

HRD Liability Update

Courtesy of Sample & Associatesã



Publisher: John Sample, Ph.D.
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Phone/Fax (850)- 443-5429
E-mail: sampleassociates@comcast.net

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Equal Employment Opportunity Laws and Training

By John Sample, Ph.D. SPHR

The human resource development (HRD) community may not be aware of the implications that decisions about who attends (and who does not attend) training and development programs could have serious legal implications. Selecting an employee for a training program falls within Equal Employment Opportunity Commission (EEOC) guidelines. Consider the following EEOC requirement:

"These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include... promotion, demotion, membership (for example in a labor organization), referral, retention.... Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above." (Underlined for emphasis. 29 Code of Federal Regulations, Ch. XIV, Sec. § 1607.2(B), p. 214, 1996)

Significant employment decisions must be job-related! Deciding who will or will not attend training is an "employment decision", and such decisions must conform to EEOC testing guidelines. If training and development are a prerequisite for promotion to higher level positions, then such decisions are "employment decisions," and procedures for selecting trainees must conform to EEOC testing guidelines.

Differential treatment occurs when there is an intentional decision to treat members of one group differently from members of another group because of membership in a protected category, such as race, gender, or age. An informal management policy that refuses to allow women to attend management development programs, while accepting all men, would be an example of differential treatment. Adverse impact occurs when a training policy that appears to be neutral on its face results in discrimination. For example, entry into a training program may be based on successfully passing a screening test. At first glance, the testing requirements may appear to be neutral, however the impact against members of a protected group could be discriminatory. The use of test, such as measures of ability or aptitude, may

be discriminatory because members of certain protected groups may not have had access and opportunity to educational programs that would prepare them for such tests. Furthermore, such tests may not be job-related. Intent is not the true issue here; impact is the bottom line!

Another issue impacting the training arena has to do with validating selection procedures when training is a significant component of the selection process. For example, performance in training may be used as a criterion (or standard) by which future performance on the job is predicted.

Again, EEOC guidelines are useful in guiding managerial decisions:

"Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance." (29 Code of Federal Regulations, XIV, § 1607.14(B)(3), p. 222, 1996).

According to EEOC, measures of success in a training program include instructor evaluations, performance samples, or tests -- however, note that paper and pencil test will be closely reviewed for job relevance by EEOC and the courts. Guidelines from EEOC state that paper-and-pencil tests, such as ability tests, must be valid indicators of job performance, and that includes performance in a training program. If training is used as a criterion for validating a selection device, such as assessment centers or behavioral interviewing methods, then the content of the training program must mirror the content of the requirements for the job. If training is to be used as a predictor for an employee selection device, an employer must consider correlating actual job requirements (i.e., task and essential function analysis, performance appraisal criteria, work samples, task simulation) with performance measures from the training program (i.e., post-tests, simulated job performance,).

Case Example -- Selection Into A Training Program

A manufacturing company has a training program for employees that is a prerequisite for promotion into a higher salaried job of senior mechanic. A promotion to senior mechanic is highly valued because of the additional pay and benefits. Employees who have been with the company as entry level mechanics for at least three years are eligible to apply for admission into the program.

Applicants must pass two tests before they are admitted to the senior mechanic training program - a mathematics test and a verbal fluency test. Cutoff scores had been determined and used for four years. The reasoning for the testing is that understanding classroom instruction requires verbal fluency and math skills.

Two Hispanic males, with over five years as mechanics with the company, expressed a desire to attend the senior mechanic program. Of the eighteen people who took the test, six fail. The Hispanic males were two of the six failures.

The two Hispanic males allege that the verbal fluency and math examination are not related to performing the actual job of senior mechanic. The course manager argues that a required level of proficiency in verbal skills and math is required for successful completion of the course.

This situation poses an interesting set of questions. The course manager is correct when he says that proficiency is necessary for predicting successful completion of the course. Those who score high on the proficiency tests are more likely to successfully complete the course, and those who score lower on the tests, in fact, do not successfully complete the course. An evaluation of the relationship between end-of-course performance with actual job performance demonstrates no correlation between these two important factors. If successful completion of the course is not related to actual job performance, then the use of the two proficiency tests must also be called into question. (See *Stallworth v. Monsanto Co.* 13 FEP Cases 827, 1974, for a similar case.)

The Americans With Disability Act (ADA)

The Americans With Disability Act has far reaching potential for human resource management and training personnel. Enacted in 1990, this comprehensive law prohibits discrimination against persons with disabilities in employment, public services, transportation, public accommodations, and telecommunications services. All aspects of employment are covered - application for employment, selection, placement and orientation, on-the-job training, compensation and benefits, and employer sponsored social activities. A qualified person with a disability is an applicant or employee who is able to perform the essential functions of the job. Employers must reasonably accommodate mental illnesses or physical disabilities unless an undue hardship can be demonstrated by the business. This law does not guarantee an individual with a disability the right to a job for which he or she is applying. The employer remains free to make decisions based on the essential functions necessary for successful job performance. This means that there is not a preference requirement to provide employment the qualified disabled.

The ADA has several implications for HRD professionals:

- **Training Environment.** Reasonable accommodations must be made for employees to attend and participate meaningfully in training and development programs. Such accommodations include environmental supports for access to the learning environment and assistance with acquisition of information. For example, wheel chair accessibility to the classroom may be an important factor for a disabled employee, just as large print materials of amplified sound may be for others.
- **Supervisory Training.** Supervisors will require an understanding of the implications of ADA in their leadership and direction of subordinates. Some supervisors may have a fear of supervising those who are qualified, but otherwise disabled. Standards of performance apply to all employees, and a qualified disability does not mean that the standards of performance change because of a disability. All employees are expected to perform the essential functions of a job. Reasonable accommodation does not mean special (differential treatment) consideration at the time of performance appraisal or promotions.

- **Interviewer Training.** Attitudes that may prevent interviewers from conforming with the ADA. Such attitudes could result in unconscious biases against the qualified disabled applicant. Prohibited questions during the selection interview process must be emphasized. A questions such as "Are you able to perform the essential functions of the job?" is legal and appropriate. Asking, "Will your disability prohibit you from performing the job ?" is an illegal question.
- **Current Employees.** There will be occasions in which employees will require time off from work for purposes of recovery and rehabilitation. Once they return to work, reasonable accommodations may be required by the employer. Supervisors and employees may require training in how to most effectively work with an employee with a disability.

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