SELECTING AND TERMINATING EMPLOYEES IN FLORIDA:

CONDUCTING THE INTERVIEW

by

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SELECTING AND TERMINATING EMPLOYEES IN FLORIDA[1]

I. CONDUCTING THE INTERVIEW

A. Defining the Hiring Objectives

1. Review/Revise the Job Description. The process of writing a job description, or reviewing and revising an existing description, will focus the advertising, interviewing, and selection process upon the types of skills that are necessary and desirable for the position. Now is the time to clarify goals and incorporate changes in policy or practice that have evolved over time. For example, if it is necessary to increase the minimum qualifications for the position, these changes should be documented in an updated position description that is completed before any applications are received. *See Gorence v. Eagle Food Centers, Inc.*, 242 F.2d 759, 764 (7th Cir. 2001)(courts should not interfere with business decision regarding qualifications for position, even if qualifications recently changed).

2. Review Job Description for Possible Disparate Impact on Protected Groups. Job descriptions need the correct type of specificity, but "equivalent" catchalls may prevent disparate impact claims. For example, it violates the Uniformed Services Employment and Reemployment Rights Act to discriminate against veterans on the basis of the membership in the military service. 38 U.S.C. § 3411(a). If a job description is written to require experience in a private hospital setting, it would tend to screen out veterans with years of military hospital experience, even though the experience is similar. If a job description is written to focus on the work to be performed, then it is less likely to have that effect. In *Fahrenbacher v. Department of Navy*, 85 M.S.P.B. 512 (2000), *aff'd* 243 F.3d 1009 (Fed.Cir. 2001), there was no discrimination on the basis of prior military service in violation of USSERA as the defendant was seeking an attorney with extensive experience in certain areas of law, and the applicant's experience was primarily in areas not covered by the position, health law and military criminal practice, both of which were outside the responsibilities of the position.

3. Review Job Description for Compliance With ADA. The job description should not contain references to any mental or physical requirements of the position. For example, rather than requiring the "lifting" of five-gallon pails, rephrase the standard to read "transport" five-gallon pails.

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[1] The following material is intended to provide information of a general nature concerning the broad topic of selecting and terminating employees in Florida. The materials included in this paper are distributed by the Law Offices of Cynthia N. Sass, P.A., as a service to interested individuals. The outlines contained herein are provided for informal use only. This material should not be considered legal advice and should not be used as such. A special thank you to Linda Sasser for her preparation and organization of these materials.

B. Recruiting Techniques

1. Advertising Considerations

a. Avoid References to Protected Categories. It is unlawful for an employer to indicate "any preference, limitation, specification, or discrimination" based on a protected category "unless membership in the category is a bona fide occupational qualification for employment." 42 U.S.C. § 2000e-3(b).

b. Advertise the Minimum Qualifications. The vacancy announcement should mirror the information developed in the job description that, as previously discussed, has been carefully written or revised to guide the entire selection process. An inference of discrimination could arise if an employer advertised for a specific set of skills, but hired someone from outside the applicant's protected group who did not have the advertised skills. Advertisements should contain the minimum qualifications in order to assist with limiting the number of responses from unqualified candidates.

c. Advertise the Job Vacancy to Diverse Groups. Consider using free resources to ensure that the job announcement is distributed not only to mainstream groups, but also to disability associations, women's groups, churches and religious organizations (be sure to use an assortment), professional associations, community groups, etc.

d. Salary Inquiries & Equal Pay Act. Using prior salary as the basis for setting current salary may result in liability under the Equal Pay Act of 1963 ("EPA"). The EPA prohibits discriminatory wages on the basis of sex, protects both sexes, and states as follows:

> No employer . . . shall discriminate, within any establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. 29 U.S.C. § 206(d).

e. The Substantial Similarity of the Jobs. In order to demonstrate "equal work on jobs . . . with equal skill, effort, and responsibility," the comparator's job need not be identical to the plaintiff's, as the skill, effort and responsibility need only be "substantially equal." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533

(11th Cir. 1992). Occasional extra tasks are insufficient to defeat the substantial equality of the positions, *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1049 (5th Cir. 1973), particularly if they take up an insignificant amount of time. *Brock v. Georgia Southwestern College,* 765 F.2d 1026, 1034 (11th Cir. 1985). Whether the work of two employees is substantially equal "must be resolved by an overall comparison of the work, not its individual segments." *Buntin v. Breathitt Co. Bd. of Ed.*, 134 F.3d 796 (6th Cir. 1998) (citing *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981).

f. Similarity of Duties Performed by Successors/Predecessors. If the duties of the position have not substantially changed, and the successor and predecessor are of different sexes, an EPA violation may arise from using prior salary as the justification for paying the successor less than the predecessor. *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995). Similarly, if the successor is paid more than the predecessor, and the duties have not changed, the predecessor may have a cause of action under the EPA. *Passmore*, 979 F.Supp. 1419 n.4 (citing 29 C.F.R. § 1620.13(b)(4)).

g. One Comparator of the Opposite Sex is Sufficient. A *prima facie* case may be demonstrated if the plaintiff is paid less than one person of the opposite sex. *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1033 (11th Cir. 1985).

h. Any Small Pay Differential Is Sufficient. Any difference in wages, no matter how small and insignificant, is sufficient to demonstrate payment at a "rate less than" the rate paid to an employee of the opposite sex. *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 420 (5th Cir. 1971).

i. Affirmative Defenses to Equal Pay Act Claims. The EPA is a strict liability statute and it is irrelevant whether the employer intended to discriminate on the basis of sex. *Meeks v. Computer Assoc. Int'l*, 15 F.3d 1013, 1019 (11th Cir. 1994). In addition, upon proof of a *prima facie* case, a violation is established, and the burden shifts to the defendant to prove that the wage differential can be justified by one of the statute's affirmative defenses. The affirmative defenses are as follows:

(1) a seniority system;

(2) a merit system;

(3) a system which measures earnings by quantity or quality of production;

(4) a differential based on any other factor other than sex.

B & B Cash Grocery Store, 975 F.2d 1533. For the reasons discussed below, salary differentials arising from the initial wage rate are limited to the fourth affirmative defense, i.e., "any other factor other than sex."

j. Seniority Systems. The principal feature of every seniority system is that the preferential treatment is dispensed on the basis of some measure of time served in employment. Every seniority system must include rules that delineate how and when the seniority clock begins ticking and the types of employment conditions that are governed or influenced by seniority. Consequently, the employee's pay must be with reference to the employee's actual length of service, or date of hire. *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 544-546 (11th Cir. 1991); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 607-608, 100 S.Ct. 814, 63 L.Ed.2d 55 (1980).

k. Merit Systems. Merit systems require a means or order of advancement or reward for merit. The system, if not written, must at least be systematically and objectively administered, and the employees must be aware of the system. Subjective evaluations of an employer are not sufficient to show the existence of a merit system, nor will a system which provides for employee evaluations and raises based on personal judgments of what an individual is worth. *Brock v. Georgia Southwestern College*, 765 F.2d 1036; *Brennan v. Victoria Bank & Trust*, 493 F.2d 896, 901 (5th Cir.1974) (showing of objectivity demonstrated where females were advanced over males as a result of merit system).

l. Earnings Measured by Quantity or Quality of Production. *See, Byrd v. Ronayne*, 61 F.3d 1026, 1034 (1st Cir. 1995) (higher compensation for male attorney justified because he generated substantially greater revenue for law firm).

m. Any Other Factor Other Than Sex.

(1) Prior Salary Not a Legitimate Defense in Eleventh Circuit. Prior salary, standing alone, is not a legitimate "factor other than sex." *Glenn v. General Motors*, 841 F.2d 1567, 1570-71 n.9 (11th Cir. 1988) (fact that male clerks had transferred from higher paying positions in company, and female clerks had transferred from lower paying positions or had been hired "off the street" did not constitute "factor other

than sex" such as to justify pay disparity between male and female clerks); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (prior salary alone does not justify pay disparity) (if prior salary were justification, the exception would swallow the rule and inequality in pay among genders would be perpetuated). If prior salary could be used to justify disparate wages, then after the first employer has discriminated against the employee on the basis of pay, the subsequent employer would also be permitted to benefit from the discrimination by using prior salary as the basis for paying the employee less than the amount paid to other employees. *Faust v. Hilton Hotels*, 1990 WL 120615 *5 & n.12 (E.D.La. 1990).

(2) EEOC Enforcement Standard. The EEOC takes the position that prior salary, standing alone, cannot justify a pay differential on the basis of sex. However, the EEOC states that "if the employer can prove that sex was not a factor in its consideration of prior salary, and that other factors were also considered, then the justification can succeed. The employer could, for example, show that it: (1) determined that the prior salary accurately reflected the employee's ability based on his or her job-related qualifications; and (2) considered the prior salary, but did not rely solely on it in setting the employee's current salary." However, "[i]f the employer did not bargain with the higher-paid comparator, it will cast doubt on the employer's argument that it had to offer a higher salary to compete for him/her. And even if there was bargaining, the investigator should consider whether the employer bargains differently with men than with women (e.g., responds more favorably to men's demands than to women's demands)." *EEOC Compliance Manual*, Section 10-IV(F)(2)(g).

(3) Prior Salary Plus. It is a defense under the "factor other than sex" affirmative defense to pay higher wages because of the comparator's higher prior salary and greater experience. *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (prior salary and greater experience); *EEOC v. Hay Assoc.*, 545 F.Supp. 1064, 1084 (E.D. Pa. 1982) (prior experience could not justify higher starting salary because experience was unrelated to duties of the position).

(4) The Market Force Defense. The market force defense is not a valid defense under the EPA. *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n. 12 (5th Cir.1973). "[T]he

argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected." *Georgia Southwestern,* 765 F.2d at 1037 (citing *Corning Glass Works,* 417 U.S. at 205, 94 S.Ct. at 2233 ("The differential arose simply because men would not work at the low rates paid to women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."); *Brennan v. Victoria Bank & Trust Co.,* 493 F.2d 896, 902 (5th Cir.1974) (market force theory that a woman will work for less than a man is not a valid consideration under the EPA).

(5) Acceptable Factors Under the "Other than Sex" Catchall. Employers may establish the "factor other than sex" affirmative defense if the wage disparity is the result of either (1) the unique characteristics of the same job; (2) the comparator's greater experience, training, or ability; or (3) the result of special exigent circumstances connected with the business. *Glenn v. General Motors*, 841 F.2d 1567, 1571 (11th. Cir. 1988).

(6) Legitimate Factors Must Be Job Related. Under the "factor other than sex" affirmative defense, the employer must demonstrate that the comparator's greater experience, training or education are relevant to the duties of the position. *Hogdson v. Brookhaven General Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970).

n. Statute of Limitations. EPA claims must be filed within two years after the cause of action accrues, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrues. 29 U.S.C. § 255(a).

2. Job Application Forms

a. Develop More Than One Application Form. It may be necessary to have more than one application form in order to adequately serve the needs of managers. For some positions, it is sufficient to use application forms that may be handwritten by walk-in job applicants. Other job applicants might question the employer's technological abilities if the employment application form could only be typed or handwritten.

b. Establish a Firm Date By Which Application Forms Must Be Submitted. At the initial application stage, job applicants should have some flexibility about whether to submit a resume or complete an application form. Some companies send application forms only to the individuals who have been selected for interviews, requesting that the form be completed and returned by the time of the interview, or shortly thereafter. Some issues, such as criminal convictions, will arise only after an application form has been submitted. If the completed application is due several days before a scheduled interview date, managers will have an opportunity to review the application and determine the issues that require additional clarification during the interview. Establishing a pre-interview deadline is necessary to give managers sufficient time to obtain advice from the human resources department or legal counsel about issues raised in the application form.

c. Obtain Consent to Contact References & Inform Applicant of Company Policies. Employers should have a form, or use the application form, to provide information to job applicants and to obtain their consent for certain actions. The form should:

(1) Obtain consent to contact others to verify any information that is on the employment application form, or resume, or has been discussed during the interview process;

(2) Provide information about the name, address, and location of the company official to contact if the applicant should find it necessary to request a reasonable accommodation during the application process;

(3) Advise of the company's criminal conviction policy and inquire about the applicant's criminal convictions;

(4) Inform the applicant of the company's policies, such as at-will employment, drug-free workplace program;

(5) If applicable, advise that offers are contingent upon drug testing pursuant to the company's policies;

(6) If applicable, advise the applicant that the company extends job offers only in a writing, and notify the applicant of the job titles of the only individuals who have been authorized to extend job offers;

(7) Inquire whether the applicant is currently subject to a non-competition, non-solicitation, non-disclosure, or privacy agreement with any other employers, and require written certification with respect to whether such agreements exist;

(8) Obtain consent from the applicant for the procurement of consumer reports and investigative consumer reports, pursuant to the Fair Credit Reporting Act ("FCRA"), during the employment application period and during any subsequent period of employment;

(9) Require an acknowledgment from the applicant that copies of the Federal Trade Commission's *A Summary of Your Rights Under the Fair Credit Reporting Act*, and the *Consumer Report Notice* and an *Investigative Consumer Report Notice* have been received (copies should be attached to the application); and

(10) Indicate the consequences of giving inaccurate or misleading information on the application form or during the interview process.

d. Avoid Asking Questions that Elicit Information About Race, Color, Sex, Religion, National Origin, Sexual Orientation, Age, Handicap, Disability, Familial Status and Marital Status. Avoid questions that elicit the following information:

(1) The applicant's marital status, including whether a female applicant is "Mrs., Miss, or Ms.";

(2) The applicant's physical appearance, height, weight, eye color, or hair color;

(3) The applicant's age and date of birth. Since the dates of attendance and graduation from educational institutions can be used to determine age, do not ask the date of graduation from high school, and ask the dates of advanced degrees only if necessary. In order to determine whether the applicant is a minor for purposes of working hour restrictions, you may ask whether the applicant is at least 18 years of age or older. In addition, considering limiting employment histories to a specific period of time, rather than requiring the applicant to indicate every position held during the applicant's lifetime, as this is another means of deriving age;

(4) The applicant's child care plans, birth control plans, plans regarding having children, pregnancy status, and whether the applicant has any children;

(5) The applicant's national origin, or information from which national origin may be derived, such as place of birth;

(6) The applicant's citizenship status or current immigration status;

(7) The applicant's arrest record;

(8) The applicant's medical history or workers' compensation history;

(9) The person to contact in case of an emergency;

(10) The other languages spoken by the applicant (unless related to the job); or

(11) Religious and civic organization memberships.

C. **Defining the Interview Objective.** Interviews should be focused on obtaining the best candidate for the position. They are an opportunity to gather information about the skills and abilities that each applicant can bring to the position and the company.

D. **Designing an Effective and Reliable Interview.**

1. Select Diverse Individuals to Serve on Interview Panels. Interview panels can enhance the fairness of the interview process, but they are not required for all positions. Panels should not be used unless there is some diversity, hopefully with diversity at least with respect to age, sex, national origin or race. If it is not possible to convene a diverse interview panel from within the department, then interviewers from outside the department should be selected to complete the panel.

   If panel members are too homogenous, they may reach the same unlawful conclusion, even though they have not conspired to reach that result. For example, in *Griffis v. City of Norman*, 232 F.3d 901 (10th Cir. 2000), an all-white interview board reviewed the employment applications and conducted interviews, with each board member giving each applicant a subjective score during the oral interview, which covered education, training, experience, communication skills, interpersonal relations, problem solving skills, and suitability for position of Communications/Records

Supervisor. Each of the board members rated the white applicant higher than the black applicant, even though the white applicant was only a probationary employee, and had recently hired as a records clerk trainee. She had some prior experience with another employer as a dispatcher and jailer. The black applicant had eight years of experience working for the defendant City in the records department, during which time she had received commendations for acting as the Communications/Records Supervisor during her supervisor's extended absences from work. Here, because the defendant contended the black applicant was not as qualified, pretext was inferred from the other facts regarding the applicants' comparative qualifications.

2. <u>Train the Panel Members About the Position</u>. The interviewers should have a copy of the job description and guidelines to help them evaluate the candidates. It is essential that they become familiar with the job duties and skills necessary to perform the job. *See Bass*, 242 F.3d 996, 1008 (selection process, when viewed in light of other evidence of efforts to hire on the basis of race, constituted circumstantial evidence of discrimination; process suspect where interview panel, sole decision makers, received no training or guidelines to help them evaluate which candidates were best qualified for training instructor position with fire/rescue department, and where two of three panel members worked outside the department and did not know duties of vacant training instructor position).

3. <u>Prepare Interview Questions & Answers and Take Notes</u>. Review the duties of the job and prepare questions that are relevant to the job, providing a set of questions to the panel members at least several days before the interviews commence. Prepare not only the questions to be asked of each applicant, but also prepare the answers (or types of responses) that are desirable. This process will focus the interviewer (or panel) on the job-related attributes that are desired, and assist with identifying the applicant who has responded best to the interview questions. In other words, define what you are looking for before the interviews commence, then compare the applicants to the previously established standard, rather than relying on stereotypes or hunches about which candidate best fits the position. If a panel is used, then each panel member must take notes of the applicant's responses in order to fairly discuss the interview results with other panel members.

4. <u>Train the Interviewers in Employment Law</u>. Interviewers must be trained in the types of questions that are permitted under the ADA and Title VII. Be sure each interviewer understands the *EEOC Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations*. <u>http://www.eeoc.gov/policy/docs/preemp.html.</u>

E. **Role of the Interviewer.** The individuals selected as interviewers should be committed to the company, and committed to selecting the best candidate for the position. With this in mind, the interviewer should be someone who will be committed to the entire project, and further recognize that his/her role is much more than merely showing up for an interview. The "interviewer" is perhaps a misnomer, because the "interviewer" must know employment law in order to respond appropriately to questions from the applicant during the interview, must understand the duties of the position, and must know the standard against which each candidate is to be compared (based on the previously developed answers to the interview questions). Further, the decision makers must compare the qualifications of the candidates, and pay close attention to the education and experience of the applicants as documented in their application forms and resumes.

F. Conducting the Interview - What You Can and Cannot Ask.

1. Medical Inquiries and Examinations of Job Applicants are Prohibited. The ADA makes it unlawful to conduct medical examinations or to make inquiries with respect to whether an applicant is an individual with a disability or as to the nature or severity of such disability. 29 C.F.R. § 1630.13(a). Employers may inquire into the ability of an applicant to perform job-related functions, and may ask applicants to describe or to demonstrate how, with or without reasonable accommodation, the applicant would perform the job-related functions. 29 C.F.R. § 1630.14(a).

   a. Questions You May Ask During the Application Process.

      (1) An employer may tell applicants what the hiring process involves (*e.g.*, an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process. Be sure to provide a reasonable accommodation during the application process, even if it appears that a reasonable accommodation (or another accommodation) may not be possible or available after the individual is hired.

      (2) An employer may ask questions about the ability to perform any and all job functions. *Nolan v. Caldera, Secretary, Dept. of Army*, 2000 WL 1687279 (EEOC) (finding no violation of ADA where interviewer asked whether applicant could lift copy paper to a rolling cart).

   b. Questions You May Not Ask During the Application Stage.

      (1) "What current or past medical problems might limit your ability to do the job?" *EEOC v. Wal-Mart Stores, Inc.*, 11 F.Supp. 2d 1313, 1325 (D.C. New Mexico 1998).

(i) A series or line of questioning that is likely to elicit information about disability. *Nolan v. Caldera, Secretary, Dept. of Army*, 2000 WL 1687279 (EEOC) (interviewer violated ADA with series of questions likely to elicit information about disability, where, upon learning of applicant's entitlement to veterans' preference (based on disability discharge), interviewer asked series of questions regarding circumstances of the military discharge, the history and severity of the back injury, and the events surrounding the military discharge).

(3) "Do you need a reasonable accommodation to perform the job?"

(i) An employer cannot ask questions that are likely to elicit information about a disability or disability status.

(ii) EXCEPTIONS: If it becomes known that the applicant has a disability, or it is obvious, and the employer reasonably believes the applicant will need a reasonable accommodation to perform specific job functions, the employer may inquire whether a reasonable accommodation will be needed to perform the job. If the applicant replies that a reasonable accommodation is needed, the employer may inquire further regarding the type of accommodation that may be necessary.

2. Other Questions Prohibited by Title VII. See Section II(B)(9)(d) (*Avoid Asking Questions About Race, Color, Sex*, etc.)

G. Interview Methods. There are a number of different interview methods, such as the stress interview, and situational interview. Games, puzzles, and brain ticklers have been popular recently in some industries. Even though employers have some leeway within this judicial circuit with respect to the interview method, using a process that disparately screens out women and minorities (for example) violates the law. Further, subjective interview questions, games and puzzles, and similar tactics are more difficult to defend, and will likely be characterized as "suspect" and evidence of pretext. A better approach is to carefully consider the process, and the interview questions, with a view toward how that process will look when played back in a courtroom.

1. Will it appear that the company seriously sought to find the best candidate for the job, without regard to any protected category, and that it used an

approach that gave fair and equal consideration to all?

2. Will it appear the process was a subterfuge for discrimination?

II. EMPLOYEE SELECTION AND NOTIFICATION

A. Legal Issues - Avoiding Discrimination During the Selection Procedure

1. Avoid Any Deviation from Established Polices and Practices. Deviating from written procedures or from normal hiring procedures may provide evidence of intent to discriminate. *Hill v. Seaboard Coast Line R.R.*, 885 F.2d 804, 811 (11th Cir. 1989); *Bass v. Board of Cty. Comm., Orange Co., Fla.*, 242 F.3d 996, 1007 (11th Cir. 2001) (employer violated its own written procedures by totaling interview scores and by relying exclusively upon interview scores, where policy provided interview scores would not be totaled and further provided that interviews were intended to highlight strengths and weaknesses of candidates, and were to be used in conjunction with other criteria to determine final selection).

2. Avoid Interviews Designed to Create "Leeway." *Bass*, 242 F.3d 1007 (performance-based interviews, designed as "subjective process" to create "leeway" to promote minorities, when combined with pressure to promote minorities, constituted evidence of discriminatory intent).

3. Before Making Final Selection, Review the Facts. Hiring a less qualified person can support an inference of discrimination. *Bass*, 242 F. 3d 1007. Although misjudging an applicant's qualifications does not, standing alone, expose an employer to liability for discrimination, it is probative of whether the employer's reasons are a pretext for discrimination. *Bass*, 242 F.3d 1007. For example, it has been found that selecting an individual who does not meet the minimum requirements of the position, rather than a qualified candidate, supports an inference of discrimination. *Bass*, 242 F.3d 1007 (it should have been facially obvious from selectee's resume that selectee did not meet minimum requirements of two years training experience and ability to obtain Florida teaching certificate within 18 months, where selectee had no training experience and no credits earned toward certificate). Take the time to ensure the applicant is qualified for the position (check the resumes and other documents) and to compare the selectee's paperwork with the paperwork obtained from other high-ranking candidates.

4. Weigh the Objective Information Before Issuing a Final Decision. The following case is an example, at the very least, of the types of errors that can be easily avoided by weighing the facts before issuing a final hiring decision. In *Luna v. City & County of Denver,* 948 F.2d 1144 (10th Cir. 1991), the appellate court found that the trial court had "ample evidence" to

find the employer discriminated against an American-Filipino applicant for an Engineer III position with the airport authority. As the Tenth Circuit stated, it is "incumbent" upon an employer to "give minority candidates equal and fair consideration, thus ensuring that an employment decision is not based upon unlawful criteria." *Id.* at 1150.

The facts in *Luna* are as follows: (a) Luna had 13 years of "exemplary" and "unblemished" service to the city, and six times more experience than Shirk; (b) Luna had approximately 12 years of experience as an Engineer I, and had been overseeing projects in airport construction and management, which was the "precise experience" the airport desired (it had been initially required but later deleted from the position description for lack of qualified candidates); (c) Shirk's application had been "facially deficient" throughout the entire process, and no one noticed that he had not completed "required forms" detailing his work experience; (d) the hiring panel (two hiring engineers and two other department heads) had asked both applicants the same questions; (e) Luna did not receive advance notice of the interview but Shirk did; (f) the interview questions were related to engineering, but unrelated to the skills needed to perform at the Engineer III level; (g) Luna felt surprised and unfairly treated because he was unable to prepare for the interview; (h) the interview panel never read Luna's employee file; and (i) Shirk had no experience in airport engineering, and only two-year's experience as an engineer on roads, bridges, and related projects.

At trial the defendants' witnesses testified "unequivocally" that the decision to hire Shirk was based *solely* on the interview. It appears the trial court was "disturbed" that Luna had not received advance warning of the interview, that the interview questions were "substantially subjective," and that the panel members "never bothered" to read Luna's employee file. Based on these facts, the Tenth Circuit found that the trial court's finding of discrimination as not clearly erroneous. *Id.* at 1150.

5. <u>Consider Criminal Records Carefully</u>. Employers must use care in making employment decisions based upon the criminal records of employees and applicants, as refusing to hire an applicant on the basis of the record may result in allegations of discrimination based on race, even though hiring in spite of, or in ignorance of, an applicant's criminal record may result in negligence and/or negligent hiring and retention claims. See, *Green v. Missouri Pacific R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (policy of excluding applicants convicted of criminal offenses violated Title VII, where employer's racially neutral policy disparately impacted black applicants and policy was not justified by business necessity). Under Title VII, the following three factors are considered in determining the employer's "business necessity" in excluding an employee/applicant on the basis of a criminal conviction: (1) the nature and gravity of the offense; (2) the time that has passed since the conviction or completion of the sentence;

and (3) the nature of the job held or sought. *EEOC Compliance Manual, Appendix 604-A.*

6. <u>Prevent Negligent Hiring Claims by Checking Records</u>. An employer is liable for the willful tort that employee commits against a third person if employer knew or should have known that the employee was a threat to others. The test is whether employer exercised the level of care which, under all circumstances, a reasonably prudent person would exercise in selecting employee for duties to be performed. *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. 1st DCA 1991); *Garcia v. Duffy*, 492 So. 2d 435 (Fla. 2nd DCA 1986) (law imposes liability where employer has been "somehow responsible" for bringing third person into contact with employee, where employer knew or should have known employee was predisposed to committing a wrong under circumstances that create opportunity or enticement to commit such a wrong).

   There have been recent changes that should assist employers with avoiding negligent hiring claims. Section 768.096 of the Florida Statutes provides as follows:

   a. In a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an employee, such employee's employer is presumed not to have been negligent in hiring such employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general. A background investigation under this section must include:

      (1) Obtaining a criminal background investigation on the prospective employee under subsection (2);

      (2) Making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;

      (3) Requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;

(4) Obtaining, with written authorization from the prospective employee, a check of the driver's license record of the prospective employee if such a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; or

(5) Interviewing the prospective employee.

b. To satisfy the criminal-background-investigation requirement of this section, an employer must request and obtain from the Department of Law Enforcement a check of the information as reported and reflected in the Florida Crime Information Center system as of the date of the request.

c. The election by an employer not to conduct the investigation specified in subsection (1) does not raise any presumption that the employer failed to use reasonable care in hiring an employee.

B. Reviewing Resumes and Checking References

1. Background Information.

a. Comply with the FCRA when seeking credit, criminal, driving, illegal drug, educational, and other reports.

(1) Consumer Reports. When obtained from "consumer reporting agencies," drug tests, driving records, criminal history reports, credit records, and reports that contain medical information are "consumer reports" subject to the FCRA. The FCRA establishes conditions under which a "consumer report" may be obtained for the purpose of employment, reassignment, promotion or retention of an employee. 15 U.S.C. § 1681-1681u. A "consumer report" includes any information by a consumer reporting agency which bears on the individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living, but does not include a "report containing information solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. §§ 1681a(d)(1), 1681a(d)(2)(A)(i).

(2) Investigative Consumer Reports. An "investigative consumer report" is a special type of "consumer report" that is obtained through personal interviews with neighbors, friends or associates, regarding the applicant/employee's

character, general reputation, personal characteristics, or mode of living.[2] The FCRA is not implicated when an employer uses its own employees to conduct interviews as most employers are not "consumer reporting agencies." However, hiring a "consumer reporting agency," such as a private detective or any third party, including an attorney, to conduct the interviews implicates the "investigative consumer report" provisions of the FCRA. For this reason, the Federal Trade Commission has issued an opinion that harassment investigations, when conducted by third-parties rather than an employee of the company, are investigative consumer reports.

(3) Compliance with FCRA Time Limits Regarding Information in Consumer Reports. The FCRA prohibits obtaining a report of any "adverse item of information" that antedates the report by more than seven years, 15 U.S.C. § 1681c(a)(6). Arrest records are subject to this time limit, but conviction records are not. 15 U.S.C. § 1681c(a)(5).

(4) Procuring Consumer Reports. The FCRA's provisions with regard to procuring "consumer reports" require employers to (a) make a clear and conspicuous disclosure, in writing, to the individual; (b) before the report is procured, or caused to be procured; (c) in a document that consists solely of the disclosure; (d) that a report may be obtained for employment purposes. 15 U.S.C. 1681b(b)(2)(A). The *Consumer Report Notice* must state that the employer may obtain a "consumer report," as that term is defined in the FCRA, 15 U.S.C. § 1681-1681u, for employment purposes. Reports may not be sought without the prior written consent of the employee/applicant. 15 U.S.C. § 1681b(b)(2)(B).

(5) Procuring Investigative Reports. The "consumer report" procedures apply to "investigative consumer reports" because "investigative reports" are special types of "consumer reports." With investigative consumer reports, employers must also (a) make a clear and accurate disclosure, in writing; (b) within three days after the date on which the report was first requested; (c) in a document that consists solely of the disclosure; (d) that "an investigative

[2] 15 U.S.C. § 1681a(e). The content of the "interview" determines whether the report is subject to the investigative consumer report provisions, in addition to the consumer report provisions. The Federal Trade Commission states that fact checking with regard to dates of employment, salaries, and job titles is not conducting an interview. However, inquiries as to performance history, disciplinary history, or termination for cause would constitute an interview.

consumer report including information as to character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made." 15 U.S.C. § 1681d(a)(1). Further, the individual must be informed of the right to request "a complete and accurate disclosure of the nature and scope of the investigation." 15 U.S.C. § 1681d(a), 1681d(b).

(6) Requests for Copies of Investigative Reports. Upon receiving a request from an employee/applicant, a complete copy of the report must be "mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is [] later." 15 U.S.C. § 1681d(b); Federal Trade Commission's *Haynes-Hahn* opinion letter dated July 8, 1998 (employer who redacts names of sources from report, prior to providing report to consumer, violates Section 604(b)(3)(A)). Along with the report, the employer should provide a copy of the Federal Trade Commission's *Summary of Your Rights Under the Fair Credit Reporting Act.*

(7) Simplify Compliance with FCRA. The process can be simplified by including *A Summary of Your Rights Under the Fair Credit Reporting Act*, the *Consumer Report Notice*, and the *Investigative Consumer Report Notice* in the application package, and then requiring the return of signed authorizations to obtain consumer reports and investigative consumer reports. It is advisable to obtain the applicant's acknowledgment of receiving, for the individual's own use and retention, a copy of each of the previously listed notices/summaries. If the FCRA procedures are properly implemented during the application process, and the disclosures and authorizations clearly cover the application period and any subsequent period of employment, subsequent reports may be obtained, as necessary, without additional notification to the affected employee that a report is being obtained.[3] However, the FCRA's pre-adverse action and adverse action provisions of the FCRA must be followed.

(8) Before Taking Adverse Action. If the employer's decision, even in part, is based on the consumer report, then the FCRA procedures must be followed before taking any adverse

[3] The Federal Trade Commission's *Isaac-Brisch* and *Haynes-James* opinion letters.

action. If a decision is made not to hire the individual, then FCRA requires that the individual be provided with (1) a copy of the report relied upon (or obtained); and (2) the Federal Trade Commission's *Summary of Your Rights Under the Fair Credit Reporting Act.* 15 U.S.C. § 1681b(b)(3). An offer of employment should not be extended to another applicant until after the FCRA procedures have occurred. Although not required by the FCRA, it is good practice to verify the information in the report, as this may resolve the issue without further action on your part or the applicant's part.

(9) How Long to Wait Before Hiring Another Applicant. The statute does not state the length of time that must lapse between providing the pre-adverse action notice and taking adverse action, defined as hiring another job applicant. It is recommended that procedures be established to allow applicants to respond or explain (to the employer) any information in the reports, and an individualized plan should be developed (and documented) to allow the employee time to respond or explain the report as it affects the employment decision. If the matter is not resolved within the time period, and adverse action is subsequently taken, then an additional notice is required that contains the following statements:

(a) The name, address, and telephone number of the consumer reporting agency (including the toll-free telephone number established by a national agency) that provided the report;

(b) The statement that the consumer reporting agency [insert name] did not make the decision to take the adverse action and is unable to provide the consumer with the specific reasons why the adverse action was taken.

(c) A statement that the applicant/employee has the right to obtain under Section 612 of the FCRA a free copy of the consumer report from the consumer reporting agency by making a request within 60 days;[4]

(d) A statement that the applicant/employee has the right under Section 611 of the FCRA to dispute with the

[4] Even though a copy of the actual report has already been provided.

consumer reporting agency the accuracy and completeness of any information in the report.

Additional information regarding the FCRA is available at http://www.ftc.gov.

2. Checking References and Educational Experience. Before beginning the process of checking references, a reference checking form should be developed. All reference and background checks should be fully documented. If background inquiries are being conducted on several top candidates, the form will assist with ensuring that the candidates receive the same consideration (or investigation). The same type of information should be obtained on all applicants, the same number of references contacted (with respect to non-prior employer references), and to the extent possible, the same period of time should be investigated. In addition, the form should document the names of the individuals who were contacted, along with their telephone numbers or other identifying information, along with the exact words that were exchanged at the time.