

## **Interview Structure and Litigation Outcomes:**

### **What are the Judges Telling Us?**

*by*

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The employment interview is perhaps the most widely used of all selection devices. Yet, even though interviews are subject to the same legal standards as other selection procedures (Uniform Guidelines on Employee Selection Procedures, Section 1607.16Q), there has been very little research on the legal defensibility of interviews in employment discrimination cases. Historically, the interview has been criticized as having low validity, and the traditional unstructured interview remains vulnerable to legal challenge. However, recent reviews and meta-analyses suggest that the interview can be quite valid, particularly if it is structured. It seems logical that structured interviews should be more resistant to legal challenge because of their heightened objectivity, standardization, and job-relatedness. My colleagues and I recently published a study<sup>1</sup> that supports this reasoning. This article summarizes our findings.

#### Aspects of interview structure are logically related to favorable litigation outcomes for employers

Although subjective procedures such as traditional unstructured interviews are not prohibited *per se*, their use typically will receive close scrutiny by the courts. Generally, courts have recognized that subjective processes are susceptible to inappropriate biases, and may unfairly deny plaintiffs a reasonable opportunity to challenge the stated basis for an employer's decision. The addition of structural elements should help to address these types of concerns.

Interview structure may be defined broadly as any enhancement of an interview that is designed to increase standardization or otherwise assist the interviewer in determining what questions to ask or how to evaluate responses. Such enhancements may improve either interview content or the evaluation process. For example, using interview questions based on a job analysis can help ensure job-relatedness, and prevent interviewers from relying on idiosyncratic beliefs about job requirements. Using more objective, specific, and behaviorally-oriented questions can reduce bias by minimizing the ambiguity and overall subjectivity of interview decisions. Using the same questions with all candidates can increase fairness by giving all candidates the same opportunity to respond. Using rating scales can reduce bias and increase reliability by making judgments more specific and behavioral. Each of these structural elements can provide for more precise comparisons and reference points to help interviewers be consistent across candidates.

Interviewer training also may improve objectivity and job-relatedness. Training programs typically review equal employment opportunity laws, and help raters learn to avoid stereotyping or asking irrelevant and potentially discriminatory questions. Using multiple interviewers or panels also can reduce bias, because ratings are based on more observations. The effects of idiosyncratic opinions should be canceled out, and the range of perspectives should increase accuracy. Using multiple interviewers also allows decisions to be reviewed by others before being implemented, and may provide an additional opportunity to keep potential problems out of court.

#### Aspects of interview structure, such as objectivity, job-relatedness, and standardization, are logically related to avoiding disparate treatment claims, and to defending both disparate treatment and adverse impact claims

The essence of any disparate treatment claim is that the aggrieved party was treated differently based on a protected characteristic (e.g., race, gender, national origin, age, disability). To the extent that structure

standardizes interview practices, it should reduce the likelihood that disparate treatment can occur (indeed, if all candidates are truly treated identically, disparate treatment *by definition* cannot occur). Where a plaintiff alleging disparate treatment is able to make out a *prima facie* case, elements of structure in the employment interview should support the employer's presentation of a legitimate nondiscriminatory reason in defense of its decision (*McDonnell Douglas Corp. v. Green*). For example, a plaintiff's poor responses to job-related structured interview questions will suggest a more "legitimate" decision than subjective negative assessments in a nonstructured interview. The frequently-used defense that an employer hired, retained, or promoted another individual who was better qualified than the plaintiff also will be easier to support if based on job-related, standardized questions.

In adverse impact claims, once the plaintiff establishes a *prima facie* case, the employer must persuade the trier of fact that the challenged practice is valid (i.e., job-related; see *Griggs v. Duke Power Co.*). Here, standardization should increase reliability, which is a precondition for validity, and thus will support an explicit defense to adverse impact claims under the Uniform Guidelines (Section 1607.3A).

Aspects of interview structure, such as objectivity, job relatedness, standardized administration, and multiple interviewers, are empirically related to favorable litigation outcomes for employers

My colleagues and I tested the reasoning outlined above by examining roughly 100 federal court discrimination cases involving the employment interview decided over the last 25 years. These cases present 84 disparate treatment claims and 46 adverse impact claims (some cases involved both types of claims). Overall, judgments were granted for the employer in just over half of each category. The cases included a mix of race, sex, national origin, age, physical disability, and reverse discrimination claims, a mix of employers from private businesses, public schools, police or fire departments, and other public organizations, a mix of unskilled, skilled, professional, and managerial jobs, and a mix of new hire, promotion, reassignment, transfer, training, and other employment decisions. Each decision was assessed using 17 items describing the aspects of interview structure discussed above. For simplification, these items were grouped into 3 composites based on statistical and conceptual similarity.

In line with our analysis of interview structure, the three composites were labelled Objective/Job-Related, Standardized Administration, and Multiple Interviewers (see Table 1). The composites were moderately to highly intercorrelated, suggesting that interviews structured on one dimension tend to be structured on others as well. Each of the composites was significantly related to favorable verdicts for the employer in disparate treatment cases (i.e., on average, significantly higher levels of structure were found in cases decided for the employer), while all composites except Multiple Interviewers were related to employer verdicts in the adverse impact cases. Specific elements of these composites are discussed more fully below.

Recommendations for Practitioners

The most conservative conclusion from our findings is that employers who utilize structured interviews, and successfully defend employment discrimination cases, probably will see aspects of structure relied upon by the courts to justify their verdicts. A stronger conclusion is that structuring interviews can enhance their ability to withstand legal challenge. These results, and prior evidence on the superior validity of structured interviews, make it sensible to use as many aspects of interview structure as possible.

Because of their logical appeal and conceptual relationship with legal defensibility, it is interesting to examine the individual items in Table 1 to see which did not distinguish verdicts for the employers in our sample of cases. Of the objective/job-related items, job analysis, a procedure strongly recommended throughout the Uniform Guidelines, did not play as important a part in judges' opinions favoring the employer as did other items. This may be because aspects of job analysis are implicitly present where, for example, objective, behavioral, or specific questions are used, or where validation evidence is otherwise available (see Table 1). Explicit mention of job analysis or job descriptions therefore may not have been considered necessary. Given the rapidly changing and more broadly defined jobs in today's competitive, technology-driven economy, and the corresponding impracticality of attempting to maintain current job analyses and job descriptions on a real-

time basis, this may be a promising sign for practitioners. The same can be said for the fact that rating forms, panel interviews, statistical combinations, and other potentially cumbersome, time consuming, and expensive items did not play a major role in the standardized administration or multiple interviewer composites. The significance of the remaining items (e.g., standardized questions, guidelines, minimal discretion, and decision review) suggests that flexibility, focus, and good sense may be more important, both legally and practically, than mechanical compliance with any particular technique.

Of course, the opinions we reviewed may not have identified the actual causes of bias in the interview process; court cases are written after decisions are made, and are meant to explain and justify those decisions. In addition, cases that go to trial probably differ from those that do not, and the findings of our study do not tell us which cases are likely to go to court. However, it seems reasonable to expect that better interview procedures, such as using standardized, job-related questions, make cases less likely to arise, more likely to settle, and thus, less likely to be litigated. For these reasons, the effects we found probably were understated; exceptionally well-structured interviews may never become subject to court review.

I also should note that our study focused on decisions made by judges in bench trials, and the Civil Rights Act of 1991 provides for jury trials where intentional discrimination is alleged. However, judges still decide adverse impact cases, and juries' deliberations will be subject to instructions from judges as to what factors to consider. In any event, the same aspects of structure that appear to preclude discrimination liability in the eyes of judges seem likely to do so in the eyes of jurors, at least in part because of the logical linkages discussed earlier on.

### Conclusion

Virtually all employers invest a significant amount of time, money, and other resources in interviewing and evaluating applicants and employees for a variety of important employment decisions. Given that interviews are likely to continue their prevalence as a selection device, it makes sense that employers also should invest resources in structuring their interviews. Doing so has the potential not only to improve the reliability, validity, utility, and overall effectiveness of the interview as a selection tool, but also to enhance its legal defensibility. That being the case, why *wouldn't* you want to structure your employment interviews?

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### Endnote

1 "The Employment Interview on Trial: Linking Interview Structure with Litigation Outcomes," by L.G. Williamson, James E. Campion, S. B. Malos, M. V. Roehling, & M. A. Campion, Journal of Applied Psychology, December, 1997, Vol. 82, No. 6, 900-912.

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Table 1

#### **Composite/Item Item Significant in Predicting Employer Verdict?**

##### ***Disparate Treatment Cases Adverse Impact Cases***

##### **Objective/Job-Related**

Objective criteria used Yes Yes

Behavioral (vs. trait-based) criteria Yes Yes

Specific (vs. general) criteria Yes Yes

Interviewer experienced or trained Yes Yes

Job description or job analysis used No No

Interviewer familiar with job requirements Yes No

Validation evidence available Yes Yes

**Standardized Administration**

Rating form used No No

Guidelines for conduct of interview used Yes Yes

Minimal interviewer discretion allowed Yes Yes

Standardized questions used Yes Yes

Plaintiff's interview same as others' Yes Yes

Interviewer/plaintiff of same race/sex No No

Statistical combination of ratings used No No

**Multiple Interviewers**

Multiple interviewers used No No

Panel interview used No No

Interviewer's decision reviewed Yes Yes