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FEATURED CASE:

Seventh Circuit Upholds Tailored Physical Abilities Test for Firefighters
Erdman v. City of Madison, No. 22-2433 (7th Cir. Jan. 22, 2024).

The Seventh Circuit recently affirmed the dismissal of a Title VII claim challenging the physical abilities test used by the Madison, Wisconsin fire department to screen firefighter candidates. Plaintiff Catherine Erdman ("Erdman"), a firefighter from a nearby city, alleged the test had an unlawful disparate impact on female applicants in violation of Title VII. This case clarifies the meaning of a "particular employment practice" and the requirements for a plaintiff to prove a "substantially equally valid" alternative practice in a Title VII disparate impact claim challenging an employer's hiring criteria.

Background:

Title VII prohibits hiring practices that have an unjustified disparate impact on job applicants based on characteristics such as sex or race, even absent intentional discrimination. If a prima facie case is established, the burden shifts to the employer to show the challenged practice is, in the words of the decision, "job-related for the position and consistent with business necessity." At the third step, the plaintiff must prove that the employer has refused to adopt an "available alternative employment practice" with less disparate impact that would still serve the employer's legitimate needs.
Madison's multi-part physical test consisted of seven events like equipment carries, ladder raises, hose drags and other job-simulation tasks. Erdman passed the cut scores for five events but fell short on the final "pike pole" event (where the applicant must use a pole with a hook on it first to simulate breaching a ceiling from below to look for hidden flames, and then pulling down ceiling material). Failure of the pike test knocked her out of the hiring process. Only 4 of the 28 female applicants passed the full test in 2014, compared to 395 of 471 males - a prima facie showing of disparate impact.
Erdman sued claiming a Title VII disparate impact. The district court ruled that Erdman established a prima facie case that the Madison fire department's entire physical abilities test disparately impacted female applicants. However, the court ultimately found for the City, holding that while Erdman's

proposed alternative test--the International Association of Firefighters Candidate Physical Abilities Test ("IAFF Test") had less adverse impact on women, she failed to prove it would be an adequate substitute to meet the department's legitimate needs.

Appeal:

Erdman appealed, claiming the district court erred in finding she failed to prove the IAFF Test was a valid alternative employment practice that would meet the Madison fire department's legitimate needs despite having less disparate impact on female applicants.

The Seventh Circuit answered two questions on appeal:

1. Whether the district court erred in determining that the proper "particular employment practice" to be analyzed for disparate impact was the Madison fire department's entire physical abilities test, rather than just the specific "pike pole" event that disqualified Erdman.

Madison argued on appeal that the district court should have focused its disparate impact analysis narrowly on only the pike pole component where Erdman was eliminated, rather than treating the fire department's full multi-event physical test as a single, indivisible employment practice. Erdman contended the full test was the appropriate unit of analysis.

2. Whether the district court clearly erred in finding that Erdman's proposed alternative employment practice, the IAFF Test, would not adequately serve the legitimate needs of the Madison fire department.

Erdman argued on appeal that the district court was wrong to conclude her suggested alternative test, which had less disparate impact on women, failed to qualify as a viable substitute that would meet the fire department's hiring needs just as well as Madison's current test. Madison defended the finding that the IAFF Test, while generally valid, was not sufficiently tailored to the Madison department's specific local conditions and requirements to be a true equivalent.

In essence, Madison challenged the district court's framing of the prima facie disparate impact case, while Erdman challenged the court's factual finding on her failure to prove the IAFF test could properly substitute as an alternative hiring practice. The Seventh Circuit ultimately sided with Erdman on the first issue and Madison on the second to affirm the judgment for Madison.

Analysis: The Seventh Circuit's analysis provides important guidance on the scope of "particular employment practices" that can be challenged, as well as what qualifies as an adequate "alternative employment practice" under Title VII's burden-shifting framework for disparate impact claims.

Scope of Employment Practice

The Seventh Circuit affirmed the district court's determination that the proper "particular employment practice" to be analyzed for disparate impact was the Madison fire department's entire multi-event physical abilities test, not just the specific "pike pole" component on which Erdman was disqualified. The court rejected Madison's argument on appeal that the district court should have focused narrowly on only the final test component that eliminated Erdman. Instead, the Seventh Circuit agreed with

Erdman and the district court that the full testing process could be treated as a single employment practice.

The court held that multi-part hiring tests can qualify as a "particular employment practice" subject to disparate impact analysis as a whole, unless the components are shown to be truly "capable of separation" under 42 U.S.C. § 2000e-2(k)(1)(B)(i). Determining separability requires evaluating if the test measures distinct skills in each section or instead imposes cumulative effects by repeatedly taxing the same physical abilities.

The Seventh Circuit emphasized that defining the "particular employment practice" too narrowly, such as only the final disqualifying event, could insulate discriminatory multi-step processes from liability by making prima facie statistical proof difficult at later stages. Confirming the district court's broader framing, the Seventh Circuit found the various job-simulation events in the Madison fire department's test were an indivisible whole that "holistically evaluate[d] physical capabilities" rather than separate skills.

On this threshold issue of defining the employment practice subject to challenge, the Seventh Circuit upheld the district court's plaintiff-favorable view of framing the disparate impact analysis in terms of the cumulative effect of the entire multi-component physical abilities test.

Identifying Valid Alternative Practices

The court also provided guidance on what qualifies as an adequate "alternative employment practice" that the plaintiff must prove would serve the employer's legitimate interests under Title VII's third step. Erdman argued Madison should adopt the widely used IAFF Test, which had less gender disparities according to national data. But the Seventh Circuit deferred to the district court's factual findings that Madison had tailored its test to local conditions, equipment and safety practices - such that a "off-the-shelf" test may not predict successful job performance equally well.

The court clarified that while plaintiffs need not show the alternative is "exactly as effective" as the challenged practice, it must be "substantially equally valid" at screening true minimum qualifications. This requires affirmative evidence that the candidates achieving the lowest passing scores on the alternative would be "roughly as qualified" as those passing the current test.

Because Erdman provided little affirmative proof along those lines, and Madison offered evidence of custom tailoring its test components, the court found no clear error in rejecting the IAFF Test as insufficiently validated locally. Employers can continue using facially neutral tests crafted specifically to their workforce needs and equipment, even amid disparate impacts, if no equally predictive alternative is shown.

The Seventh Circuit's decision reinforces Title VII's recognition that certain jobs, like firefighting, legitimately require highly specific physical qualifications that can be thoroughly assessed during hiring. While disparate impacts remain concerning, this ruling allows continued use of locally-validated screening practices when no equally predictive alternatives are demonstrated, even if off-the-shelf options exist with lesser disparities. The court struck a sensible balance preserving the substance of Title VII's protections while respecting public safety employers' needs for accurate, comprehensive applicant vetting tailored to real job demands. (While not influential in the Seventh Circuit's analysis, the court

noted that in 2018, almost eleven percent of Madison's fire department were women, compared to a national average of four percent).

Erdman v. City of Madison
No. 22-2433 (7th Cir. Jan. 22, 2024)

SHORT SUMMARIES:

3rd Circuit – Franchise Fees – CATV

While this case may seem jurisdiction specific to NJ, there could be interest nationwide. Two NJ municipalities sued Netflix and Hulu to collect franchise fees under the NJ Cable Act. Unfortunately, the court concluded that the local governments did not have standing as the act did not give them authority to enforce its provisions and that a state agency the Board of Public Utilities was the only entity with that authority. Would the law in your jurisdiction provide a different result?

Borough of Longport v. Netflix

8th Circuit – *Pickering* – Qualified Immunity – Retaliation

Officers in a small police department complained to the chief about various issues they believed affected the chief's performance and thus that of the department. One officer gave the chief a draft of a letter of resignation for the chief to sign. That discussion went nowhere. So, the officers anonymously sent a packet of grievances to the city manager. Nothing came from that, so the officers stepped up and admitted they sent the packet. An investigation of the claims was purportedly initiated but no one interviewed the officers and they were stymied and fired. They sued. No qualified immunity and *Pickering* did not apply.

Noon v. Smedley

8th Circuit – Odor Ordinance – Zoning – Equal Protection

South Saint Paul saw changes in its industrial base and land uses over the years, from one heavily tilted to livestock handling and processing to different uses. Some of the livestock uses faded and failed while some remained. Among those that remained was a rendering business. In reimagining itself and its land use plan, the city considered the problem of foul odors from some of the previously important businesses negatively affecting the transition and the city sought to deal with this by passing a foul odor ordinance seeking to mitigate the foul odors and to limit through zoning the addition of similar uses. One of the long time industrial uses sued asserting the usual Equal Protection and the newer Retaliation claim. The court found for the city and as to the Retaliation claim said "the record reveals that Sanimax's unremitting odor problem, rather than its protected

conduct, served as the impetus for the 2020 Odor Ordinance." The Court disposed of the Equal Protection challenges as well as a void for vagueness challenge and readers might want to take a look.

Sanimax v. South Saint Paul

9th Circuit- Cannabis Licensing – Commerce Clause

The 9th Circuit once again jumps at the chance to count angels on the head of a pin. The Commerce Clause, as we know, forms an important part of the federal constitution. That Clause clearly prevents states and their progeny from interrupting the course of interstate commerce. For that reason, courts have determined that licensing restrictions that prevent non-residents from holding licenses generally will violate the Clause's dormant nature. In this case, California allows cannabis products to be sold through licensed dispensaries. However, in the continuing battle over national drug policy, cannabis continues to be listed as a Schedule I substance under federal law; thus, making cannabis products just as illegal for distribution in the United States as heroin. The city of Sacramento, exercising its authority under state law established a licensing law for marijuana dispensaries and required licensees to be residents of the city. Naturally, a non-resident sued, but the District Court recognizing that general abstention rules did not apply nevertheless dismissed the federal claim on the basis of abstention because the court considered the conflict between state and federal law a quagmire into which it did not feel it could tread. The panel of the 9th Circuit reversed holding that abstention on that basis did not apply. So, the bottom line is that a federal court, applying federal law (a law that makes cannabis illegal), should ignore the basic illegality of the licensing scheme under federal law to apply the Commerce Clause to the state and local licensing scheme. I'm mystified.

Peridot Tree v. Sacramento

11th Circuit – DEI – First Amendment

Florida's governor and legislature apparently perceive that people cannot think for themselves, so pass various laws intended to prevent objectionable thoughts from being sprayed around the workplace like DDT. The 11th Circuit concluded that one such law did not survive the First Amendment. The court noted that Florida's views might be correct but the First Amendment doesn't give it the right to pick and choose which views it finds objectionable and which are not.

Honeyfund.com vs. Governor

11th Circuit – Public Meetings – Arrest for Disruptive Behavior – Cyberstalking

On January 10, the court issued an opinion involving the Town of Homestead Florida addressing the issues in the caption. This past week the circuit ordered the case for a rehearing en banc and vacated the earlier decision.

McDonough v. Garcia