

Background Screening and Pre-Employment Testing: Navigating the EEO Traps

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Our Roadmap

- Why we screen and test?
- Why are the EEOC/OFCCP investigating applicant screening and pre-employment testing?
- How to prepare for, and defend against, the eventual investigation?

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"Believe me, Mr. Roberts, checking the wear on a job applicant's molars is just basic company routine."

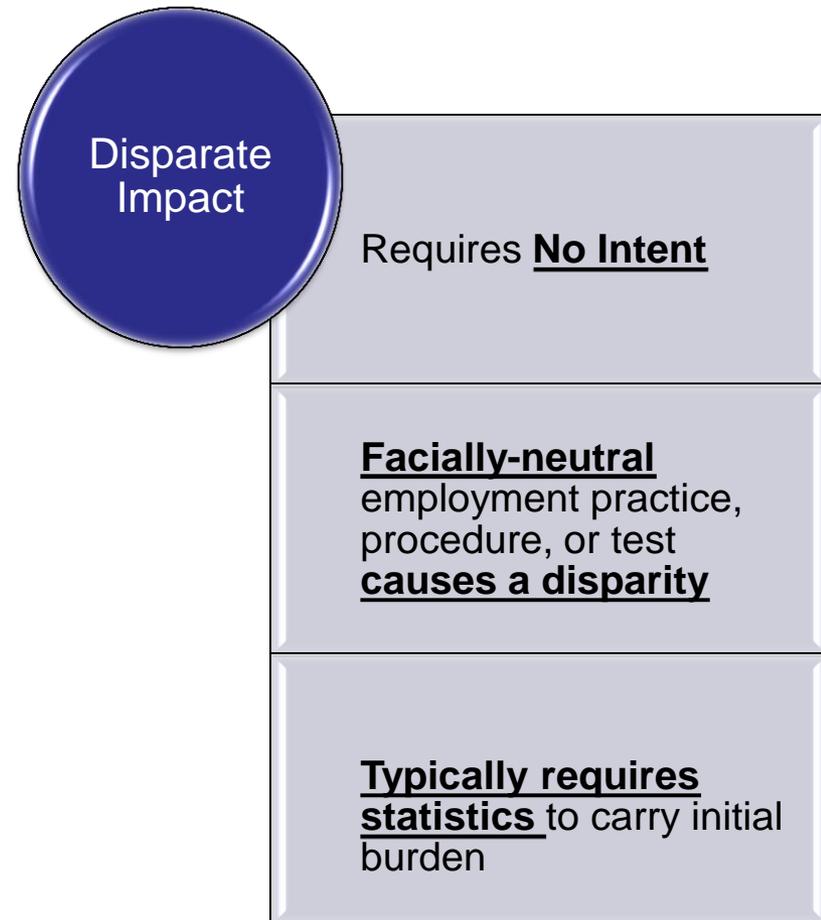
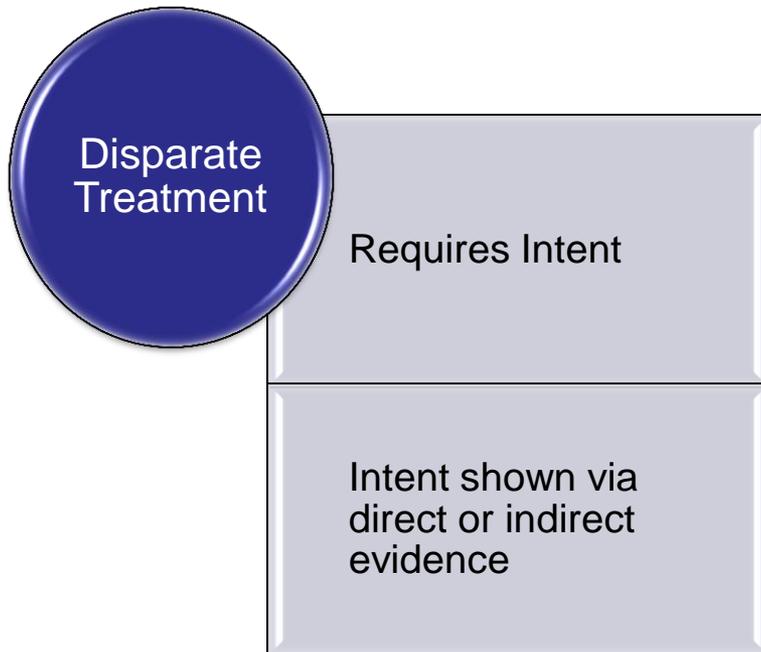
Background Screening: Why We Do It

- State and federal legal requirements,
 - e.g., positions involving child or elder care, schools, public utilities and contractors
 - banking and personal financial information
- Risk management
 - Negligent hiring
 - Negligent training/supervision
 - Negligent retention/entrustment

Background Testing: Why We Do It

- To have **objective** criteria to select among many potentially qualified applicants
 - To the EEOC/OFCCP, “subjective” often means “discriminatory”
- Concerns about “disparate treatment” claims ignited the objective testing revolution; the testing itself, however, has prompted the OFCCP’s/EEOC’s disparate impact backlash
- The disparate treatment/disparate impact continuum

Disparate Treatment v. Disparate Impact



Paradigm Shift: OFCCP

Circa 2001, OFCCP adopts statistics-driven auditing strategy dubbed “Active Case Management”

Fiscal Year	Financial Remedies	Workers Re-compensed	Compliance Evaluations
2009	\$9,300,000*	21,839	3,917
2008	\$67,510,982	24,508	4,333
2007	\$51,680,950	22,251	4,923
2006	\$51,525,235	15,273	3,975
2005	\$45,156,462	14,761	2,730
2004	\$34,479,294	9,615	6,529
2003	\$26,220,356	14,361	4,698
2002	\$23,975,000	8,969	4,135
2001	\$28,975,000	9,093	4,716

*** Dramatic drop related to a new method for calculating remedies, not a drop in enforcement success.**

Paradigm Shift: EEOC

In 2005, former EEOC Chair Dominguez established the Systemic Discrimination Task Force (“SDTF”) headed by Vice-Chair Silverman

SDTF researched EEOC’s systemic discrimination work and found:

- EEOC not effective in using employment data to identify discrimination
- EEOC lacked technology to support systemic litigation
- EEOC not appropriately staffing systemic discrimination cases
- EEOC not providing incentives to pursue systemic discrimination – district offices focused solely on individual allegations
- Defense attorneys believed EEOC disadvantaged by not making better use of its resources and expertise

Paradigm Shift: EEOC

On April 4, 2006, recognizing that the Commission cannot effectively combat discrimination without a strong nationwide systemic program, the EEOC unanimously voted to shift the EEOC's emphasis to the investigation and litigation of systemic discrimination.

Practical Implications of Systemic Focus

Commissioner Charges/Directed Investigations

- “Commissioner’s Charge” (Title VII/ADA): based upon information from EEO-1 reports, common pending charges nationally, information from advocacy groups, media reports, concerns about a “specific industry,” related charges against common vendor
- “Directed Investigation” (ADEA), even in the absence of a perfected EEOC Charge

Practical Implications of Systemic Focus

- Garden-variety individual EEOC charges often grow into EEOC systemic investigations of employer's overall applicant and hiring process
- Employer's response to Charge is often trigger for systemic discrimination investigation
 - “We treated Charging Party just like all other applicants pursuant to our policy” defense can open the door to a systemic focus.

The EEOC's Hot Issues

In December 2007, EEOC announced the practices that its systemic initiative would target as having an “adverse impact” on protected groups:

- Employment tests (both pre- and post-offer)
- Credit reports (credit score criterion)
- Criminal background check (Criminal background matrices)
- ADA policies (reassignment)
- Pay policies
- English proficiency rules
- Grooming standards

Systemic Investigations

EEOC/OFCCP systemic investigations are very similar now, and involve some or all of the following:

- Multiple requests for information (“RFI’s”)
- Production of an HRIS database in Excel, Access or Ascii format with multiple fields of information
- Test/Criterion Information--e.g., date of test, item-level responses, test score, pass/fail
- Participation of third-party test vendors (necessary for validity investigation/justification)
- Onsite with interviews of corporate officials and regular employees
- Additional data/document requests due to widening breadth of investigation
- Statistical analyses

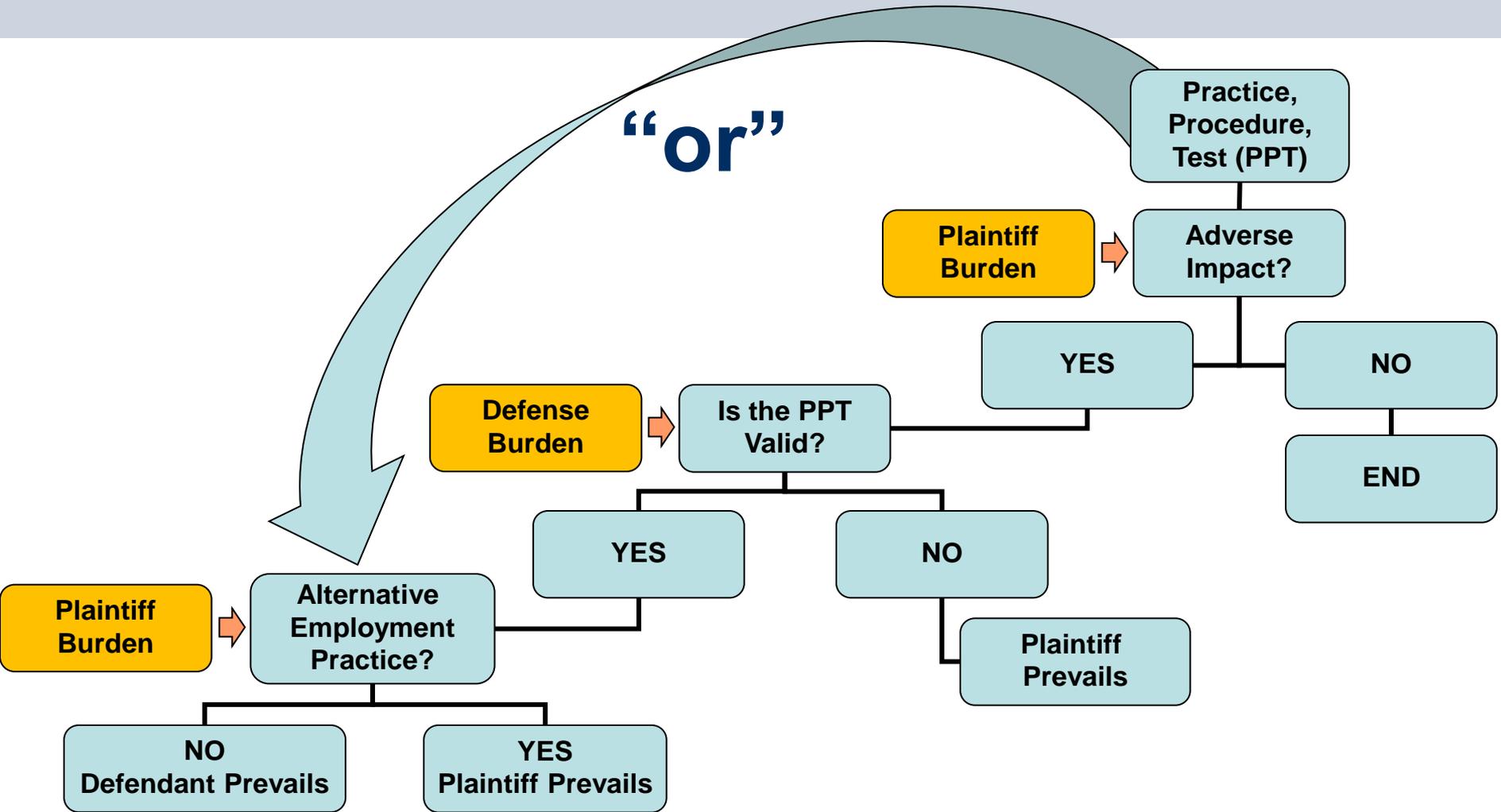
Systemic Investigations: Three Primary Components (Defined)

ADVERSE IMPACT

An unlawful employment practice based on disparate impact is established only if:

- 1 A complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact and
- 2 the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity or
- 3 the complaining party makes the demonstration described above with respect to an alternate employment practice, and the respondent refuses to adopt such alternative employment practice.

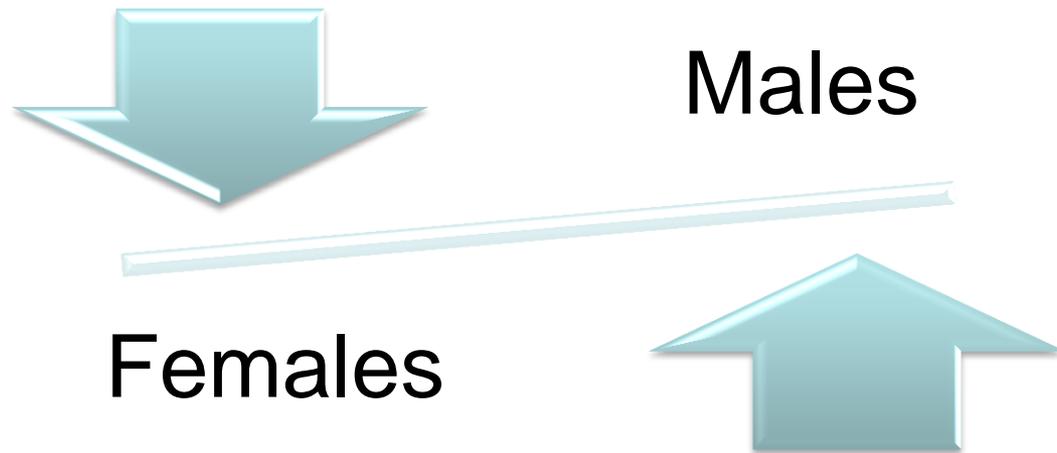
Adverse Impact: An Overview



Adverse Impact: An Overview

Selection Rate Comparison

Evaluates whether a practice, procedure or test (PPT) results in disproportionately different selection rates by gender, race/ethnic, or age group.



Adverse Impact: An Overview

www.disparateimpact.com

Selection Rate Comparison

- 2 X 2 Table Comparison
- Evaluates hires, promotions, terminations, took v. passed test, etc.
- Fisher Exact / Chi-Square / 80% Test

Men Pass	Men Fail
Women Pass	Women Fail

Results in a value indicating if the observed differences in rates are due to chance (i.e., statistically significant). Significant differences will typically carry the first burden.

Adverse Impact: An Overview

Adverse Impact “Step” Analysis Male v. Female

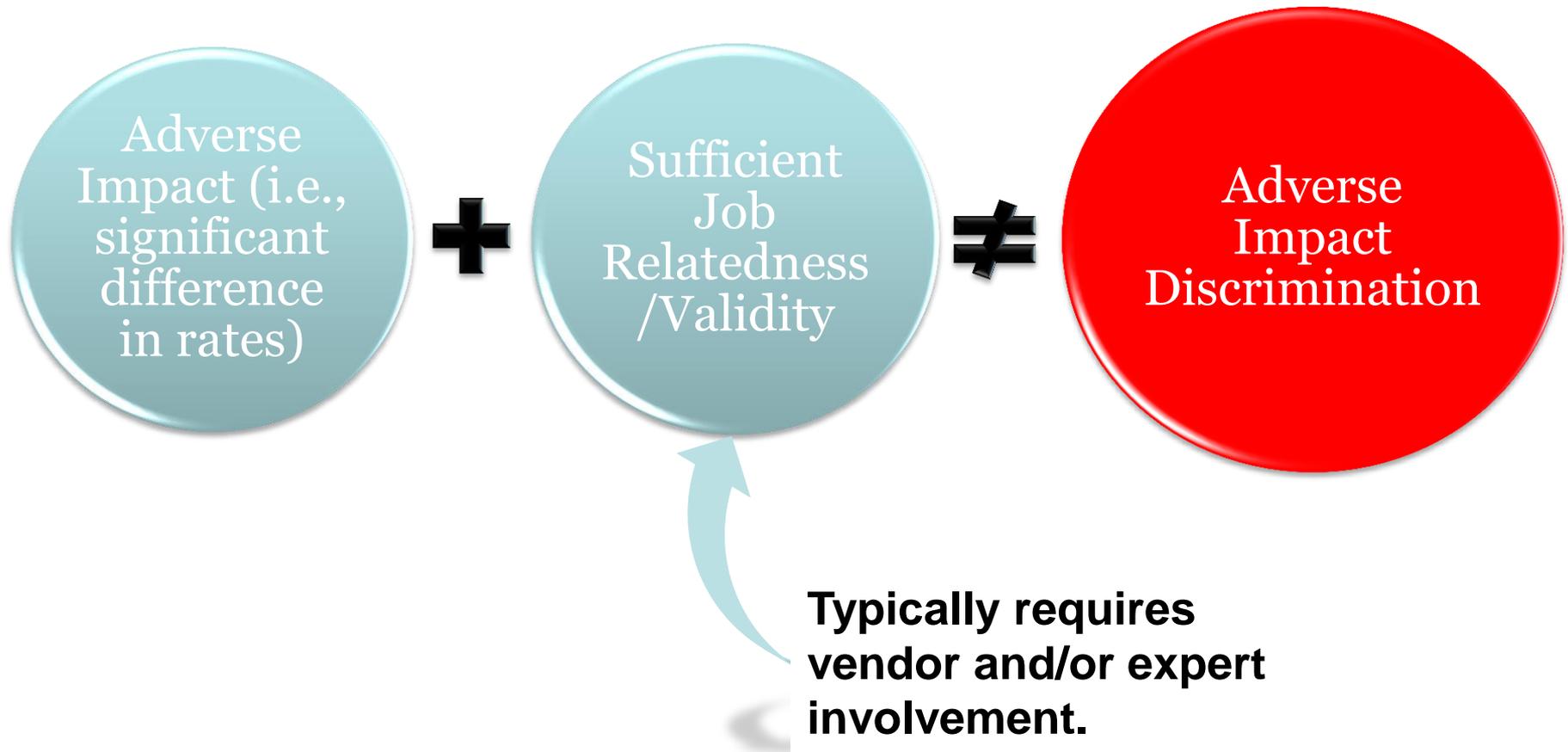
Steps	StartingCount	Completing Count	Result
Overall (App vs. Hired)	Male - 100 Female - 100	Male - 50 Female - 30	2.80 SD
1. Basic Qualifications	Male - 100 Female - 100	Male – 79 Female - 77	0.25 SD
2. Test	Male - 79 Female - 77	Male – 65 Female - 35	4.80 SD
3. Interview	Male - 65 Female - 35	Male – 60 Female - 32	0.18 SD
4. Final Selection	Male - 60 Female - 32	Male – 50 Female - 30	0.00 SD

The Case for Statistical Experts

EEOC/OFCCP are using a “data-driven strategy”

- Experts can ensure “analyses reflect reality” . . . often resulting in minimizing (or eliminating) statistical significance or shortfall
 - Conduct analyses by location, requisition, manager, similarly-situated employee groups, etc.
- BIG numbers are BAD numbers
- Enforcement agencies should ***always*** receive a database that accurately reflects the reality of how selection decisions are made
- Most often, an accurate database will result in a Shortfall is difference between expected and actual hires, used as starting point for damage calculations

Adverse Impact: An Overview



Job-Relatedness/Business Necessity

Business necessity arguments may play better in front of jury than EEOC

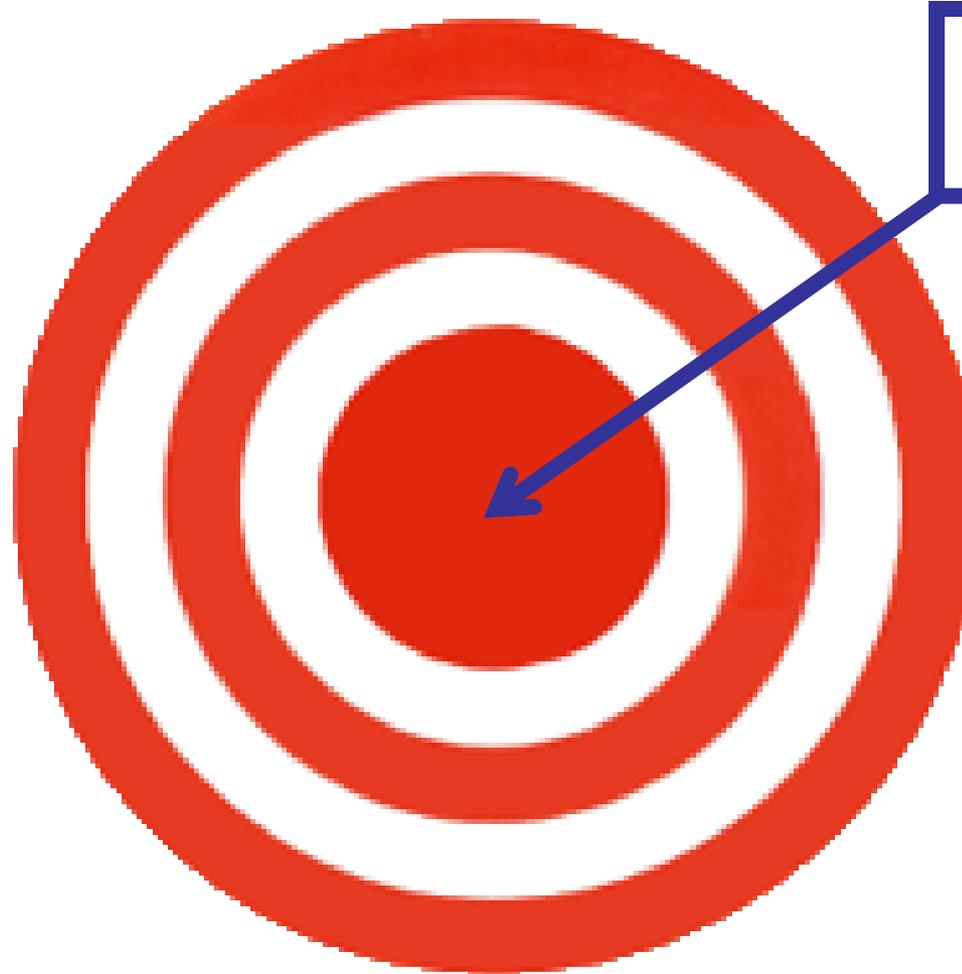
- EEOC v. Watkins Motor Lines, 7th Cir. (2009): EEOC challenged criterion requiring disqualification of violent felons

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"Can we, just for a moment, Your Honor, ignore the facts?"

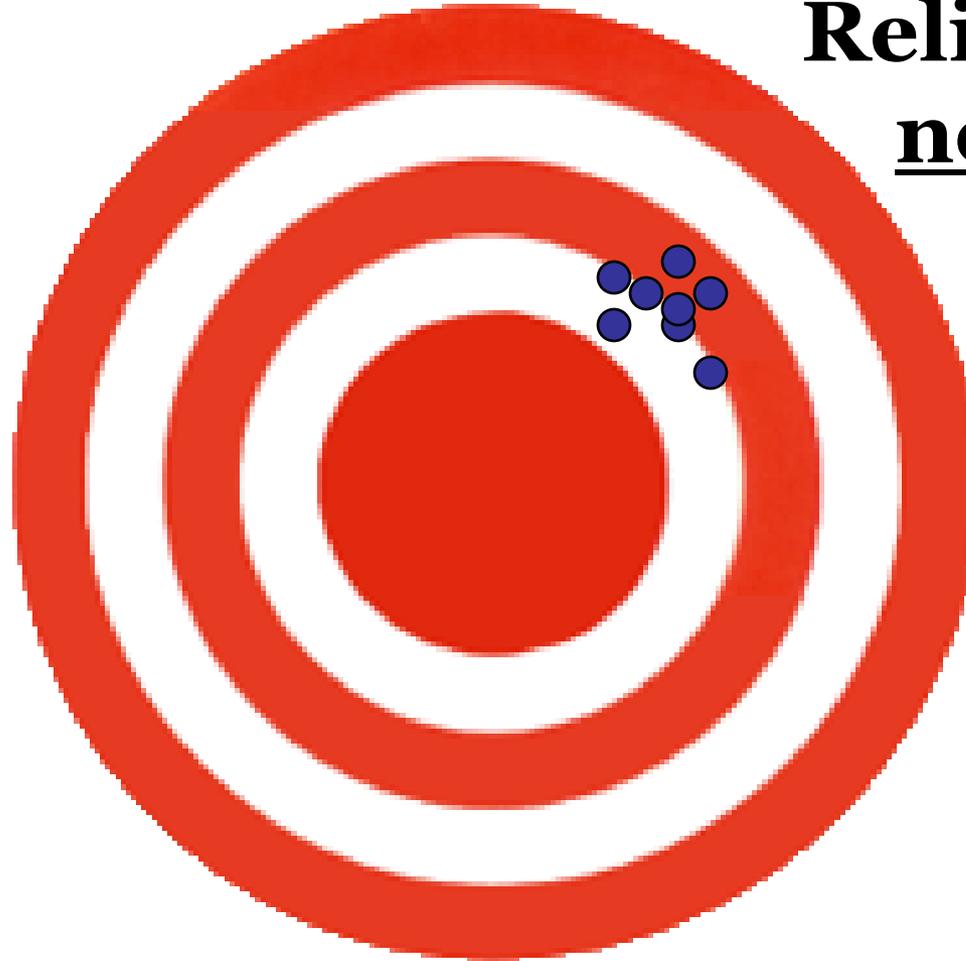
What is Validity?



**Great Job
Performance**

What is Validity?

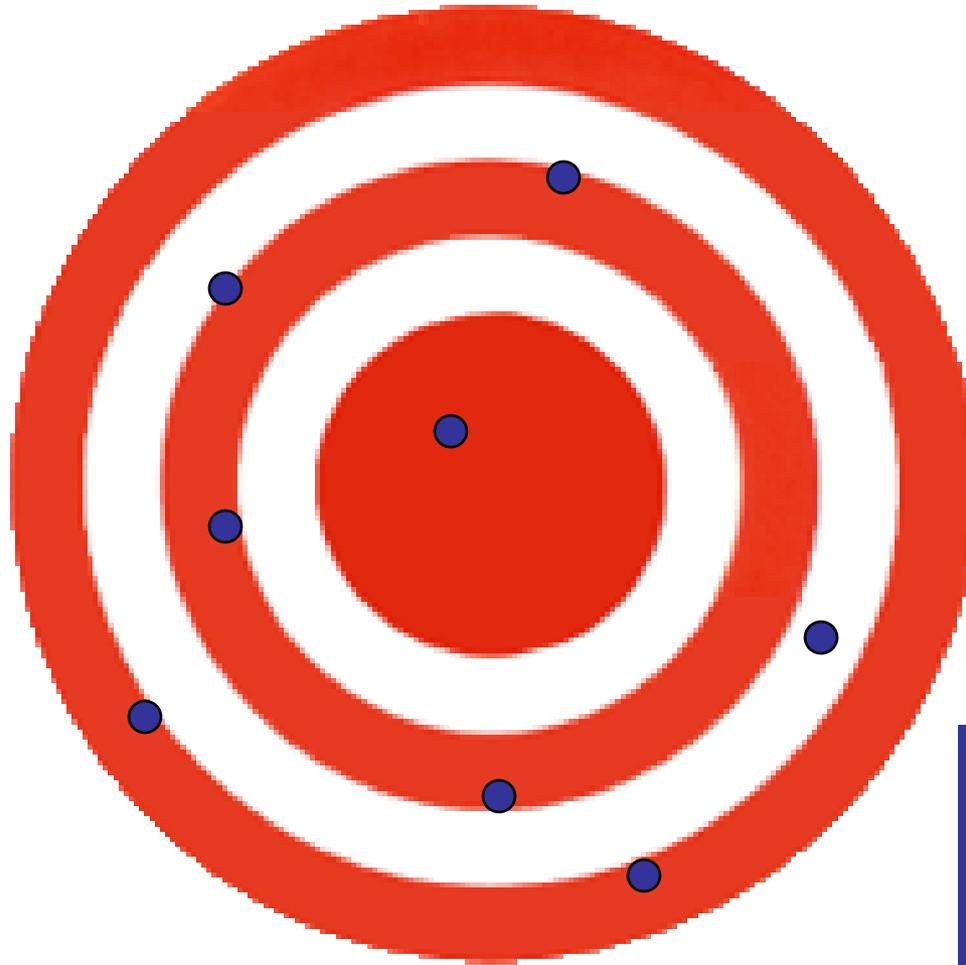
**Reliable...but
not Valid**



**Consistently
hiring the
wrong
people**

What is Validity?

**Neither
Reliable
or Valid**



**Hit or
Miss...**

What is Validity?

**Reduced
Turnover &
Absenteeism**

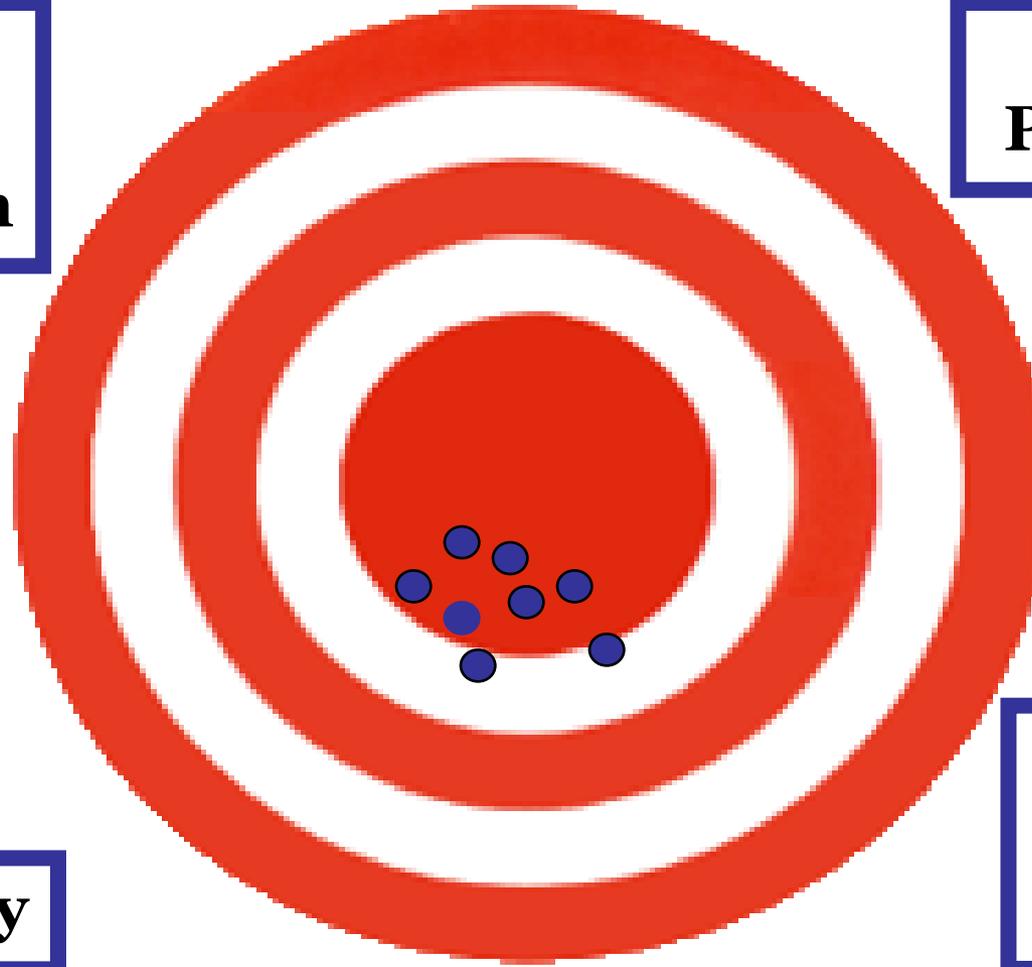
**Better
Productivity**

**More
Satisfied
Clients**

**Less
Time to
Train**

Less Liability

**Employee
Satisfaction
Increased**



The Case for Testing/Validation Experts

If policy/practice/criterion triggers adverse impact, burden shifts to employer to show that it is “job related and consistent with business necessity”

- Test Validation Studies (content, criterion, construct validity): does test have predictive value for determining job success?
- Criterion (i.e., no violent felonies): is criterion narrowly tailored to mitigate a specific risk?

How Experts Can Help . . .

- Enforcement agencies employ teams of internal experts
- Field's fund of knowledge about systemic discrimination is evolving; investigators almost universally get it wrong
- Experts can help with database creation and retrieval of data
- Experts can help with evaluating validity
- Consulting v. testifying experts
 - Disparate impact litigation requires testifying statistical expert
 - Work undertaken by consulting experts in EEOC investigation at request of defense attorney entitled to attorney work product protection

Litigation of Systemic Actions

- Recently confirmed EEOC General Counsel P. David Lopez characterized his litigation focus as “strategic, systemic, and smart,” litigating “big cases where we can have the broadest possible impact.”
- On December 21, 2010, the EEOC filed *EEOC v. Kaplan Higher Education, Inc.*, ND Ohio, alleging Kaplan’s use of credit report information for certain positions had a disparate impact on African American applicants and employees.
 - EEOC alleged both disparate treatment (pattern and practice) and disparate impact theories of liability
- Private Plaintiff employment bar is following Agency leads

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Final Questions?

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