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Law Report

LEGAL NEWSLETTER

VOLUME 2, ISSUE 1

The Through-the-Looking-Glass Department:

PSYCHOLOGICAL TEST ELIMINATES APPLICANTS AS "TOO SMART" TO BE POLICE OFFICERS

Federal Court Confirms that New London Police May Follow Psych Test's Conclusions that Candidates Can be Disqualified for Supposedly Excessive Intelligence

Police officers perhaps have one of the more vital, if thankless, occupations in our society. At risk of serious injury and death, they are called upon to protect the safety and security of citizens against the criminal and the violent. Moreover, officers cannot carry out their duties arbitrarily. Every American has the constitutional right against unlawful, unfounded searches and seizures.

The territory would thus seem to call for persons who understand where the legal lines are drawn and who can think quickly and accurately on their feet. With all that's at stake for the officer

The Jordan decision confirms that an employer can use a psychological profiling test to deprive brighter and more perceptive applicants of equal access to the job market.

and those that he or she serves, it is logical that candidates for the job could never be too intelligent. Yet, comes recent word from the United States Court of Appeals for the Second Circuit that the City of New London, Connecticut may rely on the maximum recommended intelligence score of a psychological

test publisher to discriminate against job applicants deemed "too smart" for a law enforcement position. *Jordan v. City of New London*, 2000 U.S. App. LEXIS 22195 (August 23, 2000).

Federal and state employment laws have steadily expanded the protections against discrimination, from the 1964 Civil Rights Act, shielding a person's race, gender, and religion to more recent laws barring unequal treatment against physically or mentally disabled workers. Yet, the *Jordan* decision confirms that at least for the time being, an employer can use a psychological profiling test - which suggests upper limits on the "ideal" intelligence for specified occupations - to deprive brighter and more perceptive applicants of equal access to the job market.

On March 16, 1996, Robert Jordan took the "Wonderlic Personnel Test and Scholastic Level Exam" (WPT), administered as a prerequisite for employment as a New London police officer. The WPT is touted to measure "cognitive ability." Mr. Jordan scored 33 of a possible 50 on the test.

A few months later, Mr. Jordan heard that New London was hiring. However, assistant city manager Keith Harrigan informed Mr. Jordan that New London would not interview him as he "didn't fit the profile."

The 46-year-old Mr. Jordan, concluding he was a target of age discrimination, filed a complaint with the Connecticut Com-

mission on Human Rights and Opportunities. New London responded by asserting that it only interviewed candidates that scored between 20 and 27 on the WPT. Citing the "Wonderlic Employee Turnover Report" and its recommended scoring range for a police patrolman as "approximately 18-30," the city

After a high score on the screening test, New London declined to interview Mr. Jordan as he "didn't fit the profile."

contended it was justified in declining Mr. Jordan an interview as it was trying to prevent frequent worker turnover from those supposedly overqualified for the job. The city's attorney, Ralph J. Monaco, later explained that smart candidates could quickly tire of police work and leave shortly after receiving \$25,000 in academy training. "We are looking for bright people," Monaco said, "but we're not looking for people that are so bright to an extent that they're not going to be challenged by the job."

Mr. Jordan then sued New London and Mr. Harrigan in federal district court for employment discrimination under the U.S. and Connecticut constitutions. The city brought a motion **Please see "TOO SMART," page 2**

Your Attorney's Fees at Work:

LAWYERS REFINE THE ART OF THE STUPID QUESTION

Members of the Bar Disprove the Adage That There are No Dumb Queries

Language is a reflection of a culture's preoccupations. Eskimos reportedly have hundreds of words for snow and ice conditions. Similarly, the number of American synonyms for slow-wittedness also approaches triple digits. For all of their training in logical thinking and communications, members of the legal profession are not immune from the rashes of simple-mindedness that sometimes sweep our society. Witness the following compilation, taken from *Disorder in the Court*, by Charles M. Sevilla.

* * *

Q: What gear were you in at the moment of the impact?

Please see STUPID, page 3

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The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.

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“TOO SMART”

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for summary judgment, contending it rightfully followed the recommendations from the Wonderlic company on the range of WPT scores suitable for employment as a police officer. The Wonderlic materials cautioned that because overqualified applicants might quickly become bored with supposedly unchallenging work, “simply hiring the highest scoring employee can be self-defeating.”

Mr. Jordan countered with evidence that the Wonderlic personnel profile test was unreliable in predicting a relationship between an applicant’s high cognitive ability and his or her job satisfaction, performance and longevity.

New London won the motion. *Jordan v. City of New London 1999 U.S. Dist. LEXIS 14289*. The district court judge found that Mr. Jordan had no fundamental right to employment as a police officer and that higher-than-average intelligence was not a so-called “suspect class” – such as race or national origin – under the law. Applying the U.S. Supreme

Citing the “Wonderlic Employee Turnover Report,” the city contended it was justified in declining Mr. Jordan an interview as it was trying to prevent frequent worker turnover from those supposedly overqualified for the job.

Court’s standards for reviewing government regulations that do not adversely affect fundamental rights or suspect classifications, the court found that the city did not have to demonstrate that its hiring policy was actually premised on sound reasoning, only that there was at least some “conceivable state of facts that would provide a rational basis for the government’s conduct.”

The city’s reliance on Wonderlic’s assertion that supposedly overqualified candidates would soon quit the job was an

adequate “rational basis” for the Court to uphold New London’s actions. It did not matter that Wonderlic’s position conflicted with other published workplace studies. “[The city] need show only that there was reason to believe that employing the classification could be beneficial in achieving their stated goal [of efficient personnel management.] No bright line divides the merely foolish from the arbitrary law. It is not a function of the courts to judge the wisdom of particular business practices, but to ensure that such policies are made on a rational basis... [Mr. Jordan] may have been disqualified unwisely but he was not denied [his constitutional rights.]”

Mr. Jordan appealed the decision. However, in a decision issued in late August, 2000, the federal court of appeals upheld the lower court, following the same reasoning that an “unwise” hiring policy was not necessarily an illegal one. *2000 U.S. App. LEXIS 22195*.

While the City of New London was thus “vindicated” on the law, its leaders have plainly favored bureaucratic inertia over common sense. It would not take a rocket scientist to suspect Wonderlic’s recommendations on job qualifications as misguided, if not arbitrary, when the testing company asserts that the median WPT score for a qualified insurance salesperson should be higher than that of a police patrol officer. Thus, the Wonderlic organization – which touts the use of its tests by over 50,000 clients, in some 125,000,000 hiring decisions, over the last 63 years – has apparently aided in installing smarter people to supervise our insurance policies than those hired for law enforcement, entrusted with protection of our individual constitutional rights.

Understandably, other police departments have declined to take such a rigid stand on excluding the intelligent, including bright candidates with greater potential to work through the ranks to senior positions. Police Chief Wilfred Blanchette Jr. in neighboring Groton, Connecticut allowed that his department only used the exam to screen out those below the minimum needed intelligence. “I go for the highest score on the Wonderlic that I can get,” he told the Associated Press. “My

instructions are, ‘You give me a list of people who are above this number.’ Let me figure out if they’re going to get bored or not.” Similarly, soon after the trial court’s opinion was published, San Francisco Police Chief Fred Lau invited Mr. Jordan to apply for a police job in his department, asserting smart applicants should be welcomed, not discouraged from joining the force.

Employers can and should have the right to define the functions and performance standards for their workforces. In the con-

The court found Mr. Jordan had no fundamental right to employment as a police officer and that higher-than-average intelligence was not a so-called “suspect class” – such as race or national origin – under the law.

text of the Americans with Disabilities Act, the federal Equal Employment Opportunity Commission recognizes that the law “is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative or quantitative, [and thus does not] require employers to lower such standards.”

While those determining policy for the New London Police have the corresponding discretion to perpetuate mediocrity, it was the illusory correlation between average intelligence and quality police officers – supplied by a nationally recognized psychological testing company – that was the justification of this employer’s public relations fiasco. Validated intelligence and other profiling tests can and should be used by employers as one of several tools utilized to determine the best qualified candidate for a job opening. Regardless of any accompanying wrongheaded conclusions that some applicants can be too intelligent for a given occupation, such tests should not be used as a bludgeon to discourage interest in as vital a position as front lines law enforcement. ■

STUPID

Continued from page 1

A: Gucci sweats and Reeboks.

* * *

Q: This myasthenia gravis, does it affect your memory at all?

A: Yes.

Q: And in what ways does it affect your memory?

A: I forget.

Q: You forget. Can you give us an example of something that you’ve forgotten?

* * *

Q: What was the first thing your husband said to you when he woke up that morning?

A: He said, “Where am I, Cathy?”

Q: And why did that upset you?

A: My name is Susan.

* * *

Q: Do you know if your daughter has ever been involved in voodoo or the occult?

A: We both do.

Q: Voodoo?

A: We do.

Q: You do.

A: Yes, voodoo.

* * *

Q: Now, doctor, isn’t it true that when a person dies in his sleep, he doesn’t know about it until the next morning?

* * *

Q: The youngest son, the twenty-year old, how old is he?

* * *

Q: Were you present when your picture was taken?

* * *

Q: So the date of conception (of the baby) was August 8th?

A: Yes.

Q: And what were you doing at that time?

* * *

Q: She had three children, right?

A: Yes.

Q: How many were boys?

A: None.

Q: Were there any girls?

* * *

Q: How was your first marriage

terminated?

A: By death.

Q: And by whose death was it terminated?

* * *

Q: Can you describe the individual?

A: He was about medium height and had a beard.

Q: Was this a male, or a female?

* * *

Q: Is your appearance here this morning pursuant to a deposition notice which I sent to your attorney?

A: No, this is how I dress when I go to work.

* * *

Q: Doctor, how many autopsies have you performed on dead people?

A: All my autopsies are performed on dead people.

* * *

Q: Do you recall the time that you examined the body?

A: The autopsy started around 8:30 p.m.

Q: And Mr. Dennington was dead at the time?

A: No, he was sitting on the table wondering why I was doing an autopsy.

* * *

Q: Are you qualified to give a urine sample?

* * *

Q: Doctor, before you performed the autopsy, did you check for a pulse?

A: No.

Q: Did you check for blood pressure?

A: No.

Q: Did you check for breathing?

A: No.

Q: So, then it is possible that the patient was alive when you began the autopsy?

A: No.

Q: How can you be so sure, Doctor?

A: Because his brain was sitting on my desk in a jar.

Q: But could the patient have still been alive, nevertheless?

A: Yes, it is possible that he could have been alive and practicing law somewhere. ■

MURRAY, THE WONDER DOG, BENEFITS FROM CALIFORNIA'S NEW WAGE REGULATIONS

Industrial Welfare Commission Rulings Increase Motivation for Staff to Take Office Labrador Retriever on Frequent Ten-Minute Walks

Humans familiar with Labrador retrievers know that most such dogs never met a meal they didn't like and have never turned down an opportunity to take off for the wide open spaces. This office sports one such personality, Murray, the well-loved resident yellow Lab we have dubbed our "Deputy Director of Security." While Murray has thus far shown little interest in pushing management for wages or vacation pay, he has markedly benefited from California's new "get tough" workplace regulations on regular employee breaks.

On October 1, 2000, the California Industrial Welfare Commission (IWC) issued important revisions to each of its sixteen "wage orders" covering most employees in the state. These changes expand upon California's return to daily overtime and other more stringent wage laws specified in the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999."

As reported in our article "California Employers Again Must Pay Daily Overtime" (*Bowles Law Report*, Vol. 1, Iss. 2), the "Restoration Act" went into effect on January 1, 2000. That law not only imposes overtime pay to hourly employees after eight hours of work in a day or after 40 hours in a week, but also restricts options for longer-day, shorter-week "alternate work schedules" free from overtime rates; toughens qualifications for executive, administrative, and professional exemptions from overtime; and imposes civil penalties on companies and company executives



Murray patrols Pasadena law office for lunch break scofflaws.

that violate any provision of the overtime or any of the parallel wage orders of the IWC.

Among the more important October 1 additions to the wage orders were new penalties for an employer's failure to provide meal and rest periods during the workday. Unless a worker meets the specific qualifications for an "on duty" exception, documented

While Murray has never pushed for wages or vacation pay, he has markedly benefited from California's new "get tough" workplace regulations on regular employee breaks.

in a written agreement, California requires that employers *must provide* employees a minimum thirty-minute unpaid, no-work meal period for every five hours of work. The law also specifies that employers *must provide* employees a paid ten minute rest period for every four hours of work "or a major fraction thereof."

For the typical eight-hour work schedule, this of course means that an employer must provide a ten-minute rest period in the morning, a half-hour meal break at mid-day, and another ten-minute rest period during the afternoon. As of October 1, an employer that "fails to provide" such an unpaid meal break or either of the ten-minute rest peri-

ods in any workday "shall pay the employee one (1) hour of pay at the employee's regular rate of compensation" for that day.

It is unclear as yet what the terms "provide" or "fail to provide" mean in this context. Certainly, an employer should post its applicable IWC wage order and have a standing policy that requires workers to take this time off. Obviously, when necessary, employers should remind busy, committed workers that these breaks are required under the law. It is less obvious if "provide" also means that the employer must personally escort each employee to the door three times in a regularly scheduled eight-hour day.

This employer, for one, believes that having to physically herd staff out of their chairs is overkill. However, at least in this office, the fresh threat of one-hour "penalty" wages for each day one or more of these breaks is "not provided" has been Murray's windfall. For reasons he cares not to question, Murray's leash keeps being thrust in his face throughout the workday, with yet another staff member intensely interested in taking him for yet another spin around the block. On clearly self-serving motivations, Murray would now support any prospect of an even more drastic increase, say to \$5,000 per employee, in daily civil penalties for failure to provide the required frequency or duration of break times in the workplace. ■

Announcing:

BOWLES EMPLOYMENT LAW QUARTERLY

*First Issue of a Workplace Law and
Policy Update Service Scheduled for
Mid-November, 2000*

For some years now, we have been helping protect employers by implementation of legal basics in the workplace. We encourage clients to stay current on the constant changes in the law of employee relations. Thus, to add to our range of model workplace forms and policies, we are introducing a *Bowles Employment Law Quarterly*.

This four-issue annual subscription service will provide the user with:

- Memos on legal develop-

ments affecting employers

- New sample forms and policies on workplace issues
- Updates to previously published forms and policies as new laws direct.

Our first issue, scheduled for November 17, 2000, will contain:

SAMPLE POLICY ON INTERNET AND EMAIL USAGE:

A new, detailed model policy on employee use of company computer for email and Internet

access, covering company procedures for access and monitoring of such use.

MEMO AND SAMPLE POLICY ON THE CALIFORNIA'S WAGE REGULATIONS:

In addition to a briefing on the Industrial Welfare Commission's new wage orders, effective October 1, 2000, and affecting nearly every worker in this state, the issue will include a revised, form proposal for alternative workweek schedules (AWSs), allowing company workdays of up to ten hours without incurring overtime liability.

ARBITRATION OF EMPLOYMENT DISPUTES:

The issue will include a checklist of important revisions to employee arbitration agreements, as required by the California Supreme Court's August 24, 2000 decision in *Armendariz v. Foundation Health Psychcare, Inc.*, 24 California Reports, 4th Series (Cal.4th) 83.

PROCEDURES FOR EMPLOYER CHANGES OF WORKPLACE POLICIES:

We will also include a memo on the conditions and procedures for a company's cancellation or revision of previously published workplace policies, based on the California Supreme Court's June 1, 2000 decision in *Asmus v. Pacific Bell, et al.*, 23 Cal.4th 1.

We are confident that the coming issues of the *Bowles Employment Law Quarterly* will assist you in ensuring efficient, safe expansion, free of the distractions of unplanned disputes over employee management policies and procedures.

The subscription rate is \$300 per year plus applicable sales tax, for a minimum four issues per year. To order, please call or fax our office: (626) 583-6600; (626) 583-6605 (fax). You may also order by email: tbowles@tbowleslaw.com or Pat@tbowleslaw.com. ■