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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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CONTENTS

SEPTEMBER / OCTOBER 2024

"IT AIN'T NECESSARILY SO"- PUTTING *LOPER BRIGHT* IN PERSPECTIVE

By: Norman A. Dupont, Counsel to Aleshire & Wynder LLP, Westlake Village. California

In reversing four decades of what had been settled *Chevron* deference, the Supreme Court's recent *Loper Bright Enterprises* decision promises to radically restrict federal agency authority and replace it with judicial oversight. But that transformation may not be as sweeping at the state and local level.

PAGE 6

FIT FOR DUTY: A MUNICIPAL LAW PRACTITIONER'S GUIDE TO EFFECTIVE AND DEFENSIBLE PHYSICAL ABILITIES TESTING

By: Christoper Towle, City Attorney, Newton, Kansas

It is essential that employees--whether long-time staff or new applicants—are capable of handling the physical requirements of their jobs. At the same time, employers must be alert to tests and measurement criteria that unfairly discriminate against some workers.

PAGE 10

OVERCOMING HUMAN-NATURE DUALISM IN THE TEXAS HILL COUNTRY: LOCAL GOVERNMENTS AND URBAN SPACES

By: AJ Urteaga, Assistant City Attorney, Land Use & Real Estate Division, Austin, Texas

A common perception is that biodiversity has little to do with heavily populated urban areas. But the reality is that cityscapes can be home to a wider array of plant and animal life than most of us would suspect—it just takes a broader awareness of the possibilities and a shift in focus.

PAGE 16

DEPARTMENTS

20 LAND USE
A Brief Look at Land Condemnation
By: Ben Mount, Senior Assistant General Counsel, North Carolina League of Municipalities
Municipal infrastructure and eminent domain.

24 FIRST AMENDMENT
Prayer at Council Meetings - Who Prays and How is that Decided?
By: Julian Grant, Deputy City Attorney, San Marcos, Texas
The constitutional nuances of legislative prayer.

28 INSIDE CANADA
Blocked Drainage, Illegal Tempos, Arson Allegations, and More
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

30 AMICUS
Supreme Court: On to the Next Term
By: Amanda Karras, IMLA Executive Director and General Counsel
Another round of transformational cases awaits.

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Fit for Duty: A Municipal Law Practitioner's Guide to Implementing an Effective and Defensible Physical Abilities Test

By: CHRISTOPHER TOWLE,
City Attorney, Newton, Kansas



Introduction

Employers have a legitimate interest in evaluating employment candidates to determine whether they are capable of successfully performing the requisite job duties and functions. To perform competitively in the employment market, cities need to select the right person for the position in an effectively and efficiently manner. A thorough evaluation of employment candidates will extend beyond employment applications and interviews as employers utilize physical ability testing to identify the best candidate for the position using objective metrics. One challenge for city attorneys tasked with drafting or reviewing these physical ability testing policies will be to develop measures appropriate for a diverse group of jobs spread throughout various city departments.

While cities need to establish testing programs suitable for individualized positions that are effective in identifying the appropriate candidates, they need to do so in a way that does not illegally discriminate. Apart from the moral desire to implement a hiring process that promotes a diverse workforce and is fair to all that apply, city employers must consider the financial impact of either failing to properly evaluate candidates or implementing a testing program that has a discriminatory impact.

Failing to screen out an employee during the selection process can have an economic impact on cities with the cost of a single employee turnover being estimated to range from tens of thousands of dollars to one and a half to two times annual salary.[1] Additionally, cities should consider the costs of litigation and potential judgments as a consequence of implementing an illegal physical ability testing program. Apart from the costs and resources associated with defending these claims, the penalties can be significant when a physical abilities testing program is deemed to be improper.

In 2020, the EEOC and Walmart entered into a consent decree that required Walmart to end a physical ability testing program utilized for the hiring of order fillers at their grocery distribution center.[2,3] In their action against Walmart, the EEOC alleged that the physical ability testing program used for certain distribution center employees discriminated against against women.[4] It was further alleged that the Walmart physical abilities test was not related for the position in question and was not consistent with a business necessity.[5] The decree included a requirement that Walmart pay $20 million into a settlement fund.[6,7]

In 2019 the EEOC filed suit against Stan Koch & Sons Trucking for sex discrimination based on a pre-employment strength test.[8] In that suit, the EEOC alleged that the test disproportionately disqualified female truck drivers.[9] The case was resolved through a consent decree with Stan Koch & Sons agreeing to discontinue the test and to pay $500,000.[10]

The EEOC filed a similar suit against Schuster Company, another trucking company that utilized a physical abilities test comparable to the one implemented by by Koch & Sons.[11,12] As in the Koch & Sons matter, the EEOC alleged that the strength test used by the company discriminated against female truck drivers. The case was settled with Schuster Company agreeing to discontinue the test, pay damages, and to offer employment to a class of women whose jobs were impacted by the test.[13]

Charges of discrimination can also be brought by employees themselves. Twelve female police officers sued the City of Colorado Springs challenging a physical abilities test implemented by the City's Police Department.[14] This test was not limited to the pre-employment hiring process, but was required to be performed by all officers on an

annual basis.[15] The test evaluated the number of push-ups and sit-ups that officers could do in a timed period and also included two running tests.[16] The City ultimately entered into a settlement agreement paying $2,471,350 to the plaintiffs in a case that cost more than $960,000 to defend.[17]

Applicable Federal Laws

While physical abilities testing in the employment context is generally permissible, liability can attach in certain instances when the testing results in a discriminatory impact.[18] Aside from conforming with applicable state law, a city's physical abilities testing programs-both pre-employment and ongoing or annual testing-must comport with Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Pregnant Workers Fairness Act, and the Age Discrimination in Employment Act of 1967.

Title VII

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, religion, sex, or national origin.[19] Pre-employment physical tests are permitted under Title VII unless deemed discriminatory.[20] It is a lawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[21] Title VII prohibits both intentional discrimination[22] (disparate treatment) and unintentional discrimination (disparate impact).[23] As stated in *Griggs v. Duke Power Co.* "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[24]

Burden of Proof in Title VII Disparate Impact Cases

In a disparate impact Title VII employment discrimination claim, the court will adjudicate a motion for summary judgment utilizing the burden-shifting framework from *McDonnell Douglas Corp. v. Green*.[25] In order to shift the burden to the employer, the employee must establish that 1) the employee is a member of a protected class, 2) the employee was qualified for the position, 3) the employee was rejected for the position, and 4) the position remained open, and the employer continued to seek applicants.[26] Once these requirements are met, the employer must show a legitimate and non-discriminatory justification for the adverse action.[27]

Americans with Disabilities Act

Another federal employment law for municipal practitioners to consider is the Americans with Disabilities Act (ADA). The ADA prohibits covered entities from discriminating against employment candidates based upon a disability or perceived disability.[28] Local government employers are covered entities under the ADA, so any employment candidate submitting an application to the local government would be entitled to ADA protection, which can include accommodations in certain scenarios. In February of 2024 the EEOC entered into a consent decree with Hospital Housekeeping Systems, LLC which required a settlement payment of $520,000.[29] The EEOC alleged that Hospital Housekeeping Systems terminated certain employees after failing an essential functions test because of their disabilities, despite the fact that they were able to perform their job.[30]

Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) prohibits discrimination on the basis of pregnancy, childbirth, or pregnancy related medical conditions.[31]

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) requires certain employers to provide reasonable accommodations to qualified employees or applicants affected by pregnancy or childbirth unless the accommodation will cause an undue hardship.[32]

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against persons 40 years old or older.[33]

Validation

When a physical ability test is challenged based on disparate impact, a significant issue will be the statistical data specific to the protected group. See the U.S. Department of Labor Guide related to testing and assessment which discusses the validation of such testing.[34,35] The Uniform Guidelines set forth three types of validation applicable to physical ability testing: [36]

1) **Criterion-related validation.** This This requires a statistical relationship between test performance and job performance. Criterion-related

Continued on page 12



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validation consists of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance.[37] "Criterion validity compares responses to future performance or to those obtained from other, more well-established surveys."[38]

2) **Content-related validation.** This requires a demonstration that the content of the test represents important job-related behaviors. "Content validity is the degree to which elements of an assessment instrument are relevant to a representative of the targeted construct for a particular assessment purpose."

3) **Construct-related validation.** This validation requires a demonstration that the test measures the construct or characteristic it claims to measure, and that the characteristic is important to the successful performance. "Construct validity represents the most complex and comprehensive form of validation."[39]

Erdman v. City of Madison

In *Erdman v. City of Madison*,[40] the Seventh Circuit considered a case involving Catherine Erdman, a female applicant for the Madison, Wisconsin Fire Department. Erdman was a veteran firefighter who had been promoted several times over the course of her career with a different fire department.[41]

At the time that Erdman applied for the position, the Madison Fire Department hiring process included an application with minimum requirements, a written test, a physical abilities test, an oral examination before a panel, and an interview with the chief.[42] After not being chosen for the position, Erdman filed an action against the City, alleging that the department's physical abilities test caused the City to discriminate against her on the basis of sex. The court referred to this physical abilities test as the "Madison Test" which was unique to the City of Madison and consisted of seven events designed to assess multiple physical demands that firefighters face on the job.

The court's analysis included an alternative candidate physical ability test established by the International Association of Fire Fighters (the IAFF Test).[43] The IAFF Test is a comparable physical abilities test and has many similarities to the Madison Test. However, there are differences between the two. Three of those differences outlined by the court included the method of timing each test, the number of attempts allowed, and the specific implementation of the pike pole event. The pike pole component was what ultimately disqualified Erdman from consideration. For the timing of the tests, the IAFF test establishes a maximum combined time to complete all events, whereas the Madison Test sets forth a time requirement for each component.[44] In terms of attempts, the IAFF Test provides each candidate with up to three attempts to pass, whereas the Madison Test limits each candidate to a single attempt. Both tests include a "pike pole" component which involves the candidate using a long pole with a hook on the end to simulate the action of reaching up to breach and pull down a ceiling to check for fire. However, the Court made a distinction between the two tests. Under the IAFF Test, the candidate can stand directly under the breached portion of the ceiling, whereas under the Madison Test the candidate can stand directly under the hook to push up, but they must move 18 inches back when completing the pull portion of the test.[45]

The court followed a three-step burden shifting framework to evaluate Erdman's claims against the City. First, the court considered whether the Madison Fire Department "uses a particular employment practice that causes a disparate impact" on an impermissible basis.[46,47] The City challenged the the District Court's decision that Erdman had proved her *prima facie* case of disparate impact. Here, the court analyzed whether the scope of the review should include the entire test, or should focus only on the component that eliminated Erdman from consideration. Ultimately the Circuit Court agreed with the District Court in concluding that the entire Madison Test should be considered, not just the modified pike pole test.[48] Further, the court found that Erdman proved her *prima facie* case that the test had an improper disparate impact on women.

The second step was resolved through Erdman's conceding the Madison Test is "job related for the position and consistent with business necessity."[49]

The third step was ultimately resolved by the Circuit affirming the findings of the lower court in that the IAFF test was not an "available alternative employment practice that has less disparate impact while serving the needs of the Madison Fire Department.[50] Notwithstanding, given the procedural history of the case, the burden on the third step was on Erdman.[51] Given the nature of this case, even a slight deviation to the facts could have created a different result.

Practical Guidance

1) **Any physical abilities testing program should be designed to coincide with the specific job functions of the particular employment position.** Any physical abilities test offered by an employer should have a direct connection to the actual tasks to be performed. This would include not only the job responsibilities included in the job description but should also match the actual tasks performed in the field. Clearly, cities should avoid taking a "one size fits all" approach when implementing a testing program. When evaluating the physical abilities test in *Erdman*, the court pointed out that the Madison Test "focuses on job simulation activ-

ities, rather than traditional exercise-based activities."[52] The Colorado Springs suit referenced above represents the converse approach, which evaluated the number of push-ups and sit-ups officers could do in a timed period. Clearly, an employer will be better served to evaluate actual job performance as opposed to general fitness ability.

2) **Cities should track all available data related to the test.**
Any challenge to a physical abilities test based on a claim of disparate impact will involve a review of the data associated with the testing. Employers should consider the success rate of all applicants as well as those included in a protected class that may be subject to a discriminatory framework. This analysis should include comparable data for any available alternative test.

3) **Cities should determine whether the testing being offered is a physical abilities test or a medical examination.**
Under the ADA, pre-employment medical tests are prohibited.[53] Only after a conditional job offer is extended may an employer conduct medical examinations.[54] The EEOC defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[55] Generally, physical abilities testing is suitable in the pre-offer stage, but a physical ability test can be considered a medical exam if the test measures a physiological response such as heart rate or blood pressure. [56]

Conclusion

A detailed comprehensive physical ability testing program can undoubtedly provide city employers with a significant edge in the hiring process. However, a testing program that fails to accurately identify successful candidates or imposes a prejudicial effect can be determinantal to a city. Any testing framework that fails on either front will prove to be a liability.
City Attorneys should consider the current legal guidance and confirm that their client city utilizes a physical ability testing program that accurately measures the actual physical tasks of each employment position subject to testing. Further, the city should regularly review the data associated with its testing program to identify potential disparate impact and make the client organization aware that a discriminatory testing program can incur significant costs and resources in litigation.

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Continued on page 14

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