



Personality Tests in Employment: A Continuing Legal, Ethical, and Practical Quandary

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Abstract

The controversy in human resource practice and law today continues, to wit: -the use of personality tests in employment, typically online tests, which human resource practitioners are increasingly using in the hiring process, especially for executives, sales, and customer service positions. Selecting the right people for the right positions is, of course, one of the elements of success for any business. Accordingly, it is imperative for the employer to choose highly qualified people for open positions. This article examines the effectiveness, legality, fairness, and morality of personality tests in employment. Legal aspects of the use of personality tests are examined, principally pursuant to the U.S. Civil Rights Act and the Americans with Disabilities Act. An ethical analysis of personality tests is provided to determine if their use in the context of employment is moral. The legal focus of the article is primarily on the private sector, but the principles are applicable across the board. The implications of the use of personality tests in employment are raised; and accordingly several recommendations are supplied to achieve a legal, moral, and practical use of personality tests in employment.

Key words: Personality tests, Civil rights, ADA, Minnesota Multitphasic Personality Inventory (MMPI), hiring, employee selection, employment interviews.

BRIEF HISTORY OF PERSONALITY TESTS

Personality tests can be an effective tool to determine which job applicants are most qualified or suitable for employment. Employers use personality tests to screen applicants for jobs to determine eligibility and suitability for employment as well as to ascertain if current employees are prepared for promotions or other assignments. Since people are usually a firm's greatest assets, personality tests can seek to determine such characteristics as honesty, integrity, persistence, motivation, teamwork, social skills, conscientiousness, and discipline

(Ejuma, 2015; Mujtaba, 2014). They typically are used with other more traditional assessment tools such as the resume and job interviews. Yet the increased use of personality tests has prompted a debate as to their effectiveness, morality, fairness, as well as legality. Consequently, the purpose of this article is to analyze the practicality, effectiveness, legality, morality, and fairness of personality tests in employment. First, certain background information pertaining to personality tests will be supplied.

Personality tests have been around for a long time; they were created in the “modern” era by scientists, psychiatrists, and psychologists one is likely to be familiar with, to wit: Sigmund Freud, Eduard Spranger, Carl Jung, Abraham Maslow, Erik Fromm, Henry Link, John Watson, and Isabel Briggs and her mother, Katherine Briggs (i.e., “Myer-Briggs”) (Gonzales-Frisbie, 2006; Devito, 1995; Hendrickson and Giersecke, 1994). Gonzales-Frisbie (2006, p. 188) relates that “Swiss psychiatrist Carl Jung believed that behavior was affected by personality, and several decades later, psychologists used that theory to develop personality tests.” Psychological testing, therefore, particularly the use of instruments designed to assess personality traits, has a long, rich, and somewhat controversial history. Selection and the use of varied personality assessments originated in the late 19th century (Scroggins, Thomas, & Morris, 2008; Gonzales-Frisbie, 2006). Armond (2012) further relates:

The earliest modern personality tests arose in the field of psychotherapy, which developed these tests to help treat troubled individuals, to provide both therapist and patient with information about the malfunctioning of the patient's mind. Thus, personality tests were intended to be part of a comprehensive clinical work-up. However, when mental health specialists became interested in testing personalities, employers especially in the post- World War II era, began to need to sort through large numbers of applicants to find appropriate personnel (pp. 1137-38).

The early research and literature reviews on personality testing found low validity and reliability coefficients. Contemporary researchers remained concerned about low predictive validity, high development and use costs, and considerable risks for adverse impact. Current debate focuses on the invasion of privacy and a lack of acceptance by test-takers (Scroggins, Thomas, and Morris, 2009; Mujtaba, 2014). Recent research in personality testing has modified some of these findings and accordingly provides more optimism about the role of personality testing in selection (Scroggins et al., 2009). Guion and Gottier (1965) reviewed the early years of research on the use of personality tests in selection contexts; and they remarked that “It is difficult in the face of this summary to advocate, with a clear conscience, the use of personality measures in most situations as a basis for making employment decisions about people” (p. 160). This view was the commonly held perspective for many years regarding the validity of personality tests for personnel selection; and then came the research of Barrick and Mount (1991) who concluded that meta-analytically corrected estimates of validity were meaningful, and personality measures thus should once again be considered.

Accompanying this research was a resurgence of interest in the use of personality tests in high-stakes selection environments (Morgeson, Campion, Dipboye, Hollenbeck, Schmitt, and Murphy, 2007). Armond (2012, p. 1147) further relates that “employers may have turned to personality testing after the federal government outlawed the use of polygraph tests in most private sector employment.” Interest in and research on personality testing in industrial-organizational psychology, therefore, has dramatically increased in the past 10 years; and yet human resource practitioners continue to face potential problems associated with the current operational use of personality (Morgeson et al., 2007).

Yet today, despite the challenges, personality tests continue to be increasingly used by companies and human resource practitioners to not only determine knowledge, skills, cognitive abilities, but also personality traits and other characteristics of employees and applicants; and, significantly, they are also being used to predict behavior (Weber and Dwoskin, 2014; Mujtaba, 2010; White, 2006). Employers are increasingly using personality tests in order to identify characteristics of job applicants and thus hire and to retain the “right” type of “qualified” employees for particular jobs. In essence, employers are trying to determine if job applicants will be successful in certain types of jobs; that is, employers are attempting to create a “success profile” for the job in question (Schoenberger, 2012, p. B10). The Wall Street Journal (White, 2006, p. B3), in addition, quoted a “senior” development director for a large resort who stated that “prehire personality tests are especially helpful in hiring salespeople. Sales applicants are usually able to make a good impression – and thus interview well – but sometimes offer answers that don’t display great urgency.”

The personality testing business for employment has now grown to a \$500 million business; and is growing 10% to 15% a year (Weber and Dwoskin, 2014, p. A1). These “tests are being used more often as well as earlier in the employment process” in order to screen applicants for employment (Weber and Dwoskin, 2014, p. A2). Moreover, 60% to 70% of potential employees in the U.S. are being tested, which percentage has increased from 30% to 40% from approximately five years ago (Weber and Dwoskin, 2014, p. A1). The U.S. Equal Employment Opportunity Commission (Press Release, 2007, p. 1) gave reasons for the manifest increase in employment testing, to wit: “post 9-11 security concerns and issues related to workplace violence, safety, and liability” and, “in addition, “the large scale adoption of online job applications (which) has motivated employers to seek efficient way to screen big applicant pools in a non-subjective way.” Personality testing has become not only a prevalent practice but also “big business.”

Definition and Types of Personality Tests

The first challenge in defining personality tests is to define the term “personality.” This task is very difficult because, as Armond (2012, p. 1138) points out, “in contrast to behavior, which is an actual example of a person’s conduct, personality cannot be observed, measured, or tested directly.” Rather, personality is deemed to be an inference or construct or hypothesis of traits or characteristics drawn from behavior; and, moreover, traits are deemed to be a distinguishing way in which one person behaves compared to other people (Armond, 2012). Yet further complicating the definitional challenges is the fact that traits often act with situational variables (Armond, 2012). Armond (2012, p. 1138) provides an example of the preceding point: “Someone may generally be shy, but in a particular situation (such as a party among close friends) that individual may shed her shyness.”

There are a variety of personality tests as well as definitions thereof. The EEOC (Fact Sheet on Employment Tests and Selection Procedures, 2014) defines personality tests as well as integrity ones as tests used to “assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism).” Mulvihill (2006, p. 876) relates that personality tests are a “subset of psychological testing” and “evaluate the thoughts, emotions, attitudes, and behavioral traits that comprise personality.” Armond (2012, p. 1141) states that “honesty” and “integrity” tests are a “subset” of personality tests and are used to seek “to identify those individuals who might be more likely to steal, fake sickness, or otherwise dissemble on the job.” Armond (2012), Kramer (2007), and Mulvihill (2006) state that personality tests are divided into two principal types: objective or projective. Armond (2012) explains the distinction:

In an objective test, the target may choose from only a limited number of possible responses. A...popular objective test is the Myers-Briggs Type Indicator. The Myer-Briggs Type Indicator asks targets 100 questions, each of which offer two descriptive words and phrases from which the target must select, leading to the target being assigned to one of sixteen personality types....In contrast to an objective test, in which a target may choose from only a limited number of responses, a projective technique permits a virtually 'unlimited variety of possible responses.' In a projective test, an examiner provides a relatively unstructured task to a target and then tries to discern themes that arise from the words the target uses in response to that task. Possibly the most famous of these is the Rorschach Inkblot test (pp. 1139-40).

Kramer (2007) further explains:

Objective tests, otherwise known as 'paper and pencil tests,' often contain various true and false questions. The answers then reveal certain personality traits. For example, the Minnesota Multiphasic Personality Inventory (MMPI) contains over 500 true and false questions involving issues such as religion, sex, politics, health, phobias, and family traits. Individuals may use the MMPI to diagnose psychological disorders as well as personal traits....Projective tests, which also can be used for medical or non-medical purposes, do not seek finite answers or true/false responses. Rather, projective personality tests subject the test taker to various 'ambiguous stimuli,' and the results from the test taker's response to such stimuli (pp. 1282-83).

As noted, the classic example of a "projective" test is the famous Rorschach ink blot test (Armond, 2012; Kramer, 2007). Another example is the Thematic Apperception Test, which uses pictures to ascertain personality traits (Armond, 2012). However, the aforementioned tests are not typically included in the compendium of employment tests as they require a terminal degree as well as training to interpret, and, as such, they are not designed for employment testing (Hogan, Hogan, and Warrenfeltz, 2007; Hunsley, Lee, and Weeod, 2003; and Impara, Murphy, Plake, and Spies, 2002). A test that is widely used in business is the California Psychological Inventory (CPI, Hogan Leadership Series (Hogan, Hogan and Warrenfeltz, 2007).

Personality tests also can be "screen-out" and "screen-in" tests. An example of a "screen-out" test is the Minnesota Multiphasic Personality Inventory (MMPI), which is based on true/false questions, and is used, particularly by law enforcement agencies, to determine tendencies toward substance abuse and psychological pathology (Armond, 2012). Whereas an example of a "screen-in" test is the Myers-Briggs, which is a test that requires test-takers to choose from two possible answers to a series of questions (Armond, 2012). The test is used by employers and seeks to ascertain leadership and teamwork characteristics and skills (Schoenberger, 2012). Another example is the Salovey-Caruso Emotional Intelligence Test, which "is designed to measure emotional intelligence by assessing a person's capacity to identify emotions in others. Aptitude in these areas is particularly important for customer service positions" (Knight, 2006, p. B3A). Two other emotional intelligence tests are Goleman's ECI and the Rueven Bar-On EQI (Ciarouchi, Chan, and Capuli, 2000).

One example of a personality test question comes from an online test used by RadioShack for people who apply online for jobs. The question asks: "Over the course of the day, I can experience many mood changes" (Weber and Dwoskin, 2014, p. A2). Another used by Lowe's asks applicants if they "believe others have good intentions." One used by McDonald's states: "If something very bad happens, it takes me some time before I feel happy again." The Kroger supermarket chain has approximately 80 personality based questions in its basic employment

test. For example, job applicants are asked if they “strongly disagree,” “disagree,” “agree,” or “strongly agree” with the following statements: “You are always cheerful” and “You have no big worries (Weber and Dwoskin, 2014, p. A1). Another example provided by Menjoge (2003, p. 327) is from a questionnaire used by Target for applicants for security officer positions, which asked 704 questions, including answering true or false to the following: “I believe there is a Devil and a Hell in afterlife” and “I have often wished that I was a girl (or if you are a girl) I have never been sorry I am a girl.” Korn (2012, p. B9) provided other examples of several questions taken from personality tests with an explanation of what the test is trying to measure, to wit:

- “On television, I usually prefer watching an action movie than a program about art.” – This question is from 16PF, the Sixteen Personality Factor Questionnaire, and is intended to predict a person’s preference for logic over emotion. Also, someone who answers “rarely” may be more of a creative person.
- “People often expect too much of me” – This question is from the California Psychological Inventory, and is designed to determine the taker’s “conceptual fluency,” that is, the capability to comprehend complex concepts. Thus, a person who answers “‘true’ is likely to be overwhelmed and may not believe in his or her own talent.”
- “I would never step over others in order to ensure my own success.” - This question is from the Caliper Profile and is designed to measure a person’s aggressiveness.
- “I do many things better than almost everyone I know.” – This question is from the Hogan Personality Inventory, and is designed to indicate confidence or arrogance. Thus, a false response “conveys humility or insecurity.”
- “Answer the following on a five-point scale, whether it is more true or more false: ‘is uneasy when receiving praise.’” This question is from the Workplace Big Five Profile 4.0, and is used to determine confidence, especially among potential salespeople (Korn, 2012, p. B9).

Mulvihill (2006, p. 865) relates some of the questions from the Minnesota Multiphasic Personality Inventory (MMPI), which is a widely used personality test, and, significantly, is also one used to diagnose mental illnesses. The MMPI test-taker is asked to answer “True, False, or Cannot Say” to such questions as:

- “I see things or animals or people around me that others do not see.”
- “I commonly hear voices without knowing where they are coming from.”
- “At times I have fits of laughing or crying that I cannot control.”
- “My soul sometimes leaves my body.”
- “At one time or more in my life I felt that someone was making me to things by hypnotizing me.”
- “I have a habit of counting things that are not important such as bulbs or electric signs, and so forth” (Mulvihill, 2006, p. 865).

Accordingly there are a wide variety of personality tests, as well as questions therein, used by employers to ascertain the personality traits of their current employees and job applicants. So, why are these tests being used so extensively by employers?

Rationales for Personality Tests

Employers provide several reasons for the use of personality tests. One main reason that proponents of the tests cite is that there exists, as stated by Mulvihill (2006, p. 880) “definitive links between specific personality traits and various job performances. For instance, research suggests that calm, steady individuals make ideal supervisors and security officers, while individuals who are persistent and have a strong sense of self are well suited for commissioned

sales jobs.” Many employers use personality test as part of their succession planning and development programs for identifying and developing diverse management teams (Mujtaba, 2010; Mujtaba, 2008). Mulvihill (2006, p. 871), in addition, indicates that “employers quickly recognized that an employee’s character, in addition to his or her health, is a valuable asset to the company. The reasoning behind this notion is that by hiring an employee with ‘good character,’ the employer reduces the chances of a costly negligent hiring lawsuit if an employee harms a customer or co-worker.” Armond (2012, p. 1142), says two reasons for the use of personality tests are “maximizing productivity and minimizing risk.” Armond (2012) also explains the legal reasons, to wit:

In addition to risk, responsibility follows the hiring of an employee. Under the doctrine of respondeat superior, an employer can be found liable for a number of the employee’s acts conducted with the job’s scope. Under negligent hiring doctrines, an employer may even find itself responsible for criminal acts of an employee conducted outside the job’s scope. Employee background checks and testing make sense to many; any employer would like to avoid...(legal) problems. Employers are also justifiably concerned that an employee may create a hostile work environment by abusing the company’s Internet access or email systems, which could lead to liability under Title VII of the Civil Rights Act of 1964 (pp. 1133-34).

Armond (2012, p. 1147) adds that “the tests may also be popular because they are inexpensive and can be administered to large numbers of applicants. Furthermore, employers can outsource the testing to a third-party vendor, who can take the burden of initially screening applicants for the employer.” It is also necessary to point out that based on one of the author’s herein professional experience the MMPI, CPI, and Hogan tests cost a minimum of \$250.00-500.00 plus the interpretation costs so they are not inexpensive evaluation tools.

As emphasized, many companies use personality tests for a variety of reasons. To illustrate, Xerox Company states that “the tests have reduced attrition in high-turnover customer service jobs”, and in some cases by 20% (Weber and Dwoskin, 2014, p. A2). Xerox explains that it is looking for “compassion” in its pre-employment tests, because job “applicants who score high for empathy tend to do very well in customer service positions” (Weber and Dwoskin, 2014, p. A2). The tests used by Xerox are provided by a California company called Evolv Inc. A Michigan company called Dial Direct states that “the tests allow managers and call-center operators to predict with 80% accuracy which employees will attain the highest performance scores” (Weber and Dwoskin, 2014, p. A2). One representative of a company that provides pre-employment tests contends that the tests can screen out 30% of the applicants who are “least qualified,” even before the employer commences to review resumes (Weber and Dwoskin, 2014, p. A2). Some psychologists assert that the tests have some predictive value. One example would be a test that measures and ranks the level of the applicant or employee “conscientiousness and work ethic” (Weber and Dwoskin, 2014, p. A2). Some academic studies have shown that there is a connection, but only a small one, between individual personality traits and work performance (Weber and Dwoskin, 2014, p. A2).

Criticism of Personality Tests

Critics of personality tests assert that their use in trying to quantify non-cognitive traits often is neither valid nor unreliable. Yet according to one expert (White, 2006, p. B3), they may be more accurate and reliable than just doing a job interview (which obviously can be faked too). As Armond (2012, p. 1133) emphasizes: “Individuals are not always truthful about themselves and their backgrounds. Background checks of an applicant’s claims can reveal a great deal of dissembling. Some surveys indicate that almost half of job applicants lie about their work history and education. Accordingly, employers cannot simply take resumes at face value.” As

such, the personality test emerges as another tool to examine job applicants as well as current employees.

Nevertheless, a major problem with personality tests is that they may not be infallible predictors of a job applicant's behavior due to applicants faking the results. Applicants taking personality tests, particularly if the tests are conducted before any other more traditional assessment tools, naturally want to give the "right" answers and thus to do well and gain a job or promotion. Consequently, test pressures and anxiety may lead to inaccurate results. More problematic is the dishonesty factor. Consequently, in addition to questions about their criterion-related validity, another criticism of the use of personality tests is that they are potentially open to being faked by motivated applicants. This "impression management" occurs because the "right" or most positive answer may be apparent to the candidates. The only thing preventing candidates from providing the positive answer when it is not true is their own honesty or lack of self-insight, neither of which can be assumed when there is a desirable outcome at stake (Morgenson et al., 2007). That is, applicants will be tempted to "game the system" and to try to give what they perceive to be the "desired" answer. Accordingly, a major problem is that clever "fakers" will attempt to "rig the test" and thus try to answer questions to their perceived advantage. They will not answer what they truly believe, feel, or would react, but rather "translate" their answers to "ace" the test and impress their prospective or current employer.

Actually, there are a large number of studies suggesting that "faking" has been viewed as an important problem. Moreover, people can and do fake their responses on personality tests. In almost one-half of the studies where criterion-related validity was studied, the studies found some effect of faking on criterion-related validity (Morgenson et al., 2007). In addition, there has been substantial research devoted to techniques for detecting and mitigating faking, but no techniques appear to solve the problem adequately (Morgenson et al., 2007). To underscore the "faking" problem, one recent study, Donovan, Dwight, and Schneider (2014) conducted a survey of 162 job applicants for pharmaceutical sales positions, both before and after they were hired; and they found that "applicant faking was a common occurrence, with approximately half of the individuals being classified as a faker on at least one of the dimensions contained in the (goal orientation) measure. In addition, faking was found to negatively impact the psychometric properties of the selection measure, as well as the quality of potential hiring decisions made by the organization. Further, fakers exhibited lower levels of performance than non-fakers" (p.479). Moreover, Donovan, Dwight, and Schneider (2014) examined the "faking" literature to further ascertain how faking impacts hiring determinations; and their survey revealed that "fakers rose to the top of the selection ratings, thus increasing the likelihood that an organization would hire these individuals...fakers tended to have lower levels of performance in two domains (training performance and sales performance) than non-fakers" (p. 491). These results indicate that faking might do more than simply elevate test scores; rather, faking might change the rank-order of examinees and thus impact the hiring decision-making process.

Applicants taking personality test that are conducted before other more traditional assessment tools want to give the "right" answers and want to do well to get the job or promotion. They thus may be tempted to "fake" the test. So, how is "faking" done? White (2006, p. B3) quoted a professor at the Florida Institute of Technology, Dr. Richard Griffith, who said that "it's too easy to lie on some of these tests because applicants try to predict the 'right' answer, which can vary depending on the job. Applicants can also research employment tests on the Web and ask friends who have taken them previously." Of course, "employers and testing companies are aware that some applicants give misleading answers. So they include questions designed to

weed out fakers” (White, 2006, p. B3). The objective, of course, is to devise and administer a reliable, effective, and fair test where accurate and truthful reactions and representations are obtained. Yet despite these challenges and the criticism, Kramer (2007, p. 1291) emphasizes that the “fact nevertheless remains that businesses continue to use personality tests at an extraordinary rate.” And Kramer (2007, p. 1281) notes that “personality test examiners can avail themselves of over eight thousand psychological and personality tests.” As such, “critics may doubt the efficacy of these tests, but businesses obviously are finding some value to them” (Kramer, 2007, p. 1291).

As emphasized, a major problem with personality tests is that they are not perfect predictors of a job applicant’s behavior. Professional psychologists, therefore, remain somewhat guarded in use and interpretation of personality tests in the employment testing arena (Thomas & Scoggins, 2006). Nevertheless, the validity of personality as a personnel selection measure is improving; and personality factors continue to demonstrate increasing stability within and across instruments. Since the early 1990s, estimates of the validity of personality measures have increased as a result of factorial approach known as the Big-Five personality factors many studies (Hogan, Hogan, & Roberts, 1998; Morris, Scoggins, & Thomas, 2009). In general, the job-content domain and the test-content need to be closely linked for the use of a test for employment decisions (Standards for educational and psychological testing, 2014). A key objective of employment testing, of course, is to increase the accuracy of predicting job behavior and job outcomes. However, perfect prediction is not realistic as there are limitations to the degree of prediction, as behavior in the workplace is influenced by organizational level factors and individual characteristics. Consequently, any single selection method will only yield an imperfect predictor (Standards for educational and psychological testing, 2014). The use of employment tests combined with other alternative selection methods, as well as detailed knowledge about the research literature concerning the degree of predictive accuracy as a basis for using test information, will aid in personnel decision-making (Standards for educational and psychological testing, 2014). However, the employer must tread carefully as there are several legal as well as ethical “minefields” today involving personality tests.

LEGAL ANALYSIS

There are a variety of laws that impact personality testing in employment. Principal laws are the Civil Rights Act, specifically Title VII dealing with employment, and the Americans with Disabilities (ADA). Accordingly, this article will examine the disparate treatment as well as disparate impact aspects of Title VII as applied to personality tests. Also, as per the ADA, the article will examine when that statute could apply to personality testing in the workplace. A very important federal appeals case, which interpreted a personality test as a medical examination pursuant to the ADA will be discussed. Certain state laws are now presented, in particular the few states that have some type of legislation restricting the use of personality tests in employment as well as the common law intentional tort of invasion of privacy.

U.S. Civil Rights Law

As a fundamental legal precept, personality tests as well any selection procedures will violate U.S. civil rights law if an employer intentionally uses the tests or procedures to discriminate against job applicants or employees based on the protected categories in federal civil rights law – race, color, sex, national, origin, and religion (as per Title VII of the Civil Rights Act) as well as disability (as per the Americans with Disability Act) and age (as per the Age Discrimination in Employment Act) (EEOC, Fact Sheet on Employment Tests and Selection Procedures, 2014). In addition to illegal disparate treatment discrimination, personality tests as well as other selection procedures can be deemed illegal if they have a disparate (that is, disproportionate) adverse impact on a protected group (EEOC, Fact Sheet on Employment

Tests and Selection Procedures, 2014). Specifically, regarding the Americans with Disabilities Act, the EEOC advises that the statute makes it unlawful:

- For an employer to use employment tests to screen out, or “tend to screen out,” job applicants or employees with a disability.
- For an employer to fail to select or to administer employment tests in “the most effective manner” to make sure the tests accurately reflect the skills, aptitude, or other characteristics which the tests are supposed to measure.
- For an employer to fail to provide a reasonable accommodation, including in the administration of the tests, to job applicants and employees with physical or mental impairments and disabilities (unless any accommodation would be an undue burden or hardship) (EEOC, Fact Sheet on Employment Tests and Selection Procedures, 2014).

The U.S. Equal Employment Opportunity Commission (EEOC) states that Americans with Disabilities Act places “strict limits” regarding when and how employers can ask applicants to answer medically related questions, take a medical examination, or identify a disability (EEOC, Disability Discrimination, 2014). The EEOC specifically indicates that “an employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer” (EEOC, Disability Discrimination, 2014; EEOC, Fact Sheet on Employment Tests and Selection Procedures, 2014). However, when a job offer is extended to an applicant the employer is permitted to condition the job offer based on the applicant answering certain medically related medical questions or successfully passing a medical exam, assuming, of course, all similarly situated job applicants have to answer the questions or take the exam (EEOC, Disability Discrimination, 2014; EEOC, Fact Sheet on Employment Tests and Selection Procedures, 2014).

The EEOC (Informal Discussion Letter, May 4, 2001), furthermore, provides some guidance as to whether any test, exam, or procedure is considered to be a “medical” one, to wit:

- Is the test administered by or are the results interpreted by a “health care professional”?
- However, the fact that a health care professional is involved is not dispositive of the matter; two other key factors must be considered.
- Is the test designed to disclose a medical impairment?
- Is the employer attempting to ascertain whether a job applicant has a medical impairment?

The EEOC (Informal Discussion Letter, May 4, 2001) explains that tests that are “only designed and used to measure such things as honesty, tastes, and habits would not be ‘medical’ because traits and behaviors “are not, in themselves, mental impairments, although they may be linked to mental impairments.” Moreover, the EEOC (Informal Discussion Letter, May 4, 2001) explains that “such traits include stress, irritability, anger management, chronic lateness, poor judgment, integrity, teamwork, and prejudice.” Accordingly, the EEOC (Informal Discussion Letter, May 4, 2001) concludes:

Thus, questions or tests designed to determine whether an applicant exhibits any of these traits or behaviors would not be considered medical and should be done during the pre-offer stage. Such tests would not become ‘medical’ examinations solely because a psychologist administers and interprets them. During the pre-offer stage, a psychologist can give non-medical tests, conduct interviews, or review questionnaires

that are for the sole purpose of assessing an applicant's personality traits, characteristics, and behaviors.

Specifically regarding personality tests, the EEOC states that the Americans with Disabilities Act would prohibit employers from giving personality or psychological tests to job applicants if such tests supply information that is used to identify a mental disorder or impairment (EEOC, Informal Discussion Letter, 2005, Internet Hiring). It is also important to note that an employer may have more latitude under the ADA in using personality tests on current employees, as opposed to job applicants, so long as the personality test is job-related and measures the ability to perform the job function at issue (Mulvihill, 2006, p. 909).

Presently, "the Equal Employment Opportunity Commission is seeking to determine if personality tests discriminate against people with disabilities" (Weber and Dwoskin, 2014, p. A2). Psychological and mental disorders, of course, can be disabilities protected by the Americans with Disabilities Act, which is enforced by the EEOC (Armond, 2012). Specifically, the EEOC is trying to ascertain "if the tests preclude people with mental illnesses, such as depression or bipolar disorder, from employment, even if they have the right knowledge and skills for the job" (Weber and Dwoskin, 2014, p. A2). According to the EEOC associate legal counsel (Weber and Dwoskin, 2014, p. A2), "if a job applicant's results on a personality test are affected by the fact that the person has an impairment, and the results are used to preclude the applicant from employment, the employer then must defend the use of the personality test, even if the test was otherwise legal and administered correctly." Kramer (2007, p. 1291) therefore, warns that legally, a "broad reading of the term 'medical examination' could include almost any inquiry in today's world. Every question an employer asks, with or without a personality test, has the potential effect of revealing disabilities and thereby screening out individuals with disabilities."

The leading federal case regarding personality tests involves the Americans with Disabilities Act. The case is *Karraker v. Rent-A-Center, Inc.* (2005); the case is a U.S. Court of Appeals case from the Seventh Circuit. The Appeals Court in *Karraker* determined that the use of the Minnesota Multiphasic Personality Inventory was deemed illegal discrimination in violation of the Americans with Disabilities Act because the test, which was used to fill an internal position by a national retail chain, was deemed to be inappropriate and illegal under the ADA since it was used to diagnose a psychological disorder or mental illness, which are disabilities protected by the ADA (Kramer, 2007; Knight, 2006). In examining the personality test used by Rent-A-Center, the court concluded:

Because it is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability, we think the MMPI is best categorized as a medical examination. And even though the MMPI was only a part (albeit a significant part) of a battery of tests administered to employees looking to advance, its use, we conclude, violated the ADA (Karraker, 2005, p. 837).

It should be noted that the mere failure of a personality test by an applicant or employee does not equate to a per se legal recognition of a disability which is protected under the ADA. In the case of *Miller v. City of Springfield* (1998), a police dispatcher applied for a position on the same city's police force, but failed the personality test. She sued the city alleging that she was denied employment and unlawfully screened out of the hiring process because she did not achieve a certain score on the MMPI-2 examination. She thus promoted the theory to the court that she was, by default, regarded by the employer as having a disability, since she failed the personality test with a result of "above normal depression," and thus should be protected the

ADA. The court ruled that the personality exam screening process was job-related and consistent with a business necessity; and the court further noted that she was not considered “disabled” by her employer under the ADA just due to the fact that she failed the personality test.

Of course, it goes without saying that the mechanics of administering these personality tests should conform to the procedural safeguards of the ADA, which requires reasonable accommodations to any disabled test taker. In the case of *EEOC v. Daimler Chrysler Corp.*, (2005) the employer was accused of not reasonably accommodating job applicants when they took the pre-screening written tests. The EEOC championed the test-takers’ causes; and thus the agency brought an action against company on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. Ultimately, the case was settled and Daimler Chrysler Corporation agreed to provide monetary relief for 12 identified individuals, retesting those individuals with the assistance of a reader, and agreeing to provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. Thus, employers who institute written personality tests should ensure that applicants with reading or vision disabilities who take the tests are accommodated with either a reader for all instructions and all written parts of the test, or an audiotape providing the same information to avoid violating the ADA.

Personality tests can be in violation of Title VII of the Civil Rights Act if they are used as an instrument to discriminate against job applicants and employees and thus to treat them differently based on their race, color, national origin, gender, or religion. Such discrimination would be the “classic” disparate treatment prohibited by Title VII (Cavico and Mujtaba, 2014). Menjoe (2003, pp. 328-29) further explains the “...three major ways such discrimination can occur; (1) the tests may contain questions that employers would not normally be permitted to ask during a pre-employment interview; (2) the tests may eliminate candidates on the basis of specific character traits traditionally possessed by certain minority groups; and (3) the tests may be standardized in a way that reflects cultural bias against those who do not fit within the middle-class, racial and religious norm.”

Another major area of federal civil rights law impacted by personality tests is the adverse or disparate impact doctrine. Pursuant to Title VII of the Civil Rights Act, as interpreted by the federal courts, even if an employment policy or practice is neutral on its face, if it nonetheless has an adverse or disparate, that is, disproportionate, impact on a group of people protected by the Civil Rights Act, the policy or practice is discriminatory and illegal unless the employer can justify it by demonstrating a business necessity (Cavico and Mujtaba, 2014). In the seminal case of *Connecticut v. Teal* (1982), the Supreme Court reaffirmed the deeply rooted case precedent principle articulated in *Griggs v. Duke Power* (1971) relative to employer testing policies, to wit: that Title VII prohibits policies, procedures, or testing mechanisms that operate as a hindrance to minority groups. Therefore it is important that business managers realize that any workplace job test, including personality exams and their results, will be judicially scrutinized in detail if challenged in court.

As noted, there are mixed findings on predictive validity; and as such the varying results create a challenge for organizations that want optimal prediction in selection processes, but also want to avoid the negative effects that optimal prediction might have on protected groups (Scroggins et al, 2009). According to the disparate impact doctrine, an employer may not use an employment practice (e.g., a pre-employment aptitude test) that, even though neutral on its face and applied to all applicants or employees, disproportionately excludes members of a

protected category. An employer can defend its reliance on such an employment practice only if the employer proves that the challenged practice is job-related for the position in question and consistent with business necessity (Cavico and Mujtaba, 2014). Nevertheless, research supports the use of personality tests in addition to cognitive ability tests. By relying only on one test alone, an employer can fall prey to the allegation that the test has a disparate impact on a protected group and deemed discriminatory. This was the result in *Bradley v. City of Lynn* (2006), where minority fire fighter applicants succeeded in establishing that the cognitive test results were too heavily considered in the employment selection process and consequently constituted a disparate impact type of discrimination. In that case, the federal judge wrote:

To summarize, as all experts testified, I find that cognitive ability is correlated with job performance in public safety positions and thus, that cognitive ability examinations, in part, predict entry-level firefighter job performance. However, these cognitive examinations do not predict how quickly a firefighter can climb stairs with equipment or raise a ladder. Memorization skills only carry you so far. Teamwork and physical prowess are even more highly correlated with job performance. There is no persuasive evidence in this record that the use of the written cognitive examination as the sole basis for rank ordering entry-level firefighter candidates is a valid selection procedure.... HRD [employer] has not met its burden of demonstrating that use of the 2002 and 2004 civil service examinations for rank ordering is job related and consistent with business necessity (Bradley, 2006, pp. 173-174).

Therefore, rather than relying on a single test, the employer should include a measure of cognitive ability as well as an additional measure such as a personality test if those constructs are valid predictors of job performance. For minimizing group differences, a composite predictor is needed that excludes cognitive ability and ensures high correlations among the alternative predictors. This approach should result in minimum potential for adverse impact, but it may result in decreased predictive and incremental validity. Critics who argue that employment testing is per se illegal when mean ethnic-racial differences exist are incorrect; however, federal guidelines as well as the necessity to interpose a business necessity defense do place an expensive and time-consuming burden on employers when adverse impact is present (O'Boyle & McDaniel, 2009).

Consequently, an employer who uses personality tests should be prepared to demonstrate that they are not discriminatory and do not violate the Americans with Disabilities Act, the Age Discrimination in Employment Act, and also that they do not have an adverse or disparate (that is, disproportionate) impact on job applicants and employees based on the race, gender, national origin, as well as disability status and age. Federal law, however, is not the only area of the law that the employer must be concerned with, as there may be state and local law in the U.S. that will apply to the use of personality tests in employment.

U.S. State Law

Weber and Dwoskin (2014, p. A2) noted that there is some state law on point. Knight, (2006, p. B3A) also pointed out that the states of Massachusetts and Rhode Island prohibit employers from using "personality, integrity, and honesty tests." For example, in 2011, Rhode Island government regulators ruled that there was "probable cause" to conclude that the CVS drugstore chain violated a state law prohibiting employers from eliciting information about the mental health or physical disabilities of job applicants (Weber and Dwoskin, 2014, p. A2). The company's personality test asked job applicants if they agreed or disagreed with the following statements: "People do a lot of things that make you angry." "There's no use in having close friends; they always let you down." "Many people cannot be trusted." And "You are unsure of what to say when you meet someone" (Weber and Dwoskin, 2014, p. A2). CVS removed the

questions and settled the civil case of discrimination, which was filed by the Rhode Island American Civil Liberties Union, but CVS neither admitted nor denied any wrongdoing (Weber and Dwoskin, 2014, p. A2).

Managers may wonder generally if there is a duty under state tort law in general to conduct personality tests of their workers in order to assure safety to their respective customers and clients. One Californian court has refused to adopt a general standard of care that requires retail stores to conduct personality tests on their employees in order to protect customers to their establishments. In the case of *Flores v. Autozone West, Inc.* (2008), Autozone, the employer, was sued for the actions of one of its employees at its store who struck a customer with a pipe during an argument that occurred after the customer asked about the price of motor oil. The customer alleged that Autozone failed to give personality tests to its workforce, which testing would have prevented dangerous and unstable employees from being hired and endangering their customers. The court rejected this principle soundly in a summary judgment ruling in favor of Autozone and the court explained the plaintiff's lack of evidence as follows:

Nor does Flores [Plaintiff] even come close to establishing that a retail employer might owe its customers any legal duty to conduct a thorough background check on, or to administer personality tests to, each of its employees prior to allowing them contact with the public. The burden of imposing such a requirement would be extremely high, and Flores offered no evidence that its benefit might outweigh that burden. As for the assertion that Flores' injuries stemmed from Autozone's failure to properly train Gomez, we note that it borders on the absurd to suggest that Gomez might have been dissuaded from his attack if only Autozone had provided more training concerning the inappropriateness of punching out customers (Flores, 2008, p. 180).

However, in many state public safety agencies, such personality testing can be, and are, required. For example, Chapter 501 of the Iowa Administrative Code, Section 2.2(2) (80B), titled "Required personality test," states:

The Minnesota Multiphasic Personality Inventory (MMPI) test shall be taken by all applicants in the final selection process for a law enforcement position.

The prescribed personality test for an applicant in the final selection process shall be administered, scored and interpreted by the academy or by an individual who has been approved by the academy. The prescribed personality test for an applicant in the final selection process shall be evaluated by the Iowa law enforcement academy. These tests shall be evaluated and test results and evaluations shall be forwarded to a law enforcement agency for selection purposes only by the Iowa law enforcement academy upon proper waiver by the applicant.

Failure to follow governmental regulations as to licensing or pre-hiring screen processes that require the use of personality tests can expose an employer to liability, as there is now a duty to conduct such exams by law in certain professions and industries.

Of course employers must be aware that the questions used on these personality tests should not amount to an invasion of privacy and/or be discriminatory in nature. Otherwise, employers may find themselves in the precarious position defending itself in court. In the high-profile public case of *Soroka v. Dayton Hudson Corp.* (1991), the giant retailer's (Target's) personality test questions were challenged by a group of employees who alleged they were

discriminatory in nature and a violation of California's State Constitutional Right to Privacy. The job applicants applied as store security guards at Target locations and were administered Psychscreen evaluations, which were a combination of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory questions. Target explained in its defense that both of these tests had been used to screen out emotionally unfit applicants for public safety positions, such as police officers, correctional officers, pilots, air traffic controllers, and nuclear power plant operators. The test was composed of 704 true-false questions and the applicants were instructed to answer every question. The battery of queries used (in the form of affirmative statements to the test-taker) included the following "eyebrow-raising" statements. The test includes questions about an applicant's religious attitudes, such as:

- 67. I feel sure that there is only one true religion....
- 201. I have no patience with people who believe there is only one true religion....
- 477. My soul sometimes leaves my body....
- 483. A minister can cure disease by praying and putting his hand on your head....
- 486. Everything is turning out just like the prophets of the Bible said it would....
- 505. I go to church almost every week.
- 506. I believe in the second coming of Christ....
- 516. I believe in a life hereafter....
- 578. I am very religious (more than most people)....
- 580. I believe my sins are unpardonable....
- 606. I believe there is a God....
- 688. I believe there is a Devil and a Hell in afterlife.

The test includes questions that might reveal an applicant's sexual orientation, such as:

- 137. I wish I were not bothered by thoughts about sex....
- 290. I have never been in trouble because of my sex behavior....
- 339. I have been in trouble one or more times because of my sex behavior....
- 466. My sex life is satisfactory....
- 492. I am very strongly attracted by members of my own sex....
- 496. I have often wished I were a girl. (Or if you are a girl) I have never been sorry that I am a girl....
- 525. I have never indulged in any unusual sex practices....
- 558. I am worried about sex matters....
- 592. I like to talk about sex....
- 640. Many of my dreams are about sex matters (Soroka, 1991, p.1205).

The Californian state appeals court granted the employees' request for an injunction against Target, thereby restraining the retail giant from continuing to use the current structure of the personality exam and its questions; and in doing so the court explained:

While Target unquestionably has an interest in employing emotionally stable persons to be SSO's, testing applicants about their religious beliefs and sexual orientation does not further this interest....To justify the invasion of privacy resulting from use of the Psychscreen, Target must demonstrate a compelling interest and must establish that the test serves a job-related purpose. In its opposition to Soroka's [plaintiff] motion for preliminary injunction, Target made no showing that a person's religious beliefs or sexual orientation have any bearing on the emotional stability or on the ability to perform an SSO's job responsibilities. It did no more than to make generalized claims about the Psychscreen's relationship to emotional fitness and to assert that it has seen

an overall improvement in SSO quality and performance since it implemented the Psychscreen. This is not sufficient to constitute a compelling interest, nor does it satisfy the nexus requirement. Therefore, Target's inquiry into the religious beliefs and sexual orientation of SSO applicants unjustifiably violates the state constitutional right to privacy (Soroka, 1991, p. 1213).

Target ultimately paid out over \$2 million to settle the litigation and to avoid further negative publicity and press coverage over the testing. Thus, it is important for employers to examine the nature of the questions being asked on these personality tests and not blindly assume that they are legal in form. A good risk management strategy is to make sure that the questions being asked do not, on their face, expose the organization to legal liabilities and thus give rise to claims of invasion of privacy and discrimination. Many states follow the Restatement (Second) of Torts (1977) (the "Restatement") definition of invasion of privacy, to wit: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person" (Restatement, Section 652B, 1977).

Labor

Workplace labor unions add an additional challenge to employers who institute personality testing as a condition of employment or advancement in the business organizational structure. While the forgoing discussion applies to union member employees, their collective bargaining agreement may or may not address the use of personality tests. A prudent employer should be cautious in the negotiation and drafting of the collective bargaining agreement to avoid language that would limit or preclude these tests in the workplace. However, the employer may still find itself at the mercy of an arbitrator's evaluation that the personality test is not a "fair assessment" to establish a "good reason" for discharge of labor union members who did not score high enough on the exams.

This result is exactly what occurred to Daniel Construction Company, which was hired to construct a nuclear power plant in Callaway Missouri for Union Electric Company. The personality test was created by Union Electric Company as part of its qualification to secure a license from the Nuclear Regulatory Agency to build and operate the nuclear reactors; and the Daniel Construction Company adopted that personality testing procedure for its unionized workforce so that they could qualify to work at the site without escorts. It must be noted that Daniel Construction Company was offered by Union Electric Company to institute an alternative "escort policy" at the construction worksite for its personnel if it did not wish to implement the personality testing, which presumably would increase the transaction costs to Daniel Construction Company, the employer. About 157 of Daniel Construction Company's labor force could not pass the personality test and were terminated. The unions filed grievances against Daniel Construction Company under their collective bargaining agreements, and vigorously contested the propriety of one of the "mini-IPAT psychological examinations" given to their members, which resulted in the employee terminations. The union prevailed at arbitration; and the employer appealed ultimately to the Eighth Circuit Court of Appeals in the case of Daniel Const. Co. v. LOCAL 257, IBEW (1988). The federal appeals court agreed with the arbitrator and the lower district court that the failure of the personality test by union employees was not a basis for "good cause" for their termination under the applicable labor union agreements. In doing so, the court explained:

Daniel produced extensive evidence supporting the test. After considering the extensive expert testimony, the arbitrator found the test to have sufficient "reliability." He determined,

however, that the mini-IPAT test battery with an absolute cutoff score lacked adequate "validity," and that the test procedure should have provisions for clinical interview of at least the individuals who did not pass the written test. The arbitrator ruled therefore that "the test was not a reasonable one and was not an appropriate security rule. According to evidence accepted by the arbitrator, the test would have screened out a large number of employees who were actually stable, while passing a number of employees who were unstable. In sum, the arbitrator rejected the test as unreasonable because it lacked predictive validity and because it provided no appeal interview with a clinical psychologist to ameliorate this flaw...The only evaluation of the screening plan was one rigorously tested in the adversary process before the arbitrator and reviewed by the district court and this court. That plan was found wanting in validity and was unreasonable in failing to provide for a clinical review for those employees failing the written test (Daniel Const. Co., 1988, p. 1179).

The federal court concluded with a ruling in favor of the labor unions, thereby rejecting the employer's justification of terminating employees who failed the personality test; and the court explained that "The arbitrator's award draws its essence from the contract and it in no way contravenes the public policy of nuclear plant safety" (Daniel Const. Co., 1988, p. 1183). The "take-away" for employers in this case is that discharge of labor union members based on personality test results may violate "good cause" provisions within the collective bargaining agreements themselves under certain circumstances.

In terms of the legal summary, we can say that employers must ensure that their personality tests do not violate Title VII, the ADA, the ADEA or other state laws; they cannot be used to intentionally discriminate against job applicants and employees based on their race, gender, disability, age or other protected categories pursuant to federal civil rights law. Employers also must ensure that the personality tests do not cause any adverse disparate impact on a protected group. Employers must be sure that the tests or their implementation do not violate any state or local law or violate collective bargaining agreements. Further, the nature of the test questions on their face should be evaluated to assure that they are not considered an obvious violation of privacy or discriminatory in nature. Of course, classifying a personality test as "merely" a "pure" personality one as opposed to a medical examination or a psychological test for ADA purposes is a continuing struggle. While there is no general duty of care for employers to use "personality tests" in order to protect their customers and clientele from dangerous employees, when professions and governmental agencies require these types of examinations, a duty of care pursuant to common law negligence principles does attach. Yet, assuming a personality test is indeed lawful and lawfully administered and interpreted, the question nonetheless remains as to the test's morality.

ETHICAL ANALYSIS

In order to determine if the use of personality tests in employment is moral one must ethically examine the practice. Accordingly, what is "ethics"? Ethics is the branch of philosophy that is used to reach moral conclusions as to "good" or "bad," "right" and "wrong," and "moral and immoral." The field of ethics consists of the intellectual theories and principles that one uses to reason to moral conclusions (Cavico and Mujtaba, 2013). The two ethical theories that will be addressed in this article are Utilitarianism and Kant's Categorical Imperative. These theories are all Western-based, secular, and reasoned-premised ethical theories.

Utilitarianism

Utilitarianism is a relatively modern ethical theory, created by the English philosophers and social reformers, Jeremy Bentham and John Stuart Mill. Utilitarianism is at times called a "consequentialist" ethical theory because morality is determined by a preponderance of good

results that will be produced from an action. So, the action itself is neutral; it is the consequences that determine morality. One surely is familiar with the basic tenet of Utilitarianism: An action is moral if it produces “the greatest amount of good for the greatest number of people” (Cavico and Mujtaba, 2013). Challenging aspects of this ethical theory are that one has to predict the consequences – good and bad – that will result from an action and then measure and weigh them to determine if the good outweighs the bad, and thus the action is moral, or the bad outweighs the good, and consequently the action is immoral. As for the predictive element, the Utilitarians would say to base predictions on probable or likely or reasonably foreseeable consequences; and do not guess or speculate. As to the measuring, be as objective and scientific as possible, they would say. One positive feature of Utilitarianism is that it is a very egalitarian ethical theory; that is, all people get treated equally; since everyone is a human being and feels pleasure and pain, everyone gets “counted” in this Utilitarian “calculus.” That is the “good news”; however, the “bad news” is that when the counting is done there may be more good - pleasure-happiness-satisfaction than bad – and thus the action is moral. Yet there are still some bad consequences, perhaps to a minority of people, but the bad consequences were outweighed by the good; the “bad” got counted, at least. As such, under Utilitarianism, to state another old maxim that the readers are familiar with: “The end justifies the means.” And if the “end” is the “greater good” the fact that there are some bad consequences as in the means is permissible under this ethical theory (Cavico and Mujtaba, 2013). The first step in a Utilitarian ethical analysis is to determine the people and groups affected by the action, typically called in business parlance the “stakeholders.”

The main stakeholders affected by personality tests encompass employers, job applicants and employees, customers and clients, the test creators and administrators, and society as a whole. For employers, if the tests are used properly, the hiring process should improve as employers will gain a deeper insight into the characteristics of job applicants and employees. Time, effort, and money will be saved as employers will be able to use the tests to focus on a “targeted” group of potentially more “fit” employees instead of having to screen large numbers of job applicants. Moreover, turnover should be reduced; and as a result the employer should gain more revenues and profit. Suitable employees could be more readily identified, as well as employees needing more development and training. However, if the tests are used in an improper manner, lawsuits pursuant to federal and state law could ensue as well as condemnation of the employer for acting in an unethical manner. Test results could be inaccurate due to some failing in the test as well as “fakers” supplying false information and thereby “gaming” the system. Such negative consequences could harm the reputation and profitability of the employer. Even if the tests are used wisely and well, the employer will have to bear the costs of the tests as well as the costs for the professionals who will make sure that the tests are properly devised and used.

For job applicants and employees, again, if the tests are used properly, there should be a better job-fit for positions and promotions and thus more willing, responsive, capable, and longer-serving employees. A job applicant or employee will be able to use the test as a means to display his or her strengths and characteristics well-suited for particular positions. Current employees may be able to use the tests to secure additional training and education. Yet if not used properly, the negative consequences could be disgruntled employees and job applicants who might be plaintiffs in civil rights lawsuits against the employer.

For customers and clients, being served by employees who are knowledgeable, capable, and well-suited for their positions would naturally be a positive; yet the converse holds true too. For the test creators and administrators, assuming they create and administer valid, reliable,

and legal personality tests, the result would be positive as personality testing in employment has now become “big business.”

For society, a positive consequence to personality tests being well and properly used would be a profitable employer and a productive and better paid workforce, thereby contributing to the economic growth and well-being of society. Again, if not properly devised and used, the deleterious results could be more lawsuits, animosity, and disharmony. Yet a negative consequence might be a perception that privacy rights are being further infringed on by the use of such tests. Accordingly, safeguarding the privacy of personality tests is good not just for the individual test-taker but beneficial for society as a whole.

Kant's Categorical Imperative

So, how does one determine the morality of an action pursuant to the Categorical Imperative? There are various aspects of Kant's supreme ethical principle. For the purposes of this article, two will be explicated and applied to the use of personality tests in employment. The first is called the Kingdom of Ends test. For an action to be moral pursuant to this test it must treat all people affected by the action with dignity and respect which they deserve as worthwhile human reasons. Consequently, if an action is demeaning, disrespectful, and treats people as a mere means, an instrument, or a tool, even to achieve a greater good, the action is immoral. The second is called the Agent-Receiver test, which is the “Golden Rule” of religion made secular by Kant. According to this test, if one did not know whether one would be the giver/agent of an action or on the “receiving end” and one is a rational person would one be willing to accept the action (Cavico and Mujtaba, 2013).

In order to be moral pursuant to the two seminal principles of Kantian ethics, personality tests must treat all job applicants as well as employees in a consistent and fair manner. The Kantian ethical responsibility on the employer is to ensure that the personality tests are devised and administered in such a way that equal opportunity is afforded to all applicants and employees. Accordingly, if two job applicants are applying for the same position, the personality tests as well as any other assessments must include the same questions, scenarios, and concepts. To use a test as an instrument to discriminate against candidates for employment and promotion is immoral. Moreover, if a personality test is used surreptitiously as an instrument to reveal a mental or psychological disorder the employer would be acting in a demeaning and disrespectful manner towards the job applicant or employee and consequently the use of the test would be an immoral action. The use of a test would also be if the employer puts too much emphasis on maybe one “undesirable” characteristic, without fairly weighing the positive traits, that is, looking at the “whole picture”; and thus a job applicant or employee may wrongly be characterized, and perhaps stigmatized and demeaned. Looking at the “whole picture” as well as being cognizant of the inherent problems in personality tests also means that the employer should not use personality tests alone in making employment decisions; rather, other more traditional evaluation methods should be utilized. And even assuming a test is valid and reliable and used properly and fairly, in order to be moral pursuant to Kantian ethics the results must be kept private and confidential. Privacy underscores the individual autonomy as well as self-worth and self-respect of individuals and, as such, is fundamental to Kantian ethics and morality.

“Ethics is not physics,” as the old saying goes. Moreover, as Aristotle once said, it is the mark of an educated person not to impose too much precision on a subject matter that defies it. Aristotle was referring to ethics, of course. Nevertheless, the succinct ethical analysis provided herein indicates that a valid, reliable, and fairly administered personality test could achieve the “greater good” and thus be moral pursuant to the Utilitarian ethical theory; and also the use of

the personality test could achieve this good by neither disrespecting nor demeaning any people, as required by Kantian ethics.

Implications and Recommendations

There are some limitations to this article. First, it is not a data-driven article, though it does make reference to and cite such research works. Rather, the article is a legal, ethical, and practical analysis of a continuing quandary in employment law and practice. Second, the legal focus of the article has been primarily on the private sector; as such, the use of personality tests by public sector employers is not examined from a constitutional perspective. Nonetheless, there are some important implications and recommendations for all managers and human resource s professionals.

If the tools that human resource practitioners use to assess the personalities of existing or potential employees are flawed or used improperly, decisions based on these tools cannot be expected to be credible, let alone legal and ethical. This article, therefore, has sought to draw the attention of academics, practitioners, and managers to the limited validity and use of these and other similar instruments. Although these tools facilitate the employer's decision-making process, they have limited credibility and reliability. Hence, they should, at best be used in "moderation" and in conjunction with other more traditional methods, such as interviews and on-the-job testing for taking important decisions (Patel, 2006). Employment testing involves using test information to improve personnel decision-making. However, decision-making about the use of employment testing needs to be specific to the context in which the test is to be used since both the content and the context vary (Standards for educational and psychological testing, 2014).

Employers can and should use personality tests in addition to cognitive ability measures when both are valid predictors of job performance. The employer, of course, must be aware of the limits to as well as any flaws in the tests. Moreover, organizations must be cognizant that the inclusion of a personality test will probably not reduce group differences to the degree that managers might expect. Therefore, organizations will need to make their own decisions regarding the use of these predictors, validity maximization, and potential adverse effects based on their own values, needs, and strategy. Expert advice clearly is paramount. For example, since using personality tests alone can result in adverse impact, some experts have argued that it would be better to use them in combination with cognitive ability measurements in order to ensure maximum predictive validity as well as be more "defensible" in court, if necessary (Scroggins et al., 2009).

In order to avoid legal liability, the employer should take heed of counsel from the Equal Employment Opportunity, which agency provides some general recommendations for employers regarding testing and selection procedures, called "best practices," to wit:

- Employers should use tests and selection procedures without regard to race, color, national origin, sex, religion, age, or disability.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective selection procedure that has less adverse impact, and, if so, adopt the alternative procedure.
- "Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose."

- “To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications and selection procedures accordingly.”
- “Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes...No test or selection procedure should be selected without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored” (EEOC, Fact Sheet for Employment Tests and Selection Procedures, 2014).

Based on the statutory and case law, the preceding EEOC recommendations, and legal commentary, as well as the foregoing ethical analysis, the authors offer the following additional suggestions to employers, to wit:

- Employers are not summarily prohibited from using personality tests for employment purposes; but employers should not use any personality test that could be used to identify job applicants with mental disabilities.
- Do not use tests that are used in the medical field to diagnose mental and psychological disorders in an attempt to ascertain personality characteristics since such tests will be branded as medical examinations, thereby triggering a “disability” designation and ADA purview, regardless of the employer’s appropriate business intent.
- Avoid clinical psychological tests as well as any personality test with questions designed to elicit information about mental disorders or disabilities.
- Avoid using personality tests that are designed for medical purposes as well as employment purposes.
- Remember that a court may deem a personality test a medical exam under the ADA even if the employer only intends to use any results from the tests to measure personality traits related to employment.
- Use personality tests only to ascertain employment suitability, not to reveal any mental health conditions.
- Make sure questions on personality tests are job-related and thus the tests will be helpful in determining who is the best candidate for a job or position.
- Have doctors and other medical professionals in addition to lawyers and human resources professionals examine personality tests to make sure they are not medical or psychological examinations.
- Do not provide the results of personality tests to doctors or other medical professionals for interpretation.
- Be wary of using personality tests as a “short-cut” in the hiring process; that is, also use the traditional screening tools, such as resume examinations and personal interviews.
- Use an industrial-organizational psychologist as a “preferred practice” in administering personality tests as opposed to human resources personnel or third-party consultants (Armond, 2012, p. 1139).

There is a basic general legal principle for managers to follow when instituting personality testing, to wit: Tests used in the employee selection process must evaluate the person for the job and not evaluate the person in the abstract (Griggs v. Duke Power Co., 1971). Further, Title VII of the Civil Rights Act of 1964 requires that evidence offered to show the business necessity of an employment practice directly address the necessity of the practice for the particular job for which it is utilized (42 United States Code, Section 2000e-2(k)(1)(A)(i)). Thus, personality tests will be improper if there is no rational basis for their use in the hiring process. Beyond these basic legal standards, courts and the legislature provide limited clear guidance to employers as to the use of personality tests in the workplace. Before adopting and instituting

personality tests in the workplace, a business manager should contemplate the various legal risks involved and craft a testing policy that will pass muster with the courts if challenged. Business managers should realize that adopting a “one size fits all” personality test in the workplace is not a legally sound strategy.

The employer, therefore, must investigate its own employment hiring practices to determine exactly what types of tests the employer is using to screen job applicants and to evaluate current employees. The goal of the employer as well as the creator of the test is to look for personality traits or characteristics that will make employees successful on the job and then to create a test that will ascertain those traits and/or predict certain behaviors; and thus for the employer to hire the “right” job applicant or promote the “right” employee. A key fact is whether there exist academic and scientific studies, which are objective, and which show that a test is valid, accurate, and reliable. To create, validate, and use tests, however, is a challenging task and one not without controversy or risk of litigation. The employer thus should be counseled to be aware of the limitations of such tests and not to use them solely in making hiring determinations; plainly, the tests, if used, should be used in conjunction with other more traditional hiring mechanisms such as the interview. A test should not be the sole criterion for making an employment determination; more traditional assessment measures such as education and experience, resumes, references, and personal interviews should also be used. (Gonzales-Frisbie, 2006) recommends the use of the “Role-Based Assessment,” which is an assessment tool created by the Gabriel Institute, a professional services company, and which is a form of testing based on behavioral research, is delivered online and “consists of questions structured in an unbiased form that focuses on job requirements” (pp. 203-04).

Therefore, the legal and ethical mind-set of the employer should be to use the personality tests as well as other more traditional assessment measure to better and more fairly screen people and especially to attempt to “pull out” the strengths of all job applicants and employees. The goal should be a positively framed one of seeing where job applicants and employees are most strong. Yet specifically regarding personality tests, Knight (2006, p. B3A) quoted an employment law attorney who stated that “employers need to do their homework before using tests.” Employers, therefore, must consult with legal, human resources, and psychological experts before using personality tests. One point is clear, though, that is, the use of such personality tests will increase, and so will the legal, ethical, and practical debate.

SUMMARY

The examination of personality tests provided by this article indicates that personality tests in employment must be devised, administered, reviewed, and analyzed by employers using a great deal of caution and prudence. The objective is to create and use tests that are practically efficacious, legal, as well as moral. Yet the law of personality tests is just developing and now encompasses federal regulatory and case law as well as state law. The employer, naturally, must ensure compliance with all applicable laws regarding the use of personality tests. The ethical context for personality tests is even more complex; nonetheless, the employer must ensure that the tests not only benefit the employer’s egoistic interest but also that the tests are moral pursuant to ethics. They must achieve the greater good to be moral pursuant to Utilitarian ethics, but must achieve this personal good and societal good without violating Kantian ethics. As such, to be moral pursuant to Kantian ethics, personality tests should be fair, non-discriminatory, and treat the job applicant and employee in a respectful and dignified manner. The ultimate goal, as in every aspect of employment, is to create a workplace that is efficient, effective, legal, and moral.

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