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United States District Court, D. Kansas.

Harold L. SIMMONS, et al., Plaintiffs,  
v.  
The CITY OF KANSAS CITY, et. al., Defendants.

Civ. A. No. 88-2603-O.

|  
Dec. 7, 1992.

#### Attorneys and Law Firms

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Police, Lodge 4.

#### MEMORANDUM AND ORDER

EARL E. O'CONNOR, Senior District Judge.

\*1 This case was tried to the court for six days commencing August 24, 1992. Plaintiffs sued on behalf of a class of black police officers, alleging racial discrimination in violation of Title VII. 42 U.S.C. § 2000e, *et. seq.* The court, having heard the evidence, and having reviewed the briefs of counsel, makes the following findings of fact and conclusions of law, pursuant to Federal Rule of Civil Procedure 52.

#### *Findings of Fact*

1. The named plaintiffs are nine black police officers currently employed by the City of Kansas City, Kansas, Police Department (the "Department"). Plaintiffs bring this action on behalf of themselves and a class previously certified by this court. The class consists of all black officers employed by the department on or after December 7, 1986.

2. The Department is a duly constituted department of the City of Kansas City, Kansas (the "City"), a named defendant. The other named defendants are officials of the City and/or Department sued in their official capacities.

3. The Fraternal Order of Police Lodge No. 4 (the "FOP") is and was at all relevant times the "recognized employee organization" for all Department police officers below the rank of lieutenant, and is the exclusive collective bargaining representative for these officers.

4. In this suit, plaintiffs challenge the merit-based evaluation system used by the Department to rank officers for promotion eligibility. The plaintiffs allege that the system discriminates against them on the basis of their race.

5. At the close of the plaintiffs' evidence, the court ruled that the plaintiffs had failed to present any evidence of intentional discrimination, and accordingly granted judgment as a matter of law in favor of defendants on plaintiffs' claims of disparate treatment. Therefore, the only claim remaining for adjudication is the plaintiffs' claim of disparate impact.

6. The merit based promotion system at issue in this case came into being in 1977. Prior to adoption of the merit-based system, promotions were made by the Chief of Police and were influenced more by political factors than job-related qualifications. Widespread dissatisfaction with the political promotions system led (at least in part) to a work stoppage in 1976, which in turn led to the organization and recognition of the FOP as the bargaining representative for the officers. Through negotiations, the FOP and the City agreed on the terms of the merit-based promotion system, and it became a part of their collective bargaining agreement. The promotion system, with only minor changes through the years, has been a fixture of each successive collective bargaining agreement between the City and the FOP.

7. The labor agreements govern promotion procedures for the positions of detective, sergeant, and lieutenant.

Sergeant and detective are promotions from the rank of patrolman. Although the job descriptions are different, the two positions are considered roughly equivalent within the Department. The position of lieutenant is a promotion from sergeant or detective.

\*2 8. Officers wishing to be considered for promotion must participate in the three-part testing procedure used to rank candidates for promotion. The three parts of the testing procedure are a written test, an oral interview by a panel, and a supervisor's evaluation. The written test is designed to test the candidate's knowledge of police procedures, regulations, and law enforcement technique. The oral interview is before a panel of officers and is used to evaluate the candidate's demeanor and knowledge of correct police procedures. The supervisor's evaluation is used to judge the candidate's on-the-job performance.

9. Each of the subject positions—sergeant, detective, and lieutenant—is separately tested for and a separate eligibility list is made for each position. An officer who tests for both sergeant and detective will be ranked independently on the list for each position.

10. Once the results of the three-part test have been tabulated, the candidates are ranked according to score, highest to lowest. Promotions are made from the lists, in rank order, as positions become available. If an officer testing for both sergeant and detective accepts a promotion off one list, his name is removed from the other list.

11. Promotional testing has been conducted ten times since 1977. The duration of the eligibility lists is fixed by the labor agreement between the FOP and the City. Typically, the lists have lasted from one to three years. When a list expires, those not promoted off the list are eligible to participate in the next round of testing and are given a new ranking in accordance with their performance on the new test. The most recent list was created in 1991, and is still in effect.

12. The testing process has been designed, administered, and scored by Midwest Research Institute ("MRI"), a private consulting firm. The City paid MRI approximately \$47,000.00 to conduct the most recent round of testing. MRI worked closely with the Department in formulating the test procedure, and continues to work with the Department on the content and format of each test that is administered. In addition to writing and scoring the written test, MRI trains Department officers on how to conduct the oral interviews and how to score a candidate's responses. In addition, MRI takes the supervisor's evaluations and converts them into a raw score for each candidate. MRI then tabulates the scores

and ranks all the candidates in each position. The Department has nothing to do with the scoring or ranking of the candidates. The results are delivered to the FOP and the Department at the same time.

13. When a position becomes available, the City Administrator, with the advice of the Chief, offers the job to the highest ranked person on the list for that position. According to this procedure, the City Administrator may only pass over the highest ranked candidate "for sufficient cause," and this has been interpreted to mean for legal cause, such as gross insubordination. Only once in the history of merit promotion has the highest ranked man been passed over, and that individual was white.

\*3 14. The individual plaintiffs who testified at trial do not agree on which component of the test discriminates against black officers. Some complain that the oral interview by the panel and the supervisor's evaluations are subjective and given too much weight; others believe that the written test fails to accurately identify those officers most likely to succeed if promoted.

15. In preparation of the merit testing procedure for the Department, MRI conducted an extensive written survey that was completed by all Department officers. MRI also interviewed individual officers, usually in groups, to identify the job duties and responsibilities for the positions of sergeant, detective, and lieutenant. Between 1977 and 1984, MRI conducted similar job surveys and analyses for these positions. MRI used the results of its studies to formulate the specific components of the testing procedures. The results of these studies were reviewed by Department and FOP committees. These committees always had black officers as members.

16. The writing and scoring of the written portion of the test has always been the responsibility of MRI. MRI originally used a national standardized test, but from 1980 to the present, MRI has written a test specific to the policies and procedures of the Department. The written tests are multiple choice. Seventy percent of the questions have been drawn from the standard operating procedures, internal rules and regulations, and general and special orders of the Department. The other thirty percent of the questions are taken from recognized texts in law enforcement, jointly selected by the FOP and the City. All candidates have access to both the Departmental and textual materials tested on the written examination.

17. The oral interview panel is composed of three to six officers of equal or greater rank than the candidate. A separate panel is used for each position. The interviews are designed to last from fifteen to twenty minutes. The candidates are questioned on their qualifications,

Department procedures and policies, and are also asked how they would respond to given hypothetical situations that might arise in the field. Each interviewer individually rates the candidate based upon his responses to these questions. Until 1987, the scores were simply averaged to arrive at the candidate's interview score. In 1987 and 1991, the panels were composed of six officers, and the candidate's score was reached by throwing out the high and low ratings and averaging the remaining four. In the past, the Department brought in officers from other police departments to serve on the panels, but the current system uses exclusively Department officers. In almost all cases, minority officers were included on the interview panels. In several instances, black candidates received their lowest interview scores from the black officers sitting on the panel.

18. The final component of the testing process is the supervisor's evaluation, in which a supervisor is required to rank the officers under his command. The supervisor must submit this ranking to his superior for review. MRI converts a candidate's ranking into a raw score to be figured into the candidate's overall score.

**\*4** 19. The relative weight assigned to the components of the testing procedure was originally one-third each, but now the weight assigned is fifty percent to the written portion, forty percent to the oral interview by the panel, and ten percent to the supervisor's evaluation.

20. Plaintiffs presented statistical evidence in support of their claim that the testing process has an adverse impact upon black officers. Plaintiffs' expert was Dr. Merlyne Hines-Starr. Dr. Hines-Starr is an Assistant Dean at Washburn University. Her area of expertise is applied and continuing education. Plaintiffs submit Dr. Hines-Starr is qualified to evaluate the data in this case because of her training in statistics, which amounted to fifteen hours of college level instruction. Dr. Hines-Starr has no training or experience in the areas of employment discrimination or Title VII. She has never before testified as an expert in these areas.

21. Dr. Hines-Starr attempted to calculate selection rates and representation rates for promotion of black officers in the Department. She then compared her results to the corresponding rates for white officers in the Department. Dr. Hines-Starr analyzed her data according to the four-fifths rule, finding noncompliance in six of the nine test periods she examined. She did a second analysis to determine statistical significance, and concluded that her results could not have occurred by chance.

22. In performing her analysis, Dr. Hines-Starr made a number of errors. Dr. Hines-Starr incorrectly calculated

the promotion rate for whites by double counting the promotions of white officers, i.e., if a white officer on the eligibility lists for the positions of detective and sergeant was promoted to one position, Dr. Hines-Starr counted the officer as receiving two promotions. This caused the promotion rate for white officers to be overstated. Dr. Hines-Starr also erred by grouping the positions rather than looking at sergeant, detective, and lieutenant separately. She also failed to differentiate the separate test components. Dr. Hines-Starr counted as promotions white officers who left the Department for other positions and who were consequently *not* promoted. She counted as promotions those instances when an officer declined a promotion. Dr. Hines-Starr counted promotions from the 1980-81 list twice. Sometimes she included hispanics with whites, other times she apparently left hispanics out altogether. In addition, Dr. Hines-Starr used formulas incorrectly and her report contained arithmetic errors.

23. In light of a lack of expert qualifications, and multiple errors in analysis, the conclusions drawn by Dr. Hines-Starr are unreliable and unpersuasive.

24. Defendants' witness Richard Biddle was presented as an expert on statistical analysis of job promotion figures and job-relatedness of employment testing. Biddle is a professional equal employment opportunity consultant with his company, Biddle & Associates, and is a specialist in his field. Biddle has a long history of working in the area of Title VII compliance, and he helped author the California Equal Employment Opportunity Guidelines for Employee Selection. Biddle has worked for the Department of Labor and other federal agencies in training compliance personnel. He has consulted with several hundred municipalities and numerous private employers, validating tests and doing job analyses. He has authored numerous articles and presented hundreds of seminars on Title VII compliance. He has testified as an expert witness in numerous employment discrimination lawsuits, appearing for both plaintiffs and defendants. Biddle is well qualified to perform statistical analysis and render an expert opinion whether the promotional testing system in this case has had a discriminatory adverse impact on black officers.

**\*5** 25. Biddle performed an independent analysis of the job promotion rates for the years covered by the tests in 1986, 1987, and 1991. Biddle also reviewed the testing results for the testing periods 1977-1985. He analyzed his own data, and also the data compiled by Dr. Hines-Starr.

26. Biddle testified that Dr. Hines-Starr's analysis was fundamentally flawed by numerous errors. In addition to those errors already noted, Biddle testified that Dr. Hines-Starr erred by failing to consider the practical

significance of the four-fifths rule violations she found, and that her test for statistical significance was based on the wrong formula and applied incorrectly.

27. Biddle testified that due to the small numbers involved in this case, it is necessary to go beyond the four-fifths rule to determine whether a violation is statistically and practically significant. Using information from MRI, Biddle assembled his own data for the relevant time periods. He identified where a four-fifths rule violation occurred, and then tested for statistical significance and practical significance. Biddle concluded that the merit promotion system did not have a discriminatory adverse impact on black officers.

28. Biddle further testified that taking into account the number of promotions actually made during the 1986 and 1987 testing periods, the difference in promotion rates for blacks as compared to whites during those years is not statistically significant. Notwithstanding violations of the four-fifths rule, the statistical analysis indicates that the variation in promotion rates occurred by chance and not because the test was discriminatory against black officers. With respect to the 1991 testing period, for which the lists are still in effect, thus far the variation in promotion rates has not been statistically significant. The number of promotions needed to reach a point of statistical significance is great, and therefore it is highly unlikely that the variation in promotion rates will ever be attributable to anything other than chance. In any event, to date, the variation has not been statistically significant.

29. In addition to analyzing his own data, Biddle analyzed the data assembled by Hines–Starr. Taking Hines–Starr’s data as accurate and making the assumptions she made (in error), Biddle tested her data for statistical and practical significance. Even with Hines–Starr’s flawed data, Biddle found there was no adverse impact.

30. Biddle’s statistical analysis of promotion rates from 1977 to 1991 shows that the merit-based promotion testing system has not had a discriminatory adverse impact on black officers.

31. The City adopted the merit-based testing system to identify the police officers best qualified for promotion. According to Professor Richard Holden, Chairman of the Department of Criminology at Central Missouri State University, and an expert in police administration, merit promotion procedures are valuable in law enforcement. The justifications for such procedures include: promotion of qualified officers; public safety; officer safety; enhancement of morale and job satisfaction among the officers; and reduction of potential legal liability resulting from poor supervision.

\*6 32. Biddle analyzed the testing procedures at issue and found them to be job related. Professor Holden testified that this type of three part merit promotion testing is employed by many police departments across the country. The written exam tests for knowledge of Department procedures and generally recognized principles of law enforcement. It measures the candidate’s ability to read, comprehend, and learn proper law enforcement procedures. The oral interview evaluates communication skills, leadership abilities, and the capability to correctly respond to situations that might arise in the field. The supervisor’s evaluation allows the candidate’s actual on-the-job performance to be considered in the promotion process. It measures past performance as an indicator of the candidate’s potential for success in the new position. Former Chief Allan Meyers and Lieutenant Ron Miller of the Department testified that the merit testing system has proved in practice to be far better than the previous system that was based primarily on political patronage. They also testified that the system has resulted in the promotion of qualified individuals. All three components of the merit testing process are job related and designed to promote individuals based upon ability.

33. The plaintiffs attempted to establish that there were equally effective, nondiscriminatory alternatives to the merit testing procedure at issue. Plaintiffs did not present any expert testimony on this issue; the only evidence presented was through the testimony of individual plaintiffs. The plaintiffs’ evidence on alternatives was not specific as to method of implementation, cost, or effectiveness. The plaintiffs’ testimony was insufficient to establish that the proposed alternatives would be equally effective in serving the legitimate employment goals of the Department.

#### *Conclusions of Law*

1. The only claim remaining for adjudication in this lawsuit is the plaintiffs’ claim of disparate impact. The premise of such a claim is that “some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.” *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir.1991).

2. To establish a prima facie case of disparate impact, plaintiffs must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group. *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1988)).

Plaintiffs may rely on statistics to show that the challenged practice or policy has the requisite disparate impact. *Id.* at 1243, *Wards Cove*, 490 U.S. at 650.

3. Once plaintiffs establish a prima facie case, the burden shifts to the employer to produce evidence of the “business justification” for the challenged practice. *Id.*, *Wards Cove*, 490 U.S. at 658. As the Supreme Court made clear in *Wards Cove*, the burden of persuasion remains with the plaintiff:

\*7 The employer’s burden at this stage is to “produc[e] evidence of a business justification for his employment practice. ... ‘The ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.’ ” *Wards Cove Packing Co. v. Atonio*, 490 U.S. at 659, 109 S.Ct. at 2126 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 997, 108 S.Ct. at 2790 (O’Connor, J.)) (emphasis in original).

*Ortega*, 943 F.2d at 1245 (alterations and emphasis in original). In considering evidence of business justification, the “ ‘dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.’ ” *Id.* at 1244 (quoting *Wards Cove*, 490 U.S. at 659). The challenged practice or policy need not be “ ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster ...; the ‘touchstone of this inquiry is a reasoned review of the employer’s justification for his use of the challenged practice.’ ” *Id.*

4. If the employer meets its burden of producing evidence of the business necessity or business justification for the challenged practice, plaintiffs may still prevail if they can “ ‘persuade the factfinder that “other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer’s legitimate [hiring] interest[s].” ’ ” *Ortega*, 943 F.2d at 1244 (quoting *Wards Cove*, 490 F.2d at 660 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975))). “Further, those alternative practices ‘must be equally effective ... in achieving [the employer’s] legitimate employment goals.’ ” *d.* (quoting *Wards Cove*, 490 U.S. at 661).

5. Plaintiffs have not carried their burden of persuasion to show that the merit promotion testing procedures at issue in this case have caused a significant disparate impact on black officers in violation of Title VII.

6. The four-fifths rule is not a binding rule; finding of a violation of the four-fifths rule does not conclusively establish that a promotion system has a discriminatory

impact on a particular group. *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1376 (2d Cir.1991) (the Guidelines “provide no more than a ‘rule of thumb’ to aid in determining whether an employment practice has a disparate impact”). The court must also consider the probability that the result is a random deviation from the predicted result, or in other words, whether the result occurred by chance. Standard deviation analysis measures the probability that a result is a random one—the more standard deviations, the lower the probability that the result is a random one. *Id.* (citing D. Baldus and J. Cole, *Statistical Proof of Discrimination*, § 9.03 (1980)). The Supreme Court has accepted the concept of standard deviation as a measure of the significance of statistical disparities in Title VII cases. *NAACP v. City of Mansfield*, 866 F.2d 162, 168 (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977)). In *Hazelwood*, the Supreme Court set the standard for statistical significance at two or three standard deviations. *Hazelwood*, 433 U.S. at 308 n. 14.

\*8 7. Plaintiffs’ expert witness, Dr. Hines–Starr, concluded that the four-fifths rule was violated on six out of nine promotion lists she examined. Dr. Hines–Starr attempted to ascertain the standard deviations and concluded that the results she calculated did not occur by chance.

8. The opinions of plaintiffs’ expert witness are not persuasive. Dr. Hines–Starr’s qualifications as an expert in the fields of employment discrimination and statistical analysis are meager, but even assuming that she qualified as an expert, her data and analysis were fundamentally flawed by numerous errors. These errors undermined the reliability of her conclusions both as to adverse impact and statistical significance. As a result, Dr. Hines–Starr’s conclusions are speculative and unreliable.

9. By contrast, defendants’ expert witness, Richard Biddle, was well qualified to render expert opinions about the impact of this testing procedure on African American officers in the Department. He concluded that there was no adverse impact in any of the test periods, both within the relevant time period for this suit, and for all test periods since the inception of merit promotion in the Department. His data was reliable and his conclusions sound.

10. Biddle explained that the promotion rates for blacks in this case were not equal to or greater than four-fifths the rates for whites and, therefore, the four-fifths rule was violated. However, the sample sizes in this case were sufficiently small that a four-fifths rule violation is not necessarily an indication of disparate impact. Therefore, Biddle undertook the next step in the analysis—to

determine whether the results are statistically significant. Biddle's statistical analysis demonstrates that the variations in promotion rates are *not* statistically significant. Therefore, even without consideration of practical significance, the statistical evidence plainly demonstrates that there was no discriminatory adverse impact on black officers in the Department.

11. Plaintiffs have not proved disparate impact by a preponderance of the evidence. On the contrary, the evidence shows that the test did not have a discriminatory effect on black officers in the Department.

12. Assuming for the sake of argument that plaintiffs' statistical evidence *did* establish a prima facie case of disparate treatment, the City has produced ample evidence of the business justification for the merit promotion system. The merit promotion process was instituted to eliminate the old system of political patronage, where an officer's chances for promotion depended upon his connections more than his ability. The Department's goal is to promote the most qualified individuals, based on their ability, and the Department has implemented a testing process designed to identify those officers most likely to succeed in a particular position. It may be that the system does not always identify the most qualified individual for the job. However, that is not to say that the system discriminates against black officers. The goal of the system is to give everyone a fair chance to be promoted according to ability, and the system measures the abilities that an officer must have to succeed on the job. For example, the written portion of the exam tests the candidate's knowledge of police procedures and techniques. The oral interview panel measures the candidate's demeanor and ability to apply his knowledge to situations that might arise in the field. The supervisor's evaluation allows the candidate's on-the-job performance to be taken into account in the promotion decision. Thus the system combines objective and subjective elements, measuring the candidate's present ability and knowledge, along with the candidate's track record at the Department. The merit-based promotion system serves, in a significant way, the legitimate goals of the Department.

\*9 13. Plaintiffs attempted to prove that other, nondiscriminatory promotion selection systems would serve equally well the goals of the Department. The evidence regarding these alternatives was scant; plaintiffs produced no expert testimony on this point. Several of the

named plaintiffs who testified advanced their opinions concerning possible alternative methods, including an assessment center and assorted variations on the present system. Plaintiffs' suggestions of alternative procedures for promotion do not provide the court with a sufficient evidentiary basis to conclude that the alternatives would serve the Department's legitimate interests equally well as the present system and without discriminatory effects. The evidence presented by defendants on this point, including expert testimony, tends to prove that the promotion system in place is a widely-accepted and successful method of selecting police officers for promotion. Regardless, the plaintiffs have failed to persuade the court that their suggested alternatives would be equally effective in meeting the Department's legitimate goals.

14. The plaintiffs have failed to sustain their burden to prove that the merit promotion system in question has a disparate impact on black officers in the Department. The court has no doubt that the plaintiffs are dedicated and competent officers who have served the Department and their community well. Because of the number of officers who participate in the testing process, and the relatively few promotions that are made, it is likely that there will be some fine officers who do not receive a promotion under the merit promotion system. But the court cannot find from the evidence in this case that the merit promotion system discriminates against black officers because of their race. Accordingly, judgment must be entered for the defendants on plaintiffs' claim of disparate impact. Further, and consistent with the court's ruling at trial, judgment must also be entered for the defendants on plaintiffs' claim of disparate treatment.

IT IS THEREFORE ORDERED BY THE COURT that defendants are awarded judgment on plaintiffs' claims of racial discrimination in violation of Title VII. The clerk is directed to enter judgment for defendants on plaintiffs' claims of discrimination by disparate treatment and discrimination by disparate impact.

#### All Citations

Not Reported in F.Supp., 1992 WL 403096