the projected cost of redesigning exams which are being validated, I think disclosure could be properly denied for this type of materials.

K. Research Information Pertaining to Administered Exams

Computer print-outs must be evaluated in light of the information contained therein.

You have articulated a number of policy considerations with regard to certain types of examination material. These concerns would be appropriate bases for your non-disclosure guidelines.

Finally you have posed a series of additional questions which, if not already answered are addressed as follows:

1. You asked whether tests constitute trade secrets, privileged information or confidential commercial information so as to come under section (3)(A)(IV) which prohibits the disclosure of this type of information. The legislature chose to treat examinations differently from trade secrets, permitting disclosure of the former, prohibiting disclosure of the latter. Nondisclosure of examinations must be based on the public interest as opposed to nondisclosure of trade secrets which is based on the nature of the material itself.

You ask whether tests produced by the Department of Personnel differ from tests provided by commercial or non-profit organizations. One distinguishing factor would be that the commercial or non-profit organizations are not subject to the Public Records Act because they do not fit within the definition of an official custodian of a person having custody of public records. However, if tests produced elsewhere are used by the Department of Personnel, they shall be treated in the same way.

2. You ask if questions used at both the qualifying stage and on a weighted exam are exam material. Since both the screening and the weighted exam are methods by which merit selection is made, these questions constitute examination data.
3. You ask me to define an application. An application is a form which solicits background information from persons seeking employment. It is the initial stage in the selection process. By completing an application, a person formally submits to the selection process which may lead to employment. These completed applications must be disclosed pursuant to the exception to the personnel file portions of the statute in (3)(A)(II). The question of disclosure becomes more complicated when the application form is used as the training and evaluation questionnaire. As I have mentioned above, an application remains an application even though it may be used at different stages of the selection process. The applicability of the Public Records Law does not change merely because a particular piece of paper is labeled differently or used for a separate purpose. An application form collects facts which are already established, such as past

job experience as distinguished from substantive knowledge or analytical abilities which may be the subject of an examination. Questions seeking the latter have been found by the legislature to be the appropriate subject of non-disclosure. On the other hand the factual information about an applicant's past has been found to be appropriate for disclosure or inspection.

4. Examinations or questions which you use for state examinations are records which must be kept pursuant to the Public Records law. The fact that you may have received the materials from another source as opposed to developing that material yourself is not dispositive of the open records question. Therefore if you would be able to justify non-disclosure of your own material, the same justification would apply to material obtained elsewhere. Since you can protect your own exam product from disclosure based on the public policy reasons discussed above, you can similarly maintain security of materials obtained elsewhere.
5. The economic point you make in paragraph number 5 is certainly a valid basis for non-disclosure policy which could be incorporated in general guidelines to be promulgated in this area.
6. You ask whether federal guidelines, specifically EEOC's definition of tests, supersede the Colorado statutes. I assume your inquiry is whether the definition of tests etc. as used in the Public Records law, is synonymous with the broad range of selection devices designated as tests by EEOC. The definitions need not be the same because the state statute and the federal guidelines address different questions; the former relates to public policy of disclosure, the latter covers selection procedures for purposes of evaluating their non-discriminatory impact. The federal definition could be used for purposes of defining the terms used in the Public Records Law, but would not be dispositive of the question. However, even if it were, you have only answered the first part of the test set forth earlier. The Department as custodian of exam materials still has to make the discretionary determination of whether or not the materials should be disclosed.
7. Answered in III. F. above.
8. Disclosure of bona fide research projects may be denied under section 204(2)(a). Since examination data and specific details of research projects both fall within the permissive nondisclosure section of the statute, the custodian's discretion as to disclosure is the same for both categories.

If other questions arise, do not hesitate to call me.

Gregory K. Chambers Opinion on Release of Employment or Promotional Applications to the Public

The following is the opinion received from the Attorney General's Office (Duane Woodard, Attorney General) in response to a request for an opinion regarding the release of information on the application form. Although the application form has changed since the opinion was issued the opinion is still valid.

January 14, 1985

M E M O R A N D U M

TO: Gail Schoettler
Executive Director
Department of Personnel

Rudy Livingston
Deputy Director
Department of Personnel

FROM: Gregory K. Chambers
Assistant Attorney General
Human Resources Section

RE: Release of employment or promotional applications to the public – Public Records Act
AG Alpha No. PE AD YAD
AG File No. CHR8404793/SC

This memorandum is in response to a written request by Rudy Livingston for an opinion regarding what information on a completed application form should be denied to parties who request to review the application pursuant to the Open Records Act, (A sample copy of an application was provided by the department.) It does not contain any opinion as to what information is subject to discovery pursuant to the Colorado Rules of Civil Procedure. This memorandum expresses the opinion of this attorney and is not to be construed as a formal opinion of the attorney general.

CONCLUSION

The applicant's identity cannot be deleted. However, certain information may be deleted from the face of the application. If a person requests to inspect an application other than his own, the department may delete the score results. If a person requests his own employment application (not promotional examination), the score results may also be deleted. If a person requests merely to look at his own promotional application, the score results cannot be deleted. If the person requests a copy of his own promotion application, however, his score results may be deleted. If such a person wants a copy of his own promotion application, however, his score results may be deleted. Score results include

everything in the upper right hand corner of the application except the identity of the reviewer and the number of veteran preference points.

ANALYSIS

A. APPLICATIONS IN GENERAL

Under the Open Records Act, all records are open for public inspection unless the record falls within a specific exception. Section 24-72-203, C.R.S. (1982 Supp.). Section 24-72-204(3)(a)(II), C.R.S. (1982 Supp.) sets forth the applicable law on release of personnel applications. It states, in pertinent part:

(3) (a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, . . . shall be available to the person in interest under this subsection (3):

. . .

(II) Personnel files, except applications and performance ratings;. . .

Under the above language, personnel applications fall outside any exception from inspection and anyone may inspect these applications pursuant to section 24-72-203(1). There is no provision that the applicant's identity be deleted from the application prior to release of the application. Thus, the application must be released without the applicant's identify deleted. This memorandum does not address whether identity should be deleted if the application is actually used as part of the test process.

B. EMPLOYMENT EXAMINATION SCORES

The application provided by the department appears to be used as an employment application and as a promotion application. There is a space for test results and other information in the upper right hand corner of the application. Because scores from employment examinations are treated differently than scores from promotional examinations under the Open Records Act, I shall address them separately.

Section 24-72-204(2)(a), C.R. S. (1982 Supp.) sets forth the applicable law on release of scores and exam results. It states, in pertinent part:

(2) (a) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

(II) Test questions, scoring keys, and other examination data pertaining to administration of a licensing examination, examination for employment or academic examination; except that written promotional examinations and the scores or results thereof conducted pursuant to the state personnel system or any similar system shall be available for inspection, but not copying or reproduction, by the person in interest after the conducting and grading of any such examination; (emphasis added)

According to this statute, the custodian of examination data from employment examinations may refuse the right of inspection to the public if contrary to the public interest. Examination data from employment examinations can be construed to include test results and scores of employment examination. Thus, the custodian may refuse the right to allow inspection of employment examination scores by blocking out these scores on the ground that disclosure would be contrary to the public interest.

C. PROMOTIONAL EXAMINATION RESULTS.

The application in question may also contain scores of promotional examinations. Whether these scores may be deleted depends on who is requesting the application. According to section 24-72-204(2)(A)(II), only a “person in interest” may examine his promotional scores. A “person in interest” is defined in section 24-72-202(4), C.R.S. (1982 Supp.) as:

. . . the person who is the subject of a record or any representative designated by said person; except that if the subject of the record is under legal disability, “person in interest” means and includes his parent or duly appointed legal representative.

Thus, a person, or his designated representative, can only inspect his own scores, for that is the only situation in which he would be considered the subject of the exam results.

However, according to section 24-72-204(2)(a), a person can only inspect his promotional scores; he cannot make a copy of these scores. So, if a person requests merely to look at his application, the department cannot block out his promotional exam results. If a person wants a copy of his application, the department can delete these results.

If a person requests an application that is not his own, the promotional exam results on the application obviously would not be his own. In such a situation, he would not be considered the subject of those scores and therefore would not be considered a “person in interest” as defined above. Thus, that person could not inspect the promotional scores on the application. The department may delete these scores on the grounds that disclosure of these results is considered contrary to the public interest.

D. DISCLOSURE OF TEST SCORES AGAINST PUBLIC POLICY.

There appears to be every indication that disclosure of employment exam results to anyone, and disclosure of promotional exam results to anyone but a person in interest, would be contrary to the public interest. The plain language of section 24-72-204(2)(a)(II) lends the

strongest support to such a conclusion. That section indicates that inspection (but not copying) of one's own promotional exam results is the exception. Obviously, then, the general rule must be that disclosure of employment exam results to anyone and disclosure of promotional exam results to anyone but the person in interest would be contrary to the public interest.

If, arguendo, disclosure of all personnel test results would not be contrary to the public interest, then the custodian of these results would be required to allow inspection and copying pursuant to section 24-72-203(1). If that was the case, then the second part of section 24—72-204(2)(a)(II), which provides that the inspection of promotional exam results is the exception, would be totally inoperative because inspection and copying would already be mandated. Such a construction is generally avoided. Thus, there is strong evidence that the legislature intended that disclosure of application exam results to anyone, and disclosure of promotional exam results to anyone but a person in interest, is contrary to the public interest.

E. INFORMATION CONSIDERED TO BE TEST RESULTS

The remaining question is what information in the upper right hand corner of these applications constitutes scores and test results so as to be subject to deletion. In the upper right hand corner, there is a space with the words "ACCEPT", "COND. ACCEPT", and "REJECT". This area obviously indicates the ultimate results of the sum total of all examinations and there fore should be deleted. Immediately to the right of these words, is an area to indicate the identity of the reviewer. Such information cannot be considered scores and test results and must not be deleted. Immediately below these two spaces, is a space for the weight, the raw score, the converted score, and the weighted score for certain enumerated tests. This data would be considered scores and can be deleted. At the bottom, there are areas to indicate the earned score, veteran preference points, final score, and rank. Of these areas, only the area indicating the veteran's preference points would not be considered test results or scores. These points are an arbitrary number added to a final passing score to give preference to certain veterans. In no way do they reflect any results of a completed test. Thus, the area to indicate veteran preference points should not be deleted. All other areas at the bottom, as test results, can be deleted.

CONCLUSION

Under the Open Records Act, the department must allow any person to inspect and copy any application without deletion of identifying information. I would suggest that the department continue it's practice of blocking out test scores on applications requested by any person unless the person merely requests to look at his own promotional application. In that case, the scores cannot be blocked out. If the person requests a copy of his own promotional application, however, the scores on the application may be blocked out. Scores or test results are everything in the upper right hand corner of the application except for identity of the reviewer and the number of veteran preference points These two areas should not be deleted.