

Office of Research Services

Psycho-Legal Aspects of Behavioral Screening and Application to Biocontainment Laboratory Workers

Casey Skvorc, PhD, JD
Deborah E. Wilson, DrPH, CBSP
Division of Occupational Health and Safety
National Institutes of Health



Office of Research Services

Overview

- This presentation provides an overview of selected legal and psychological issues associated with the creation of behavioral screens for BSL-4 workers.
- It does not provide an analysis of all potential legal and psychological factors necessary for a behavioral screening process.
- Behavioral screening represents a pioneering effort to ensure public safety and protection of worker privacy.
- The NIH behavioral screening process has been operational for the past year, and will continue to undergo refinement as instruments and procedures are evaluated.



Office of Research Services

For group discussion:

- Which of the following occupations do you think currently, or in the past, have required applicants to answer the following questions as a condition of employment?
- Also, evaluate the applicability of any of these questions to actual job performance.



Office of Research Services

Occupations

- Air Traffic Controller
- Manager, Furniture Rental Store
- Police Officer
- NIH BSL-4 Laboratory Worker



Office of Research Services

Are these screening questions relevant to job performance?

- I like mechanics magazines
- My mother was a good woman.
- Evil spirits possess me sometimes.
- I have had very peculiar and strange experiences.
- I do not always tell the truth.
- I do not read every editorial in the newspaper every day.
- Once in a while I put off until tomorrow what I ought to do today.



Office of Research Services

- I have no fear of spiders.
- Peculiar odors come to me at times.
- I like repairing a door latch.
- I hate my whole family.
- I would like to be a journalist.
- I don't like other people giving opinions about their life.
- I have had no difficulty in keeping my balance in walking.



Office of Research Services

- When a man is with a woman he is usually thinking about things related to her sex.
- I would like to be a florist.
- My hearing is apparently as good as that of most people.
- I am not afraid of fire.



Office of Research Services

- My soul sometimes leaves my body.
- At one or more times in my life, I felt that someone was making me do things by hypnotizing me.
- I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.



Office of Research Services

Source: Minnesota Multiphasic Personality Inventory (various versions).

The MMPI-2 Law Enforcement Interpretive Report, for example, provides scores for the following scales:

- Personality Psychopathology
- Depression
- Hysteria
- Psychopathic Deviate
- Paranoia
- Schizophrenia
- Hypomania
- Social Introversion
- Fears
- Health Concerns
- Bizarre Mentation
- Anger
- Cynicism
- Antisocial Practices
- Type A Subscales
- Low Self-Esteem
- Social Discomfort
- Family Problems
- Negative Treatment Indicators



Office of Research Services

- All of the jobs listed, except NIH BSL-4 workers, have used versions of the MMPI as employment screening tests.
- We believe these test questions are not, without a demonstrated incident, related to a BSL-4 laboratory worker's job performance.



Office of Research Services

- Businesses and public service agencies are not alone in utilizing various testing measures for prospective employees.
- Consider the following questions used in a screening instrument for prospective players for the National Football League.



Office of Research Services

NFL Prospective Player Screening Question

Assume the first two statements are true. Is the final one “true”, “false” or “not certain”?

- Tom greeted Beth.
- Beth greeted Dawn.
- Tom did not greet Dawn.



Office of Research Services

Two additional questions for the NFL occupational group:

- A boy is 17 years old, and his sister is twice as old. When the boy is 23 years old, what will be the age of his sister?
- Three individuals form a partnership and agree to divide the profits equally. X invests \$9,000, & invests \$7,000 and Z invests \$4000. If the profits are \$4,800, how much less does X receive than if the profits were divided in proportion to the amount invested?



Office of Research Services

Wonderlic Personnel Test (WPT)

- WPT first applied in 1937.
- Since, more than 125 million job candidates have taken the WPT
- Approximately 40,000 companies each year use it for hiring, training, and promotion practices
- WPT figures prominently in two important Supreme Court decisions regarding employee testing.



Office of Research Services

With regard to the WPT:

- Men and women score about equally
- Median scores vary widely by occupation
- Chemists and attorneys score medians of 31 and 29, respectively
- Receptionists and assembly workers score medians of 21 and 16, respectively
- NFL players score a median of 22, with offensive tackles scoring 26, and halfbacks scoring 15.
- Only 1 person in 100,000 scores a perfect 50, and in the NFL only 2 have done so: both punters, both graduates of Harvard University.



Office of Research Services

The NIH Behavioral Screen for BSL-4 Laboratory Workers

- Measures include assessments for depression, anxiety, substance abuse, and safety attitudes.
- Each instrument used has been validated in published studies, although not (yet) with laboratory workers.



Office of Research Services

- Elevated levels of depression, anxiety, and substance abuse have been correlated with decreased worker productivity, accuracy and safety.
- Poor safety attitudes (high risk) are associated with higher incidence of occupational injuries and accidents.
- The consequences of decreased productivity, accidents, and worker injuries in a BSL-4 laboratory are substantial.
- Bruce Ivins and the “Amerithrax” case.
- The measures for depression, anxiety, and substance abuse are medical tests.



Office of Research Services

Review of Medical Tests

- Elevated scores on the medical tests, indicating moderate or greater depression/anxiety, or the presence of substance abuse, are reviewed by the Certifying Medical Authority (CMA), and a determination made if additional evaluation is indicated.
- A psychiatrist or clinical psychologist will interview the worker, and based upon their job elements, and in consultation with the worker's medical or mental health provider, make a recommendation to the CMA.



Office of Research Services

- This recommendation could include granting conditional privileges of lab admission for a specific period of time, unconditional privileges of admission, or denial of privileges to work in the laboratory.
- All recommendations specifically relate to the individual's ability to perform their job assignment in the BSL-4 laboratory.



Office of Research Services

Employee Safety Inventory

- The Certifying Official (CO) reviews the assessment report generated for each worker.
- The CO uses the assessment report to interview the worker, to make an assessment of the worker's attitudes and beliefs regarding compliance with safe laboratory practices and procedures associated with the BSL-4 laboratory.
- None of the screening instruments are used alone to disqualify a worker from gaining privileges to work in the BSL-4 laboratory.



Office of Research Services

Griggs v. Duke Power Co.

- Griggs v. Duke Power Co., 401 U.S. 424 (1971).
- African American employees challenged the employer's requirement of a high school diploma or passing of intelligence tests (Including the WPT) as a condition of employment in or transfer to jobs at the plant.
- The employer claimed no discriminatory purpose.



Office of Research Services

Griggs v. Duke Power Co.

- The employer testified the educational and/or intelligence test requirements were not related to a relationship of job-performance ability, but rather to generally improve the overall quality of the workforce.
- White employees who were not subject to the new educational/intelligence testing requirements because of grandfather-clauses, performed satisfactorily.



Office of Research Services

Griggs

- The promotion records of present employees who would not be able to meet the new criteria suggested the possibility that the requirements may not be needed even for the limited purposes of preserving the avowed policy of advancement within the Company. ***There was no showing of fulfilling a genuine business need.***



Office of Research Services

Griggs v. Duke Power Co.

The Supreme Court held the following:

- Tests must reflect a reasonable measure of job performance.
- Any (testing) requirement must have a manifest relationship to the job in question.



Relevant Findings

- “History is filled with examples of men and women who rendered highly effective performance without diplomas or degrees.”
- “Diplomas and tests are useful servants, but Congress (through Title VII of the Civil Rights Act) has mandated the commonsense proposition that they are not to become masters of reality.”



Relevant Findings

- “Title VII expressly protects the employer’s right to insist that an prospective applicant, regardless of race, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.”



Relevant Findings

“Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are *demonstrably a reasonable measure of job performance*.” (emphasis added)



Final Word

- “What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract.”



Office of Research Services

Albemarle Paper Co. vs. Moody (1975)

- Albemarle Paper Company required applicants for employment, in skilled positions, to have a high school diploma and to pass two aptitude tests, the Revised Beta Examination and the Wonderlic Personnel Test.
- In the 1950s, after the plant was modernized with new more sophisticated equipment, the Company introduced the high school diploma requirement.
- The Company soon concluded this requirement did not improve the quality of the workforce.



Office of Research Services

Albemarle Paper Co. vs. Moody

- Later the company added the WPT and the Beta Test.
- The company made no attempt to validate the tests for job-relatedness and simply adopted the norm score of 18 as a cut-off point for new job applicants.
- After discontinuing segregation in 1964, the Company allowed A-A workers to transfer to skilled positions only if they could pass the Beta and Wonderlic Tests. Few succeeded. Incumbents (white) were not required to pass the tests to retain their jobs.



Office of Research Services

Albemarle Paper Co. vs. Moody

The Supreme Court referenced EEOC guidelines which find that discriminatory tests are impermissible unless they are shown to be *predictive of or significantly correlated with important elements of work behavior* which comprise or are relevant to the job or jobs for which the candidates are being evaluated.



Office of Research Services

Albemarle Paper Co. vs. Moody

- The Company's validation study showed correlation between test score and job performance, as measured by supervisor ratings of job competence, for only 3 of the 8 job types.
- The Company attempted to generalize the validity of the tests to all 8 job types.
- The rankings for job competence, as rated by supervisors, were extremely vague and "fatally open to divergent interpretations."



Office of Research Services

Albemarle Paper Co. vs. Moody

“There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors were considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind.”



Office of Research Services

EEOC Guidelines for Employment Tests and Selection Procedures

- On May 16, 2007 the U.S. Equal Employment Opportunity Commission held a public meeting on Employment Testing and Screening.
- A fact sheet was issued to provide technical assistance on common issues relating to federal anti-discrimination laws and the use of tests and other selection procedures in the employment process.



Office of Research Services

Governing EEO Principles

An employer can establish that a selection procedure is job-related and consistent with business necessity by showing the test or selection procedure is necessary to the **safe** and efficient performance of the job.



Office of Research Services

Governing EEO Principles

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or UGESP.
- UGESP provides uniform guidance for employers on how to determine if their tests and selection procedures are lawful for purposes of Title VII disparate impact theory.
- UGESP provides guidance to employers on how to demonstrate job-relatedness by test validation.



Office of Research Services

Americans with Disabilities Act

- Prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities.
- When hiring, an employer may not ask questions about disability or require medical exams until ***AFTER a conditional job offer is made to the applicant.***



Office of Research Services

Americans with Disabilities Act

- After making a job offer, but before the person starts working, an employer can ask disability-related questions and conduct **medical examinations** as long as it does so for ***all individuals entering the same job category.***
- With respect to employees, an employer may ask questions about disability or require medical exams ***only if doing so is job-related and consistent with business necessity.***



Office of Research Services

Americans with Disabilities Act

- An employer can request medical information when it has a reasonable belief, based upon objective evidence, that a particular employee will be unable to perform essential job functions **or *will pose a direct threat because of a medical condition.***
- Tests cannot be used to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, ***is shown to be job-related and consistent with business necessity.***



Office of Research Services

Proposed Best Practices

- It is critically important that the process is transparent to employees participating in personnel reliability programs including those utilizing behavioral health screens.
- Seminars or group meetings describing the process are valuable in establishing the participant's comfort with the process.
- Questions and discussions regarding the process should be encouraged and facilitated.
- Administer the test(s) consistently, to every worker or applicant.



Proposed Best Practices

- Personnel reliability requirements should be clearly stated in job descriptions and announcements.
- Maintain the tests and results in a secure area, with strictly enforced accessibility.
- Describe the data security measures to all participants.
- Establish the validity of each testing instrument (Does it test what it says it tests?), and the application of the test and its results to *job elements and performance*.



Proposed Best Practices

- An independent expert source should confirm the validity of each testing instrument and its application to the job.
- Ensure that the safety message is clearly associated with the program.
- Behavioral health screening programs should be administered by occupational medical services.
- Test results are not the sole determinate for hiring.



Proposed Best Practices

- Results obtained from use of behavioral health screening tools must be interpreted by a behavioral health professional within the context of the job and of the individual's life events.
- To have value, behavioral screening should be performed on a routine basis and at least annually.

