Public safety agencies are often the target of lawsuits for some type of employment discrimination. Despite their regular practice of a variety of proactive good faith efforts in diversity and personnel practices, public safety agencies still get sued for cases ranging from entry-level testing practices to promotional processes. Should an agency lose an equal employment opportunity (EEO) suit, judgments can include significant financial consequences (e.g., back pay with interest to the adversely affected group), court-monitored recruiting, testing and hiring practices, and even mandated hiring quotas or goals that can sometimes last for several years.
Discrimination cases can be filed by government agencies, such as the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice or various plaintiff members represented by private counsel. The EEOC files hundreds of Title VII (Civil Rights) lawsuits every year, and sometimes public safety agencies are the preferred target. The authors are aware of periods in which the Department of Justice has set up camp at central locations and systematically sued every police and fire department within a radius of their temporary location.

Plaintiff advocates often believe many challenged agencies had it coming because of recruiting, testing or hiring practices that were unfair in some way. How can an agency guard against such litigation in the first place? What steps can be taken to minimize damage after a lawsuit has been filed? This article reviews types of EEO litigation that typically occur in the public safety arena, provides foundational steps for preventing such litigation and offers help for taking action after a lawsuit has been filed.

**COMMON TYPES OF EEO LITIGATION**

Broadly speaking, there are two types of employment discrimination cases: 1) those that pertain to disparate treatment and 2) those that involve a disparate impact approach. The primary difference between these two types of discrimination is the requirement to show intent.

Plaintiffs in a disparate treatment case must show that an individual or several individuals were treated differently because of their race, sex, religion, age or national origin. Thus, disparate treatment involves some type of deliberate act(s) that implies a discriminatory intent. The plaintiff must show intent, which can come from either direct evidence or be inferred from the circumstances.

Plaintiffs in a disparate impact case must show that an agency’s practice, procedure or test (PPT) has a disparate impact on their group (usually one or more minority groups or women), even if everyone was treated identically. So disparate impact involves the use of a PPT that is neutral on its face but has a (seemingly) discriminatory outcome. Plaintiffs are not required to show intent.

Defining and interpreting these two types of discrimination has been a legal feat since the passage of the 1964 Civil Rights Act. Courts of all levels have wrestled to define, interpret and reinterpret the criteria. State courts often base their legal guidelines on federal standards, which in turn rely on interpretations.
from the U.S. Circuit Courts of Appeal. Occasionally, the U.S. Supreme Court will take a case from one of the 11 Circuits and rework the decision to more closely align with its own viewpoints, creating “landmark precedence” on issues pertaining to EEO litigation.

Congress also occasionally intervenes to redirect judicial developments in the EEO arena. Such was the case when Congress passed the 1991 Civil Rights Act, in part to stop the practices of race-norming (applying different standards based on ethnicity) on employment tests and to dismantle litigation precedence established by the U.S. Supreme Court in *Wards Cove Packing Co. v. Atonio.*

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

**DISPARATE IMPACT DISCRIMINATION**

Before discussing disparate impact and disparate impact discrimination, an important distinction needs to be made: *Disparate impact simply means an agency’s PPTs have “substantially different passing rates” between groups (e.g., whites vs. Hispanics). Proving such is the first burden that occurs in employment discrimination litigation, and this weight falls squarely on the shoulders of the plaintiffs. If the plaintiffs meet this burden, the burden then shifts to the agency to show the PPT in question is in fact “job-related and consistent with business necessity” (see further discussion below). If the employer fails to carry this burden of proof, a judge can then draw a conclusion of *disparate impact discrimination.* The disparate impact analyses discussed below are relevant to the first burden of disparate impact litigation.

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

The 80% test (originally derived from the Uniform Guidelines), involves making a mathematical comparison between the passing rates of the comparison group (e.g., Hispanics) to the reference group (e.g., whites). For example, if 50% of whites passed a written test, and only 30% of Hispanics passed, an 80% test would show a violation because the Hispanic passing rate was less than 80% of the white passing rate (30% divided by 50% = 60%).

*Statistical tests* employ the use of advanced inferential statistical tests that answer the question, “Is the difference in passing rates so great that it cannot be attributed to chance?” In other words, statistical tests will identify whether chance, or something beyond chance, is the likely cause for the difference.

Note that these methods have been presented within the context of an agency’s testing practices (i.e., whether the agency’s PPTs have disparate impact). This is an important distinction because, under most circumstances, the only way a plaintiff can show disparate impact in a litigation setting is to identify a *particular employment practice* (e.g., a written test, interview panel or work-sample test) that is causing the disparate impact.

While the courts went back and forth on the question of whether an employer’s “entire selection or promotion practice” or “distinct selection or promotion practice” would be subject to scrutiny in a disparate impact case, Congress settled the matter with the passage of the 1991 Civil Rights Act, which states, “An unlawful employment practice based on disparate impact is established under this title only if a complaining party demonstrates that a respondent uses a *particular employment practice* that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity” (emphasis added). The two tests described above represent the most common methods used by plaintiffs in discrimination cases when evaluating an agency’s particular employment practice. However, other types of arguments can be used to shift the burden in disparate impact cases (i.e., other than proving an agency’s specific employment practices have disparate impact). Some of these methods are reviewed below. An important requirement for each of these alternative methods is that the agency must have a “manifest imbalance” or a “statistically significant underutilization” in the at-issue job. These terms are typically used in litigation to mean that there’s a “statistically significant” gap between the comparison group’s availability for employment or promotion (typically derived from a group’s representation in the qualified applicant pool for entry-level positions and the “feeder” positions for promotional positions) and the group’s current representation in the at-issue job or group of jobs. When such a statistically significant imbalance or underutilization exists, any of the five circumstances listed below can possibly lead to a court’s finding of disparate impact.

1. **The agency failed to keep applicant records (sometimes referred to as an “adverse inference”—see Section 4D of the Uniform Guidelines).** If an agency fails to keep applicant data, the government has reserved the right to infer disparate impact on the selection or promotion process if the agency has an imbalance in a job or group of jobs.

2. **The agency failed to disprove disparate impact data on the selection or promotional processes (Section 4D of the Uniform Guidelines).** Similar to No. 1 above, if agencies have an imbalance in a job or group of jobs and do not have information regarding the disparate impact of the various PPTs used in the selection or promotion process, an adverse inference can be made. Agencies should maintain passing rate data for their various selection and promotional processes, and PPTs that have disparate impact should be justified by evidence of job-relatedness and business necessity (see below).

3. **The agency’s recruiting practice was discriminatory toward the protected group (see Section 4D of the Uniform Guidelines).**
Guidelines and Hazelwood School District v. United States). For example, if the agency recruits for certain jobs only by word of mouth and the only employees who are informed about the job opportunities are a certain race and/or gender group, the agency can fall prey to a discrimination lawsuit. The authors are aware of countless such allegations in litigation settings (proving them, however, is a difficult task for the plaintiffs to accomplish). Plaintiff groups may also argue that minorities and/or women were funneled by the agency’s systems and processes into filling only certain position(s) in the agency.

4. The agency maintained a discriminatory reputation that chilled or discouraged protected group members from applying for the selection process (Section 4D of the Uniform Guidelines).

This argument has been made successfully in several discrimination cases and is a viable argument for plaintiffs to make in some circumstances. One way to help lessen the likelihood of this claim is to make your agency transparently open to all qualified members of the community. For example, appropriately portray employees who are typically under-represented in your agency in your recruiting literature or as representatives at community functions. This may help convince under-represented members of the community to apply.

5. The agency failed to conduct a formal selection process for the position and instead hired or promoted individuals through an appointment-only process.

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

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

TACTICS FOR DEFENDING DISPARATE IMPACT DISCRIMINATION SUITS

So long as a PPT is valid, it may not be illegally discriminatory in having a disparate impact against a protected group of employees (e.g., women or minorities). Validity in regard to civil rights issues typically refers to whether the PPT is job-related and a business necessity for its use exists.

VALIDATION STUDIES

Job-relatedness and business necessity are typically demonstrated through one of three court-approved methods: 1) content, 2) criterion and 3) construct-related validity studies.

The Uniform Guidelines provide minimum requirements for conducting validation studies; however, there appears to be no one correct method for conducting these types of studies. Agencies must often rely on the training and professional judgment of experts to determine the appropriate validation method and how to properly carry out a validation study in a particular setting.

When asked how a user (agency) can obtain professional advice concerning validation of selection procedures, the EEOC states, “Many industrial and personnel psychologists validate selection procedures, review published evidence of validity, and make recommendations with respect to the use of selection procedures.”

Many competent test development practitioners can be found through the Society of Industrial and Organizational Psychology (Division 14 of the American Psychological Association) and local colleges and universities. Competent test developers can also be found in many consulting firms. Although explicit and complete definitions of the three validation methods (i.e., content, criterion and construct) are beyond the scope of this article, brief (practical, not technical) definitions of each are provided below:

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

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

3. Construct validity evidence is a complex validation method typically obtained by demonstrating a triangular relationship between a specific trait or characteristic, a test said to measure such a trait and measures of job performance. Due to its complex nature, this type of validation method is seldom used in practice and litigation.

Sometimes, employers blindly rely on assertions of validity made by companies that produce or sell PPTs. This can result in unnecessary liability for the employer because it is their responsibility as the employer to ensure such assertions are true.

The Uniform Guidelines state that it is the “user’s responsibility to determine that the validity evidence is adequate to meet the Guidelines” and that “Users should not use selection procedures which are likely to have a disparate impact without reviewing the evidence of validity to make sure that the standards of the Guidelines are met.”

In other words, it is the agency that is liable if a PPT does not address the applicable validity standards, not the test
publisher or developer. It is, therefore, suggested that all PPTs be reviewed by an independent EEO expert for both validity and potential disparate impact before they are used for employment purposes.

ALTERNATE SELECTION PROCEDURES

Fairness should also be considered when validating a selection procedure. According to the Uniform Guidelines, an agency validating a PPT should conduct an investigation of suitable alternative selection procedures or methods that have less disparate impact. Section 3B of the Uniform Guidelines states, “Where two or more selection procedures are available which serve the user’s legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser disparate impact.”

One of the best methods to inoculate an agency from potential EEO lawsuits is to have conducted an alternative selection procedure investigation, and then have made an informed decision about using such a procedure before a PPT is used for employment purposes (e.g., hiring). It can be rather embarrassing, and sometimes potentially fatal in litigation, to defend against a civil rights complaint when it’s determined that alternative selection methods with lower disparate impact that equally serve the interests of the agency were readily available but not considered. This does not mean, however, that an agency is always required to use a PPT with less disparate impact, but it does indicate that the agency should explore and consider alternatives before using a PPT.

STANDARDIZATION

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

OUTSIDE CERTIFYING AGENCIES

Agencies might consider asking outside certifying agencies to review their selection practices and procedures. For example, the Commission on Accreditation for Public Safety Agencies Inc. (CALEA) has recommended guidelines for many human resource issues, such as hiring and promotion.

Although certification does not guarantee your agency is in compliance with state or federal civil rights laws, it does indicate to potential job applicants (and the community) that your agency is willing to have an impartial organization review your practices.

Agencies should also consider having outside EEO consultants, who are thoroughly familiar with the applicable civil rights requirements, review their PPTs to make certain legal exposure is minimized.

‘FACE’ VALIDITY

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

AN EMPLOYMENT DISCRIMINATION COMPLAINT

The first mistake agencies commonly make when potential civil rights issues are brought forth is a failure to immediately take these issues seriously. Potential plaintiffs often first attempt to work within an agency’s grievance system and choose to pursue a lawsuit only when other avenues appear to fail or when the agency fails to take the grievant’s claims seriously.

Caution against labeling grievances as complainers or malcontents, which serves only to reinforce negative perceptions they might have about their ability to be treated fairly by the agency and may signal to other employees that similar claims won’t be dealt with appropriately.

Many applicants are inclined to expect injustice unless they are provided clear, objective evidence to the contrary. For this reason, we urge agencies to make every effort to take these issues seriously at the earliest stages and to treat individuals who claim they are being treated unfairly with dignity and respect during all aspects of the process. Also, we suggest that every effort be made to resolve the issue at the lowest possible level, using the agency’s standard operating procedures or other rules as a guide.

Agencies often fail to admit early in the process when they have truly treated someone unfairly, which only delays the process. A sincere apology, accompanied by an offer to rectify the wrong, can frequently lead to a quick, and potentially less costly, resolution.

The authors are very familiar with a 1984 civil rights case in which the plaintiffs approached a public safety agency discriminating against female employees with an offer to settle for less than $25,000 and a promise from the agency to discontinue their unfair practices. Instead, rather than admit any wrongdoing, the agency chose to fight the charges for more than 15 years, despite overwhelming evidence it had, in fact, violated the civil rights of many of their female employees who were applying for promotion. It took millions of dollars in legal and settlement fees before the agency was able to satisfy the courts that it had rectified discriminatory practices it should have rightfully resolved decades before.

Let us assume, however, that a grievant has exhausted all internal grievance procedures and files a legal action against an agency for a civil rights violation. It’s a good idea to quickly gather a team of legal and employment experts. Consult with
attorneys who are thoroughly familiar with EEO issues. The plaintiff will likely seek out such an attorney, and agencies should do the same. Local government attorneys sometimes don’t have extensive experience in this area, so it’s often a good idea to seek outside expert legal assistance.

Consult with EEO and test development experts who have successfully dealt with similar issues in the past. These experts can identify what information and data need to be collected during the preparation of the case and conduct the statistical analyses necessary to refute a claim. They can also prepare rebuttals to plaintiffs’ arguments or theories about alleged discriminatory practices and otherwise aid in the defense of these claims.

Failing to take early action in preparing for a civil rights case can make the difference between winning, losing or settling.

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

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

Your defense should be based on strong legal and scientific arguments without getting personal. Everyone in the agency should treat the grievant with dignity and respect, even if you don’t agree with his or her complaints. Many interested parties both in and outside the agency are viewing the agency’s actions and how the agency treats the grievant. If grievances are treated with dignity and respect, agencies are more likely to be considered as fair and reasonable and are less likely to be sued by other employees at a later time.

Finally, if agencies have followed all of this advice and still lose, they should be graceful in the loss and appeal only for strategic, not reactionary, reasons. Animosity held toward a plaintiff after a suit is settled can lead to ill will within your agency and lower your agency’s reputation in the eyes of the community.

CONCLUSION

It almost goes without saying that if your agency has not yet been sued for a civil rights violation, it will be. However, many actions can be taken to reduce the likelihood that your agency will be held liable if such a complaint were to occur. Agencies that proactively make certain the selection PPTs they use are job related and fair for all applicants before a lawsuit is filed are much less likely to be the subject of civil rights litigation. Most of all, agencies that treat all their job applicants and employees with dignity and respect are setting up a foundation of fairness that may make it less likely they will be subject to a discrimination lawsuit in the first place.

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REFERENCES & END NOTES


5. 42 USC §2000e-2(k).

6. The common procedure for this type of analysis uses a two-tail “exact binomial” statistic.

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


