



Legal Challenges through the Eyes of Experts and Attorneys

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John Weiner, PSI
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IPAC Annual Conference, Columbus OH
July 21, 2013



Agenda

1:30-1:40	<i>Introductions</i>
1:40-2:05	<i>Keith Pyburn</i> - Legal Foundations & Cases
2:05-2:30	<i>John Weiner</i> - Assessment Foundations & Issues
2:30-2:55	<i>Jeff Feuquay</i> - How to Get Sued Gracefully
2:55-3:00	<i>Q & A and Closing Comments</i>



Galileo Galilei

Astronomer

*“I have never met
a man so
ignorant that I
couldn’t learn
something from
him.”*

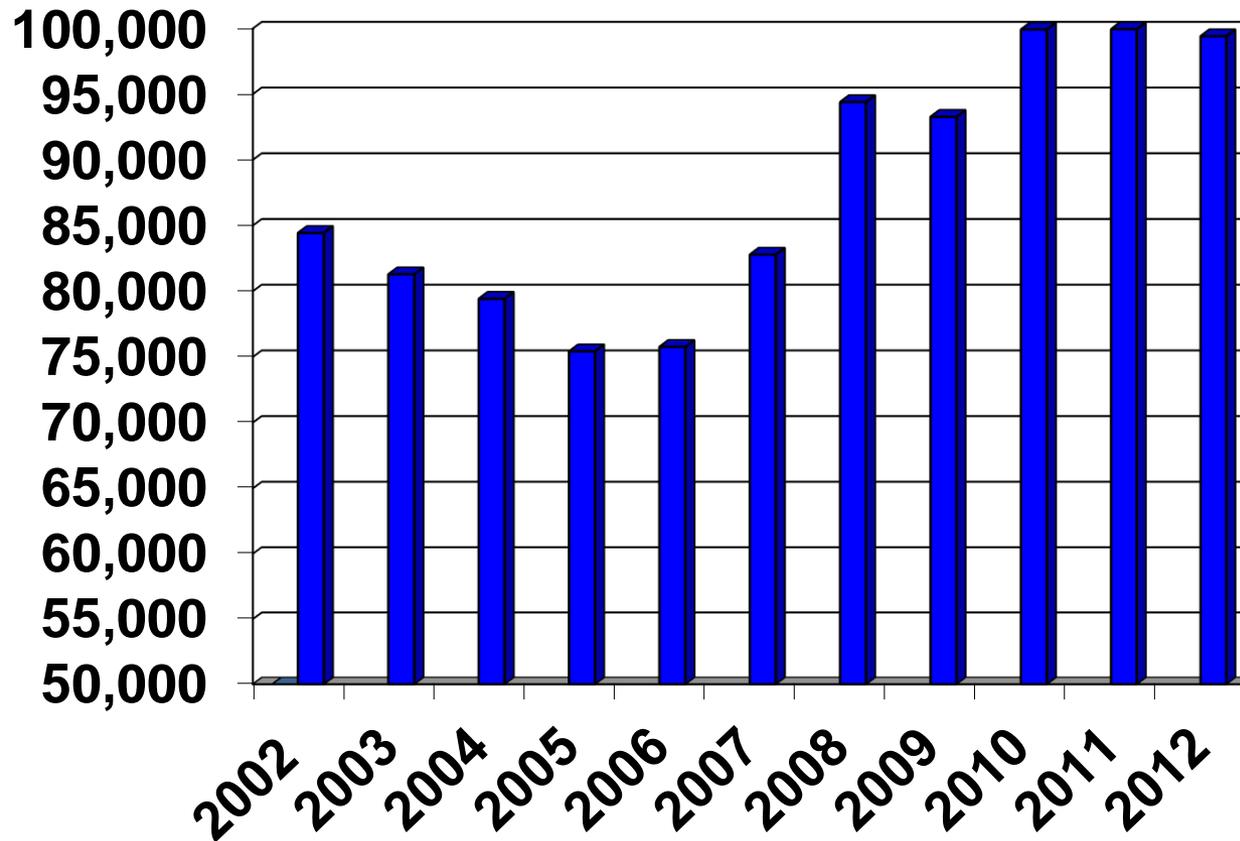


Legal Foundations & Cases

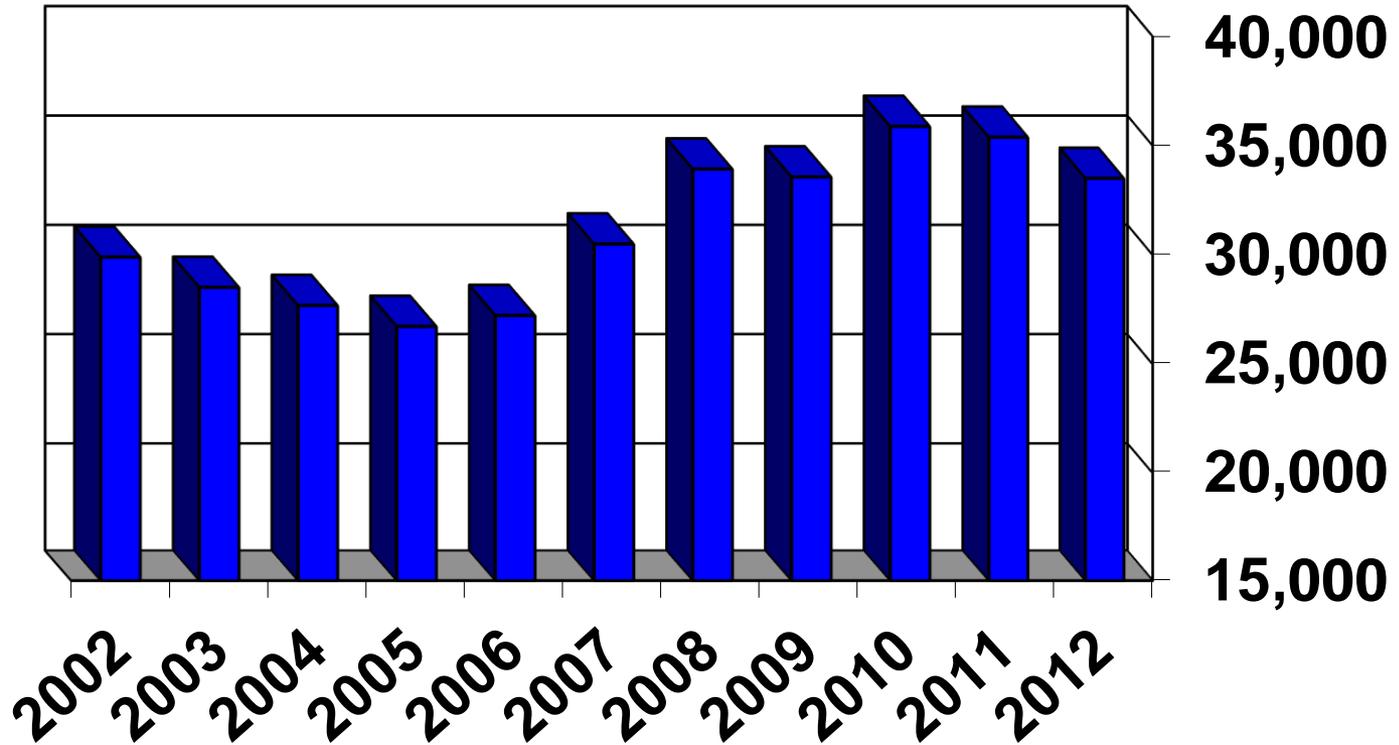
Keith Pyburn

Fisher & Phillips LLP

TOTAL EEOC CHARGES



EEOC CHARGES - RACE



The EEOC Disparate Impact Initiative

- What It Is
 - On April 25, 2012 the EEOC – (by a 4 to 1 vote) issued its “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.”
 - Argues that statistics show that minorities are disproportionately convicted of crimes.



Criminal Background Checks

New Guidance

- Use the *Green* factors (and a few more) to make an *individualized assessment*.
 - Facts surrounding the offense
 - Number of offenses for which the individual was convicted
 - Evidence that the person performed the same type of work, post conviction, with a different employer, with no criminal conduct
 - Length and consistency of the employment history before and after the offense
 - Additional training/education
 - Character references
 - Contributions to society; rehabilitation efforts
 - Age at the time of the offense; age now

EEOC Files Suit for Use of Criminal Background Checks

- BMW
 - BMW required employees to re-apply for positions during a “transitional period”
 - Criminal background checks were completed
 - As many as 70 black employees fired due to criminal convictions
- Dollar General
 - Dollar General completes background checks on all applicants
 - One black woman disqualified and job offer withdrawn for 6-year-old felony drug conviction even though she had four years prior experience with competitor
 - Another black woman disqualified and job offer withdrawn for felony conviction on a criminal background report that allegedly contained errors

Individualized Assessment: Process

- If conducted, the employer should:
 - inform the applicant that he or she may be excluded based on the past criminal conduct
 - provide an opportunity to the individual to establish that the exclusion should not apply; and
 - consider whether the individualized assessment shows that the policy should not be applied to the applicant

The Supreme Court Term

- *Fisher v. University of Texas at Austin*
 - Race in University Admissions
- *University of Texas Southwestern Medical Center v. Nassar*
 - Mixed motive standard
- *Vance v. Ball State University*
 - Limiting of definition of supervisor
- *United States v. Windsor*
 - DOMO
- *Hollingsworth v. Perry*
 - California's Proposition 8

The Supreme Court Term

- *Fisher v. University of Texas at Austin*

Student diversity remains a permissible basis for preferences in admissions

BUT

University must PROVE it is needed and NO lesser intrusive alternative would work

Grutter v. Bollinger, 91 FEP Cases 1761 (U.S. 2003)

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. *Bakke, supra*, . . . In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.

Fisher v. University, 118 FEP Cases 1459 (U.S. 2013)

To implement these canons, judicial review must begin from the position that “any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.” *Fullilove, supra*, at 523 (*Stewart, J., dissenting*); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Strict scrutiny is a searching examination, and it is the government that bears the burden to prove “that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,” *Croson, supra*, at 505 (quoting *Fullilove*, 448 *supra*, at 533–535 (*Stevens, J., dissenting*)).

Fisher v. University, 118 FEP Cases 1459 (U.S. 2013)

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.

The Supreme Court Term

- *Fisher v. University of Texas at Austin*

- *Still unanswered questions*

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter v. Bollinger, 91 FEP Cases 1761 (U.S. 2003)

It's been 10 years.

Developments in Validation Law

- *M.O.C.H.A Soc'y v. City of Buffalo*, 115 FEP Cases 929 (2d Cir. 2012)
 - Court approves deductive evidence as supporting relevance of state wide job analysis for validation of test in the City of Buffalo.

Can an employer show that promotional examinations having a disparate impact on a protected class are job related and supported by business necessity when the job analysis that produced the test relied on data not specific to the employer at issue?

Developments in Validation Law

- *M.O.C.H.A Soc'y v. City of Buffalo*, 115 FEP Cases 929 (2d Cir. 2012)
 - Court approves deductive evidence as supporting relevance of state wide job analysis for validation of test in the City of Buffalo.
 - ... While employer-specific data may make it easier for an employer to carry his burden at the second step of Title VII analysis, such evidence is not required as a matter of law to support a factual finding of job relatedness and business necessity.

Developments in Validation Law

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 - Court approves deductive evidence as supporting relevance of state wide job analysis for validation of test in the City of Buffalo.

Where, as here, the district court hears extensive evidence as to how an independent state agency (1) determined, based on empirical, expert, and anecdotal evidence drawn from fire departments across New York and the nation, that the job of fire lieutenant, wherever performed, involves common tasks requiring essentially the same skills, knowledge, abilities, and personal characteristics; and (2) developed a general test based on those findings, we conclude that the district court had sufficient evidence to make a preponderance finding that Buffalo's use of that test to promote firefighters to the rank of fire lieutenant was job related and consistent with business necessity.



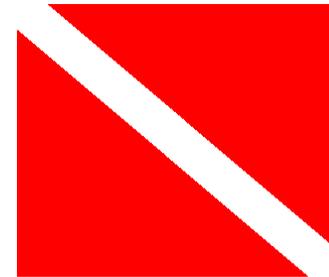
Assessment Foundations & Issues

John Weiner

PSI Services LLC



1. *Assessment Context*
2. *Validity*
3. *Validity Generalization*
4. *Validity-Diversity Dilemma*
5. *Approaches to Reducing AI*



*Deep dive
warning*

❑ *Assessment plays a critical role in identifying candidates who possess the KSAOs required for job success*

- **Domains** (*cognitive, noncognitive*)
- **Taxonomies** (*Fleishman, o*net*)
- **Types** (*MCQ, multimedia*)
- **Uses** (*selection, development, talent review, succession*)

The Iceberg Model



Competencies
Skills
Knowledge



Abilities
Traits
Attitudes
Motivation
Interests

(Reynolds & Weiner, 2008)

Reynolds & Weiner, 2009

“Validity is ...the most fundamental consideration in developing and evaluating tests.”

Standards for Ed & Psych Testing (AREA et al, 1999, Ch. 1, p.9)

Additional References:

Principles for the Validation and Use of Personnel Selection Procedures (SIOP, 2003)

Uniform Guidelines on Employee Selection Procedures (EEOC et al, 1978)

❑ **Scientists once believed in “specificity”**

- Validity of a test for a job will vary by organization for reasons “difficult to explain” (Ghiselli, 1966)
- Bank teller ≠ Bank teller
- Implication: local validation studies must be repeated

❑ **Science evolved: Advances in analytic methods over several decades**

- Observed validity differences due to artifacts (sampling error)
- Compelling evidence that validity generalizes across situations – “Situational specificity” dispelled (Schmidt & Hunter, 1998)
- Bank teller = Bank teller

“At times, sufficient accumulated validity evidence is available for a selection procedure to justify it’s use in a new situation without conducting a local validation research study”
([SIOP, 2003, p. 27](#))

❑ VG Methods (SIOP 2003)

- ***Transportability*** Local job analysis to demonstrate similar work behaviors (**consistent with Uniform Guidelines*)
- ***Synthetic/Job Component Validity*** Local job analysis to demonstrate similar job components.
- ***Meta-analysis*** Rely upon aggregated criterion-related validity studies for similar jobs (**state of the science*)

❑ **The Uniform Guidelines do not recognize meta-analysis**

- Written in 1978 before VG research was completed
- “Specificity” is still presumed -- a local validation study is needed

❑ **Adverse Impact remains a trigger for legal scrutiny and the ensuing cost to the organization to defend its practices**

- OFCCP audit escalation – AI is presumed evidence of discrimination
- EEOC complaints

The most predictive tests tend to produce subgroup differences

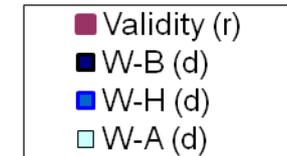
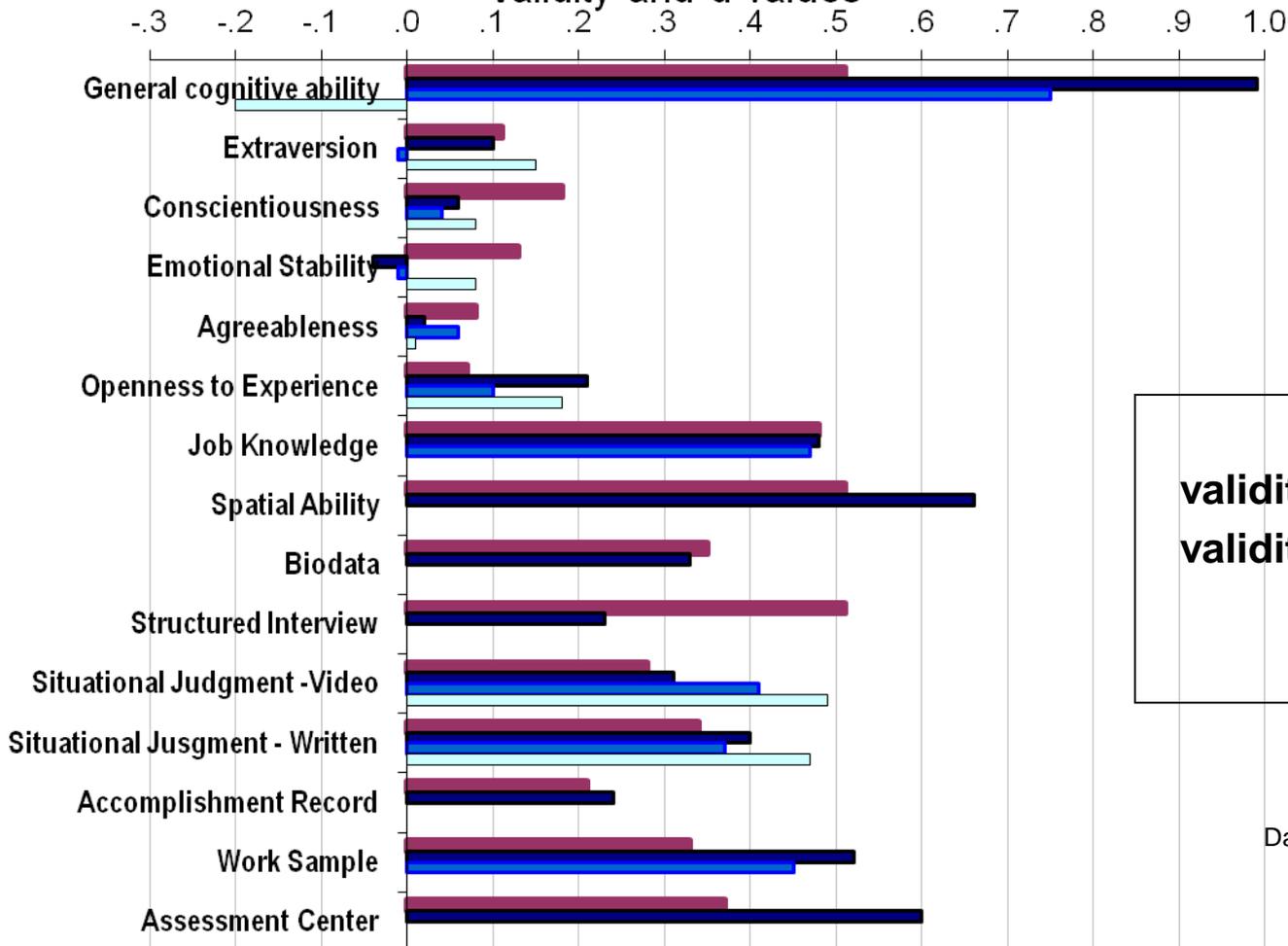


Validity

Adverse impact

Validity-Diversity Tradeoff: The Most Predictive Assessment Types Tend to Produce Subgroup Differences

Validity and d-values



Correlations:
validity with d (W-B) = .49
validity with d (W-H) = .75
 (Weiner, 2008)

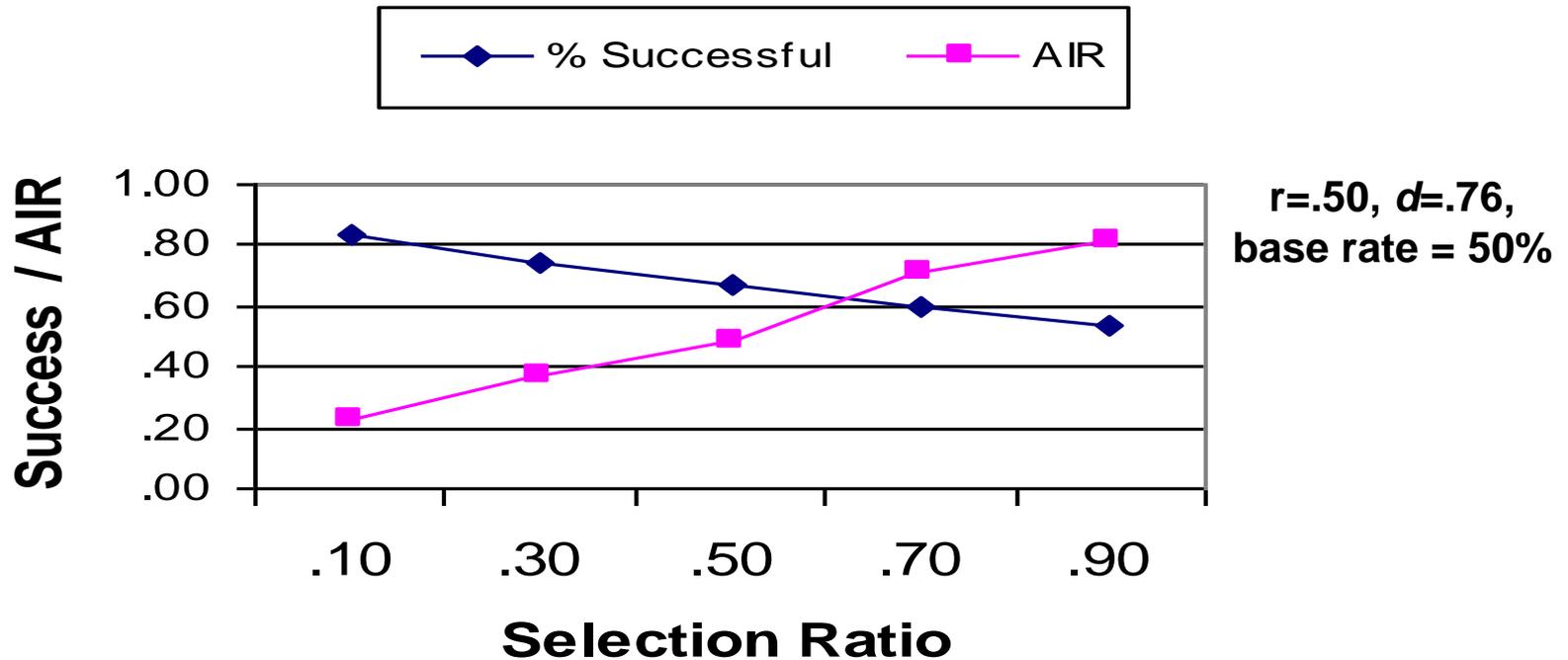
Data from Ployhart & Holz (2008)

1. Measure Additional Relevant Constructs (Non-cognitive) + + +
2. Adjust Scoring (Weighting, Banding, cut score) + +
3. Use Alternative Assessment Methods + +
4. Use Alternative Modes of Administration + +
5. Remove “Biased” Item Content +

6. Adjust Instructions and Context +
7. Provide Practice +
8. Modify Test Time (0)

Sackett, et al (2001), Ployhart & Holtz (2008)

Example: Adjusting the Cut Score



Taylor – Russell expectancy values;
d values from Bobko, et al 1999)

Example: Adjusting test weights

Weights		Validity ^a	Adverse Impact ^b	
Cognitive	Temperament		30%ile	70%ile
100	0	.22	.57	.36
90	10	.25	.57	.36
80	20	.28	.57	.36
70	30	.31	.62	.34
60	40	.32	.66	.34
50	50	.34	.67	.43
40	60	.32	.69	.50
30	70	.30	.73	.60
20	80	.28	.77	.67
10	90	.26	.80	.69
0	100	.25	.83	.76

Job: Call Center Representative

Cognitive: Basic Skills Tests

Temperament: ViewPoint™

Criterion: Training/Job Performance

^a N = 187

^b N = 818 Whites, 240 African Americans

r = .15
between
tests

- ❑ *Science has evolved in the validation of assessments – local studies are not always needed*
- ❑ *Legal guidelines have not evolved – local studies are needed*
- ❑ *Users are faced with a validity-diversity dilemma*
 - *The most predictive (cognitive) tests tend to have adverse impact*
- ❑ *AI can be reduced but not eliminated when cognitive is measured*
 - *Thus, legal defense (local study?) is required*



How to Get Sued Gracefully

Jeff Feuquay

Psychology-Law Center LLC



Why do organizations get sued?



*What proportion of
discrimination lawsuits are
won by the organization?*

Let's get real . . .

You've lost when the
suit gets filed.

Who's Running the Show?

- ✓ Plaintiff(s)

- ✓ Attorneys

yours, theirs, Attorney General

- ✓ Insurer

- ✓ Defendant(s)

Commencement of Action



- ❖ **Notice Pleading - Stone Soup**
 - ❖ EEOC or local agency done

Oh yea?

Defenses and Objections

- Use ‘em or lose ‘em

Judgment on the Pleadings

- Even if everything they say is true . . .

Counterclaims & Cross Claims

- “You not so great yourself” & “It was him, not me”

Parties

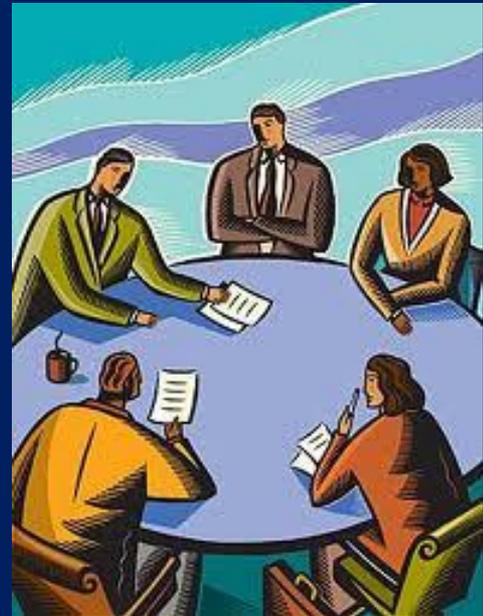
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Scheduling Conference

Joint Status Report
Scheduling Order

Mediation



Discovery

- **Interrogatories, Requests for Admission & Production**
- **Depositions** (more in a moment)
- **Obligation to Preserve Evidence**
 - What is “evidence”
- **Sanctions**

Summary Judgment

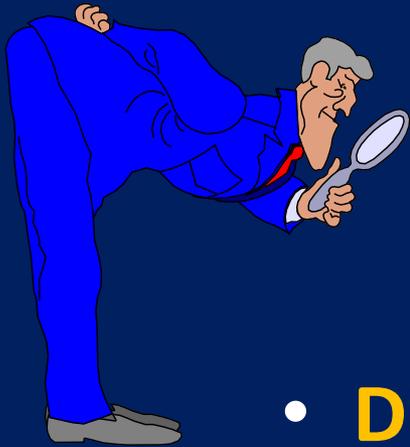
Depositions

- **Beware the friendly opposing attorney.**
 - honey, vinegar and flies
- **Yes . . . what you say can be used against you.**
- **Deposition is not where case is won.**

Last Stuff Before Trial

- Final Pretrial Conference
- Judge brokered settlement
 - Pressure to settle may be high, depending on judge





Examination of Witnesses & Introduction of Exhibits

- **Direct & Cross-examination**
 - hearsay and argumentative
- **Sponsoring Exhibits**
 - e.g., Business Records

Submission of Case to Jury

- General & Specific Instructions

Appeals

➔ **Digression** - The Genius of Our
Countermajoritarian System

➔ **Interlocutory v. Final Judgments**

➔ **Standard of Review**

- De Novo
- Abuse of Discretion - Against the Clear Weight of the Evidence





Questions?

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July 21-24, 2013
Sheraton Columbus at Capitol Square

*Balancing Legal Trends and Organizational
Goals/Values in the Use of Assessment*

Thank you & enjoy the conference!

Keith, John & Jeff

*Weiner, Pyburn and Feuquay
have left the building.*