

EMPLOYMENT TESTING FOR CIVIL RIGHTS ENFORCEMENT

An Operations Manual



EMPLOYMENT DISCRIMINATION ENFORCEMENT

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ACCEPTED DUALITY

We would like to thank the anonymous referees for their helpful comments and suggestions.

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~ CHAPTER ONE ~

THE EMPLOYMENT DISCRIMINATION PROJECT: AN OVERVIEW

Since July of 1991, The Legal Assistance Foundation of Chicago (L AFC), with the support of grants from the United Way, has been developing and operating a project that uses employment testers to uncover hiring discrimination based on race, national origin and gender. We have taken the testing approach that has been used successfully to combat housing discrimination and adapted it to the employment context, with the ultimate aim of establishing employment testing as an effective legal tool for enforcing fair employment laws.

As the principal provider of free legal services in civil law matters to low-income people in Chicago, L AFC is particularly interested in addressing hiring discrimination as it affects the poor minorities and women who make up most of our client population. We have found that, while clients regularly come to us suspecting an employer of discriminatory discharge, they rarely bring hiring claims. And yet, the inability to secure a decent-paying, permanent job lies at the heart of many of our clients' entrenchment in poverty.

In litigating other employment cases, we have often seen evidence of unfair hiring processes in the low representation of minorities or women in an employer's work force, in minority or female hiring rates that don't reflect the applicant flow, and in inconsistencies among the qualifications of successful and unsuccessful applicants. Clients themselves frequently have a subjective sense that they've been discriminated against in applying for a job, but they seldom have proof that would hold up in court. Without knowing the identity and credentials of other applicants, or of the successful applicant, they have no way of knowing if they have been denied a job because of their race, gender or some other prohibited reason.

This is where testing can play a valuable role, providing an objective measure of the fairness of an employer's hiring practices. By sending a pair of applicants--for example, one black and one white--with similar credentials to apply for the job, you can document their progress through the hiring process and assess whether both are being given equal access, that is, whether the same criteria are being applied to each applicant to evaluate their suitability for the position.

We are interested in assessing the degree to which discriminatory hiring practices affect our clients' ability to get jobs for which they are otherwise qualified, and which would mean the difference between remaining in poverty or being able to support their families. Thus, we focus our testing on jobs that require a high school education or less and that pay appreciably above minimum wage. To date, the job categories and industries we have tested include: general office positions (e.g., administrative assistants, secretaries) available through employment agencies; receptionists; retail sales clerks and management trainees in a variety of industries (including auto

dealerships); unskilled laborers and apprentice trade painters; truck and delivery drivers; warehouse and factory workers; and wait staff in upscale restaurants.

Our tester pairs have applied for positions in person, by phone or by mail with over 1,000 Chicago area employers. Overall, we have found disparate treatment of African-Americans, Latinos or women about 40% of the time. In one industry we tested, 64% of employers gave preference to the white male applicant. We have pursued legal action against a number of the employers whose discriminatory hiring practices were most clearly documented by our tests.

What follows is a manual sharing the lessons we've learned in setting up our testing operation and developing a method to effectively document employer hiring practices. Each chapter discusses a step in the process--from staffing the operation to deciding when to take legal action based on tester evidence. Sample forms we've developed to document the hiring process, track results, etc., are included at the ends of chapters as relevant. All forms used by the project are also available from the Legal Assistance Foundation on disk in Wordperfect 5.1 format.

Thus far, our project has tested for discrimination based on race, national origin and gender. To simplify the manual's language, we often refer to only one of them. The testing method we used can, of course, be applied to other variables as well, such as age, disability, etc.

Employment testing, like any testing operation, involves ethical considerations. You must weigh the value of addressing discriminatory behavior that is difficult to detect without testing against how you feel about sending people with fictitious resumes to apply for jobs that they do not in fact want. In the housing context, courts have recognized that the degree of deception involved in testing is warranted by the importance of ferreting out discrimination that would otherwise go undiscovered. We feel the same way about testing in the employment context. Even so, we adhere to certain guidelines in our operation in an effort to minimize inconvenience to employers. We have testers reject job offers promptly, and we stop testing an employer immediately when our tests indicate an absence of discriminatory behavior. This manual assumes you share the view that testing is an appropriate tool for addressing discriminatory hiring practices, and have made the decision to proceed. What it offers is information to help you set up your operation.

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Testing in the employment context is a new, exciting and evolving field. We hope our work will be useful to others seeking to start their own employment testing operation for civil rights enforcement.

SETTING UP AN ENFORCEMENT-BASED EMPLOYMENT TESTING OPERATION

Employment testing is a vastly more complicated undertaking than housing testing, whose methods it adapts. A test, in housing or employment, is conducted with two testers who are similar in every characteristic relevant to the housing or job sought except the variable being tested (e.g., race).

In housing, the relevant characteristics are generally income and family size. Armed with similar identities on these points, the testers seek the housing in question. Generally, the minority goes first, followed shortly afterward by the white. If they are told different things about the housing's availability, cost, or the conditions of rental or purchase, there is strong evidence to suggest that the landlord or realtor may be engaging in racial discrimination.

In employment, there are many more characteristics an employer may consider relevant in deciding whom to hire. These include not only work history and education, but also things such as dress, personality, poise and articulateness. The testers in a pair must be similar to one another not only in the memorized facts of their identities, but also in appearance and presentation.

In housing testing, the tester is the "buyer" being pursued by the landlord or realtor with property to rent or sell. The tester can usually name the time for appointments. Each tester has a right to expect to be shown the available property and to be provided with all information needed in order to rent or buy it. This makes carrying out a housing test a relatively simple and straightforward task.

In employment testing, the tester is the "seller" pursuing the employer who has the job. The tester must accommodate herself to the employer's schedule. The employer has no obligation to hire, or even to consider, either tester for the available position--as long as he doesn't apply different criteria for selection based on the tester's race, gender, etc. Thus, employment testing becomes a much more complicated game of cat-and-mouse, wherein you try to figure out what the employer is looking for and how he hires, and mirror it in your testers' identities, presentation and pursuit of the job. You must make each tester individual enough in her life story and behavior to be credible, while controlling for job-relevant variables sufficiently to identify any differences in treatment that are based solely on race, gender, etc.

Employment testing is a complex endeavor. The usefulness of your test results will be directly proportional to the time, thought and resources you have committed to achieving them. Following are some things to consider as you set up and get started.

I. Choosing a Manager

There is no ideal background for the manager of an employment testing operation. The Employment Discrimination Project's first manager was an attorney with a doctorate in city and regional planning and a Master's degree in public administration. The current project manager is a journalist with experience in housing testing. Whatever the background, there are several traits to look for in selecting a manager for your operation.

- **organization and attention to detail**

To conduct an effective test, the manager must have the ability to monitor a complex flow of events, orchestrating every variable within her control and keeping close watch on the effects which variables outside her control have on the test process. She must make sure the testing method is carried out consistently, and each stage is documented along the way.

- **leadership and interpersonal skills**

The manager must be able to hire, train, manage and motivate testers to carry out their role with the same care and attention to detail that she puts into running the testing operation. The manager needs to be an effective leader and a good teacher. Testers who know what to do and understand why they're doing it will make better applicants and more credible witnesses.

- **testing experience**

It is helpful if the manager is familiar with discrimination testing, and has experience in or knowledge of what it takes to run a testing operation.

- **legal experience**

It is also helpful if the manager has a basic understanding of how a legal case works, and knowledge of how to document evidence for use in a legal proceeding. This does not necessarily require that the manager be an attorney--especially if she has access to lawyers she can consult when legal questions arise--and it may be inadvisable for an attorney who runs a testing operation to litigate cases the tests generate (see this chapter, section IV). Whether or not the manager is an attorney, it is important to keep in mind that running the testing operation is a full-time job; it is not something a litigator will be able to effectively undertake alongside an active case load.

II. Support to the Manager

As our testing operation has evolved, we have found that it takes more than one person to run it. Targeting employers to test, recruiting and training testers, conducting tests and documenting results are time-consuming and labor-intensive tasks that are difficult for one person to juggle.

The complexity of employment testing is such that it doesn't typically generate the volume of legal cases that a housing testing operation might. But it requires a great deal more preparation prior to sending out testers. Having the staff in place to adequately do the pre-test groundwork saves time and money in the long run, and leads to better test results.

In order to accurately interpret what is happening to testers in the hiring process, the manager needs to have a hand in every phase of the testing operation. She needs to know, among other things, how the employer was targeted, how the hiring process works, what the available job entails, what the employer is looking for, who the testers are and how they present themselves. Dividing tasks, therefore, can be tricky. Here is how we've divided some of the major spheres of responsibility with a two-person management team:

Manager

- sets goals, selects industries & job types to test, and plans research strategy
- supervises employer targeting
- plans tester recruitment strategy and prepares job announcement
- interviews and hires testers
- trains testers
- selects test sites and sets testing schedule
- oversees deployment of testers
- conducts second reading of test reports and final post-test debriefing of testers (see Chapter Eight)

Assistant Manager

- researches selected industries & job types, & conducts information-gathering interviews with employers
- runs employer targeting (resume mailing) operation (see Chapter Four)
- contacts recruitment sources and distributes tester job advertisement
- screens tester candidates
- assists in training testers and prepares resumes
- gathers information about test sites and prepares test assignments
- deploys and tracks testers in the field
- conducts first reading of test reports and first post-test debriefing of testers (see Chapter Eight)

III. Infrastructure

A testing operation doesn't require a huge investment in infrastructure and supplies, but there are a few critical things for which to plan and budget.

- space -- office space for managers; conference room for tester training; tester work space that allows testers to complete reports out of view of their colleagues (e.g., cubicles); one or two fairly soundproof rooms containing phones with Caller ID-blocked lines where calls to employers can be made
- computer system -- computers for manager and assistant; system to maintain test data, charts, forms, etc.; printer
- phone lines with voice mailboxes -- to use as home numbers for simulated applicants in resume mailing operation (see Chapter Four), as professional and personal reference phone numbers for testers (see Chapter Eight), and/or as tester home phone numbers for employer callbacks. We have 12 phone lines, most or all of which are in use at any given time.
- filing cabinets with locks -- to maintain secure files of test data
- TV/VCR/video camera -- to use in tester training (see Chapter Seven)
- several types of resume-quality paper, envelopes and stamps -- for tester and simulated applicant resumes and cover letters (see Chapter Four)

IV. Special Considerations When Running an Employment Testing Operation Within a Law Office

There are a number of advantages to running an employment testing operation within a law office. Not only is much of the infrastructure you need already in place, but more importantly, experienced attorneys to litigate the cases your testing generates and to consult on legal issues related to testing can be just down the hall. Further, the law office's own clients can be a source for tips about employers who may be engaging in discriminatory hiring practices.

There are, however, some potential disadvantages. When tests are conducted within a law office rather than by a separate organization devoted to employment rights issues, you may

face greater difficulty in establishing your organization's standing as a plaintiff in lawsuits involving test evidence.¹

There are several precautions you may want to take if you set up your operation in a law office. Because the individuals who manage and carry out the testing operation will be witnesses in any ensuing litigation, the people who run the operation should not be the same people who litigate the cases it generates. The Employment Discrimination Project is run by a non-attorney. LAFC attorneys are available to consult on broad legal issues related to testing, and to review test evidence and decide whether legal action is warranted. But they do not participate in the resume mailing operation to target employers for testing, in hiring and training testers, or in the day-to-day operation of the testing project.

V. Organizations Doing Similar Work

When setting up your testing operation, you'll find it helpful to contact other testing organizations that have grappled with the same issues you're facing. Your local housing testing group may be a good place to start. While the field of employment testing is relatively new, there are several organizations across the country that have developed some expertise, and which welcome inquiries from others interested in employment testing:

**Fair Employment Council
of Greater Washington, Inc. (FEC)**
1300 19th Street, N.W., Suite 320
Washington, D.C. 20036
Contact: Claudia Withers
Executive Director
(202) 463-7088

**Massachusetts Commission Against
Discrimination (MCAD)**
1 Ashburton Place, Room 601
Boston, Massachusetts 02108
Contact: John Ahearn
Associate Director
(617) 727-3990, ext. 237

**Employment Discrimination Project
Legal Assistance Foundation of Chicago (LAFC)**
111 West Jackson Boulevard, 3rd Floor
Chicago, Illinois 60604-3502
Contact: LeeAnn Lodder, Project Manager
(312) 347-8395

¹ In the first employment tester case to reach a federal court of appeals, the U.S. Court of Appeals for the District of Columbia Circuit held that a fair employment organization had a cause of action and standing to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, even though (at least under the law in effect at the time of the testing) individual testers did not. See Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994) (leaving open whether individual testers may sue under Title VII as amended by the Civil Rights Act of 1991). See note 2, *infra* at 59.

~ CHAPTER THREE ~

TARGETING EMPLOYERS FOR TESTING: A SUMMARY OF APPROACHES

When you are conducting employment tests to study the treatment different class members receive in the hiring process, you want to test a broad cross-section of employers. But when you are conducting tests to enforce fair hiring laws, your primary interest is in finding employers who are discriminating as quickly and cost-effectively as possible, documenting their discriminatory practices, and taking legal action that will have the greatest impact in terms of: 1) changing the employer's behavior; 2) acting as a deterrent to discrimination by other employers; and 3) contributing to the evolving case law in support of using testers in the employment context. These priorities make the task of targeting employers for testing critical to your operation's success.

I. Defining Your Goals

Before you can decide which employers to test, you need to define your goals. For whom are you seeking to widen employment opportunities? Answering this question should enable you to sketch a clear picture of your "tester archetype." This is the person your testers will be modelling themselves after and representing in the job market.

The archetype for the Employment Discrimination Project's testers is a typical LAFC client -- an African-American or Latino woman or man, or a white woman, with a high school education or less, whose work history has often been confined to minimum wage jobs.

Once you have a clear picture of the person for whom you are seeking to gain greater access to the job market, you must determine the types of jobs that would represent a meaningful expansion of opportunities for that person. At what skill and salary level has your archetype been denied access to jobs for which she is otherwise qualified?

A meaningful job opportunity for an LAFC client would enable her to escape poverty and support a family. It would require a high school education or less, pay well above minimum wage, and be in a relatively stable or growth industry. Ideally it would also offer the client an opportunity to gain skills and experience that would enhance her attachment to the labor market and her opportunities for further advancement.

In our case, our goal to test on behalf of LAFC clients defined our focus on entry level jobs for which most of them would be qualified. But testing lower-skilled jobs is also less difficult. It is easier for testers to under-represent their credentials than to claim qualifications and experience they don't actually possess. For example, a tester with a college degree can more plausibly present himself as an applicant with only a high school diploma, than a tester who has never been to college can talk credibly about having a bachelor's degree in engineering. The

higher the skill level of the job you choose to test, the more likely it is that you will have to recruit testers who have actually done that job.

Whatever industries and job types you choose, they must be "testable." That is, there must be a way to find out about available openings, and there must be some standard hiring process into which you can introduce testers and track their progress. Positions advertised in the newspaper and the procedures employment agencies use to screen and refer applicants are examples of hiring scenarios that can lend themselves well to testing. On the other hand, we ran into difficulties when we tried to conduct gender tests on some trades jobs at construction sites, because employers typically didn't advertise openings. Instead, they hired via word of mouth and union halls, whose procedures were difficult to penetrate without arousing suspicion.

II. The Data-Based Approach

One possible targeting approach is to use databases to identify occupations and employers that meet the criteria you've defined for the types of jobs you want to test. These can offer some information, but have significant limitations.

We used a database called Horizons to generate a list of broad occupational categories in growth industries with jobs that fit our education and wage requirements. We cross-referenced these with Dunn and Bradstreet database information to generate a list of Chicago area employers who fit within our search parameters. But a mail test of simulated resumes (see Chapter Four) to some of the employers on the list, and calls made to survey the rest, found few who were actually hiring.

We also obtained data from the U.S. Census and the Illinois Department of Employment Security. While these provided numbers of minorities and women employed in various occupations, and the geographic regions where employers were located, they were of no help in identifying specific employers or available job openings.

We concluded that data-based targeting approaches might be more useful in setting up a social science employment testing study than in identifying employers to test for civil rights enforcement purposes.

III. The Prior Complaint Approach

Another targeting approach is to seek out information about employers who have already run afoul of authority, who have been cited or sued for violating fair employment laws or affirmative action guidelines.

We tried making Freedom of Information Act requests to obtain information about employers with federal contracts who had been cited for affirmative action violations. This proved to be a very slow and labor-intensive effort that yielded little information of use in setting up an employment test.

IV. The Networking Approach *(Referrals)*

An obvious approach to selecting test targets--and one that should certainly become a part of any long-term targeting effort eventually--is to make your testing operation known to the community and solicit tips about employers suspected of discriminatory hiring. There are a number of potential sources for such information:

- your own clients, if you are operating within a law office. Don't look just at discriminatory hiring claims, which are generally few, but at other behavior by the employer (e.g., in discharges and promotions) suggesting a discriminatory pattern that might show up in a hiring test. For example, two black clients came to LAFC complaining that they had been fired by the same employer because of their race, although the employer's work force was predominantly black. Piecing together their stories created a picture of an employer who had brought in new white management and was now possibly attempting to "whiten" the work force by firing black employees on trumped up charges and replacing them with white workers. A hiring test may be able to confirm whether or not this is the case.
- other lawyers with whom you develop relationships so that they seek your testing services to confirm their clients' discrimination claims.
- your local office of the Equal Employment Opportunity Commission (EEOC). The EEOC published a position paper in 1990 endorsing employment testing and inviting the filing of charges based on test evidence. In 1996 the agency issued another notice reiterating its endorsement and laying out guidelines for regional offices in handling tester-based charges (see EEOC policy guidance and enforcement guidance notices at the end of this chapter). There is a great deal of potential to be explored in forming a partnership with the EEOC, whose charge data and EEO-1 reports may be able to assist you in focusing your testing efforts where they are most needed. LAFC's Employment

Discrimination Project has developed a cooperative framework for working with the Chicago district office, in which appropriate charging parties can be referred to the Project for corroboration of their complaint through testing, and tester charges can be prioritized for fast-track EEOC investigation.

- community organizations that serve the population represented by your tester archetype, particularly those which address employment issues. For the Employment Discrimination Project, this has included talking with groups such as tradeswomen's associations and job training and placement services for low-income minorities. Such groups can also be helpful in recruiting testers who can credibly represent your tester archetype.

Although networking is a valuable source of employer targets that builds over time, it is unlikely to generate a volume of targets sufficient to sustain a testing operation, particularly at the start. We found, for example, that while many job placement organizations had fascinating stories to tell about barriers they faced in trying to help clients find jobs, few kept records about problems with specific employers. The scarcity of such information is inherent in the elusive nature of hiring discrimination. Since individual applicants seldom know who other applicants are or who eventually gets the job, they have no way of knowing whether or not they've been discriminated against, and so, rarely register a complaint.

Spreading the word about your testing operation will help you in collecting information about employers who may be discriminating, and it will put employers on notice that their hiring practices may be monitored for fairness. But it is a good idea to take care in choosing when, how and to whom you spread the word.

You may want to wait to publicize your operation until you've gained some testing experience, so that you can experiment with and refine your testing method in an atmosphere in which employers might be less likely to be "looking" for testers. **Before publicizing your efforts, consider which details of your methods should be kept confidential to guard against being detected by an employer when you are conducting a test.**

V. The Random Testing Approach

Many housing testing organizations conduct random tests--in addition to complaint-based tests--as a regular component of their work. You may want to make it a part of your employment testing operation as well. Certainly if one of your goals is to deter discriminatory hiring practices, you'll want employers to think that any applicant who walks in the door could be a tester. Random testing can be useful to assess the level of discriminatory behavior in industries you have suspicions about because of their low minority representation or for other reasons.

Random testing also offers a means of gathering information about the local job market and learning more about the hiring procedures of various employers.

Of course, no employment test can be truly random, in that you'll need to keep your focus on jobs for which your tester archetype is qualified and which your testers have been trained to pursue. Further, random testing--that is, testing without prior information to suggest that an employer may be discriminating--involves a considerable commitment of time and resources in order to achieve results. An employment test takes longer and costs more than a housing test. Many variables outside your control can muddy the results and slow the process, resulting in it taking months to document evidence sufficient to take legal action against a particular employer. For your testing operation to yield results that have an impact, it is helpful to find ways, in addition to random testing, that zero in more directly on employers who are discriminating.

VI. The Resume Mailing Approach

This approach to targeting employers involves sending similar sets of resumes from simulated job applicants to apply for a job by mail, much as you would send similarly matched testers to apply for a job in person. In a race test, for example, the first resume sent has an identifiably African-American name and address (in Chicago, as in many other racially segregated American cities, addresses are often racial identifiers). Sometime later, it is followed by a resume whose name and address are identifiably white. The credentials and presentation of the applicants on paper are matched closely enough to suggest that both are qualified for the targeted job, but the minority applicant's qualifications and packaging are made quantifiably superior. Both applicants' resumes list phone numbers that ring back to voice mails monitored by testing operation staff. If the employer calls only the white applicant, you follow up with an in-person test.

The mailing operation has distinct advantages over other targeting methods:

- it allows you to survey a large number of employers in a short time period and at reasonable expense;
- it allows you to survey an industry or job type to assess the level of discrimination and determine whether a hiring test is needed;
- it allows you to "test" the qualifications you plan to send live testers out with, to determine whether they will attract employers and land interviews;
- and, most importantly, it pre-selects employers showing possible discriminatory hiring tendencies before in-person testing, saving considerable time and money, and eliciting clearer test results.

Of course, mailing resumes to target employers for testing has limitations as well:

- you can only test for discrimination based on variables that are identifiable either in the name of the simulated applicant (e.g., race, gender, national origin) or in some other factor that can be illustrated on the resume (e.g., school graduation dates and years of experience listed to test for age discrimination). You cannot test variables such as disability by mail.
- you can only test jobs for which it would be plausible for an applicant to apply by mailing a resume. This excludes many blue collar jobs and jobs in the trades.
- it only works in identifying targets among those employers who respond to resumes sent in the mail. In our operation, about 50% of employers don't respond to any resume we send them. This means we can only measure response patterns among the other half who do call one or more of our simulated applicants.

Our resume mailing operation has proven to be our most effective method to date for identifying employers engaged in discriminatory hiring practices. The next chapter will discuss what's involved in running such an operation.

NOTICE

1. **SUBJECT:** Policy Guidance: Whether "testers" have standing to file charges of employment discrimination against employers, employment agencies and/or labor organizations which have discriminated against them because of their race, color, religion, sex or national origin.
2. **PURPOSE:** This policy guidance sets forth the Commission's position on the issue of whether "testers" (persons who apply for employment for the purpose of testing for discriminatory hiring practices, but do not intend to accept such employment), have standing to file charges under Title VII.
3. **EFFECTIVE DATE:** Upon receipt.
4. **EXPIRATION DATE:** As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.
5. **ORIGINATOR:** Title VII/EPA Division, Office of Legal Counsel.
6. **INSTRUCTIONS:** File after § 605 of Volume II of the Compliance Manual.
7. **SUBJECT MATTER:**

I. Introduction

The issue addressed here is whether "testers" have standing to bring actions under Title VII. "Testers" are defined as individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices. Section 706(b) of Title VII, 42 U.S.C 2000e-5(b), authorizes the Commission to accept charges of employment discrimination "filed by or on behalf of a person claiming to be aggrieved." Since testers do not actually want the positions for which they apply, the question is whether testers can be "persons claiming to be aggrieved" within the meaning of § 706(b).¹ The Commission concludes that testers are aggrieved parties under Title VII where they have been unlawfully discriminated against when applying for employment. Whether or not a person intends to accept a position for which he/she applied, he/she has a statutory right, pursuant to Title VII, § 703(a)(1), not to have been rejected on the basis of race, color, religion, sex or national origin. The discriminatory rejection itself constitutes an injury, even though

¹ The analysis set forth in this policy guidance could also be applied to the ADEA, since the language in § 7(c)(1) and (d) is almost identical to that in § 706(b) of Title VII.

the tester may not have suffered the loss of a real employment opportunity or any monetary loss.

II. Definition of Testers

"Testers" in the employment context perform the same function as do testers in the housing context.² Testers in housing cases have been defined as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982). Typically, a fair housing or other civil rights organization sends testers of different races³ to apply for housing with a particular realtor or landlord. Usually, the realtor/landlord is chosen because someone has complained to the fair housing organization about this particular housing provider.

The housing/civil rights organization ensures that where testers are "paired" (sent to the same landlord/realtor for comparative treatment), both the Black and White testers provide information on their applications which will make them equally qualified with respect to their incomes, employment, credit and residence histories, present rents, etc. Housing/civil rights groups that routinely use testers create a "profile" for each tester for each assignment and provide him/her with a "script."

In the classic case of a discriminatory landlord/realtor, the Black tester applies for an apartment and is told that no apartments are available or is informed only about housing which is located in predominantly Black neighborhoods. Shortly thereafter, the White tester applies to the same housing provider for the same type of apartment requested by the Black tester. The White tester is told of one or more apartments which were not made available to the Black tester.

Several sets of testers may be sent to the same housing provider to establish a pattern of discriminatory treatment and thus avoid the defense of an individual "fluke," oversight or personality conflict. Follow-up calls may be made by the testers to receive updated information so that a provider cannot claim that

² Testers have been used much more intensively in the housing area than in the employment area, and there is well established case law on the validity of tester standing in fair housing cases (see Section V).

³ The discussion here and all cases cited in this document refer only to Black and White testers challenging discrimination on the basis of race. Apparently, this is the only context in which courts have addressed the issue of tester standing. However, all theories discussed in this document are equally applicable for testers challenging discrimination on the basis of color, religion, sex, national origin or age.

a residence listing "came in" after the Black applicant left, but before the White applicant arrived.

Testers in the employment context perform the same role vis a vis equal employment opportunity. They are generally used by civil rights organizations or government agencies.⁴ Black and White testers are sent to apply for employment with a particular employer or employment agency. The organization/agency ensures that where testers are paired, both provide information on their applications which makes them equally qualified as employees with respect to their employment histories, educational backgrounds, references, etc.

As in the housing context, Black and White testers are sent to apply for the same position and the treatment of the two applicants is compared. Conceptually, there is no difference between a tester in the fair housing context and a tester in the equal employment context. Although the employment tester might, in some instances, have a more difficult and elaborate role to play,⁵ he/she performs precisely the same role in the furtherance of Title VII as does the tester for housing discrimination.

III. Standing Interpreted Broadly Under Title VII

Standing is generally interpreted broadly under Title VII in order to achieve the statute's goal of equal employment opportunity, particularly since Title VII is generally enforced through civil actions brought by or on behalf of private parties.

The private right of action remains an essential means of obtaining judicial enforcement of Title VII ... the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

⁴ Testers may be sent out by agencies or organizations which intend to file charges against the targeted employer. The tester may be an employee or volunteer of the organization who has no personal interest in filing a charge. However, the organization may file a charge on behalf of "a person claiming to be aggrieved" under Title VII. 29 C.F.R. § 1601.7(a). Under the ADEA, the "Commission shall receive information concerning alleged violations of the Act, including charges and complaints, from any source." 29 C.F.R. § 1626.4. Therefore, such an organization may file a charge on behalf of a tester.

⁵ Unlike testers in the housing area, testers for employment discrimination have the additional burden of appearing qualified for the job in question if interviewed. This might limit the types of jobs for which an organization can reasonably test.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). Congress has cast the Title VII plaintiff in the role of a "private attorney general" in enforcing the Act. Stewart v. Hannon, 675 F.2d 846, 850, 28 EPD ¶ 32,582 (7th Cir. 1982). Congress intended that the language in § 706(b), referring to an "aggrieved" person, be construed to define standing as broadly as possible under Article III of the United States Constitution.⁶ Id. at 849; EEOC v. Mississippi College, 626 F.2d 477, 482, 24 EPD ¶ 31,268 (5th Cir. 1980), cert. denied, 453 U.S. 912, 26 EPD ¶ 31,901 (1981); EEOC v. Bailey Co., 563 F.2d 439, 452-453, 15 EPD ¶ 7,840 (6th Cir. 1977), cert. denied, 435 U.S. 915, 16 EPD ¶ 8,148 (1978); Waters v. Heublein Inc., 547 F.2d 466, 469-470, 12 EPD ¶ 11,238 (9th Cir. 1976), cert. denied, 433 U.S. 915, 14 EPD ¶ 7,635 (1977); Hackett v. McGuire Bros., 445 F.2d 442, 446, 3 EPD ¶ 8,276 (3d Cir. 1971).

IV. Standing of "Testers" in Early Civil Rights Litigation

The broad construction of standing under Title VII is consistent with cases involving standing in the context of other civil rights statutes. "[C]omplainants act not only on their own behalf, but also 'as private attorneys general' in vindicating a policy that Congress considered to be of the highest priority." Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972) (referring to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604 et seq., commonly known as the Fair Housing Act). Accord Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990).

Historically, in civil rights litigation, standing has been construed liberally in order to further "an overriding, constitutionally rooted national policy against racial discrimination." Wright v. Regan, 656 F.2d 820, 829 (D.C. Cir. 1981). In Wright, the court held that Black parents and students attending public schools in segregated areas had standing to challenge the tax-exempt status of "White-only" educational institutions in their communities. Although the plaintiffs did not seek admission to the schools, the court held that the injury which they suffered, viz., denigration caused when their government "graces with tax-exempt status educational institutions in their communities which treat members of their races as persons of lesser

⁶ Article III, § 2, of the U.S. Constitution states, in pertinent part, that "[t]he judicial Power shall extend to all Cases ... (and) Controversies" A "controversy" is a matter in which the plaintiff has alleged "a personal stake in the outcome of the controversy." Warth v. Seldin, 422 U.S. 490, 498-499 (1975). See also Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976) (plaintiff's injury is likely to be redressed if the requested relief is granted); Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 151-152 (1970) ("the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action").

worth," was sufficient to sustain a challenge of the tax exempt status of the institution. 656 F.2d at 827. The court held that this case was indistinguishable from previous civil rights cases which granted standing to persons acting as social protesters rather than as persons who were actually deprived of a tangible benefit which they intended to accept, citing Coit v. Green, 404 U.S. 997 (1971) (Black parents and public schoolchildren had standing to challenge tax-exempt status of racially exclusive private schools); Norwood v. Harrison, 413 U.S. 554 (1974) (parents of Black schoolchildren had standing to challenge state's provision of textbooks to private schools which excluded Blacks); Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (Black citizens had standing to challenge city's practice of permitting racially segregated private groups and clubs to reserve temporary exclusive use of certain park facilities). The civil rights activists in these cases challenged racially discriminatory practices as a form of social protest to eradicate racial discrimination in this country, rather than to gain a specific, tangible, personal benefit. Arguably, these activists acted as "testers," challenging discriminatory practices where they had no intention of personally accepting any tangible benefit. The injury which they suffered was denigration, as Black citizens, resulting from the state's sanction or support of racial discrimination.

Courts have recognized the need for broad standing in virtually all civil rights contexts. The court in Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985), holding that a Black tester had standing to challenge discriminatory housing practices, both under Title VIII and § 1982, analogized several cases in support of this conclusion. In addition to adopting the Third Circuit's reasoning in Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894 (3d Cir. 1977), (conferring standing on a Black tester in a § 1982 housing discrimination case), it relied on the Supreme Court's decisions in Pierson v. Ray, 368 U.S. 547 (1967), and Evers v. Dwyer, 358 U.S. 202 (1958).⁷ In Pierson, a group of Black clergymen went to a segregated bus terminal in Jackson, Mississippi, for the sole purpose of testing the legality of segregated public accommodations. The Supreme Court held that although the plaintiffs' purpose was to test the law rather than to actually use the terminal, they had standing to seek redress under § 1982 because they had been discriminated against by being removed from the terminal. Similarly, in Evers, 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 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

⁷ Pierson and Evers were also cited in Meyers. 559 F.2d at 898.

segregation laws.⁸ See also Havens Realty Corp. v. Coleman, 455 U.S. at 374 (Pierson and Evers cited for proposition that a person need not have intended to buy or rent in order to have been injured within the meaning of Title VIII). As demonstrated by the cases cited above and in Section V regarding tester standing in the housing context, the civil rights movement and its accompanying litigation have a rich history of testers in one form or another.

V. Testers' Standing to Challenge Discriminatory Housing Practices

It is well established that testers have standing under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604 et seq., where they have been racially discriminated against in the provision of or referral to housing. Havens Realty Corp. v. Coleman, 455 U.S. 363; Village of Bellwood v. Dwivedi, 895 F.2d 1521; Watts v. Boyd Properties, Inc., 758 F.2d 1482; Village of Bellwood v. Gorey & Associates, 664 F. Supp. 320 (N.D. Ill. 1987). In these cases, the injury was not the deprivation of housing on the basis of race, but rather the failure to provide accurate or complete information with respect to available housing on the basis of race, i.e., disparate treatment.

Title VIII makes it unlawful for an individual or firm covered by the Act:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race, color, religion, sex, or national origin.

...

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(a), (b) and (d).

Section 810(a) of Title VIII, 42 U.S.C. § 3610(a), authorizes any "person aggrieved" under Title VIII to file a complaint with the Secretary of Housing and Urban Development and defines "a

⁸ However, Watts recognized that the injury to plaintiffs in Pierson was greater than in Evers because the clergymen were arrested and later convicted of violating state law. 758 F.2d at 1485.

person aggrieved" as "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur...."

In Havens, the Supreme Court held that where a tester was given inaccurate or incomplete information with respect to available housing, the tester was an "aggrieved person" within the meaning of § 810(a) of Title VIII.⁹ The Court began its analysis with the specific language of § 804(d)¹⁰ and concluded that "Congress conferred on all 'persons' a legal right to truthful information about available housing." 455 U.S. at 373. Section 804(d) thus created "an enforceable right to truthful information concerning the availability of housing" rather than limiting the Fair Housing Act to the right to acquire housing, irrespective of race, color, religion, sex, or national origin. "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Village of Bellwood v. Dwivedi, 895 F.2d at 1526, quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). Where a tester is given truthful information about available housing and is not denied any opportunity to obtain housing, the tester does not have standing as a person aggrieved under Title VIII. Havens Realty Corp. v. Coleman, 455 U.S. at 374-375 (White tester had no Title VIII standing because she was given accurate information about available housing and was not denied any opportunity to rent).

⁹ Havens cited Trafficante as authority for a broad interpretation of standing under Title VIII. 455 U.S. at 376 n. 17. In Trafficante, the Court unanimously concluded that under Title VIII, the term "person aggrieved" should be interpreted broadly where: 1) actions brought by private persons are the primary method of obtaining compliance with the statute; 2) the statutory language indicates a congressional intent to construe standing as broadly and inclusively as allowed by Article III of the Constitution; 3) the legislative history of the statute indicates a congressional intent to broadly construe standing; and/or 4) the governmental agency charged with enforcing the statute broadly construes standing.

¹⁰ The Court noted the distinction between § 3604(a) and § 3604(d) and proceeded to find tester standing under § 3604(d) with no further discussion of § 3604(a). 455 U.S. at 374. There is an argument, then, that the Court regarded the bona fide offer requirement as precluding tester standing under § 3604(a). Accord U.S. v. Youritan Construction Co., 370 F. Supp. 643, 650 (N.D. Cal. 1973) (holding that a landlord had violated Title VIII by giving false information about available housing to testers, the court distinguished § 3604(a) from § 3604(d), explaining that under § 3604(a), the term "bona fide offer" might disqualify a tester from having standing while § 3604(d) prohibits the misrepresentation of the availability of housing without the "bona fide offer" requirement).

Accord Nur v. Blake Development Corp., 655 F. Supp. 158 (N.D. Ind. 1987).

The Seventh Circuit in Dwivedi recognized that "Congress may not circumvent Article III of the Constitution by authorizing someone whose substantive rights have not been invaded to sue to redress an invasion of someone else's substantive rights." 895 F.2d at 1526. "But Congress can create new substantive rights, such as the right to be free from misrepresentations, and if that right is violated, the holder of the right can sue without running afoul of Article III, even if he incurs no other injury (for example, the loss of a home-buying opportunity)." Id. at 1526-1527.¹¹ Accord Havens Realty Corp. v. Coleman, 455 U.S. at 373. The Dwivedi court further explained that the misrepresentation was a violation of Title VIII because it was intended to prevent a Black person from buying a house in a White neighborhood. 895 F.2d at 1529. "He is treating a black customer differently from a white one because the customer is black. He knows they are of different races and treats them differently because of that knowledge." Id. Title VIII violations are not limited to instances where a landlord/realtor misrepresents information regarding the availability of housing. "If a broker simply refuses a customer's point-blank request to show him a house in a neighborhood that the broker wants to reserve for persons of a different race, this is steering even though there is no misrepresentation." Id. "Steering" is defined as "directing prospective home buyers interested in equivalent properties to different areas according to their race." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979).

The Dwivedi court compared the standard and intent requirement to be applied in Title VIII cases with that of Title VII cases:

The mental element required in a steering case is the same as that required in employment discrimination cases challenged either under Title VII of the Civil Rights Act of 1964 (and section 3604 is part of the same Act) or under 42 U.S.C. § 1981 (the standard of liability in which is similar to that in Title VII) on a theory of disparate treatment.... The unlawful conduct is treating a person differently because of the person's race

895 F.2d at 1529-1530. The similarities between the purposes and language of Title VIII and Title VII are clearly apparent. Courts typically "borrow" language and reasoning from one statute to apply to the other.

In addition to their standing in the context of Title VIII, testers have standing to challenge discriminatory housing

¹¹ Note, however, that the jury did not award monetary damages to the testers in this case. 895 F.2d at 1532.

practices under the Civil Rights Act of 1866, 42 U.S.C. § 1982. Watts v. Boyd Properties, Inc., 758 F.2d at 1484-1485, and Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d at 898 (discussed in Section IV.) Section 1982 provides as follows:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

In the § 1982 housing cases, the Black testers were deprived of the same right to rent property as was granted to White citizens. The fact that they did not actually intend to rent the apartments in question was irrelevant in determining whether their statutory rights had been violated. Unlike § 3604(a) of Title VIII, § 1982 does not require that an applicant for housing, who was rejected on the basis of race, make a bona fide offer to rent in order to challenge the practice. (See Section VI). In this respect, Title VII is analogous to § 1982.

VI. Testers in Employment Cases Analogous to Testers in Housing Cases

Although the courts have not specifically decided the issue of whether testers have standing in the employment context, the analysis of tester standing in Title VII cases should be construed in a manner consistent with the principles set forth in the context § 3604(d) of Title VIII. The purpose and structure of these civil rights statutes are "functionally identical." Waters v. Heublein, Inc., 547 F.2d at 469 (White employee had standing to sue for discriminatory hiring practices which excluded Blacks and Hispanics, thus depriving her of interpersonal contacts with persons of other races in her work environment).¹²

¹² Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), authorizes the Commission to accept charges of employment discrimination "filed by or on behalf of a person claiming to be aggrieved" under the statute.

Section 703(a)(1) of Title VII makes it unlawful for an employer to:

fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin

Similarly, § 703(b) makes it unlawful for an employment agency to:

fail or refuse to refer for employment, or otherwise discriminate against any individual because of his race, color, religion, sex or national origin, or to classify

The Waters court held that "[t]he distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory. These goals are opposite ends of the same coin." 547 F.2d at 469. The court explained that deprivation of interracial interaction in the workplace is at least as great as it might be in one's home environment and therefore held that a White employee had standing to bring a Title VII action against her employer for discriminatory hiring practices aimed at Blacks and Hispanics. Id. See also EEOC v. Mississippi College, 626 F.2d 477 (White faculty member granted standing to challenge discriminatory hiring practices against Blacks); Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir.), cert. denied, 406 U.S. 957, 5 EPD ¶ 7838 (1972) (Hispanic employee of optometrist had Title VII standing to challenge segregation of patients since it created a demeaning and discriminatory work environment).

Waters stressed that the extension of the Title VIII definition of "person aggrieved" to Title VII made "no new law." The court noted that in Trafficante, the Supreme Court specifically turned to Hackett v. McGuire Bros., 445 F.2d 442, a Title VII case, for guidance in formulating its definition of a "person claiming to be aggrieved," holding that both statutes require similar, broad interpretations of standing.¹³ "The fact that Trafficante thus approved the reasoning of this Title VII case further demonstrates that on this issue of standing the Supreme Court does not conceive Title VII and VIII to be different...." EEOC v. Bailey Co., 563

or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Under § 703(c), it is unlawful for a labor organization:

(1) to exclude or expel from its membership, or otherwise to discriminate against any individual because of race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

¹³ Hackett held that a pensioner could be an aggrieved party under Title VII where he had been discriminated against as an employee on the basis of race.

F.2d at 453. Accord Stewart v. Hannon, 675 F.2d at 849; EEOC v. Mississippi College, 626 F.2d at 482.

Where an employer fails or refuses to hire a person on the basis of race, color, religion, sex, or national origin, the employer has violated Title VII. By clear analogy to § 3604(d) of Title VIII, the applicant has a statutory right not to be rejected on one of these bases, even if that applicant does not intend to accept the position. Title VII contains no requirement, analogous to the provision in § 3604(a) of Title VIII, that the request for employment be bona fide. The injury is the disparate treatment based on race, color, religion, sex, or national origin, rather than the loss of a real employment opportunity -- just as the cases based on 42 U.S.C. § 1982¹⁴ and § 3604(d) of Title VIII hold that an applicant for housing is injured as a result of disparate treatment in the provision of or referral to housing on the basis of race, color, religion, sex, or national origin.

The language of Title VII with respect to employment agencies (see § 703(b)) is almost completely parallel to that of § 3604(d) of Title VIII. Title VII prohibits an employment agency from failing or refusing to refer persons in protected groups for employment. Any person who is not referred for employment based on prohibited discrimination is "a person claiming to be aggrieved" within the meaning of Title VII, just as a person who is not given accurate information regarding housing based on prohibited discrimination is "a person aggrieved" within the meaning of Title VIII. Section 703(b) similarly prohibits the classification of individuals by race, color, religion, sex, or national origin. Therefore, a person who was so classified by an employment agency would be a "person aggrieved," whether or not he/she intended to accept an employment offer obtained through that agency, since his/her statutory right not to be so classified would have been violated. The language in § 703(c)(2), with respect to labor organizations, is nearly identical to that in § 703(b).

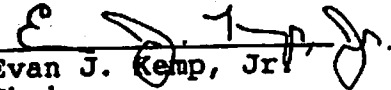
Title VII prohibits employers, employment agencies and labor organizations from "otherwise" discriminating against individuals on the basis of race, color, religion, sex, or national origin with respect to employment related matters (see §§ 703(a)(1), (b) and (c)(1)). Congress clearly intended to extend Title VII coverage to include disparate treatment against protected groups by employers, employment agencies and labor organizations which were not contemplated by the specific violations identified in the statute. This inclusive language reflects a legislative intent to prevent all forms of discrimination against protected groups which employers/agencies/labor organizations might create in order to limit employment opportunities on the bases of race, color, religion, sex, or national origin.

¹⁴ See Section IV for a discussion of Watts and Meyers, decided under § 1982.

VII. Charge Processing

Field offices should accept charges from "testers" and/or civil rights/community organizations filing charges on behalf of testers. Title VII, as a provision of national civil rights legislation enacted to eradicate racial discrimination, requires a broad interpretation of standing. Title VII and Title VIII are "functionally identical" in purpose and structure. Testers in both the housing and employment areas serve essentially the same function. It is well established that testers in the housing area have standing to challenge prohibited discriminatory practices by landlords/realtors. There is no reason to distinguish between the standing of testers in the housing area and testers in the employment context. Therefore, testers who pose as job applicants for the sole purpose of uncovering illegal discrimination have standing to challenge these practices under Title VII.

Nov. 20, 1990
Date

Approved: 

Evan J. Kemp, Jr.
Chairman

1. SUBJECT: Enforcement Guidance: Whether "testers" can file charges and litigate claims of employment discrimination.¹
2. PURPOSE: To set forth the Commission's position that testers and organizations that send testers to respondents may file charges and litigate their claims.
3. EFFECTIVE DATE: Upon issuance.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: Title VII/EPA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after § 605 of Volume II of the Compliance Manual.
7. SUBJECT MATTER:

I. Introduction

This document reiterates the Commission's view that testers (persons who apply for employment for the purpose of testing for discriminatory hiring practices, but do not intend to accept such employment), and the organizations that send testers to respondents, may challenge any discrimination to which they were subjected while conducting the tests. The document describes the legal developments that have occurred since the issuance of the 1990 document on tester standing and discusses their impact on the issue.

The discussion focuses on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., because employment testing to date has focused on race. However, the analysis applies to any basis

¹ This Enforcement Guidance supersedes Policy Guidance No. 915-062, issued on November 20, 1990, entitled: "Whether 'Testers' have standing to file charges of employment discrimination against employers, employment agencies and/or labor organizations which have discriminated against them because of their race, color, religion or national origin."

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covered by Title VII as well as to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., which incorporates Title VII procedures and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., whose language is, in relevant part, virtually identical to that of Title VII.²

II. Definition and Function of "Testers"

Testers are individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices. Testers are matched to appear equally qualified with respect to their employment histories, educational backgrounds, references, and other relevant factors. The basis being tested, e.g., race, national origin, disability etc.,³ should be the only significant difference between the testers.

Matched testers apply for the same job[s] and their treatment is compared at each stage of the application and selection process. In other words, the comparison is not limited to whether the testers were ultimately offered jobs. It also includes whether, for example, each tester was given the same information about job availability or length of time before a selection decision would be made; whether interviews of the testers were comparable in duration and content; and how far in the hiring process each tester progressed.⁴ If the testers are properly matched, unequal

² Compare Section 7(c)(1) of the ADEA with Section 706(b) of Title VII.

³ Since, as noted above, most discrimination testing has focused on race -- and for the sake of editorial convenience -- references in this document will generally be to Black and White testers. Of course, the theories discussed in this document are equally applicable to testers challenging discrimination on the basis of color, religion, sex, national origin, age, or disability.

⁴ Federal and state governmental agencies are also increasingly using testing as an enforcement technique to detect discrimination in employment, housing, and mortgage lending. For example, the Office of Federal Compliance Programs recently announced that it has begun a pilot tester program. Employment Discrimination Report (BNA) at 142-43 (Feb. 7, 1996). See also Massachusetts Agency Settles Job Tester Cases, 177 Daily Lab. Rep. A-18 (1993) (Massachusetts Commission Against Discrimination settled with two clothing stores after testers hired by agency reported that White applicants were informed of hiring (continued...))

treatment of them will evidence discrimination.

Several sets of testers may be sent to the same employment provider to establish a pattern of discriminatory treatment and to assure that the different treatment was not an individual "fluke," oversight, or personality conflict.⁵ Similarly, testers will make follow-up calls to receive updated information about the status of the vacancy to assure that discrimination is the likely explanation for any different treatment. For example, a phone call could verify that a vacancy continued to exist after a Black applicant was told that the job had been filled.

III. "Testers" Have Standing To Enforce Civil Rights Laws

A. Individual Testers

The Commission concludes that individual testers who were subjected to employment discrimination have standing to seek both monetary and appropriate injunctive relief. This conclusion is based on a considerable body of law addressing tester standing in a variety of contexts, on statutory construction and on sound enforcement policy.

1. Standing Is Broad Under Civil Rights Laws

Standing is generally interpreted broadly under employment discrimination laws to achieve the statutory goal of equal employment opportunity. Hackett v. McGuire Bros., Inc., 445 F.2d 442, 3 EPD ¶ 8,276 (3d Cir. 1971) ("[t]he national public policy

⁴(...continued)
opportunities while Black applicants with the same qualifications were told that no positions were available); Justice 'Sting' Finds Housing Discrimination, Wash. Post, June 22, 1993, at A-6 (Department of Justice obtained the largest civil penalty ever in housing discrimination case -- \$350,000 -- after undercover testing showed that two apartment complex owners in Detroit refused to rent to Blacks; program has produced five other complaints in Detroit area and testing project will now be expanded to approximately six cities); U.S. to Use Agents to Detect Mortgage Bias, N.Y. Times, May 6, 1993, at D1 (government to use undercover agents to test whether mortgage lenders are illegally discriminating among borrowers).

⁵ While tester pairs in the housing area need only show that they are qualified to pay for the housing, employment tester pairs have the more complicated assignment of appearing qualified for the particular jobs.

reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies").⁶ Cf. McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 885, 65 EPD ¶ 43,368 (1995) (regarding the ADEA: "[t]he disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry wide significance").

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, 42

⁶ See also Murphy v. Derwinski, 990 F.2d 540, 543-44, 61 EPD ¶ 42,231 (10th Cir. 1993) (female has right to challenge a gender-based barrier to consideration for employment, even though removing the barrier may not result in her being employed); EEOC v. Mississippi College, 626 F.2d 477, 482, 24 EPD ¶ 31,268 (5th Cir. 1980) (White faculty member granted standing to challenge discriminatory hiring practices against Blacks), cert. denied, 453 U.S. 912, 26 EPD ¶ 31,901 (1981); Waters v. Heublein, Inc., 547 F.2d 466, 469-70, 12 EPD ¶ 11,238 (1976), cert. denied, 433 U.S. 915, 14 EPD ¶ 7,635 (1977) (White employee had standing to sue for discriminatory hiring practices which excluded Blacks and Hispanics because it deprived her of interpersonal contacts with persons of other races in her work environment).

U.S.C. § 3604 et seq. ⁷ Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982). The Havens Court relied on Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209 (1972), in which the Court unanimously concluded that the term "person aggrieved" should be interpreted broadly where: 1) actions brought by private persons are the primary method of obtaining compliance with the statute; 2) the statutory language indicates a congressional intent to construe standing as broadly and inclusively as allowed by Article III of the Constitution; 3) the legislative history of the statute indicates a congressional intent to broadly construe standing; and/or 4) the governmental agency charged with enforcing the statute broadly construes standing. 409 U.S. at 209-211. ⁸

The Havens Court concluded that, in enacting section 804(d), Congress "conferred on all 'persons' a legal right to truthful information about available housing," regardless of race, color, religion, sex, or national origin. 455 U.S. at 373. ⁹ Accord

⁷ In relevant part, Section 804 makes it unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex . . . or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race, color, religion, sex . . . or national origin.

(d) To represent to any person because of race, color, religion, sex . . . or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

⁸ The Court also cited Pierson and Evers for the proposition that a person need not have intended to buy or rent in order to have been injured within the meaning of Title VIII.

⁹ The Court noted that section 804(a) differs from 804(d) in that 804(a) makes it unlawful to refuse to rent or sell after
(continued...)

Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994), cert. denied, 115 S. Ct. 205 (1994); United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992), cert. denied, 114 S. Ct. 58 (1993); Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990); Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985); Village of Bellwood v. Gorey & Associates, 664 F. Supp. 320 (N.D. Ill. 1987).¹⁰

2. Title VII Language Similar to Housing Discrimination Statutes

Significantly, the language relied upon by the courts to find standing under Title VIII is paralleled in Title VII. As the Ninth Circuit observed, the purpose and structure of Titles VII and VIII are "functionally identical." Waters v. Heublein, Inc., 547 F.2d 466, 469, 12 EPD ¶ 11,238 (1976), cert. denied, 433 U.S. 915, 14 EPD ¶ 7,635 (1977).¹¹ Like Section 810(a) of Title VIII, which authorizes suit by "person[s] aggrieved,"¹² Section 706(b) of Title

⁹(...continued)

the making of a *bona fide* offer; it proceeded to find standing under section 804(d) without further discussing 804(a). Neither Title VII, the ADEA nor the ADA requires that the applicant have a *bona fide* intent to accept an offer of employment.

¹⁰ Courts have also concluded that testers have standing to challenge discriminatory housing practices under the Civil Rights Act of 1866, 42 U.S.C. § 1982, which provides that "[a]ll citizens shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." See, e.g., Watts v. Boyd Properties, Inc., 758 F.2d at 1484-85, and Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 898 (3d Cir. 1977), overruled on other grounds, Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987). As with section 804, the fact that the Black testers did not actually intend to rent the apartments in question was deemed irrelevant in determining whether their statutory rights had been violated. Unlike § 804(a) of Title VIII, and like Title VII, Section 1982 contains no language about the need for a *bona fide* offer as a condition for some challenges.

¹¹ The Ninth Circuit stressed that extending the Title VIII definition of "person aggrieved" to Title VII made "no new law." Waters v. Heublein, Inc., 547 F.2d at 470.

¹² At the time of the Trafficante decision, the "person aggrieved" language was defined in Section 810, 42 U.S.C. § 3610. That definition has been recodified at 42 U.S.C. § 3602(i).

VII, 42 U.S.C § 2000e-5(b), authorizes the Commission to accept charges of employment discrimination "filed by or on behalf of a person claiming to be aggrieved." ¹³ Indeed, the Supreme Court's holding in Trafficante, 409 U.S. 205, 209 (1972), that Title VIII's "person aggrieved" language conferred "standing as broad[] as is permitted by Article III of the Constitution," was based on a Title VII case, Hackett, 445 F.2d 442. As the Sixth Circuit observed: "[t]he fact that Trafficante . . . approved the reasoning of this Title VII case further demonstrates that on this issue of standing the Supreme Court does not conceive Titles VII and VIII to be different" EEOC v. Bailey Co., Inc., 563 F.2d 439, 453, 15 EPD ¶ 7,840 (6th Cir. 1977), cert. denied, 435 U.S. 915, 16 EPD ¶ 8,148 (1978).

Similarly, the discrimination prohibitions set forth in sections 703 of Title VII and 804 of Title VIII are comparable. ¹⁴

¹³ Note that only the tester who is discriminated against can file the charge as a "person aggrieved." The tester of the opposite class who functions as the comparator is a witness, not a charging party. Havens Realty Corp. v. Coleman, 455 U.S. 363, 374-75 (1982); Nur v. Blake Development Corp., 655 F. Supp. 158 (N.D. Ind. 1987).

¹⁴ Under Section 703(a) of Title VII, it is unlawful for employers to:

fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Similarly, section 703(b) provides that employment agencies may not:

refuse to refer . . . or classify individuals on [the prohibited bases];

and, in section 703(c), labor organizations may not:

(1) exclude or expel [individuals] from . . . membership on [the prohibited bases];

(2) limit, segregate, or classify its membership, . . . or fail or refuse to refer

(continued...)

Like an applicant for housing, an applicant for employment has a statutory right to be referred and selected without regard to race, color, religion, sex, or national origin, even if the applicant does not intend to accept the position. The injury is disparate treatment based on race, color, religion, sex, or national origin, rather than the loss of employment or housing.

3. Employment Testers Are Private Attorneys General

Although the issue of employment tester standing has not often been the subject of litigation, standing to function as Title VII testers was recognized as long as twenty-five years ago. Lea v. Cone Mills Corp., 301 F. Supp. 97, 2 EPD ¶ 10,052 (M.D.N.C. 1969), aff'd in relevant part, 438 F.2d 86, 3 EPD ¶ 8,102 (4th Cir. 1971). The plaintiffs were Black women who were organized to apply for positions with employers who were reputed not to hire Black women. The plaintiffs expected to be referred and intended to file charges against those who illegally discriminated against them. The court concluded that the plaintiffs' primary motive was to test for discrimination, but did not determine whether any of the plaintiffs would have accepted a position, if offered, at the time that they applied. The court held that the plaintiffs' Title VII rights had been violated, whether or not they intended to accept the jobs,¹⁵ because they had not been considered for employment due to their race and sex.¹⁶

¹⁴ (...continued)

for employment any individual, in any way which would deprive . . . [or limit] employment opportunities, . . . or otherwise adversely affect [the employment status on the prohibited bases]; or

(3) cause or attempt to cause an employer to discriminate against an individual in violation of this section.

¹⁵ In fact, some of the non-plaintiff applicants in the original group of testers did accept employment which was offered after the discrimination charges were filed.

¹⁶ Cf. NAACP v. City of Clifton, New Jersey, 1990 U.S. Dist. LEXIS 17512, at *19 - 20 (D. N.J. Dec. 27, 1990) (applicant need not have a genuine interest in a job to establish standing to challenge, as violative of Title VII, a hiring policy that allegedly discriminated on the basis of race) (unpublished). But see Parr v. Woodmen of the World Life Ins. Society, 657 F.Supp. (continued...)

The Commission agrees that individual testers have broad standing to challenge discrimination to which they were subjected and disagrees with the limitations on standing expressed in Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corporation, 28 F.3d 1268 (D.C. Cir. 1994) ("FEC").¹⁷ The court there ruled that the individual Black testers lacked standing to challenge an employment agency's allegedly discriminatory refusal to refer them for jobs on the ground that they could not demonstrate likelihood of future injury.¹⁸ The court distinguished the Supreme Court's holding, in Havens, that housing testers had standing under 42 U.S.C. § 1982 on the ground that, unlike § 1982, damages were not available under Title VII.¹⁹ Of course, since damages are now available under Title VII and the ADA, the court's rationale means that testers seeking damages under those statutes for discriminatory conduct which occurred after November 21, 1991, would not be barred.

However, in ruling that individual testers lack standing to obtain injunctive relief unless they allege likely future harm, the

¹⁶ (...continued)

1022, 43 EPD ¶ 37,199 (M.D. Ga. 1987) (plaintiff whose primary purpose in obtaining a pre-application job interview was to create a basis for a Title VII claim, and who did not actually formally apply for a job, failed to establish prima facie case of hiring discrimination; court stated in dicta that, even if plaintiff had formally applied for the job and been rejected, he would not have been harmed because he did not want the job).

¹⁷ Of course, testers may file charges with the Commission and the Commission may investigate -- and, if appropriate, litigate -- the claims whether or not the individual testers have standing to litigate. General Telephone Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980) (the EEOC has a statutory mission of eliminating discrimination; "[it] is not merely a proxy for victims of discrimination." See also, EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291-92 (7th Cir. 1993) (Commission may pursue an enforcement action for injunctive relief even when no individual could pursue a suit on her own behalf). Accord, EEOC v. United Parcel Service, 860 F.2d 372, 374 (10th Cir. 1988); EEOC v. Goodyear Aerospace Corp., 813 F.2d 23, 25 (5th Cir. 1982).

¹⁸ The FEC Court explicitly declined to address defendant's argument that only *bona fide* job applicants had standing to sue.

¹⁹ The alleged discriminatory conduct occurred before the effective date of the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 445.

FEC court overlooked several important factors. Namely, 1) the statutory language contradicts that interpretation; 2) the individual testers have suffered very real injury and, 3) such construction undermines the fundamental precept that individual plaintiffs serve as private attorneys general.

First, on its face, Title VII permits a court to award an injunction based on past discrimination without requiring the plaintiff to make a separate showing of likely future harm. Section 706(g) of Title VII grants authority to impose injunctive relief whenever "the Respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice," indicating that injunctions are appropriate even where the discrimination occurred in the past. 42 U.S.C. § 2000e-5(g) (emphasis added). Though not mandatory, injunctions for prior discrimination can be issued and are particularly appropriate where a pattern or practice of discrimination is proven and the discrimination is likely to continue. Tester evidence by its nature tends to show a pattern or practice of discrimination.²⁰

Second, plaintiff testers are entitled to relief because they are individual victims of discrimination. Justice White has observed that "any discrimination in employment based upon sexual or racial characteristics aggrieves an employee or an applicant for employment having such characteristics by stigmatization and explicit or implicit application of a badge of inferiority" Sosna v. Iowa, 419 U.S. 393, 413 n.1 (1975) (dissenting from the Court's holding that a class challenge to a residency requirement could survive even though the issue was moot as to the named plaintiff and distinguishing Title VII). "Congress gave [persons aggrieved by employment discrimination] standing by statute to continue an attack upon such discrimination even though they fail to establish particular injury to themselves in being denied employment unlawfully." *Ibid.* (emphasis added).

²⁰ The 1991 Title VII amendments further belie the idea that injunctive relief necessarily depends upon proof that the plaintiff will likely suffer future harm. The amendments provide that an employer who takes an adverse action against an employee for both discriminatory and nondiscriminatory reasons is subject to an injunction even when Respondent proves that it would have taken the same action in the absence of the unlawful reason. In other words, the court may enjoin the employer from future discrimination even though the individual plaintiff may have been lawfully terminated and cannot, therefore, be affected by any of Respondent's future actions. Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B).

Third, to deny injunctive relief to individuals who prove that they were victims of a pattern of discrimination undermines congressional intent to deter discrimination by permitting individuals to function as private attorneys general. See Lea v. Cone Mills, 438 F.2d at 88 (if a "[tester] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority"), citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); ²¹ Briscoe v. Fred's Dollar Store, 24 F.3d 1026, 1029 (8th Cir. 1994) (even though the individual plaintiff was denied reinstatement and would not benefit from it, a permanent injunction was imposed because the evidence revealed the employer's "consistent practice" of discrimination against Black employees); EEOC v. Corinth, Inc., 824 F. Supp. 1302, 1312 (N.D. Ill. 1993) (injunction issued because there was evidence of a pattern of discrimination against pregnant employees, even though the named plaintiff was not reinstated and would not benefit from the injunction). ²²

²¹ Recently, the Supreme Court unanimously reaffirmed the idea that individuals should be encouraged to function as private attorneys general, in holding that after-acquired evidence of the plaintiff's wrongdoing does not bar relief for earlier violations of the Act and stating that "[t]he objectives of [the federal employment discrimination laws] are furthered when even a single [person] establishes that an employer has discriminated against him or her. . . [w]e have rejected the unclean hands defense 'where a private suit serves important public purposes'." McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 885, 65 EPD ¶ 43,368 (1995) (citation omitted).

²² Injunctions have also been upheld in "tester" cases under fair housing laws. See, e.g., Cabrera v. Fischler, 814 F. Supp. 269, 281 (E.D.N.Y. 1993) (injunctive relief granted in a fair housing tester case because the defendants will likely engage in future discriminatory activity), aff'd in relevant part, 24 F.3d 372 (2d Cir. 1994), cert. denied, 115 S. Ct. 205 (1994); United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992) (court upheld an injunction because the defendant had engaged in a pattern or practice of discrimination and had not shown that the discriminatory practices had ceased), cert. denied, ___ U.S. ___, 114 S. Ct. 58 (1993); Davis v. Mansards, 597 F.Supp. 334, 348 (N.D. Ind. 1984) (injunction granted in a fair housing tester case because the "public interest in abolishing racial discrimination dictates that the defendants be held to a continuing high standard of fair dealing").

B. Organizations Sponsoring Testers

An organization that uses testers to identify a pattern or practice of discrimination by employers and employment agencies has standing to file charges on behalf of the testers. Furthermore, an organization that sponsors testers has standing on its own behalf if it can demonstrate a perceptible injury to its activities which is fairly traceable to the alleged illegal action.

The D.C. Circuit, for example, held that the Fair Employment Council, which sent testers to the defendant's employment agency (BMC) to test for discriminatory job referrals, had standing to contest the damage to the organization caused by BMC's alleged discrimination. The court ruled that organizations sponsoring testers have a cause of action under Title VII to the extent that alleged discrimination has "perceptibly impaired" the organization's programs.²³ According to the court, the organization must demonstrate that the defendant's conduct caused it "injury in its own right" by draining its resources in order to counteract the unlawful employment practices. 28 F.3d at 1277. The court stated that the FEC's "standing stems from BMC's actions against bona fide employment candidates, not from BMC's actions against the testers," because any drain on the Council's resources flows from BMC's refusal to refer genuine job-seekers for employment. Id. BMC's treatment of the testers provided evidence of a pattern or practice of discrimination by BMC.

IV. Remedies

²³ Similarly, in Havens, 455 U.S. at 378-79, an organization that sent out testers to test defendants' housing practices had standing in its own right under the Fair Housing Act based on its allegation that the defendants' steering practices impaired its ability to provide counseling and referral services for low and moderate income homeseekers. This concrete and demonstrable injury to its activities constituted far more than simply a setback to its abstract social interests. See also Chicago v. Matchmaker Real Estate Sales Center, 982 F.2d 1086, 1095 (7th Cir. 1992) (organization had standing to challenge Fair Housing Act violations uncovered by its testers based on showing that it deflected its time and money from counseling to efforts directed against discrimination), cert. denied sub nom., Ernst v. Leadership Council, ___ U.S. ___, 113 S.Ct. 2961 (1993). Cf. Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corporation, 28 F.3d 1268 (D.C. Cir. 1994) (rejecting Seventh Circuit rule that the expense of testing constitutes the requisite injury in fact).

As a matter of statutory construction, testers who are subjected to unlawful employment practices may be entitled to compensatory and punitive damages pursuant to the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

Compensatory and/or punitive damages have been awarded to testers in housing discrimination cases where the tester demonstrated that s/he suffered humiliation and degradation as a result of the discriminatory treatment and/or that the defendant acted with reckless disregard of federally protected rights. See Saunders v. General Serv. Corp., 659 F. Supp. 1042, 1061 (E.D. Va. 1987) (compensatory damages award of \$2,500 to tester was appropriate); Davis v. Mansards, Inc., 597 F. Supp. 334, 347 (N.D. Ind. 1984) (awarding \$5,000 and \$2,500 to testers for emotional distress caused by discriminatory rejection of housing application). One court has suggested that, because testers are "investigators," they are less likely than the bona fide home or job seeker to feel humiliated by discrimination. United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992). Nevertheless, the court concluded that the jury was "in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury." Id. at 933. Accordingly, in that case, the court upheld a \$2,000 award made to each of the testers. Id.

Compensatory and/or punitive damages have also been awarded to the civil rights organizations that sponsored the housing testers. The compensatory damages were based on diversion of the organizations' resources and frustration of their missions. See, e.g., Chicago v. Matchmaker Real Estate Sales Center, Inc., U.S. Dist. LEXIS 4435 (N.D. Ill. April 5, 1991), aff'd in relevant part and rev'd in part, 982 F.2d 1086 (7th Cir. 1992), cert. denied sub nom. Ernst v. Leadership Council, ___ U.S. ___, 113 S.Ct 2961 (1993); Saunders v. General Serv. Corp., 659 F. Supp. at 1061; Davis v. Mansards, Inc., 597 F. Supp. at 347-48. See also United States v. Balistrieri, 981 F.2d at 933.

The rationale applied in those cases applies equally in the employment context. An organization that sends out employment testers may establish eligibility for damages by showing that it diverted resources from other programs in order to identify and counteract the defendant's unlawful employment practices. A state court jury recently awarded compensatory and punitive damages in an EEO tester case brought under the District of Columbia's Human Rights Act. The female testers, sent by the FEC, and a bona fide applicant had encountered sex discrimination upon seeking the services of the defendant employment agency. The jury awarded \$79,000 in compensatory and punitive damages to the FEC, its testers, and the bona fide applicant. Fair Employment Council et

al. v. Molovinsky, Civil Action No. 91-7202 (Sup. Ct. D.C. Aug. 12, 1993) (discussed at 155 DLR A-15 (Aug. 13, 1993)). See also 1 Merrick T. Rossein, Employment Discrimination Law and Litigation, §§ 15.4(6), 19.8(1) (1990) (discussing availability of damages for testers).

Whether it is appropriate to seek compensatory and/or punitive damages during conciliation must be decided case by case. For further guidance on evaluating compensatory and punitive damages, see EEOC Enforcement Guidance: "Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991," July 7, 1992.

Testers may also be entitled to injunctive relief²⁴ and attorney's fees. Testers are not, however, entitled to reinstatement or back pay because they did not intend to take the jobs. The goal of the federal employment discrimination statutes is to try to put the plaintiff in the same position s/he would have been in absent the discrimination.²⁵

V. Charge Processing

A. Charges filed by individual testers

1. Accept charge from the tester(s) aggrieved by the discrimination.
2. At intake, obtain sworn statement from both the aggrieved and the non-aggrieved tester(s) who serve as comparator(s). If the comparator(s) are not present at intake, obtain their names, addresses, and phone numbers and contact them as promptly as possible to obtain sworn statements. The comparator(s) are not charging parties, but are witnesses to the discriminatory conduct.

²⁴ But see discussion of the FEC case at pages 8 - 10. For the reasons discussed there, the Commission disagrees with the conclusion of the FEC court that the testers lacked standing to seek an injunction.

²⁵ See Lea, 438 F.2d at 87-88 (upheld lower court's award of injunctive relief and denial of back pay in EEO tester case, and overruled lower court's refusal to award attorney's fees). See also Sledge v. J.P. Stevens & Co., 585 F.2d 625, 641, 18 EPD ¶ 8657 (4th Cir. 1978) (reiterating holding in Lea that "test plaintiffs are not eligible for back pay"), cert. denied, 440 U.S. 981 (1979).

3. Obtain any contemporaneous notes made by the testers during or immediately after the testing occurred.
4. Determine the scope of the investigation -- Was a specific job or a wider class of jobs tested?
5. Review applications of persons hired and rejected for the relevant jobs and time frame and compare qualifications. This review may result in the identification of actual victims of hiring discrimination.
6. Investigate as you would any disparate treatment case, See CM sections 604.3 through 604.6. ²⁶
7. Carefully evaluate the respondent's articulated explanation for the possibility of pretext, focusing on whether each pair of testers was successfully matched so as to be "similarly situated." For example, if the respondent asserts that Tester A seemed more ambitious and therefore was more impressive in the job interview than Tester B, determine whether an effort was made to match the two testers in terms of their demeanor. Also, look at the interviewer's notes to determine if a notation was made as to Tester A's alleged ambition or Tester B's alleged lack of ambition. Review other applicant's files to determine whether minority applicants were subjected to different standards and whether "ambition" was a determinative standard.
8. Tester evidence typically constitutes evidence of a pattern or practice of discrimination and, as such, should be evaluated for possible systemic processing and a Commissioner's charge or, in an ADEA case, a directed investigation. Analyze statistical data regarding disparities between minority representation in the qualified available labor market and in the job in question.

²⁶ The Employment Discrimination Testing Manual, developed by the International Association of Official Human Rights Agencies, also has useful information on investigating and assessing tester charges.

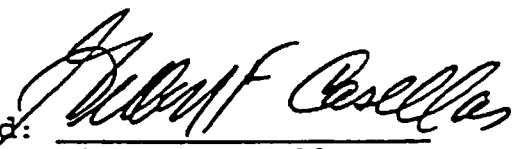
B. Charges filed by organizations

1. If organization seeks to file a charge on its own behalf, determine whether it meets appropriate criteria (i.e., did it use resources to counteract respondent's allegedly unlawful employment practices). If organization seeks to file "on behalf of" the testers, the procedures in 29 C.F.R. § 1601.7 should be followed.
2. Obtain identifying information about both the aggrieved tester(s) and the comparator(s).
3. Inquire whether the organization "debriefed" the testers after the testing situation. Obtain debriefing documents and other evidence held by the organization.
4. Investigate as usual. See A.6 and A.7 above.
5. As noted at A.8 above, evaluate for systemic processing and Commissioner's charge or directed investigation.

C. Remedies

1. Injunctive relief should be sought.
2. Attorney's fees are available during conciliation.
3. Because they did not actually intend to take the job, reinstatement or back pay are not appropriate remedies for the testers.
4. For the reason set forth in #3, immediately above, compensation for costs associated with not getting the job also is not available.
5. Other monetary damages for the testers and for the organization may be sought if warranted. Non-pecuniary compensatory and punitive damages may be available.

5/22/96
Date

Approved: 
Gilbert Casellas
Chairman

RUNNING A RESUME MAILING OPERATION

I. Defining Parameters and Isolating Test Variables

Targeting employers with a resume mailing operation, like any other targeting method, requires well-defined goals in order to be effective. Begin with a clear picture of your tester archetype and your targeted salary and skill level (see Chapter Three, section I). You're likely to get a higher employer response rate if you choose a particular industry (e.g., sales) or occupation (e.g., administrative assistant), and design cover letters and resumes geared specifically toward those jobs.

It's also important to isolate the variable you want to test. Employers may discriminate based on more than one factor, and mixing them in a test could muddle your results. To test race as a factor, the simulated applicants in a pair should be of the same gender. To test gender, the applicants should be of the same race.

For example, suppose you want to identify employers who give preference to whites over blacks for their job opening. If an employer also prefers to hire a man over a woman, you may find out nothing if you send a black male's resume paired with a white female's, because the employer may reject both.

To isolate one variable that you want to test, offer applicants who are stereotypical for the job in all other respects. For example, if you want to test race in an entry-level job usually held by men, send resumes of males in their early to mid-twenties.

It is possible to test several variables at once. But each applicant should represent only one of the variables, and the "control" applicant (in our case, the white or male) should represent all of the variables you expect employers to prefer. Here are some examples of applicant pairings to test for discrimination based on more than one characteristic:

- To test for discrimination against blacks and Latinos, in a job usually held by men:

BLACK MALE / LATINO MALE / WHITE MALE
(tests race) (tests nat'l origin) (control)

(If the job is usually held by women, make all the applicants female).

- To test for discrimination against blacks and women:

BLACK MALE / WHITE FEMALE / WHITE MALE
(tests race) (tests gender) (control)

- To test for discrimination against blacks, Latinos and women:

BLACK MALE / LATINO MALE / WHITE FEMALE / WHITE MALE
(race) (nat'l origin) (gender) (control)

One caveat: whenever you conduct resume mail tests, you need to take into account the employer's normal hiring process. Does the employer typically receive resumes by mail? How many resumes does the employer receive in a month? It is especially important to answer these questions before conducting a multiple-variable resume test. If an employer rarely receives more than a resume or two per month, suddenly receiving a series of black, Latino and white resumes could arouse suspicion. In order to introduce your resumes in a way that flows seamlessly into the employer's normal applicant pool, you may want to spread out the timing of the mailings, or you may decide to test fewer variables at once.

II. Selecting Simulated Applicant Names and Addresses

Select a name for each applicant that clearly suggests the person's gender, race and national origin. You might "test" your proposed name on others by asking them to describe a person with that name.

If possible, select an address for the applicant that also suggests the person's race or national origin. In Chicago, a city largely made up of distinct neighborhoods identified with particular racial or ethnic groups, this is easy to do. The same is true of many other urban areas across the country. (In such areas, you can often include yet another racial or ethnic indicator by listing on the applicant's resume a high school and/or college that is attended predominantly by members of the applicant's racial or ethnic group).

Most employers who respond to a resume sent by mail will do so with a phone call. A few, however, will respond in writing, so you'll want to use real addresses where you can actually receive mail. For our project, we chose neighborhoods we knew to be predominantly black, Latino and white, and checked the most recent census data to select areas with the highest percentage of inhabitants of each group. Then we asked LAFC staff and friends who lived in those areas to volunteer their addresses for our simulated applicants' resumes. As a final check of a chosen address's "identity," we asked volunteers to describe the racial and ethnic make-up of their street.

III. Tailoring Simulated Applicants to the Job

The resume mailing technique will only be an effective targeting tool if you're able to create simulated applicants who look attractive enough on paper to solicit an employer's call. You must find out what the employer wants and what the typical applicant's background looks like, and then create fictional job seekers who stand out in the applicant pool.

There are a number of ways to acquire this information. A thorough reading of the newspaper job ads in your targeted industry will give you a good sense of the level of education, skills and experience employers are seeking. Career guides and job-hunting references at your local library or bookstore can offer guidance as well. It is especially helpful if you can develop contacts inside your target industry who can tell you about the applicant pool and the qualifications sought. These could be people who do the job you're testing or have done it in the past, or people who hire others to do the job. Answering the following questions will help you to construct applicant backgrounds:

- Does the employer want the applicant to have a college degree?
- Does the employer want an applicant with a certain number of years of experience?
- Does the employer want someone with prior experience doing this particular job?
- What kinds of backgrounds do others have who've been hired for this job?
- What kinds of previous experience does the employer consider most applicable to doing this job?

IV. Designing and Pairing Simulated Applicant Resumes

Developing resumes for your simulated applicant pair that will effectively measure an employer's response to your chosen test variable requires research, practice, test runs and fine-tuning. Resume mailing operations whose purpose is research generally want both applicants to be equally qualified for the position being sought. **When you are resume testing for enforcement purposes, your goal is to identify likely discriminators as quickly as possible.** You'll increase your likelihood of doing this accurately if you can eliminate factors that might cause an employer who is *not* discriminating based on race or gender to choose the white or male applicant. In other words, you want to give an employer who is assessing applicants based on fair, consistent criteria clear reasons to choose the minority or female applicant. Your goal, then, is to strike a balance in your pair in which both applicants' backgrounds put them in the running for the job, but the minority or female applicant is better qualified in key, quantifiable ways. The white or

male applicant has to be strong enough to solicit an employer's call (he can't be clearly underqualified for the available job). At the same time, the minority or female can't be so much stronger that an employer wouldn't consider her as an applicant for the same category of work (she can't be clearly overqualified for the available job).

There are a number of criteria you can match and vary in creating resumes of a simulated applicant pair. Our most effective resume sets have made applicants similar in the following characteristics, but weighted all or most characteristics slightly in the minority or female's favor:

- number of years of relevant experience
- level of responsibility held in previous jobs, as conveyed through job descriptions
- similarity of job most recently held to job being sought, and length of time that job was held
- level of education achieved
- level of job-relevant skills (e.g., typing speed, familiarity with computer software packages, cash handling experience, etc.)
- whether currently employed; if unemployed, for how long

In addition to the resume's contents, you can vary aspects of the physical presentation to give an edge to the minority or female applicant. You can put her resume and cover letter on better paper and select a font for the type that is slightly cleaner, sharper and more professional than the font you use for the white or male applicant.

While doing all this fine-tuning to weight things in the minority or female applicant's favor, it's important to remember not to sabotage the white or male applicant. He should always be a strong, qualified candidate for the available position. If he's not good enough to get a call from the employer, you will not have succeeded in creating a test that allows you to measure the employer's response to your test variable.

It's extremely important that there be no spelling or grammatical errors in either applicant's materials. In short, you want nothing in your simulated applicants' materials that the employer could use to legitimately reject them outright.

Another decision you'll have to make about both of your simulated applicants' resumes is whether or not to use the names of actual companies as their former employers. We have used both real and fictitious company names on our simulated resumes. This decision becomes more of an issue on the resumes you create for real tester applicants, because they will actually be

meeting employers and their references are more likely to be checked (see Chapter Eight, section VII for a discussion of tester references). We do not list references on test resumes, whether they are mailed or presented in person. Resumes either include a statement saying references are available upon request, or they don't mention them at all.

V. Designing Simulated Applicant Cover Letters

We never send a resume without a cover letter, for the same reasons that one wouldn't do so in one's own job search. A cover letter is a necessary component of one's presentation to an employer by mail, and key to soliciting an employer's response. Without a cover letter, an applicant appears unprofessional, undirected and lacking in interest in or knowledge of the specific job for which she is applying. The goal of a resume mailing operation is to get as many employers to respond as possible, and cover letters are a necessary part of making your simulated applicants stand out as model job seekers.

Cover letters also provide another means of pointing out your applicant pair's comparable suitability for the job, while highlighting the minority or female applicant's superior credentials. We use the cover letter to underscore the characteristics we have matched and varied in the pair.

For example, in her cover letter each applicant might mention her number of years of relevant experience, the responsibilities she had in her most recent job, her education and her applicable skills. This gives the employer another quick snapshot, besides the resume, that summarizes each applicant's qualifications for the job while showing how the minority or female applicant is better qualified.

The minority or female applicant's letter might also be a little longer, and might be written in a slightly more sophisticated style.

You can write a cover letter that is professional and tailored to the available job without having to revise it for every job for which your simulated applicant applies. If you know your tester archetype and what kind of job she's after (see Chapter Three, section I), and you've done your homework on your targeted occupational category or industry (see this chapter, section III), you should be able to create a resume and cover letter that can be used to apply for a variety of jobs within your chosen category or industry. If an applicant makes an impressive presentation on paper, employers will often call even if she doesn't meet every qualification they seek.

VI. Testing Simulated Applicant Resumes

As a final check of the resumes you've created and paired, it's a good idea, if possible, to test them "blind" (with the names and addresses removed) on someone who hires people for the job your simulated applicants are seeking, or who is otherwise familiar with the occupation or industry. This person could come from among the contacts you've developed in researching the industry before preparing your resumes (see this chapter, section III). If you've done a good job, your contact should find both simulated applicants to be impressive candidates, but should, upon a little closer scrutiny, choose the minority or female applicant as clearly better qualified. Industry contacts can also give you helpful tips about how they assess resumes they receive, and can sometimes suggest small changes that can make a big difference in how your resumes are viewed by employers.

The real test of your resumes will, of course, come as they reach employers' mailboxes and you begin monitoring responses. A resume mailing operation is not a science, and there is no percentage of responses you should receive to let you know whether it's "working." Response rates vary across industries, and in accordance with the availability of jobs at the salary and skill level at which you're testing the market.

To date, the Employment Discrimination Project's mailing operation has yielded a 47% employer response rate. Response rates by industry have varied, from as low as 34% (when we sent resumes in response to advertised sales positions at car dealerships) to as high as 65% (when we sent resumes in response to advertised receptionist positions). Among the employers who have responded to date, 41% contacted only the white applicant. Again, there was significant variation across industries, from a low of 24% in general sales positions, to a high of 55% in auto sales.

As you gain experience running your operation, you will develop your own sense of how well it's working as a targeting tool, and when the response level indicates the need for an adjustment. If your response rate is low, and/or if employers are not contacting your white or male applicant, for example, you may need to upgrade applicants' credentials and paper presentation to make them more attractive candidates.

In some cases, however, a low response rate may simply reflect the fact that employers in that industry tend not to recruit through the mail. We have found this to be the case in some positions involving a high degree of public contact (e.g., car sales persons, wait staff in upscale restaurants). In such positions--in which in-person presentation and self-assurance are critical to performance on the job--employers tend to hire walk-in applicants, who offer them an opportunity to evaluate these traits on the spot. If you want to test such industries, you will have to research employer habits and decide whether you will gain sufficient information from a resume operation to make it worthwhile.

VII. Timing Simulated Resume Mailings

Send the minority or female applicant's materials first, so that she can reasonably be expected to be called about the job opening before her partner, if the employer is responding based on qualifications alone. You want to set up a situation that will give an employer every opportunity to choose the more qualified candidate.

This order of mailing will also enable you to detect a preference for the white or male applicant even in cases where an employer eventually calls both applicants. For example, we have found that some employers will call only the white applicant at first and then, after repeated efforts to contact her, will call the black applicant several weeks later. Knowing that they most likely received the black applicant's resume first makes this behavior a strong potential indicator of a preference for hiring whites.

Whether you stagger the mailing of your resumes by a day or two, or by a week or more, will depend upon: 1) whether you're responding to a newspaper ad (in which case an employer will probably expect to receive a lot of resumes); 2) what your research on the industry taught you about the volume and frequency of resumes employers generally receive; and 3) how many variables you're testing, and thus, how many resumes you're sending.

Keep in mind that you want the resumes staggered far enough apart that, even with variations in mail delivery, an employer will likely receive the minority or female applicant's resume first, and have time to consider it before receiving the white or male applicant's materials. On the other hand, you want the employer to receive the resumes in close enough succession that both applicants can get into the pool of candidates while the job is still open and before the employer makes any preliminary decisions, such as an initial screening and selection of candidates to interview. Your goal is to put both applicants before the employer for consideration at the same stage of the hiring process.

VIII. Sources for Selecting Employers for Resume Mailings

No matter how well your resumes are tailored to the targeted job, they won't get a response from an employer who isn't hiring. It doesn't cost much to mail a few resumes, but you don't want to waste the simulated identities you've carefully created where there's no job opening. You want, as much as possible, to channel your resumes into active hiring processes.

The most obvious source for finding available jobs are the want ads of your local newspaper. We've gotten the highest response rate from this source. Job ads often also offer information that's useful in conducting a mail test, such as specific qualifications sought and a contact name to whom correspondence should be directed.

There are a number of approaches you may want to consider in deciding which newspapers to survey for ads. You'll probably want to cover your city's largest newspaper (e.g., the one with

the largest Sunday classifieds). But there are good reasons to look at smaller newspapers as well. We found that smaller newspapers, particularly in predominantly white neighborhoods or suburbs, were useful sources because: 1) employers who didn't want as diverse a group of applicants as they might get by advertising in the Chicago Tribune tended to advertise in the smaller papers; and 2) ads placed there tended to attract a smaller pool of applicants, increasing the chances that our resumes would receive a response.

Whichever newspapers you use, there are several things to be aware of in choosing ads. We focused our attention on ads that gave the company name, rather than on "blind" ads listing only a box number. First, we found that the more "serious" ads for decent jobs--that is, full-time, permanent, salaried positions--were those that offered the most information about the employer. Often, blind ads turned out to be commission-only sales jobs with no security or guaranteed income--not the kinds of jobs to which we were most interested in helping poor women and minorities gain access. Second, employers who place blind ads tend to place several versions of them repeatedly over a period of weeks or even months. They can be difficult to recognize, and you run the risk of sending your sets of timed mailings more than once to the same employer, which not only could arouse suspicion but also wastes time and resources.

Many ads don't list a company name but do list a phone number. This is especially true of entry-level jobs. A call to the number itself, or to the phone company's customer name and address service, can supply the employer's name and address. Thus, you can determine whether you've already mailed resumes to this employer and, if not, get the information you need to do so.

While a phone number only in an ad suggests that an employer would prefer applicants to call rather than write, we have found that employers who place such ads will often contact applicants who send resumes. In fact, many employers with entry-level job openings seem impressed that the applicant showed the initiative to send a letter and resume when it was not specifically requested.

We have found the same to be true of ads that ask applicants to apply in person. It is worth seeing if the employer will respond to mailed resumes, and if the response indicates discriminatory behavior, before you spend the time and money on an in-person test.

Besides reading newspaper ads, you can also select employers for a resume mailing by targeting a specific industry and getting names from the phone book, some other directory, or a data base (see Chapter Three, section II). This can be useful especially if you want to assess the degree to which discriminatory hiring practices affect your tester archetype in a particular industry or occupational category. You can also gather information about what an employer is looking for in an applicant. For these purposes, you might have a greater interest in surveying as many employers as possible in a limited time period, than in sending resumes only to employers you know are hiring.

The limitation of this approach is that you are likely to get a much lower response rate because many employers to whom you send resumes may not be hiring. It is, however, an effective approach in industries where employers are always, or often, looking for applicants, such as employment agencies.

IX. Recording Employer Responses to Simulated Resumes

To record employer responses to your simulated resumes, each resume needs a phone number where an answering machine or voice mailbox can record the caller's message, and the date and time of the call, 24 hours a day.

The Employment Discrimination Project set up a phone bank of 12 lines with voice mailboxes that could be used for multiple purposes in our testing operation. Several lines are assigned to our simulated applicants.

This arrangement, which enables us to monitor and clear all the lines from any phone, allows for easier and more accurate monitoring than answering machines, which must be checked one by one and cleared manually, and which tend to run out of tape and malfunction. We have grown to appreciate the phone bank's capabilities all the more as our testing operation has gotten into full swing. With some lines assigned to resumes being mailed weekly, and others sometimes assigned as references for testers out in the field (see Chapter Eight, section VII), the lines often need to be checked, logged and cleared more than once a day.

One factor you will need to take into account if you use a phone bank is that, normally, when you rent a bank of lines from the phone company, you receive a set of lines whose phone numbers all share the same first three digits. This is because the first three digits of a phone number designate its geographic area. This presents a problem, however, because you won't want all the phone numbers you use in your testing operation to have the same first three digits. For an additional charge, you can make arrangements with the phone company to have a bank of lines with a variety of initial digits indicating geographic areas all over the city. Finally, don't forget to make your phone bank lines unlisted.

When you log employer phone responses, you may find it useful to record not just which applicant the employer called and when, but also exactly what the employer said. Employers' messages will often give more information about the company, about the job, or about their view of the applicant. We have found, for example, that some employers respond as though they are much more impressed by, and are much more encouraging toward, the less qualified white applicant. We transcribe their messages on a log sheet word for word, so that we are able to notice and maintain records of even these more subtle differences in treatment (see sample "Resume Operation Employer Response Log" at the end of this chapter).

We log the calls on a legal pad first, listing them chronologically as we take them off the voice mails, and then transfer them later to appropriate log sheets filed by employer name. The legal pad list gives us a back-up means of verifying the date and time of calls in case a mistake is made in transcribing them onto the log sheets.

While most employers respond to mailed resumes by calling the applicant, some send a postcard or letter. We collect these and record them on the log sheets as well.

If you use addresses of project staff, colleagues or friends for your simulated applicants (see this chapter, section II), remember to ask address volunteers to place the simulated applicant's name on their mailbox to ensure that the postal carrier will deliver mail for them. Ask them to save and turn over to you the envelope as well as the letter, so you'll have the postmark showing when it was sent. Finally, if the mailing project is ongoing, it's a good idea to remind volunteers periodically that their address is still in use so they continue to watch for mail.

X. Keeping Records and Avoiding Detection

Introducing simulated resumes into the job market without detection requires careful attention to every detail, from the wording of the cover letter to the stamp on the envelope. The task will be easier if you develop record-keeping systems and procedures to ensure care and consistency from the start.

Once we've established individualized "paper identities" for each simulated applicant, we keep each one's characteristics on file and maintain them consistently throughout each mailing. An applicant's paper identity includes: font, format, address and abbreviation style, paper and envelope type, stamp type, etc.

We maintain hard copies of every letter and resume we mail, and a computer chart tracking when and to whom each was sent. If we sent the resume in response to an ad, we keep a copy of the ad as well. We have found these records to be invaluable in keeping track of our activities, assessing our progress and documenting our work for legal purposes.

Our computer chart lists employers alphabetically. It records the employer's address, the type of job opening, the source through which the employer was selected (e.g., the name and date of the newspaper in which the ad appeared), which resumes were sent and the dates they were mailed. We refer to it for a variety of reasons, such as: to identify employers who advertise under more than one name; to make sure we don't send to the same employer twice; to help trace the source of calls from employers who don't identify themselves, or who identify themselves in a different way than our applicants' correspondence was addressed; and to tally data on job sources, resumes sent and response rates in order to assess the effectiveness of our operation.

To ensure consistency, we always mail resumes so that they will be postmarked on the same day as the cover letter is dated. We file our hard copies of resumes and cover letters by the date they were mailed. This file is useful in several ways. Since we vary resumes and cover letters to apply for different jobs, we refer to the file when we need to clarify which version went to a particular employer. We also look at the resumes we mailed to a particular employer when designing resumes for testers conducting in-person tests, to ensure that we're sending similarly qualified yet credibly varied applicants. In addition, the file copies provide documentation of our mail test if we decide to take legal action against an employer.

Our computer system, which uses Wordperfect 5.1, allows us to type a list of employer names and addresses that can be merged to print out addressed cover letters as well as envelopes. We maintain computer and paper files of these address lists, along with the computer chart and the copies of the resumes and cover letters. With records kept several different ways, if a mistake is made or some piece of information is lost, there are back-up methods for correcting the error or retrieving the data.

Maintaining accurate records, and referring back to them often, will go a long way toward avoiding detection, but there are a number of other details to keep in mind. Many of them seem small, but any one of them, if not considered, could "give away" your resumes:

- **Writing Style & Wording:** Try to vary the writing style of each applicant. One might use short phrases, while the other uses longer sentences or more description. Watch out for phrases that might sound natural to you because you use them all the time, but that jump out at someone else who sees them in two different applicants' writing. **Have different writers write each applicant's materials, or** have someone other than the writer read both to look for unique styles or phrases they have in common.
- **Spelling:** Run spell-check on your computer and proofread carefully. The same misspelled word in both applicants' materials could link your applicants.
- **Abbreviations:** Beware of abbreviating words the same way in each applicant's materials, particularly in the address. The address is the first thing the employer will notice, both on the envelope and at the top of the cover letter, and identical styles could link your applicants, particularly if an employer doesn't receive a lot of resumes. We've established an address and abbreviation style for each applicant, which we maintain for all mailings. For example, one might write: "Chicago, Illinois," while another writes "Chicago, IL."
- **Fonts and Formats:** Use different fonts and formats for each applicant's resume and cover letter. Vary your spacing, use of bold and capital letters, etc.
- **Paper & Envelopes:** Use a different kind of paper and envelope for each applicant.

- **Stamps & Postmarks:** Use different stamps for each applicant. If you're working from an office, don't send your resume mailings out through the office postage meter. If you're working from a location that isn't central (as would be a downtown, where applicants from different parts of the city might have business and be mailing from), you may want to consider mailing different applicants' resumes from different post offices. For example, you wouldn't want applicants whose resumes list various addresses throughout the city all having envelopes postmarked from the remote suburb where you're operation is located.
- **Phone Numbers:** Make sure the phone number you list on your applicant's resume as his home phone is unlisted, so that a suspicious person checking with directory assistance won't get a different name.
- **Timing:** Stagger your resume mailings in a way that takes into account whether the position was advertised, how many resumes the employer typically receives, and how many you are planning to send.
- **Checking & Double-Checking:** Take care to check over what you're doing at each stage of preparation. Check the list of employers you're planning to send to against your master list of those to whom you've already mailed resumes. Check the addresses, too, because some employers are known by, or advertise under, several names. This is especially necessary if you send resumes in response to ads with P.O. boxes and no employer names. Most computer systems have a search function that will allow you to do this fairly easily. Finally, have a second pair of eyes (in addition to those of the person(s) primarily responsible for preparing the mailing) look over the cover letters, resumes and envelopes before you drop them in the mail. A resume mailing operation is a detail-intensive, exhausting endeavor--what one person doesn't notice, another perhaps will.

RESUME OPERATION EMPLOYER RESPONSE LOG

COMPANY NAME _____ BUSINESS TYPE _____

ADDRESS _____ JOB APPLIED FOR _____

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NAME OF APPLICANT CONTACTED	DATE RESUME MAILED	CONTACT METHOD	CONTACT DATE	CONTACT TIME	CONTACT NAME	MESSAGE
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RECRUITING TESTER CANDIDATES

I. Qualities to Seek in a Tester

Quality testers are the key to success in any civil rights enforcement testing operation, but especially in the area of employment. Employment testers must expect to face a much greater level of scrutiny than housing testers, both from employers during a test and later from attorneys if the test is used to support legal action. With the use of testers in the employment context not yet approved by the Supreme Court, tester quality is even more critical.

A tester needs to be a model job applicant and a keen observer and recorder of events. There are a number of qualities we seek in a tester:

- **poise and articulateness:** A tester must be comfortable in an interview situation, know how to handle himself and respond well to an employer's questions.
- **good judgment:** Even the best-trained tester will face questions or situations during a test for which he has not planned. He needs to be able to think on his feet and choose the response or action that would best maintain the integrity of the test.
- **appearance:** Testers must be dressed and groomed appropriately for the job. Since employers take an applicant's appearance into account in forming an impression, the tester's appearance should not provide a reason for disqualification that's unrelated to race, gender or national origin.
- **observation and memory skills:** Testers must take note of not only what is said and done during an interview, but also what's happening around them, the times when events occur, physical descriptions of people they meet, and more. They must be able to remember these details and record them in their reports.
- **writing skills:** A tester must be able to record his test experiences in a clear, concise writing style in order to effectively document test results for legal use. He also needs to write well in completing applications and written tests given by employers. He'll need to have clear handwriting, too.
- **accuracy & attention to detail:** These skills are necessary throughout the test process, from scheduling the interview to writing the narrative.

- **organization:** A tester needs to keep track of many details. He must be able to schedule and keep appointments, develop a system for remembering and recording events during a test, and complete test reports on time.
- **punctuality:** A tester needs to understand the importance of punctuality to the test process, and arrive on time for work and scheduled appointments.
- **dependability:** For a testing operation to run effectively, the manager needs to be able to count on testers to carry out their role as they were trained to do, to be where they need to be at the time they need to be there, to keep in contact with the manager, to report events fully and accurately, and to inform the manager of any problems.
- **objectivity:** We look for testers who can perform their role without preconceived notions, and who understand that their job is to be neutral observers and recorders of events.
- **maturity:** The role of a tester requires integrity and personal responsibility. We look for testers who understand the goals of the testing operation and take their role seriously.

II. Defining the Job

The position of employment tester is an unusual one. There is no degree, course of study, or previous job experience that specifically prepares someone to be a tester, and working as a tester doesn't advance one further on a specific career path. Yet the job requires a great deal of intelligence and ability, and testers often find it to be an enriching experience. Many report feeling much more confident about handling job interviews in their own lives after going through a number of them as testers, and we "sell" the position in our ads, in part, as a way to polish interviewing skills.

The challenge you face in recruiting testers is to define and compensate the position in a way that fits within your budget and attracts the quality candidate you seek. We have tried several approaches, all of which have advantages as well as drawbacks. Following are some of the factors you'll need to consider in defining the tester position within your operation:

- **paid vs. volunteer:** Some housing testing organizations use volunteer testers. We chose not to go this route with employment testing for several reasons: 1) The level of responsibility, commitment and skills that effective employment testing requires from the tester is more than we felt was realistic to expect from volunteers; and 2) Unlike housing testing, which can be performed on evenings and weekends by someone with a full-time job, employment testing must be done during business hours, taking time during which

the person could be making money doing something else. It necessitates hiring people with flexible schedules, such as students and part-time workers, many of whom need additional income.

- **permanent vs. temporary:** If the goals of your testing operation are narrowly defined, you may be able to keep "all-purpose" testers on staff. For example, if your operation was set up with the sole purpose of addressing discriminatory hiring practices as they affect Latino men in their early twenties, you could conceivably hire one or more permanent pairs of young Latino and white men. But if your goals are broader, and you want the flexibility to address discriminatory hiring practices as they affect women and men of different ages, races and/or national origins, and in different job types, your needs might be better met by temporary testers.

We have found it best to focus on one variable and sector of the job market at a time (e.g., discrimination against black women in hiring for administrative assistant positions, discrimination against Latino men in hiring for jobs in the retail sales industry). Defining each phase of testing in this way enables us to identify a number of employers to test in a given field, and then hire appropriate testers to apply for their jobs.

We have also found that, in order to make the best use of the time involved in hiring, pairing and training testers, and to ensure enough time for testers to complete the hiring process with each employer, it is best to hire testers for a period of at least three months.

- **full-time vs. part-time:** Offering testers a full-time job can help you attract professional, committed candidates, and ensure that tests in progress will not be compromised by scheduling difficulties involving a tester's other daytime commitments. But it requires a significant budget, not only to pay testers, but also to pay the staff required to support the testing operation. To keep testers busy full-time and achieve useful test results, you'll need several other staffers doing the groundwork identifying test sites, managing testers in the field, reading test reports, debriefing testers, and tracking test results. Your operation could quickly become unwieldy.

Offering testers part-time work enables you to maintain better control over tests and operate effectively within a smaller budget. Difficulties arise when an employer wants to schedule an interview outside a tester's working hours, in conflict with another job or other commitments. Maintaining the tester's identity as an interested job seeker requires the tester to follow the employer's lead and schedule appointments as the employer requests. Further, each tester in a pair must be equally responsive and available to the employer throughout the hiring process. With testers working part-time, test logistics can become extremely complicated.

- **set hours vs. flexible hours:** Defining set tester work hours simplifies test management. If testers report to work at the office where the testing operation is headquartered, and return to the office after visiting employers, you can give instructions, orchestrate timing between members of a pair, receive reports and debrief testers with relative ease. But because you have to follow employers' leads in scheduling interviews, there can be a fair amount of "down time," when you're paying testers to sit around between appointments. Further, it sometimes won't make sense for a tester to come to the office before or after a test (if the employer is far away and the appointment is early in the morning or late in the afternoon, for example). Also, if testers are working part-time and an employer needs to schedule an interview outside their regular working hours, you must either modify the tester's hours, or stop the test if the tester has a time conflict.

If you set a fixed tester work schedule, we have found it best to have testers work 20-25 hours a week, so that there are about three days in the week during which they can schedule interview appointments. If they are available much less than this, it becomes difficult to present themselves credibly as eager job seekers. We have found it best to **concentrate tester work hours at the beginning of the week, when employers tend to do most of their interviewing.** It is particularly important for testers to work on Mondays if they are applying for jobs in response to newspaper ads, so that they enter the hiring process before the employer stops taking applications or fills the position.

If you hire testers to work flexible hours, they can schedule interviews throughout the week as employers request them, and only come into the office to receive assignments, turn in reports and debrief. It is even possible to give testers assignments over the phone and have them mail in their reports. Under this system, you don't have testers sitting around or travelling unnecessarily between home, test headquarters and employers. But for it to work, testers must have flexible schedules, be highly responsible and dependable, and be able to work independently. They must keep in close contact with the test manager by phone while they are testing. If you use this approach, you may find it better to **pay testers per test rather than per hour** (see "payment system" below).

- **payment system:** We have experimented with several systems for paying testers--an hourly rate, a salary for an agreed-upon average number of hours per week, and a lump sum per visit to an employer. All have pros and cons associated with them.

1) An hourly wage is straightforward and easy to explain when recruiting. We have paid testers working under the hourly system \$8.00 per hour. The wage reflects the pay range offered for the entry-level professional jobs we test, and it has proved an adequate incentive in attracting the college students and recent graduates we traditionally hire.

An hourly wage system can become difficult to manage fairly when you find that some testers tend to take longer than others to conduct tests and complete reports. Testers who are slower, and require more supervision and debriefing, can end up making more money than testers who are more efficient. If not checked, this discrepancy can make it difficult to stay within a budget.

2) A set weekly salary can solve problems of equity and budgeting. In 1992-94, we paid salaried testers \$160 for a 20-hour work week, based on an hourly wage of \$8.00 per hour.

A salary system wastes money when the logistics of following an employer's hiring process leave testers sitting around with nothing to do. Also, it may not motivate testers to work as efficiently as a system in which their pay is connected to the number of tests they conduct.

3) Establishing a system under which testers are paid per test performed motivates testers to work efficiently and enables you to control costs as you go along. It may be the most practical approach if testers are working independently and mailing in reports, because it avoids potential conflicts over the number of hours they work to complete each test. You can make payment contingent upon getting reports in within a specific time period, to help ensure that they are completed while events are still fresh in testers' minds.

However, it can be difficult to recruit under this system because you won't be able to tell applicants exactly how much money they will make or how many hours they will work. Also, it can be complicated trying to determine a fair per-test pay rate because the time it takes to complete different tests can vary widely. When we instituted this pay system, we set a \$40.00 rate for a visit that involved completing an application only, and a \$50.00 rate for a visit that involved an interview. We set the rates by: 1) reviewing tests conducted thus far and estimating the time testers spent at the test site, traveling to and from the test site, making related phone calls and writing reports; and 2) determining the average number of hours per application visit and per interview visit, and setting a rate based on the wage we had paid testers when they worked hourly.

How you define all of the above elements in writing your tester job description will affect the number and type of candidates you are able to recruit to be testers in your operation. We have tried a combination of approaches, and all have had advantages and disadvantages. There isn't one simple answer that will bring the people you need to your door. One thing we have learned is that it is necessary to recruit a large pool of applicants to find and pair appropriate testers.

III. Recruitment Sources

Recruiting testers is unlike recruiting for a traditional job. With most jobs, your first step might be to place a detailed ad in your local newspaper, figuring that advertising widely and providing as complete a job description as possible will increase your likelihood of attracting qualified applicants. In recruiting testers, however, you may want to be more careful about how much information you disseminate and whom you invite as applicants.

If not done with some discretion, advertising for testers in the newspaper could alert employers to your operation before you're ready for them to know about it, or give them clues you don't want them to have about when and how you're conducting tests. An ad in the job classifieds could invite employers or others who want to find out how your operation works to "plant" an applicant--a sort of "countertester"--to gather information in order to expose your operation, or for other of their own purposes that could undermine its effectiveness in enforcing civil rights. While this may seem like an unduly paranoid concern, it has happened in housing testing operations. The loss of time and effort involved in devising new tactics when key details of your methods become known makes it worth taking extra precautions to protect them from exposure.

When we advertise for testers in the classifieds, we don't use the term "tester" and we don't describe the duties involved. Instead, we list skills we seek (e.g., typing speed when we are testing jobs whose hiring process involves taking a typing test). We place the ad under the same category where the kinds of jobs for which testers will be applying are found (e.g., under "administrative" when we are seeking testers to apply for general office jobs).

Whether you choose the newspaper classifieds or other recruitment outlets will depend upon your tester archetype and the kinds of jobs you'll be testing. Following are some of the advertising outlets we have used to recruit African-American, Latino and white women and men (see sample ads at the end of this chapter; the ads reflect a variety of skills we've sought to test different job categories, and a variety of pay scales and systems with which we've experimented):

- college and university placement offices
- professors, department offices and graduate programs in specific disciplines such as sociology, urban studies, political science, journalism, psychology, African-American studies, etc.
- campus African-American and Latino student cultural centers
- student organizations for African-Americans, Latinos, women, etc.
- law schools

- secretarial, paralegal and office technology schools (when we need people who can type to apply for administrative positions for which they will be tested as part of the application process)
- community job placement and training organizations that work specifically with minorities and women
- community organizations that work with the population represented by our tester archetype, or on similar issues (poverty, race, etc.)
- organizations serving women in the building trades and other jobs traditionally held by men
- other organizations that do testing, in housing, mortgage lending, etc.
- theaters and job placement outlets for actors
- word of mouth spread among former testers, LAFC staff and friends

Of course, none of the above recruiting outlets necessarily safeguard your operation against "countertesters," but they do allow you to maintain a little more control over how widely you publicize your hiring process than does advertising in the newspaper.

Our steadiest sources of tester recruits have been the placement offices of local colleges and universities. College students have flexible schedules and are often looking for part-time work they can fit around classes, factors which work well with the part-time temporary status of our tester position. They tend to have the education and skills necessary to be effective testers, particularly the writing skills.

We have also recruited excellent testers through LAFC contacts and former testers. These recruits tend to come to us with some understanding of the operation and its goals, and are motivated to help achieve them.

We have had less success recruiting from among the population most closely represented by our tester archetype (e.g., from job placement and training organizations that serve low-income minorities, from office technology schools and two-year community colleges), for the very reasons that we are seeking to gain greater access to good jobs for this group. Many potential recruits from these sources are under much greater financial pressure than the average college student seeking a four-year degree. They often have families and are looking for a full-time permanent job to support them. A temporary part-time job as a tester often isn't feasible for them.

A caveat about recruiting actors: While it may seem natural to assume that actors would make good testers because they would be able to comfortably and convincingly assume another identity, we have run into scheduling difficulties with them. A person who is seriously trying to make a living as an actor must give their first allegiance to auditions and rehearsals, which are often scheduled on short notice. An actor's hectic schedule is sometimes not conducive to keeping interview appointments with employers.

STUDENTS & OTHERS -- PAID SUMMER INTERNSHIP -- PART-TIME HOURS

YES, you can:

- * earn money
- * gain valuable interviewing skills
- * do something good for the community

Be an

EMPLOYMENT TESTER

for an

INNOVATIVE ANTI - DISCRIMINATION PROGRAM

The **Employment Discrimination Project** of the **Legal Assistance Foundation of Chicago** seeks motivated, responsible people to assist in carrying out a study of hiring practices. African-Americans paired with whites, and women paired with men, will apply for jobs to determine whether there are differences in treatment in the hiring process based on race or gender.

The position requires:

- 1) strong oral and written presentation skills
- 2) ability to observe and report events accurately and keep meticulous records
- 3) punctuality
- 4) availability to work 10 am - 5 pm Monday - Thursday, June 16 - September 4

The position offers:

- 1) payment of \$8.00/hour, 25 hours/week for 12 weeks
- 2) an opportunity to develop your interviewing skills and knowledge about the job market

For more information, call:

**Teresa Matthews
Project Associate
Employment Discrimination Project
Legal Assistance Foundation of Chicago
(312) 431-2270**

- YES, you can:
- * earn money while you're in school
 - * gain valuable interviewing skills
 - * do something good for the community

Be a

PART - TIME EMPLOYMENT TESTER

for an

INNOVATIVE ANTI - DISCRIMINATION PROGRAM

The **Employment Discrimination Project** of the **Legal Assistance Foundation of Chicago** seeks interested, responsible people to assist in carrying out equal employment opportunity enforcement efforts. Pairs of testers will be sent to apply for jobs to determine whether there are differences in treatment in the hiring process based on race or gender.

The position requires:

- 1) strong oral and written presentation skills
- 2) ability to observe and report events accurately and keep meticulous records
- 3) punctuality
- 4) some hours available to work between 9 am and 5 pm Monday through Friday
- 5) some knowledge about how to get around Chicago on public transportation

The position offers:

- 1) payment of \$40/application and \$50/interview
- 2) a flexible work schedule
- 3) an opportunity to develop your interviewing skills and knowledge about the job market

For more information, call:

LeeAnn Lodder
Project Manager
Employment Discrimination Project
Legal Assistance Foundation of Chicago
(312) 347-8395

SELECTING TESTERS

In our experience, finding appropriate testers who match each other and have schedules that can accommodate testing is the most difficult part of employment testing. The testers you choose and the pairs you match can make or break your testing operation. It is extremely important to hire people in whom you have confidence, and to match testers in pairs you feel good about. If you have doubts, or foresee potential problems or mismatches in key characteristics, it could show up in test results and all your hard work could be in vain.

Selecting and matching testers takes time--make sure you allow yourself enough. It's not beneficial in the long run, for example, to simply set a timetable for tester hiring, and to hire the best people you can find and match within that time period. If they can't perform the job, or if members of a pair can't present themselves equally well, your tests won't be useful for enforcement purposes. As we have gained experience hiring testers, the time we have devoted to recruiting has increased. A recent recruiting drive took about 10 weeks, during which we screened 100 candidates by phone and interviewed 22 in person to form two tester pairs.

With experience, you'll sharpen your ability to identify quality testers and pair them appropriately. This chapter outlines the tester selection and matching process we have developed.

I. Initial Phone Screen of Potential Candidates

All of our tester job ads ask applicants to apply by calling rather than by sending a letter and resume. Since there is no specific background required to be a tester, a person's resume tells you very little about what kind of a tester they would make. We prefer to make an initial assessment about whether an applicant would be appropriate to invite in for an interview by talking with them on the phone.

We use the initial phone conversation with an applicant for several purposes:

- 1) to explain the tester position and determine whether the applicant is still interested. As part of our explanation, we make sure the applicant understands that the reports she writes could be used as legal evidence and that she could be called upon to be a witness in legal proceedings.
- 2) to find out if the applicant's schedule has the flexibility necessary for testing, and whether the hours and pay of the position meet her needs.

- 3) to assess the applicant's level of articulateness and enthusiasm.
- 4) to get a quick work and educational history in order to determine whether the applicant's background could be applicable to the jobs targeted for testing.
- 5) to find out if the applicant is of the race, gender and age needed for the round of testing for which we are hiring. Even with the obvious relevance of this information to the tester position, asking such questions can be sensitive. We wait until we have talked with the applicant for awhile and fully explained the testing operation, so that she understands why we are asking for this information.

It's worth it to gather the above information from every interested applicant, because even if they're not right for the current round of testing, they may be right for a future round. Since you need to talk to a large number of applicants to find the people you need, you don't want to lose track of any potential candidate.

If an applicant seems appropriate for the current test round based on the information gathered in the initial phone conversation, we invite her in for an interview.

II. The Confidentiality Agreement and Application

When applicants arrive for a scheduled interview, we ask them to read and sign a confidentiality agreement before we proceed. The agreement explains that the testing operation is confidential. In signing it, applicants promise not to disclose anything they learn during the hiring process about the specific nature of the operation, whether or not they are ultimately hired as testers. They must sign the agreement before they can receive an application. (See sample applicant agreement at the end of this chapter).

We ask applicants to complete a detailed, 9-page application (see sample application at the end of this chapter). The first page explains the purpose of the testing operation and the role of a tester. It informs them that they may be asked to testify in court, that they will not be paid to testify, and that they will not be able to receive monetary damages recovered through testing litigation. (Some housing testing organizations sue for damages for testers and allow testers to keep the money. Since employment testing is new and the issue of tester standing has not been fully resolved, we felt it was more important to remove any potential doubts about testers' objectivity and neutrality. So we ask testers before they start work to sign a contract assigning their rights to any monies recovered through litigation to other non-profit organizations engaged in civil rights enforcement efforts).

The application further explains that it asks applicants more detailed and personal questions than most job applications (e.g., race, age, height, weight, etc.) in order to assist in the process of matching them with a test partner.

The application requests complete educational and employment histories. It also requests other information that may be relevant in applying for various types of jobs as a tester, such as typing speed, cash handling experience, possession of a valid driver's license, etc.

At the end of the application, applicants are asked to read and sign a more detailed confidentiality agreement. In signing the final statement, applicants agree to the terms involved in being a tester as explained on the first page, and agree not to disclose the specific nature of the operation, their participation in it, the names of employers tested or the test results.

The application is designed to collect as much information as possible about the applicant, which you can then flesh out in the interview. The more information you collect, the better opportunity you have to assess an applicant's suitability for the position.

The lengthy application serves a few other useful purposes. Noting how completely and legibly an applicant fills out your application gives you a good indication of how well he will complete applications for employers he tests, as well as how thorough a job he might do in completing test reports. It also gives an initial clue about the applicant's attitude and willingness to follow instructions. An applicant who balks at completing a long form is unlikely to make a good tester.

III. Testing Applicants

Because the narratives testers write about their test experiences will be the key evidence in any test-based litigation, it's important to evaluate an applicant's writing ability. At some point, generally after the application and interview, we collect an on-the-spot writing sample from applicants. We ask them to spend about 15 minutes writing a narrative describing how they got to LAFC that day, being as detailed and specific as possible about the chronology of events involved and anything they observed along the way. This exercise simulates the type of narrative they will be trained to write following a test, and gives us an opportunity to assess the clarity of their writing and their powers of observation. Since testers write all their reports by hand, it also gives us an opportunity to see whether the applicant has legible handwriting.

If we are hiring testers to apply for jobs whose hiring processes routinely involve taking any type of test, we also give applicants tests similar to those they may be asked to take by employers. When we hire testers to test employment agencies, for example, we give them typing, grammar and spelling tests similar to those given at agencies.

We test our tester applicants to make sure that they can do reasonably well on any tests employers might give them, and that, if there's any variation, it's in favor of the minority or female applicant. Thus, when hiring black and white women to test jobs whose application processes involve taking a typing test, we seek to pair white women with black women whose typing speed is ten or more words per minute faster. If we test them and find that this is not naturally the case with two testers we otherwise want to pair together, we might have the white woman slow down so that she tests at a lower speed than her black partner.

IV. Interviewing Applicants

The first thing we note is whether the applicant arrives on time for his scheduled interview. If an applicant can't make it to your interview on time, you have no basis for believing he will arrive on time for test appointments.

We have developed a two-interview hiring process. The first interview is an extensive one-on-one discussion with the project manager. It generally takes about an hour. The manager takes this time to explain the testing operation and answer any questions the applicant might have about his role as a tester. She asks the applicant a lot of questions about his background, strengths and weaknesses, goals and reason for interest in the job. Through this discussion, the manager assesses the applicant's interviewing ability, personality and background in order to determine whether he would make a suitable tester. At the same time, she tries to fix an impression of him in her mind that will help her pair him with a potential partner.

During the first interview, the manager also asks a series of questions to identify any issues in the applicant's background that could potentially affect his credibility as a model job applicant and court witness. These include issues such as a criminal conviction, problems with previous supervisors or a discharge from a previous job, or involvement in a discrimination suit against an employer that was lost or is pending (see sample "Interviewer's Checklist" at the end of this chapter). Incidents in these areas of a tester's background could be discovered by an employer being tested, skewing test results, or they could be raised during test-based litigation by defense attorneys seeking to discredit testers.

If an applicant passes the above stages satisfactorily, and a potential partner who has also passed them is identified, both candidates are called in for second interviews with the manager and one or more other interviewers. The interviews are conducted separately but in close succession. The role of the additional interviewer(s) is to offer a second opinion on the impression the applicants make and on the proposed pairing. Additional interviewers could include: someone from the industry you are planning to test; someone with a good deal of hiring experience, or specific experience hiring people for the job you are testing; a former tester or testing manager; or even just someone who has especially good judgment about people. It's a good idea to bring in interviewers who can add another perspective, such as being of a different race, gender, etc., from project staff (particularly being a member of the protected class variable to be tested if staff members are not). It helps, too, if interviewers understand what employment testing is about and the characteristics that are important to match in a tester pair to help them make a similar impression on employers.

Following the second interviews of both candidates, the manager and second interviewer confer and make a final determination about the suitability of the testers and of the proposed match. Prior to extending a job offer, we call candidates' former employers and/or other professional or character references they provide.

V. Characteristics to Match in Tester Pairs

Your goal is to create a pair in which the testers are similar in every characteristic relevant to the jobs they will be testing, with the major difference between them being the variable you want to test--race, gender, etc.

Some characteristics--education, skills, previous work experience--can largely be created "on paper" when testers develop their test identities during training (see Chapter Seven, section III). It's relatively easy to invent such characteristics when you're testing entry-level jobs, where you won't likely be asking testers to assume identities of job seekers with higher skills and education than the testers themselves possess. We have found, though, that testers' presentations tend to be more similar when their actual levels of education and experience are comparable.

Other characteristics may be equally job-relevant but less easily manufactured. These include attributes such as personality, assertiveness, energy level and confidence. We try to hire test partners who already resemble one another in their expression of these traits, and then fine tune the similarity of their presentations during training.

Ideally, characteristics such as height, weight and physical attractiveness shouldn't be relevant to an employer's hiring decision. In reality, they may play as big a role in the selection process as credentials listed on a resume. We have found this to be especially true, for example, in the case of weight with women, and similarly though a bit less so, in the case of height with men. In order to isolate the variable we want to test, then, we have found it necessary to hire test partners who are similar in height, weight and general attractiveness (that is, average to tall, relatively slim and reasonably attractive).



EMPLOYMENT DISCRIMINATION PROJECT

LEGAL ASSISTANCE FOUNDATION OF CHICAGO

Writer's Direct Number:

343 South Dearborn Street • Chicago, Illinois 60604 • (312) 341-1070
FAX (312) 341-1041
TDD No.: (312) 431-1206

To the Employment Tester Applicant:

The Employment Discrimination Project of the Legal Assistance Foundation of Chicago is recruiting people to assist in a study of hiring practices. This project is confidential and, as a condition of participation, you will be asked to sign a confidentiality agreement at the end of the application. The agreement requires that you not disclose the specific nature of the project, the names of employers studied and/or the project's results, either for the duration of your participation in it or afterwards, unless instructed to do otherwise by the Legal Assistance Foundation of Chicago. If, for any reason, you feel you cannot follow these requirements, you need not complete an application -- you can simply let us know you have decided not to apply.

I understand that, as a condition of participation in the Employment Discrimination Project, I will be asked to sign a confidentiality agreement at the end of the application. I understand that by choosing to complete an application -- even if I am not selected to participate in this project -- I am agreeing to keep the specific nature of the project confidential.

Signature

Date

READ AND SIGN THIS PAGE

AND RETURN IT TO THE RECEPTIONIST TO RECEIVE AN APPLICATION

FOR OFFICE USE

SCHED: _____

ARR: _____



EMPLOYMENT DISCRIMINATION PROJECT

LEGAL ASSISTANCE FOUNDATION OF CHICAGO

Writer's Direct Number:

343 South Dearborn Street • Chicago, Illinois 60604 • (312) 341-1070
FAX (312) 341-1041
TDD No.: (312) 431-1206

APPLICATION FOR EMPLOYMENT TESTER

This project compares the experiences of black, Latino and white job seekers, or female and male job seekers, when applying for and interviewing for jobs. This study is an investigation that may result in litigation as a means of enforcing civil rights laws. The information collected may be used to file suits against businesses that violate federal, state and local employment discrimination laws.

In this study, data will be collected by conducting employment "tests." You are being recruited as an "employment tester." A test is conducted by sending out pairs of trained testers who separately apply for the same jobs. The testers in a pair are similar in every characteristic relevant to the job for which they are applying except the variable being studied -- race, ethnicity or gender. Each tester will record in writing detailed information about his or her experiences.

You may be asked to testify about your experiences in court under oath. In order to remove any doubt about your objectivity and neutrality, you will not be paid to testify. Also, prior to conducting any tests, you will be required to sign a contract assigning your rights to any monies recovered through litigation involving tests in which you participate to the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. and/or the Public Interest Law Initiative to support civil rights enforcement efforts.

It is important for you to understand that we can only hire you for this study if you can be matched with another tester. So, while we may feel you are ideally suited to perform this kind of research, if there is no other applicant of the appropriate race or gender with similar characteristics, you may not be selected.

If you are selected as a tester, you will be required to participate in mandatory training sessions. You will be paid while in training.

TESTER APPLICANT PROFILE

We will use the information you give us on this form to pair you with another tester with similar characteristics, and to determine what kinds of jobs you would be best suited to test. You will notice that we ask more in-depth and personal questions than those normally found on a job application. This allows us to get a better idea about you as a person to help us match your background, experience and personality with those of a test partner, and with the types of jobs we want to test.

This information will be held in confidence but may be released if a charge is filed with the Equal Employment Opportunity Commission (EEOC) or if litigation is pursued.

Please fill out all sections completely.

=====

NAME _____

How were you referred to this position? _____

CURRENT ADDRESS _____

Number Street Apt. No.

City State Zip Code

HOME PHONE: (_____) _____ - _____

Do you have an answering machine? Yes _____ No _____

MAY WE CONTACT YOU AT WORK? Yes _____ No _____

If yes, work number: (_____) _____ - _____

Best time to reach you at work: _____

PERMANENT CONTACT ADDRESS (a parent or other close relative or friend who is not likely to move in the next three years and who will always know where you are):

Name Relationship

Number Street Apt. No.

City State Zip Code

PHONE: (_____) _____ - _____

PERSONAL INFORMATION

RACE/NATIONAL ORIGIN
(check one)

- White, not of Hispanic origin
- African-American, not of Hispanic origin
- Hispanic
- Asian or Pacific Islander
- Native American or Alaskan Native
- Other (specify): _____

CITIZENSHIP STATUS
(check one)

- U.S. citizen
- Permanent resident alien
- Temporary resident alien
- Other (specify): _____

GENDER _____ AGE _____
BIRTHDATE _____ BIRTH PLACE _____
Month Day Year City State Country
HEIGHT _____ WEIGHT _____ HAIR COLOR _____ EYE COLOR _____
MARITAL STATUS _____ NO. OF CHILDREN _____

Children's ages and genders _____

Do you have a social security card? Yes _____ No _____

Social security number _____ - _____ - _____

Do you have a valid driver's license? Yes _____ No _____

If yes, in what state was it issued? _____

Driver's License No. _____

Do you have a car, or access to a car? Yes _____ No _____

If yes, make, model and year _____

Can you provide proof of automobile insurance? Yes _____ No _____

How well do you know the metropolitan area?

Very well _____ Fairly well _____ Not very well _____

How well do you know the suburbs?

Very well _____ Fairly well _____ Not very well _____

How often do you use the Chicago public transportation system?

Often _____ Occasionally _____ Rarely or never _____

COMMUNITY AND PUBLIC AFFAIRS

Has your name been mentioned on television or radio or in newspapers in the Chicago area? Yes _____ No _____

If yes, explain _____

Are you active in any community, civic, political or religious organizations? Yes _____ No _____

If yes, explain _____

Are you an officer of any community, civic, political or religious organizations? Yes _____ No _____

If yes, explain _____

Are there any companies or industries you believe you should not test because you might be recognized? Yes _____ No _____

If yes, specify _____

Have you ever been trained and/or worked as a "tester" for similar research? Yes _____ No _____

If yes, explain _____

What days and hours would you generally be available to conduct tests?

MONDAY	(AM)	_____	(PM)	_____
TUESDAY	(AM)	_____	(PM)	_____
WEDNESDAY	(AM)	_____	(PM)	_____
THURSDAY	(AM)	_____	(PM)	_____
FRIDAY	(AM)	_____	(PM)	_____

EDUCATION

Please list all schools you have attended.

ELEMENTARY/JUNIOR HIGH SCHOOL(S) :

Name City State Dates Attended

Name City State Dates Attended

HIGH SCHOOL(S) :

Name City State Dates Attended/Grad Date

Name City State Dates Attended/Grad Date

COLLEGE(S) AND/OR UNIVERSITY(IES) :

Name City State Dates Attended
Concentration _____ Degree _____

Name City State Dates Attended
Concentration _____ Degree _____

Name City State Dates Attended
Concentration _____ Degree _____

SPECIAL TRAINING / CERTIFICATION(S) _____

EMPLOYMENT HISTORY

Are you currently employed, either full or part-time?

Yes _____ No _____

Please provide the following information on the last three jobs you have held. Begin with your current or most recent job:

EMPLOYER _____
Name _____

Address _____
Number Street City State Zip Code

Type of employer _____

Job title _____ Salary _____

Job duties _____

Starting date _____ Ending date _____

Reason for leaving _____

Supervisor _____ () _____ - _____
Name Phone Number

EMPLOYER _____
Name _____

Address _____
Number Street City State Zip Code

Type of employer _____

Job title _____ Salary _____

Job duties _____

Starting date _____ Ending date _____

Reason for leaving _____

Supervisor _____ () _____ - _____
Name Phone Number

EMPLOYER _____

Name _____

Address _____

Number Street City State Zip Code

Type of employer _____

Job title _____ Salary _____

Job duties _____

Starting date _____ Ending date _____

Reason for leaving _____

Supervisor _____ (_____) _____ - _____

Name Phone Number

Please list all other jobs you have held prior to the three listed above, including entry level and low-skilled jobs. Begin with the most recent jobs:

Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration
Position	Employer	Salary	Duration

SKILLS

Can you type? Yes _____ No _____

If yes, how many words per minute? _____

Do you have cash register or cash handling experience?

Yes _____ No _____

If yes, explain _____

Do you have any computer skills? Yes _____ No _____

If yes, explain _____

Other special skills _____

Hobbies or interests _____

APPLICANT STATEMENT

PLEASE READ CAREFULLY

The information I have provided on this form is accurate and complete to the best of my knowledge. The role of a tester has been explained to me. I understand that I can only be offered a position as an employment tester if the Legal Assistance Foundation of Chicago is able to pair me with one or more partners with similar characteristics. I understand that, in order to be employed as a tester, I must participate fully in the training sessions and carefully follow the instructions for conducting tests as provided to me by the Project Manager. In addition, I understand that I may have to participate in litigation based on my test experiences after I perform the tests, and that I will not be paid for such participation. Further, I understand that, in order to remove any doubt about my own objectivity and neutrality, I assign all my rights to any monies recovered through litigation involving tests in which I participated to the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. and/or the Public Interest Law Initiative to support civil rights enforcement efforts.

I agree that I will not disclose any information about the specific nature of this project, my participation as a tester, the names of employers studied, and/or the project's results, unless instructed to do otherwise by the Legal Assistance Foundation of Chicago.

Signature

Date

INTERVIEWER'S CHECKLIST

Applicant _____

Interviewed by _____ Date _____

1. Have you ever been trained and/or worked as a "tester" for research similar to our project (employment, housing, other)?

Yes _____ No _____ If yes, for what organization?

If yes, have you ever participated in litigation? (please explain)

2. Have you ever been sued? Yes _____ No _____

If yes, please explain. _____

If yes, what was the result of the suit?

3. Have you ever sued anyone, or filed a discrimination complaint against an employer? Yes _____ No _____

If yes, please explain. _____

4. Have you received any traffic tickets for moving violations in the past five years? Yes _____ No _____

If yes, how many, when and what was/were the violation(s)? _____

5. Have you ever been convicted of a crime? Yes _____ No _____

If yes, please explain. _____

6. Do you have any credit problems? Yes _____ No _____

If yes, please explain. (Have you seen your credit report?)

7. Could you pass a drug test? Yes _____ No _____

If an employer you were testing asked you to take a drug test, would you be willing to do so? Yes _____ No _____

8. Have you had any legal problems that might affect your credibility as a tester? Yes _____ No _____

If yes, please explain. _____

9. Do you have any physical or mental disabilities that would make it difficult to do certain kinds of work? Yes _____ No _____

If yes, please explain. _____

10. Have you ever been fired from a job? Yes _____ No _____

If yes, please explain, including the name(s) of the employer(s) and the date(s). _____

11. What kind of reference would your present/most recent employer give you?

Prior employer? _____

Would any other previous employer give you a negative reference?

Yes _____ No _____ If yes, please explain, including the employer's name and the dates you worked there. _____

12. Would you feel comfortable playing the role of a job applicant even if it means assuming characteristics that are not your own?

Yes _____ No _____

Please explain why. _____

13. Would you feel comfortable using your own name, address and phone number as part of your identity on tests? Yes _____ No _____
14. Are you willing to keep us informed about changes in your address for the next three years, and to be available, if necessary, to participate unpaid in legal proceedings? Yes _____ No _____
15. Are you willing to be a named plaintiff in a lawsuit, and, in order to remove any doubt about your objectivity and neutrality, to assign your rights to any monies recovered through litigation involving tests in which you participate to the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. and/or the Public Interest Law Initiative to support civil rights enforcement efforts? Yes _____ No _____

INTERVIEW RESULTS

HIRED _____

START DATE _____

HIRE IN FUTURE _____

NOT HIRED THIS TEST CYCLE BECAUSE:

_____ PARTNER MATCHING PROBLEM

_____ AVAILABILITY PROBLEM

_____ DISCRIMINATION SUIT PENDING

DO NOT HIRE _____

TRAINING TESTERS

I. Agenda for Tester Training

Once you've selected and matched your tester pairs, you need to train them thoroughly in the testing procedures you've developed. Your goal is not only to get partners to present themselves comparably, but also to prepare them to handle a variety of situations that may arise in the course of a test in ways most likely to maintain the test's integrity. To do this, testers must fully understand the testing method and their role in it.

We have developed a tester training workshop that spans at least three full days (see "Sample Tester Training Workshop Agenda" at the end of this chapter). We may extend formal training into additional days if circumstances call for it, such as: 1) if testers need to learn a new body of knowledge in order to credibly test the selected industry (testers applying for wait staff jobs in upscale restaurants, for example, must have some familiarity with fine food and wine); 2) if we are training more than a couple of pairs, because of the time it takes to run each pair through practice interviews; or 3) if we determine that one or more tester pairs need more practice and fine tuning of their test identities before being sent into the field. Our workshop covers several key topics:

- what discrimination testing is and why it's done, including some of the legal history, the history of housing testing, etc.;
- the tester's role as a neutral observer and recorder of events, a model job applicant and potential court witness;
- procedures for conducting a test;
- how to complete test reports, including narrative writing exercises in which testers learn to produce detailed, accurate and objective narratives without introducing their own feelings and interpretations of events;
- development and matching of tester pairs' identities and resumes;
- interviewing practice with different interviewers asking a variety of questions, followed by group critiques through which testers fine tune their presentation to match their partners.

The rest of this chapter offers a more detailed discussion of some of the training exercises we have developed.

II. Narrative Writing Exercises

The adage which says that the best way to learn is by doing is certainly true in the case of writing narratives for legal evidence. But you don't want your testers learning to write narratives on tests that may become part of legal action.

To give new testers an opportunity to practice writing narratives before they test, we have them watch and then write about videotaped interviews created by LAFC staff. It's not the same as writing about an interview in which they took part, but it gives us an opportunity to discuss narrative writing as a group.

We try to make our video interviews similar to those testers may experience in the tests they will be doing. Then, at some point in the interview, we have the interviewer make a comment or behave in a way that could be construed as racially or sexually discriminatory, but may not be clearly so. For example, an interviewer may say to a black or female applicant something like, "I'm not sure you'd feel comfortable among the rest of the people who work here." Or the interviewer may be short with the applicant or act disinterested. We do this to create a tool for discussing the difference between recording events as they occurred, and writing one's own feelings about and interpretations of those events.

Testers watch and write narratives of two videotaped interviews. We show the first one without giving them any guidance about how to write the narrative. Many people initially fall into the "trap" we set, writing narratives in which they jump to conclusions about the interviewer's thoughts or intentions, overstate or misstate the interviewer's questionable comment, or write how they feel about the interviewer's behavior. Using examples from their own narratives (without names, to facilitate free and unembarrassed discussion), we show them the difference between reporting what the interviewer said and did, and reporting *what they think about* what the interviewer said and did. We explain that the former is what will be useful as legal evidence.

We also use examples from their narratives to illustrate other important aspects of narrative writing, including: accuracy, completeness, attention to detail, avoiding generalizations, reporting events chronologically, and using quotation marks correctly. Sometimes, we show them the videotape again, so they can compare what actually happened with what they wrote.

Following this discussion, testers watch another videotaped interview and write another narrative. A second, shorter discussion, again with examples of do's and don't's from their own writing, is generally sufficient to reinforce main points and identify any problems that still exist.

We have found this process to be extremely effective in teaching testers to write good narratives, because it allows them to examine their own thought processes and become more critical, careful reporters and writers.

III. Developing Identities and Resumes for Tester Pairs

In developing tester pairs' identities and resumes for enforcement-based testing, you want to match--and vary slightly in favor of the minority or female tester--characteristics similar to those you use in creating simulated applicant pairs for a resume mailing operation (see Chapter Four, section IV). In fact, if your testers are going to be applying for jobs with employers targeted through a resume mailing operation, their credentials should be similar not only to one another, but to their simulated applicant counterpart as well. Otherwise, you could introduce new variables into the test process that could prevent you from determining whether the pattern you observed in the employer's response to the mailed resumes was indicative of discriminatory hiring practices. For example, if your tester pairs are not as qualified as the simulated applicants, both may be rejected.

For simulated applicants, you need only develop enough of a background to create a resume. But with testers, you'll want to flesh out many more details because they'll be talking in person with employers, who will want to know more about them than what's listed on their resume. Testers need to be able to tell their stories convincingly, and respond to unexpected questions that may not be directly related to the job, but that real applicants could answer about themselves without hesitation. If they haven't worked out these details ahead of time, they may pause too long or give a reply that doesn't fit the rest of their story.

In our operation, each tester develops his own test identity, with our guidance, building as much as possible upon his real life and experiences. Testers are more comfortable and better able to remember the details of identities they have worked out themselves, and which are based upon their real lives. Their comfort with the material makes them come across more credibly in an interview situation. Having each tester develop his own identity also increases uniqueness and diversity among tester backgrounds.

The tester identity creation process we have developed involves several steps:

- 1) Each tester writes down key details of his real-life background (see sample "Tester Biography Worksheet" at the end of this chapter; testers write their details in the "Actual Identity" column).
- 2) Test partners compare their actual backgrounds, noting similarities and differences.
- 3) After being briefed on the types of jobs for which he will be applying, each tester brainstorms on a separate sheet of paper every job or activity he can remember doing that relates in any way to the targeted jobs.

- 4) Using the brainstorm list, each tester develops a fictional work and educational history, made up of as many components from his real life as possible (he records it in the "Test Identity" column on the tester biography worksheet; see sample at the end of this chapter). Partners work together at this stage, altering each one's details as necessary to make themselves comparable, with the minority or female partner a little stronger. Testing operation staff work with each pair to make sure they're on track.
- 5) When they're finished, the pair transfers the identities they've developed onto a common form (see sample "Tester Team Biographies" form at the end of this chapter). They study this in preparation for practice interviews.

There are a few tricks you can suggest to a tester who is stumped to help him create an identity. If he is having trouble creating an appropriate work history out of the jobs or activities he has actually done, he might be able to picture the environment of a place where he really worked, but imagine that he held a different job there. For example, we once had a tester who needed to create a salesperson's work history, although his own background was primarily in newspaper reporting. He created a job for his test resume in which he sold newspaper classified ads. Because the environment of the fictional job was familiar, it wasn't such a big leap for him to familiarize himself with the fictional job as well. Another trick the tester can use is to think of people he knows who hold or have held the targeted job, or who work in the same general field. He can "borrow" details from their work history to create his own, and perhaps can even talk to them to get more details to make his story credible.

Just as with simulated resumes that you mail to employers, you'll need to decide whether your testers will use the names of real companies as former employers in their test identities (see Chapter Eight, section VII for a discussion of tester references). If you choose to use real company names, it's a good idea not to allow testers to use companies where they've actually worked (unless the employer is part of your testing operation and has agreed to act as a reference). This will avoid the chance that an employer being tested will call the company directly seeking a reference and discover an inconsistency in the tester's background (if, for example, you have changed the job description and the time period during which the tester worked there). One way to prevent this problem is to set up tester references yourself so that you can maintain control over how they are handled (see Chapter Eight, section VII).

IV. Interviewing Exercises

Interviewing practice is the most time-consuming, and perhaps most important, part of training. Testers need to have their stories down cold, and be able to relate them without hesitation in response to a variety of questions from interviewers with different interviewing styles. You need to feel confident that testers are presenting themselves well, and that partners are making comparable impressions, before you send them out to do their first test. As with hiring testers, interview training is not a task to rush.

We start by letting test partners practice interviewing one another. We give them a set of index cards, each card listing a question commonly asked in interviews on previous tests (see sample "Commonly Asked Interview Questions" at the end of this chapter). We encourage them to rearrange the cards and add their own questions to create varied interview scenarios. Allowing partners to work together gives them an opportunity to work out comparable yet unique answers as they practice.

Next, the partners interview one another in front of the group. After each interview, project staff and the other testers offer positive feedback and suggestions for improvement in each tester's presentation. Then, they offer feedback and suggestions regarding the comparability of the pair. Non-verbal characteristics, such as body language and energy level, are observed as well, and one or both partners are asked to make adjustments if necessary.

The tester who was interviewed gets a chance to give feedback, too. If something he said didn't come off well, it could be because a particular detail of his identity doesn't feel credible to him. He may need help fleshing it out, or it may be worth changing it to make him more comfortable.

Then, test partners practice together on their own again, fine tuning their presentations based on the feedback they have received. When they're ready, they interview one another again for the group. This time, project staff jump in with additional questions, and encourage other testers to do so, too. The additional questions might be ones that the partner-interviewer didn't think to ask, or ones that were raised by the interviewee's own responses. For example, the tester being interviewed might have made some statements that were not consistent with the identity he had worked out, or that left a negative impression. Pointed questions can show the tester the flaws in his story, so that he can see where he might get tripped up and can strengthen his performance.

Once test partners feel comfortable with their basic presentation and comparability, we may begin including additional people besides project staff in the audience at practice interview sessions. As is the case when hiring testers, it's a good idea at this point to get feedback from people who can add another perspective, such as being of a different race, gender, etc., from project staff (especially being a member of the protected class variable to be tested, if project staff are not). We have found it useful to solicit reactions from as many different people as

possible about how testers are coming across. Since each employer may react differently, the more reactions we can anticipate and adjust for, the better prepared and matched our testers will be.

Finally, it's a good idea to have each tester interviewed by an outside interviewer he has never met before, whose interviewing style he will be unable to anticipate. Ideally, this will be someone from the targeted industry, who can conduct an interview like those the tester will face in the field. New questions, or questions posed in a different way, can help prepare the tester to handle a variety of interview situations on a test. We have also found that, while a tester may have worked out just how he will answer a question posed in a particular way, if the question is framed differently, or with a different attitude, the tester's response may change as well--sometimes for better, sometimes for worse. Either way, letting the tester experience how this can happen gives him the opportunity learn how to maintain control over his story regardless of an individual interviewer's style and attitude.

We have the outside interviewer interview each test partner in a pair alone, and then give feedback--first to the individual tester regarding his performance and credibility, and then to the pair together regarding their comparability. In addition to acting as a "reality check" on testers' presentations, we have found that the process of being interviewed by an outsider from the industry they will be testing gives testers that last boost of confidence they need to go out and test effectively.

V. Practice Tests and Mock Tests

Before you send testers to apply for jobs with employers you suspect may be discriminating in hiring, you may want to run them through a few "random" tests on employers you have no suspicions about. This will give them a chance to get test procedures down and gain confidence using their test identity before it is likely to "count" in a test that ends up as part of legal action.

It will also give you a chance to double-check testers' ability to carry out their role. In reading their reports, questioning them closely after each test, and comparing their experiences with those of their partner, you can gain a sense of whether they are presenting themselves as they were trained to do and making a good impression on employers.

You may also want to send testers on a mock test--a test which, to their knowledge, is the real thing, but where the employer is someone who has agreed to interview your testers and tell you how they came across. You can then share the employer's feedback with the testers and talk about any adjustments that need to be made. Mock tests can be conducted at any time during the course of testing to check on how testers are performing in the field.

WORKSHOP AGENDA

Race Testing -- Wait Staff/Upscale Restaurants -- June 16-19, 1997

Day 1

- 10:00 -- 10:30 Breakfast and partner introduction exercise
- 10:30 -- 10:45 Complete employment forms & timesheets; conduct desk lotto; take tour; assign desks
- 10:45 -- 11:15 PrimeTime Live program; discussion/questions
- 11:15 -- 11:30 Intro to project and role of tester
- 11:30 -- 12:30 Watch videotape; write narratives
- 12:30 -- 1:15 Begin bio development:
-- complete "actual" portion of bio worksheet & compare to partner;
-- brainstorm restaurant experience, other customer service/public contact experience, extracurricular activities
- 1:15 -- 2:00 LUNCH
- 2:00 -- 4:00 Continue bio development:
-- create 3-4 job descriptions, w/ time periods, salaries, supervisors, and extracurricular activities
-- complete team bio sheets
- 4:00 -- 5:00 Distribute list of common interview questions; practice interviewing w/ partner, using biosheet; assign reference phone numbers
DISTRIBUTE: Wait Staff Handbook and assign reading;
Copies of team bio sheets to learn
Take copies of common interview questions home to practice

Day 2

- 10:00 -- 10:30 Administer "Know Your Waitstuff" Quiz 1; collect and then go over answers
- 10:30 -- 11:30 Go over 1st narratives, w/ examples; re-watch videotape, comparing w/ own narrative
- 11:30 -- 12:30 Distribute sample forms & instructions; review test procedures and form completion; discuss difficult situations
- 12:30 -- 1:30 Watch 2nd videotape; complete employment test form, including narrative

1:30	--	2:15	LUNCH
2:15	--	2:45	Distribute resumes; complete sample job application (using resume, but not bio sheet)
2:45	--	3:15	Distribute interview "Do's" and interview question cards; practice interviewing w/ partner and resume
3:15	--	5:00	Interview partner for group critique; adjust bios DISTRIBUTE: Copies of resumes to learn; copies of common interview questions practice

Day 3

10:00	--	10:45	Go over narratives and practice test forms; re-watch 2nd videotape, comparing w/ own narrative
10:45	--	11:30	Location and people description exercises
11:30	--	12:00	Distribute adjusted resumes; practice interviewing w/ partner, modifying answers in response to Day 2's critique
12:00	--	1:30	Interviewer from other team interviews each for group critique; outside interviewer observes
1:30	--	2:15	LUNCH
2:15	--	3:00	Lecture on wine and food by industry expert; take notes; ask questions
3:00	--	5:00	Interviews for group critique; industry expert sits in; as time allows, update team bio sheets DISTRIBUTE: latest version of resumes and team bio sheets; remind re: another quiz tomorrow, including info from lecture

Day 4

10:00	--	10:30	Administer "Know Your Waitstuff" Quiz 2; collect and then go over answers
10:30	--	11:30	Watch videotapes of gender wait staff testers and discuss
11:30	--	1:00	Complete sample job application (using resume, but not bio sheet); fine-tune & complete bio sheets; practice interviewing w/ partner, fine-tuning presentations in response to Day 3's feedback from industry expert and videotapes of gender wait staff testers
1:00	--	1:45	LUNCH
1:45	--	5:00	Industry expert interviews each tester alone; after each pair, critiques each tester alone, and then

TESTER BIOGRAPHY WORKSHEET

JOB TYPE _____

ACTUAL IDENTITY

TEST IDENTITY

Name: _____

Race: _____

Age: _____

Birth Date: _____

Birthplace
(City/State): _____

How long in
Chicago: _____

Why came to
Chicago: _____

Career Goal: _____

Home Address: _____

Who do you
live with: _____

Marital
Status: _____

No. of
Children: _____

Driver's
License/
State issued: _____

Other ID: _____

Moving
Violations/
Number/Year: _____

Car Available: _____

Year/Make: _____

ACTUAL IDENTITY

TEST IDENTITY

Name: _____

EMPLOYMENT HISTORY

Latest
Employer: _____

Job Title: _____

Duties: _____

Salary: _____

Starting
Date: _____

Ending
Date: _____

Reason for
Leaving: _____

Address: _____

Supervisor
Name: _____

Title: _____

Previous
Employer: _____

Job Title: _____

Duties: _____

Salary: _____

Starting
Date: _____

Ending
Date: _____

Reason for
Leaving: _____

ACTUAL IDENTITY

TEST IDENTITY

Name: _____

Prev. Employer
Address: _____

Supervisor
Name: _____

Title: _____

Previous
Employer: _____

Job Title: _____

Duties: _____

Salary: _____

Starting
Date: _____

Ending
Date: _____

Reason for
Leaving: _____

Address: _____

Supervisor
Name: _____

Title: _____

EDUCATION

College/
University: _____

City/State: _____

Major/Courses: _____

Years
Attended: _____

Degree/Year: _____

Why, If Didn't
Graduate: _____

ACTUAL IDENTITY

TEST IDENTITY

Name: _____

Other College
Attended: _____

Major/Courses: _____

Years
Attended: _____

Reason for
Leaving: _____

High School: _____

City/State: _____

Years
Attended: _____

Year
Graduated: _____

SKILLS/INTERESTS

Computer
Skills: _____

Typing Speed: _____

Cash Handling
Experience: _____

Special
Training/
Experience: _____

Hobbies/
Interests: _____

OTHER

Health: _____

Smoker: _____

TEST TEAM BIOGRAPHIES

JOB TYPE _____

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

Race: _____

Age: _____

Birth Date: _____

Birthplace
(City/State): _____

How long in
Chicago: _____

Why came to
Chicago: _____

Career Goal: _____

Home Address: _____

Who do you
live with: _____

Marital
Status: _____

No. of
Children: _____

Driver's
License/
State issued: _____

Other ID: _____

Moving
Violations/
Number/Year: _____

Car Available: _____

Year/Make: _____

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

EMPLOYMENT HISTORY

1) Latest
Employer: _____

Job Title: _____

Duties: _____

Salary: _____
starting / ending

starting / ending

Starting Date: _____

Ending Date: _____

Reason for Leaving: _____

Address: _____
Number Street

Number Street

City State

City State

Supervisor Name: _____

Title: _____

Phone: _____

2) Previous Employer: _____

Job Title: _____

Duties: _____

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

Salary: _____
starting / ending

starting / ending

Starting Date: _____

Ending Date: _____

Reason for Leaving: _____

Prev. Employer Address: _____

Number Street

Number Street

City State

City State

Supervisor Name: _____

Title: _____

3) Previous Employer: _____

Job Title: _____

Duties: _____

Salary: _____
starting / ending

starting / ending

Starting Date: _____

Ending Date: _____

Reason for Leaving: _____

Address: _____

Number Street

Number Street

City State

City State

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

Supervisor Name: _____

Title: _____

4) Previous Employer: _____

Job Title: _____

Duties: _____

Salary: _____ starting / ending

_____ starting / ending

Starting Date: _____

Ending Date: _____

Reason for Leaving: _____

Address: _____
Number Street

_____ Number Street

_____ City State

_____ City State

Supervisor Name: _____

Title: _____

5) Previous Employer: _____

Job Title: _____

Duties: _____

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

Salary: _____
starting / ending

starting / ending

Starting Date: _____

Ending Date: _____

Reason for Leaving: _____

Address: _____
Number Street

Number Street

City State

City State

Supervisor Name: _____

Title: _____

6) Previous Employer: _____

Job Title: _____

Duties: _____

Salary: _____
starting / ending

starting / ending

Starting Date: _____

Ending Date: _____

Reason for Leaving: _____

Address: _____
Number Street

Number Street

City State

City State

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

Supervisor
Name: _____

Title: _____

EDUCATION

College/
University: _____

City/State: _____

Major/Courses: _____

Years
Attended: _____

Degree/Year: _____

Why, If Didn't
Graduate: _____

Other College
Attended: _____

Major/Courses: _____

Years
Attended: _____

Reason for
Leaving: _____

High School: _____

City/State: _____

Years
Attended: _____

Year
Graduated: _____

MINORITY/FEMALE TESTER

WHITE/MALE TESTER

Name: _____

SKILLS/INTERESTS

Computer Skills: _____

Typing Speed: _____

Cash Handling Experience: _____

Special Training/ Experience: _____

Hobbies/ Interests: _____

OTHER

Personal References: _____

Health: excellent

excellent

Smoker: no

no

Available to Start: immediately

immediately

Part-time: want full-time; will consider part-time if it could lead to FT

want full-time; will consider part-time if it could lead to FT

Temporary: want permanent position; will consider temporary if it could lead to permanent job

want permanent position; will consider temporary if it could lead to permanent job

Shifts: will consider evening or weekend work; prefer normal weekday shift

will consider evening or weekend work; prefer normal weekday shift

Overtime: willing to work overtime

willing to work overtime

COMMONLY ASKED INTERVIEW QUESTIONS

1. Tell me about yourself.
2. Tell me about your work experience.
3. Tell me about what you did at your last job. At previous jobs.
4. What did you like/dislike about your previous job(s)?
5. How was your relationship with your boss at your last job? If I called your former employer, what would s/he say about you?
6. Why did you leave your last job? The jobs before that?
7. How long have you been out of work?
8. Where else have you applied? Have you had any interviews? Why do you think you haven't found a job yet?
9. How did you hear about this job?
10. What makes you interested in this job?
11. What is your greatest strength as a worker?
12. What is your greatest weakness as a worker?
13. What special skills/attributes do you have to offer that make you stand out from other applicants?
14. Why should I hire you?
15. What are your future plans? What do you see yourself doing in five years?
16. IF APPLICABLE: Why didn't you finish/continue your education? Are you planning to go to college?
17. What kind of salary do you need?
18. How will you be getting to work? Do you have a car?
19. What shifts/hours can you work?
20. Do you have any questions?

~ CHAPTER EIGHT ~

CONDUCTING AN EMPLOYMENT TEST

I. Pre-Test Preparation

A carefully selected, matched and trained tester pair is a valuable tool you don't want to waste. If a test is compromised because of inadequate information or preparation, you may not be able to test that employer again until you've developed another tester pair. Before sending your pair on a test, it's worth it to research your test target and prepare your testers as much as possible.

Prior to testing an employer, try to gather as much information as you can in the following areas (see Chapter Four, section III, for a discussion about sources for gathering this information):

- how the employer's hiring process works;
- the typical application method most applicants use (e.g., dropping in, calling or mailing a resume);
- the volume of applicants the employer generally sees;
- the available job opening--job duties and qualifications sought;
- a profile of the typical applicant for the available position;
- the exact location and hours of the employer's personnel office, and how to get there.

Armed with this information, you'll want to share with testers everything that will help them to conduct the test well. We give testers an assignment sheet on each employer they test (see sample "Tester Assignment Form" at the end of this chapter). It includes information such as:

- employer name, phone number, address and directions;
- what the employer does;
- the job for which the tester is applying;

- how the tester heard about the job (e.g., a friend; an ad--if the tester is responding to an ad, we give them a copy of it);
- instructions for applying (e.g., call first or drop in);
- contact name at the company, if applicable;
- special instructions regarding dress, arrival time, adjustments in identity (for example, we once sent two testers to apply for a job that involved inside sales. The white tester happened to have inside sales on his resume, while the black tester did not. We had the white tester remove inside sales from his background for that test so he wouldn't appear more qualified for the job than his minority partner).
- testers also receive a site number assigned to each employer they test, which is used to track that employer throughout the hiring process. Testers are instructed to put the site number on every report they submit on that employer. Every report also has a space for the test number, which refers to the number of pairs that have tested the employer. The test number is left blank, and is filled in by project staff after the tester has submitted the report. This is done so that testers do not know whether they are the first or one of a series of pairs to visit an employer, to prevent them from having preconceived ideas about whether or not that employer is discriminating.

While preparing the tester with all of the above information, you'll want to be careful to withhold information a real job applicant might not have which could compromise the test if testers knew it. For example, if you want testers to call about a job in response to an ad that gives only a phone number, you may not want to give them the employer's name and address. That way, if they are invited to come apply, they will have to ask the logical questions a real applicant would need to ask (e.g., the employer's name, address, location and directions).

We also withhold from testers any information about why they are testing a particular employer. They don't know if the employer was randomly chosen, was targeted through the simulated resume mailing operation, or is being tested in response to a complaint. Testers are also instructed not to talk with one another about their test experiences, either during a test or after it is completed. We want, as much as possible, to guard against having testers embark upon a test with preconceived ideas about what they will find.

II. Scheduling Initial Contact with an Employer

Whether it's done by phone or in person, the minority or female applicant always makes the first contact with an employer. You want to set the test up so that an employer cannot offer a job to the white or male applicant before he has been offered the opportunity to consider the more qualified minority or female applicant.

Ideally, we try to have test partners make their first contact no closer than 15 minutes apart, but within an hour of one another. But sometimes it's necessary to vary this time frame by as much as a day or so in order to avoid detection. Circumstances that might call for wider variation include when an employer hasn't advertised a position, is not accustomed to seeing many applicants, or has been tested by another pair recently.

If testers are working from the testing operation office, orchestrating initial contact is relatively easy. If the situation requires a call to the employer first, the minority or female tester calls first (from a caller ID-blocked phone line in a separate room). She reports what happened to a manager, and then completes her report (see sample "First-Contact-By-Phone Form" at the end of this chapter). If she made contact, regardless of its outcome, the manager gives her partner the go-ahead to call.

We try whenever possible, however, to have testers make their first contact in person, even if an employer's ad suggests that they prefer otherwise. This is particularly true when we are conducting race tests. Differential treatment of black and white applicants via phone does not constitute sufficient evidence to prove racial discrimination, because there is no proof that the employer knew the race of the callers. Nevertheless, employers will sometimes detect a minority tester's race from the dialect or inflection of her speech, and will reject her over the phone. Thus, she has lost the chance to present herself in person, and we've lost an opportunity to test that employer. To prevent this from happening, we generally bypass the initial phone call and get both testers out to the employer in person. This has never hurt a tester's chances as a job seeker and, in fact, employers are often impressed by the initiative applicants display by showing up in person.

When testers go on in-person tests from the office, we figure out how long it will take to get to the employer, send the minority or female applicant, and have her partner wait an appropriate length of time before setting out. If possible, we may wait until the minority or female tester returns from the test or calls in, so that we can find out what happened to her before sending her partner. Following any in-person contact with an employer, testers complete a detailed report (see sample "Employment Test Form" at the end of this chapter).

When we orchestrate initial contact between testers working from their homes, a manager acts as the intermediary. Each tester calls her to report the results of contact efforts, and she relays necessary information and instructions to the partner. This allows managers to maintain control over tests, and prevents testers' perceptions from being colored by knowledge of what's happening to their partner.

III. Monitoring Testers Through the Hiring Process

We train testers to keep in close contact with managers throughout a test. They must check in with a manager to report what happened (either by calling in or returning to the office, depending upon how the tests are being run) as soon as possible after any contact with an employer, whether it was by phone or in person. During the "check-in," the manager collects key details, including the date and time of the contact, whom the tester saw or spoke with, and what the tester was told to do next. She records it on a form designed to track what's happening to test partners in an employer's hiring process. The form provides a quick reference managers can use to keep tabs on tests in progress even before receiving testers' written reports (see sample "Test Tracking Form" at the end of this chapter).

In addition to filling out the tracking form, the manager takes notes on anything else testers say when they make their verbal reports. Later, she checks the notes against the written reports the testers submit, and asks them about any omissions or inconsistencies when she debriefs them (see section V for a discussion of debriefing).

Managers need to have the tracking information at their fingertips because, although testers follow an employer's instructions in pursuing the job once we've introduced them into the hiring process, managers sometimes need to orchestrate the pursuit. They need to ensure that both testers are pursuing the job with equal vigor, and that the employer is given every opportunity to consider the minority applicant. For example, if a white tester is told to call back in three days, while his black partner is given no specific time frame in which to follow up, managers will have the black tester call back in three days as well, making his call before his white partner. (Testers record follow-up calls--*from* employers as well as *to* them--on a "Follow-Up Contact Form," see sample at the end of this chapter).

IV. Completing Test Reports

You'll want to organize your testing operation to ensure that testers complete reports as soon as possible after each test, while events are still fresh in their minds. Sometimes the logistics of conducting a number of tests in a week, especially if testers are working part-time and have other commitments, makes it difficult for them to complete every report immediately after the contact. But we try to schedule things to get as close to that goal as possible.

We also train testers to pause after leaving an employer or getting off the phone and make quick notes to help them remember specific details they'll need when they complete their reports (e.g., arrival and departure times, physical descriptions of people, event chronology, significant quotes, etc.).

When testers work out of our testing headquarters, they return to the office after a test, give a manager a brief verbal account of what happened, and then write their report. When they work out of their homes, testers are instructed to call a manager immediately after a contact to give a

verbal report, and then have their written reports postmarked or dropped off at the office within 48 hours of the contact. This procedure holds for reports on phone calls to or from employers as well as in-person visits.

We make every effort to hold as close as possible to the 48-hour goal for report completion. To emphasize its importance, we tell testers who work out of their homes and are paid per test that they may receive reduced payment for reports received after that time.

Our test report forms contain a question-and-answer portion followed by a narrative portion. The first section breaks the contact down into stages, asking a series of questions which testers answer by checking appropriate choices and writing short answers in the spaces provided. It is designed to gather key facts about a tester's contact with an employer that will be helpful in comparing his experience with that of his test partner (e.g., was he offered an application, how long was he kept waiting, was he interviewed, what step was he told to take next). We have found that it also helps testers to recall what transpired in a particular contact with an employer and organize the chronology of events prior to writing the narrative.

The narrative section offers testers space to write a detailed account of their experience with the employer from start to finish, in chronological order. It puts the key points covered in the question-and-answer section in context, and gives testers an opportunity to report anything else about the contact not covered in the question-and-answer format.

The two sections act as a check on one another, helping testers to remember and clarify test details, and report them accurately and fully.

V. Reading Test Reports and Debriefing Testers

Your testers' written reports will be your key evidence if you decide to take legal action against an employer based on testing, so it's important that they be as accurate, complete and detailed as possible. It's also critical while testing is in progress that you keep close tabs on what's happening in each test and on tester performance--how testers are handling themselves and how employers are responding to them--so that you can evaluate test results appropriately, determine when to conduct follow-up tests, and correct any problems testers might be having early. This is a daunting undertaking for one person. As our testing operation has developed, reading test reports and debriefing testers has evolved into a two-stage process conducted by both the project manager and assistant manager.

The assistant manager reads each test report first as it comes in, checking for the following: accuracy; completeness; legibility; clarity; consistency--both between the question-and-answer section and narrative, and in the story as a whole; tester signature and date at the end of the narrative; events described without injection of tester's personal feelings and interpretations. As she reads, she notes any questions that arise on post-it notes placed throughout the report, so that she can quickly find those portions she needs to ask the tester about.

The assistant manager then sits down with the tester to review his report and experiences; we call this process debriefing. The first debriefing focuses on the tester's written report. The assistant manager asks the tester to correct errors or omissions, and clarify any details that are unclear. (Testers are instructed to initial and date any changes or additions made to a report after it is written).

After the assistant manager has completed the first reading and debriefing with each test partner on a contact with a given employer, the project manager reads the reports of both test partners in succession. She looks for discrepancies between them (e.g., significantly different descriptions of the same person or place); for differences in treatment (e.g., did one proceed further than the other in the hiring process, were they told different things about what the job required or about how to apply); and for anything else in their written accounts that still remains unclear.

The project manager then conducts a second debriefing with each tester, this time focusing more on what happened on the test and how the tester handled it. During this discussion, she has the tester make any final changes or additions to his report that are needed, again initialing and dating each one. The debriefing process at this stage serves several functions:

- It provides an opportunity to correct errors and clarify details in test reports.
- It allows the manager to question test partners about apparent differences in treatment reflected in their reports, to determine whether there were, in fact, differences that cannot be explained either by the tester's accidental omission of some detail from the report, or by other extenuating circumstances probably unrelated to the tester's race or gender.

For example, a tester once reported in her narrative that, before being given a test consisting of a page of text whose grammar she was to correct, she was told how many grammatical errors there were in the text. Her partner did not report receiving such coaching. But when the partner was asked about it in debriefing, she remembered that she had, in fact, been given that information as well and had just forgotten to report it. She added it at the end of her narrative, signing and dating the addition.

- It allows the manager to give testers detailed feedback on their test performance, adherence to procedure, and report writing. She can iron out problems as they arise and coach testers about how to handle specific situations.
- It gives testers the opportunity to vent feelings they can't put into their reports about how they were treated by employers. Being an employment tester can be uncomfortable and frustrating, particularly at times for the minority tester.

Even though testers don't want the jobs for which they are applying, we have found that the process of presenting themselves and risking rejection can arouse many of the same feelings of vulnerability that actual job hunting does. Since testers are instructed not to talk with one another about their test experiences, they need another place where they can express these feelings and learn that their reactions are natural and part of their role as testers. The manager can offer testers some perspective that helps them remain open-minded. She can help them realize that some feelings of alienation are to be expected, and are as inherent in the job seeker's position as they may be attributable to discrimination.

VI. Test Follow-Ups

We generally have each tester pursue the job until she receives either a firm job offer or a clear rejection. Of course, if the minority tester receives a job offer first, her partner does not need to proceed.

Even if a tester seems to be getting the runaround, we will have her continue to follow up for awhile as long as the employer has not clearly cut her off. For example, if an employer says they are still interviewing, the tester will ask when she can expect a decision or when she can check back, and will do so. On the other hand, if the employer says the tester is not qualified or the position is filled, the tester stops.

Some employers, however, never flatly reject candidates they're not interested in, but just keep putting them off, hoping they'll get the message and give up. So, at some point, when it becomes clear that this is what's happening, we may stop the test. If, for example, both test partners have applied and gotten nowhere despite repeated follow-up calls, we may conclude that their background is not what the employer is looking for and stop the test.

If an employer is giving the runaround only to the minority tester, the tester needs to follow up enough to ensure that the employer has had ample opportunity to consider her, and/or long enough to document that the employer does not *intend* to consider her. For example, the employer puts her off with an excuse that is not consistent with what her partner was told (e.g., she is told they are really looking for someone with more experience, while her partner, who has less experience, got an interview). In this case, once you've documented the discrepancy, you may want to follow up with a second set of testers to see if the pattern is repeated.

In general, we conduct a second test only to confirm what appears to be a clear pattern of disparate treatment documented by the first test--that is, the black or female tester is rejected, apparently without being seriously considered, and the less qualified white or male tester receives a job offer. While our tests often document more subtle differences in treatment that suggest discriminatory behavior on the part of the employer, we generally pursue only those in which the white or male tester receives a job offer. However, if the white or male tester appears to be

receiving preferential treatment but doesn't in the end get the job, if we can identify some qualification missing from his background that the employer is looking for, we may send in a second pair with backgrounds that include that qualification, and see if the pattern of disparate treatment is repeated.

Employment agencies present another hiring scenario in which we may conduct multiple tests regardless of whether the white or male tester receives a job offer. With agencies, which screen applicants and refer them to employers with job openings, we consider a referral equivalent to a job offer in documenting disparate treatment. Once the tester has been referred to an interview, you are testing the employer to whom she was referred rather than the employment agency. We still have testers go on referral interviews and continue working with the agency until they receive a job offer, if possible, so that we can continue to document how far the agency goes in trying to place each tester in a job.

In testing agencies, disparate treatment can be documented in many aspects of the screening process, from the application and skills tests to the interview and referrals. One agency we tested told black testers there were no jobs available unless they could type at least 60 words per minute, while white testers who couldn't type received referrals. Another agency funneled black testers to a junior recruiter, while white testers saw a senior recruiter who appeared to have more job leads. Documenting these patterns in a drawn-out hiring process with many stages, such as employment agencies have, could involve sending multiple tester pairs.

Whatever criteria you use to determine when to send a second pair, you'll want to put thought and care into the decision to conduct multiple tests on an employer. If conducted without sufficient planning and preparation in the backgrounds, presentation and approach of follow-up pairs, you could introduce variations that cloud rather than confirm patterns of disparate treatment documented by initial tests. If a follow-up pair doesn't fit the employer's selection criteria as well as the first pair, for example, neither may get far enough in the hiring process to document treatment.

You need to take timing into account as well. You don't want one pair to follow so close on the heels of another that you risk arousing an employer's suspicion. On the other hand, you want to conduct multiple tests before changes occur in other variables that could skew test results, such as the availability of the job opening or which people are making the hiring decision.

VII. Tester References

At some point in the hiring process, whether at the application stage or after the interview, employers often ask testers for professional and/or personal references. While it has been our experience that employers request reference numbers more often than they actually call them, you'll need to be prepared for those occasions when they do follow up in checking references.

There are several ways to handle references in a testing operation. One option is to enlist the cooperation of actual employers, who allow you to use their company names on testers' resumes and agree to supply references when necessary. An employer whose existence can be verified makes your reference more "airtight." If you use real employers, however, you'll have to make sure they are fully briefed on the biography of the tester for whom they are providing a reference. This might include updating them on details a tester provided about her tenure with their company that were not a prearranged part of the tester's story, but which were offered in response to questions that arose during a particular interview.

Another option is to use fictitious company names on testers' resumes. If you have a bank of testing phone lines (see Chapter Four, section IX), you can dedicate some of them as reference numbers for testers' previous employers. Record an appropriate message on the voice mail, and if an employer calls, operation staff or friends can return the call acting as the tester's reference.

The advantage of this method is that it allows you to maintain control over the process. You can log when employer calls come in, make sure they are returned in a timely manner, and control the content and quality of the reference provided for the tester. When we have used this method, we have logged the employer's call on a form developed for this purpose, the narrative portion of which is completed by the person who returns the call to provide the reference (see sample "Reference Contact Form" at the end of this chapter).

The drawback is that it can become quite complicated trying to arrange the best use of a limited number of phone lines, record appropriate messages on the voice mails, and get calls returned--especially when a number of testers are out in the field and when employers request more than one reference. It also doesn't provide the verifiable reference that using a real company does.

VIII. Preventing Tester Burnout

New testers often start out excited by the idea of going into a variety of situations with an identity that's different from their own. While testing certainly can be interesting and even fun, its glamour tends to fade after about the eighth or ninth time the tester has been asked to "tell me about yourself." More often than not, nothing earth-shattering happens in a tester's encounter with an employer, and he can soon find himself mired in follow-up calls to make and reports to write whose narratives all sound remarkably the same. This tedium may be exacerbated by brusque treatment or rejection from employers, and further, by being unable to know if his partner is experiencing the same thing. At some point, the tester may start asking himself why he is going through all this and whether it's worth it.

There are a number of precautions you can take which we have found helpful in avoiding tester burnout:

- **Educate testers about the history, purpose and achievements of civil rights enforcement testing, so they can understand the importance of their role.** We begin this education process even before hiring a tester, with explanations on the tester application and during the interview. During training, we show a video of a PrimeTime Live segment on testing that illustrates some of the ways in which discrimination manifests itself and how testing can be used to uncover it. We talk about the history and successes of the testing method in housing, and its evolution through the legal process, to give testers some basis for understanding where employment testing fits into the picture. We conduct detailed training in the testing methodology so that testers can be clear about their role and understand why it's important that they not have information about why they are testing a particular employer or what their partner is experiencing. We don't stop talking about these things after the training workshop, but remind testers throughout their tenure with the operation. This knowledge can strengthen testers' resolve to persevere even when they can't know whether their own work is uncovering discrimination.
- **Prepare testers as much as possible in advance for the feelings they are likely to experience during testing.** Even as early as the pre-hiring interview, we caution tester candidates about the frustrations inherent in the position and ask how they think they might respond to them. During training, we devote time to talking about potential emotional pitfalls in more depth, and encourage testers to bring their frustrations to testing operation staff. If testers know such feelings are common and are encouraged to express them, they are less likely to feel burned out.
- **Use test debriefing sessions to identify and address signs of burnout.** In addition to going over a tester's reports and clarifying facts, ask the tester how he feels about his experience, if he had any problems, etc. Sometimes there are strategies you can suggest that will enable the tester to handle a similar situation more easily in the future, or simply to feel more comfortable. Other times, just encouraging the tester to talk and assuring him that his feelings are not uncommon will be enough to renew his energy and confidence for the next test encounter.
- **Conduct "group debriefing" sessions periodically.** While testers can't discuss their test experiences with one another, we have found it helpful to meet as a group periodically to discuss problems and potential solutions in a general way. Although not being able to share specific examples is somewhat limiting, the sense of camaraderie and shared experience that tends to develop from

these sessions seems to invigorate testers. If your testers don't work set hours, the group meeting gives partners who might not see one another that often in the course of testing a chance to share presentation strategies and fine tune details of their identities. It also provides a good opportunity to continue the education process about testing and refresh testers on key points from training.

- **Assign tests at a reasonable pace to prevent tester overload.** There are a number of factors involved in setting the right pace for assigning tests. You'll need to take into account the number of hours and the schedules testers are working, as well as the complexity of the test (e.g., travel time, stages of that employer's hiring process, etc). You'll also need to consider the work pace and other commitments of individual testers. If you are paying testers on salary, you may be especially tempted to try to get the most out of their working hours by assigning tests for them to start at a rate that will minimize "down" time as much as possible. This can backfire down the road because, with employment testing, there is generally a slow start as applications are submitted, and then things pick up as employers begin processing them and calling testers for interviews. If you've started too many tests, testers may have difficulty following each employer's hiring process through to completion and getting all the reports written in a timely manner. The difficulties can intensify if testers are working part-time and have to schedule appointments around school or another job, or if partners work at different paces. One tester may take 45 minutes to write an excellent test narrative while it takes his partner an hour and a half to record a similar experience. While testers generally get faster with time, people's work styles do vary and you can only push a person who takes more time completing tasks so far before you begin to sacrifice quality. There's no right number of tests to assign per day or week. You'll have to experiment and learn with experience. The most important thing is to be flexible and ready to adapt the pace in response to different types of tests and individual tester work schedules and styles.

TEST ASSIGNMENT FORM

SITE # _____

TEST # _____

Date assigned _____

TEST TEAM

Tester #1 _____

Race/National Origin _____ Sex _____

Tester #2 _____

Race/National Origin _____ Sex _____

DESCRIPTION OF COMPANY/BUSINESS

Employer _____
Name

_____ Number Street Phone

_____ City State Zip Code

Major business activities _____

No. of employees _____ Job types _____

Job applying for _____

How you heard about this job/company _____

Call ahead to make an appointment? Yes _____ No _____

Person to contact _____
Name
_____ Title _____ Phone _____

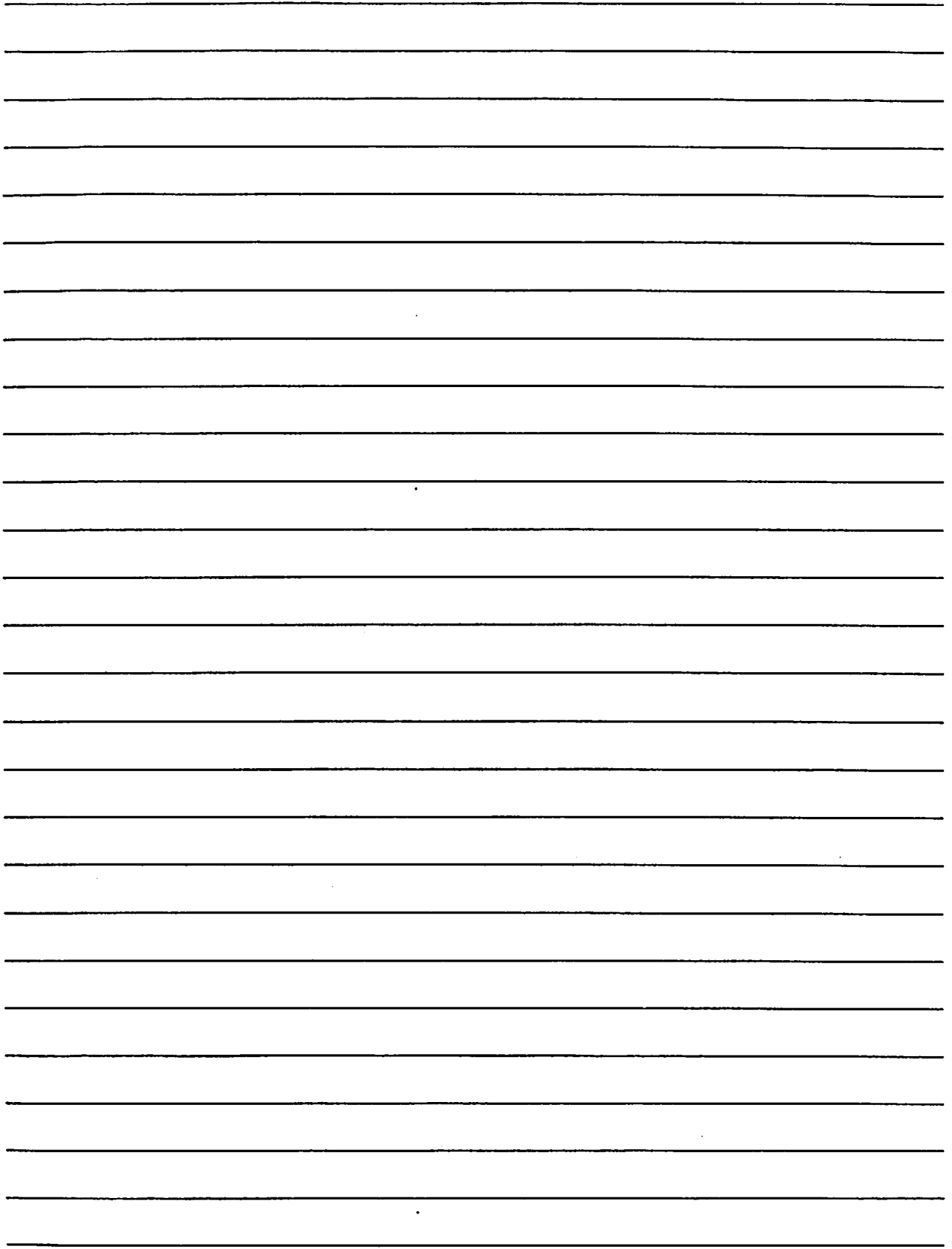
ADDITIONAL INSTRUCTIONS

Date of test _____ Time of test _____

Mode of dress _____

Bring Resume: Yes _____ No _____

Other _____



EMPLOYMENT TEST FORM

SITE # _____

TEST # _____

VISIT # _____

BACKGROUND INFORMATION

Employer _____
Name

Number Street Phone

City State Zip Code

No. of employees _____ according to _____

Tester _____
Name

Number Street Phone (H) _____
(W) _____

City State Zip Code

Race/National Origin _____ Sex _____

Tester's Partner _____
Name

Race/National Origin _____ Sex _____

Date of test _____ Date report completed _____

Tester's signature _____

1. Name used on test if different from your own _____

2. Job you applied for _____

3. Have you ever applied for employment at this company prior to working as an tester? Yes _____ No _____

If yes, answer the following:

a) Date(s) of application: _____

b) Position(s) applied for: _____

c) What happened the previous time(s) you applied for employment at this company? _____

4. For this test, did you apply in response to a newspaper advertisement? Yes _____ No _____

5. Did you give the prospective employer a resume during this visit?

	Employer Asked	Tester Offered
Yes _____	_____	_____
No _____		

6. For this test, did you alter your bio/resume from the one assigned to you in training? Yes _____ No _____

If yes, what changes did you make? _____

7. When did you arrive?

_____ : _____ a.m./p.m. (circle one)
Month Date Year Hr. Min.

8. What time did you leave? _____ : _____ a.m./p.m. (circle one)
Hr. Min.

9. Describe what you wore _____

10. Describe the location (size, number of desks, layout, etc.)

11. Did you see a statement about equal employment opportunity
posted anywhere on the premises? Yes _____ No _____

If yes, where? _____

12. Number, race and gender of employees you observed during your
visit _____

What were they doing? _____

13. Number, race and gender of other applicants (besides testers),
if any _____

What were they doing? _____

14. Did you have to wait for someone to help you initially?

Yes ____ No ____ If yes, how long did you wait? _____

15. With whom did you first make contact?

Name _____

Title _____

Race: _____ Gender: _____

Approximate Age: _____

Height: tall / average / short (circle one)

Weight: heavy-set / average / slender (circle one)

Hair color, length and style: _____

Clothing: _____

Other distinguishing characteristics: _____

16. What were you told? (check the answer(s) that apply)

_____ I was given information about the job opening.

Describe briefly _____

_____ I was asked questions about my qualifications for the job. Describe briefly what was asked and what you answered _____

_____ I was given an application

_____ I was given tests

_____ I was interviewed

_____ I was given an appointment for an interview

Date _____ Time _____

Interview with _____
Name

_____ Title

_____ I was told I was not qualified for the position.

Describe briefly the reason given _____

_____ I was told there were no openings

_____ I was told the position had been filled

When? _____

_____ I was told to come back/call back (circle one) at
another time. When? _____

Why? _____

_____ Other (describe briefly) _____

THE APPLICATION

17. Did you receive an application?

Yes _____ If yes, employer offered _____
tester asked _____
No _____

IF YOU RECEIVED AN APPLICATION, ANSWER #18 - #23:

18. Were you asked any questions before receiving the application?

Yes _____
No _____

If yes, what were you asked and what did you answer? _____

19. When did you receive the application?

Date _____ Time _____:_____ a.m./p.m. (circle one)
Month / Date Hr. Min.

20. How many page sides did the application include?

_____ page sides

21. Check any of the following which the application included:

a company name printed on the application

Company name _____

an equal employment opportunity statement

a section asking you to identify your race
on the application / on a separate sheet (circle one)

a place to list previous jobs

a place to list employment references
names / phone numbers (circle one or both)

a place to list personal references

a place to note special skills

What did you list? _____

a question to which you were asked to write a paragraph or
short essay in reply

The question _____

Your answer (summarize) _____

anything else unusual or noteworthy

Describe _____

22. To whom did you submit your application?

Name _____

Title _____

If different from first contact, describe the person:

Race: _____ Gender: _____

Approximate Age: _____

Height: tall / average / short (circle one)

Weight: heavy-set / average / slender (circle one)

Hair color, length and style: _____

Clothing: _____

Other distinguishing characteristics: _____

23. What happened when you submitted your application?

____ I was given tests

____ I was interviewed

____ I was scheduled for an interview at another time

Date _____ Time _____

Interviewer _____

Name

Title

____ I was told to come back/call back (circle one) later
When? _____

____ I was told to wait for a call from the employer

When did employer say he/she would call? _____

____ I was told there were no openings

____ I was told the position had been filled

When? _____

____ Other (describe briefly) _____

TESTS

24. Were you asked to take any tests to determine if you were qualified for employment? Yes _____ No _____

If yes, how was/were the test(s) described to you?

25. Did you take any tests as part of the application process?

Yes _____ No _____

If yes, describe the test(s) _____

IF YOU TOOK ONE OR MORE TESTS, ANSWER #26 - #30:

26. At what point during your visit did you take the test(s)?

27. Where did you take the test(s)? _____

28. Were you given a time limit? Yes _____ No _____

If yes, how long? _____

29. If you took a typing test, describe the machine you used.

30. What were you told about how you did on the test(s)?

THE INTERVIEW

31. Date of interview _____
Month Date Year

Time scheduled _____ : _____ a.m./p.m. (circle one)
Hr. Min.

Time you arrived _____ : _____ a.m./p.m. (circle one)
Hr. Min.

Time interview began _____ : _____ a.m./p.m. (circle one)
Hr. Min.

Time interview ended _____ : _____ a.m./p.m. (circle one)
Hr. Min.

32. Who interviewed you?

Name _____

Title _____

Describe, if different from contact(s) previously described:

Race: _____ Gender: _____

Approximate Age: _____

Height: tall / average / short (circle one)

Weight: heavy-set / average / slender (circle one)

Hair color, length and style: _____

Clothing: _____

Other distinguishing characteristics: _____

33. Was there more than one person interviewing you at the same time? Yes___ No___ If yes, provide name(s), title(s) and description(s) of other interviewer(s) _____

34. Where were you interviewed? _____

35. During the interview, were any of the following subjects discussed?

	Interviewer Initiated	Tester Initiated	Not Discussed
a) Your resume	_____	_____	_____
b) Your qualifications	_____	_____	_____
c) Your reason for interest in the job	_____	_____	_____
d) Job duties	_____	_____	_____
e) Hours of work	_____	_____	_____
f) Shift or schedule	_____	_____	_____
g) Location of job	_____	_____	_____
h) Probationary period	_____	_____	_____
i) Salary	_____	_____	_____
j) Raises	_____	_____	_____
k) Benefits	_____	_____	_____

36. Did the interviewer make any comments about race or gender?

Yes _____ No _____ Not sure _____

If yes or not sure, explain _____

37. Did the interviewer appear to be recording information during the interview? Yes _____ No _____

If yes, how did the interviewer do it?

_____ Interviewer took notes _____
(describe what s/he wrote on)
_____ Interviewer filled out a form
_____ Other (explain) _____

38. What was the result of the interview?

_____ I was offered a job as _____
at a salary of _____

_____ I was told to call back/come back (circle one) later
When? _____

_____ I was told the employer would call me
When? _____

_____ I was told I was not qualified because _____

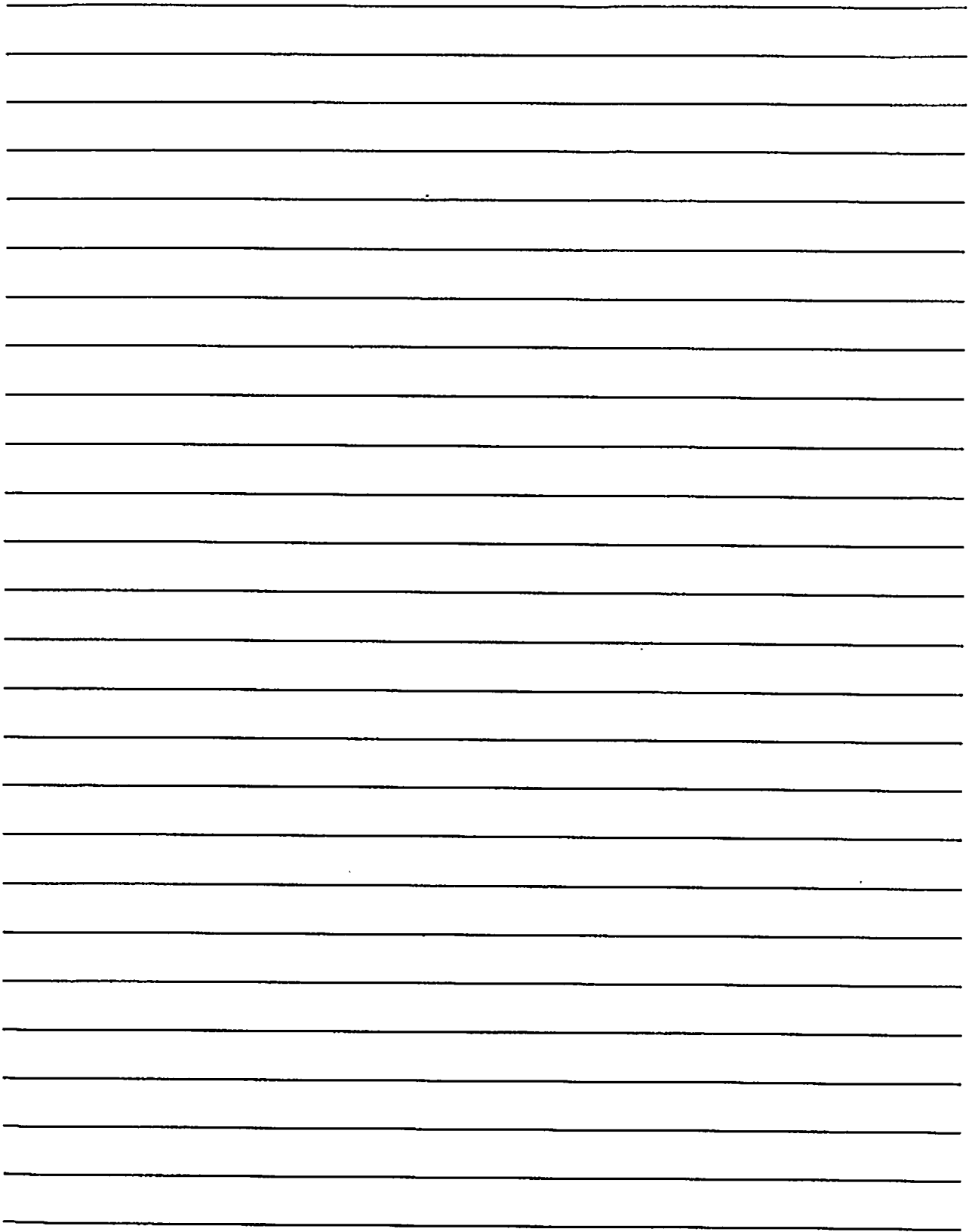
_____ Other (explain) _____

39. Were you given any materials (business cards, brochures, etc.) to take with you?

	Employer Offered	Tester Asked
Yes _____	_____	_____
No _____		

If yes, what were you given? _____

PLEASE ATTACH ANY MATERIALS YOU RECEIVED TO THIS REPORT



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Lined writing area with 25 horizontal lines.

[Blank lined page]

TEST TRACKING FORM

SITE # _____ TEST # _____ TEST TYPE _____

TESTER #1 _____ TESTER #2 _____

JOB APPLIED FOR _____ TYPE OF BUSINESS _____

EMPLOYER _____

ADDRESS _____

PHONE _____ SOURCE: UNSOLICITED AD _____

BASIS FOR TEST: RANDOM FOLLOW-UP MAILOUT TIP

TESTER #1

TESTER #2

FIRST CONTACT: dt/time _____
contact _____
result _____

FOLLOW: dt/time _____
contact _____
result _____

FOLLOW: dt/time _____
contact _____
result _____

FOLLOW: dt/time _____
contact _____
result _____

FOLLOW: dt/time _____
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FOLLOW: dt/time _____
contact _____
result _____

FOLLOW: dt/time _____
contact _____
result _____

FOLLOW: dt/time _____
contact _____
result _____

JOB OFFER: dt/time _____
pos/wage _____

FOLLOW-UP CONTACT FORM

SITE # _____

TEST # _____

Employer _____

Report by _____

1. Who initiated this contact? Tester _____ Employer _____

2. The contact was: by phone _____ in person _____ by mail _____

(ATTACH ANY LETTERS RECEIVED BY MAIL TO THIS REPORT)

3. When did you make contact (when was the mail received)?

_____ : _____ a.m./p.m. (circle one)
Month Date Year Hr. Min.

4. With whom did you speak? _____
(Who sent the mail?) Name

_____ Title

5. What happened?

_____ A message was left

_____ I was offered the job

_____ I was asked for more information

_____ I was asked to come in for an interview, tests, etc.

When? _____

_____ I was told to call back later

When? _____

_____ I was told employer would call me

When? _____

_____ I was told the position had been filled

_____ Other (describe briefly) _____

REFERENCE CONTACT FORM

SITE # _____

TEST # _____

Employer who called
for reference:

_____ Caller's Name/Title

_____ Company/Business

_____ Phone Number

Tester the employer
called about:

Reference number the
employer called:

Reference given to
the employer:

_____ Name

_____ Title

_____ Company/Business

How many times did the employer call and leave messages?

List dates and times: _____

Was the employer's call returned? Yes _____ No _____

IF YOU RETURNED THE EMPLOYER'S CALL, ANSWER THE FOLLOWING:

How many times did you call the employer and leave messages?

List dates and times: _____

~ CHAPTER NINE ~

DECIDING WHEN TO TAKE LEGAL ACTION ON TEST EVIDENCE

Since testing in the employment context has not yet been exhaustively litigated, every discriminatory hiring charge filed based on tester evidence has the potential to impact whether or not employment testing will ultimately be approved by the Supreme Court as a tool for enforcing civil rights. Thus, it is extremely important to proceed with caution and weigh test evidence carefully before deciding to file charges against an employer.

While our tests have documented numerous instances in which employers have shown a preference for the white or male applicant, we generally look for a certain combination of events to occur before we consider pursuing legal action (although this varies as we adapt our testing method to different employers' hiring processes):

- 1) The minority or female applicant is rejected, apparently without serious consideration;
- 2) Her less-qualified white or male partner receives a job offer (or in the case of an employment agency, a referral);
- 3) When a second pair applies, the pattern is repeated--the employer rejects the minority or female and hires the white or male.

In evaluating test results, we look not only at whether certain events occurred, but also at their context. Following are two actual test scenarios from our files, in which testers documented discriminatory hiring practices that we might consider sufficient to support legal action.

Scenario #1

A black tester and his white partner filled out applications for an advertised sales position, and both were called by the sales manager for an interview. When the black tester arrived, the sales manager looked visibly surprised. Without making further eye contact with the tester, the manager told him he would talk to the owner and call him back that evening. He never called. When the black tester called him a few days later, he said he hadn't talked to the owner yet and to call back.

Several days afterward, the manager interviewed the white tester briefly. Of the white tester's resume, which showed a year less sales experience than his black partner's, the manager said, "So you've been in sales for awhile, that's good, you know the business." He told him he would train him to sell their product, and offered him a job. The white tester called back the next day and declined the offer.

The black tester then called again, was told the manager was with a customer, and left a message. Several minutes later, a receptionist called him back and relayed a message from the manager that the job was filled.

Several weeks later, a second pair applied. The black tester filled out an application, was told the manager was busy and he should call back. He called the next day, was told the manager was unavailable again, and left a message.

Later that afternoon, his white partner applied. He met the manager, who asked him when he could start and set an appointment for him to come back to talk further.

Meanwhile, the black tester made another unsuccessful attempt to reach the manager by phone, and left another message.

The white tester arrived for his scheduled appointment, was handed a pay plan and offered a job. He called back several days later and declined it.

Less than two hours afterward, his black partner called. The manager told him he was still looking over applications and would be calling people in a few days. He never called the black tester.

Scenario #2

A black tester filled out an application for an advertised sales position. After waiting forty minutes, he was interviewed briefly and was told they were not interested in him because he had no experience selling their product. He was told they had just placed the ad, and they would only consider him if they didn't get enough experienced applicants.

Several hours later, his white partner applied. The white tester's resume showed he had a year less sales experience than his black partner, and also had no experience selling the employer's product. He was offered a cup of coffee while he completed his application and was interviewed immediately. He was coached on selling techniques and was told they would like to enroll him in a sales training program for new employees. He was called in a second time and was offered the job. When he called back later to

decline it, the manager wished him luck and told him to call back if things didn't work out.

Two days later, the black tester called to follow up on his application. He was told that the person who interviewed him was with a customer, and he left a message. His call was not returned. Several days later he called again. He was told they were still taking applications, and that they wanted people with lots of experience because they didn't want to train anyone.

Several weeks later a second black tester completed an application. He waited an hour to be interviewed, and then the manager told him he was too busy to interview him but would call him back that afternoon. He didn't call.

The next day, the white tester filled out an application. He met the manager, who was on his way out but said someone else would interview him and he should come back to meet with the manager later that day or the next. The man who interviewed him was in charge of new employee training. At one point, he said that a boss he'd had early in his career, "a black guy...was a real prick...the type who wore double-breasted suits." He said this was a much better place to work, and repeated several times during the conversation that they didn't like "the double-breasted suit look" here. He told the white tester he thought he'd have no trouble getting hired, and scheduled an appointment for him with the manager.

Later that day, the black tester called, was told the manager was out, and left a message. The manager called him back, told him he hadn't made any decisions and he would get back to him.

When the white tester arrived for his second interview, the manager asked him a few questions, offered him a job and signed him up for the training program. A few days later, the white tester called back and turned down the offer.

Several hours afterward, his black partner called again to follow up on his application. The manager told him he still hadn't made any decisions, but would call him if any positions "came up."

In the above examples, the rejection of the minority candidates and the job offers to the less-qualified white candidates provide the central evidence of the employers' discriminatory hiring practices. But there are additional details in each scenario which point to a race-based preference in the employee selection process. Employers' comments to several of the applicants, indicating experience level as a basis of selection, are contradicted by their choice of the less-experienced candidates. Further, the minimal scrutiny given both to whites who were offered jobs and to

blacks who were rejected decreases the possibility that specific aspects of testers' backgrounds or presentation played any role in the selection.

In the treatment testers received overall, there is a striking contrast between the courtesy and openness with which whites were welcomed (e.g., the cup of coffee, the coaching on sales techniques, the offers of training, the good luck wish and offer of future employment) and the closed door presented to blacks by unavailable managers and unreturned messages. Seen in the context of all these events, the comments of one interviewer about his black former manager and "the double-breasted suit look" suggest a climate of racial prejudice that runs deeper than his remarks, manifesting itself in diminished job opportunities for blacks.

While the test scenarios just described meet all three criteria for pursuing legal action outlined above, some tests may not follow this pattern but may still provide strong evidence that an employer is discriminating. With employment agencies, for example, documenting disparate treatment in the screening and referrals testers receive may provide sufficient evidence of discriminatory hiring practices, regardless of whether any tester is offered a job (see Chapter Eight, section VI for a discussion of testing employment agencies). Or, in another scenario, a single test may be deemed sufficient for legal action if, for example, the black tester is told the job is filled and the white tester is offered the position shortly thereafter.

The variations in the hiring processes in different industries require that test results be evaluated on a case-by-case basis to determine whether tester evidence warrants legal action. You'll want to look not only at who gets the job and who is rejected, but also at factors such as: 1) the degree of scrutiny each applicant receives; 2) whether the employer consistently seeks the same qualifications regardless of the applicant's race or gender; and 3) whether the employer's behavior and candidate choice is consistent with his stated selection criteria.

Once you've weighed the evidence and are confident that your testers have clearly documented an employer's discriminatory hiring pattern, there is one more step you may want to consider taking before filing discrimination charges. Since the issue of whether employment testers have standing to sue has not yet been conclusively resolved,² you may want to file charges on behalf of a bona fide applicant -- someone who would actually like the job -- as well. This could be a minority who has already applied for the job and been rejected, or one who applies and is rejected after you've completed your tests. If the court rules that employment testers cannot be

² In July 1994, the U.S. Court of Appeals for the District of Columbia Circuit ruled in the case of Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994), that employment testers had no standing to seek injunctive relief and no cause of action for damages under either 42 U.S.C. § 1981 or the pre-1991 version of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which provided only equitable relief. The court took no position as to whether testers would be permitted to sue under Title VII as amended by the Civil Rights Act of 1991, which added provisions for compensatory and punitive damages, since the 1991 Act was passed after the testing in Fair Employment Council had taken place.

plaintiffs, you would still be able to use your testers' evidence to support a discriminatory hiring charge on behalf of your bona fide applicant plaintiff.³

³ There is a difference of opinion among civil rights attorneys on this matter, however. Some favor bringing employment tester cases without a bona fide applicant plaintiff, believing that it underscores the need for employment testers to have standing as plaintiffs--rather than just as witnesses--because without the evidence gathered by testers, bona fide job applicants seldom have sufficient information to know that they have suffered discrimination, much less to take legal action on their own.