Jumping the Gun: The Increasing Use of Pre-Employment Testing

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Introduction

Pre-employment tests, including machine-based physical stress testing, have been around for years. "Isokinetic" and other physical stress tests mainly originated from the sports medicine field. In other words, those types of tests involve methods used to evaluate the progress of an athlete's post-injury rehabilitation.

In the name of reducing workplace injuries and otherwise avoiding unnecessary "costs," employers have begun to use such tests purportedly to predict who supposedly can perform essential job functions. Given the original purpose and ongoing nature of such testing, however, employers may end up discriminating based on disability, sex, age, or another protected class when screening employees on this basis. The use of pre-employment tests can violate employment and civil rights statutes in two ways: (1) by causing disparate impact, also known as discriminatory effect and (2) by causing disparate treatment, also known as discriminatory conduct.

I. Pre-employment Testing may Constitute Disparate Impact in Violation of Employment and Civil Rights Law

A neutral employment policy or practice that has a statistically significant and disparate impact on a protected class will violate anti-discrimination statutes unless the policy or practice serves legitimate business purposes and less discriminatory means do not exist.[1] The governing Federal anti-discrimination statutes include the Americans with Disabilities Act,[2] Title VII,[3] and the Age Discrimination in Employment Act.[4] The regulations promulgated to implement these laws explicitly restrict the use of pre-employment testing to preclude unlawful discrimination via pre-employment tests.[5]

Disparate impact, standing alone, does not demonstrate a *prima facie* case of illegal discrimination; the imbalance must be statistically significant regarding the qualified pool of applicants or employees.[6] When a plaintiff establishes a *prima facie* case of unlawful discrimination due to a disparate impact from a testing procedure, the employer then has the burden of establishing that the test in question is related to safe and efficient job performance and comports with business necessity.[7] Even if an employer could meet its evidentiary burden in this respect, a plaintiff will still prevail when he or she demonstrates that an equally effective and valid selection method exists as an alternative and, moreover, the alternative method less of a disparate impact than the challenged test.[8]

Under the governing analysis, both the Supreme Court and the Eighth Circuit have ruled that employers illegally discriminated based on a protected class by using pre-employment tests with a disparate impact.[9] Courts also have rejected the use of pre-employment testing even when employers administer it after offering employment to a job applicant.[10]

II. Pre-employment Testing may Constitute Disparate Treatment in Violation of Employment and Civil Rights Law

To have a valid disparate treatment claim under the indirect or "pretext" method of proof, a plaintiff must establish a *prima facie* case of discrimination: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the job at issue; (3) the employer gave the job to someone else; and (4) the person hired for the job in question is a member of the protected class at issue.[11]

Importantly, settled Supreme Court precedent makes clear that a prima facie case is a minimal threshold to surmount.[12] After a plaintiff presents a *prima facie* case, the employer must provide a legitimate, non-discriminatory reason for the challenged conduct.[13] A plaintiff will nonetheless prevail by demonstrating that the employer's reason is pretext, or a camouflage, for discrimination.[14] Pretext can be inferred from the mere fact that the reason offered by the employer for its adverse action is not believable.[15] In this context, comparators need not be virtually identical to prove the disparate treatment of a plaintiff.[16]

A plaintiff can also demonstrate disparate treatment under the direct or "mixed-motive" method of proof. Specifically, a plaintiff may prove disparate treatment by showing a protected class was a motivating factor in the decision not to hire the plaintiff.[17] Plaintiffs should be wary of this approach, however, because it triggers an affirmative defense and related "same decision" jury instruction. In short, an employer will avoid paying any damages and perhaps reduce the attorney's fee/costs award to the plaintiff if the employer can prove it would have taken the challenged action notwithstanding the discriminatory motive.[18]

The context for, and nature of, "isokinetic" and similar machine-based physical stress tests explain much about why the use of this pre-employment testing may constitute disparate treatment. Evidently prompted by certain segments of the insurance industry, a growing number of employers are starting to contend that the use of such pre-employment tests will somehow reduce workplace injuries and otherwise serve employers' lawful objectives. These physical stress tests, however, only measure the strength of an isolated muscle group (such as 1 arm or 1 leg), at a constant rate of speed, and along a certain plane or range of motion. In other words, the testing mechanisms do not evaluate body mechanics – that is, how the body works together as a unit – to perform essential job functions, the experience-based judgment to perform essential job functions, or the techniques used to perform essential job functions.

Not surprisingly, then, courts have determined that "isokinetic" and similar machine-based physical stress tests can be a form of disparate treatment based on a protected class.[19] Otherwise stated, courts have found that the use of such testing as a screening mechanism manifests the intent to discriminate – regardless of the impact on the pool of qualified applicants or employees overall.[20]

Conclusion

The use of physical stress tests, such as "isokinetic" screening, often calls to mind the proverbial square peg being hammered into a round whole. For decades, the courts have rejected testing mechanisms like this when they unfairly screen out employees based on a protected class. Indeed, although the disparate impact doctrine has been severely limited in recent years, the courts have taken a robust approach to the doctrine when reviewing pre-employment tests. In the name of reducing costs, therefore, some employers have increased their costs substantially when using pre-employment tests as a screening mechanism.

[1]*See, e.g., EEOC v. Dial Corp.*, 469 F.3d 735, 742-43 (8th Cir. 2006).

[2]42 U.S.C. §§ 12101, *et seq.*

[3]42 U.S.C. §§ 2000e, *et seq.*

[4]29 U.S.C. §§ 623, *et seq.*

[5]29 C.F.R. § 1630.10 ("It is unlawful...to use...employment tests...that...tend to screen out an individual with a disability..."); 29 C.F.R. § 1607.3A ("The use of any selection procedure which has an adverse impact on the hiring...of any sex...will be considered to be discriminatory...unless the procedure has been validated in accordance with these guidelines..."); 29 C.F.R. § 1625.7(c) ("Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'").

[6]*Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650-51 (1989), *superseded on other grounds*, 42 U.S.C. §§ 2000-e, et seq.

[7]*Firefighters' Inst. for Racial Equal. v. City of St. Louis*, 220 F.3d 898, 904 (8th Cir. 2000), *cert. denied* 532 U.S. 921 (2001); 42 U.S.C. § 2000e-2(k).

[8]*Id.*

[9]*Lewis v. City of Chicago*, 560 U.S. 205, 213-15 (2010) (reversing the court of appeals because the pre-employment test was discriminatory); *Dial Corp.*, 469 F.3d at 742-43 (affirming the judgment that the pre-employment test discriminated based on a protected class).

[10]*See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (holding that testing used to make hiring, transfer, and promotion decisions was illegal because it disproportionately excluded employees based on a protected status).

[11]*See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[12]*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."); *Johnson v. Arkansas State Police*, 10 F.3d 547, 551 (8th Cir. 1993) ("The threshold of proof necessary to make a prima facie case is minimal and the district court improperly conflated the prima facie case with the ultimate issue in this Title VII case.").

[13]*Id.*

[14]*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.") (emphasis omitted); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) (same).

[15]*Id.*

[16]*See, e.g., Wimbley v. Cashion*, 588 F.3d 959, 962 (8th Cir. 2009).

[17]*See, e.g., Cowan v. Strafford R-VI School Dist.*, 140 F.3d 1153, 1157-58, *rhrg. and rhrg. en banc denied* 140 F.3d 1153 (8th Cir. 1998).

[18]42 U.S.C. § 2000e-5(g)(2)(B).

[19]*City of La Crosse Police and Fire Com'n v. Labor and Industry Review Com'n*, 407 N.W.2d 510, 521-22 (Wis. 1987) (considering the employer's reliance on isokinetic testing and concluding that there was no evidence the female plaintiff could not perform the essential job functions and, moreover, that the physical stress test on which the employer relied was not rationally related to essential job functions); see also *Lujan v. Pacific Maritime Ass'n*, 165 F.3d 738, 742 (9th Cir. 1999) (reversing summary judgment for the employer under the ADA because the strength and agility testing did not appear to be related to essential job functions).

[20]*Id.*