

EEOC Educational Hiring Standards

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www.eeoc.gov/eeoc/foia/letters/2011

On 11/17/11 the Equal Employment Opportunity Commission (EEOC), Office of Legal Counsel, issued a legal opinion letter regarding employer hiring Qualification Standards. While not the equivalent of a legal Court decision, these opinions are sometimes cited by Courts in rendering legal opinions and often used by organizations preferring to avoid litigation. Although the discussion involved a state government, other public employers, private employers and federal agencies with EEOC compliance policies or bound by Executive Orders may desire to have their legal advisors review "ADA: Qualification Standards; Disparate Impact" available at <http://www.eeoc.gov/eeoc/foia/letters/2011>.

Quoting from the letter, the EEOC has determined that "If an employer adopts a high school diploma requirement for a job, and that requirement "screens out" an individual who is unable to graduate because of a learning disability that meets ADA's definition of "disability", the employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity. The employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does or does not have a diploma."

As discussed in detail in previous ADA, ADAAA articles published in "Polygraph", this should have little effect on most law enforcement agencies who conduct validated physical agility tests prior to pre-employment interviews and/or polygraph examinations since presumably applicants with disabilities significant enough to be disqualified by the physical agility test would never be questioned or investigated regarding the educational requirements. Problems arise, however, if employers disqualify applicants based solely on responses to questions about educational requirements solicited on applications, Personal History Statements or pre-polygraph questionnaires since such disqualifications fail to consider disabilities let alone any Reasonable Accommodation.

Much more problematic, however, is the basic premise for the opinion, i.e., that Disparate Impact drives the decision thereby shifting the burden of proof from the applicant to the employer and requiring the employer to prove that the job could not be performed by someone without the educational requirement. While it would be nice to think that someone with a Doctorate makes a better police officer than someone with High School or Bachelor's degrees, reality indicates that this is neither always nor often true. Again, while it is recommended that employers fight the Disparate Impact battle prior to getting to interviews or polygraphs, this is only practical when dealing with disability claims or employers who don't disqualify based on initial application responses. Applicants seeking redress because of Disparate Impact on the basis of racial or gender differences and educational requirements are far more numerous and therefore likely to challenge education disqualifications.

Unfortunately, it appears unlikely that employers can completely avoid litigation initiated by the EEOC since they would have to either completely eliminate educational requirements from hiring decisions or prove that there is no Disparate Impact between educational requirements and subject variables such as race or gender. If this could be demonstrated - that there are no significant differences in graduation rates on the basis of race or gender - then the complaint would be dismissed at the investigation level. Soliciting educational information on applications or pre-employment interview forms but claiming it wasn't used or only used as part of a greater totality would probably be rejected since most Courts have determined "if you ask for it, you use it." In the same vein, arguing that the educational requirements are certification requirements will not prevail since the certification requirements are created by the state or the organization and are superseded by federal law. This leaves employers with the difficult task of conducting internal studies that prove that individuals with less than the level of education required cannot perform the job and there is neither an alternative (such as training) that has less Disparate Impact nor any way to Reasonably Accommodate such applicants. In addition, anecdotally, there is evidence indicating that some police employers have proven the negative hypothesis: after raising educational standards and having difficulty finding sufficient numbers meeting the new, higher standards, they have reverted to the lower educational standards all of which took place without any measurable difference in performance. Therefore, employers should have ready studies proving their desired educational requirements are Bona Fide Occupational Qualifications so they can at least prevail in litigation. Have a nice day.