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HEADLINE: Employer's reasons for strength test aren't strong enough to win case

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BODY:

The Eighth U.S. Circuit Court of Appeals, which covers Missouri, recently addressed a corporation's preemployment strength testing and its effect on female job applicants. After examining the employer's testing practices, the court held there was sufficient evidence to support the jury's verdict that the employer had a pattern or practice of intentionally discriminating against women in its hiring practices and that the employer's testing practices had a disparate impact on female applicants.

Facts

Dial Corporation has an Armour meatpacking plant in Fort Madison, Iowa. Entry-level employees at the plant were assigned to the sausage-packing area, where workers were required to lift and carry up to 18,000 pounds of sausage daily. Employees were required to carry approximately 35 pounds of sausage at one time, and the job required repetitive lifting of the 35-pound rod of sausages to heights between 30 and 60 inches above the floor.

Because employees who worked in the sausage-packing area experienced a disproportionate number of injuries compared to the rest of the plant's workers, in late 1996 Dial implemented several measures to reduce the injury rate. Examples of measures taken by the company included rotating jobs to improve ergonomics, instituting a team approach, lowering the height of the machines to decrease lifting pressure for the employees, and conducting periodic safety audits.

In 2000, Dial implemented a strength test, identified as a "work tolerance" test, to evaluate potential employees. The test involved asking job applicants to carry a 35-pound bar between two frames approximately 30 and 60 inches off the floor and to lift and load the bar onto those frames. The applicants were told to work at their "own pace" for seven minutes. An occupational therapist watched the testing process, documented how many lifts each applicant completed, and recorded her own comments about each candidate's performance. Starting in 2001, the plant nurse also watched and documented the process. From the inception of the test, the plant nurse reviewed the test forms and had the ultimate hiring authority. For many years, men and women had worked together in the sausage-packing area doing the same job. In the three years before the work-tolerance test was introduced, 46 percent of the new hires were women, but after the test was implemented, the number of women hires dropped to 15 percent. The test was the only change in Dial's hiring practices. The percentage of women who passed the test decreased almost every year it was given, with only eight percent of the women applicants passing in 2002. The overall percentage of women who passed was 38 percent, while the men's passage rate was 97 percent.

One of the first applicants to take the work-tolerance test was Paula Liles, who applied for a job in January 2000. She wasn't hired even though the occupational therapist who administered the test told her she had passed. She filed a discrimination charge with the Iowa Civil Rights Commission and the Equal Employment Opportunity Commission (EEOC) in August 2000. In September 2002, the EEOC filed a claim in federal court on behalf of Liles and 53 other women who had applied to work for Dial and were denied employment after taking the work-tolerance test. The agency alleged that Dial had a pattern or practice of intentionally discriminating against women through its use and interpretation of the work-tolerance test. The EEOC also asserted that the policy of administering the test, although apparently neutral, had the unintended consequence of discriminating against women; that is, it had a disparate impact on women applicants.

Jury's verdict

The case went to a jury trial in August 2004. At trial, the EEOC and Dial offered competing experts. The agency presented an industrial organization expert who testified that the work-tolerance test was significantly more difficult than the actual job that workers performed at the plant. He explained that although employees did 1.25 lifts per minute on average and rested in between each lift, applicants who took the work-tolerance exam performed six lifts per minute on average, usually without any breaks. The expert additionally concluded, after analyzing Dial's written evaluations of the applicants, that more men than women were given employment offers even when they had received similar comments about their performance. The agency introduced evidence that the occupational nurse marked some women as failing even though they completed the full seven-minute test. The EEOC's expert also testified that although overall injuries and strength-related injuries among sausage workers declined consistently after the test was implemented in 2000, the downward trend in injuries had begun in 1998 after Dial had instituted the other measures to reduce injuries. Moreover, in

two of the three years before the company implemented the work-tolerance test, the women's injury rate had been lower than that of the male workers.

In an attempt to counter the EEOC's expert's testimony, Dial produced an expert in work physiology who testified that in his opinion, the work-tolerance test effectively tested skills that were representative of the actual job. An industrial and organizational psychologist testified that the work-tolerance test did, in fact, measure the requirements of the job and that the decrease in injuries could be attributed to the test. The company also called the plant nurse, who testified that although she and other Dial managers knew that the work-tolerance test was screening out more women than men, it had a business necessity for using the test: a decrease in injuries.

The jury found that Dial had engaged in a pattern or practice of intentional discrimination against female job applicants, starting in April 2001. The jury awarded compensatory damages to the nine claimants who testified at trial but declined to assess punitive damages.

The question of whether the test had a disparate impact on female applicants was submitted to the district court judge. With respect to the disparate impact allegations, the district court concluded that the work-tolerance test had a discriminatory effect and Dial hadn't demonstrated the test was justified by business necessity or established that the test was valid, nor had it effectively controlled for other variables that might have caused the decline in injuries, including other safety measures that it implemented starting in 1996. The district court awarded the claimants back pay and health care benefits in the amount Dial would have paid for benefits had it provided the women with jobs. In all, the awards to the spurned applicants totaled approximately \$ 3.4 million.

Dial appealed to the Eighth Circuit, arguing that there was insufficient evidence for a jury to find intentional discrimination. It also argued that it couldn't be held liable for disparate impact discrimination because the work-tolerance test was a business necessity since it decreased the number of injuries in the plant's sausage-production area.

Eighth Circuit's decision

The appeals court first addressed Dial's challenge to the jury's finding that the company had engaged in a pattern or practice of intentional discrimination with respect to its hiring practices. The court noted that a pattern and practice claim can be shown by proving "regular and purposeful" discrimination -- in essence, that discrimination was the company's standard operating procedure. The court pointed out that under the law, statistics combined with anecdotal examples of discrimination could establish a pattern or practice of regular, purposeful discrimination and that discriminatory intent could be inferred from the mere fact of differences in treatment.

The Eighth Circuit examined the statistical evidence offered in the case and found that it clearly showed a large disparity between the hiring of men and women. Moreover, the percentage of women who passed the work-tolerance test declined with each implementation of the test. Additionally, despite knowing about the statistical differences and the fact that more men were being hired than women, Dial continued to use the work-tolerance test. The company tried to argue that the statistics were inapplicable, asserting that men and women had profound physiological differences. The court noted, however, that the evidence showed men and women had worked the same job together for many years before the work-tolerance test was implemented and that the evidence showed that men and women had received similar comments on their test forms, yet only the males received employment offers. Accordingly, the court held that the evidence introduced at trial was sufficient for a jury to find a pattern and practice of intentional discrimination against women. The court therefore upheld the jury's verdict.

The court next addressed Dial's appeal of the district court's determination that the work-tolerance test had a disparate impact on females. In a disparate-impact case, an employee or applicant must show that an apparently neutral policy or practice has a disparate impact on one sex (or on some other protected group). For an employer to escape liability on the claim, it must show that the practice at issue is consistent with a business necessity, e.g., in this case, that the test was related to safe and efficient job performance. An employer using the business necessity defense must prove that the practice was related to the specific job and the skills and physical requirements of the position in question. It also must show there is a need for the challenged practice. The court stressed that although a study showing the validity of an employment test can be sufficient to prove business necessity, that isn't necessary when the employer can demonstrate that the procedure is sufficiently related to safe and efficient job performance.

The court rejected Dial's assertion that it proved business necessity because safety improved after the test was implemented, stating:

Although Dial claims that the [reduction in] injuries shows that the [test] enabled it to predict which applicants could safely handle the strenuous nature of the work, the sausage plant injuries started decreasing before the [test] was implemented. Moreover, the injury rate for women employees was lower than that for men in two of the three years before Dial implemented the [test]. The evidence did not require the district court to find that the decrease in injuries resulted from the implementation of the [test] instead of the other safety mechanisms Dial started to put into place in 1996. After its safety arguments were rejected, Dial argued that it still could prove business necessity through the validity

studies discussed by the experts at trial. Dial argued that the work-tolerance test was shown by its experts to have both "content" and "criterion" validity and thus should be upheld as nondiscriminatory. The standard for examining both types of validity is set forth in guidelines promulgated by the EEOC. The regulations state that "a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated." Criterion validity can be shown by "empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance." Dial argued that it had established content validity because its expert had testified that the work-tolerance test was highly representative of the actions required by the job. The company claimed that testimony wasn't rebutted by the EEOC, which had no physiology expert. The court noted that despite the company's contentions, the district court was persuaded by the EEOC's expert in industrial organization and his testimony that "a crucial aspect of the [test] is more difficult than the sausage making jobs themselves" and that the average applicant had to perform four times as many lifts as current employees and had no rest breaks. The appeals court also pointed to evidence showing that in a testing environment in which hiring is contingent on test performance, applicants tended to work as fast as possible during the test to outperform the competition.

Dial next argued that the test was criterion-valid because both overall injuries and strength-related injuries decreased dramatically following the work-tolerance test's implementation. The company claimed that the decrease in injuries showed that the work-tolerance test enabled it to predict which applicants could safely handle the work's strenuous nature. But the court again noted that the company's reasoning was flawed because the evidence showed that the sausage plant injuries started decreasing before the work-tolerance test was implemented. Accordingly, the Eighth Circuit found that the district court was well within its province to find that the decrease in injuries resulted not from the work-tolerance test, but instead from the other safety mechanisms that Dial had implemented in 1996.

Bottom line

This case doesn't hold that preemployment physical-ability tests are necessarily discriminatory against women. When subjective strength testing has a disparate impact on women and the employer can't establish a validated testing process or otherwise show the test is justified by "business necessity," however, it's probably unlawful.

Employers that want to implement a preemployment physical-ability test should take the lessons illustrated by this case to heart. Two criteria seem to be essential to defending a challenge to work-tolerance testing: a job task analysis and a validated testing process. **First, you need to ascertain exactly what types of abilities the actual job requires.** Once that has been determined, you need to formulate a testing procedure that mirrors, as closely as possible, the actual requirements of the job. **Next, you should implement an objective scoring system, rather than a subjective scoring system, which could be open to discriminatory interpretations.** Lastly, once the test is implemented, you need to follow up at regular intervals to make sure that the test is doing what it was designed to do -- increase safety or reduce injuries. Copyright 2007 M. Lee Smith Publishers LLC

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