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Measuring the Mind: A Comparison of Personality Testing to Polygraph Testing in the Hiring Process

Jennifer Leonard Nevins*

I. Introduction

Since the hiring boom of the late 1990s, human resource professionals have referred to the challenges of recruiting and retaining valuable employees as the “war for talent.”¹ The war for talent continues in the twenty-first century, as more than ever, employers seek to maximize employee production while minimizing hiring and training costs.² Accordingly, employers looking for an edge in the hiring process are increasingly using psychological testing as a tool for making employment decisions.³ One category of psychological testing used

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1. The term “war for talent” was first coined in a 1997 study performed by the consulting firm of McKinsey & Company. Elizabeth G. Chambers, Mark Foulon, Helen Handfield-Jones, Steven M. Hankin, & Edward G. Michaels III, *The War for Talent*, THE MCKINSEY Q., 1998 No. 3. The study was updated in 2001. Elizabeth L. Axelrod, Helen Handfield-Jones, & Timothy A. Welsh, *The War For Talent, Part II*, THE MCKINSEY Q. 2001 No. 2.

2. Matthew W. Finkin, *From Anonymity to Transparency: Screening the Workforce in the Information Age*, 2000 COLUM. BUS. L. REV. 403, 427 (2000); Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 281-83 (2002). See also U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, THE USE OF INTEGRITY TESTS FOR PREEMPLOYMENT SCREENING, OTA-SET-442, at 3 (Sept. 1990) [hereinafter PREEMPLOYMENT SCREENING].

3. A recent study by the Society for Industrial and Organizational Psychology revealed that two-thirds of U.S. employers utilize some form of job skill testing as part of the hiring process, 29% of which use some form of psychological assessment. Catherine Valenti, *True or False? Psychological Tests to Help Choose Workers are Gaining Popularity*, ABC News, October 30, 2003, at <http://abcnews.com> (last visited Nov. 6, 2004) (on file with the Penn State Law Review). See also EDWARD HOFFMAN, PSYCHOLOGICAL TESTING AT WORK 1, (2002); MERRICK T. ROSSEIN, EMPLOYMENT LAW DESKBOOK FOR HUMAN RESOURCES PROFESSIONALS, 1 EMP. L. DESKBOOK HUM. RESOURCES PROF. § 1:2, March 2003.

frequently by employers is personality testing,⁴ which employers administer not only to applicants during the hiring process, but also to current employees for training and advancement purposes.⁵ The demand for personality testing tools for use in the workplace, by employers as diverse as law firms,⁶ retail chains,⁷ law enforcement agencies,⁸ and even religious organizations,⁹ has triggered a \$400 million a year industry.¹⁰

The prevalence of preemployment personality testing reflects employers' attempts to reduce bad hiring decisions at the outset of the hiring process, keeping replacement and training costs low.¹¹ Moreover, the tests are inexpensive, allow employers to eliminate large numbers of applicants quickly and efficiently, and need not be professionally validated absent a discriminatory effect on a protected class.¹² Some employment experts have also suggested that the recent rise in personality testing, at least in part, may be in response to the September 11, 2001 terror attacks, as employers attempt to screen potentially

4. HOFFMAN, *supra* note 3, at 1-2. In 2000, an estimated 27% of preemployment screening tests measured personality and integrity, as compared to 17% in 1981, while intelligence and aptitude tests comprised 20% of all testing, down from 73% in 1965. Finkin, *supra* note 2, at 426.

5. Stabile, *supra* note 2, at 312.

6. See, e.g., Ritchena Shephard, *Firm Uses Behavioral Test to Hire Lawyers*, THE NAT'L L. J., Dec. 7, 1998, at 16.

7. See, e.g., Soroka v. Dayton Hudson Corp., 235 Cal. App. 3d 654, 1 Cal. Rptr. 2d 77 (Cal. App. 1991), *rev. granted* 4 Cal. Rptr. 2d 180 (1992), *rev. dismissed as moot*, 24 Cal. Rptr. 2d 587 (1993); see also Kate Lorenz, *Can Your Personality Get You Fired?*, CareerBuilder.com Ed., available at <http://www.justcolleges.com/jobs/index.phtml?inc=personality.htm>, discussing a profiling tool administered to job applicants at the retail store Ann Taylor Loft (last visited Nov. 27, 2004) (on file with author).

8. See, e.g., Speller v. City of Roanoke, No. CIV.A. 799CV00904, 2001 WL 1057813, at *4 (W.D. Va. Sept. 5, 2001); Varnagis v. City of Chicago, No. 96-C-6304, 1997 WL 361150 (N.D. Ill. June 20, 1997).

9. ACAD. OF RELIGION & MENTAL HEALTH, PSYCHOLOGICAL TESTING FOR MINISTERIAL SELECTIONS (William C. Bier ed., 1970).

10. Stabile, *supra* note 2, at 279; Constance Hays, *Trying to Get a Job? Check Yes or No—Tests are Becoming Common in Hiring*, N.Y. TIMES, Nov. 28, 1997, at D1; Malcolm Gladwell, *Personality Plus*, THE NEW YORKER, Sept. 20, 2004, at 43.

11. *Id.* at 281; see also Finkin, *supra* note 2, at 426-27. A recent Harvard study discovered that dismissals due to personality and communication problems occur twice as often as dismissals based on poor performance. Lorenz, *supra* note 7.

12. Finkin, *supra* note 2, at 426. Many intelligence and aptitude tests used by employers have been found to have a disparate impact on statutorily protected classes, and therefore can be administered only after professional validation proving business necessity through job relatedness. See discussion *infra* Part III.B.2; EQUAL EMPLOYMENT OPPORTUNITY COMM'N ("EEOC"), UNIF. GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 29 CFR § 1607.3(A) (1978); see also Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (employee testing program impermissible when employer's attempt at validation failed to show job relatedness); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment tests that are facially neutral but operate to exclude members of a minority class are unlawful without a showing of job-relatedness).

threatening or dangerous applicants more carefully.¹³

The increase in the use of personality testing in the workplace may also be attributable to federal law severely restricting polygraph testing by private employers.¹⁴ In 1988, Congress enacted the Employee Polygraph Protection Act¹⁵ (“EPPA”), which regulates polygraph testing by private sector employers. With few exceptions, the EPPA prohibits private employers from requiring or requesting applicants to take a polygraph test, and the refusal or failure of an applicant to take a polygraph may not factor into the employment decision.¹⁶ Congress passed the EPPA after holding a public hearing in which polygraph experts and industry representatives expressed concerns about using polygraph test results as the basis for employment decisions.¹⁷ Congress ultimately concluded the practice was abusive because of the lack of reliable data and proof of the scientific validity of polygraph results in employment contexts.¹⁸ On the surface, personality testing presents

13. Elise M. Bloom, Madeleine Schachter, & Elliot H. Steelman, *Competing Interests in the Post 9-11 Workplace: The New Line Between Privacy and Safety*, 29 WM. MITCHELL L. REV. 897, 899 (2003); Condon McGlothlen, *Hiring and Legal Risks*, THE NAT’L L.J., Apr. 29, 2002, at 28. Cases decided prior to the events of September 11, 2001 also address the use of psychological testing within the context of employer liability for the dangerous acts of employees. *See, e.g.*, Southern Bell Tel. & Tel. Co. v. Sharara, 307 S.E.2d 129, 132 (Ga. App. 1983) (woman attacked by a telephone company employee in her home sued the company for failing to administer periodic psychological tests to employees who enter customers’ homes. The Georgia Court of Appeals did not find that such testing should be compulsory, but did suggest it would be “a better practice” for employees who enter customers’ homes to be “more closely checked, observed, screened and interviewed by employers as to any outward manifestation of dangerous propensities relating to aggression or violence.”) (Deen, P.J., concurring specially).

14. HOFFMAN, *supra* note 3, at 5, 28; Dan Balaban, *Personality Testing is Catching On Among U.S. Businesses*, KAN. CITY BUS. J., May 2, 1997, at 6 (noting the rise in personality testing after Congress severely restricted polygraph testing by private employers through the enactment of the Employee Polygraph Protection Act). *See also* PREEMPLOYMENT SCREENING, *supra* note 2, at 4.

15. The Employee Polygraph Protection Act of 1988, Pub. L. 100-347, 102 Stat. 646 (codified at 29 U.S.C. §§ 2001-2009 (1994)).

16. *Id.* § 2002(3)(A); S. Rep. No. 100-284 (1988), *reprinted in* 1988 U.S.C.C.A.N. 726.

17. S. Rep. No. 100-284, *reprinted in* 1988 U.S.C.C.A.N. 726, 733. The hearing before the Committee on Labor Relations and Human Resources occurred on June 19, 1987, and included both written and oral testimony by, among others, the AFL-CIO; the American Medical Association; the American Association of Railroads; the American Pharmaceutical Association; the Securities Industry Association; the American Trucking Association; the President of the American Polygraph Association; and the Attorney General of the State of New York. *Id.*

18. S. Rep. No. 100-284, *reprinted in* 1988 U.S.C.C.A.N. 726, 728-29. The Senate Report also notes “[t]he Committee . . . found that many employers . . . abuse and manipulate the [polygraph] examination process, and frequently use inaccurate or unfounded results to justify employment decisions which otherwise would be suspect.” S. Rep. No. 100-284, *reprinted in* 1988 U.S.C.C.A.N. 726, 734. Dr. John S. Beary III,

similar reliability and validity concerns in the context of employment decisions.¹⁹

This comment explores the legality of the use of personality testing as a hiring tool, focusing on the similarities and differences between personality testing and polygraph testing. A general overview of various types of personality tests is presented in Part II, accompanied by a review of the scant case law and state statutes addressing the use of personality tests by employers. After a discussion of the history and goals of the EPPA, Part III compares the federal regulation of polygraph testing to the legal concerns surrounding personality testing, particularly in the arenas of privacy (Section A) and discrimination (Section B). After weighing the interests of both applicants and employers (Section C), Part IV addresses the benefits of personality testing in the hiring process, particularly when compared to traditional employee selection methods. Finally, this comment concludes with a recommendation that lawmakers adopt a more moderate approach toward regulating personality testing in comparison to the virtual federal ban imposed on polygraph testing by the EPPA. While calling for limited state regulation of personality testing by employers to ensure more reliable and accurate results, this comment advocates against imposing the strict federal regulations of the EPPA to personality testing.

II. An Overview of Personality and Polygraph Testing

Since the early 1900s, employers have used various forms of intelligence and aptitude testing in an attempt to hire employees well-suited to their particular trade, thereby reducing turnover and replacement costs.²⁰ The practice ballooned during the World War I and II eras when military recruits were subjected to both aptitude and personality tests,²¹ the latter designed primarily to identify recruits

representing the American Medical Association, testified that statistically, polygraph tests indicate deception at a rate that is only slightly better than chance. S. Rep. No. 100-284, *reprinted* in 1988 U.S.C.C.A.N. 726, 728-29. The Senate Report also cites a 1983 report by the Office of Technology Assessment which found "little research or scientific evidence . . . establish[ing] polygraph test validity . . . in personnel security screening situations. . . ." U.S. CONGRESS OFFICE OF TECH. ASSESSMENT, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW & EVALUATION—A TECH. MEM., OTA-TM-H-15 at 102 (1983) [hereinafter POLYGRAPH TESTING].

19. See PREEMPLOYMENT SCREENING, *supra* note 2, at 8, 48-62, discussing the problems of personnel test validity. The study focuses on integrity testing, but also notes that experts consider it difficult to differentiate honesty and integrity tests from "the broader family of personality tests." *Id.* at 2.

20. See Finkin, *supra* note 2, at 414-16.

21. ROBERT M. KAPLAN & DENNIS P. SACCUZZO, PSYCHOLOGICAL TESTING: PRINCIPLES, APPLICATIONS, AND ISSUES 17-20 (5th ed. 2001) [hereinafter KAPLAN & SACCUZZO].

emotionally unsuited for combat.²² By the late 1990s, 46% of employers reported using some form of psychological testing;²³ by October 2003, the number had increased to approximately 75%.²⁴ Tests designed to assess the personality traits of prospective employees comprise a relatively large number of these psychological tests.²⁵

Personality tests are generally classified under one of two categories: objective tests or projective tests.²⁶ Objective or self-report²⁷ tests consist of a series of questions designed to correlate to predictable behavioral responses,²⁸ to which subjects select the appropriate response from several provided.²⁹ Objective tests can take the form of questionnaires asking multiple choice or true-false questions, or a series of questions requesting responses on a numerical scale.³⁰ Psychologists and human resource professionals refer to the second category of personality tests as projective tests, in which subjects are presented with an ambiguous stimulus, such as an image, a drawing, or a photograph.³¹ The subject is asked to provide an interpretation of the stimulus, or to discuss his or her reactions or thoughts.³² Because of the open-ended

22. HOFFMAN, *supra* note 3, at 21.

23. AMERICAN MANAGEMENT ASSOCIATION, SURVEY ON WORKPLACE TESTING, 1999 MGMT. REV. 44.

24. See Valenti, *supra* note 3.

25. As of October 30, 2003, 13% of employers in the United States reported using personality tests as a preemployment selection tool. *Id.*

26. Kimberli R. Black, *Personality Screening In Employment*, 32 AM. BUS. L.J. 69, 72 (1994).

27. Self-report tests are the most frequently used method of assessing personality in employment contexts. PSYCHOLOGICAL TESTING IN PERSONNEL ASSESSMENT 6 (Kenneth M. Miller ed. 1975) [hereinafter PERSONNEL ASSESSMENT].

28. RICHARD I. LANYON & LEONARD D. GOODSTEIN, PERSONALITY ASSESSMENT 16 (3d ed. 1997) [hereinafter LANYON & GOODSTEIN].

29. *Id.* at 58.

30. Examples of a few of the most recognized and often used objective tests include the Minnesota Multiphasic Personality Inventory ("MMPI"), the Myers Briggs Type Indicator ("MBTI"), Cattell's Sixteen Factor Personality Questionnaire (16F), and the Guildford-Zimmerman Temperament Survey. PERSONNEL ASSESSMENT, *supra* note 27, at 6; Stabile, *supra* note 2, at 285. The Myers-Briggs Type Indicator is used by eighty-nine of the Fortune 500 companies. Gladwell, *supra* note 10, at 43. See also Black, *supra* note 26, at 72-80 for a comprehensive description of other commonly used personality tests.

31. LANYON & GOODSTEIN, *supra* note 28, at 14. Examples of projective tests include the Thematic Apperception Test ("TAT"), in which a series of images depicting ambiguous scenes are shown to subjects who are asked to tell a story describing what they perceive is happening; and the Rorschach inkblot test, in which subjects' responses to a series of ten symmetrical inkblots are analyzed and categorized. Projective tests are infrequently used in employment screening because they are time intensive and require more psychological training on the part of the interpreter. PERSONNEL ASSESSMENT, *supra* note 27, at 6-7.

32. KAPLAN & SACCUZZO, *supra* note 21, at 20; Gregory R. Vetter, Note, *Is a Personality Test a Pre-Job Offer Medical Examination Under the ADA?*, 93 NW. U. L.

nature of projective tests, they are not easily normed³³ and require a more subjective judgment by the examiner when “scoring” the responses.³⁴

Generally, both objective and projective personality tests are designed to measure an individual’s emotional, motivational, interpersonal, and attitudinal characteristics, as opposed to abilities.³⁵ Although personality tests were originally designed for use by psychologists and psychiatrists in clinical settings to diagnose and treat mental illnesses,³⁶ the increasing use of such tests by employers³⁷ has spawned an entire industry focusing on developing job-specific personality testing.³⁸ Only a few states have enacted legislation recognizing the use of some form of psychological testing in employment,³⁹ and no direct regulation of personality testing currently exists.⁴⁰

REV. 597, 621 (1999).

33. Scores on personality tests are interpreted by placing individual raw or scale scores on a distribution of scores from a comparison group to draw inferences about performance. The statistics for the reference groups are called norms, and test score interpretations based on these comparisons are referred to as norm-referenced. *See* AMERICAN EDUCATIONAL RESEARCH ASS’N., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 49-50 (1985).

34. KAPLAN & SACCUZZO, *supra* note 21, at 20.

35. ANNE ANASTASI & SUSANA URBINA, PSYCHOLOGICAL TESTING 348 (7th ed., Prentice Hall 1997) [hereinafter ANASTASI & URBINA].

36. *Id.* at 352; Finkin, *supra* note 2, at 418 (noting that the MMPI, one of the most widely used personality inventories by employers, was first designed for clinical purposes but has since been rescaled to measure attitudes and behavioral characteristics).

37. *See* PERSONNEL ASSESSMENT, *supra* note 27, at 9, explaining that psychological testing is generally used for three purposes: to predict, compare, and understand behavior. In employment contexts, it is often the predictive component on which employers are relying to ensure that a particular job is not too challenging or unchallenging for the applicant. *Id.*

38. Stabile, *supra* note 2, at 280.

39. These state statutes address only written examinations purporting to measure honesty: in Rhode Island, written examinations of honesty are permitted so long as the results do not form the primary basis of the employment decision. R.I. GEN. LAWS § 28-6.1-4 (2002). In Massachusetts, written examinations of honesty are prohibited. MASS. ANN. LAWS § 149B(1) (2003).

40. In 1978 the EEOC, Civil Service Commission, Department of Labor, and Department of Justice collaborated to adopt guidelines on hiring procedures. *See* UNIF. GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, *supra* note 12. The Guidelines establish a unified set of principles to “assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin . . . [and] provide a framework for determining the proper use of tests and other selection procedures.” 29 CFR § 1607.1(B). The Guidelines do not require employers to have personality tests validated unless adverse impact results; however, the Guidelines “encourage [all users] to use selection procedures which are valid, especially users operating under merit principles.” 29 CFR § 1607.3. If adverse impact is present, the standards for validation are provided in 29 CFR § 1607.5. The American Psychological Association (“APA”) also publishes guidelines aimed at

Case law regarding the use of personality testing in employment is similarly scarce. The first case to squarely address the issue was *Soroka v. Dayton Hudson Corp.*,⁴¹ decided by the California Court of Appeals. In *Soroka*, applicants interested in a position as a security guard at one of the defendant's retail chain stores were required, as part of the selection process, to complete a test called the "Psychscreen."⁴² The Psychscreen contained hundreds of true-false questions⁴³ including several referring to religious beliefs and sexual orientation.⁴⁴ Applicants' responses to the Psychscreen questions were scored by a consulting firm which converted each applicant's score into a rating based on five personality traits.⁴⁵ The firm then made hiring recommendations to the defendant retailer based on each applicant's results.⁴⁶

Several applicants for the security guard positions filed suit in California state court challenging the test.⁴⁷ On appeal of the trial court's denial of plaintiff's motion for an injunction, the California Court of Appeals held that the plaintiffs would likely prevail on the merits of the lawsuit because the Psychscreen violated California's constitutional right to privacy as well as several of the state's antidiscrimination statutes.⁴⁸

ensuring ethical testing practices. AMERICAN EDUCATIONAL RESEARCH ASS'N., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING, *supra* note 33. The APA does not sell or endorse testing instruments; however its website provides information on finding particular types of tests and publishers. See <http://www.apa.org/science/faq-findtests.html> (last visited Nov. 26, 2004). For a sampling of the multitude of psychological tests readily available online, the Buros Institute of Mental Measurement, a test publisher recognized by the APA, lists over three hundred personality tests that it has reviewed on its website, at <http://buros.unl.edu/buros/jsp/category.html> (last visited Nov. 26, 2004).

41. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Cal. App. 1991), *rev. granted* 4 Cal. Rptr. 2d 180 (1992), *rev. dismissed as moot*, 24 Cal. Rptr. 2d 587 (1993).

42. *Id.* at 79.

43. The test was a combination of the California Psychological Inventory and the MMPI, discussed *supra*, notes 30, 36. *Id.*

44. *Id.* at 79-80. Sample questions included: 201. I have no patience with people who believe there is only one true religion; 580. I believe my sins are unpardonable; 339. I have been in trouble because of my sex behavior; 640. Many of my dreams are about sex matters. *Id.*

45. The five traits measured were: (1) emotional stability; (2) interpersonal style; (3) addiction potential; (4) dependability and reliability; and (5) socialization and tendency to follow rules. *Id.* at 80.

46. *Id.*

47. The plaintiffs' amended complaint challenged the nexus of the questions to job performance and alleged claims of a violation of California's constitutional right to privacy, invasion of privacy, disclosure of confidential medical information, fraud, negligent misrepresentation, intentional and negligent infliction of emotional distress, violation of the Fair Employment and Housing Act, violations of sections 1101 and 1102 of the Labor Code, and unfair business practices. *Id.*

48. *Id.* at 89. The California Constitution explicitly grants privacy the status of an inalienable right, while the Fair Employment and Housing Act prohibits inquiries into applicants' religious beliefs unless the employer can show a job-related reason for the

In reaching this conclusion, the court applied a strict compelling interest standard rather than a reasonableness standard, erasing any distinction in the protection of the interests of job applicants and those of employees.⁴⁹ Before the California Supreme Court could hear the case, the parties agreed to a multi-million dollar settlement.⁵⁰

Although the settlement disappointed many in the psychological and human resources community by preempting a definitive ruling on the legality of personality testing in the hiring process,⁵¹ the opinion sent a strong message of caution to employers using such tests in California and nationwide.⁵² Unlike California, most states do not have an explicit constitutional or statutory right to privacy; however, the tests may nonetheless infringe upon common law protections against the invasion of privacy.⁵³

Similar employee privacy concerns prompted federal lawmakers' growing scrutiny of polygraph testing when used as a hiring tool. Prior to the enactment of legislation regulating polygraph testing in 1988, private employers used polygraphs primarily to assess honesty and reliability, citing the prevention of theft and embezzlement as justification for any intrusion into employee privacy.⁵⁴ Private employers also believed that they, not the government, were in the best position to determine standards for hiring.⁵⁵ Employees uncomfortable with such an invasive questioning technique,⁵⁶ however, argued that

questions. CA. CONST. art. I, § I; California Fair Employment and Housing Act, West Ann. Cal. Gov. Code § 12900 (1992).

49. Prior to *Soroka*, the California courts applied a lesser reasonableness standard to employers in assessing employment practices, reasoning that a job applicant has less of a privacy interest in obtaining employment than an employee, because applicants who seek employment "ch[oose] to disclose certain personal information to prospective employers, such as employment and educational history, and to allow the prospective employer to verify that information." *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1048, 264 Cal. Rptr. 194, 203 (Cal. App. 1989).

50. See Wayne J. Camara & Peter F. Merenda, *Using Personality Tests in Employment Screening: Issues Raised in Soroka v. Dayton Hudson Corp.*, 6 PSYCHOL. PUB. POL'Y & L. 1164, 1167 fn. 2 (2000) (discussing the specific terms of the settlement).

51. *Id.*

52. *Id.*, noting the "chilling effect" of the California Appeals Court's opinion on employers and test publishers.

53. See *Stabile*, *supra* note 2, at 303-04.

54. Brad V. Driscoll, Note, *The Employee Polygraph Protection Act of 1988: A Balance of Interests*, 75 IOWA L. REV. 539, 551 (1990).

55. *Id.*

56. A typical polygraph examination includes attachments on the subject's body in three places: first, a device called a sphygmograph is wrapped around the subject's upper arm to record changes in blood pressure; second, two tubes are attached to the subject's upper and lower chest to measure changes in respiration patterns; and third, electrodes are connected to the index and second finger of one hand to record changes in the perspiration of the skin. All three of these instruments are connected to a pen register, recording the physiological changes on a chart which is evaluated by the examiner to

polygraph testing constituted an unwarranted violation of employee privacy rights.⁵⁷

Troubled by the increasing use of polygraph testing in employment contexts,⁵⁸ Congress enacted the Employee Polygraph Protection Act (“EPPA”) in 1988.⁵⁹ The EPPA imposed a virtual ban on the use of polygraph testing for preemployment purposes by most private employers.⁶⁰ Congressional testimony by experts within the scientific community⁶¹ strongly suggested that polygraph tests are largely unreliable in assessing deception.⁶² Notably, the hearings included testimony regarding the use of written preemployment psychological tests, but Congress declined to address these tests in the EPPA legislation because, according to the Senate Report, experts presented “few complaints . . . and little evidence of abuse.”⁶³

III. The Legal Issues Surrounding Polygraph Testing and Personality Testing in the Hiring Process

The similarities between the preemployment use of polygraph

determine the results of the examination. S. Rep. 100-284, *reprinted in* 1998 U.S.C.C.A.N. 726, 729 (1988).

57. Driscoll, *supra* note 54, at 551.

58. Polygraph testing was initially designed for use in criminal investigations by law enforcement personnel, not for use in the employment context. S. Rep. 100-284, *reprinted in* 1998 U.S.C.C.A.N. 726, 728 (1988).

59. *Supra* note 15.

60. The EPPA does not restrict polygraph testing by government employers or contractors, nor does it ban the use of polygraph testing as a tool for internal investigations into employee conduct by private employers. 29 U.S.C. § 2006.

61. *See supra* notes 17-18.

62. In addition to the expert testimony, a study released by the U.S. Congress Office of Technology Assessment in 1983 emphasized the lack of scientific data supporting the validity of polygraph testing in employment determinations. *See* POLYGRAPH TESTING, *supra* note 18, at 102.

63. S. Rep. 100-284, *reprinted in* 1988 U.S.C.C.A.N. 726, 735. One senator opposing the EPPA expressed concern over the federal government’s imposition into the employment relationship by raising the following questions: “If the polygraph is unfair, what about the personality test? What about the personal reaction which probably governs most hiring decisions . . . [w]e will be [ignoring] reality if we believe that federal supervision of the hiring . . . process will improve . . . quality.” Statement of Sen. Quayle, *id.* at 745. The House Committee on Education and Labor subsequently requested the Office of Technology Assessment to examine available evidence on “integrity” tests, including personality tests designed to assess honesty. *See* PREEMPLOYMENT SCREENING, *supra* note 2. The report noted the existing research on integrity tests did not clearly support or dismiss the assertion that the tests could predict dishonest behavior. *Id.* at 8. The study concluded that “errors in test results, potential discriminatory impact, and potential violations of privacy raise important public policy issues pertaining to the use of integrity tests” and that “the potentially harmful effects of systematic misclassification, possible impacts on protected groups, and privacy implications of integrity tests combine to warrant further governmental attention.” *Id.* at 78.

testing and personality testing are too great to be ignored by the legal community. In each instance, an employer is attempting to delve into the mind and the mentality of a prospective employee to assess whether the applicant possesses certain characteristics⁶⁴ appropriate for a particular job. Such an intrusion into a person's inner thoughts arguably implicates privacy issues,⁶⁵ and may also raise discrimination concerns.⁶⁶ As with polygraph tests, questions of both test reliability and validity⁶⁷ surround personality tests.⁶⁸ The *Soroka* court considered concerns about test reliability and validity paramount, and accordingly determined that several of the Psychscreen test questions lacked a nexus to the position for which the applicant applied.⁶⁹ Even in the limited instances in which polygraph testing is permitted,⁷⁰ the EPPA prohibits examiners from asking questions relating to religion, race, politics, sexual behavior, and union organization⁷¹—constructs that some personality tests may attempt to assess.⁷² The corresponding rise in the incidence of preemployment personality testing occurring after polygraph testing was banned in 1988⁷³ indicates that employers may view personality testing as a workable (and currently unregulated) alternative to polygraph testing.⁷⁴

64. Many personality tests used for employee selection focus on similar traits. For instance, the Five Factor or "Big Five" model of personality testing, developed in the late 1980s, is based on the theory that normal human behavior can be understood on the basis of five factors: neuroticism, extraversion, conscientiousness, agreeableness, and openness to experience. The Big Five model is frequently applied in employment contexts. ANASTASI & URBINA, *supra* note 35, at 364-65; HOFFMAN, *supra* note 3, at 24-25.

65. ANASTASI & URBINA, *supra* note 35, at 540.

66. *Id.* at 545-46.

67. Reliability refers to the lack of measurement errors in a test, ensuring accuracy, dependability, and repeatability of the results. Validity refers to the appropriateness of the inferences drawn from a test—in essence, if the test actually measures what it is meant to measure. KAPLAN & SACCUZZO, *supra* note 21, at 12-13.

68. See PREEMPLOYMENT SCREENING, *supra* note 2, at 8, 42-68.

69. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 85 (Cal. App. 1991), *rev. granted* 4 Cal. Rptr. 2d 180 (1992), *rev. dismissed as moot*, 24 Cal. Rptr. 2d 587 (1993).

70. See *supra* note 60.

71. 29 U.S.C. § 2007(b)(1)(C).

72. For example, the tests reviewed by the Buros Institute, a test developer recognized by the American Psychological Association, include the "Racial Attitude Test"; "Religion Scale (A)"; and "Sexuality Experience Scales". See *supra* note 40. Although most employers would probably not administer these types of tests as part of a standard employee selection process, the tests illustrate the easy availability of inventories designed to measure constructs which employers are prohibited from inquiring into according to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (2000). See *infra* notes 119, 121 and accompanying text.

73. According to Finkin, *supra* note 2, at 426, personality testing by employers increased from 24% in 1988 (the year the EPPA was enacted) to 27% in 1999. See also HOFFMAN, *supra* note 3; Stabile, *supra* note 2, at 281; and Balaban, *supra* note 14 (discussing the correlation between enactment of the EPPA and the rise in personality testing).

74. The increase in the use of personality testing corresponding to the enactment of

The similarities therefore beg the question: should the federal government regulate personality testing in the same manner, and to the same degree, as it regulated polygraph testing?

A. *Privacy*

The California Court of Appeals' primary legal justification for the decision in *Soroka* was the defendant's violation of California's state constitutional right to privacy through the use of the Psychscreen personality test.⁷⁵ Although no parallel right is explicitly stated in the United States Constitution, the Supreme Court of the United States has grappled with the issue of privacy in a variety of contexts.⁷⁶ The Court has since recognized a limited federal right to privacy emanating from within the protections guaranteed by the Bill of Rights,⁷⁷ and in particular, from the Fourth Amendment.⁷⁸

The privacy rights emanating from the Constitution and recognized by the Supreme Court impact many aspects of American society,⁷⁹ including privacy in the workplace.⁸⁰ The Supreme Court has most fully

the EPPA suggests that employers believe the same constructs are being measured by the two types of tests. *See id.* and accompanying text.

75. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 85 (Cal. App. 1991), *rev. granted* 4 Cal. Rptr. 2d 180 (1992), *rev. dismissed as moot*, 24 Cal. Rptr. 2d 587 (1993).

76. Legal commentators have also struggled with the meaning and application of a legal right to privacy. *See e.g.*, Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L.R. 1087, 1088 (2002), commenting that "[t]ime and again philosophers, legal theorists, and jurists have lamented the great difficulty in reaching a satisfying conception of privacy."

77. The Supreme Court initially recognized a "zone of privacy" created by the penumbras of several specific guarantees in the Bill of Rights, including the First, Third, Fourth, Fifth, and Ninth Amendments. *See Griswold v. Conn.*, 381 U.S. 479, 484 (1965) (plurality opinion discussing the penumbra of privacy emanating from the First, Third, Fourth, and Fifth Amendments; concurring opinion citing the Ninth Amendment as the source of the penumbra of privacy). In *Roe v. Wade*, 410 U.S. 113 (1973), the Court expanded this notion of privacy by determining a substantive right to privacy is found in the Due Process clause of the Fourteenth Amendment.

78. U.S. CONST. amend. IX. The Fourth Amendment protects against unlawful searches and seizures by government employers, but this protection does not reach the conduct of private employers. Bloom, Schachter, & Steelman, *supra* note 13, at 900. Analysis of employee privacy issues in the private sector requires a balancing test of the employer's interests (for example, safety, protecting against employer liability, or prevention of theft) with the employee's or applicant's right to privacy. *Id.* Similarly, in the case of public employees, the Supreme Court has held that the privacy of an employee should be balanced against the realities of the workplace. *O'Connor v. Ortega*, 480 U.S. 709, 721 (1987).

79. Legal commentators have identified several categories of privacy. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1392 (1992), who describes one type of privacy as encompassing an individual's interest in avoiding disclosure of personal matters, as discussed in *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Personality and polygraph testing would implicate this category of privacy.

80. For further discussions of issues surrounding employee privacy, *see* Sharona

addressed the issue of employee privacy within the context of drug testing.⁸¹ The Court has recognized that drug and alcohol testing of employees, by means of a physical intrusion,⁸² constitutes a search under the Fourth Amendment when conducted by a public employer.⁸³ The relevant test postulates that government employees are not compelled to submit to searches or other practices involving violations of privacy unless a clear, direct nexus exists between the nature of the employee's duty and nature of the alleged or potential violation.⁸⁴

Because the Fourth Amendment does not apply to private employers, federal courts have not considered the privacy implications of drug testing in the private sector. Some states, through both legislation and case law, have regulated the conditions under which private employers can administer drug testing,⁸⁵ but only California has established a constitutional right to privacy that has been held to apply equally to government and private employers.⁸⁶

Although comparisons may be made between drug testing and psychological and personality testing, the nature of the intrusion differs in kind and degree. Drug testing requires a physical, bodily intrusion; personality testing does not. The procedures employed in drug testing are therefore more analogous to polygraph testing, which also involves testing of the body. If the federal government elects to regulate personality testing by private employers as it did in the EPPA, the

Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517 (2001); Peter J. Isajiw, *Workplace E-Mail Privacy Concerns: Balancing the Personal Dignity of Employees With the Proprietary Interests of Employers*, 20 TEMP. ENVTL. L. & TECH. J. 73 (2001); and Stephen E. Lichtenstein, *Workplace Privacy—An Oxymoron*, 35 BUS. L. REV. 51 (2002).

81. *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Ry. Exec. Ass'n.*, 498 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

82. Typical methods of drug testing include drawing blood samples and urinalysis. Breath analysis through the use of a breathalyzer test requiring a "deep lung" breath for chemical analysis has also been held to constitute a search. *Skinner*, 498 U.S. at 617.

83. *See id.*; *Von Raab*, 489 U.S. at 665. These cases involved public employers, in which the Court found the government's compelling interest in ensuring the employees were drug-free outweighed the privacy interests of the employees. Federal courts routinely consider employees holding "safety sensitive" positions to have a diminished expectation of privacy. *See, e.g., Carroll v. City of Westminster*, 233 F.3d 208, 212 (4th Cir. 2000); *but see Chandler*, 520 U.S. at 322-23 (1997) (Georgia statute requiring drug testing for candidates for state public offices unconstitutional because no special need for drug testing existed in light of intense scrutiny to which candidates are subjected).

84. *Harmon v. Thornburgh*, 878 F.2d 484, 490 (1989); *cert. denied*, *Bell v. Thornburgh*, 493 U.S. 1056 (1990).

85. John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALBANY L. REV. 799, 816 (2000).

86. *Wilkinson v. Times-Mirror Corp.*, 264 Cal. Rptr. 194, 215 Cal. App. 3d 1034, 1040 (1989).

differences in the degree of intrusion into privacy call for a more limited form of regulation. A moderate approach taken by Congress (or state legislatures) could incorporate the "special need" doctrine of drug testing, in which personality tests would be absolutely permissible when administered to individuals in certain safety sensitive positions.⁸⁷ Such a view would reflect a more liberal approach than the severe restrictions on polygraph testing imposed by Congress in the EPPA.

Unlike drug testing, the Supreme Court has never directly addressed personality testing and polygraph testing within the context of privacy; however, these issues have not gone unrecognized by the members of the Court. In a wiretapping case in which the use of a recording device was found to be permissible,⁸⁸ Justice Douglas responded in a dissent lamenting the erosion of privacy rights, specifically referring to the use of polygraph tests and personality tests, which he argued "seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex, and the like."⁸⁹ The Court likewise has noted the respect society holds "for the inviolability of the human personality" represented by the Fifth Amendment privilege against self-incrimination, and the right of each individual to lead a private life.⁹⁰

Employment law issues, including those surrounding the legality of polygraph and personality testing, were initially governed by contract and tort principles developed within state law.⁹¹ Prior to the enactment of the EPPA, several states had enacted statutes restricting the use of polygraph tests in employment.⁹² The states' growing recognition of the need to regulate polygraph testing by employers constituted a primary reason for Congress to explore the issue.⁹³ Without a federal statutory limitation on personality testing, states are free to regulate the use of

87. In fact, much of the case law regarding psychological testing involves emergency personnel. See *Shuman v. Phila.*, 470 F. Supp. 449 (1979) (police officers); *McKenna v. Fargo*, 601 F.2d 575 (N.J. 1979) (firefighters); In the Matter of Vey, 591 A.2d 1333 (N.J. 1991) *cert. granted*, 627 A.2d 1149 (N.J. 1993), *aff'd*, 639 A.2d 718 (N.J. 1994) (police officers).

88. *Osborn v. United States*, 365 U.S. 323 (1966).

89. *Id.* at 342.

90. *Murphy v. Waterfront Comm'n. of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

91. See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 14-26 6th ed. (Aspen 2003).

92. S. Rep. 100-284, *reprinted in* 1988 U.S.C.C.A.N. 726, 731-32, noting that at the time of the EPPA's enactment, only nine states had no law governing polygraph testing. The regulation of polygraph testing in the remaining majority of the states varied widely, ranging from near prohibition to merely requiring licensing requirements for polygraph examiners.

93. *Id.*, noting that the absence of uniform standards confused employers as to their rights and in some cases, enabled employers to circumvent state restrictions.

such tests to the extent required by their respective privacy jurisprudences.

Courts are also divided on whether personality testing violates the privacy provisions in the Americans with Disabilities Act ("ADA"),⁹⁴ which prohibits medical examinations administered prior to a job offer.⁹⁵ Courts facing the question have reached opposite conclusions regarding whether a personality test constitutes an unlawful pre-offer medical examination.⁹⁶ The guidelines developed by the Equal Employment Opportunity Commission are similarly unclear.⁹⁷ According to the guidelines, the EEOC classifies some psychological tests as medical exams, except when the tests are designed to merely measure habits or tastes.⁹⁸

A full discussion of the impact of the ADA on psychological testing is beyond the scope of this comment.⁹⁹ The courts addressing the issue appear to make a key distinction between psychological tests designed for clinical, and thus medical, diagnoses, and personality tests intended merely to assess normal range personality attributes.¹⁰⁰ A distinction between normal and abnormal psychological attributes, however, may not be as clear as it initially appears. Scientific studies have raised the possibility that personality traits are genetically coded into each human

94. 42 U.S.C. § 12101 (1994).

95. *Id.* at § 12112(d)(2)(A) (1994).

96. Vetter, *supra* note 32, at 629-30, citing *Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996) (psychological evaluation for corrections officers determined to be a medical examination because of "its nature and extent" and because it was administered by a licensed psychologist); *Thompson v. Borg-Warner Protective Serv's. Corp.*, No. C-94-4015 MHP, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996) (no reasonable jury could find personality test used by employer an unlawful medical examination when it was not designed to elicit information about impairment). "The ADA ought not to be interpreted to prohibit inquiry into such personality attributes as propensity for honesty, ability to get along with others, etc. . . . [the] ADA protects disabilities, not any characteristic which an employer may consider to be a personal flaw or undesirable aspect of an applicant's personality." *Id.* at *7.

97. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N., ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS & MED. EXAMINATIONS 14, No. 915.002 (revised Oct. 10, 1995).

98. *Id.*

99. For a more comprehensive discussion of the ADA's impact on the legality of psychological tests, see Vetter, *supra* note 32; see also Sujata S. Menjoge, Note, *Testing The Limits Of Anti-Discrimination Law: How Employers' Use of Preemployment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. REV. 326, 347-354 (2003); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000); David W. Arnold & Alan J. Thiemann, *To Test or Not to Test: The Status of Psychological Testing Under the ADA*, (June 1992) (paper presented at the International Personnel Management Association Assessment Council Conference, Baltimore, MD, June 7-11, 1992).

100. *Thompson*, 1996 WL 162990, at *7.

being in the same manner as a disease or illness is caused by a genetic predisposition.¹⁰¹ If personality traits do exist on a continuum, with the extremes qualifying as mental illness protected from pre-job offer examinations by the ADA, an exploration of where illness begins and normality stops (if such a line can be drawn at all) is a subject for future investigation.¹⁰²

B. Discrimination

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers with fifteen or more employees to discriminate on the basis of race, color, religion, sex, or national origin.¹⁰³ The analytical framework subsequently developed by courts to be applied in Title VII cases allows a plaintiff to prevail on an employment discrimination claim using one of two theories. The first, disparate treatment, requires proof of either a discriminatory intent on behalf of an employer, or other evidence of discrimination. The second, disparate impact, requires a plaintiff to show an adverse impact on a protected class absent a discriminatory motive.

1. Disparate Treatment

Disparate treatment cases were among the first cases litigated under Title VII. In disparate treatment cases, an employee or applicant for employment asserts that she was treated differently because of her protected class status.¹⁰⁴ The standard for proving disparate treatment by an employer, often referred to as the “burden shifting” approach, was developed by the Supreme Court in *McDonnell Douglas Corp. v.*

101. Thus mental illness or impairment may simply be an extreme manifestation of an otherwise “normal” human personality trait resulting from a genetic malfunction, either in the structure of the brain or the neurochemical activity which signals human behavior. See, e.g., HOFFMAN, *supra* note 3, at 14, 16; Vetter, *supra* note 32, at 616 n. 141, stating that: “[P]sychiatrists model personality from a biological point of view . . . the causes of abnormal personality are related to the brain and body,” citing Barry S. Fogel & John J. Ratey, *A Neuropsychiatric Approach to Personality and Behavior*, in NEUROPSYCHIATRY OF PERSONALITY DISORDERS 1, 3-7 (John J. Ratey, ed., 1995). Assuming *arguendo* the credence of this theory, if inquiry into mental illness is protected by the ADA, one may argue inquiry into mental *health* should be protected as well.

102. For articles discussing genetic testing by employers within the context of privacy, see, e.g., Samantha French, *Genetic Testing in the Workplace: The Employer's Coin Toss*, 2002 DUKE L. & TECH REV. 15, (2002); Carol A. Schneider, Felicia Cohn & Cynthia Bonner, *Patenting Life: A View from the Constitution and Beyond*, 24 WHITTIER L. REV. 406 (2002).

103. 42 U.S.C. § 2000e-2 (2000).

104. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 647 (2001).

Green.¹⁰⁵ The test¹⁰⁶ requires that a plaintiff first show a prima facie case of discrimination through four elements (although not all are required to be present in the facts of each case): (1) the plaintiff is a member of a protected class; (2) the plaintiff applied for an available job for which the plaintiff was qualified; (3) the plaintiff was rejected for the position; and (4) after the rejection the employer continued to seek applicants with the same qualifications.¹⁰⁷ Once this presumption of discrimination is shown, the burden shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the adverse employment action.¹⁰⁸ If the employer is successful in asserting a nondiscriminatory reason for its decision, the burden shifts back to the plaintiff to show that the employer's articulated reason is simply a pretext for its true discriminatory motive.¹⁰⁹

2. Disparate Impact

In 1971 the Supreme Court recognized disparate impact theory as an additional viable theory of liability under Title VII.¹¹⁰ Disparate impact analysis involves employment policies that are facially nondiscriminatory, but adversely affect one protected class in comparison to other classes without any legitimate business purpose for the different effect.¹¹¹ Disparate impact is distinguishable from disparate treatment in that the former does not require an intent to discriminate, while the latter results from intentional exclusion of protected class

105. 411 U.S. 792 (1973).

106. The *McDonnell Douglas* "burden shifting" approach was established for plaintiffs who lack direct evidence of employment discrimination on a disparate treatment claim.

107. *Id.* at 802.

108. *Id.* Title VII also makes three exceptions available to employers, providing that the following practices are not unlawful as long as they are not designed, intended, or used to discriminate because of race, color, religion, sex or national origin: (1) giving or acting upon professionally developed ability tests; (2) having a bona fide seniority system; or (3) having a bona fide merit system. 42 U.S.C. § 2000e-2(h); ZIMMER, SULLIVAN & WHITE, *supra* note 91, at 400-01.

109. *McDonnell Douglas*, *supra* note 105, at 804.

110. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the employer required both a high school diploma and a certain passing score on a standardized aptitude test as a condition of employment in a power plant. The requirements had the effect of excluding large proportions of African American applicants from the workforce because this group had historically been subject to inadequate education due to segregationist policies. The Supreme Court held that the requirements constituted unlawful employment discrimination under its newly asserted disparate impact theory, because although the diploma and testing requirements were facially nondiscriminatory, they operated to exclude members of a protected class while having no relation to job performance.

111. *Id.* at 431; *see also* Jolls, *supra* note 104, at 647.

members from jobs.

In 1991 Congress amended Title VII of the Civil Rights Act by adding § 703(k), providing a statutory basis for disparate impact theory.¹¹² To prevail on a disparate impact claim, the plaintiff must first present a prima facie case of discrimination by showing the employer uses a particular employment practice that causes disparate impact on the basis of race, color, religion, sex, or national origin.¹¹³ The burden then shifts to the employer to rebut the presumption of discrimination by showing either: (1) the use of the practice does not cause disparate impact; (2) the practice is a business necessity and is related to the job; or (3) no less discriminatory alternative employment practice exists.¹¹⁴ The statute also expressly permits the administration of ability tests so long as they do not discriminate against protected class members;¹¹⁵ this provision has been held to apply to psychological tests, including personality tests.¹¹⁶

A preemployment personality test, which facially discriminates against one of the protected classes enumerated in Title VII, will give rise to a disparate treatment claim. Examples of incidences of disparate treatment in the context of personality tests include requiring only protected groups to take the tests, or using the test to eliminate members of a protected class from the hiring process. Most employers, however, are not likely to propagate such overt discrimination in the use of personality tests. Instead, plaintiffs hoping to invoke the protections of federal employment discrimination laws in response to an alleged misuse of a personality test likely will bear the burden of showing a disparate impact on a protected class.¹¹⁷

Prior to the protections of the EPPA, employees attempting to prove discrimination as a result of the use of polygraph testing had no recourse other than Title VII as a vehicle for their claims.¹¹⁸ A requirement that an applicant take a polygraph test as a condition of employment seems potentially vulnerable under Title VII, considering that interview questions prohibited by antidiscrimination laws were routinely included

112. 42 U.S.C. § 2000e-2(k) (2000).

113. *Id.* § 2000e-2(k)(1)(A)(i).

114. *Id.* § 2000e-2(k)(1)(A)(i-ii); (B)(i).

115. *Id.* § 2000e-2(h).

116. *Colbert v. H-K Corp.*, 4 Fair Empl. Prac. Cas. (BNA) 529, 530 (N.D. Ga. 1971) (finding personality and intelligence test to be reasonably related to job performance and thus lawful under Title VII).

117. *McGlothlen*, *supra* note 13, at 28; *ZIMMER, SULLIVAN & WHITE*, *supra* note 91, at 321; *Menjoge*, *supra* note 99, at 335.

118. *Ramirez v. City of Omaha*, 678 F.2d 751 (8th Cir. 1982) (plaintiffs claiming a preemployment polygraph test for firefighters discriminated on the basis of race failed to make a prima facie showing of disparate impact).

in polygraph examinations;¹¹⁹ however, Congress elected to provide a separate, specific statutory provision giving protection beyond that of Title VII to job applicants. Congress's objective in passing the EPPA, in addition to protecting the privacy of employees and applicants, was to eliminate one form of employment discrimination.¹²⁰ Likewise, personality tests may also measure constructs about which direct questions are prohibited by Title VII.¹²¹

3. The Personality "Defense"

Although few claims attacking personality testing in employment have been brought under Title VII, courts have confronted broader issues of personality conflicts in the workplace, finding them largely without redress. The Supreme Court has expressly excluded conduct based on personal animosity from the scope of actionable employment discrimination.¹²² In *Hicks v. St. Mary's Honor Center*, the plaintiff, an African American male corrections officer, alleged that his termination was based on a discriminatory motive.¹²³ The district court determined that the plaintiff failed to prove the employment action was racially, and not personally, motivated.¹²⁴ After the case reached the Supreme Court¹²⁵ and was sent back on remand, the employer claimed the termination of the plaintiff resulted from the personal animosity that existed between the plaintiff and the supervisor.¹²⁶ The Eighth Circuit concluded that mere personal animosity between the employer and the employee did not amount to a showing of discriminatory conduct by the employer.¹²⁷

Similarly, an Eleventh Circuit case notes that Title VII protects neither personality clashes nor harsh treatment in the workplace.¹²⁸ In *McCollum v. Bolger*, a female mail carrier sued her supervisor, the local

119. David E. Neely, *The Employee Polygraph Protection Act: Good News for Employers and Job Applicants*, 77 ILL. B.J. 598, 599 (1989).

120. *Id.*

121. See *supra* notes 44, 72 and accompanying text; see also Mejoge, *supra* note 99, at 338.

122. *Hicks v. St. Mary's Honor Ctr.*, 509 U.S. 502 (1993); *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978).

123. *Hicks*, 509 U.S. at 504.

124. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991), *rev'd*, 90 F.3d 285 (8th Cir. 1992), *cert. granted*, 509 U.S. 502 (1993).

125. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487 (8th Cir. 1992), *cert. granted*, 506 U.S. 1042, *rev'd*, 509 U.S. 502 (1993).

126. *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285, 290-91 (8th Cir. 1996).

127. *Id.*

128. *McCollum v. Bolger*, 794 F.2d 602 (11th Cir. 1986), *cert. denied*, *McCollum v. Tisch*, 479 U.S. 1034 (1987); see also *Jackson v. City of Killeen*, 654 F.2d 1181, 1186 (5th Cir. 1981).

postmaster, for sex discrimination when her route was shortened (resulting in a pay cut), followed by a subsequent suspension for allegedly failing to follow instructions.¹²⁹ Although determining that the plaintiff successfully presented a prima facie case of sex discrimination¹³⁰ because she was treated more harshly than similarly situated male carriers at the same office, the court ruled in favor of the defendant because it found the reason for the disparate treatment was not sex discrimination, but personal animosity between the plaintiff and her supervisor.¹³¹ Commenting on the “evident hostility” that had existed between the plaintiff’s family and the postmaster for years, culminating in the filing of the complaint,¹³² the court noted that “personal feud[s]” cannot be turned into discrimination cases without proof of prejudice.¹³³

The exclusion of conduct claimed to be the product of a personality clash or personal animosity from the scope of actionable employment discrimination claims raises questions about the role of personality and personality conflicts in employee-employer interactions. Members of a protected class claiming employment discrimination based on an action taken in response to the results of a personality test must initially present a prima facie case,¹³⁴ from which a defendant employer can escape by asserting a personal animosity defense. Even if the plaintiff can show that this defense is merely pretextual, the plaintiff is not guaranteed to win; the trier of fact is still free to decide that the defendant did not act in a discriminatory manner nonetheless.¹³⁵ No cause of action is available for a job applicant rejected because the employer simply did not like one or more personality traits of the applicant.¹³⁶ In light of this distinction,

129. *McCollum*, 794 F.2d at 609.

130. *McCollum* involved a claim of disparate treatment discrimination, which is analytically distinct from the disparate impact analysis described *supra* notes 110-114 and accompanying text.

131. *McCollum*, 794 F.2d at 610.

132. *Id.* at 605.

133. *Id.*

134. Both the *McDonnell Douglas* burden shifting approach and the disparate impact analysis under Title VII require the plaintiff to initially show a prima facie case of employment discrimination, and to retain the burden of persuasion even after the defendant’s proffered reason for the adverse employment decision seems incredible. See *supra* notes 109, 114.

135. Although the ultimate fact of discrimination can be inferred from the falsity of the employer’s explanation for the adverse employment action, it is not enough to compel a finding for plaintiff; a plaintiff must introduce additional evidence of discrimination showing an intent to discriminate. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147-48 (2000).

136. ZIMMER, SULLIVAN & WHITE, *supra* note 91, at 3-4; see also, e.g., *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980), *reh’g denied*, 625 F.2d 1016 (5th Cir. (1980), *cert. denied*, 449 U.S. 1113 (1981) (noting that Title VII does not prohibit employers from hiring only those born under a particular sign of the Zodiac if it chooses to do so).

employers using personality testing could legitimately cite personality factors assessed on the basis of the tests as reasons for rejecting an applicant even when these factors may relate to protected characteristics, thereby releasing employers from the consequences of potential liability for discrimination.¹³⁷

The distinction between personal animosity and discriminatory conduct has spurred much scholarly review by legal, psychological, and sociological professionals on the phenomenon known as unconscious bias.¹³⁸ Unconscious bias refers to discrimination occurring not intentionally, but as a result of social and cognitive processes.¹³⁹ One scholar has noted that the *Hicks* decision creates a legal “loophole” by permitting employers to use personality excuses to disguise discrimination.¹⁴⁰ Employers who are sued for allegedly discriminatory terminations can simply cite personality conflicts as the reason for the dismissal, even if those personality conflicts are inextricably linked with a protected characteristic. For example, an employer who, on an unconscious level, believes that females are not assertive enough for a sales position may reject a female applicant by claiming her personality did not reflect the assertiveness required.¹⁴¹ Unless that applicant can show that gender discrimination motivated the decision, she will not prevail on an employment discrimination claim.

In an employment environment in which personality clashes provide

137. For example, personality tests may be based on a white male norm; members of other genders, socioeconomic classes, and ethnicities may exhibit qualities not associated with this model and accordingly not score “well” on the employer’s measure. Mejege, *supra* note 99, at 343-44.

138. See Mark Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, 18 BERK. J. EMP. & LAB. L. 183 (1997); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003).

139. For more discussion of the role of unconscious bias in discrimination, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999), with response by Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, IND. L.J. 1234 (1999).

140. Brodin, *supra* note 138, at 215. In Brodin’s view, the decision authorizes lawful personality clashes and suggests that a connection between racial discrimination and personality conflicts or personal dislike cannot be superficially discounted. “The recognition of so generous a ‘personality’ defense reflects a failure and refusal to appreciate the subtleties of the discrimination phenomenon.” *Id.* at 216.

141. Similar issues arose in *EEOC v. Sears*, 839 F.2d 302 (7th Cir. 1998). In response to the EEOC’s statistical evidence showing that few women were selected for commission sales positions, the defendant relied on generalized stereotypes about the lack of interest by women in aggressive commission sales positions and presented no statistical evidence in rebuttal; the defendant ultimately prevailed.

a lawful basis for adverse employment decisions, preemployment personality testing raises similar discriminatory concerns.¹⁴² Arguably, the unconscious bias phenomenon may potentially spill over into the administration and scoring of personality tests. In the process of screening out applicants on the basis of their scores on certain personality traits, employers may be unconsciously (or, as cynics may say, consciously) screening out classes of people who will tend to respond in a particular way.¹⁴³

Conversely, personality tests may actually work in the opposite manner, combating employment discrimination problems by reducing the negative effects of the unconscious bias phenomenon. Contrary to the characterization of personality traits as purely subjective constructs,¹⁴⁴ personality testing may represent an ideal method of objectively measuring an applicant's traits and thereby his or her suitability for a particular position.¹⁴⁵ The unconscious bias phenomenon has generally been studied on the basis of face-to-face interactions between people in the workplace, where race, gender, or other overt characteristics are readily observable.¹⁴⁶ In contrast, a personality test administered or scored by an independent firm, especially before the face-to-face hiring process begins, reduces the likelihood of discrimination on the basis of protected class status, whether conscious or unconscious.

Moreover, the concept of "at will" employment allows employers to refuse to hire an applicant or to terminate an existing employee for any reason, absent proof of disparate impact.¹⁴⁷ Viewed against the backdrop

142. See, e.g., ANNIE MURPHY PAUL, *THE CULT OF PERSONALITY* (Free Press 2004) (describing a "national mania" with personality testing that is "dangerous and disturbing").

143. Brodin, *supra* note 138, at 220.

144. *Id.* at 200, labeling personality "the quintessential subjective criterion" and asserting "the 'personality' defense is thus an open invitation to discrimination, either conscious or unconscious." See also *supra* note 138 and accompanying text.

145. See ANASTASI & URBINA, *supra* note 35, at 549 "[S]ocial stereotypes and prejudice may distort interpersonal evaluations . . . tests provide a safeguard against favoritism and arbitrary and capricious decisions." The goal of personality tests is to objectively measure characteristics, as opposed to other subjective selection techniques such as interviewing. See STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING, *supra* note 38 at 49-50. When a test is normed, the data can be assessed objectively if the norms are based on a technically sound, representative, and scientific sample of sufficient size. *Id.* at 55.

146. A study by Claudia Goldin & Cecelia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000) provides one illustration of this phenomenon. The study reported on selection techniques that required auditioning for a musical ensemble from behind a screen. Although the small sample size precluded statistically significant results, the study showed that the blind audition method increased the likelihood that women would be selected for the orchestra.

147. See *supra* note 136.

of an at-will employment¹⁴⁸ environment, hiring decisions made on the basis of an applicant's responses on a personality test no longer appear abusive. In such a context, the private employer enjoys the prerogative of hiring employees with certain personality traits conducive to a particular business.

C. *Balancing the Hiring Interests of Employers and the Privacy and Antidiscrimination Interests of Employees*

Private employers enjoy the right to select applicants who are best suited for the nature of the work of the enterprise. Moreover, no law prohibits the use of arbitrary or even bizarre hiring decisions, provided that Title VII or other federal statutes specifically protecting certain classes are not violated.¹⁴⁹ The use of personality testing reflects an employer's attempt to objectively measure¹⁵⁰ the presence of skills and traits required for success in a particular position. Although concerns regarding the reliability of such tests are legitimate,¹⁵¹ the tests arguably represent a more systematic and effective way of selecting the right person for the position.

If personality testing as a screening method is made unavailable to employers, employers are relegated to utilizing traditional employee selection methods that are inherently subjective in nature.¹⁵² For example, the most classic, widely accepted practice of employee selection—the interview¹⁵³—inevitably has a largely subjective component.¹⁵⁴ Interviews are essentially oral employment tests¹⁵⁵ with

148. ROSSEIN, *supra* note 3. While a few states (California, North Dakota, South Dakota, Louisiana, and Georgia) have codified their at-will employment doctrines, a common law rebuttable presumption of at-will employment exists in most jurisdictions. *See, e.g.,* McDonald v. Corinth, 102 F.3d 152, 156 (5th Cir. 1996); Prescott v. Farmers Tel. Coop., Inc., 516 S.E.2d 923 (S.C. 1999).

149. Other federal statutes prohibiting employment discrimination include 42 U.S.C. § 1981 (1994); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701-796 (2000); the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-634; and the ADA, *supra* note 94.

150. *See supra* note 145.

151. *See supra* note 63.

152. *See* ANASTASI & URBINA, *supra* note 35, at 549, explaining that tests were developed as a means of compensating for unreliability, subjectivity, and bias of traditional employee selection procedures such as letters of recommendation and interviews (and concluding that these latter practices have proved to be less accurate than tests in predicting job performance).

153. Interviews, like personality tests, are used to gather data or information about an applicant, allowing the employer to make future behavioral predictions about the individual. KAPLAN & SACCUZZO, *supra* note 21, at 227.

154. *See* PERSONNEL ASSESSMENT, *supra* note 27, at 3-4. If employers relied only on objective constructs in making employment decisions, the hiring process could be streamlined by making employment decisions solely on the basis of objective criteria

the same, if not greater, reliability and validity concerns that exist in polygraph and personality testing.¹⁵⁶ Despite this subjectivity,¹⁵⁷ little resistance to the practice of interviewing exists.¹⁵⁸ Personality tests, which have been professionally validated¹⁵⁹ for a certain position, are arguably a more objective selection method than an interviewer's subjective responses to an applicant, whether conscious or not.

Because of the ever-present danger of subjective biases, employers may not view the traditional interview as a truly viable replacement for personality testing.¹⁶⁰ Even more structured interview techniques such as behavioral interviewing, which involves asking an applicant how he or she has responded in the past in a particular situation,¹⁶¹ attempt to

listed on a resume. Instead, employers also interview applicants in addition to reading resumes to "get a feel" for the person, observe how the person interacts, and rate the person's communication skills—in short, to assess the personality traits he or she exhibits.

155. *Id.* at 227.

156. *Id.* at 247, 250. Validity errors in interviews result from distortions in observations and judgments about another person. Reliability errors are caused when inter-interviewer agreement (agreement among several interviewers) varies. *Id.* at 250.

157. The mutual interaction involved in interviews results in a phenomenon called social facilitation, in which one party tends to respond in a manner similar to the other by mimicking his or her movements or emotional responses. KAPLAN & SACCUZZO, *supra* note 21 at 228. Interviewer bias can also result from the halo effect, in which an interviewer forms an early negative or positive impression that influences the remainder of the interview; errors of "general standoutness," in which one prominent physical characteristic of the applicant influences the interviewer; and cross-cultural, cross-ethnic, and cross-class interviewing errors. *Id.* at 248.

158. Interviews remain the most frequently used employee selection technique. See ANASTASI & URBINA, *supra* note 35, at 464.

159. The EEOC Guidelines, discussed *supra*, note 12, provide that psychological tests can be used despite evidence of disparate impact if the test can be validated for job relatedness. KAPLAN & SACCUZZO, *supra* note 21 at 567. The Guidelines delineate three types of test validity: (1) criterion-related validity (relating to how well a test corresponds with a criterion, such as a personality trait); (2) content validity (the degree of the representation of the job skills the test is designed to measure); or (3) construct validity (the relationship between a test and other measures). See 29 C.F.R. § 1607.5; ZIMMER, SULLIVAN & WHITE, *supra* note 91, at 406-07. See also *Billish v. City of Chicago*, 989 F.2d 890, 896 (7th Cir.) (en banc) (no one method of validity is preferred over another), *cert. denied*, 510 U.S. 908 (1993).¹⁶⁰ HOFFMAN, *supra* note 3, explains that managers view personality testing as the only tool capable of tapping into the subtleties of an applicant. See also KAPLAN & SACCUZZO, *supra* note 21, at 245 (noting that recent studies reviewing employment interviews recommend combining interview data with other sources of information, such as personality characteristics).

161. Roger D. Sommer, *Behavioral Interviewing*, Society for Human Resource Management Employment Management Association Forum, at http://www.shrm.org/ema/library_published/IC/CMS_000340.asp (last visited Nov. 17, 2004) (on file with author).

expose the inner workings of an applicant's thought process to predict that person's future behavior. This type of interviewing lends itself to canned answers because an applicant can easily see through most questions and provide the response that portrays them in the desired light.¹⁶² The answer to this transparency problem may be a professionally developed personality test that more subtly masks the traits that are being assessed.¹⁶³

Employers also typically use reference checks as part of the due diligence required in the hiring process.¹⁶⁴ The reference checking process also raises a red flag of reliability concerns. The information gleaned from an applicant's prior employers and former co-workers may be tainted by unrevealed personal biases.¹⁶⁵ Moreover, most references are self-selected by the applicant,¹⁶⁶ virtually guaranteeing an endorsement of the applicant's work behavior. Applicants' previous employers are increasingly unwilling to provide references on their former employees for fear of litigation, either by the hiring organization if the applicant proves incompetent,¹⁶⁷ or by the applicant for defamation.¹⁶⁸

The benefits to employers in administering personality testing in the hiring process are evident; however, as in polygraph testing, the interests of applicants must also be counterbalanced to determine the need for regulation. Proponents of employee testing assert that those applying for a job already have a reduced expectation of privacy¹⁶⁹ in applying for a job, and fully expect to be subjected to inquiries about their behavior through reference checking and interviewing.¹⁷⁰ Job applicants "assume the risk" of a minimal intrusion into their personalities when applying for a job. So long as the intrusion does not lead to a Title VII violation or

162. For example, a typical interview question may ask the applicant to discuss his or her strengths and weaknesses. A savvy applicant knows how to present weaknesses that in reality are likely to be viewed as favorable, i.e., "I tend to be a perfectionist and won't stop working on a problem until I am sure I have the right solution." Arguably, a personality test could measure specific strengths and weaknesses in a more objective and veiled manner. *But see* Black, *supra* note 26, at 88 (asserting that applicants taking personality tests may also be able to "fake it" by responding in a manner believed to be desirable); *cf.* PERSONNEL ASSESSMENT, *supra* note 27 at 7 (arguing that "with complex multi-factor questionnaires it is more difficult to know what is required and to be effective in selecting the 'right' responses.").

163. PERSONNEL ASSESSMENT, *supra* note 27 at 7; HOFFMAN, *supra* note 3.

164. Finkin, *supra* note 2, at 439-46.

165. *See id.*

166. HOFFMAN, *supra* note 3, at 5.

167. *Id.*

168. *See, e.g.,* Ali v. Douglas Cable Communications, 929 F. Supp. 1362, 1382 (D. Kan. 1996).

169. *See id.*

170. *See id.*

other employment discrimination violations,¹⁷¹ the minimal invasion into privacy is not enough to warrant a complete ban on personality testing, at least until the efficacy of the tests are more widely understood.

Moreover, discrimination concerns do not necessitate a ban on personality testing because applicants are safeguarded by the EEOC guidelines¹⁷² and the APA testing standards¹⁷³ providing legal remedies for any discriminatory effects of a personality test.¹⁷⁴ Additionally, while personality testing aids employers by identifying the types of applicants best suited for the available positions, the results of personality testing can also be an advantage to applicants.¹⁷⁵ A better fit of an applicant to a position will likely result in an improved employment relationship,¹⁷⁶ and the increased understanding of employees by managers and supervisors will enable them to tailor feedback, job structure, and training to the unique personalities of their staff members.

IV. Conclusion

Personality testing, when used appropriately, can be a valuable tool for employers in the hiring process. Traditional hiring methods such as interviewing, reference checking, and verifying employment and educational history from a resume provide a one-dimensional assessment of skills and experience, but personality testing may represent a more accurate measure of an applicant's inherent fit for a particular position. Human resource professionals are even touting personality as the "new" diversity—a major hiring objective of many employers and recruiters.¹⁷⁷

In contrast to the questionable validity of the polygraph test, personality tests can be validated specifically for particular employment positions,¹⁷⁸ ensuring a more accurate (and a more fair) result. The

171. See *supra* note 149.

172. See *supra* note 12.

173. See *supra* note 33.

174. See Part III.B.1-2 for a discussion of the remedial framework for disparate impact and disparate treatment claims under Title VII.

175. HOFFMAN, *supra* note 3, at 7, noting "placing people with compatible emotional or problem-solving traits together can improve or accelerate the synergy of their work teams; conversely, teams with other worker mixes are almost doomed from the start to ineffectiveness or outright failure." See also AMERICAN EDUCATIONAL RESEARCH ASS'N., *supra* note 33, at 151, explaining that the goals of employment testing, in addition to efficiency, growth, and productivity, are to influence employee motivation and satisfaction.

176. HOFFMAN, *supra* note 3, at 7.

177. Jane Mitchell Howard & Pierce J. Howard, Center for Applied Cognitive Studies, *Personality Diversity: The Overlooked Variable for Team & Leadership Success* (presented at the 2003 ASTD International Conference & Exposition).

178. The major difference is the interpretation of the test results. Little question exists regarding the polygraph's accuracy in recording physiological changes in the subject; the controversy lies in the examiner's interpretations of the physiological

ability to make a refined hiring decision provides an invaluable long-term benefit to employers, and additionally leads to increased job satisfaction for employees.¹⁷⁹ Moreover, personality testing, when used as one piece of the hiring process, is less intrusive than polygraph testing.¹⁸⁰ The privacy and discrimination concerns implicated by polygraph testing are not as prevalent in personality testing, and do not warrant a similar federal ban. Rather, the existing protection of Title VII is more than sufficient to address any potential misuse.

States, however, should consider limited regulation of personality testing to ensure that employers are administering the tests appropriately.¹⁸¹ The easy availability of personality tests¹⁸² and the potential for misuse calls for limited state regulation of the personality testing industry. States should consider licensing or certification requirements for test developers and encourage or require employers to use only those tests that have received such approval. As in the EPPA,¹⁸³ state lawmakers could also consider making personality testing optional for applicants, preventing employers from refusing to hire applicants who choose not to take a test.

A full endorsement of personality testing comes with the caveat that only validated tests should be used. Employers should be responsible for selecting personality tests that have been professionally developed and validated by a recognized testing organization,¹⁸⁴ and that are appropriate for the available position.¹⁸⁵ Questions involving protected characteristics that lack a logical nexus to the job should be eliminated. Moreover, a wise employer will utilize personality testing to complement, not replace, traditional employee selection methods of hiring.¹⁸⁶ Using personality testing in conjunction with other selection

responses. Emotions such as fear, shame, embarrassment, or resentment may naturally arise in a polygraph subject; however, concluding that these responses represent the subject's degree of deception or honesty is problematic. In contrast, personality tests are validated to ensure a relationship between the test and the job-related trait it is designed to measure. See *supra* notes 67, 145.

179. *Supra* note 175.

180. See discussion *supra* note 56. Applicants are likely to be more comfortable taking an anonymously scored pen and paper or computer based test, compared to the physical burden involved with taking a polygraph test (including attaching the applicant to a machine and measuring physiological responses while a human examiner asks personal questions).

181. See Menjoge, *supra* note 99, at 364.

182. See ANASTASI & URBINA, *supra* note 35, at 555 app., for a listing of test publishers, distributors, and test related organizations.

183. *Supra* note 15.

184. See *supra* note 159.

185. *Id.*

186. PREEMPLOYMENT SCREENING, *supra* note 2 at 41, citing ASSOCIATION OF TEST PUBLISHERS, MODEL GUIDELINES FOR PREEMPLOYMENT INTEGRITY TESTING PROGRAMS

methods, rather than citing the results of a personality test as the dispositive factor in an employment decision, may help shield employers from potential liability while resulting in a more robust assessment of the applicant.

Lawyers and human resource professionals should educate employers about the proper use and application of tests to ensure compliance with existing state and federal employment regulations. Employers must use personality testing carefully so as not to violate any other employment laws.¹⁸⁷ Used appropriately, responsibly, and as one indicator in the overall hiring process, personality testing can be a valuable and lawful resource for both applicants and employers.

(1st ed. 1990).

187. See *supra* note 149.
