HELD: The Tenth Circuit affirmed the District Court, holding that the seven promotion denials were from independent schools and independent of each other, precluding the Court from inferring any common purpose among the actors.

DISCUSSION: Violations of Title VII or 42 U.S.C. § 1983, which have the same standard, are proven with either direct evidence or indirectly under the *McDonnell Douglas* burden-shifting framework. Davis, lacking direct evidence, pursued the later path, necessitating he prove "(1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there [wa]s a causal connection between his protected activity and the adverse employment action." As for his retaliation claim against the HR director, Davis contended the director failed to submit his application for the head custodian position at two of the schools he applied for. Davis's evidence against the HR director consisted of the fact that he failed to receive a confirmation email indicating he had been "referred for consideration" to the two schools and that HR director failed to investigate the qualifications of the successful applicants for the two jobs. The failure to refer his name was an adverse employment action according to Davis, however, according to the HR director he did forward Davis' name to the appropriate schools and he was able to prove it for one school, though the confirmation email was never sent. The Tenth Circuit concurred with the District Judge's findings that given the lack of evidence that Davis' name was not sent to the appropriate schools (excepting a missing confirmation email) no reasonable jury could find that the director took an adverse employment action against him. And as for the director's failure to "investigate" the successful applicants, both Courts agreed that that did not fall within the definition of an adverse employment action – for even if an unqualified applicant was referred for consideration to the principals in questions, neither Circuit could see how such an incident would be adverse employment action against Davis.

Davis' retaliation claim against the school district was similarly rejected based on a lack of evidence. Davis argued that the sheer number of rejections (seven) for the promotion he applied to indicated he was retaliated against. The Tenth Circuit disagreed. It found no support for Davis' allegations of but-for causation with respect to each incident of being passed over for the promotion. Nor did it find any conspiracy among the principals that rejected Davis; each principal independently investigated and evaluated applicants, and independently made hiring decisions.

http://law.justia.com/cases/federal/appellate-courts/ca10/13-3224/13-3224-2014-05-05.html (Last accessed May 14, 2014).

Employment: Racial Differences of Boston Police Department's Hair-Based Drug Testing Support Prima Facie Case of Disparate Impact

Jones v. City of Boston, No. 12-2280 (1st Cir. May 7, 2014).

Where a hair-based test for cocaine use produced anomalous results along racial lines, such that black police officers tested positive at rates far in excess of normal standard deviations, the First Circuit has reversed a lower court decision, finding that the officers had made a prima facie case of disparate impact under Title VII.

In 1999 the Boston Police Department began subjecting officers and candidates with conditional offers of employment to drug tests, using hair samples. Two exculpatory safeguards were in place for individuals testing positive: 1) an independent, licensed physician would check to see if the individual had been given "cocaine hydrochloride" in a recent medical procedure; and 2) the individual could elect to have a second test done of a different hair sample. If neither exculpatory path exonerated the individual, he or she was terminated unless agreeing to undergo rehabilitation and treatment, as well as an unpaid 45-day suspension. Moreover, before termination every individual was provided written notice of the reason, followed by an evidentiary hearing (if he or she elected to have one), and then an optional post-termination appeal to the Massachusetts Civil Service Commission.

More black officers than whites tested positive, despite the fact that that white officers outnumbered black officers on the Boston police. Ten black officers challenged the hair-testing program, alleging that it caused a disparate impact on the basis of race in violation of Title VII. All plaintiffs denied that they used cocaine and that instead the results were false positives, evidenced by statistical analysis. The District Court granted summary judgment to the Police Department on the Title VII claim.

HELD: The First Circuit reversed the District Court, finding that no genuine issue of material fact precluded the plaintiffs from making a prima facie case for disparate impact.

DISCUSSION: Title VII prohibits employers from utilizing "employment practices that cause a disparate impact on the basis of race" unless those practices are justified by business necessity. Plaintiffs in such cases must first identify the employment practice and then show that it causes a disparate impact on the basis of race, with either direct or indirect evidence. The Supreme Court has recently described this prima facie showing as "essentially a threshold showing of a significant statistical disparity."

Plaintiffs relied on the raw numbers of black officers terminated in comparison to the number of terminated white officers. The Department did not challenge the numbers or that its testing program was an "employment practice" within the meaning of Title VII. In short, plaintiffs demonstrated that the employment practice in question had a statistically significant correlation with race.

Additionally, plaintiffs showed the standard deviation – the amount by which the observed disparity in drug-test outcomes for black and white officers differed from the expected result if the individuals had been given an equal opportunity – evidenced disparate impact as well. The Supreme Court has stated that "[a]s a general rule . . . , if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis [that the outcome in question] was random would be suspect to a social scientist." Here, aggregating the total numbers for all years since 1999, the standard deviation was 7.14. The Court held this evidence allowed it to be "almost certain" that the drug-test outcomes in at least three years and in the aggregate "cannot be attributed to chance alone."

The Department argued that, even if there was a statistically significant skew in the drug-test outcomes, it does not constitute disparate impact unless the racial differential is also "practically significant." The Court acknowledged that "practical significance" does matter, pointing out that the EEOC guidelines on Title VII include a rule defining when disparate impact is taking place – the four-fifths rule, which states that where an employment practice results in a "selection rate"

for any racial group less than four-fifths of the "selection rate" for another group, these statistics "will generally be regarded by [f]ederal enforcement agencies as evidence of" disparate impact.

However, even the EEOC has stated that its four-fifths rule should not be decisive. The rule allows anomalous results because, for example, if a police department (like Boston's) with 500 black officers and 1200 white officers fired 90 black officers, under the rule this would not constitute disparate impact because 82% of black officers survived the firing (more than four-fifths of 100%) but "this hypothetical illustration undoubtedly has a very significant and disproportionate effect on black officers." The Court found "any theoretical benefits of inquiring as to practical significance outweighed by the difficulty of doing so in practice in any principled and predictable manner." It concluded that "a plaintiff's failure to demonstrate practical significance cannot preclude that plaintiff from relying on competent evidence of statistical significance to establish a prima facie case of disparate impact."

http://media.ca1.uscourts.gov/pdf.opinions/12-2280P-01A.pdf (Last accessed May 14, 2014).