Volume Three • Number Two • February 1994

Employment Testing Law & Policy Reporter

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How Ethical Is Investigative Testing?

by John T. Sanders, Ph.D.

An ethicist contends that the practice of sending in "testers"—persons posing as job applicants—to ferret out workplace discrimination is easier to defend from an ethical standpoint if an agency's investigation stems from an actual complaint. By contrast, defendants may rightfully challenge the legitimacy of the procedures used for choosing "test" subjects when an investigation is based solely on the general goals of an antidiscrimination agency.

Introduction

The growing body of antidiscrimination law has brought with it an enforcement problem. On the one hand, people who are discriminated against are frequently among the most vulnerable members of society and are thus least likely to avail themselves of their right to complain to enforcement agencies or to bring suit. On the other hand, even when complaints or suits *are* brought to light, the cases are inherently hard to prove. The only evidence readily available is the anecdotal report of the aggrieved party, and such evidence is plainly weak when confronted with the adamant denials of respondents who are typically better armed, both socially and legally.

This problem is especially acute in decisions made about employee recruitment, referral, and hiring. Victims of discrimination at employment agencies and personnel offices are extraordinarily unlikely to be in touch with one another, and the support that could in other situations be gathered through mutuality of experience is thus, practically speaking, unavailable.

Yet employment decisions are of unparalleled importance to the overall objective of undermining various forms of unreasonable and unfair discrimination in society. Substantively, it is necessary to end discrimination in recruitment, referral, and hiring so that people may fend for themselves and live their lives decently. Perceptually, it is necessary to end such discrimination so that potential discriminators are not led to false generalizations about others born of unfamiliarity and the mistaken presumption that all truly competent people get the jobs for which they are qualified. Indeed,

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Employment Testing (ISSN 1065-2531) is published twelve times a year by University Publications of America, 4520 East-West Highway, Bethesda, MD 20814-3389; (301) 657-3200/(800) 692-6300. (UPA is an imprint of Congressional Information Service, Inc.) The annual subscription rate for ***Employment Testing*** is $295. Please direct all subscription inquiries to the UPA customer service department. The editor welcomes submissions and editorial comments or questions.

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efforts to end employment discrimination are best understood as attempts to make the latter presumption come true.

The challenge is thus to expose discrimination in agency referral and hiring, while at the same time attempting to build a better evidentiary base for cases that are actually brought to adjudication. To this end, both public and private antidiscrimination agencies have begun to adopt the technique of investigative "testing." Rather than rely only upon anecdotal accounts of people genuinely seeking jobs and alleging discriminatory practices, agencies send their own employees into the field to examine the employment practices of firms.

To secure the reliability of information thus obtained, antidiscrimination agencies send several testers. Where racial discrimination against African-Americans is being examined, for example, the agency may send out two African-American testers and two Caucasian testers. Where it is gender discrimination that is the subject of the test, the agency will use two males and two females. The agencies will then compare the agents' stories for evidence of discriminatory practices. Was there consistency among the accounts? If there were differences, do the differences support a claim of discriminatory practices?

In principle, it is plain that the technique could be revised and sharpened in a variety of ways. If the number of testers was held to be inadequate for determining discriminatory patterns in hiring and referring applicants for employment, there is no reason why the number could not be increased. Other potential improvements in the technique could be envisioned as well.

Such investigative practices, however, raise questions not only about legality but also about compliance with legitimate *ethical* standards. While it is not always easy to separate these two realms, what follows is intended as an examination of various ethical questions raised by the use of investigative testing. Although the technique is new, there are three cases that have been brought and to varying extents resolved in 1993, and these will serve as illustrations in the discussion.

Entrapment

One concern that critics of investigative testing have raised is that such a practice constitutes entrapment. Entrapment entails luring or cajoling a person into committing a crime for the purpose of prosecution.

Public Enforcement Agency

In August 1992 the Massachusetts Commission Against Discrimination sent an African-American male tester into a retail clothing store in Boston to apply for a job.[1] The commission was acting in conformity with its charge to "attempt to bring about compliance with the state's antidiscrimination laws without resort to a public hearing." This first tester claimed on his application form that he had experience as a sales clerk. During an interview, the business manager told him that nothing was available.

On the same day, the commission sent a Caucasian male tester into the same store to apply for a job. Before filling out an application, this applicant was told in an interview with the same business manager that there was an opening for an assistant store manager. The manager told the second tester to take his application home, fill it out, and return it to the store later along with a résumé. When this applicant returned with the materials four days later, he indicated no sales experience whatsoever on his application.

Neither applicant, in the end, was offered the job as assistant store manager. The store filled the position about a week later. The complaint against the store stemmed from the perception that the two testers were treated differently as they applied for work.

The ethical basis of antipathy to entrapment stems from the plain wrongfulness of an enforcement agency luring or cajoling a party to break a law where none would have been broken otherwise, and where the enforcement agency had no independent reason to suspect noncompliance with the law. While it is plain that the particular African-American tester sent in by the Massachusetts Commission Against Discrimination would not have been discriminated against had the commission not acted, it is not at all clear that the law would not have been broken in other cases. But neither is it clear that it would have. Indeed, since this particular case was settled out of court (as per the mandate under which the commission operates), it is not even clear that the law was broken in *this* case.[2]

But the claim of entrapment remains an interesting one in the abstract. Enforcement agencies are often charged with investigative activities that require some degree of deception. While all such deception might in principle be called into question on ethical grounds, it is not likely that all deception would be ruled out. Sometimes it is not only ethically acceptable but also morally obligatory to lie and deceive.

An entrapment charge is, in any case, a special one. Where investigative practices cannot plausibly be construed as luring or cajoling, it seems likely that the entrapment charge would (and should) fail. Thus, where enforcement agency testers merely place themselves in situations in which members of the public often find themselves and act in ways in which members of the public have a right to act—or even, as in the case of advertised jobs, in ways in which members of the public are *invited* to act—they do not entrap. Although unethical entrapment is surely *possible* in such settings, it by no means follows that all usages of investigative testing are cases of entrapment.

Because the Massachusetts Commission Against Discrimination expected, as of April 1993, that it would be expanding its testing practice sevenfold in 1994, it is likely that further legal and ethical

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exploration of this issue will be forthcoming. One may hope for clearer lines of distinction between acceptable and unacceptable practices.

The charge of entrapment has relevance, though, only in cases brought to adjudication by legally constituted enforcement agencies and especially in cases where no independent reason exists to suspect an employer or employment agency of discriminatory activity. The two remaining cases that have reached some manner of resolution involve situations in which one or both of these conditions fail to be met and in which entrapment is therefore not the issue.

Private Antidiscrimination Agency

A federal district judge in the District of Columbia addressed several important questions concerning the right of private corporate agencies to bring suit against an employment agency for violation of federal and local civil rights law. In June 1993 the judge issued a carefully detailed memorandum and order in *Fair Employment Council (FEC) of Greater Washington, Inc. v. BMC Marketing Corporation.*[3] In this case, it is not easy to draw a sharp line dividing ethical from legal issues.

The FEC is a nonprofit corporation whose principal goal is to promote equal employment opportunities for all members of the diverse work force in the greater Washington, D.C., area. Thus the FEC is not a legally constituted enforcement agency, and its activity is to be understood in accordance with its corporate interests. One primary element in these interests is, however, compliance with civil rights law on the part of employers and employment agencies.

The FEC, in the course of its attempts to check compliance with the law, sent two African-American testers to a local employment agency to seek referral to prospective employers. Later, the FEC sent two Caucasian testers. On the basis of a comparison of the treatment given to the four testers, the FEC and its African-American testers sued the agency for violation of civil rights. The defendants filed motions to dismiss the case on several grounds, among them that the plaintiffs had no legal right to sue.

Present standards concerning who may bring suit in federal court include the following features:

- a litigant must show some actual or threatened injury[4];
- the injury must be fairly capable of being traced to a challenged action;
- the injury must be likely to be redressed by a favorable decision[5];
- the plaintiff must not assert a generalized grievance[6];
- the plaintiff's interest must be within the zone of interests protected by the statute under which the claim is made[7]; and
- plaintiffs must assert their own claims, not those of third parties.[8]

The employment agency argued that the claims should be dismissed on the ground that the testers were not injured by the agency's activity since they were not really seeking jobs. The judge responded that the testers *were* injured because of the plain wording

of the statute under which they brought suit:

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, *any individual* because of his race, color, religion, sex, or national origin.[9]

The statute creates rights regarding nondiscriminatory referral for all persons, not just persons who are really seeking employment.

The defendant cited an earlier case involving a plaintiff who sued an airline for placing newspaper advertisements seeking female (but not male) flight attendants. In that case, the fifth federal circuit ruled that, in order to have standing to file suit, a person "must be able to demonstrate that he has a real, present interest in the type of employment advertised."[10] In response to this argument, the district judge observed that the fifth circuit case had been based on a different subsection of the law that did *not* contain the "every individual" wording of the subsection at issue here and that this difference in wording made a difference in who was empowered to sue under the two subsections. Moreover, the fifth circuit case involved advertisements, and the court had reason to avoid empowering every casual reader of a discriminatory newspaper ad with the standing to sue the advertiser.

The defense argued that in yet a *different* case, a district judge had decided that a "plaintiff whose primary purpose in interviewing for a job is to create the basis for a Title VII EEOC [Equal Employment Opportunity Commission] charge and lawsuit, is not a bona fide applicant for a job [and] that he must be to establish a *prima facie* case."[11] The *BMC Marketing* judge observed that that case was based on yet a *third* subsection of the law in question. That case involved discriminatory *hiring*, while the subsection at issue in the present case specifically addresses discriminatory *referral* by employment agencies. While it is true that the FEC testers were not really seeking jobs, they were really seeking referrals. In being denied referrals, it may be that the FEC testers were denied something to which they had a right, namely, nondiscriminatory referrals.

Finally, the defendants argued that the FEC itself should not have been allowed to bring suit. An organization can have standing to bring litigation in federal court if it can show a "concrete and demonstrable injury to [its] activities," rather than just "a setback to the organization's abstract social interests."[12] The FEC argued that it was forced to devote scarce resources to the investigation of the employment agency. The agency responded that the allocation of resources to investigative activities had occurred long before any of the alleged incidents had taken place. Thus it could not be argued that the FEC's allocation of scarce resources was caused by any activity of the employment agency.

The court responded in two ways. First, it argued, on the basis of precedent,[13] that groups do suffer cognizable injury when they

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In being denied referrals, it may be that the FEC testers were denied something to which they had a right.

expend resources in order to identify discrimination. While this may be a correct citation of legal precedent, it does not seem particularly responsive to the argument of the defendants. Second, and much more plausible in the present case, the court observed that the defendants' arguments failed to take into account the second set of testers that the FEC decided to send in after the first tests were completed. It is at least possible that the second set of testers (the Caucasian testers) would not have been sent in had the first set been treated differently. Thus it was at least possible that the FEC was required, because of the illegal actions of the employment agency, to reallocate resources in its investigatory activities differently than it would have in other circumstances.

Thus it was at least possible that the FEC was required, because of the illegal actions of the employment agency, to reallocate resources.

As responses to dispositive motions, these arguments are strong ones. The questions concerning whether the agency actually *did* engage in discriminatory activity or otherwise violate anyone's rights remains, of course, to be seen. And whether equally strong rebuttal arguments can be made by the defendants also remains to be seen, since the federal circuit court for the District of Columbia has agreed to review the case on the issue of standing.

Legitimacy

It would appear that claims of entrapment, in particular, lose their relevance in cases like this, where the party bringing the claim to court is not a legally constituted enforcement agency but rather a private individual or organization. The principal ethical issues that remain in such cases involve (1) the legitimacy of the suit as it relates to the standing of the claimants, as in the case just discussed, and (2) the legitimacy of the procedures used to pick out any particular employer or employment agency for investigation.

In the case just discussed, the employment agency was able to claim that the FEC had no prior reason to suspect the employment agency of discriminatory activity. The agency just fell into the FEC's investigative net, as it were. If the federal district judge's orders on the dispositive motions are sustained, and if the litigation proceeds, this is bound to be an issue.

The FEC has provided another example of litigation inspired by the investigative testing of employment-related businesses, and this one involves an importantly different *modus operandi*. In *Fair Employment Council of Greater Washington v. Molovinski*,[14] the FEC sent out testers in response to a genuine prior complaint.

This case involved a complaint of sexual harassment and gender discrimination made against an agency in the business of providing lists of potential employers to job seekers. In this case, a woman actually seeking employment went to the defendant agency and was subjected to overt and covert offers of employment assistance in exchange for sex. She left and eventually brought the matter to the attention of the FEC.

The FEC sent in a total of four testers, two female and two male, all of whom were interviewed by the person who had interviewed the original complainant. The female testers were subjected to overtures and vocabulary consistent with what the complainant had reported. The male testers reported nothing similar. The FEC, just as in the other case, argued that its rights had been violated too, especially insofar as it had to reallocate resources to this investigation that could have been directed in other ways.

This case has been resolved. A jury ordered the defendant to pay $27,000 in compensatory and punitive damages to the original complainant, $15,000 each to the two female testers for compensatory and punitive damages, and $22,000 to the FEC for compensatory damages. The defendant has appealed the verdict.

Conclusion

What emerges from these three cases in terms of legal precedent is not entirely clear, but the results make some sense from an ethical point of view. The only case to have reached resolution is, in most respects, the clearest one.

Where claims are brought by private individuals and corporations, rather than by legally constituted enforcement agencies, questions of entrapment do not arise. Questions of standing to bring civil suit are legal matters and can expect legal resolution. So far, what resolution has been offered seems consistent with any ethical principle that may be applied.

Cases in which discrimination is ferreted out through no original complaint, but instead via the general investigative activities of some agency, are likely to be somewhat less persuasive from an ethical point of view than those in which the investigation comes in response to an independent complaint or series of complaints. In the former instance, but not the latter, defendants can plausibly complain that agencies were fishing for parties against whom to bring charges.

The three 1993 cases discussed here merely set the stage for the huge number of cases that will inevitably follow in the coming months and years. If anything is clear, it is that the ethical and legal challenges posed by the use of investigative testing in employment discrimination cases will increase both in number and in subtlety. For now, it would appear that these techniques, if used with discipline, can offer an ethically acceptable tool for investigating and providing an evidentiary basis for preexisting cases, and, to a lesser extent, for the ferreting out of discriminatory practices in general.

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Endnotes

1. *Mass-C MCAD v. Brooks Brothers, Inc.*, No. 92-BEM-1191, Probable Cause Finding, 27 November 1992.
2. The respondents agreed to make payments to a Massachusetts state trust for equal employment rights and to institute internal affirmative action and minority outreach programs. They admitted no wrongdoing.
3. *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, Civil Action No. 91-0989 (NHJ) (D. D.C., 18 June 1993).

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4. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). These cites are taken from the district court decision of 18 June 1993, written by Judge Norma Holloway Johnson.
5. *VFCC v. AUSCS*, ibid., quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).
6. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).
7. *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175 (D.C. Cir. 1976).
8. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).
9. 42 U.S.C.A. § 2000e-2(b) (West 1981), emphasis added by Judge Johnson in her order of 18 June 1993.
10. *Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir. 1972).
11. *Parr v. Woodmen of the World Life Insurance Society*, 657 F. Supp. 1022 (M.D. Ga. 1987).
12. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).
13. Ibid.
14. *Fair Employment Council of Greater Washington, Inc. v. Molovinsky*, Civil Action No. 91-CA7202 (D.C. Super. Ct., 12 August 1993).

This paper has profited from the commentary and suggestions of Victoria L. Varga.