



# A COMMUNICATION STYLE ASSESSMENT

INTERNATIONALLY RECOGNIZED (ENGLISH)

**Note from Mr. G. W. Tucker, MS- Author and Developer of The PEAC SYSTEM® and a Management Consultant to the hiring, training and management industry for over three decades:**

Although this article applies almost in total to true 'psychological testing,' it does a great job of pointing out the important factors to any form of testing, including communication evaluations such as the PEAC SYSTEM® assessment. And, though it is also somewhat dated, it is a great discussion of one of the main legs from which I revised and developed the PEAC SYSTEM® beginning as early as 1984 to fit into corporate America. Ms. Kress simply does a better job than just more information thrown at you from me! Some of the following may not apply to you or your situation directly, but you will be better educated, simply by investing a little time...

REPRINT FROM EMPLOYMENT RELATIONS TODAY /Spring 1989

## **PSYCHOLOGICAL ASSESSMENT PROGRAMS: THEIR USE IN EMPLOYMENT DECISIONS**

Properly implemented psychological testing can help employers identify the best employee for the job and minimize costly placement errors.

by Marjorie Kress

The use of psychological assessment programs is increasingly popular in corporations for hiring decisions generally, for both the selection and development of upper-level management personnel, and as a part of succession planning. When a management vacancy occurs, executives are under immense pressure to make a good hiring decision. The psychological assessment process can help identify individuals who have the ability and interest needed to successfully perform the job. Meaningful job references are difficult to obtain, for they can expose former employers to litigation. Moreover,

placement errors are costly- not only in terms of wasted training and orientation funds, but because such errors can lead to litigation. Psychological assessment programs offers a response to these concerns.

This article reviews the types of litigation to which psychological assessment programs reduce exposure, as well as statutory limits on such testing. Types of assessment are examined in terms of their relative depth and cost, and such potential problem areas as disparate-impact effects of testing and the potential for invasion of privacy and defamation are contemplated. Finally, solutions with regard to selection of an assessor, reducing employee anxiety, supplementing test results with other material, and providing employee feedback are demonstrated.

### **The impetus for testing**

As courts continue to limit the circumstances under which an employee can be terminated, many employers have turned to increased use of psychological assessment as an additional supporting factor for their employment decisions.

Among the developing theories of employment law to which employers must be responsive are discharges in violation of public policy, other wrongful-discharge theories, and defamation. Furthermore, actions for breach of contract are now often based not only on explicit contracts but also implied contracts (which recognize a covenant of good faith and fair dealing) or promissory estoppel (if there was reasonable reliance on a representation to the employee's detriment). Courts are imposing obligations on employers to follow written policies and guidelines even when the company had not intended to create a contractually binding promise. When an employee is not advised accurately of the conditions affecting his or her advancement opportunities, a basis for claims of misrepresentation could exist.

New employment law theories make it difficult for employers to investigate the background of job candidates, yet increase the employer's exposure.

The potential for defamation actions has caused employers to limit their references on former employees to job title and dates of employment. Employers' ability to obtain information on an applicant's criminal history has been restricted in some states. Nonetheless, when an employer does not exercise reasonable care in investigating a prospective employee's

background and that employee causes injury to another person, the employer may be liable for negligent hiring.<sup>1</sup> Psychological assessment programs may serve to counter such allegations of employer negligence in hiring.

---

***Psychological assessment programs may serve to counter such allegations of employer negligence in hiring.***

---

### **Statutory limits on testing**

Any evaluation process that is used for employee selection and promotion, including psychological assessment, must comply with a variety of federal and state employment laws. Depending on the employer's size and the nature of the business, the following laws may apply:

- the Civil Rights Act of 1964 (Title VII);
- the Age Discrimination in Employment Act (ADEA);
- the Rehabilitation Act of 1973;
- the Pregnancy Discrimination Act;- Executive Order No. 11246;
- state law counterparts to these federal laws;
- federal and state privacy laws and other laws affecting access to employee personnel and medical records;
- state laws defining permissible psychological test use by employers.

Also, the Employee Polygraph Protection Act of 1988 and state substance-abuse testing laws may be tangentially involved.

Programs that incorporate professionally developed ability tests are specifically permitted by Title VII, as long as the terms of the statute are met. A significant amount of employment litigation involves alleged violations of that law, which prohibits employment discrimination against any individual because of his or her race, color, religion, sex, or national origin. The law states further:

***It shall not be unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test provided that such test, its administration or actions upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.***

The Uniform Federal Guidelines on Employee Selection Procedures and the Questions and Answers on the Uniform Guidelines, as adopted by the Equal Employment Opportunity Commission (EEOC) explain the agency's standards for evaluating psychological assessment practices in the enforcement of equal employment opportunity laws.<sup>2</sup> Courts often give deference to the guidelines.

The administration and use of professionally developed ability tests are also permitted and regulated under the laws of many states. Like federal law, these state laws generally allow employers to give and act on the results of ability tests that are not designed, administered, or used to discriminate against members of protected classes.

There are variations in several states. Maryland restricts the use of psychological examinations. Minnesota's testing statute focuses on pre-employment testing and lists criteria tests must meet to be considered fair. In Rhode Island, written psychological tests are not permitted to be the sole basis for an employer's decision on whether or not to hire an applicant. Employers should consider these and any other state laws when structuring a psychological assessment program.

The procedures established in the Employee Polygraph Protection Act of 1988, which prohibits polygraph test use by most employers, may be instructive for employers that use psychological assessment. For those employers that are still able to use polygraph tests after December 27, 1988, guidelines must be adopted that include numerous employee protections. Some states have passed laws that are even more restrictive; and employment laws that apply to substance-abuse testing also exist. Before adopting a psychological assessment program, it is essential that employers review the state law in all locations where the testing process will be used.

## *Types of assessment*

The most popular assessment methods for employers are: (1) formal testing programs, (2) individual assessment, and (3) assessment center evaluation.

Under formal testing programs, a battery of tests is administered to the individual and then scored. The results are compared to scores considered necessary for an acceptable job performance level. Formal testing programs are primarily used for entry-level positions in which a specific skill or ability is being measured.

Individual psychological assessment combines testing and one-on-one interview evaluation by a psychologist. The tests vary from a formal program by including an observed individual's reaction component. Employers that review job candidates in pre-employment screenings are likely to use formal testing, or possible individual assessment, in order to limit costs. In individual psychological assessment, the job-seeker's ability to "mesh" with both the position and with the culture of the organization is often evaluated.

Assessment center evaluation relies on the combined evaluation of several psychologists or trained assessors. The participant is observed performing simulated work exercises in role play and with an in-basket facsimile. The assessment includes general background information about the job candidate and formal testing and, like the individual assessment, considers the individual's ability to fit into the organization. The center typically involves one to three days of evaluation away from the workplace, often with an overnight stay at the assessment facility.

Formal testing is the least expensive method of evaluation, but measures the individual's performance under the most limited circumstances. Formal testing is followed in cost by individual assessment. The assessment center method is the most expensive program, especially when overnight accommodations are necessary. Assessment center testing is seen by many to be the most reliable of the three methods, because the ability of individual assessors to evaluate the characteristics of potential employees, as well as the degree of empathy they develop with such candidates can differ, and the assessment center technique dissipates this factor. This technique's

proponents believe that it also provides a broader review of aptitudes and personality characteristics than do other assessment procedures, as the individual is observed under a variety of conditions.

With regard to management-level positions, assessment with psychological evaluation is primarily used for (1) pre-employment screening of job candidates, (2) employee evaluation for promotion, and (3) employee development. For employers attempting rapidly to fill openings in management positions with qualified internal candidates, assessment results may be used for candidate identification and match. This is especially important in large organizations, in which difficulty in identifying employees with the ability to move from one area of the organization to another may exist.

With regard to workers, developmentally designed assessments give employees feedback, so that they may attain insight and self-improvement. Recommendations should be made to assist the employee in meeting his or her development needs.

---

***Watson raises many questions about how to develop a program that can withstand disparate-impact challenges.***

---

### ***Problem Areas***

Because many hiring decisions are based on subjective criteria, there is some danger that such discriminatory effects as disparate-impact may be produced, that privacy rights may be violated, or that grounds for claims of defamation may occur. The following section examines these problems, and solutions are suggested.

### ***Discriminatory criteria***

There are many subjective considerations in hiring and promoting employees, especially at the upper-management level. As employees advance, their technical expertise is only one of many factors considered important for performance success. Administrative, leadership, and

interpersonal relationship skills are often critical, as are motivation, communication style, and skills at conceptual thinking or problem analysis. The ability to adjust to unforeseen circumstances may also be relevant.

A major employer concern is that the qualities selected, and their respective measurements, are not discriminatory. Subjective value judgments based solely on considerations of comfort and familiarity, instead of potential job success, may result in the selection of employees with personal experiences and backgrounds similar to management's, thus perpetuating the status quo. This can exclude those in protected classes and, therefore, may be discriminatory. Employers should evaluate and monitor assessment methodology and use so that such discrimination against protected classes does not occur.

***Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988) and Griggs v. Duke Power Co. 401 U.S. 424 (1971)***

These are considered benchmark employee selection and promotion cases. In both, race discrimination was alleged. In Griggs, the Court analyzed claims that certain evaluation procedures had a statistically adverse effect, that is, a disparate impact, on a protected class. The Griggs decision held that employers have the burden of showing that the employment testing and other criteria are valid predictors of job performance. The Court observed that "what Congress has commanded is that any test used must measure the person for the job, and not the person in the abstract." Griggs also established that in a disparate-impact case, the plaintiff is required to identify the employment practice leading to the disparity and to establish intent. Griggs was important as an early testing case involving disparate-impact theory.

Until Watson, however, opinion was divided on whether actions against employers that include subjective evaluation methods could be brought solely as disparate-impact cases. With Watson, the Court clearly resolved the issue by allowing an employee to proceed using a disparate-impact model in a case involving subjective evaluation procedures.

In Watson, Justice O'Connor stated for the plurality that "employers are not required, when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict on-the-job performance," and added that "many jobs, for example those involving

managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing." Consequently, in cases involving subjective determinations, judicial deference will be given to the employer's business judgement in choosing personal qualities as selection criteria, as long as evidence is produced of "job relatedness" or of a "manifest relationship" to the employment.<sup>3</sup>

. ;The business necessity defense can be supported by accurate job descriptions, including a summary of necessary abilities, and valid assessment procedures. This follows from the Court's observation in *Griggs* that "what Congress has commanded is that any test used must measure the person for the job and not the person in the abstract."

For Employers that want to develop practices that meet the terms of the law, *Watson* raises many questions about how to develop a program that can withstand disparate-impact challenges. The disparate-impact evidentiary burdens and the role of business judgement are now at issue in *Wards Cove Packing v. Antonia*, 827 F.2d 439 (9th Cir. 1987), cert. granted, 108 S. Ct. 2896 (1988), No. 87-1387 (argued January 18, 1989). It is expected to resolve some of the confusion created by *Watson* as to how and why disparate-impact analysis will be applied.

## **Privacy rights**

Although the Constitution does not specifically mention a right of privacy, the Supreme Court has held that the Constitution recognizes an implied right of privacy under penumbras of the First, Fourth, Fifth and Ninth Amendment and the Fourteenth Amendment guarantee of personal liberty.<sup>4</sup>

Similarly, a right of privacy is not specifically provided in most state constitutions-a statutory right exists in only a few states. An invasion of privacy tort is recognized, however, under the common law in many states. In evaluating an invasion-of-privacy claim, courts look at whether a highly offensive, intentional interference with the individual's solitude occurred. A "reasonable person" standard is applied. Criticisms of polygraph testing (along with related psychological stress evaluation tests) and substance-abuse testing have been based on privacy issues. Individuals being tested asserted that the tests were physically intrusive, coercive, and highly inaccurate. In response, courts and legislatures are restricting and controlling such tests.



Yet in some respects, expectations of privacy are being eroded. In *O'Conner v. Ortega*, 480 U.S. 709 (1987), the court examined privacy claims advanced by the former chief of professional education at a state hospital after state hospital officials searched his office, files, and cabinets. The Court found that the employer's actions in this type of case should be judged under a standard of reasonableness under all circumstances, not a probable cause standard. While recognizing the employee's reasonable expectation of privacy in his office, desk, and file cabinets, the Court saw a need to balance this expectation against the employer's need for supervision, control, and an efficient operation of the workplace. Moreover, the Supreme

---

**Strict reliance on psychological assessment results to make promotion and hiring decisions presents risk.**

---

Court recently determined that expectations of personal privacy did not extend to papers thrown away as trash in *California v. Greenwood*, 108 S.Ct. 1625 (1988). Although these decisions are interpretations of public/governmental activity, they indicate that the Court does see definite limits on legitimate privacy expectations in spite of the seeming expansion of the concept elsewhere.

Federal and state law protection of medical record confidentiality is a factor in any psychology assessment program. Laws in some states prohibit disclosure of medical information except on a need-to-know basis. Even when no statutory limit applies, prudent business practice should lead employers to establish procedures that recognize and protect the confidentiality of this sensitive information.

Employees have a right of access to their personnel files in various states. If psychological assessment information is included in those files, employees may have access. An employer can, of course, refrain from including this

information directly in that file. The success of such an approach varies by state.

## ***Defamation***

If conducted without adequate safeguards, such assessment also has the potential for exposing the employer to defamation claims arising from the conclusions reached and the dissemination of the information to a third party. Actions based on intentional infliction of emotional distress and even product liability actions, if the employer developed the psychological tests used, are possibilities.

There are ethical, if not legally enforceable, obligations for employers and psychologists/test administrators who use or administer assessment programs. Psychologists are governed by state licensing laws and professional codes of conduct. The informed consent doctrine, which requires to disclose procedures and treatment and obtain the patient's consent, is relevant. The employer may have a resultant obligation to structure an assessment process that respects those ethical concerns. Employers and psychologists may rely on the *Principles for the Validation and Use of Personnel Selection Procedures when formulating a job-related assessment program*.<sup>5</sup>

This document offers "principles of good practice in the choice, development, evaluation, and use of personnel selection procedures." *The Standards for Educational and Psychological Testing (1985)* offers guidance.<sup>6</sup>

## **Administrative issues**

Such issues as whether or not to use in-house assessors or consultants, the need to reduce employee anxiety with regard to testing, the desirability of using supplementary methods of gathering information, providing employees feedback, and the need to maintain confidentiality must be addressed. Here, these issues are described and various alternatives examined.

## ***Selecting an assessor in full Psychology Analyzation or Assessment***

Employers using psychological assessment for management positions have several options for resource selection. Depending on the size of the

program, the organization may prefer to retain staff psychologists to work full-time on assessment development and administration. In other cases, the service of an outside consultant group or individual psychologist may be used; however, a reliance on staff presents an increased risk for the employer. Reliance on staff eliminates a third-party evaluator who could also be a respondent should there be litigation relating to the assessment process. When outside assessors are used, however, the employer loses a measure of control over the type of questions being asked, and time must be spent explaining the organization's culture and ground rules to the outside assessor.

Employers should select their assessors with care. The use of licensed, trained professional psychologists is recommended for anything deeper than communications or style assessment. Even a valid test can be improperly administered, and its validity destroyed. The results can also be improperly analyzed, and validity is then negatively affected. The employer should also instruct the assessor not to request information that relates to protected class status.

***[Note added- The PEAC SYSTEM is communication style based, only- no attempt for diagnoses is provided nor implied- GWT]***

### **Allaying employees' anxiety**

When faced with the prospect of a psychological assessment, job candidates or employees will have various concerns. The employer can anticipate and even avoid some issues by accurately explaining the assessment program in advance. Important information to be disclosed includes: the type of data to be collected; the employer's privacy policy; the purpose for which the information will be used; the length of time it will be kept; and the identity, qualifications, and role of those involved in the process. The assignment of employees to the assessment program should follow guidelines that are uniformly applied. An option to delay assessment can be made available if employees are ill or receiving medication that could affect the results.

Because the candidate can benefit from the process, either by avoiding job mismatch, by identifying new job options, or for career development, it can be expected that most will agree to participate. Current employees should

therefore receive information on the assessment program and its significance for their advancement in the company. Some employees may, however, find the assessment process intimidating and believe their consent was coerced. Employers that use assessment programs can include a notice and consent section on the employment application, in the employee handbook, or any postings of employment policies. These statements can explain that psychological assessment may be used and that a candidate's or employee's refusal to participate may affect their opportunities within the company.

Employers may find that some potential employees may withdraw their applications. Employers should decide in advance whether those who do not agree can remain applicants. The employer may decide to continue to proceed without assessment information, but if another qualified candidate is assessed, and the results indicate a good job match, the individual who completed the assessment process would normally be preferred for the position.

### ***Using supplementary information***

Strict reliance on psychological assessment results to make promotion or hiring decisions presents risks because relevant information could be ignored. The interview process is another important method for gathering information. Information about educational history, work experience, and outside activities can be critical. Past performance appraisals conducted through annual reviews should be combined with and compared to assessment results on current employees. Major discrepancies between the assessment results and these performance evaluations should be reviewed and analyzed. Because employees may undergo experiences that can affect work performance, evaluations should be performed every three to five years.

### ***Providing employee feedback***

Employees need a consistent, timely approach for releasing assessment feedback. Some employees may maintain that they have a right to see the underlying test scores or the assessor's written report. The possibility that the candidate would not understand, or misinterpret, the conclusions of test scores to his or her detriment probably outweighs the benefits to be gained, as long as a summary is provided. These issues should be discussed before the assessment, and the candidate advised that no physician-patient relationship will exist and that raw test data will not be released to the candidate. By

allowing the candidate to comment, either verbally or in writing, on the conclusions expressed in the assessment report, the employer can identify and respond to controversy at an early stage.

If the candidate disputes the results, further consultation with those who were involved in the assessment, including the candidate, is advisable. Retesting, using a different test, may be considered. Conducting the same test again is not an option, however, because test familiarity affects result and destroys validity.

### ***Maintaining confidentiality***

Instead of establishing a written policy on assessment report privacy, existing employer policies relating to the confidentiality and disclosure of medical or employment records may be used, if they are sufficient. Provisions for the destruction of records would also be included. If existing procedures are not adequate, modification is recommended. Employers can maintain the confidentiality of assessment results by restricting access to any reports. The records can be retained in the human resource department (but separate from the personnel file), with the psychologist or assessment organization, or with the employer's medical personnel.

A distinct assessment policy that includes a privacy section may be advantageous, however, in organizations wherein large numbers of employees are being assessed and the program is well known. It is also advisable, in order to contradict potential claims of unauthorized testing or disclosure, for employers to obtain written consent to assessment from the job candidate or employee. The statement to be signed should outline the program's operation, acknowledge an understanding of the process, express consent, and authorize the release of the results to the employer.

The approach that provides the greatest privacy protection for employees is a voluntary program that uses psychological assessment only for employee development and gives the employees the option of not releasing the results to the employer.

For many employers, that approach is not workable because they are seeking to identify the individuals with various strengths for hiring or as part of succession planning. In such cases, a program that combines fairness to the

employee and confidentiality, while providing useful information for the employer, is the most reasonable alternative.

## **Conclusion**

The cost to employers of management placement errors is high, as is that of overlooking hidden talent in the work force. Psychological assessment programs may provide employers with legitimate and useful information on the abilities of job candidates and current employees. Employers can expect the information to help them minimize placement mistakes and assist with employee development, which will create cost efficiencies for their organizations.

The programs must be carefully structured and include safeguards for the candidate, especially relating to privacy. The programs should also be monitored and reviewed for possible discriminatory impact. Although current employees and job candidates usually favor a voluntary, developmentally designed program whereby results are released only to the candidate, employers will not necessarily find such an approach useful. Therefore, employers should establish their assessment programs with the needs of both the organization and the employees in mind, along with equal employment opportunity goals. The result can be a program which is fair, legally supportable, and contributes to a successful match between the individual and the employer.

**Marjorie M. Kress is corporate counsel for Western Life Insurance Company in St. Paul, Minnesota. (NOTE: at the time of this publication)**

## **NOTES**

1. *See Ponticus v. K.M.S. Investments*, 331 N.W. 2d 907 (Minn. 1983)
2. 29 C.F.R. 1607 (1978)
3. *See also, Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Washington v. Davis*, 426 U.S. 229 (1976)
4. *See, e.g., Roe v. Wade*, 410 U.S. 1131 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965)
5. *Society for Industrial and Organizational Psychology, Inc. Principles for the Validation and Use of Personnel Selection Procedures*, 3rd ed. (1987)

6. *American Psychological Association, Standards for Educational and Psychological Testing (1985).*

7. *Reprinted with permission from Marjorie Kress, with the thanks of those who find it helpful...*