

The Use of Undercover Testers to Identify and Eliminate Discrimination in the Selection and Hiring of Employees

**A Special Report
Prepared for the Iowa Civil Rights Commission**

August 27, 2010

**The University of Iowa Clinical Law Programs
Law and Policy in Action Project
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I. Project Team Activities and Methods:

The University of Iowa Clinical Law Program prepared this report during the Summer of 2010. The project team was comprised of Student Legal Interns Kate Fitzsimmons and Matthew McMurrer, Research Assistant Travis Cavanaugh and Clinical Professor of Law Len Sandler.

To familiarize ourselves with the governing law, we examined state, federal and local civil rights and employment laws, regulations, judicial and administrative agency decisions, agency guidance, handbooks, texts and treatises. Team members also conducted extensive interviews with pre-eminent experts, including researchers, lawyers, enforcement officials and academics with years of experience developing, implementing and evaluating tester programs. To confirm that the advice and proposed solutions we received were practical and sound, we compared the methods and approaches used by others in the field as illustrated in tester cases, research projects, government reports and operational materials.

Each one of us read several studies and reports about testing programs in the U.S. and other countries designed to ferret out or measure discrimination in housing, employment, mortgage and credit services, public accommodations and other arenas.

II. Introduction to the Values, Benefits and Costs of Testing:

“The concept of auditing for discrimination is straightforward. Two individuals (auditors or testers) are matched for all relevant personal characteristics other than the one presumed to lead to discrimination, e.g. race, ethnicity, gender. They then apply for a job, a housing unit, or a mortgage, or begin to negotiate for a good or service. The results they achieve and the treatment they receive in the transaction are closely observed, documented and analyzed to determine if the outcomes reveal pattern of different treatment on the basis of the trait studied and/or protected by antidiscrimination laws.”¹

Contemporary forms of employment discrimination are likely to be subtle and covert, according to Princeton University Professor Devah Pager, a distinguished sociologist and researcher. Pager also believes that few “Americans today believe that discrimination remains an important factor in shaping opportunity.” As a result, it is difficult to assess whether discrimination is now a thing of the past or whether it has simply become more difficult to observe and document. Though discrimination is by no means the only—or even the most important—cause of contemporary racial inequality, this research suggests that discrimination remains far more prevalent than most Americans would expect.”²

¹ An Overview of Auditing For Discrimination, see MICHAEL FIX, GEORGE C. GALSTER, & RAYMOND J. STRUYK, CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 1 (The Urban Institute Press 1993).

² Devah Pager, *Have We Conquered Discrimination?*, PRINCETON SOCIOLOGY DEPARTMENT, <http://sociology.princeton.edu/Faculty/Pager/>.

Potential Benefits of Matched Pair and Situation Testing:

Practitioners and researchers agree that testing plays a vital role in shaping public awareness and perception, improving employer practices and educating employers, promoting individual rights, obtaining injunctive relief and compensation through litigation or agency enforcement, and empowering job seekers.³ This section highlights and summarizes the most significant advantages and disadvantages of testing programs.⁴

Macro-Level Benefits:

A person's job has long been recognized as a major contributing factor of psychological prosperity and well-being. As Sigmund Freud once noted "the two great wellsprings of mental health are love and work."⁵ In our society, a job often defines the person and is a central measure of social and economic progress as well as self-identity. Work-related discrimination restricts career advancement and can substantially damage a person's self worth, as well as perceived and real social acceptance. Its impact extends far beyond one individual's ability to secure a job. As one economist observed, "Employer discrimination creates in the minds of its victims a sense of inequity and disenfranchisement that threatens national social solidarity."⁶

The negative impact and burden of employer discrimination is not the victim's alone to bear; it also creates inefficiencies in the national labor market when employers reject the most qualified applicant based on irrelevant characteristics or biases. Additionally, ever-changing U.S. population demographics impose a competitive disadvantage upon companies that fail to recruit and retain a culturally diverse workforce. Businesses that do not tap into this qualified talent pool increasingly find it difficult to reach all segments of their potential customer base and market.

Micro-Level Benefits:

Bolster Enforcement: Agency enforcement efforts prove inadequate because job applicants are rarely motivated to file complaints or do not know where to go for help. These individuals are hampered by having little or no information regarding the applicant pool, which person got the job, or why they were not hired. Furthermore, they lack the means, ability or authority to gather evidence sufficient to support their claims. And, because they are preoccupied with finding work to pay for food, clothing and shelter, applicants do not have the time or inclination to file complaints.

There are other factors at work as well—job seekers can be oblivious to discriminatory acts or behaviors. Researcher-Professor Devah Pager discovered that even trained testers find it difficult if not impossible to read cues during job interviews. She required testers to complete a "feeling thermometer" questionnaire after each interview to record their impressions and

³ Id.

⁴ Many of these subjects are covered in greater detail and in a slightly different context in the sections about resume and interview testing and operational issues.

⁵ Richard H. Price, Daniel S. Friedland, Anuram D. Vinokur, *Job Loss: Hard Times and Eroded Identity*

⁶ Marc Bendick, Jr., *Situation Testing for Employment Discrimination in the United States of America*

observations. The purpose was to identify anything that the tester heard or saw that led them to believe the interviewer was biased toward or against them.

In a surprising finding, black testers had the same feelings as white testers, even though they encountered greater discrimination than whites in the end. The focal point of the interview was when the interviewer reviewed the candidates' job history. The manager favored the work history from the white applicant over the same work history provided by the black applicant—even though neither applicant perceived any difference or bias. Utilizing audio recording devices and adhering to highly structured testing protocols allows agencies and testers to record and capture even nuanced discriminatory acts.

Increase Public Awareness and Shape Public Perception: There is a growing belief and common public misperception that workplace discrimination is a thing of the past. Exposing inequalities and disparate treatment in the workplace is one of the ground-level benefits of enforcement- or empirically-based workplace testing. Tester programs also reveal the subtleties of contemporary employer behaviors and quantify the extent of discrimination. Properly conducted, tests generate vivid and compelling human interest anecdotes through observations, recordings and transcripts that “combine unusual persuasiveness with rigorous accuracy.”⁷ Public awareness and acknowledgment that the problem still exists is essential if employers are to change their practices, lawmakers are to pass protective legislation and agencies are to step up enforcement efforts. Situation testing is a way of shaping public perception and highlighting the pervasive nature of subtle discrimination in hiring.

Provide Incentives to Improve Employers' Practice: Testing gives employers an incentive to identify and evaluate their hiring policies and practices. Some businesses and industries conduct testing programs to gauge their level of compliance with civil rights laws and to bolster recruitment initiatives. In a related vein, they often use “mystery shoppers” to measure the quality of customer service. Companies often respond to compliance testing by a) requiring additional or specific training for human resources personnel, b) establishing employee affinity groups and diversity initiatives, c) updating recruitment and retention policies and d) creating internal testing programs or hiring third party consultants to monitor compliance with company policy and practices. For employers that resist or fail to adhere to the law, testing is a way to force them to implement changes through litigation or government action.

Educate the Public and the Workforce: Information obtained through testing can be used to educate other employers and members of the general public. Employers can leverage such information to revise their hiring practices, to address instances of unconscious bias, subtle or blatant acts of discrimination. In addition, job seekers can become better informed as to their rights as job applicants and what questions employer may, may not or must ask during the

⁷ Amir Tal, et al., *Using Situation Testing to Document Employment Discrimination Against Persons with Psychiatric Disabilities*, 25 EMPLOYEE RELATIONS LAW JOURNAL 82, 88 (2009), available at http://www.bendickegan.com/pdf/Testing_Psychiatric_Disabilities.pdf. [hereinafter *Psychiatric Disabilities*]

interview and hiring process. Applicants and employers who are aware of their rights might be more inclined and empowered to file complaints or lawsuits to combat discriminatory behavior.

Validate a Complaint Filed by a Bona Fide Applicant: Situation testing is most compelling when used to confirm or strengthen a complaint or legal action filed by a bona fide applicant or employee. Complaints based on a refusal to hire are difficult to prove because hiring decisions are often based on a multitude of factors. Unsuccessful applicants rarely have sufficient proof, knowledge or documentation of what happened, and cases often come down to one person's word against another's. Except for the rare instance when there is a "smoking gun," or an unrebutted, blatant discriminatory act or statement, a case hinges greatly on whom the court chooses to believe, the applicant or employer. Matched pair testing can be used to support, or undermine, complaints filed by other individuals.⁸

Provide a Snapshot of Workplace Discrimination: Testing can provide crucial data regarding the type, quantity and extent of discrimination that exist in a particular market, industry or business. It also provides a scientific method of demonstrating that groups not protected by civil rights law encounter barriers to employment. For instance, testers have been used to document discrimination against men and women who have criminal convictions or at one time have been imprisoned. The results of these tests have convinced lawmakers to introduce legislation to "remove the box" on employer application forms that request information regarding an applicant's criminal record.⁹ Organizations use testing to record and understand how employers react to these groups or other classes of individuals to change law or policy or to improve employment prospects.

Potential Costs of Tester Programs and Other Considerations:

Employment tester programs pose unique challenges, particularly to civil rights commissions and other entities that are resource-constrained. Success is highly dependent on recruiting and training a corps of testers, adhering strictly to protocols honed by 30 years of professional research and learning, and devoting significant resources, staff time and funds to detect bias in selection and hiring.¹⁰ Here are four concerns we believe merit your attention.

Financial Expense: As noted earlier, hiring decisions involve a universe of factors, behaviors and interactions between applicant and employer. By contrast, testing for housing discrimination is for the most part relatively simple. The basic outcomes are restricted to two or three yes-or-no answers depending on the protected class: Did they offer to rent the apartment to you? Did they steer you to a different apartment or neighborhood? Did they refuse to let your assistance animal live with you? Bringing job-related litigation or enforcement actions can be costly and time-consuming because of the number of variables and the complexity of the interviews'

⁸ Iowa Civil Rights Commission: Orlando Ray Dial v. Friedman MotorCars, LTD. (available through the Iowa Civil Rights Commission)

⁹ Michael Sumner (hereinafter, citations that include only a name refer to information obtained through interviews conducted with that individual) ; Bruce Western, Devah Pager, *Race at Work: Realities of Race and Criminal Record in the NYC Job Market*, New York Commission on Human Rights Conference (Dec. 9, 2005).

¹⁰ Marc Bendick, Tim Huizenga, Brad Seligman.

dynamics. Every researcher, lawyer and enforcement official we interviewed, without exception, agreed that testing is an expensive enterprise. Moreover, personnel and operational costs were cited as the number one reason that tester program have been abandoned or dropped.

Whole-Hearted Commitment: In addition to devoting substantial funding, testing organizations must be willing to make a long term commitment to ensure testing is conducted properly. Many programs hire a full- or part-time coordinator and retain social science experts to design, train, implement testing, record, preserve and analyze evidence and testing data. These steps are a prelude to trial or administrative hearings. The sometimes arduous process might take six months to a year from start to finish. A typical schedule requires six to eight months of planning, two to three months of testing, and three to four months of evaluating test results. Most test programs require one full-time testing coordinator to oversee the work, a part-time assistant, and four or more testers. Without the proper commitment and planning, testing will likely fail to yield usable results, waste time and money, and end with unsubstantiated allegations and investigations.

Certain Employers Are Off-Limits: Some employers and occupations are not amenable to testing. The first category includes jobs that require applicants to sign and swear under penalty of perjury that the information provided is true and correct. Most, if not all, federal and state jobs fall within this category because they criminalize misrepresentations made in connection with employment applications. Testers, and the Commission itself, might be exposed or subject to liability if testers use falsified credentials when applying for these types of jobs. The second category of untestable jobs includes occupations that require a license or certification.¹¹ These types of credentials are easily verifiable and the employer would learn quickly if an applicant was unqualified or acting as a tester. Many health care professionals, over-the-road truck drivers and lawyers, for example must have a valid license. As a practical matter, it would be impossible to recruit testers who have the needed credentials, so most testing organizations have excluded such occupations from their programs.

Political and Public Relations Considerations: The Commission is funded with taxpayer dollars and must be cognizant of and sensitive to the possible fallout from using testers to detect discrimination. Targeted employers and industry colleagues may launch high-visibility campaigns claiming entrapment, deceit and unfairness. They will decry the use of public funds for tester projects when the Commission lacks the staff and resources to investigate complaints on behalf of bona fide applicants and employees.¹² Also, some individuals and protected classes are less sympathetic than others. Some media figures and members of the public may question why the Commission is protecting criminals, felons, mentally ill, dangerous people or “those people,” whoever they may be.

¹¹ Brad Seligman

¹² Marc Bendick.

III. How Testing Relates to the Commission's Powers and Duties

While the natural inclination in beginning an employment testing effort might be simply to focus on enforcement, keep in mind the full breadth of the Commission's powers and duties. Iowa Code Section 216.5 also charges the Commission and staff with investigating and studying the contours of discrimination and eliminating it through education and conciliation, issuing publications and reports of research and investigations, advising the Iowa legislature and executive branch, and recommending remedial or corrective legislation.¹³

The basic mandate is to eliminate discrimination that is targeted toward individuals or groups in protected classes, e.g., age, color, creed, familial status, gender identity, marital status, mental disability, national origin, physical disability, race, religion, sex and sexual orientation. That mandate extends only to certain arenas and activities, e.g. credit, education, employment, housing and public accommodations; however, testing can help the Commission fulfill and advance its mission in the following ways:

To Investigate and Determine the Merits of Complaints: Testing is a valuable weapon in the Commission's enforcement arsenal. It can be used to support complaints filed by bona fide applicants or employees; in that instance, the applicant's complaint forms the core of the case,

¹³ IOWA CODE § 216.5 (2009). §216.5 POWERS AND DUTIES, in relevant part, reads:

The commission shall have the following powers and duties...

....

2. To receive, investigate, mediate, and finally determine the merits of complaints alleging unfair or discriminatory practices.

3. To investigate and study the existence, character, causes, and extent of discrimination in public accommodations, employment, apprenticeship programs, on-the-job training programs, vocational schools, credit practices, and housing in this state and to attempt the elimination of such discrimination by education and conciliation.

....

5. To hold hearings upon any complaint made against a person, an employer, an employment agency, or a labor organization, or the employees or members thereof, to subpoena witnesses and compel their attendance at such hearings, to administer oaths and take the testimony of any person under oath, and to compel such person, employer, employment agency, or labor organization, or employees or members thereof to produce for examination any books and papers relating to any matter involved in such complaint.

6. To issue such publications and reports of investigations and research as in the judgment of the commission shall tend to promote goodwill among the various racial, religious, and ethnic groups of the state and which shall tend to minimize or eliminate discrimination in public accommodations, employment, apprenticeship and on-the-job training programs, vocational schools, or housing because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, ancestry, or disability....

....

8. To make recommendations to the general assembly for such further legislation concerning discrimination because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, ancestry, or disability as it may deem necessary and desirable. . .

....

10. To adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this chapter.

and testers establish or verify the discriminatory nature of an employer's practices, particularly when the employer repeats its unlawful behavior. Or, the evidence might fail to support or confirm the claim. Testing might be used to eliminate any suggestion that the bona fide applicant's statements or behaviors during the interview poisoned his or her employment prospects. Generally a prima facie case in a discrimination claim can be rebutted by showing a legitimate, nondiscriminatory reason for the failure to interview or hire the applicant. Audio recordings and post-interview notes can document what happened and remove from consideration factors other than the applicant's or tester's status as a member of the protected class. Testing data can be used to impeach witnesses, undermine questionable defenses and refute post-hoc rationalizations or justifications for rejecting the candidate. Even without necessarily introducing the data as evidence, which will be discussed later, testing can show the Commission how meritorious a complaint is before commencing action against the employer.

The second way the Commission may use testing as an enforcement tool is to exercise its prerogative to initiate and file a complaint against an employer. This power extends to the Commission, a Commissioner and the Attorney General. Once the Commission has proof from testers showing that an employer is engaging in discriminatory hiring practices, it may initiate a complaint on its own.

To Investigate and Study the Existence, Character, Causes and Extent of Discrimination: At first blush, the power to study discrimination and eliminate it through education and conciliation seems to bear little relation to tester programs. The Commission *already* has the power to investigate complaints and the duty to conciliate when a probable cause finding is issued during the course of an investigation whether or not testers are used. That said, testing can be conducted to quantify the extent of discrimination in a particular market sector, occupation or industry without conciliation or enforcement as the goal. Many academic researchers use testers to identify barriers to employment and discriminatory practices with an eye toward designing interventions and policies to counter or remove unlawful conduct uncovered during the study. Publishing the results, findings and recommendations from tester studies would dovetail with several of the Commission's duties and powers.

To Issue Publications and Reports: Moving beyond enforcement and conciliation, the Commission may use tester-based data to fulfill its duty to educate the public and raise awareness of equality issues. Whether or not publicizing testing program results and findings will tend to promote goodwill among a diverse population is unclear. Will an employer purposefully engaging in discriminatory hiring practices stop simply because the Commission publishes a report saying there is discrimination in hiring? Regardless, publishing reports and conducting public workshops might tend to minimize discriminatory hiring practices uncovered by testers—at least to the extent the Commission puts the public on notice that it is actively monitoring and policing the workplace (preferably after the tests are completed).

To Propose Legislation: The Commission may also use testing as a part of its policy-related power to recommend corrective, remedial or forward-thinking legislation to eliminate discrimination in Iowa. Taking time to reflect on how testers have been used in housing, public accommodations or employment will provide an opportunity to consider the more general

implications of testing as a vehicle for change. Commission staff might examine and question the effectiveness of current practices and techniques, priorities, budgets and administrative rules. They could also review Iowa Code Chapter 216 and other civil rights codes, recommend legislation to bolster or increase protections, create new protected classes or expand or amend the Commission duties or powers. Should you deem it necessary to propose legislation, evidence from testing programs that demonstrate widespread or uncaptured discriminatory practices would be a powerful tool in pursuing this goal.¹⁴

IV.A A Summary and Timeline of Tester Cases in the Courts 1958-2010

“The civil rights movement has a long history of using testers to uncover and illustrate discrimination. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that a group of Black clergymen who were removed from a segregated bus terminal in Jackson, Mississippi, had standing to seek redress under 42 U.S.C. § 1983. The Court ruled that plaintiffs had been discriminated against by being ejected from the terminal, despite the fact that the plaintiffs' sole purpose was to test the law rather than to actually use the terminal. Similarly, in *Evers v. Dwyer*, 358 U.S. 202 (1958), the Supreme Court recognized the standing of a Black plaintiff who sat in the White section of a Memphis bus and was removed from the bus by local authorities. The plaintiff had never before ridden a bus in Memphis and had done so solely for the purpose of testing the legality of the state's segregation laws. Testers have most frequently been used to detect housing discrimination. More than a decade ago, the Supreme Court held that a tester who was given inaccurate or incomplete information with respect to available housing had standing to sue the realtor under Section 804 of Title VIII of the Civil Rights Act of 1968, 2 U.S.C. § 3604 et seq. 7 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982).¹⁵

One unresolved fighting issue is whether testers may file an *employment* discrimination case in federal court. As the timeline indicates, courts are divided on the issue of a tester's legal standing to sue; courts that dismiss the tester's suit do so because the tester did not suffer a cognizable injury—she never wanted the job and was not prepared to accept a job offer. This report does not address the “standing” issue further because it is unrelated to the use of testers to support complaints filed by bona fide employees and complaints initiated by the Commission.

¹⁴ See, e.g., *Final Report: Familial Status Testing in Waterloo, Iowa* (reporting that the local Civil Rights Commission found hard evidence that state fair-housing laws were being violated in Waterloo, and could share the report with the state Commission. Regarding uncaptured discrimination, testing has been used in the State New York to show high rates of discrimination based on transgender. While an executive order barring such discrimination in public employment was issued in 2009, there remains no state-wide legislation incorporating gender identity as a protected class.)

¹⁵ *EEOC Guidance on Whether Testers have Standing*, <http://www.eeoc.gov/policy/docs/testers.html>.

To provide additional historical perspective, we have created timelines that illustrate seminal cases in the courts and the Iowa Civil Rights Commission, as well as research studies about testers and tester programs.

1958-- U.S. Supreme Court: A one-time rider who is trying to desegregate the bus system has legal standing to bring a federal civil rights lawsuit. (*Evers v. Dwyer*, 358 U.S. 202 (1958))

1971-- Fourth Circuit: Federal Court endorses tester claims of race and sex discrimination in hiring under Title VII. *Lea v. Cone Mills Corp.*, 438 F.2d 86 (1971)

1973-- N.D. California: Tester testimony and experiences are uniformly admitted into evidence to prove discrimination. *US v Youritan Construction Company, et al.* 370 F. Supp. 643 (ND Calif. 1973)

1982-- Supreme Court: Testers who are given false information by housing providers can bring fair housing suit. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982)

1990-- 7th Circuit: Testers do have standing when encountering racial bias in housing. *Village of Bellwood v. Dwivedi* 895 F.2d 1521 (7th Cir. 1990)

1992-- Iowa Civil Rights Commission: Testing is used to support a job discrimination complaint filed by other employees. *Orlando Ray Dial, Commissioner et al, v. Friedman Motor Cars, LTD, et al.*

1994-- D.C. Circuit: Testers do not have the legal standing to file a job discrimination lawsuit under Title VII. *Fair Employment Council of Greater Wash. v. BMS Marketing Corp.* 28 F.3d 1268 (D.C. Cir. 1994)

1996-- D.C. Court of Appeals: Testers have legal standing to sue for job bias under local human rights act. *Molovinsky v. Fair Employment Council of Greater Wash.* 683 A.2d 142 (D.C. 1996)

2000-- Testers do have the legal standing to file a job discrimination lawsuit under Title VII. *Kyles v. J.K. Guardian Sec. Servs., Inc.* 222 F.3d 289 (7th Cir. 2000)

2003-- 8th Circuit: Tester cases are used to support an ADA employment retaliation claim. *John Christopher Shaver v. Independent Stave Company, et al* 350 F.3d 716 (8th Cir. 2003)

2006-- 7th Circuit: Resume testing can support Title VII race-based job discrimination lawsuit. *EEOC v. Target Corporation*, 460 F.3d 946 (7th Cir. 2006)

2010-- Maryland: Testing protocols can be obtained if they relate to the facts of the case and discovery methods. *Equal Rights Ctr. v. Lion Gables Residential Trust* 2010 U.S. Dist. LEXIS 58951 (D. Md. 2010)

IV.B. A Summary and Timeline of Employment Sector Tester Studies 1991-2010

The courts and administrative agencies are not the only ones grappling with complex questions regarding discrimination in the workplace. For decades, researchers and scholars have examined and tried to measure the existence and effects of bias in selection and hiring, and they do so alone or in conjunction with litigators, non-profits and government agencies. These researchers define and conduct testing programs through a rigorous, social science lens. From that perspective the term “matched pair testing” means a systematic research procedure for creating controlled experiments analyzing employers’ candid responses to employees’ personal characteristics.”¹⁶ Synonyms also include situation testing, paired-comparison testing, employment auditing, field experiments and employment testing.

Over the past twenty years, employment testing has been used both to uncover discrimination against already protected classes as well as for gathering evidence to advocate for adding other classes to the list of protected classes. As early as 1993, the key players in civil rights enforcement testing have discussed the merits of using employment testing to uncover illegal discrimination.¹⁷ In 1994, Bendick, Jackson, and Reinoso used in-person interview testing to uncover a 24% discrimination rate against black applicants in Washington State. In 1999, a study by Nunes and Seligman documented a 38% discrimination rate against black applicants at employment agencies in San Francisco. Research has also been conducted for bias based on national origin, gender, and age. For example, in 1991 Bendick, Jackson, Reinoso and Hodges conducted a resume-only test that uncovered a 12% rate of discrimination against Hispanics. In 1996, Bendick, Jackson, and Romero completed resume testing that found a 27% rate of discrimination against older workers applying for sales office and professional jobs nationwide. In 2000, Nunes and Seligman, through interview testing, recorded a 27% rate of discrimination against women applying for auto service jobs in San Francisco.

A New York City program led to the addition of a new protected class. Make The Road New York conducted an interview test in 2009 that uncovered a 42% net rate of discrimination against transgender individuals applying for high-end retail jobs in Manhattan. New York City Human Rights Law now prohibits discrimination based on gender identity, even though state and federal law extend similar protections. The study triggered complaints against J. Crew and American Eagle; American Eagle has since settled and implemented a statewide overhaul of its

¹⁶ Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, JOURNAL OF SOCIAL ISSUES (forthcoming 2011) (manuscript at appendix), available at http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf. [hereinafter *Controlling Bias*]

¹⁷ Roderic V.O. Boggs, Joseph Sellers & Marc Bendick, Jr., *Use of Testing in Civil Rights Enforcement*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 345 (Michael Fix and Raymond J. Struyk, eds. 1993).

hiring practices.¹⁸ Some research projects want to determine if testing is feasible and effective for enforcement and research purposes. Other studies are designed to find out whether minority applicants receive the same treatment, information and opportunities that employers extend to non-minority applicants. While the project team reviewed many studies, these key articles represent a wide array of approaches and research subjects over time.

1991-- Testing for bias against Latinos in Washington, D.C., who apply for jobs that don't require a college degree. Marc Bendick, Jr., Charles W. Jackson, Victor A. Reinoso, Laura E. Hodges, *Discrimination Against Latino Job Applicants: A Controlled Experiment*, 30 HUM. RESOURCE MGMT. 4, Winter 1991.

1994-- Study to measure bias against African -Americans in Washington D.C. who apply for jobs that do not require a college degree. Marc Bendick, Jr., Charles W. Jackson, Victor A. Reinoso, *Measuring Employment Discrimination through Controlled Experiments*, THE REV. OF BLACK POL. ECON., Summer 1994.

1996-- Testing to gauge bias against women in Philadelphia who apply for waitservice jobs. David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, Q. J. OF ECON., Aug. 1996.

1999-- Study of bias against older workers in Washington D.C. who apply for entry- level jobs. Marc Bendick Jr., Lauren E. Brown, *No Foot In The Door: An Experimental Study Of Employment Discrimination Against Older Workers*, 10 J. OF AGING & SOC. POL'Y 4, Apr. 1999.

level 2005-- The effect of race, ethnicity and criminal records in New York City's entry- job market. Devah Pager, Bruce Western, *Realities of Race and Criminal Record in the NYC Job Market*, (2005) (unpublished manuscript, Princeton University) (on file with Department of Sociology, Princeton University).

2008-- Research to study bias against older women in Boston and St. Petersburg who apply for entry-level jobs. Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*, 43 J. OF HUM. RESOURCES 1, Winter 2008, at 30.

2008-- Discrimination against formerly- incarcerated women in the San Francisco Bay area who are seeking work). Monique W. Morris, Michael Sumner, Jessica Z. Borja, *A Higher Hurdle: Barriers to Employment for Formerly Incarcerated Women*.

¹⁸ See Make the Road New York, *Transgender Need Not Apply: A Report On Gender Identity Job Discrimination* March 2010, updated May 2010, available at http://www.maketheroad.org/pix_reports/TransNeedNotApplyReport_05.10.pdf.

2009-- Study measures race-ethnicity bias in New York City against individuals seeking jobs in upscale restaurants. Marc Bendick, Jr., Rekha Eanni Rodriguez, Sarumathi Jayaraman, *Race-Ethnic Employment Discrimination in Upscale Restaurants: Evidence from Paired Comparison Testing*, (Bendick and Egan Economic Consultants, Inc. Working Paper, Feb. 2009)

2010-- Study of bias against transgender individuals in New York City's retail job market. Make the Road New York, *Transgender Need Not Apply: a Report on Gender Identity Job Discrimination*, (Make the Road's LGBTQ Justice Project Working Paper, March 2010)

V. Testing Methods and Approaches: Resume and Interview Testing

An employment test answers or helps to answer the question: Are people being treated differently in the selection and hiring process because of their status, whether it is race, gender, age, disability, lawful source of income, national origin, etc.? The inquiry might encompass several stages because discriminatory treatment can occur at different points in the hiring process. By project's end, the coordinator should be able to compare how the employer treated the protected class tester and the control tester. Benchmark indicators include whether the employer:

- a) Read or responded to the protected class tester's resume and cover letter
- b) Agreed to interview the protected class tester
- c) Interviewed the protected class tester (and control tester):
 - a) Using the same method, phone, in-person or video interview
 - b) Spent a similar amount of time with protected class and control tester
 - c) Asked the testers the same questions and inquired about the same subjects
 - d) Asked the testers lawful questions
 - e) Required the testers to take the same tests
 - f) Treated the testers with equal respect, tone of voice, courtesy, etc.
 - g) Conducted the interview in the same room or environment
 - h) Invited the testers to ask questions (and responded to them)
- d) Advanced the tester(s) to the next stage of the process (interviews, tests, exams)
- e) Offered the protected class tester employment:
 - a) The job and wage or salary that was advertised
 - b) The job and wage or salary that was offered to control testers
 - c) A job with fewer benefits or perks
 - d) A job with fewer or lesser responsibilities, prestige or compensation
 - e) A job at a different branch or office of the employer
- f) Did something or failed to do something expected or required of the employer
- g) Other

For a state or local civil rights commission with limited resources, testing might best be accomplished using either resume and cover letter submissions or in-person interviews. Each option is described and analyzed in great detail in the sections that follow. The tips and best practices throughout this section have been gleaned from interviews, materials and manuals

used during past employment tests, and research papers. For more information, or more in-depth information on any of these subjects, see the list of interviews, research sources and other materials in the appendix. There are considerations that apply to any testing program.

General Considerations

Funding Is Everything: Running a testing program is an expensive undertaking. Organizations that operated programs in the 1990s discontinued testing because they lacked the funding for resume or interview testing. The cost of an interview testing program can vary widely. Tim Huizenga of the Legal Assistance Foundation of Chicago said it can cost around \$150,000 per year to cover costs of a full time testing manager, a full or part time assistant, and four testers employed just for the summer months. His figure included all overhead.¹⁹ Brad Seligman of the Impact Fund stated that a decent sized study across an industry could cost \$40,000-\$50,000, but a test for a single employer with the intentions of bringing charges could cost \$5,000-\$10,000.²⁰ Marc Bendick, who is most extensively involved in national and international employment testing and research, stated that the smallest testing program that he had been involved with had one full time staffer for six months out of the year, and required \$25,000.²¹ The Commission must secure stable funding or grants to sufficient to both start and complete type of testing suited to its goals. Cancelling a program midstream would be embarrassing, weaken or defeat the individual charge or complaint, and might erode public trust.

Repercussions and Backlash: As noted earlier in this report, testing sometimes engenders strong reactions and responses from employers, politicians and taxpayers. This is particularly true when testing is designed to uncover bias based on criminal history or personal characteristics the public finds objectionable or abhorrent. Dr. Marc Bendick said the public has less sympathy for people with criminal records and will likely be extremely critical of a testing program that “helps” convicts. In contrast, the public is much less likely to criticize testing done to reduce disability-based discrimination when the testers use a wheelchair or have a visible disability.

Most states have a backlog of complaints from bona fide applicants and workers. One way to deflect criticism or attempts to limit funding is to use testers only to verify complaints filed by individuals who were turned down for a job. People also object to testing programs that waste local employers’ time and money interviewing candidates who have no intention of taking the job. In a slack economy with high jobless rates, this backlash is more likely. Resume-only testing is less likely to be criticized because it only requires employers to read a resume or a cover letter and make a phone call. Interview testing provokes strong negative response in this regard because an employer’s investment of time, money and staff to recruit fictitious candidates could have been better spent on an applicant truly interested in the job.

¹⁹ Tim Huizenga.

²⁰ Brad Seligman.

²¹ Marc Bendick.

Adhering Consistently to Test Protocols: Employment testing has a pedigree of 30 years of professional learning and research²². The protocols developed are a time-tested marriage of social science and litigation practice intended to harvest accurate, discrete, reliable, litigation-worthy evidence. Maintaining objectivity and laboratory-like conditions in the field also helps persuade hearing officers, jurors and judges that testers do not have a personal ax to grind and are not fabricating stories to get money damages. Failure to follow procedures—going off-script, forgetting to complete debriefing forms completely, etc.—is a problem that can surface after testing is underway, or worse, after the tests have been completed. Lapses like these can subject evidence to impeachment or scuttle an enforcement action, and wreak similar havoc on testing conducted solely for educational purposes. We remind you of oft-repeated advice we received: “If you are going to test, don’t do it unless you are prepared to do it right.”

Timing is Important: Because testing is time- and resource -intensive, it should be conducted when it is likely to produce results.²³ In a slack job market, it is harder to get results from any kind of employment test. Fewer employers are hiring and those that are hiring receive many, many applications. As a result, it is unlikely that the testers will be contacted at all.²⁴ The goal of testing is to produce results, whether for educational purposes or for enforcement, so testing should be targeted to get the best results possible.

Creating Identities and Credentials for Resume Testers: In constructing resumes for testing, this is a relatively simple proposition, though one with two facets. The first is being sure to properly emphasize the status as a member of a protected class. When testing for race discrimination, the focus resume could include a degree from a traditionally black college, high school or vocational program, residency in a predominantly black neighborhood or membership in the NAACP or similar organization. Care should be taken to prevent any of these factors from either implying a protected-class-neutral issue or from being made irrelevant by a superior listing on the control resume. The same holds true when crafting the identity of a tester who will participate in a job interview.

We were cautioned by practitioners against relying too heavily on involvement with a political or activist organization when emphasizing the protected class. Membership in an activist organization, for example, may be seen as a negative to an employer regardless of the cause or subject matter of the group.²⁵ In the extreme, when writing a resume to isolate national origin, listing membership in the Tamil Tigers would leave the test results open to impeachment; the employer might be justified in not hiring a person with ties to a “terrorist” organization, regardless of national origin. This is an extreme example, but is meant to highlight the inherent problems in constructing resumes that *truly* isolate the protected class.

When highlighting the protected class, the resume should not inadvertently present an objectively less desirable applicant. If the African American tester attended a traditionally black

²² Joe Sellers.

²³ Marc Bendick.

²⁴ Marc Bendick.

²⁵ Political beliefs are not, per se, part of the protected classes the Commission is mandated to protect from discrimination.

college that does not enjoy an “Ivy League” reputation, the control resume should probably not include a degree from Harvard, Oxford, or the Sorbonne. This is an issue of balance that goes beyond simply ensuring the testers are ‘equal’ on all issues other than the protected class. We were also advised to make the control resume subtly but definitely less attractive than the protected-class resume. The idea is to make the protected class candidate slightly but noticeably *more* appealing in all respects except for membership in the protected class. This should help preempt the defense that the employer’s decision was based on a legitimate, non-discriminatory reason. The defense claim is much harder to make in the face of a protected class resume that shows a year more experience in the field, a degree from a better ranked college, slightly better grades, etc.

Creating Identities and Credentials for Interview Testers: The same concerns of isolating the protected class and making that applicant a slightly better candidate also apply to interview testing, but are somewhat more complicated to put into practice. While a strictly resume-based test can be performed by one anonymous person, interview testing requires, obviously, real testers to convincingly maintain characters reflecting their background and information noted in the resumes. In conversations with practitioners, several common themes emerged for ensuring the integrity of the interview testing process. The first involves “creating a wall” between the testers when training, deploying and debriefing them and not informing them the role they will play until the last possible moment. This prevents discrimination-seeking behavior on the testers’ part and preserves the objectivity of the data. This will not be possible in all circumstances, particularly when a program hires people who use wheelchairs to test for disability discrimination. Equipping testers with hidden audio recording devices allows the tester to stay in character and focus on the interview dynamics. It relieves testers of the burden of having to remember and recall with great detail each and every aspect of the interview and the interviewer’s behavior – while they do their best to “sell” their character and go undetected as testers. Professor Pager said she has begun testing the testers to preserve the integrity of the test itself and to motivate the testers. She recruits employers who agree to conduct a mock interview without the testers’ knowledge. The interview is recorded and the project team reviews and critiques the tape and the performance. This quality control measure also communicates to testers that they are being monitored and are expected to follow the scripts and protocols.

Resume Testing:

In a resume test, a fictional pair of paper or electronic resumes is submitted to an employer. Depending on the job, a cover letter must also be drafted to accompany the resume. The employer then calls or emails a reply to the fictional applicants. By comparing the feedback given to each applicant from the employer, the commission can try to determine if illegal discrimination is occurring. Resume testing can be accomplished on a small scale, by testing a single company, or on a larger scale, by testing several companies that are hiring for similar positions and have a local or statewide presence (or by selecting an industry or specific market sector of different size and location).

Sometimes the results from resume tests alone can be used to detect discrimination. Other times, resume can be used as the first stage of a sequential testing program that also involves in-person interviews. It was suggested that “positive” results from a resume test can be used to secure funding for additional or more in-depth testing.²⁶

When to Use Resume Testing: Resume testing is best used for educational purposes. When the results point to discriminatory hiring practices, they can be used to educate the targeted employer, the general public and other audiences, including other enforcement agencies. This method is also well suited for academic research aimed at exposing or quantifying bias in the overall job market, select market sectors or only one employer. If the results are to be published in peer-reviewed journals, the tests must follow extremely stringent methods and protocols that might not be required in enforcement testing.

If conciliation is the goal, evidence of discrimination from resume tests, if strongly indicative of discrimination, can be used to leverage a settlement. Resume test results are often unpredictable, let alone unequivocal. Sometimes the employer does not respond at all. In the words of Dr. Marc Bendick, “if you don’t get a nibble” the results and reasons are merely speculative and unusable. The employer might not have received the resume, might not be hiring, might have filled the position, etc. To be valid, testing requires several or many matched pairs of resumes and responses (at least to the control test resume). Replicating results is difficult when employers are not actively hiring or accepting applications on a regular basis. Also resume testing is not typically used to support complaints filed by bona fide applicants because the results do not provide sufficient information or feedback to verify the basis or nature of the discriminatory act noted in the complaint.

Resume testing is used to initiate a complaint or enforcement action when the results are unequivocal. For example, if resumes are mailed from a Mexican-born applicant and an applicant born in the U.S. and the prospective employer leaves a voicemail message saying, “Sorry, we don’t hire Mexicans here, tell your friends” this is evidence to support an administrative agency or court action. These “smoking gun” scenarios occur less frequently than in years past because employers have stepped up risk management, human resources, and diversity workplace training.

Examples of Resume-Only Tests: Resume-only tests have mixed results. For example, the Massachusetts Commission Against Discrimination (MCAD) sent out resumes to fifty different employers in certain targeted industries, making the control tester less qualified than the other two testers, one foreign born and the other Latino and U.S. born. The tests revealed that 2/3 of the protected class testers were subjected to discrimination. The Impact Fund in Berkeley, California used resumes to test discrimination based on criminal record. The results were used for educational purposes and to gather evidence in support of the “ban the box” initiative that prohibited employers from asking applicants about certain criminal convictions.²⁷ In some instances, testers opt to file lawsuits based on their experience. Some tests reveal the absence

²⁶ Eric Bove.

²⁷ Michael Sumner.

of discrimination. For example, a 2001 study indicated that gender identity did not have a significant overall impact on hiring chances.²⁸

Constructing the Resume and Cover Letter: If the Commission decides to conduct resume testing, it should consider adopting these practices:

- Resumes have to be set up in pairs. For the results to be usable or admissible there have to be at least two different pairs of resumes submitted. Otherwise, the employer can claim that evidence or challenged hiring decision was just a fluke, the result of an oversight, accident, lost or misplaced letter, or a one-time lapse by a lone, overworked or harried manager or employee.
- One resume needs to represent a member of a protected class, e.g., a black applicant, a female applicant, an applicant over 55, a foreign-born applicant, an applicant requesting an ADA job accommodation, and one resume, the control resume needs to represent the non-protected class (e.g. a white male, a white female or a person without a disability).
- Protected class status must be made clear on the document. If the protected class is race, then the white applicant's resume should have a traditionally Caucasian name (think Kelly Johnson), whereas the black applicant should have what the public perceives as a traditionally black name (think Shonda Green), have attended a traditionally black high school, and/or lived in a traditionally black neighborhood.
- The protected class applicant should have credentials that bestow a slight competitive advantage over the control applicant. For example, when the test is for national origin bias at a car dealership, the protected class applicant should have a year or two more experience in retail compared to the control applicant. The document could include slightly better educational background or more stable employment history.
- The drafters must be sensitive to unintended signals. Other than a slight advantage given to the protected class applicant, resumes need to be equal on all accounts. Resumes can contain a lot of information that an employer will associate with certain characteristics or traits. Certain high schools, neighborhoods, extra-curricular activities, or social organizations carry different connotations.²⁹ It would be too obvious to have the same detail on each resume, but it is necessary to select

²⁸ Doris Weichselbaumer, *Sexual Orientation Discrimination in Hiring*, 2 (Johannes Kepler University of Linz, Working Paper No. 0021, 2001), available at <http://www.economics.uni-linz.ac.at/papers/2000/wp0021.pdf>. [hereinafter *Sexual Discrimination*]

²⁹ Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 104, 111 (2007), available at <http://ann.sagepub.com/content/609/1/104.full.pdf+html>. [hereinafter *Field Experiments*]

different details that carry the same connotation. One way to avoid testing errors is to have an neutral party or consultant review both resumes before mailing,³⁰

- The resume has to represent a credible applicant for the position or job that is being tested. The best way to accomplish this is to have someone familiar with the job and the hiring process for that type of job assist with developing the resumes. For example, to create the best resumes for a retail management position, have someone who does or has hired retail managers explain what characteristics are and are not the most desirable on a resume. This “insider” can also inform the coordinator on the best times to apply and the normal hiring cycle of the position(s) being tested.

What Do Test Resumes Look Like? An article published in the Employee Relations Journal describes techniques and documents that could be used to test for discrimination against persons with psychiatric disabilities.³¹ The article provides examples of how best to illustrate mental disability through a requested for workplace accommodations; it is available online at http://bendickegan.com/pdf/Psych_Disabilities.pdf

Tips from the field: Operational Best Practices: Even though resume testing is fairly easy to develop and administer, coordinators suggested practices to fine-tune and make programs more effective. Hire an experience coordinator to oversee the entire program from beginning to end. Use great care when selecting the protected class; Race, age, gender, and national origin can be clearly communicated through the words on the resume. Gender can be communicated through names, age through high school graduation date, and race or national origin through the use of traditionally ethnic names.³² Some classes, e.g., physical or mental disability, take extra effort. The tester might need to request a reasonable accommodation in the cover letter or resume, list a rehabilitation center or congregate living center as the return address, or give as a reference a mental health professional or case worker. Resumes should not be used to test for bias based on sexual orientation and sexual identity. Short of typing “I’m a lesbian” or providing the name of a same-sex spouse or partner on the resume, the only other way to communicate protected class status is by noting membership in an LGBT group or similar affiliation.

The targeted business or industry should be actively hiring and resumes should be sent to employers that traditionally hire through resume submissions (or the efforts are wasted).

³⁰ *Field Experiments*, 111.

³¹ Tal, A., Moran, G., Rooth, D., & Bendick, Jr., M. (2009). Using Situation Testing to Document Employment Discrimination Against Persons with Psychiatric Disabilities, *Employee Relations Law Journal*, VOL. 35, NO. 3 WINTER 2009, Aspen Publishers.

³² Joanna Lahey, *Age, Women, and Hiring: An Experimental Study*, 33-34(Center for Retirement Research Working Paper, Working Paper No. 4, 2006), available at http://escholarship.bc.edu/cgi/viewcontent.cgi?article=1133&context=retirement_papers. [hereinafter *Age, Women, and Hiring*]; Monique W. Morris, et al., A HIGHER HURDLE: BARRIERS TO EMPLOYMENT FOR FORMERLY INCARCERATED WOMEN, a final report for THELTON E. HENDERSON CENTER FOR SOCIAL JUSTICE (Dec.. 2008), at 12, available at http://www.law.berkeley.edu/files/A_Higher_Hurdle_December_2008.pdf.

Administrative, clerical and white collars jobs fall within this category; many entry level or blue collar jobs hire based on an application or in-person inquiry and interview. The protected class resume should be sent first, followed soon by the control resume, to rebut any claim that the hiring decision was based on the date or order resumes are received. To track documents, each resume and cover letter must have an assigned phone number, voicemail and email account or address unique to each applicant.

For the test to be effective, the employer must to reply to both applicants, otherwise, the results are speculative (even if the response is to the control resume). When an employer replies to both applicants, the coordinator must review and compare the response and whether one applicant is treated more favorably than the other. Examples of replies that are discriminatory include a) telling the protected class applicant that the position is filled, but telling the non-protected class that the position is open, or b) steering the protected class applicant to a lesser paying job, a job with fewer benefits or less prestige, or a job that requires less experience, while still offering the non-protected class applicant a chance to interview for the job advertised. While these are the most common behaviors that point to discrimination, there are many, many other employer responses that are illegal. One test with unequivocal results can support a complaint or trigger conciliation; most of the time, though, the results only raise the specter of discriminatory treatment. Without explicit evidence, the resume test will have to be repeated with the same employer.

Interview Testing:

In an interview test, a team of matched testers applies and interviews for the position with the employer or employment agency. Once each pair of testers advances as far in the hiring process as possible, the coordinator compares the experiences, interactions and outcomes to determine if illegal discrimination played a role in the hiring decision. Interview tests are well suited to enforcement actions because they provide specific, detailed accounts of what transpired. Interview testing can be used effectively to leverage a settlement in conciliation and mediation. And, if no settlement is reached, the evidence can be used in the hearing process. That said, we do not recommend using this method if education is the Commission’s primary goal, because interview tests are significantly more expensive and complex to administer than resume tests.

What Might A Discriminatory Job Interview Look Like? The following is a transcript created by Dr. Marc Bendick regarding a job interview for work at the fictional Sam’s Shoe Store.³³

	Favorable Interview	Unfavorable Interview
Greetings:	Hello, I’m Phil Jones, the store manager (shakes hands). I’m really glad to see you because the Christmas season is	What can I do for you? (doesn’t shake hands; interviewee has to ask his name and title).

³³ See Bendick Materials.

	<p>coming on, and we're short two sales clerks.</p> <p>Let's go into the back room where it's quieter so that we can talk more easily (area is deserted, so conversation is private; then offers him a seat).</p> <p>Can I get you a cup of coffee or a soft drink or something?</p> <p>May I call you Dave, because we're all really friendly in this store. In fact, remind me to tell you about our softball team; we came in first in the league, and we have a lot of fun with it.</p>	<p>(remains standing in the middle of the sales floor which is not busy but another clerk is one the floor within earshot).</p> <p>Can I get you a coke, or is that a bad thing to say to you people (taps nose and laughs).</p> <p>(Calls tester Mr. Jones throughout the interview, each time looking at the resume to remind himself of the name).</p>
<p>Interview:</p>	<p>Not done much sales before? That really doesn't matter—an intelligent person like you can pick it up in no time. I had no sales experience when I started here.</p> <p>Working here is a really good opportunity. It pays \$6.00 an hour to start which isn't much, but you get two weeks paid vacation, a medical plan that includes dental. Besides, I rose to assistant manager 13 months after I started, and then you make \$26,000 a year plus get a commission based on store gross—last year that was another \$3,000.</p>	<p>Your resume says you don't have much sales experience. That's too bad, because this is a really competitive environment—there are eight other shoe stores in this mall alone—and so we really feel that we need experienced sales staff.</p> <p>Tell you what, though. We do have a stocker position that might come open next week. The nice thing about it is that the hours can be adjusted to fit in with your part time school. (Doesn't mention wage rate; when asked, he says \$5.50 an hour and doesn't mention fringe benefits).</p>

	<p>The key thing in shoe sales is to make a good appearance. You wouldn't believe some of the people who think they're qualified to work here—right off the boat, real hard to understand with their accents and all, or, you know, spangles on their shoes.</p> <p>When we hire you, Dave, there's on formality I should mention. Headquarters makes you take a lie detector test. It's really nothing to worry about, just some crazy idea headquarters dreamed up. I just didn't want you to be surprised.</p>	<p>I see on your resume that your car is pretty old. Is it reliable? You know, attendance and promptness is crucial; we can't tolerate unreliable employees.</p> <p>You realize, of course, that all new employees have to pass a lie detector test. That cause you any problem?</p>
<p>End:</p>	<p>Please come back at 4:00 p.m. Sally Smith, my regional manager, will be here then, and once she meets you we can process and offer within three days. I'm sure she'll like you, and we can get on with this. At 4, I can also introduce you to George Mason, my assistant manager, and we can talk about what hours you could cover.</p> <p>Dave, really glad to meet you, and see you at 4 (walks him from back room to front of store, shakes his hands warmly and pats him on the back)</p>	<p>I've got to go because monthly sales reports are due. My regional manager is out of town this week, and I have to check with her before I can make any decisions. So leave this resume with me, and I'll get back to you.</p> <p>Well, thanks for coming in (shakes hand briefly and immediately turns away).</p>

Examples of Interview Testing Programs: In-person interview testing programs yield significant results. As noted, Make the Road New York implemented a test in New York to uncover

discrimination against transgender individuals.³⁴ Also, New York has been the location of race testing in low wage labor market that revealed significant rates of discrimination.³⁵ Other examples of testing have been cited to throughout this report.

Recommended Protocols and Practices: There are many different ways to go about setting up and running an interview testing program, but testing will be much more effective by taking into account some of tips and practices: Hire a coordinator to secure funding, prepare training and testing manuals, develop testing and debriefing forms, and solidify the protocols and specifics of the test.³⁶ These tasks must be accomplished before hiring testers, and do not be surprised if it takes a significant time to finish this task. Eric Bove of MCAD said that it took one year of preparation before testers were hired.³⁷ Hire testers who are similar in all respects *except* for the protected class characteristic. The testers should be of comparable height, weight, physical attractiveness, interpersonal style or demeanor, and other characteristics unrelated to the protected class being tested.³⁸

Testers must be skilled, objective observers who recall what they see or hear—not just their feelings or hunches.³⁹ The testing coordinator must provide the training, which can take anywhere from a half-day to a week or more.⁴⁰ Training should include multi-media presentations rather than text-heavy manuals and readings. Training materials can be used at trial to educate the hearing officer or jury about the program’s methods and protocols. PowerPoint and other presentation materials are easier to follow and understand than single-spaced text-only program manuals and checklists. Testers must learn to be punctual, respond appropriately to questions, understand social cues, dress appropriately for the job, engage in conversation and be courteous.⁴¹

The testers also need to prepare for the interview, know a bit about the job and the employer’s business and understand standard hiring and interview practices. Programs often ask workforce specialists to assist the trainees; when testing for restaurant jobs, training might include a

³⁴ See *Transgender*.

³⁵ See Devah Pager, Bruce Western, & Bart Bonikowski, *Discrimination in a Low Wage Labor Market: A Field Experiment* (Sociological Review, Discussion Paper No. 4469, 2009), available at <http://ftp.iza.org/dp4469.pdf>.

³⁶ Eric Bove.

³⁷ Eric Bove.

³⁸ *Field Experiments*, 111; Amir Tal, et al., *Using Situation Testing to Document Employment Discrimination Against Persons with Psychiatric Disabilities*, 25 EMPLOYEE RELATIONS LAW JOURNAL 82, 88 (2009), available at http://www.bendickegan.com/pdf/Testing_Psychiatric_Disabilities.pdf. [hereinafter *Psychiatric Disabilities*]

³⁹ *Psychiatric Disabilities*, 88.

⁴⁰ *Psychiatric Disabilities*, 88; *Field Experiments*, 117;

⁴¹ Marc Bendick, Jr. et al., *Race-Ethnic Employment Discrimination in Upscale Restaurants: Evidence from Paired Comparison Testing*, (Feb. 2009), at 9, available at http://www.bendickegan.com/pdf/2009/Testing_article_%20Feb_2009.pdf. [hereinafter *Upscale Restaurants*]; David Neumark, et al., *Sex Discrimination in Hiring: An Audit Study*, THE QUARTERLY JOURNAL OF ECONOMICS, Aug. 1996, at 915, 922, available at http://aysps.gsu.edu/isp/files/ISP_SUMMER_SCHOOL_2008_CURRIE_SEX_DISCRIMINATION_IN_RESTAURANT_HIRING.pdf. [hereinafter *Audit Study*].

session with a restaurant server, waitstaff manager or hospitality industry veteran. The consultant can describe the hiring process, the standard questions asked and the best answers to give during an interview. The testers must be “good” testers and learn to act and dress alike, stay in character during every contact with the employer and have similar demeanors.⁴² Role-plays, practice interviews, and critiquing sessions are the preferred training methods. In addition, testers need in-depth training in how to observe and record events. Evidence from employment tests comes directly from the eyes and ears of the testers; if they do not properly record what they see and hear, the program will yield no usable evidence.⁴³ If audio recorders are not used in the interviews, testers should be trained to be “human tape recorders.”⁴⁴

Try to schedule job interviews as close together as possible to make it more likely that the same person will conduct both interviews. Immediately after the interview ends, testers need to write down everything they remember. One important goal is not to be detected, so testers must leave the site and meet with the coordinator to memorialize what happened. Testers should never speak with each or compare their experiences before the tests are completely finished. Once both testers advance as far as possible in the hiring process, the coordinator compares the experiences of each tester to see if there is evidence of discrimination and conveys the results to the staff members who decide if and how to act on the results.

Selecting and Training Protected Class Applicants: As you know, the Iowa Civil Rights Act forbids job discrimination based on age, color, creed, gender identity, mental disability, national origin, physical disability, race, religion, sex, and sexual orientation.⁴⁵ Unlike, resume testing, interview testing allows the tester to meet and interact personally with employer; as a result, there is a greater opportunity to observe and measure discriminatory behaviors or statements regarding every protected class. It is easiest to portray gender, race, age, and visible physical disability through interviews because the tester’s status or membership in a protected class is apparent. Sexual orientation and gender identity, while still not easy to portray, can be communicated in person through stereotypical behaviors, manner of dress, and answers to questions posed by the employer.

Selecting Businesses or Industries to Test: Interview testing provides great flexibility when deciding which employer(s) to test. If interested in filling gaps left by traditional enforcement methods, you might center efforts on gender identity or sexual orientation, groups that were only recently added to Iowa Code Chapter 216.⁴⁶ Studies indicate a high rate of discrimination against transgender individuals, but there is an extremely low rate of discrimination complaints filed by transgender individuals, for many reasons.⁴⁷ Interview testing works with a large

⁴² *Upscale Restaurants*, 9; *Audit Study*, 922.

⁴³ *Upscale Restaurants*, 10.

⁴⁴ *Psychiatric Disabilities*, 88.

⁴⁵ Iowa Code §216 (2009).

⁴⁶ Marc Bendick.

⁴⁷ *Transgender*, 17.

variety of jobs and a wide range of businesses and can be used for any job that hires by application, resume, or in-person inquiry.⁴⁸

Employment agencies are a major avenue for workers who want a part-time or full-time job and for employers interested in outsourcing employee selection and hiring. Research has shown that these agencies have a high rate of discrimination but a very low number of discrimination complaints filed against them. Temporary agencies provide the ideal environment for testing initiatives. A pair of testers could call, apply in-person, provide a resume, interview and obtain a job referral within a few hours or on the same day, yielding immediate results.⁴⁹

VI. Evidentiary and Ethical Considerations for Tester Programs

Formal rules of evidence do not apply to Commission proceedings. Instead, the Commission's rules specify that "a finding shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs, and may be based on such evidence even if it would be inadmissible in a jury trial."⁵⁰ Needless to say, this is not the most specific or clear rule. Testing practitioners strongly advised us that the physical evidence associated with a testing initiative should be handled as if subject to the more stringent requirements of the Iowa Rules of Evidence.

On a related note, employers' attorneys will try to block the introduction of audio recordings or undermine their value by claiming that clandestine recordings are illegal, immoral or the product of deceit. The defense, which is mostly unsuccessful, is grounded in the doctrine of *in pario delicto*, the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.⁵¹ As noted later in this report, Iowa law and federal law permit non-lawyers to surreptitiously record conversations without facing criminal liability and without the consent of the other party to the conversation.

Authentication and Chain of Custody: An important evidentiary concern is the need to identify and authenticate documents, recordings and other potential exhibits, and establish and maintain a chain of custody on all physical evidence produced. Every piece of evidence produced through testing must have a clear trail back to its point of creation or collection in order. The primary method of establishing authenticity is by implementing evidence handling protocols that ensure chain of custody from the moment a piece of evidence is created or collected to the moment it is offered as an exhibit. Some of these protocols are simple and easily put in place. The most simple is the creation of a sort of an evidence locker for the program. All documents created, whether resumes, debriefing reports, cheat sheets to remind testers what to highlight after interviews, etc., should be kept locked when not actively in use. Program staff often reviews interview transcripts, debriefing reports and other documents to

⁴⁸ *Field Experiments*, 111.

⁴⁹ Marc Bendick.

⁵⁰ IOWA ADMIN. CODE r. 161-1.17(7).

⁵¹ *Reed v. Cedar County*, 2007 WL 509186 *4(N.D. Iowa 2007 Feb. 12, 2007).

evaluate evidence, consider enforcement options or prepare for conciliation, hearings or trial. Documents that are being used or distributed within the organization (or externally) should be checked out, with time, date, and user recorded. Original materials should rarely be distributed outside of the testing program facility or locker. When materials are mailed, photocopies of all originals should be made and kept. The goal of chain of custody measures is to have custody of each piece of evidence traceable to a specific person (or to the locker) at every moment since its collection.

One practitioner pointed out the problematic nature of recording interviews. He stressed the importance of setting up a system that used non-rewriteable media for recording. Using non-rewriteable technology eliminates the need to obtain experts to vouch for the recordings' authentic and testify that it has not been tampered with. Voicemail messages in response to resumes or phone-inquiries should be transferred to non-rewriteable media immediately, and accurately transcribed wherever possible.

Even in a testing project that does not use recording, establishing the chain of custody quickly is important. In these situations a dedicated testing coordinator becomes very important. Practitioners who do not record or tape interviews because the practice is prohibited by local law, stressed the importance of having the coordinator as close to the interview site as possible. This practice allows the post-test debrief session to take place immediately, when memories are as fresh as possible, but it also allows the chain of custody to begin as close to the test as possible.

Use of Expert Testimony: Testing practitioners and litigators with whom we spoke were somewhat divided on the value of expert testimony. At one extreme were testing initiatives that relied solely on tester testimony and reports. At the other extreme were litigators who stressed the need for expert testimony to review, prepare and present testimony about every aspect of the program, the evidence obtained and the significance of the project's findings. In the latter case, experts should analyze the results and break the process down into discrete, readily identifiable segments for the fact finder, be it an ALJ, jury or judge. The initial greeting stage of the interview could be analyzed as follows: Did the interviewer greet the applicant? Did the interviewer stand to greet the applicant? Did the interviewer offer to shake hands? Was the interviewer "pleased to meet" the applicant or launch into questions? Did the interviewer ask for a cover letter or resume? The process transforms the subjective experience of the tester into an objective evaluation based on scientific method.

The second aspect of expert involvement is testimony at trial. This, again, has the simple benefit of controlling how the testing data is presented as evidence. An expert witness may demystify the methods used and explain the test results in language that is easy to understand and digest, with the goal of proving that the employer's actions were based on the status – not the qualifications – of the tester. Use of an expert witness opens the test itself as well as the expert to scrutiny and impeachment by the employer, who will challenge the reliability of the testing evidence and seek to exclude all related expert testimony.

Iowa courts take a liberal view on the admissibility of expert testimony and evidence.⁵² To be admissible in an Iowa court, expert evidence must be relevant, must be evidence in the form of scientific, technical, or other specialized knowledge and must assist the trier of fact to understand the evidence or to determine a fact in issue pursuant to Iowa R. Evid. 702. The witness must be qualified as an expert by knowledge, skill, experience, training, or education. In addition, any potential for an exaggerated effect of the proffered evidence will be considered. The target of the hearing officer's or judge's scrutiny is the principles and methodologies used to reach the expert's conclusions, not the conclusions themselves.

When the scientific evidence is particularly novel or complex, courts could consider the relevant factors identified by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786, 2796-97, 125 L. Ed. 2d 469, 482-83 (1993).⁵³ These factors help assess reliability of expert evidence by evaluating the scientific validity of the reasoning and methodology as applied to the facts of the case. These factors are: (1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community.^{54 55}

The polestar for admissibility is always scientific validity and reliability. In light of the liberal standard of the evidentiary rules and the relaxed standard used in Commission proceedings, there should be few barriers to the admissibility of expert testimony, provided the project has been properly designed and implemented.

Confidentiality of Tester Identities: Preserving the secrecy of the testers' true identities is essential to the continued efficacy of any testing program. Practitioners reported running tests anywhere from several months to all year round using the same testers. Should the testers' true identities become public, they would likely be unable to participate in further testing. The cost to the program would be quite severe; new testers would have to be recruited, trained and deployed and all or part of other testing programs might have been comprised. The operations manual and other materials in the Appendix address these concerns.

Confidentiality of Tester Files, Protocols and Materials: Litigation-orientated tester programs zealously safeguard all materials and work product relating to their operations. To prevent or limit disclosure in discovery and other court proceedings, they bear the burden of demonstrating that the testing documents reveal information akin to trade secrets, in that the sophisticated data collection it has developed provides it a competitive edge in seeking funds to

⁵² *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (1999) See, [Iowa R. Evid. 5.702](#).

⁵³ *Leaf*, 590 N.W.2d at 532.

⁵⁴ *Id.*, *Leaf v. Goodyear*.

⁵⁵ One court using the federal rules of evidence ruled that the proffered testimony of a fair housing testing expert must meet the criteria for scientific validity and reliability under the test formulated by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Metropolitan St. Louis Equal Housing Opportunity Council, Et. Al, v. Gordon A. Gundaker Real Estate Co., Inc.*, 130 F. Supp 2nd 1074 (E.D. MO 2001).

do its work, and public disclosure would not only jeopardize that advantage, but would also impinge on its ability to conduct the testing if more developers were aware of its methodology and particular measurements.⁵⁶ That court noted “the fact that similar materials may have been disclosed in another case is not automatically fatal to a request for confidentiality, particularly where the disclosure was inadvertent...Nor does the fact that HUD provided some of the confidential information in response to a FOIA request alter its confidential nature in this litigation.”⁵⁷

The Iowa Code provides that materials prepared in anticipation of trial are privileged and beyond the scope of discovery.⁵⁸ The question of whether testing data falls under the category of ‘materials prepared in anticipation of litigation’ is a tricky one, particularly in administrative law proceedings. The primary goal of this provision is to protect any materials where counsel has written his or her analysis or legal counsel down from being discoverable by opposing counsel. Should such material be discoverable, the integrity of attorney-client privilege would be significantly weakened. How, then, would the identity of testers be protected through this measure? In the case of testing to support a bona fide complaint, it might be argued that the testing was initiated in anticipation of an administrative hearing that is conducted in a trial-like manner. The employer seeking discovery must show that it has substantial need of the materials to prepare its case and that it is unable without undue hardship to obtain the materials, or the substantial equivalent of the materials by other means.”⁵⁹ It is unclear how the employer would establish a “substantial need” to know the true identities of testers, except perhaps to challenge credibility. Oftentimes, the lawyers for employer and tester will stipulate to a confidentiality order that seals or limits access to the records. However, they first may seek a protective order claiming that the materials are attorney work product.

In preparing for trial, it should also be kept in mind that any materials reviewed by a witness in preparation to testify are discoverable.⁶⁰ Testing coordinators often end up testifying at trial, which underscores the need to create an administrative separation between the testers and the attorney or attorney general who will represent the Commission or the testers.

The Ethics of Attorneys’ Participation in Tester Programs: By its very nature, testing is a form of calculated dishonesty; dishonesty designed to uncover illegal activity and greater social ills, but dishonesty that could involve individuals and large-scale misrepresentations nonetheless. This is important because lawyers are held to different and sometimes higher ethical standards than non-lawyers. It is integral to the functioning of the legal system that when a client asks for advice, he or she can, without a serious leap of faith, expect that that advice will be given honestly and without ulterior or other motive. In order to ensure this, the Iowa Rules of

⁵⁶ *Equal Rights Center v. Lion Gables Residential Trust, et al.*, 2010 U.S. Dist. LEXIS 58951 (June 15, 2010).

⁵⁷ *Id.*

⁵⁸ IOWA R. CIV. P. 1503(3).

⁵⁹ *Id.*

⁶⁰ *Id.* at R. 5.612.

Professional Conduct make it professional misconduct for which an attorney may be censured to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”⁶¹

Questions persist regarding what role a lawyer can play in undercover tester programs. Some states take the position that participation or oversight does not reflect adversely on a lawyer’s fitness to practice law. Iowa has taken a different path that provides guidance but little certainty, particularly about tester programs that use audio or video recordings. One law review author called it “*The Iowa Approach: Finesse with a Comment.*”⁶² Rule 32.8.4 broadly proscribes deceit, fraud and dishonesty; however, according to the *commentary*,

It is not professional misconduct for a lawyer to *advise clients or others* about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer’s conduct is otherwise in compliance with these rules. “Covert activity” means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.⁶³

In more plain language, a private or government lawyer may help plan, advise, oversee and participate in undercover testing programs so long as they have a good faith reasonable belief that some unlawful employment discrimination has occurred, is occurring or will soon occur. As discussed above, it is the Commission’s duty to investigate the existence of job discrimination in Iowa, so participation by the Attorney General or another lawyer should fall within the acceptable bounds of professional responsibility.

Can Non-Attorneys or Attorneys Record Tester Interviews or other Conversations? The other ethical dilemma concerns attorney participation in the audio recording of interviews without the employers’ knowledge or consent.⁶⁴ For non-attorneys, the issue is rather clear-cut. The

⁶¹ IOWA RULES OF PROFESSIONAL CONDUCT R. 32.8.4(c).

⁶² Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV., 155-56 (2008).

⁶³ IOWA RULES OF PROFESSIONAL CONDUCT R. 32.8.4(c) at comment [6]. It should be noted, however, that the authoritative weight of this comment is untested. Without explicit language in the rule itself, or a case testing the weight of the comment, we can only say that attorney participation *should* be acceptable.

⁶⁴ This refers strictly to audio recording. Silent video recording presents problems, both in terms of use as evidence and legality of creation, depending on the expectation of privacy of the interviewer. Additionally, testing practitioners seem skeptical about what if, anything, would be the added benefit of having a video record of interview tests. They referred specifically to the logistical concerns to which the tester would have to attend in

Federal Electronic Communications Privacy Act of 1986 and its Iowa counterpart ban any person from intentionally intercepting, or trying to intercept, wire, oral or electronic communications by using electronic, mechanical or other devices.⁶⁵ Both laws include exceptions, and permit conversations so long as one of the parties to the conversation has consented to the intercept. In more common parlance, Iowa is known as a “one-party consent” state. A Commission tester, by agreeing to record the interview using a hidden microphone and recorder, obviously satisfies this requirement.

The involvement of an attorney in the testing process complicates matters. While the ethical rules discussed earlier allow an attorney to participate in covert testing programs, other ethical rules have been interpreted to forbid an attorney from recording a conversation without the consent of all parties – and from engaging someone else to perform an act the attorney would be barred from doing personally.

The Iowa Supreme Court Board of Professional Ethics and Conduct issued Formal Opinion 83-16 (1982) labeling it professional misconduct for an attorney to make recordings without the consent of *all* parties to the conversation. The opinion touched upon many issues, including Rule 8.4 discussed above before the addition of Comment 6. The fundamental concern was maintaining the integrity of the legal profession, and the negative impact that even the appearance of impropriety by covertly recording people without their consent could have on the perception of that integrity.

The Iowa Supreme Court addressed the issue in *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Mollman*, where it held that an attorney had committed professional misconduct by covertly recording a conversation as part of an FBI narcotics investigation.⁶⁶ The holding explicitly affirms the 1982 Ethics Board opinion, albeit in a context other than tester programs, and notes that an exception exists for attorneys general assisting in prosecutorial investigations. The Board had the opportunity to review its stance on recording conversations three years after the *Mollman* decision. It did so in one sentence -- Formal Opinion 95-09 reads “The Board is of the opinion that Formal Opinion 83-16 is correct and it hereby is reaffirmed.”

This issue remains unresolved; we cannot predict what would happen if the Attorney General representing the Commission recorded a conversation or created, planned or executed the testing protocol that includes recording. This dilemma should stress the importance of isolating the test coordinator and program staff from the Attorney General and the Commissioners. The Attorney General and the Commission can insulate themselves from ethical violations charges by ensuring that the tester coordinator and staff work alone.

terms of keeping the interviewer in the shot versus the ease of use and ‘out of sight, out of mind’ benefits from audio recording, as described above.

⁶⁵ 18 U.S.C. 2511 (2009) and IOWA CODE § 808B.1 et seq. (2009).

⁶⁶ *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168 (Iowa 1992).

VII. Issues to Consider When Deciding Whether to Establish an Employment Tester Program:

This special report is intended to provide sufficient information for the Commission to decide whether it wants to establish an employment tester program in Iowa and, if so, what type of program will best suit its mission and goals. We had hoped to find a “testing bible” during our research, but were disappointed to learn that no such document exists. Given the diverse nature of enforcement and education testing programs we, and the experts we interviewed, doubt that any single approach or manual would work or be successful. In the absence of such a blueprint, we have furnished a list of the issues to consider and questions to ask, step-by-step, to assist you reviewing your options and making a decision

Determine if there is a need for a tester program:

Does unlawful discrimination in selection and hiring still exist in Iowa despite your best efforts?

Do incidents of job discrimination go unreported?

Do community leaders, consumers or providers know of or have heard about specific employers or job sectors that have discriminated against individuals in protected classes?

Do individuals that are not protected by the Iowa Civil Rights Act encounter discrimination in employment, housing or other areas, for example, individuals with criminal backgrounds or who receive public benefits, Section 8 vouchers, Social Security disability benefits or other lawful sources of income?

Do census reports, EEO-1 or other employment data sources reveal possible unlawful discrimination by a particular employer, industry or job sector in Iowa?

Are there other reasons to send resumes or use matched-pair testers to apply for particular jobs, employers or market sectors?

Could you utilize methods other than testing to bolster efforts to combat job discrimination?

Define Yours Goals:

Educate the public and shape its perception of discrimination

Educate and conciliate with individual employers

Validate or support a complaint filed by a bona fide employee

Initiate a complaint on behalf of the Commission, a Commissioner or the AG

Investigate and report on discrimination in a specific occupation, job sector or industry

Investigate and report whether non-protected class members are being subjected to discrimination

Recommend remedial, corrective or proactive legislation, policy or rule change

Report to the Executive Branch and General Assembly

Establish a “testing institute” to provide tester services and training to local civil rights agencies and/or to cooperate with local agencies or community organizations

Other goals

Identify the most effective and practical methods to achieve your goals:

Resume only

Resume with cover letter

Resume followed by phone call or employer inquiry

Resume followed by phone interview or in-person job interview
Phone call or email inquiry only (used only when required by employer)
In-person job interview
Other methods or approaches

Determine Your Legal of Commitment and Expertise:

How modest or ambitious a testing program do you need or want to establish?
Are funds available to hire a half-time or full-time qualified testing coordinator?
Are funds available to start, staff and run a program on a short- or long-term basis?
Do current personnel have experience in programs that test for discrimination in credit, education, employment, housing or public accommodations?
Are you willing and able to hire a consultant to determine the feasibility and contours of a Commission-based or statewide testing program?
Are social science or research experts available to design, oversee, evaluate and testify in Commission proceedings regarding the rigor of the methods and protocols used and the significance of the evidence obtained?
Are you prepared to endure and respond to public criticism, or worse, from employers, taxpayers, lawmakers, potential funding sources and others for conducting employment testing?
Are there other practical, political or resource issues that should be considered before starting a testing program?

Decide what to do next:

Create an action plan based on your answers to these questions and the priorities you establish.