

Utilizing Vocational Experts in Employment Discrimination Cases

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Abstract. In cases involving allegations of discrimination in employment, vocational experts are often asked to assess the vocational loss and monetary damages arising from employer bias or wrongful termination. The role of the vocational expert in the damages phase of a lawsuit is to assist the courts in understanding the employment and economic impact of alleged prejudice. The expert can identify whether the plaintiff has been adversely impacted by the employers actions, and thereby experienced a loss in access to their local labor market, or whether the individual has the potential to find comparable employment, thus mitigating damages. Experts can also serve as valuable resources in gauging liability, particularly in cases relating to the American with Disabilities Act. Through such methods as assessing an employers' compliance with existing laws, their attempts to offer reasonable accommodations, and their willingness to offer job modifications, the vocational expert can assist the court with adjudging violations of existing statutes. This article provides a general discussion on employment discrimination, including statutes protecting individuals from discrimination, the role of the vocational expert in such cases, and what plaintiff and defense attorneys need to know when retaining an expert to assist in their case.

Utilizing Vocational Experts in Employment Discrimination Cases

Introduction

In cases of employment discrimination, vocational experts (VEs) are called on by courts to assist in understanding the impact of employer bias on a plaintiff's employment and earnings potential. The VE is adept at identifying whether an individual has a diminished access to alternative work activity, or is capable of mitigating damages by obtaining comparable employment. VEs possess specialized training and knowledge in the field of trades, professions and occupations, and serve in assessment and/or testimony in a litigious forum (Havranek 1995). With unique credentials, education, and work experience

as a vocational consultant, the VE is capable of providing courts with the most complete assessment of the economic damages sustained by an individual in light of disability. Included in this appraisal is the potential for replacement employment in the individuals' labor market, and the impact on present and future earnings capacity (Forman & Shuster, 1985). Based on their extensive training and knowledge of the world of work, VEs are prized resources to the attorney seeking to establish or mitigate damages. Traditionally utilized in Social Security, Worker's Compensation, Disability Determination, and Personal Injury cases, the VE has more recently come to be viewed by courts as a valuable asset in quantifying damages, with or without the presence of physical limitations, in employment discrimination cases. For the plaintiff, the VE is often request-

ed to show the discrimination to have had an adverse impact on earnings potential, and in those cases involving the Americans with Disabilities Act (ADA), a failure by the employer to provide reasonable accommodations. When retained by the defense, the VE is typically called to demonstrate the capacity of the individual to mitigate damages by obtaining comparable employment. In ADA cases, the defense may rely on the VE to support assertions that accommodations were either made available, or when absent, that they caused and undue hardship on the employer.

Foundation for Use of the Vocational Expert

The use of VEs for litigious purposes can be traced back to the Social Security Act of 1956. This Act, and its subsequent amendments, allowed for benefits to be paid to permanently disabled individuals aged 50 and over who were considered incapable of resuming competitive employment (Erlanger & Roth, 1985). In *Kramer v. Fleming*, the court held that a denial of disability benefits could not be sustained by a finding of mere theoretical ability to engage in substantial gainful activity. Rather, when it was clearly demonstrated that an individual was not capable of performing their regular occupation, the burden of proof fell upon the Social Security Administration to establish what, if any, other kinds of work the claimant could perform. This responsibility initially fell to Hearing Examiners (today known as Administrative Law Judges) who cited published labor market information to make a determination of employability. After that approach was found by the courts in 1962 to be inadequate, the SSA began to utilize VEs to determine whether there were jobs for SSDI claimants (Harper, 1985). Today, the use of VEs for disability determination has expanded to other arenas, including Worker's Compensation, Railroad Retirement, and the Veteran's Administration.

When VEs are used in the domain of Social Security, Workers' Compensation, and Veterans' Administration, they have traditionally been used to assess whether an individual can perform work and if so, whether jobs exist in significant numbers to obtain employment (Growick, 2002). These types of cases involve some alleged physical and/or mental impairment resulting in a diminished capacity to engage in work. The VE retained in these cases typically identifies

whether the "claimant" is capable of engaging in any sustained remunerative employment, or whether they are prevented from accessing a significant number of jobs to be considered employable, or are totally disabled from all employment, as a result of their medical condition. VEs have also been used extensively in Personal Injury, Wrongful Death, and even Divorce proceedings (Smith & Growick, 1999). In these instances, the VE not only opines whether an individual is capable of employment, but to what extent they can access the labor market and earn wages. In these court cases, the VE helps to identify damages in monetary terms.

The introduction of VEs in employment discrimination arose as a result of the Civil Rights Act of 1964 (Havranek, 1997). This legislation prohibits discrimination in programs receiving federal assistance. It was amended in 1991 and expanded protections to private and Federal workplaces. The Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, Equal Pay Act of 1963 (EPA), and American with Disabilities Act of 1990 (ADA) further protects individuals against discrimination in employment. These laws have combined to deter employers from discriminating, discharging, failing to hire, or in some way segregating individuals in provisions of employment compensation, terms, or privileges based on an individual's age, race, color, religion, sex or national origin. Reacting to the need to establish authoritatively or temper monetary damages, plaintiff and defense attorneys alike began to retain vocational professionals to identify the impact of termination on an individuals' ability to locate comparable employment. Based on factors such as education, credentials, adherence to an ethical code, experience in dealing in vocational issues, publication of written material, and standing among their peers, such qualified individuals became known as VEs (*Frye v. United States*, 1984). These qualified individuals are permitted to testify when possessing relevant and reliable testimony (*Daubert vs. Merrill Dow Pharmaceuticals*, 1993).

Employment Discrimination

Employment Discrimination differs from disability determination cases in that while a disability may be a factor related to the discriminatory practice, a physical or mental impairment is not necessarily a prerequisite

for prejudice or discrimination to occur. Discrimination usually occurs on the basis of age, gender, religion, race, national origin and, in select states, sexual orientation, and transpires when the civil rights of an individual are denied because of their membership in a particular group or class. In order to address the pervasive problems of employment discrimination, Congress enacted a series of statutes that dealt with various aspects of the phenomenon. These laws include Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967 (ADEA); the Rehabilitation Act of 1973; the Equal Pay Act of 1963 (EPA), and the Americans with Disabilities Act of 1990 (ADA). While each of these Acts provides protection in different ways, each serves to prevent discrimination in, among other areas, employment (Zimmer et al., 2000). These statutes are united by two premises: first, the groups that are protected are disadvantaged economically, and second, discriminatory practices of employers contribute to that disadvantage (Zimmer, Sullivan, Richards, & Calloway, 2000). The following section provides case law outlined by Zimmer et al., 2000, and this text should be referenced for an in depth look at implications of these laws on employment practices.

Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 is often considered the landmark act protecting individuals from discrimination on the basis of race or color. But Title VII of the Civil Rights Act of 1964 also makes it unlawful for any employer: "to fail or refuse to hire or to discharge any individual, or otherwise 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". Under Title VII, all individuals in the United States are protected from employment discrimination regardless of citizenship or work eligibility (see *Espinoza v. Farah Mfg. Co.*, 1973).

Title VII also protects non-citizens against race, color, sex, religious, and national origin discrimination; *EEOC v. Hacienda Hotel*, 1989. Plaintiffs were subject to Title VII's protections notwithstanding their status as undocumented workers.), with the exception of those states covered by the Fourth Circuit (see *Chaudhry v.*

Mobil Oil Corporation, 1999. Foreign national employed overseas by U.S. employer was not protected by Title VII because he was not authorized for employment when the alleged discrimination occurred).

Title VII prohibits employers from using discriminatory criteria in any employment practice, including hiring, firing, transferring, promoting, advertising, recruiting, training, or compensating, except in those cases where sex, religion, or national origin is a bona fide occupational qualification (see *Dothard v. Rawlinson*, 1977. Upheld rule requiring prison guards in "contact" positions to be the same gender as the inmates they guarded), or there is a bona fide seniority or merit system (Ransom & Benjamin Publishers, 2003). In the later cases, the employer must demonstrate that the merit system does not negatively and significantly impact minorities.

To prove discrimination under Title VII, employees must establish that they are members of a protected class, and prove that an employment decision was based on that membership. A connection may be based on an individual instance ("disparate treatment"), or a general policy affecting a group of individuals ("disparate impact"). Disparate treatment cases may involve such instances as an employers' policy to hire only whites, terminate individuals at a certain age, or separate employees based by class. Disparate Impact involves employer policies adversely affecting one group more than others. In *Griggs v. Duke Power Co.* (1971), the Supreme Court found that requiring a high school diploma or passage of a general intelligence test as a condition of employment served to disqualify blacks at a higher rate than whites, when in fact neither condition was shown to correlate to job performance. Under Title VII, the administering of such tests would be allowable if the employer could prove a direct link between results and job performance.

Title VII also established the Equal Employment Opportunity Commission (EEOC) to review compliance with and enforce the rules set forth in the Act. Congress gave the EEOC litigation powers in 1972, and all individuals seeking to file suit under Title VII must first file a charge with the EEOC.

Age Discrimination in Employment Act of 1967

The ADEA echoes Title VII of the Civil Rights Act

with the additional clause of "because of age". Originally defining the protected class as individuals between the ages of 40 and 65, Congress ultimately abolished the upper limit. The ADEA requires that employers make decisions of employment based on merit as opposed to age, but the statute still allows for age discrimination in two cases. First, mandatory retirement of "bona fide executives" at the age of 65 is allowable, and second, employees can be terminated when the employer can factually demonstrate an age-linked decline in job performance, (see *Western Air Lines, Inc. v. Criswell*, 1985. Holding that mandatory retirement age for flight engineers would be lawful only where advanced age would impair the engineer's ability to carry out his job functions). Individuals bringing suit under the ADEA must demonstrate that the decision of employment was motivated by the plaintiff's age as opposed to merit.

Rehabilitation Act of 1973

This Act required federal contractors and executive agencies to take affirmative action to employ and promote individuals with disabilities. Although the influence of the Rehabilitation Act would appear to be usurped by the ADA, it remains important in that it covers employers not covered by the ADA, most notably the federal government and those employers with federal contracts. Section 501 of the Act requires each department in the federal government to formulate and update affirmative action plans for employing individuals with disabilities (see *Prewitt v. United States Postal Service*, 1981. Prohibits covered employer from discriminating against a qualified person with a disability). The EEOC is then charged with reviewing and enforcing such policies. Additionally, the Act uses different language than the ADA, and the employer taking care to strictly follow the provisions of the ADA may still find themselves faced with a suit under the coverage of the Rehabilitation Act.

Equal Pay Act of 1963

The Equal Pay Act, or EPA, prohibits paying wages based on gender. It does not however, prohibit other discriminatory employment practices. The EPA states that "No employer having employees subject to any provi-

sions of this section 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" (Equal Pay Act, 1963). When filing suit under the EPA, the plaintiff must demonstrate that they are performing "equal work" (see *Corning Glass Works v. Brennan*, 1974. Burden falls to the plaintiff to prove that an employer pays an employee of one sex more than an employee of the other sex for substantially equal work.). Although jobs do not need to be identical in order to be equal, nor can they be too different and still be equal (Zimmerman et al., 2000).

Americans with Disabilities Act of 1990

Prior to the ADA, federal legislation promoting the welfare of individuals with disabilities in employment fell to the Rehabilitation Act of 1973. However, leading up to the 1990 passage of the ADA nearly two-thirds of individuals with disabilities and under the age of 64 remained unemployed (Zimmerman et al., 2000). The ADA sought to remedy this by expanding the Rehabilitation Act to the private sector. Under the ADA: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" (Americans with Disabilities Act, 1990). Individuals filing suit under the ADA must first prove that they are a member of a protected class (*School Board of Nassau County v. Arline*, 1987. The 'determination of whether an individual poses a significant risk of communicating an infectious disease to others' must be based on medical or other objective scientific evidence) and then prove that they were discriminated against based on that disability. Failing to provide reasonable accommodations is one such violation of the ADA (*Vande Zande v. State of Wisconsin Department of Administration*, 1995. Intermittent impairment that is a characteristic manifestation of an admitted disabil-

ity is a part of the underlying disability and requires reasonable accommodation). Under the statute, the employer is required to make accommodations that are considered reasonable or do not impose an undue hardship (see *Borkowski v. Valley Central School District, 1995*. Burden falls to plaintiff to prove that she is otherwise qualified to perform duties with reasonable accommodation. Burden falls to defendant to prove accommodations causes undue hardship). The plaintiff must prove that they can perform the essential functions of the job with the reasonable accommodations. If reasonable accommodations cannot be made, the employer then has an obligation to consider reassignment to a vacant position (see *Smith v. Midland Brake, Inc., 1999*. Any potential accommodation, including reassignment to a vacant position, must pass an objective test of reasonableness). Additionally, the plaintiff must demonstrate that their physical or mental impairment prevents or significantly limits major life activities (see *Toyota Motor Mfg. v. Williams, 2002*. For an employee to be considered "substantially limited" in performing manual tasks, the workers' impairment must prevent or severely restrict him or her from doing activities that are of central importance to most people's daily lives).

Scope of Problem in Employment Discrimination

According to information provided from the Equal Employment Opportunity Commission (EEOC), in 2002 there were 84,442 charges of discrimination filed with the EEOC, resulting in monetary benefits to the plaintiff of over \$257 million. An additional 364 claims resulted in suits under Title VII (247), the Americans with Disabilities Act (61), Americans with Disabilities Education Act (20) Equal Pay Act (3), or a combination of Acts (14). These cases resulted in \$52.8 million in awards. Because attorneys typically view the VE as serving to assess individuals with physical and/or mental impairments, they often overlook the usefulness of VEs in employment discrimination cases. Yet, with many of the suits filed with the EEOC having economic damages arising from lost earnings and benefits as part of the claims, the VE is equipped to deal with issues in a significant number of these cases (Hotchkiss, 2003).

The Vocational Expert in Employment Discrimination Cases

Individuals terminated from employment for causes other than work-related deficiencies may have recourse if the plaintiff's contention about such dismissal can be established (Havranek, 1997). The VE is able to assist in identifying damages by determining what vocational options and wages are available to the plaintiff following termination, including potential barriers to employment and the anticipated length of unemployment. Potential impediments in returning to work include a period of immediate and unplanned employment resulting in economic strain and public disdain, costs associated with a job search, and physical and psychological health problems (Cutler & Cutler, 1995).

To determine an individual's vocational outlook, the expert assesses the plaintiff's education, work history, and other demographic and vocational information to establish what skills the individual has that can be transferred to similar or alternative work activity. Although medical issues are not a prerequisite for discrimination cases, in those instances where disability is an issue, a physician may be retained to provide an assessment of physical or psychological functioning. Likewise, based on the VEs findings, an economist can provide an assessment of the impact of earnings over the course of a lifetime. While medical and economic input is a critical component in most cases, it is the forensic VE who is in the best position to tie these important elements together for the judge and jury. By virtue of their education, training and experience, these specialists are uniquely qualified to comment on pre- and post-discrimination vocational capacity. This, in turn, lays the foundation for the determination of losses (Toppino & Boyd, 1993).

VEs are utilized by both the plaintiff and the defense. Plaintiff attorneys' have found the VE to be a valuable resource in establishing liability and monetary damages, while defense attorneys' have identified VEs to help defend against such charges and identify alternative employment options.

Whether retained by the plaintiff or defense however, the expert must provide an unbiased opinion or risk losing credibility. Attorneys should take caution not to pressure VEs into going against their true findings. These experts are easily revealed during testimony to be bought

witnesses, thereby discrediting even their valid and honest conclusions. The VE must arrive at a vocational opinion utilizing consistent methodology and taking into account all relevant fact of the case. Although the expert remains impartial, the plaintiff and defense attorneys often have differing objectives when retaining the VE.

The Vocational Expert and the Plaintiff's Attorney

Most commonly, plaintiffs' counsel seeks to quantifiably support contentions that the plaintiff has suffered a loss of wages, a loss of wage-earning capacity and a loss of the opportunity to pursue avenues of work that had been available pre-morbidly (Feldbaum, 1993). However, in ADA cases, the VE can also be utilized to assist the attorney in establishing employer liability by conducting a job analysis to determine the potential for reasonable accommodations.

In the damages phase of the case, the plaintiff turns to the VE to identify the impact of discrimination on earning capacity and labor market access. Whether or not the plaintiff has been terminated from employment, the VE can assist in identifying if the individual has lost opportunities to advance in the company, has suffered diminished or restricted wages, or has been adversely affected in a search for future employment.

This process begins with a review of the plaintiff's medical and psychological (where applicable), educational, and work records. A vocational interview with the plaintiff is conducted to review the information and assess intangibles, such as their thought processes, attitudes, available job seeking skills, and job search performed to date. Through the record review and vocational interview, the VE is able to conduct a transferable skills analysis to determine feasible vocational alternatives (Dunn & Growick, 2000). Finally, the VE examines the labor market data to determine the availability of jobs. Through this process, the VE can determine to what, if any, extent the plaintiff has lost access to employment opportunities, whether they can return to work in comparable employment providing comparable wages and benefits, and estimate a time frame for obtaining gainful employment. The VE will consider factors such as age, education, physical capacity, work skills, job seeking skills, the impact of discrimination on psychological functioning, and the economic strain of unemployment to establish monetary damages.

In the liability portion of a case, the goal of the VE is to determine whether the plaintiff was qualified to perform the essential duties of the job in question, and whether reasonable accommodations were available or could have been provided to allow the individual to perform the job duties. A potential barrier to gauging liability is the employers' willingness to allow the VE access to the employment site, personnel records, and company policies. The attorney in this case must ensure full cooperation from the employer so that the VE can conduct a job analysis. In a job analysis, the VE gathers, evaluates, and records accurate, objective and complete job data. By understanding the work performed by the plaintiff and the company's ability to offer reasonable accommodations, the VE can accurately determine whether modifications were made, or whether they could have been to allow the plaintiff to continue to perform the essential functions of the position.

The Vocational Expert and the Defense Attorney

Defense counsel, on the other hand, seeks to mitigate damages by exploring and identifying alternative direct placement or retraining options which approximate as closely as possible the plaintiff's pre-morbid earnings (Feldbaum, 1993). Again, the VE can assist in the liability portion of ADA cases by conducting a job analysis and assessing the employers' efforts to provide reasonable accommodations. Although the employer would not be expected to block the VE from conducting this analysis or reviewing personnel records, the defense attorney should ensure that the VE has access, and that the employer has been briefed regarding the VE's role in the case. Personnel records, such as an employment application, may reveal additional training and work activity not acknowledged by the plaintiff during the vocational interview.

The vocational interview is an important component in assessing employment capacity. In addition to gathering work and educational data, the VE can appraise intangibles, such as the plaintiff's interview skills, motivation level, and attitudes towards work. Although the plaintiff's attorney may deny the VE access to the plaintiff, getting the request on record protects against the attorney attacking the VE on cross-examination for having limited their assessment to a file review. The VE who fails to, at minimum, request

a meeting with the plaintiff risks a loss of credibility, particularly if the plaintiff's VE conducts a face-to-face. The absence of personal contact with the plaintiff is defensible if the jury understands that it was the plaintiff's attorney who denied this petition.

The VE retained by either plaintiff or defense should be skilled at conducting a thorough labor market evaluation. Typical of these evaluations are a review of employment data. This data includes employment numbers by occupations and by demographics, such as age, race, gender, and educational level. A thorough review of classified advertisements is also a tactic used by the VE to provide documented evidence of employment options during the period following dismissal. The VE is also able to contact employers directly to determine if they were accepting applications or actively hiring during a given time period, and whether they would consider an individual with the plaintiff's credentials. This review of the plaintiff's labor market serves to illuminate available employment options as well as any failure by the plaintiff to engage in a 'good faith' job search. Where possible, the plaintiff is required to mitigate damages by seeking and accepting comparable employment. The VE can assess the plaintiff's efforts to find suitable work activity.

Although the VE can assist in ascertaining liability, it is not their role to offer opinions outside of their scope of practice, or act as an investigator to uncover discoverable information (Heitzman, 2000). For example, the VE should not be involved in any work typically associated with a private detective, such as attempting to obtain undercover video (e.g. working, performing physical activity) in an attempt to compromise the plaintiff's lawsuit. Nor should the VE be asked or offer a medical opinion. Such an opinion is considered outside their area of expertise.

Assessing Liability in ADA Cases: A Closer Look

Plaintiff and defense attorneys have typically introduced VEs during the damages portion of a case, after the alleged discrimination has been accepted as fact. Overlooked is the utility of the VE in the liability portion of a case, particularly in cases filed under the American with Disabilities Act (ADA). Individuals alleging violation of the ADA often cite inaccessibility of the workplace or employers' failure to provide rea-

sonable accommodations. The VE possesses the expertise to identify the essential functions of the job, whether the employer has engaged in a "good faith" effort to provide reasonable accommodations to the individual (Hablutzed & McMahon, 1992; McMahon, 1995; Growick, 1993), or whether an employment decision was predicated on the basis of a perceived or known disability (American with Disabilities Act).

Essential Functions, Reasonable Accommodations and Undue Hardship. Under the ADA, the employer is required to make reasonable accommodations "to the known physical or mental limitations of an otherwise qualified individuals with a disability who is an applicant or employee". An employer who does not know of an individuals' disability may argue this fact in their defense (see *Hedberg v. Indiana Bell Telephone Co., 1995*. 'The ADA does not require clairvoyance'). Therefore, an individual must make the employer aware of the disability if there are corresponding limitations. An individual who could otherwise perform the essential duties of the job "but for" their disability may request reasonable accommodations from the employer. The employer is then required to consider accommodations that would not "impose an undue hardship on the operation of the business or such covered entity" (ADA; Growick, 1993).

Essential functions of a job are those that are fundamental, and not marginal or unnecessary, to fulfill the objectives of the job (Bennett-Alexander & Hartman, 2003). The employer must not consider duties incidental to the job as essential, nor should they consider the means for accomplishing the job, only that it can be performed. This is the essence of reasonable accommodations. An individual is qualified for a position if, with or without reasonable accommodations, they can perform the essential duties of a job (Bennett-Alexander & Hartman, 2003). When considering accommodations, the employer must consider whether it will increase the likelihood of employment of the individual with a disability, whether it will allow the individual to demonstrate adequate job performance, and whether it will impose an undue hardship on the establishment (Havranek, Grimes, Field, & Sink, 1994).

Some accommodations are costly, such as widening doors and adding elevators or chair lifts to structures built pre-ADA. Others are relatively inexpensive, such as lowering work tables or adding cups next to

drinking fountains for those utilizing wheelchairs. What constitutes reasonable accommodations and undue hardship is not easily defined. The EEOC has created guidelines on accommodations for individuals with disabilities. Information provided includes the responsibility of the individual to request reasonable accommodations, and the way in which an employer should handle the request; accommodations for job applicants; information on accommodations such as part-time work, unpaid leave, and job restructuring; changes the employer is not required to make to a job; and those instances when an employer can cite an undue hardship as reason for not providing accommodations (EEOC, 2002).

Undue hardship is any accommodation that is costly, substantial or disruptive, and is an acceptable defense to a claim of employment discrimination (Bennett-Alexander & Hartman, 2003). In essence, it is the limitation on the employer's obligation to provide accommodations (EEOC, 2002). Employers must consider whether an accommodation creates an undue hardship on a case by case basis. The EEOC outlines the criteria for concluding an undue hardship. Factors include the cost and nature of the accommodation, the financial resources of the facility, and the impact of the accommodation on the facility. Employers must consider whether outside funding is available for the accommodations, sources the VE should be familiar with. Undue hardship cannot be based on an employers or customers fear of the disability (EEOC, 2002).

Stone v. City of Mount Vernon, 1997 (Essential Functions). Stone was initially hired by the department as a firefighter and worked in this capacity for two years. An off-duty accident resulted in temporary paraplegia, and following physical therapy, he regained the ability to walk with the assistance of leg braces. In 1994, the plaintiff passed a test promoting him to lieutenant and requested a return to active duty in the Fire Alarm Bureau, where he could work performing duties of receiving and transmitting alarms of fires, performing paperwork, and assisting in the dispatching center. He was denied employment by Fire Commission and informed he would not be receiving accommodations in the form of alternate duty. The city was initially awarded summary judgment after asserting that Stone could not perform the regular duties of a fire fighter. On remand, the 2nd Circuit Court found that while the

plaintiff could not perform the duties of a fire fighter, he could perform the essential functions of the job he was applying for. The argument that plaintiff could not fight fires in the case of a multi-alarm fire was not pertinent, as there was no evidence to show, in the form of a job description or union contract, that this was an essential function of the Fire Alarm Bureau.

US Airways, Inc. v. Barnett, 2002 (Reasonable Accommodation). Plaintiff was employed as a cargo handler for the defense. Upon injuring his back, he requested a transfer to the mailroom, which required less physical activity. Plaintiff was temporarily placed in the mailroom on light duty, and realizing that the position was coming up for bid, and two individuals with more seniority were prepared to bid for the mailroom position, Barnett asked his employer to make an exception to the seniority rule. After several months, the employer decided against this accommodation, and terminated Barnett. Plaintiff sued under the ADA, stating that he was a qualified individual with a disability, and allowing him to work in the mailroom was a reasonable accommodation. The Court found that the airline had rightfully relied on their well established seniority system, and therefore allowing the plaintiff to remain in the mailroom while violating their own policy would not be considered a reasonable accommodation (see also Growick, 1993).

Dexler v. Tisch, 1987 (Undue Hardship). Dexler, who suffered from achondroplastic dwarfism, sued his employer under the Rehabilitation Act when he was not hired for employment by the United States Postal Service to work as a distribution clerk. The plaintiff was four feet, five inches tall, weighed 200 pounds, and had a vertical reach of 58.5 inches. The position required individuals to perform a variety of tasks, and individuals could not be assigned specifically to any one task. The plaintiff's stature and reach rendered him unable to load and unload trucks, load and unload mail, and impaired his ability to sort mail as he could not reach the uppermost row of mail boxes. Plaintiff proposed the employer provide him with a portable step stool to extend his reach which would allow him to perform 90% of the required job duties. The court found that the plaintiff's height and weight would make him unstable on top of the stool, and the stool might pose an obstacle to coworkers. The court concluded that the proposed accommodations, and other accommodations

that would allow the plaintiff to perform limited job duties, would pose an undue hardship on the defendant.

Job Analysis. Ideally, employers involved in discrimination suits have detailed job descriptions outlining the essential functions of the job. These analyses are helpful in establishing prima facie evidence in employment discrimination cases (Havranek, et al., 1994). Even when available however, job descriptions may be inaccurate, reporting marginal functions to be essential. It may be left up to the court to break down the duties of a job to determine what is in fact essential. In these cases, the expertise of the VE will make a significant impact on determining liability. Job Analysis involves gathering, evaluating, and recording objective data about a job. It describes what a worker does, how the work is done, results of the work, the skills, knowledge, and abilities required to perform the work, and the context in which the work fits into the organizational structure (USDOL, 1982). Job Analysis is not a study of the individual performing the work activity, but of the work activity itself (USDOL, 1982).

VEs are trained in conducting job analysis and evaluating the merits of existing job descriptions. In employment discrimination cases, VEs can assist attorneys in formulating an argument of liability. The Job Analysis can look at the essential functions of the job. The VE can begin by examining the available job description and utilize information provided by the United States Department of Labor (USDOL), particularly the Dictionary of Occupational Titles (DOT), O*NET, Classification of Jobs to gain a better understanding of the job. The DOT is a compilation of job descriptions for each of over 12,000 positions in the workforce. However, it has not been updated since 1991, and because of this there are questions regarding its relevance. The USDOL has attempted to remedy this with the creation of the O*NET, a modern version of the DOT that provides practical information on each job.

However, this publication has yet to be accepted by any court or government agency, and may not be in the near future. Still, information helpful to the analysis may be culled from the O*NET. Due to these limitations, the VEs expertise is crucial. The VE is capable of visiting the job site to witness the job being performed, as well as interviewing supervisors and employees to the accuracy of existing job descriptions. Once the Job Analysis is completed, the court has an understanding

of the essential duties of the job. Next, the VE can make recommendations for reasonable accommodations, including external sources of funding; testify to the efforts of the employer to provide reasonable accommodations, or refer the court to an ergonomist, who may be better suited to create a reasonable accommodation.

Job Analysis has been demonstrated as playing an important role in establishing the validity of employment tests in federal court (Havranek et al., 1994). Under Title VII, employment tests are only allowable if they demonstrate a connection between results and job performance (*Griggs v. Duke Power Co.*, 1971). Test measures based on job analysis have content validity, and therefore are allowable under Title VII. When not based on objective criteria, the validity of selection instruments has been successfully challenged (Schuler & Youngblood, 1986; Thompson & Thompson, 1982; as cited in Havranek et al., 1994).

Measuring Vocational Loss

The VE has the capacity to measure the impact of the discriminatory practice on earnings potential. Some aspects of the consequences of employment discrimination, such as loss of salary and benefits, and the length of unemployment, are easily measurable. But other issues, such as whether the plaintiff engaged in a 'good faith' effort to secure comparable work, and/or the vocational ramifications within a particular industry of sudden unemployment, are more difficult to gauge. Individuals alleging an adverse impact on income as a result of wrongful termination or discrimination are required to make an effort to mitigate damages, by taking advantage of any reasonable opportunity, such as accepting a reasonable job offer, to reduce or minimize economic losses. The VE can assess the extent and quality of the plaintiff's job search (Heitzman, 2000) by assessing what types of work activity the plaintiff is qualified to perform work and whether these jobs exist in sufficient numbers for the plaintiff to be a competitive job seeker.

To determine the impact of discrimination on earnings potential, the VE assesses the claimant's vocational options, including number, types, and wage level of jobs available prior to the discriminatory action, and vocational options following the discrimination or termination. Appraisal of the individual's ability to com-

pete in the open labor market is also an essential element in the vocational role. Job availability, the selection ratio (number of available jobs divided by the number of individuals seeking jobs), as well as employer attitudes towards hiring an individual terminated from previous employment, are all vocational considerations and often form the foundation for the economic analyst (Dillman, 1998).

Factors to be considered by the expert include the plaintiffs' physical or mental impairments (if any), work history, transferable skills, education, age, gender, race, aptitudes, labor market, and wage data. In cases where a physical or mental impairment are present, the expert will consider documentation of the individual's residual capacity as defined by the medical practitioner (Butler, 1991). The VE is not a doctor, and should not render a medical opinion. In many cases there will be conflicting opinions presented by physicians retained by each side. Instead of choosing sides, the VE should handle this situation by rendering separate opinions based on the findings of each doctor. (Choppa & Shafer, 1992)

Depending on the case specifics, the expert can travel one of two avenues in determining post-termination vocational alternatives. The first method is to assess what the individual was doing for work prior to termination, and then to identify opportunities in the local labor market to return to the same form of work with an alternative employer. The second method is to consider alternative job duties. The VE assesses the individuals' past work and skills developed through occupational performance. Adding in education, as well as results of relevant vocational tests administered during the vocational interview, the expert can provide an opinion of what occupations the individual could reasonably be expected to perform immediately or with appropriate training.

After feasible vocational alternatives are identified, the occupational outlook or growth opportunity in a particular work field must be considered. If an individual is unfairly terminated from employment in a work field that is not growing, then replacement employment is much more difficult to obtain. In addition, the geographical area in which the person resides is equally important. If a person resides in a part of the State that does not have many job opportunities, then their employment prospects are greatly curtailed. The individual's age and

gender might be complicating factors in a situation if the hiring patterns in certain industries can be demonstrated to be detrimental to re-employment. The expert should be expected to identify labor market information, as well as employment trends of the plaintiff's cohort group in terms of age, gender, and race.

In addition, psychosocial issues are an important variable to consider when evaluating employment potential. Individuals who are subject to discrimination may show decreased confidence and self-esteem that are significant factors in securing future employment. As a result, these individuals may suffer from depression and other health problems that compound the financial impact of unemployment. Cutler & Cutler (1995) reviewed extensive literature suggesting a link between the effects of unemployment on health problems. If these conditions are documented by a medical expert, then the VE can help in describing their negative affects on re-employment.

By considering the above factors, the VE can determine employment potential and establish monetary loss. It is imperative that the VE recognizes that each plaintiff's case is unique and requires caution in arriving at vocational opinions. Consideration should be made for different legal statutes among states, extenuating circumstances, and other individual factors influence the approach taken by the VE (Butler, 1991).

Under various statutes, the plaintiff can seek back pay (see *Albermarle Paper Co. v. Moody*, 1975), front pay (see *Patterson v. American Tobacco Co.*, 1976), compensatory and punitive damages (see *Johnson v. Railroad Express Agency*, 1975), liquidated damages (*ADEA, Section 7b, 29 U.S.C.A. SS626b, 1999*), and attorneys' fees (*ADEA, Section 7b, 29 U.S.C.A. SS 626b, 1999*). The VE can be used by attorneys to establish or mitigate these damages in cases of employment discrimination. Most importantly, the VE can assist attorneys' in identifying the average time for an individual to obtain equivalent or comparable employment following termination from previous work activity. Factors to consider include age, gender, job seeking skills, labor market information, presence of a disability, and other employer's attitudes towards the unemployed.

Age may play a role in the length of time to locate employment. In a survey of employers, Forte & Hansvick (1999) found that older workers were rated higher than younger workers in the areas of academic

skill levels, attendance, ability to get along with coworkers, work ethics, salary expectations and supervisory skills, but lower on computer skills, ability to learn quickly, energy and stamina, and flexibility. The age of the worker had a positive correlation with the age of the employer, suggesting that the older worker may or may not encounter bias, depending on the characteristics of the employer and the nature of the job duties. Physical demands associated with some jobs may rule out women, who either don't meet physical requirements of a job or who are not given the opportunity to demonstrate their capacity. Terminated individuals may have limited job seeking skills, outdated resumes, or limited confidence in securing future work. Employer attitudes may adversely affect the individual who has been terminated from previous employment. Employers may be reluctant to hire the disabled or those perceived to be "troublemakers". They may fear the need for additional supervision of the plaintiff, loss of productivity, and being stuck with the individual if the job doesn't work out (Peck and Kirkbride, 2001). The VE can recommend avenues for securing job seeking assistance to return the plaintiff to work in a timely fashion, and at a level of pay commensurate with former income.

Another area that the VE can assist the defense attorney is in determining the integrity of the job search, and the plaintiffs' access to employment within a certain geographical area. Once again, the VE can consult information from the U.S. Bureau of Labor Statistics on the average time to find replacement employment for different jobs. The VE can also assess the integrity of the job search by identifying specific prospective employers in the local economy and what they currently pay in both salary and benefits. Finally, the VE can help to determine the cost of a job search, by assessing what types of assistance will be needed to secure employment in a particular work field.

Identifying and Retaining Qualified Vocational Experts

A particular danger in retaining a VE is the prevalence of rehabilitation consultants masquerading as qualified VEs. Rule 702 of the Federal Rules of Evidence allows an expert to testify "*if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue*"

and where the witness is "*qualified as an expert by knowledge, skill, experience, training, or education*" (Field & Stein, 2002). Legal precedents (*Daubert v. Merrell Dow, 1993* and *Kumho Tire Company v. Carmichael, 1999*) require that expert testimony be based on principles, methods and techniques that are proven reliable and valid (Weed, 2000). Determination of whether testimony meets these standards has fallen to trial judges, who have been given significant leeway in determining what is reliable and relevant (Field, 2000). For these reasons, it is vital that the attorney understand what qualifies an individual as a VE.

To be considered qualified as a VE, the expert should possess some combination of the following: graduate degrees in a behavioral science or vocational rehabilitation related fields, specialized training in vocational rehabilitation, professional licensure and certifications administered by recognized rehabilitation groups, demonstrated evidence of expertise via teaching, lectures or publication, association with professional organizations, (Blackwell, 1992; Machovec, 1987; Williams & Reavy, 1993), work experience including vocational assessment, job analysis, and job placement, familiarity with current literature (Havranek, 1997), knowledge of vocational tests, references and resources, and skills allowing one to accurately convey information in depositions, hearings, and trials (Blackwell, 1992). Additionally, the expert should adhere to an ethical code. The ethical codes within the various professional rehabilitation organizations have in common several important traits. It is essential for the expert to identify accurately qualifications, emotionally distance themselves from the referral source, refrain from basing fees on trial outcome, accurately report and represent facts, and maintain levels of confidentiality that protects the client from unnecessary harm. (Johnston & Klein, 2001)

When seeking a VE, consultation with professional certifying bodies, such as the American Board of Vocational Experts (ABVE), or professional organizations, such as the International Association of Rehabilitation Professionals (IARP) is a good starting point. The VE should be able to provide a *Curriculum Vita* outlining work experience, education, publications, presentation, and other relevant qualifications, including a list of previous cases in which testimony was provided. The later item should reflect a balance between plain-

tiff and defense work. The VE should be able to demonstrate knowledge of local and national jobs, employment conditions, current and future labor market trends, and available community resources (Thomas, 1997). A fee schedule should be made available. According to *The Guide to Experts' Fees* (2002), VEs charge, on average, \$160 per hour for report writing, and \$275 per hour on deposition and trial. The experts' fees should remain consistent, and should not be dependent upon or reflect a percentage of the "winnings".

Summary

In employment discrimination cases, the VE can be helpful to both plaintiff and defense attorneys. For plaintiff attorneys, the VE can help to document damages regarding loss of earnings by providing an objective opinion based upon factual information regarding an individual's ability to engage and maintain employment. Likewise, the defense will seek to minimize the various elements of damage by convincing the jury that the reduction in earning capacity is less than that advocated by plaintiff's counsel (Deutsch, 1990). The attorney who retains a VE will possess an individual with knowledge of the labor market, wage rates, and vocational options not understood by the common lay person. The VE can assist triers of fact in understanding the vocational and economic impact of employment discrimination. The attorney, absent such an expert, must argue these points themselves. In a presentation to the American Board of Vocational Experts in 1990, Judge Richard Rogers, Senior United States District Judge, commented that "In the use of experts, attorneys have to ascertain that they are not being overmatched in experts by the other side" (Rogers, 1990). Retaining the VE can protect the attorney and their case from this threat, especially in situations in which large monetary damages are at stake.

The VE also possesses the unique expertise to critique job descriptions and perform Job Analysis to determine the essential functions of the job. In this way, the VE provides the court with a valuable resource in gauging the liability of the employer in employment discrimination cases. Through this Job Analysis, the VE can determine whether reasonable accommodations can be made, assess the efforts of the employer to make such accommodations, and support or refute

assertions of undue hardship.

The VE, based on their knowledge of vocational issues, including transferable skills and labor market conditions, can play a pivotal role to the attorney wishing to establish or refute liability and economic damages. With the increasing use of these experts in discrimination cases, attorney's choosing to retain the VE will possess an advantage in the court of law.

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