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Book Review

Every Manager's Legal Guide to Hiring

By August Bequai.
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Pp xiii, 189. $39.95.

I. INTRODUCTION

Employment discrimination law presents an incredible array of practical problems for managers and other human resource practitioners.[1] *Every Manager's Legal Guide to Hiring*,[2] by August Bequai,[3] attempts to educate the non-legal practitioner on the legal consequences of improper employee selection.

Mr. Bequai strives to provide an overview of hiring law in an attempt to help managers avoid the legal pitfalls that can accompany recruiting, screening, testing and interviewing job applicants. The book examines a broad range of discriminatory practices and places them strictly into the context of hiring.

Each chapter of *Every Manager's Legal Guide To Hiring* begins with illustrations of how an employer can get into trouble by failing to "hire right."[4] The author aims to do more than merely describe discriminatory hiring practices. He evaluates the effect of discrimination laws on hiring and provides managers with general guidelines on proper procedures to employ in hiring.

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1. The massive body of federal law, including the Civil Rights Act of 1964, Equal Pay Act, Age Discrimination in Employment Act, Fair Labor Standards Act, Employee Retirement Income Security Act, and state fair employment laws have created a need for managers and other human resource professionals to be well educated in the law to avoid costly litigation.

2. A. BEQUAI, EVERY MANAGER'S LEGAL GUIDE TO HIRING (1990).

3. Mr. Bequai has taught at George Washington University, The American University, and New York University. He is presently in private practice in Washington, D.C. His other books include: COMPUTER CRIME (1978); HOW TO PREVENT COMPUTER CRIME: A GUIDE FOR MANAGERS (1983); WHITE COLLAR CRIME: A 20TH-CENTURY CRISIS (1978); and MAKING WASHINGTON WORK FOR YOU (1984).

4. The book provides no legal references and uses no legal terminology in the anecdotes illustrating cases which emphasize discriminatory hiring practices.

This review analyzes *Every Manager's Legal Guide to Hiring* in the context of current Missouri and federal law, with the purpose of providing an in-depth look at hiring laws for the Missouri practitioner.

II. The Employment-at-Will Doctrine

Missouri continues to follow the "at-will doctrine" of employment.[5] This means that an employer may hire or fire at will—for good reason, bad reason, or no reason at all.[6] Since the Civil Rights Act of 1964 (Title VII),[7] however, Congress has passed laws to prevent an employer from relying on the at-will doctrine when his or her conduct results in discrimination on the basis of race, color, religion, sex, or national origin.[8] The Civil Rights Act of 1964, along with the Pregnancy Discrimination Act,[9] the Age Discrimina-

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5. Bethea v. Levi Strauss & Co., 827 F.2d 355, 359-60 (8th Cir. 1987) (Missouri employers may terminate employees at any time, absent contract for definite term); Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120, 122 (Mo. Ct. App. 1985) ("[A]n employer may discharge an employee who is not subject to a contract of employment for a definite term, at any time with or without cause provided no statutory provision is violated.").

6. A. Bequai, *supra* note 2, at 4. Missouri courts have set aside the at-will doctrine where an employee can show that there was an implied contract based upon the employers personnel handbook which was disseminated to all employees. *See* Matthews v. Federal Land Bank, 718 S.W.2d 220 (Mo. Ct. App. 1986).

7. 42 U.S.C. §§ 2000a to 2000e-17 (1988).

8. Title VII provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

9. The Pregnancy Discrimination Act provides in pertinent part:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to

tion in Employment Act of 1967,[10] the Rehabilitation Act of 1973,[11] and the Equal Pay Act of 1963[12] have worked to limit the employer's ability to invoke the at-will doctrine. These Acts have in essence created a new at-will doctrine. Missouri also has enacted statutes designed to protect employees from discrimination because of race, color, religion, national origin, sex, ancestry, age or handicap.[13]

Mr. Bequai gives the following common sense approach to avoiding problems when invoking the at-will doctrine: "Avoid anything that smacks

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permit otherwise.

42 U.S.C. § 2000e(k) (1988).

10. The Age Discrimination Act provides in pertinent part:

§ 623. Prohibition of age discrimination.

(a) It shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

§ 631. Age Limits.

The prohibitions in this chapter . . . shall be limited to individuals who are at least 40 years of age.

29 U.S.C. §§ 623, 631 (1988).

11. The Rehabilitation Act of 1933 provides:

§ 794. Nondiscrimination under Federal grants and programs.

(a) Promulgation of rules and regulations.

No otherwise qualified individual with handicaps in the United States, . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1988).

12. The Equal Pay Act provides in part:

(1) No employer . . . shall discriminate, within any establishment in which such employees are employed, 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, except where such payment is made pursuant to . . . - any other factor other than sex.

Id. § 206(d).

13. MO. REV. STAT. § 213.055 (1986).

of bias."[14] This is a very straightforward rule of thumb to follow and, as he points out, "all that the new at-will doctrine really asks of employers is that they base their hiring decisions on merit and qualifications for the job."[15]

III. DISCRIMINATORY CONDUCT IN THE EMPLOYMENT PROCESS

Up to this point, the author has discussed the statutes that define and determine the existence of illegal discrimination. Next the author discusses the various actions by which illegal discrimination may be effected in the hiring process. Discrimination may occur through discriminatory job classifications, advertising, recruitment, wage rates, testing, pre-employment inquiries, application forms, and subjective interviews.

A. Job Classification

Separate job classifications based upon sex are violations of Title VII,[16] unless sex, national origin or religion is a "bonafide occupational qualification"[17]for the particular job. Of course, it is not necessary that the employer

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14. A. BEQUAI, *supra* note 2, at 15.

15. *Id.*

16. E.E.O.C. Guidelines state: "Label[s]—Men's jobs' and Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other." 29 C.F.R. § 1604.2(a) (1989). "Accordingly, employment practices are unlawful which arbitrarily classify jobs so that . . . [a] female is prohibited from applying for a job labeled "male" or for a job in a "male" line of progression; and vice versa . . . ." *Id.* § 1604.3(a); *see also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (holding Title VII was violated by a system of job classification discriminating against females from competing for jobs that required lifting more than thirty-five pounds).

17. *See* 42 U.S.C. § 2000e-3(b) (1988). Generally, the "bonafide occupational qualification exception is applicable in situations involving explicit discrimination, while the business necessity doctrine is applicable to practices which are neutral on their face, but which have a discriminatory impact." *See* Annotation, *Business Necessity*, 36 A.L.R. FED. 9 (1978).

The business necessity doctrine has been defined in many different ways and there does not seem to be a general consensus as to what test will be used. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (if an employment practice cannot be shown to be related to job performance, the practice is prohibited); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) (an employment practice may be justified by business necessity if it is necessary to the safety and efficiency of the employer's business), *cert. denied*, 401 U.S. 954 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (whether there exists an overriding legitimate business purpose such that the challenged practice is necessary to the safe and efficient operation of the

literally use such labels as "male jobs" and "female jobs" to violate the rule against job classification based on sex. A history of the employer filling a particular category exclusively with members of one sex suffices.[18]

B. Advertising

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer, labor organization, or employment agency to print any advertisement indicating a preference based on race, color, religion, sex, or national origin, except where religion, sex, or national origin is a bona fide occupational qualification for employment.[19] In *Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations*,[20] the Supreme Court upheld an ordinance which prohibited newspapers from carrying "'help-wanted' advertisements in sex-designated columns, except where the employer is free to make hiring or employment referral decisions on the basis of sex."[21] The Court noted that advertisers who place ads in a "Male Interest" column are likely to discriminate against women in the hiring decision.[22]

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employer's business), *cert. denied*, 404 U.S. 1006 (1971).

18. *See* Armstrong v. Index Journal Co., 647 F.2d 441 (4th Cir. 1981) (special salesman status was occupied by females and regular salesman status was occupied entirely by males); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976) (airline's classification of "purser" and "stewardess" did not reflect substantial differences in duties and purser was a male classification with higher pay), *cert. denied*, 434 U.S. 1086 (1978); Thompson v. Boyle, 499 F. Supp. 1147 (D. D.C. 1979) (Government Printing Office was held to be in violation of Title VII because of its practice of hiring all female bindery employees as journeyman bindery workers).

19. 42 U.S.C. § 2000e-3(b) (1988). The section provides in pertinent part:

> It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, . . . any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Id.

20. 413 U.S. 376 (1973).

21. *Id.* at 378.

22. *Id.* at 387.

C. Recruiting

In recruiting, the employer should not deter qualified applicants from seeking interviews by indicating a preference as to race, religion, sex, or national origin.[23] The employer may not rely on word-of-mouth for recruiting because the recruitment of applicants by word-of-mouth perpetuates discrimination when the work force is predominantly white.[24] In *Catlett v. Missouri Highway & Transportation Commission*,[25] the court found that the Commission's hiring process was discriminatory because its word-of-mouth recruiting policy generated disproportionately low numbers of female applicants.

Recruitment requirements also apply to foreign employers who establish offices and manufacturing plants in the United States.[26] The foreign employer must conduct a systematic recruitment of available American workers to fill any open positions.[27] To correct past discriminatory practices, some courts have required that the employer undertake special recruitment measures, such as contracting placement officers in predominately black high schools and vocational schools, and advertising in newspapers or on radio stations directed toward the black community.[28]

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23. *See* McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974). The *McDonald* court held that plaintiff sufficiently stated a cause of action by alleging that she was deterred from making application and seeking interviews with the defendant employer because of the employer's practice of indicating express preference to interview and hire males at college placement center. *Id.* at 37.

24. *See* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972) (where a company had previously discriminated, the practice of not posting notices of vacancies and allowing news of vacancies to be passed along by word-of-mouth is itself discriminatory against black employees), *cert. denied*, 409 U.S. 982 (1972). In Stamps v. Detroit Edison Co., 365 F. Supp. 87 (D. Mich. 1973), *rev'd on other grounds*, 515 F.2d 301 (6th Cir. 1975), it was held that the company's practice of hiring employees on the basis of word-of-mouth referrals violated Title VII in that preference in both hiring and assignment was given to friends and relatives of the predominately white work force. *Id.* at 117.

25. 589 F. Supp. 929 (W.D. Mo. 1983).

26. *See* Imperial Textiles, Inc. v. Secretary of Labor, 642 F. Supp. 1041 (N.D. Ill. 1986). The *Imperial* court found that the Immigration and Nationality Act, 8 U.S.C. § 212(a)(14) (1970), required that the employment of foreign workers could not be allowed unless there were insufficient workers in the United States who were able, willing, and qualified to perform the work. *Imperial*, 642 F. Supp. at 1042. The court noted specifically that "Imperial failed to conduct a systematic recruitment of available domestic workers." *Id.*

27. *Imperial*, 642 F. Supp. at 1042.

28. *See* Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100 (N.D. Ga. 1975).

D. Wages

Another form of forbidden discrimination relates to wages. The Equal Pay Act of 1963[29] and the provisions of Title VII on sex discrimination are applied harmoniously[30] to eliminate wage discrimination. The jobs do not need to be identical in every aspect, but merely substantially equal, to fall within the auspices of the Equal Pay Act.[31]

E. Testing

Intelligence, aptitude, and educational testing are probably a more prevalent issue in the context of race discrimination than in discrimination based on sex.[32] The landmark decisions of *Griggs v. Duke Power Co.*[33] and *Albermarle Paper Co. v. Moody*[34] both dealt with testing in which there was no correlation between the test given and job performance. In both, the Court stressed the necessity for validation of job tests through actual studies demonstrating correlation between test scores and job performance. The

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29. 29 U.S.C. § 206(d) (1988). The Act provides in part as follows:

> (d)(1) No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

Id.

30. Di Salvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978). The court found that Di Salvo was discriminated against when she was paid $4,000 less than one male employee and $3,000 less than another while doing substantially the same job in terms of skill, effort and responsibility. The court noted that in some instances she had even more duties and responsibilities than her two male counterparts. *Id.* at 596.

31. Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978). *See also* 29 C.F.R. § 1620 (1989) (inconsequential differences in job content is not a valid excuse for payment of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment).

32. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the court held that illegal race discrimination is present, whether intended deliberately or not, when an aptitude test which is not job-related has a greater unfavorable impact on blacks than on whites. The opinion stresses the necessity for validation of job tests through actual studies demonstrating correlation between test scores and job performance. *Id.* at 433-36.

33. *Id.* at 424.

34. 422 U.S. 405 (1975).

Eighth Circuit addressed this problem in *Easley v. Anheuser-Busch, Inc.*,[35] where the court held that a test administered to 1,500 applicants had an adverse impact on the protected group. Fifty percent of white applicants and only thirty percent of black applicants passed a test which did not clearly approximate job tasks.[36] The court noted that proof of discriminatory motive is not required in a case involving disparate impact.[37]

Many of the principles in racial discrimination cases appear in sex, age, and handicapped discrimination litigation. This is especially true as to employment requirements which specify a minimal level of physical strength,[38] or height and weight.[39] The Uniform Guidelines on Employee

35. 758 F.2d 251 (8th Cir. 1985).

36. *Id.* at 251.

37. Disparate impact occurs when facially neutral employment decision-making has a statistically significant and unjustifiable adverse effect on members of a protected class. Although such practices or criteria are not intentionally discriminatory, they perpetuate the effects of discrimination and are therefore invalid under Title VII. The disparate impact analysis was first authorized by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

38. In Harless v. Duck, 619 F.2d 611 (6th Cir. 1980), *cert. denied*, 449 U.S. 872 (1980), a police department's physical ability test was found to have a disparate impact on women and thus was discriminatory because there was no justification for the physical strength requirement. *Id.* at 616. The court in Payne v. Travenol Laboratories, Inc., 416 F. Supp. 248 (N.D. Miss. 1976), *aff'd in part, rev'd in part on other grounds*, 565 F.2d 895 (5th Cir. 1978), found the employer's heavy physical requirements to be discriminatory sexually since the majority of material handling work required little heavy lifting. *Id.* at 262-63. A physical agility test given to applicants for the police department was found discriminatory in Thomas v. City of Evanston, 610 F. Supp. 422 (N.D. Ill. 1985), based upon disparate impact because the test eliminated 85% of female applicants while eliminating only 10% of male applicants. *Id.* at 427-29, 432.

39. In Boyd v. Ozark Air Lines, Inc., 568 F.2d 50 (8th Cir. 1977), the court affirmed a lower court ruling that the airline's minimum height requirement for pilots had a disparate impact on female applicants and thus established a *prima facie* case of sex discrimination. The court further affirmed the 5'5" height requirement approved by the lower court, which was the actual minimum height that could be accommodated in the cockpit area. *Id.* at 54. The court in Costa v. Markey, 706 F.2d 1 (1st Cir. 1983) (en banc), held that a city's height requirement for police officers was a violation of Title VII since it excluded 80% of the women applicants without a showing of job-relatedness. *Id.* at 6. A height and weight requirement for the position of state trooper was also found to be discriminatory in United States v. Commonwealth of Virginia, 454 F. Supp. 1077 (E.D. Va. 1978), because it disqualified disproportionately more women than men. *Id.* at 1088.

Selection Procedures[40] ("Guidelines") contain the following basic prohibition regarding testing:

> "[A] [p]rocedure having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines . . . .[41]

The Eighth Circuit, in *Firefighters Institute for Racial Equality v. City of St. Louis*,[42] noted "that Title VII was not meant to preclude the use of testing devices, and that what is forbidden is the controlling use of such tests 'unless they are demonstrably a reasonable measure of job performance.'"[43] The Guidelines supply detailed technical standards for validation studies,[44] and require that validation be in accord with generally accepted professional standards, such as the American Psychological Association standards.[45]

Other types of testing that are of interest to employers include the use of honesty tests and the use of drug and alcohol testing. As the cost of doing business increases, managers have undoubtedly become more aware of losses caused by employee theft. As a result, many employers require that applicants take an honesty test. These tests are usually in the form of pencil and paper tests "consist[ing] of a series of questions that use different angles to uncover any dishonest behavioral traits of a prospective employee and the individual's views toward punishment of dishonesty."[46] The Employee Polygraph Protection Act of 1988[47] bans the use of all lie detector tests in most private employment settings. The paper and pencil honesty test, however, is excluded from the definition of "lie detector,"[48] and consequently the legality of its use is still subject to debate.

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40. 29 C.F.R. § 1607 (1989).

41. *Id.* § 1607.3(A). The guidelines go on to define selection procedure as including "the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms." *Id.* § 1607.16(Q).

42. 549 F.2d 506 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977).

43. *Id.* at 510 (quoting *Griggs*, 401 U.S. at 436).

44. 29 C.F.R. § 1607.14 (1989).

45. *Id.* § 1607.5(C).

46. Comment, *Prohibition of Pencil and Paper Honesty Tests: Is Honesty the Best Policy?*, 25 WILLAMETTE L. REV. 571, 572 n.5 (1989) (citation omitted).

47. 29 U.S.C.A. §§ 2001-2009 (West Supp. 1990).

48. *Id.* § 2001(3).

Alcohol and drug abuse are among this nations highest concerns, as is readily apparent from a brief glance at a newspaper or television. On September 17, 1986, President Reagan issued Executive Order 12564[49] which prohibits drug use by federal employees and establishes a drug testing program for employees in sensitive positions.[50] In *American Federation of Government Employees, AFL-CIO v. Weinberger*,[51] the government required civilian employees to sign a consent form for random drug and alcohol testing. If the employee did not sign the consent form, he or she would be subject to transfer or termination. The court preliminarily enjoined the Department of Defense from implementing drug testing of any civilian employee without probable cause. The court noted that private employers "can engage in activity that, if conducted by the government would clearly violate the Constitution."[52] The court additionally stated that "private-sector employees may be 'forced to consent' to random urine testing without individualized suspicion as a condition of employment."[53]

The Supreme Court, in *Skinner v. Railway Labor Executives' Association*,[54] recently held that drug and alcohol tests mandated or authorized by the Federal Railroad Administration were reasonable under the fourth amendment "in the absence of a warrant or reasonable suspicion that any particular employee may be impaired."[55] This was based upon the compelling government interest served by the regulations, which outweighed employees' privacy concerns.[56] Courts generally refuse to invalidate a private employer's drug and alcohol testing programs under the theory that the constitutional right to privacy "protects against incursions by the government and persons acting as government agents,"[57] but that such a claim has little force against a private employer.[58]

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49. Exec. Order No. 12,564, 51 Fed. Reg. 32,889, *reprinted in* 5 U.S.C. § 7301 (1988).

50. *Id.*

51. 651 F. Supp. 726 (S.D. Ga. 1986).

52. *Id.* at 737.

53. *Id.*

54. 109 S. Ct. 1402 (1989).

55. *Id.* at 1422.

56. *Id.* at 1421.

57. Johnson v. Carpenter Technology Corp., 723 F. Supp. 180, 185 (D. Conn. 1989).

58. *See id.* (that constitutional right to privacy protects against incursions by the government but has little force against a private employer who requires employee to submit to drug and alcohol testing); Stevenson v. Panhandle Eastern Pipe Line Co., 680 F. Supp. 859 (S.D. Tex. 1987) (private action by employer in implementing drug testing program is not subject to restrictions of the constitution); Greco v. Halliburton Co., 674 F. Supp. 1447 (D. Wyo. 1987) (that constitutional proscriptions against

The use of a pre-employment physical is not an unlawful employment practice as long as the physical requirements are job-related.[59] The use of drug and alcohol testing in the pre-employment and periodic physical examination is becoming more widespread.[60]

In addition, Mr. Bequai discusses an applicant's privacy rights and the need to obtain the applicant's permission to receive certain records which are confidential in nature, such as medical records, personnel records and school records.[61] An employers's use of background or character investigations for employment may also be discriminatory if the evidence reveals that the practice has had a disparate impact on minority applicants.[62]

F. Pre-Employment Inquiries

Illegal pre-employment questions may relate to arrests, convictions, child care, pregnancy plans, and the like. Inquiry into the prior arrests and convictions of an applicant may also be considered a violation of Title VII if used to exclude that applicant.[63] The Eighth Circuit's 1975 decision of *Green v. Missouri Pacific Railroad Co.*[64] held in part that a flat disqualification rule was not justified. The court stated, "We cannot conceive of any business necessity that would automatically place every individual convicted

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invasions of privacy, taking of property without due process and unauthorized searches or seizures were not applicable to private employer who requires its employee to submit to drug and alcohol testing).

59. *E.g.*, Dorcus v. Westvaco Corp., 345 F. Supp. 1173 (W.D. Va. 1972) (that Title VII of the Civil Rights Act of 1964 did not prohibit a medical examination requirement where the physical requirements for employment clearly bore a substantial relation to the adequacy of job performance).

60. *See* Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988), in which the court noted that "approximately one-third of all United States businesses and governmental entities have resorted to employee drug-testing programs. The percentages vary according to industry, but ninety-one percent of the public utilities and eighty-one percent of the transportation industries employ testing." *Id.* at 593 (footnotes omitted).

61. A. BEQUAI, *supra* note 2, at 16-26.

62. In Dozier v. Chupka, 395 F. Supp. 836, 844, 855-59 (S.D. Ohio 1975), the court enjoined a city from using information gained from a background investigation which included "health, arrests and convictions, education, residences, finances ([including any] indebtedness, bankruptcies, insurance), employment, and military service" to determine if there had been any falsification of information on the application. The court found that this policy had a disproportionate impact on minority applicants and that it lacked a valid relationship to job performance. *Id.* at 851-52.

63. *See* Annotation, *Employer's Use of Arrest Record*, 33 A.L.R. FED. 263 (1977).

64. 523 F.2d 1290 (8th Cir. 1975).

of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[65] The court further observed that it was between 2.2 and 6.7 times as likely for a black as a white to be convicted during his lifetime.[66] This does not mean that those previously convicted of a crime must be hired indiscriminately. Rather, the opinion suggests an employment procedure involving consideration of the individuals' particular offense in relation to the particular job would probably not be objectionable.[67] With this in mind, a flat prohibition on the hiring of someone with a conviction record is a violation of Title VII, while the use of the conviction record on a case-by-case basis is probably acceptable.

The use of arrest records to exclude applicants is much more likely to result in a finding of disparate impact. In *Carter v. Gallagher*,[68] a fire department's use of arrest records was found to be a violation of Title VII. The district court stated that "an arrest record, per se, [was] not proof of any criminal act and bears no rational relation to ability adequately to perform as a fire fighter."[69]

Other inquiries that have found their way into court relate to pregnancy and child care. Under the Pregnancy Discrimination Act[70] courts have found that a *prima facie* case of sexual discrimination exists when a female applicant is refused employment after being subjected to interview questions on childbearing, child care, and the legitimacy of her children.[71] The Equal

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65. *Id.* at 1298.

66. *Id.* at 1294.

67. *See also* Hetherington v. California State Personnel Bd., 82 Cal. App. 3d 582, 147 Cal. Rptr. 300 (1978) (denying a black male, with two felony convictions, the right to file applications for jobs as a youth counselor or parole agent was justified since the restrictions against ex-felons were directed to the particular job of peace officers).

68. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

69. Carter v. Gallagher, 3 Fair Empl. Prac. Cas. (BNA) 692, 697 (1972); *accord* Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972) (information concerning a prospective employee's record of arrest without convictions is irrelevant to his suitability or qualification for employment and cannot be justified by business necessity).

70. *See supra* note 9.

71. In King v. Trans World Airlines, Inc., 738 F.2d 255, 256 (8th Cir. 1984), a woman was asked questions regarding her unwed marital status and the legitimacy of her children, and child-care. The employer failed to rebut the presumption that this information was used in the decision not to hire her. *Id.* at 259. The court held that male applicants were not questioned about pregnancy, childbearing and childcare, and as such an employer cannot have two interview policies for job applicants, one for men and one for women. *Id.* at 258-59. Therefore, the questions were the product of unlawful discrimination. *Id.* at 259.

Employment Opportunity Commission's Sex Discrimination Guidelines[72] state that "[a]ny pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bonafide occupational qualification."[73]

Questions probing sexual lifestyle or sexual preference, including such matters as homosexuality, transexuality, "adulterous" relationships, and cohabitation, are not prohibited by Title VII. It has been held, however, that a state school board violated a teacher's rights to due process and equal protection when it denied him employment as a teacher solely on the basis of his homosexuality.[74] Furthermore, questions on sexual lifestyle directed at women may violate one of the Acts which do fall under the auspices of Title VII. As Mr. Bequai points out, "questions about a woman's sex life could certainly be construed as a form of harassment, and Title VII prohibits sexual harassment of female applicants and employees."[75]

A related area of recent concern is whether women may be excluded from employment which involves the risk of fetal injury. This issue was recently addressed in *International Union v. Johnson Controls, Inc.*,[76] where a battery manufacturer's fetal protection policy recited that "women with child bearing capacity will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive."[77] The court upheld the exclusion finding that the fetal protection policy was reasonably necessary to further the industrial safety concerns of the employer.[78]

This same result was reached in *Wright v. Olin Corp.*[79] In *Wright*, the court found that the employer's "fetal vulnerability program," by which fertile female employees were excluded from positions coming in contact with toxic substances, was a violation of Title VII because it resulted in a disproportionate adverse impact on the employment opportunities of women.[80] The court

72. 29 C.F.R. § 1604 (1989).

73. *Id.* § 1604.7.

74. In Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974), the court held that the school board's policy of refusing to knowingly employ homosexuals as teachers was violative of the fourteenth amendment's guaranties of due process and equal protection. The court commented that the time had come for "private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests." *Id.* at 851.

75. A. BEQUAI, *supra* note 2, at 92.

76. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).

77. *Id.* at 876.

78. *Id.* at 901.

79. 697 F.2d 1172 (4th Cir. 1982).

80. *Id.* at 1187.

ruled, however, that the program could be justified under the business necessity exception.[81] In *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*,[82] a company excluded women workers from production jobs involving exposure to lead, unless they were surgically sterilized.[83] This policy was found permissible under the Occupational Safety and Health Act of 1970 (OSHA).[84] The court did not address the issue of sexual discrimination in *American Cyanamid.*

Considering the holdings in these cases, it would appear that women may be excluded from jobs where they are exposed to toxic chemicals that could pose a substantial risk of harm to a fetus. The Supreme Court has not issued an opinion on this topic and, furthermore, studies of male workers have shown that lead, asbestos, beryllium, and organic solvents have effects on the offspring of male workers similar to the effects of the agents on the fetuses of female workers exposed in the workplace.[85] Therefore, it may be premature to conclude that women can be excluded from jobs based on fetal harm.

Finally, employers are required to make reasonable accommodations for the religious practices of their employees.[86] An employer cannot be compelled, however, to bear more than *de minimis* costs to accommodate the religious practices of an employee.[87]

G. Application Forms and Interviews

The inquiries discussed above may show up on an application form or in the interview. The employment interview, given its convenience, is probably the most often used selection device.[88] In spite of its frequent use, the interview, in an uncontrolled setting, is plagued with problems. In light of the

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81. *Id.* at 1189.

82. 741 F.2d 444 (D.C. Cir. 1984).

83. *Id.* at 445.

84. 29 U.S.C. §§ 651-678 (1988).

85. *See* Note, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113, 1117 n.17 (1977).

86. 42 U.S.C. §§ 2000e(j), 2000e-2(a)(l), (2) (1982).

87. In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), the Supreme Court provided guidelines concerning the degree to which Title VII requires an employer to accommodate the religious beliefs of its employees. *See also* Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441 (8th Cir. 1979) (court held that T.I.M.E. should not be required to bear more than a *de minimis* cost in order to accommodate Wren's religious practices and thus were not required under Title VII to do so).

88. *See* W. CASCIO, APPLIED PSYCHOLOGY IN PERSONNEL MANAGEMENT 263-64 (3d ed. 1987).

recent Supreme Court decision in *Watson v. Fort Worth Bank & Trust*,[89] employers must now review their interview process for possible violations of Title VII. In *Watson*, plaintiff Clara Watson was a black employee who had applied for, and was denied, four supervisory positions at Fort Worth Bank & Trust.[90] The bank's selection process for supervisory positions was based on the subjective judgment of supervisors who had knowledge of the candidates and the jobs to be filled.[91] The Court held that impact analysis should determine if the subjective selection procedure is proper.[92] An interviewer making a subjective decision will draw on her perspectives, beliefs, experience, and judgment. There are no identifiable external standards upon which to measure the discretionary criteria, which results in a lack of uniformity. In *Watson*, the Court noted that if the disparate impact analysis was not made applicable to subjective criteria, employers could give subjective criteria substantial but not absolute weight, and thereby avoid the strictures of disparate impact.[93] As a result, the employer could mask more easily an intent to discriminate.[94]

Just how can employers conduct valid interviews? One commentator has noted:

> [T]he use of employment interviews should be preceded by a thorough analysis of the target job, the development of a structured set of questions based on the job analysis, and the development of behaviorally specific rating instruments by which to evaluate applicants. . . . Where non-test predictors like interviewer judgments are used, the [employer] should develop procedures that will minimize error resulting from differences between judges.[95]

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89. 487 U.S. 977 (1988). The Court in *Watson* held that discretionary decision-making [subjective decision-making] by employers, which was challenged as violating Title VII, may be scrutinized under the disparate impact rather than the disparate treatment standard. *Id.* at 991. Thus, the question should be whether a facially neutral employment practice has had a statistically significant adverse effect on members of a minority group.

90. *Id.* at 982.

91. *Id.*

92. *Id.* at 989.

93. *Id.* at 989-90.

94. *See* Comment, *Disparate Impact and Subjective Employment Criteria Under Title VII*, 54 U. CHI. L. REV. 957, 970 (1987), which noted that employers intending to discriminate could do so more easily if disparate impact was limited to objective employment practices, and even those not intending to discriminate may move away from objective criteria which may later be attacked.

95. Comment, *Watson and Subjective Hiring Practices: The Continuing Saga of Industrial Psychology, Title VII and Personnel Selection*, 22 AKRON L. REV. 599, 619

Mr. Bequai had this simplistic, but excellent advice: "Confine the interview to inquiries and questions that directly relate to the job," and "[a]pply your standards equally to all applicants, regardless of race, sex, religion, or ethnic background."[96]

IV. ADDITIONAL FORMS OF DISCRIMINATION

A. Age

Discrimination can occur in all the hiring procedures discussed above; however, older workers may be subjected to discrimination solely because of their age. Discrimination based on age is also a prohibited act. The Age Discrimination in Employment Act of 1967[97] was enacted to protect older workers from arbitrary employment practices and to protect those displaced from jobs and unable to gain new employment.[98] A request for age on an application form or in an interview may violate the Act.[99] Courts have found that under certain circumstances the setting of a maximum hiring age may be

(1989) (quoting the APA *amicus curiae* brief to the Supreme Court).

96. A. BEQUAI, *supra* note 2, at 110.

97. *See supra* note 10.

98. *See* 29 U.S.C. § 621 (1988).

99. According to the Code of Federal Regulations:

> A request on the part of an employer for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Act. However, because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for a purpose proscribed by the Act.

29 C.F.R. § 1625.5 (1989).

allowed.[100] In all cases, however, courts look at whether there is a bona fide occupational qualification present when setting the maximum hiring age.

B. Reverse Discrimination

Mr. Bequai notes the recent tendency for reverse discrimination cases.[101] These involve cases in which white male applicants sue because an employer chose a woman or minority applicant over him. In *United Steel Workers v. Weber*[102] the Supreme Court approved race-conscious affirmative action by employers where it is designed to remedy racial imbalance in traditionally segregated job categories. The Eighth Circuit addressed this issue in *Setser v. Novack Investment Co.*,[103] where it held that an employer is entitled to summary judgment in a reverse discrimination case if the court finds that the employer's affirmative action plan was bona fide.

The Eighth Circuit discussed what would constitute a bona fide plan when it noted that

> [p]rivate employers face loss of substantial federal contracts and liabilities to minorities[] if they refuse to initiate affirmative action as a remedy for past discrimination, and they face liability to whites for any voluntary preferences accorded minorities . . . . [C]ourts are reluctant to discourage

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100. In E.E.O.C. v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985), the court upheld the policy of a maximum hiring age of thirty-two for state highway patrol troopers as based upon a bona fide occupational qualification. In addition, the court upheld the mandatory retirement at age sixty, because evidence did show that substantially all patrol members over the age of sixty lacked sufficient aerobic capacity to safely and efficiently perform the duties of a patrolman. *Id.* at 455. The court also upheld the maximum hiring age of thirty-two for highway patrol radio operators because the patrol presented convincing evidence that age for radio operator was a bona fide occupational qualification. *See also* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (maximum hiring age of forty for bus drivers was a bona fide occupational qualification and reasonably necessary to the normal operation of the business); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 491 U.S. 1122 (1975) (maximum hiring age of thirty-five for bus drivers was upheld as a bona fide occupational qualification); *but see* Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985) (maximum age of twenty-nine for hiring police officers was invalid where evidence that individuals over forty could perform as well as those in their twenties); E.E.O.C. v. City of Linton, 623 F. Supp. 724 (S.D. Ind. 1985) (statute setting maximum hiring age at thirty-five for police officers was struck down where there was no evidence to support claim of bona fide occupational qualification).

101. A. BEQUAI, *supra* note 2, at 141-42.

102. 443 U.S. 193 (1979).

103. 657 F.2d 962 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981).

> experimentation by employers in remedying past discrimination . . . [and will find that a] plan is bonafide if it is reasonably related to its remedial purpose.[104]

Considering this holding, it appears that Mr. Bequai's comment that one "will have a better chance of coming out ahead if a prospective employee sues . . . for reverse discrimination than if the EEOC sues . . . for discriminating against groups protected under Title VII"[105] is probably accurate.

C. Handicapped

Handicapped individuals gained protected status from discrimination under the Rehabilitation Act of 1973.[106] The Rehabilitation Act applies only to federal employers or those who receive federal assistance in the form of grants, loans, contract or other federal funding.[107] The Missouri statute,[108] however, applies to all employers, and the Federal Americans With Disabilities Act applies to all employers with fifteen or more employees. Congress has broadly defined "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more . . . major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[109]

Because of the broadness of this definition, it has been determined in recent decisions that individuals afflicted with contagious diseases,[110] heart disease,[111] epilepsy,[112] history of drug use,[113] and unusual sensitivity to

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104. *Id.* at 970.

105. A. BEQUAI, *supra* note 2, at 140.

106. *See supra* note 11.

107. 45 C.F.R. §§ 84.2, 84.3(f)-(h) (1989).

108. MO. REV. STAT. § 213.055(1)(a) (1986).

109. 29 U.S.C. § 706(8)(B) (1988). *See also* 45 C.F.R. § 84.3(j) (1989) (guidelines promulgated by the U.S. Commission on Civil Rights which provide a more comprehensive definition of handicapped).

110. School Board v. Arline, 480 U.S. 273 (1987) (woman suffering from tuberculosis can be considered handicapped since her condition is an impairment which substantially limits major life activities); Kohl v. Woodhaven Learning Center, 672 F. Supp. 1221 (W.D. Mo. 1987), *rev'd on other grounds*, 865 F.2d 930 (8th Cir. 1989) (active carrier of hepatitis B is handicapped individual).

Since *Arline* Congress has amended the Rehabilitation Act definition of "handicapped person" in order to make it specifically applicable to persons having contagious diseases or infections. 134 CONG. REC. S1738-01 (1988).

111. Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982) (plaintiff was handicapped individual where he had record of physical impairment, cardio-vascular disease, uncontrolled blood pressure, cardia enlargement, and an abnormal electrocardiogram,

tobacco smoke[114] are considered "handicapped," and thus protected under the Rehabilitation Act. In all cases which have considered the rights of a handicapped individual, however, it must be shown that he or she is "otherwise qualified" to do the job.[115] In *Laclede Cab Co. v. Missouri Commission on Human Rights*,[116] for example, the court determined that a taxicab company discriminated against an applicant whose left hand had been amputated when evidence showed that he was capable of performing all the duties of a taxicab driver.

Several court cases have dealt with the issue of whether individuals infected with the Acquired Immune Deficiency Syndrome (AIDS) virus are "handicapped" and thus protected under the Rehabilitation Act.[117] In light of the decision in *School Board v. Arline*[118] and an amendment to the

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which substantially limited major life activities).

112. Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) (epilepsy is a handicap under the Rehabilitation Act).

113. Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (holding that drug addicts or persons with a history of drug use were to be considered handicapped). The court felt that prior addiction and drug use fell clearly within the definition of "handicapped individuals" as defined in the regulations. *Id.* at 796.

It should be noted that in Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988), the court held that employees who tested positive for illegal drug use were not handicapped individuals and thus were not protected under the Rehabilitation Act. The court further found that state and federal statutes which prohibit discrimination against handicapped individuals will not, and do not, protect employees who have not previously been, or were not currently being, treated for illegal drug use. *Id.* at 597-98.

114. Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982) (individual is handicapped where he has unusual sensitivity to tobacco smoke which limits his capacity to work in environment which is not completely smoke-free).

115. 29 U.S.C. § 794 (1988). *See also* 45 C.F.R. § 84.3(k)(1) (1989), which defines "qualified handicapped person" to mean: "With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."

116. 748 S.W.2d 390 (Mo. Ct. App. 1988).

117. In Chalk v. United States Dist. Court, 832 F.2d 1158 (9th Cir. 1987), the court concluded that the plaintiff was handicapped because of AIDS. Similarly, in Local 1812 v. United States Dep't of State, 662 F. Supp. 50 (D. D.C. 1987), the court concluded that those who carry the AIDS virus may be handicapped under the Act in two ways: (1) a known carrier of the virus will be perceived to be handicapped; or (2) carriers may be impaired physically because of some measurable deficiency in their immune system. *Id.* at 54. *See also* Shuttleworth v. Broward County, 639 F. Supp 654 (S.D. Fla. 1986) (AIDS victim was found to have been discriminated against under the Florida Commission on Human Relations Act).

118. *See supra* note 110.

Rehabilitation Act which deals specifically with infections and contagious diseases,[119] AIDS infected individuals should be able to invoke protection from employment discrimination. This means that an employer may not discriminate against an individual who tests positive for the AIDS virus if that individual is otherwise qualified and capable of doing the job.

V. CONCLUSION

Mr. Bequai's book was written for managers with little or no experience in hiring law, and not as an in-depth review for attorneys. The anecdotal cases that precede each chapter contain no citations and has used non-technical language in his presentation. At the end of each chapter there are one or more "rules to hire by" which should help managers avoid charges of discrimination in their hiring decisions. The book is an extremely broad overview of hiring regulations, but will at a minimum enable someone without experience or knowledge in this area to realize that this is an area of law that will affect each employer on a day-to-day basis.

Employment discrimination law is continually changing through legislation and court decisions. Although this review tries to provide an examination of current hiring law, it cannot be considered an analysis of the law. Likewise, the book *Every Manager's Legal Guide To Hiring* should not be viewed as a legal guide. It does, however, provide a feel for the status of the law on hiring and some good general advice to managers. By using the cases noted in this review, along with *Every Manager's Legal Guide to Hiring*, the practitioner should have a broad overview of the current law as it pertains to hiring decisions.

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119. *Id.*