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Adverse impact as disability discrimination: Illustrating the perils through self-control at work

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In their focal article, Melson-Silimon, Harris, Shoenfelt, Miller, and Carter (2019) discuss the risk that personality testing might be challenged under the Americans with Disabilities Act of 1990 (ADA) due to the Act's prohibition against pre-offer medical examinations. Although the authors provide a compelling argument that normal and abnormal personality characteristics exist on a common continuum, their argument regarding the legal risks rests on speculation with regard to how the courts might reinterpret such tests in the future. We accomplish the following goals in this article: (a) discuss our position regarding Melson-Silimon et al.'s (2019) claim concerning personality testing and ADA (b) discuss disparate impact as a potentially larger risk associated with personality testing in employment contexts using both the employer and employee/applicant perspective, and (c) use self-control to illustrate the above in the context of job relatedness in job analysis.

Our position is that there is no indication in current Equal Opportunity Employment Commission (EEOC) guidelines (EEOC, 2000) or the scant case law (as reviewed in the focal article) to suggest that the use of broad normal-range personality tests will be viewed as medical examinations. If a test is being used in a manner that resembles a clinical diagnosis, then it would be considered a medical exam and prohibited before a conditional job offer (EEOC, 2000). The mere existence of a characteristic on the same continuum as a disability does not imply that the test is being used for clinical diagnosis. There are many characteristics on which an extreme value could be considered a disability (as in the case of cognitive and physical abilities), and there is no indication in the EEOC guidelines or the case law that job-related tests of these characteristics would be considered a medical exam.

Adverse impact and discrimination

We believe there is a potential legal risk under the ADA associated with personality tests, but not because they will be considered prohibited disability-related inquiries (EEOC, 2000). Three distinct types of illegal employment actions are identified in the ADA: (a) administering pre-offer medical exams and disability-related inquires (discussed in depth in the focal article), (b) discrimination on the basis of disability, and (c) failure to reasonably accommodate. We argue that the connection between standard

personality tests and psychiatric disabilities is most concerning due to the potential for such tests to produce illegal discrimination under a disparate impact theory. Although industrial and organizational psychology often looks to personality tests as a way to minimize adverse impact, personality tests have been the focus of recent EEOC allegations of race and national origin discrimination (EEOC, 2018a, 2018b), showing that these tests are not immune from legal scrutiny. Along similar lines, the connection between normal-range personality and psychiatric disorders raises concerns of adverse impact against persons protected under the ADA.

Disparate impact refers to the use of facially neutral employment practice that results in differential outcomes (adverse impact) across protected groups. The use of a test that produces adverse impact is illegal unless the employer can show that the test is job related and consistent with business necessity. Although it has not been the focus of much ADA litigation to date, disparate impact discrimination is recognized under the ADA (Raytheo v. Hernandez, 2003). Specifically, the ADA defines illegal discrimination to include the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity" (The Public Health and Welfare Act, 2009).

The legal framework for evaluating disparate impact has evolved primarily in the context of Title VII of the Civil Rights Act (1964). The plaintiff (i.e., applicant or employee) must first demonstrate that an employment practice produces adverse impact against a protected group (in this case, persons with disabilities). Once this is established, the employer can defend its use of the practice by providing evidence that it is job related, typically through content- or criterion-related validation (Gutman, Koppes, & Vodanovich, 2010). Applying this framework to ADA poses several potential complications due to the unique nature of disability discrimination.

The employee/applicant perspective

For job applicants making an allegation of disparate impact discrimination under ADA, obtaining statistical evidence of adverse impact is likely to be challenging. First, it will generally be inappropriate to classify all individuals with a disability as a single class (Prewitt v. United States Postal Service, 1981), because it is unlikely that employment practices will have a common impact on different types of disability. Thus, the number of persons impacted by a use of a particular personality test (e.g., qualified applicants with depression) will often be too small to provide statistical evidence and will lack sufficient power and precision to support a prima facie case of disparate impact (Morris, 2017). Second, as in the case with other invisible disabilities (such as chronic pain, debilitating fatigue, ADHD, and so on), individuals suffering from non-conspicuous disability may be unknown to the organization and thus would not be included in disparity analyses. Recently, the Office of Federal Contract Compliance Programs (OFCCP) regulations were revised to require federal contractors to collect voluntarily reported disability status

from applicants and employees (41 CFR § 60-741; Pryor, Dunleavy, & Cohen, 2014). Because many organizations are hesitant to ask, and many employees are reluctant to disclose disability status, data on disability linked to individual employee and applicant records is likely to be incomplete. The current state of affairs would make statistical evidence of adverse impact difficult to obtain, especially when conducted for a specific type of disability negatively impacted by a personality test.

Some might view the lack of data on disability as lowering the risk of legal scrutiny. However, in other situations where employers have failed to maintain adequate employee records, courts and federal agencies have inferred adverse impact from a comparison of the employer's workforce to population demographics (Kuang & Ramos, 2017). Without knowing the prevalence of a relevant disability group in the workforce, an employer will be unable to assess areas of risk and take proactive steps to address disparities before they result in a lawsuit. Effective risk management will demand complete and accurate data on applicant and employee disability.

Job relatedness and self-control

On the employer's side, establishing evidence of job relatedness is also likely to be challenging for traits more closely related to psychiatric disorders. We illustrate this through the example of self-control. Although extant research in general, cognitive, and clinical psychological sciences has focused on self-control as a psychological trait with meaningful behavioral and mental outcomes (for instance, Barkley, 1997; Hirschi, 2004; Longshore, Chang, & Messina, 2005; Muraven & Baumeister, 2000), there is relatively less work in industrial-organizational psychology exploring self-control as a factor associated with work performance. Self-control refers to the human ability to override impulses and exercise restraint over inner urges in accordance with norms of the social setting. Theoretical models and empirical research provide insight on the role of self-control in ensuring performance effectiveness and other aspects of work behavior that fall outside the traditional realm of task performance.

With regard to the former, self-control is fundamental to maintaining worker attention on task, ensuring that the employee is able to concentrate on task performance in the face of distractions and maintain goal pursuit in the face of boredom, fatigue, and the myriad variety of thoughts and attentional fluctuations that are core to the human experience (for instance, see the episodic performance model; Beal, Weiss, Barros, & MacDermid, 2005). The failure to exercise attentional control would invariably lead to reduction in performance by way of off-task thinking and reduced resource allocation.

On the other hand, self-control is also implicated in contextual work behaviors (de Boer, van Hooft, & Bakker, 2015), emotion labor (Brief & Weiss, 2002), leadership effectiveness (Yam, Fehr, Keng-Highberger, Klots, & Reynolds, 2016), work–family conflict (Thomas & Ganster, 1995), and fewer strain responses to stress (Diestel & Schmidt, 2009). Self-control is positively related to organizational citizenship behaviors

and personal initiative (de Boer et al., 2015), and is negatively associated with counterproductive work behavior and incivility in response to experienced deviancy (Meier & Gross, 2015). Recently, self-control has also been found to be related to justice variability, such that supervisors who possess higher levels of self-control display fewer fluctuations in their fair treatment of subordinates, thereby leading to less stress on part of subordinates and serving as better managers (Matta, Scott, Colquitt, Koopman, & Passantino, 2016). Therefore, increasingly, scholars have suggested the use of self-control measures in selection and placement (for instance, Matta et al., 2016).

On the other side of the spectrum, self-control is closely related to a variety of psychopathological conditions such as impulse control disorder (Hirschi, 2004), attention deficit disorder and attention deficit hyperactivity disorder (Nigg, 2001), conduct disorders (Nigg, 2017), depression (Rehm, 1977), and other diverse forms of criminal and delinquent behaviors (DeLisi, 2017). Overall, self-control represents a construct that may create adverse impact by disproportionately screening out persons suffering from these disorders because they display low to moderate levels of control.

The role of job analysis in legal defensibility

Strategies to demonstrate job relatedness often rely heavily on job analysis. Job analysis methods tend to focus on the task requirements of a job, and therefore are well suited to identifying knowledge and skills required for successful completion of assigned job tasks. This focus on job tasks, on the other hand, can make it more difficult to identify dispositional determinants of performance, such as persistence, extra-role behaviors, leadership, and supervisory effectiveness, among others. As a further extension, this becomes particularly valid in the context of “dark” personality traits that are likely to be related to counterproductive work behaviors, such as incivility, bullying, or abusive supervision (e.g., Baysinger, Scherer, & LeBreton, 2014). Although these represent important outcomes to avoid, they are not directly related to the completion of individual work tasks, and as such may be missed by traditional job analysis.

Although there has been some progress is developing job-analysis methods that focus on personality traits required for a job (Cucina, Vasilopoulos, & Sehgal, 2005; Raymark, Schmit, & Guion, 1997), the application of these methods to “dark” personality traits is uncertain. There is a need to further develop these methods to ensure that they capture the gamut of both in-role and extra-role behaviors as well as the variety of psychological processes that support work performance and are related to the personality traits used in selection.

In summary, although we disagree with the focal article’s concern over personality tests as medical exams, we strongly endorse their recommendation that organizations collect evidence to support their job relatedness. Due to the potential for personality tests to disproportionately screen out candidates with psychiatric disabilities, employers should be prepared to defend those tests against disparate impact claims.

Although the general framework for assessing disparate impact discrimination can be applied to individuals with disabilities, current practices for detecting adverse impact and establishing job relatedness may need some refinement in order to accommodate the unique characteristics of psychiatric disabilities as a protected class.

References

Barkley, R. A. (1997). ADHD and the nature of self-control. New York, NY: Guilford Press.

Baysinger, M. A., Scherer, K. T., & LeBreton, J. M. (2014). “Exploring the disruptive effects of psychopathy and aggression on group processes and group effectiveness”: Correction to Baysinger et al (2013). Journal of Applied Psychology, 99(1), 65. doi: 10.1037/a0034768

Beal, D. J., Weiss, H. M., Barros, E., & MacDermid, S. M. (2005). An episodic process model of affective influences on performance. Journal of Applied Psychology, 90(6), 1054–1068.

Brief, A. P., & Weiss, H. M. (2002). Organizational behavior: Affect in the workplace. Annual Review of Psychology, 53(1), 279–307.

Civil Rights Act of 1964 § 7, 42 U.S.C. §2000e et seq (1964). Retrieved from Equal Employment Opportunity Commission: http://www.eeoc.gov/laws/statutes/titlevii.cfm

Cucina, J. M., Vasilopoulos, N. L., & Sehgal, K. G. (2005). Personality-based job analysis and the self-serving bias. Journal of Business and Psychology, 20(2), 275–290. doi: 10.1007/s10869-005-8264-2

de Boer, B. J., van Hooft, E. A. J., & Bakker, A. B. (2015). Self-control at work: Its relationship with contextual performance. Journal of Managerial Psychology, 30(4), 406–421. doi: 10.1108/jmp-08-2012-0237

DeLisi., M (2017) Self-control pathology: The elephant in the living room. In C. L. Britt & M. R. Gottfredson (Eds.), Control theories of crime and delinquency (pp. 21–38). New Brunswick, NJ: Transaction Publishers.

Diestel, S., & Schmidt, K. H. (2009). Mediator and moderator effects of demands on self-control in the relationship between workload and indicators of job strain. Work & Stress, 23(1), 60–79. doi: 10.1080/02678370902846686

Equal Employment Opportunity Commission. (2000). Enforcement guidance: Disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act (ADA). Notice No. 915.002.

Equal Employment Opportunity Commission. (2018a). CVS Caremark Corporation and EEOC reach agreement to resolve discrimination charge. Press release. Retrieved from https://www1.eeoc.gov/eeoc/newsroom/release/6-6-18b.cfm

Equal Employment Opportunity Commission. (2018b). Best Buy and EEOC Reach Agreement to Resolve Discrimination Charge. Press release. Retrieved from https://www1.eeoc.gov/eeoc/newsroom/release/6-6-18a.cfm

Gutman, A., Koppes, L., & Vodanovich, S. (2010). EEO law and personal practices (3rd ed.). New York, NY: Routledge.

Hirschi, T. (2004). Self-control and crime. In R. F. Baumeister & K. D. Vohs (Eds.), Handbook of self-regulation: Research, theory, and applications. (pp. 537–552). New York, NY: Guilford Press.

Kuang, D., & Ramos, M. (2017). Workforce composition and utilization analyses. In S. B. Morris & E. M. Dunleavy (Eds.), Adverse impact analysis: Understanding data, statistics and risk (pp. 126–146). New York, NY: Routledge.

Longshore, D., Chang, E., & Messina, N. (2005). Self-control and social bonds: A combined control perspective on juvenile offending. Journal of Quantitative Criminology, 21(4), 419–437. doi: 10.1007/s10940-005-7359-2

Matta, F. K., Scott, B. A., Colquitt, J. A., Koopman, J., & Passantino, L. G. (2016). Is consistently unfair better than sporadically fair? An investigation of justice variability and stress. Academy of Management Journal, 60(2), 743–770. doi: 10.5465/amj.2014.0455

Meier, L. L., & Gross, S. (2015). Episodes of incivility between subordinates and supervisors: Examining the role of self-control and time with an interaction-record diary study. Journal of Organizational Behavior, 36(8), 1096–1113. doi: 10.1002/job.2013

Melson-Silimon, A., Harris, A. M., Shoenfelt, E., Miller, J. D., & Carter, N. T. (2019). Personality testing and the Americans with Disabilities Act: Cause for concern as normal and abnormal models are integrated. Industrial and Organizational Psychology: Perspectives on Science and Practice, 12(2), 119–132.

Morris, S. B. (2017). Statistical significance testing in adverse impact analysis. In S. B. Morris & E. M. Dunleavy (Eds.), Adverse impact analysis: Understanding data, statistics and risk (pp. 71–91). New York, NY: Routledge.

Muraven, M. R., & Baumeister, R. F. (2000). Self-regulation and depletion of limited resources: Does self-control resemble a muscle? Psychological Bulletin, 126(2), 247–259.

Nigg, J. T. (2001). Is ADHD as disinhibitory disorder? Psychological Bulletin, 127(5), 571.

Nigg, J. T. (2017). Annual Research Review: On the relations among self-regulation, self-control, executive functioning, effortful control, cognitive control, impulsivity, risk-taking, and inhibition for developmental psychopathology. Journal of Child Psychology and Psychiatry, 58(4), 361–383. doi: 10.1111/jcpp.12675

Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981). Retrieved from https://openjurist.org/662/f2d/292/prewitt-v-united-states-postal-service

Pryor, K., Dunleavy, E., & Cohen, D. (2014). Funny you should mention it: New disability EEO/AA regulations finalized for federal contractors. Industrial and Organizational Psychology, 7(2), 220–224.

Raymark, P. H., Schmit, M. J., & Guion, R. M. (1997). Identifying potentially useful personality constructs for employee selection. Personnel Psychology, 50(3), 723–736. doi: 10.1111/j.1744-6570.1997.tb00712.

Raytheon Co. v. Hernandez, 540 US 44 at 53, 298 F.3d 1030 (2003). Retrieved from https://www.law.cornell.edu/supct/html/02-749.ZO.html

Rehm, L. P. (1977). A self-control model of depression. Behavior Therapy, 8(5), 787–804. doi: 10.1016/s0005-7894(77)80150-0

The Public Health and Welfare Act, 42 U.S.C. § 12112. (2009). Retrieved from https://www.gpo.gov/fdsys/pkg/USCODE2009-title42/pdf/USCODE-2009-title42-chap126-subchapI-sec12112.pdf

Thomas, L. T., & Ganster, D. C. (1995). Impact of family-supportive work variables on work-family conflict and strain: A control perspective. Journal of Applied Psychology, 80(1), 6–15.

Yam, K. C., Fehr, R., Keng-Highberger, F. T., Klotz, A. C., & Reynolds, S. J. (2016). Out of control: A self-control perspective on the link between surface acting and abusive supervision. Journal of Applied Psychology, 101(2), 292–301. doi: 10.1037/apl0000043