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United States District Court, S.D. Ohio, Eastern Division.

Ann BRUNET, et al., Plaintiffs,
v.
CITY OF COLUMBUS, et al., Defendants.

Nos. C2–84–1973, C2–91–0616.
|
March 18, 1992.

MEMORANDUM OPINION

GRAHAM, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

***1** These consolidated cases involve claims of gender discrimination asserted by male and female applicants for the position of firefighter in the City of Columbus Public Safety Department, Division of Fire. Case No. C2–84–1973 was commenced in 1984 by Ann Brunet and her co-plaintiffs, hereinafter referred to as the "*Brunet* plaintiffs." The *Brunet* plaintiffs challenged the tests used by the City to select entry level firefighters in 1980 and 1984 on the grounds that they discriminated against female applicants. Case No. C2–91–616 was filed by Guy E. Tucker and his co-plaintiffs (hereinafter "*Tucker* plaintiffs") in July of 1991. The *Tucker* plaintiffs alleged that the consent decree which terminated the *Brunet* litigation in February of 1989 discriminates against male applicants.

At all relevant times, the Columbus Division of Fire entry level firefighters examination has consisted of two components, a cognitive mental ability test (CAT) and a physical capability test (PCT). In the *Brunet* litigation, the Court found that the plaintiffs failed to prove intentional discrimination against female applicants, but that they had shown that the PCT portion of the 1984 test had an adverse impact on female applicants and that the City had failed to show the job relatedness of this component of the examination. *Brunet v. City of Columbus,* 642 F.Supp. 1214 (S.D.Ohio 1986) (Kinneary, J.), appeal dismissed, 826 F.2d 1062 (6th Cir.1987), *cert. denied,* 485 U.S. 1034 (1988). The 1984 test was found not to be content valid for two reasons: (1) the test, taken as a whole, did not represent the physical demands of the firefighter's position, and (2) there was insufficient evidence to justify rank order hiring. *Id.* at 1250.

The City was enjoined from hiring any new firefighters until a new PCT had been validated by the Court. The Court held that even after such validation, the City could use that test only on a pass/fail basis and that it could be used to rank order applicants only if the City could show, on the basis of subsequent studies, that it was, as a whole, sufficiently precise to be used for ranking. *Brunet,* 642 F.Supp. at 1252, 1253.

Before the decision in *Brunet,* the City had already hired a consultant to develop a new PCT. The new test was completed and administered in early 1986. On May 21, 1987, after a three-day hearing, the Court found that, with the exception of one test event, the new PCT was content valid. The Court approved the use of the examination if modified to eliminate that event, approved the test for use on a pass/fail basis and required the City to hire male and female firefighters in proportion to their numbers in the candidate population which passed the test. *See Brunet,* Order of May 21, 1987. The City modified the new PCT to eliminate the offending test event and proceeded to hire firefighters in accordance with the Court's order.

In an order issued on June 12, 1987, the Court found that a total of four women should have been hired from the 1984 firefighter applicant class, and, noting that the City had already hired three women from that class, it ordered the City to hire one more.

***2** In order to support rank order hiring on the basis of the new PCT, the City commissioned a criterion-related validity study. This study was completed and filed with the Court on August 3, 1987. In the meantime, both sides appealed various aspects of the Court's prior rulings. While the appeal was pending, the City and the *Brunet* plaintiffs negotiated a settlement which included a consent decree containing *inter alia* the following provisions:

> 1. For purposes of hiring future firefighter applicants, the City and Civil Service Commission

shall continue to use and administer the 1986 physical capability test events as modified by the Court on May 21, 1987, which order excludes the hose hoist event.

2. The City and Civil Service Commission shall continue to score the firefighter applicants test results on the physical capability test on a pass/fail basis, using the Court approved cut score of one standard deviation below the mean of incumbent firefighter "sum of Z's" scores on the test as a whole.

10. The City and Civil Service Commission report on criterion related validity currently pending in this action is ordered withdrawn.

11. The City and Civil Service Commisison shall continue to score the cognitive abilities test portion of the firefighters applicant examination on a pass/fail basis, and may continue to use the previously court approved cut score of the applicant mean.

12. The City and the Safety Director shall continue to appoint male and female applicants in proportion to the relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole, for a period of at least 20 years from the date of this Order. The number to be hired if a fraction shall be rounded up to the next whole number.

The order also provided compensation and other make whole relief for the *Brunet* plaintiffs.

The consent decree was submitted to the Court without any provisions for notice or hearing to any other individuals or class of individuals who might be affected by its terms. It was accepted and entered by the Court on February 27, 1989 without a hearing. Thereafter, the City has selected firefighter applicants from two lists, one for men and one for women. On their respective lists, the men and women are ranked and selected in the order of their combined scores on the PCT and CAT with equal weight being given to each section of the examination. Women consistently score lower than men on the PCT. Thus, the consent decree operates to require the City to hire some women before or instead of some men who have higher combined scores.

In the *Tucker* case, plaintiffs seek declaratory and injunctive relief against the City, alleging that they have taken and passed the firefighter entry level examination and that their hiring or likelihood of hiring is eliminated or reduced by the *Brunet* consent decree which, they claim, prefers lesser qualified female applicants and thus discriminates against them on the basis of gender. The *Brunet* and *Tucker* cases were consolidated on August 13, 1991. On October 15, 1991, after having been granted the right to intervene, the *Tucker* plaintiffs filed a motion in the *Brunet* case for relief from the consent decree pursuant to Fed.R.Civ.P. 60(b). Commencing on December 19, 1991, a hearing was held on the claims of the *Tucker* plaintiffs, and the matter is now before the court for decision on the merits.

***3** Since they were not parties to the *Brunet* litigation, the *Tucker* plaintiffs are not bound by the consent decree of February 27, 1989. *Martin v. Wilks*, 490 U.S. 755 (1989). The *Tucker* plaintiffs had no notice of the proposed consent decree, nor were their interests adequately represented by the City which apparently decided to settle the case to avoid additional litigation expense. There is no evidence that the City gave any consideration to the impact of the consent decree on the rights of male firefighter applicants. There have been significant developments in the law since the signing of the consent decree, principally the decision of the United States Supreme Court in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Even a party to a consent decree may seek to modify it if there has been a significant change in facts or law. *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 60 U.S.L.W. 4100 (1992). For all of these reasons, the *Tucker* plaintiffs have standing to challenge the consent decree.

"[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 521–22 (1986). "Consent judgments are, in effect, merely contracts acknowledged in open court and ordered to be recorded, ..." *Long v. Saginaw*, 911 F.2d 1192, 1201 n. 5 (6th Cir.1990). Thus, the validity of relief provided in a consent decree is to be assessed for consistency with the Fourteenth Amendment no differently than a voluntary affirmative action plan. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1501 n. 23 (11th Cir.1987), *aff'd on other grounds, Martin v. Wilks, supra; Howard v. McLucas*, 871 F.2d 1000, 1006 (11th Cir.1989), *cert. denied, Poss v. Howard*, 493 U.S. 1002 (1989).

In *Croson*, 488 U.S. at 507, the Supreme Court held that race based set aside programs undertaken by municipalities are subject to strict scrutiny and that to satisfy the Equal Protection Clause, they must be "narrowly tailored to remedy prior discrimination." Gender based preferences are likewise subject to strict scrutiny under the Equal Protection Clause.

> In order for a race or sex based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved, and second, the remedy adopted by the state must be tailored narrowly to achieve the goal of righting the prior discrimination.

Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir.1989). *See also, Long v. Saginaw, supra.* The February 27, 1989 consent decree fails to pass muster under this standard.

In *Brunet,* 642 F.Supp. at 1223, the Court found that the plaintiffs failed to prove intentional discrimination against women applicants for the position of firefighter:

> Plaintiffs' evidence of intent to discriminate is at best impressionistic. Further, there is substantial evidence suggesting the absence of discrimination. Accordingly, judgment must be rendered for the defendants on plaintiffs' claim of intentional discrimination under § 1983.

***4** The Court further found that the plaintiffs had failed to show that the 1980 testing and selection process had an adverse impact upon female applicants. *Id.* The only finding of discrimination against women was the finding that the PCT portion of the 1984 entrance examination had an adverse impact against women and that the City had failed to show that it was job related. In a later decision, the trial judge in *Brunet* characterized this finding of discrimination as "singular." Temporary Restraining Order, 7/30/91 at page 6.

Although the *Brunet* plaintiffs argue that the consent decree is supported by past and present disparity of women in the position of firefighter, neither the City nor the *Brunet* plaintiffs attempted to prove past discrimination with evidence of disparity in the present proceedings. The Court in the original *Brunet* case apparently did not accept plaintiffs' claims in that regard. In any event, mere statistical imbalance alone would not suffice. *Croson,* 488 U.S. at 501; *Hazelwood School District v. United States,* 433 U.S. 299 (1977). There was no evidence introduced here or in the original *Brunet* case which would justify a finding of a pattern or practice of discrimination against women. There was no evidence that the City itself had made any determination of past discrimination as the predicate for an affirmative action program for the hiring of female firefighters. Based on the record in *Brunet* and the record here, the appropriate relief was an order providing make whole relief for the women who were adversely affected by the 1984 examination and an order enjoining the City from utilizing the offending testing procedures in the future.

The Court in its interim orders in *Brunet* required the City to adopt a system for selection of male and female firefighters who passed the 1986 exam "so that the percentages of females and males considered for hire reflects the relative proportions of male and female applicants achieving passing scores." *Brunet,* 642 F.Supp at 1253. Such a formula was necessary until a final nondiscriminatory set of selection procedures was approved by the Court, but the Court stressed that in the final analysis the number of women firefighters to be hired should be decided on the basis of a validated examination. The Court stated, *Id.* at 1228:

> Title VII does not require employers to equalize the probabilities of hiring of the average members of two groups. Rather, it requires that actual individuals enjoy opportunities for employment free from discriminatory barriers.

The Court went on to note, *Id.* at 1250:

> It is not the province of the Court to determine whether women should be firefighters, or how many women should be firefighters. Rather, it is the Court's duty to evaluate a test in light of the standards set forth in Title VII. How many women should be firefighters can be decided only by the administration of a validated examination.

***5** Paragraph 12 of the consent decree creates a gender based quota for firefighter applicants which must remain in effect for at least twenty years. The consent decree utilizes a floating percentage tied to the "relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole." In the absence of the consent decree, applicants of both genders would be permitted to compete for all positions, but under the decree they are each limited to a lesser percentage of the available jobs. The distinction is based solely upon the gender of the applicant. But for their gender, male applicants would be entitled to compete for all available firefighter positions. By agreeing to this order, the City has intentionally discriminated against male applicants. The consent decree violates the Equal Protection rights of male applicants for the entry level position of firefighter because it is not narrowly tailored to remedy the prior discrimination found in *Brunet.* After the decision in *Croson*, the invalidity of the decree should have been obvious to the City.

The consent decree purports to treat all applicants who pass the combined PCT and CAT as equally qualified. In fact, however, the City does not consider them equally qualified. It uses the results of the combined tests to rank order candidates within their gender groups. Two hiring lists are maintained, one for men and one for women. Women who score higher are regarded as better qualified than women who score lower and they are hired accordingly. The same is true of men. To date, women as a group have scored lower than men. Thus, the decree has operated to require the City to hire women who score lower than men.

Members of both sexes should have an equal opportunity to compete for all the available positions. If all passing applicants are equally qualified then they should be selected on a gender neutral basis. A lottery would be one example of a gender neutral selection device. No doubt there are other selection devices which would give applicants of both sexes the opportunity to compete for all available positions. If all passing applicants are not equally qualified, then the best qualified should be hired regardless of gender.

Assuming hypothetically that in the absence of the consent decree the City would have rank ordered all applicants on one list, then the decree has, to date, operated to the detriment of male applicants. However, it does not necessarily follow that this would always hold true. As more women engage in physical training programs which increase their physical strength and cardiac reserve, it is entirely possible that the floating quota of the consent decree could result in the hiring of men who score lower than women. Although the present challengers are male, in a real sense the consent decree discriminates against both men and women by making sex a determining factor in the hiring decision. The Constitution requires that applicants of both sexes have an equal opportunity to compete for all positions.

***6** The Court retains continuing jurisdiction to modify or enjoin the enforcement of a consent decree. *Stotts v. Memphis Fire Department,* 679 F.2d 541 (6th Cir.1982), *rev'd on other grounds,* 467 U.S. 561 (1984). Modification of the instant consent decree is appropriate because the *Tucker* plaintiffs have established that its provisions unlawfully infringe their rights under the Fourteenth Amendment.

Most of the evidence presented at the hearing of December 19, 1991 related to the issue of whether the new PCT could be appropriately used to rank order all candidates, male and female, on one selection list. The Court does not rest its finding of discrimination on the City's failure to use the test in this fashion. The Court recognizes, however, that the City may wish to consider so using it as one of the options available to it in implementing a non-gender based selection procedure in light of this Court's decision finding the consent decree invalid.

The Court is not prepared at this time to make a finding on the validity of the PCT as a basis for rank ordering. As noted *infra,* additional expert testimony may be helpful once the City decides what kind of selection procedure it will use in the absence of the consent decree. While the Court is not prepared to make a final decision on the validity of the PCT for rank order scoring, it is prepared to make findings on some of the issues relevant thereto.

"Ranking is a valid, job-related selection technique only where the test scores vary directly with job performance." *Williams v. Vukovich,* 720 F.2d 909, 924 (6th Cir.1983), *citing Guardian's Ass'n of New York v. Civil Service Commission,* 630 F.2d 79, 100 (2nd Cir.1980), *cert. denied,* 452 U.S. 940 (1981).

The Equal Employment Opportunity Commission's *Uniform Guidelines on Employee Selection Procedures* ("*Uniform Guidelines"*) provide:

> If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results

> may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

29 C.F.R. § 1607.14(C)(9).

The development and evaluation of personnel selection devices falls within the field of industrial psychology. When called upon to construct or evaluate an employment test, experts in this field generally rely on their education and experience, the professional literature and recognized standards or principles of employment testing. In the latter category, there are three principal sources: the *Uniform Guidelines, Principles for the Validation and Use of Personnel Selection Procedures* published by the Society for Industrial and Organizational Psychology ("*SIOP Principles* "), and *Standards for Educational and Psychological Testing* published by the American Psychological Association ("*APA Standards* ").

***7** There are three accepted strategies for validating an employment test: content validity, criterion-related validity, and construct validity. Evidence of criterion-related validity typically consists of a demonstration of a correlation between the test and success on the job, and the measure of job performance is referred to as the "criterion." There are two kinds of criterion-related strategies: predictive and concurrent. In a predictive criterion-related analysis, the results of the test are related to the subsequent job performance of a group of individuals who have been hired after having taken the test. Such a study often requires a number of years to complete, since the individuals to be measured by the job performance criteria must have time to gain experience and demonstrate their performance on the job and there must be a sufficient number of them to provide meaningful statistics. In a concurrent criterion-related analysis, the employment test is given to incumbents who have already obtained the necessary on the job experience and have an established record of performance. In content validation, a job analysis is conducted to identify the tasks, behaviors or knowledge which are important in performing the job, and the test is designed to be a representative sample of those tasks, behaviors or knowledge. Construct validation involves testing for certain psychological characteristics or "constructs" thought to be important or essential to the job.

In response to the *Brunet* plaintiffs' challenge to the 1984 firefighter examination, the City retained Frank J. Landy, Ph.D. and his consulting firm Landy, Jacobs & Associates, Inc. to develop and validate a new PCT. In formulating the new PCT, Dr. Landy relied on the content validity strategy. After a hearing, the Court found that the new PCT was valid after eliminating one test event.

In *Brunet*, 642 F.Supp. at 1250, the Court said:

> If defendants wish to continue to rank order candidates, they must be prepared to show that rank ordering complies with the Uniform Guidelines. Specifically, they must produce evidence to show that a higher score on the examination is likely to result in better job performance.

In a supplemental opinion and order, the Court noted that the City had been discussing concurrent and predictive criterion-related validity studies with Dr. Landy in order to address the Court's concern regarding the use of test scores to rank order applicants. *Brunet*, 642 F.Supp. at 1252. The Court noted that a "predictive criterion-related validity study provides the best and most direct evidence of job relatedness" and went on to hold, *Id.* at 1253:

> When hiring from the 1986 list occurs, defendants will then perform their proposed predictive criterion-related validity study. If defendants can show, on the basis of the predictive and concurrent criterion-related studies they propose, that the test as a whole is sufficiently precise to be used for ranking, they may then apply to the Court for an Order permitting ranking.

A concurrent criterion-related study was completed and filed with the Court in early August 1987. Funds were set aside for a predictive criterion-related study and some preliminary work was done, but this project was terminated when the City entered into the consent decree.

Nothing in the professional standards or in the *Uniform Guidelines* requires both a concurrent and a predictive criterion-related validity study in order to justify rank order scoring. Indeed, there is no requirement that any criterion-related validity study be performed in order to justify rank order scoring. Rank order scoring can be justified on the basis of a content validity study. The City's expert, Dr. Landy, testified that in his opinion, the content validity analysis of the 1986 CAT demonstrated sufficient reliability to justify rank order scoring without the necessity of further studies.

The Court's statement in *Brunet* that the City must show that rank ordering complies with the Guidelines, specifically that it must show that a higher score on the examination is likely to result in better job performance, was a correct statement of defendants' burden. The more stringent requirements set forth in the Court's supplemental opinion and order appear to have been induced by the City's representation that it then intended to conduct both concurrent and predictive criterion-related validity studies to justify rank order scoring. In any event, the Court's pronouncements in its supplemental opinion and order were not intended to be its last word on the subject. The *Brunet* Court retained jurisdiction over the City's testing procedures and clearly contemplated that a hearing would be held on the issue of rank order scoring if the City chose to pursue rank order scoring of the new PCT. This Court does not view the statements contained in the supplemental opinion and order as restricting it to evidence of predictive criterion-related validity in determining whether rank order scoring is appropriate. Circumstances have changed since the *Brunet* Court made those comments. The City did not proceed with the predictive criterion-related validity study. Instead it entered into a voluntary consent decree and withdrew the report of Dr. Landy's concurrent criterion-related validity study before the Court had the opportunity to consider it.

***8** With regard to the August 1987 concurrent criterion-related validity study, Dr. Landy described his methodology as follows: He identified a representative sample of incumbent firefighters who were given the new PCT. He then proceeded to gather performance ratings from the supervisors of these incumbent firefighters on eighteen different firefighting performance areas. Landy then calculated the correlation coefficients or measures of association between test scores and performance ratings. A correlation coefficient is a statistical index of association between two variables. In order to be significant, it must be demonstrated that a validity coefficient is significant at or beyond the .05 level of significance, which means it would be expected to occur no more than five times out of a hundred by chance alone. The *Uniform Guidelines* require a value of .05. Landy's analysis showed that each of the seven PCT test events (with the exception of the coupling event which had no adverse impact on women) was significantly correlated with one or more performance dimensions of the firefighter job. The level of significance of the correlation coefficient for each event exceeded .05 and many far exceeded that standard. Landy demonstrated that there is a high correlation between an applicant's score on the PCT and performance on the job.

The *Brunet* plaintiffs' expert, Dr. Charles J. Cranny, believed that there was a significant error in Appendix K of Dr. Landy's report which cast doubt on the reliability of his correlation coefficients. Dr. Cranny came to this conclusion largely because Appendix K reported that the validity coefficient of the final composite of the PCT and the written exam was less than the total of the two components. A multiple correlation coefficient cannot be less than the highest correlation of any one of the independent variables included within it. As Dr. Landy explained, however, the values reported in Appendix K are corrected values and each was corrected in a different way. As such they can no longer be used together for other statistical manipulations. Landy pointed out that the uncorrected values for the overall PCT and written examination when added together do result in a higher composite validity coefficient just as Cranny said they should. Further, as Landy pointed out, the final composite validity coefficient reported in Appendix K is not a multiple correlation coefficient but a zero order coefficient, and as such there is no anomaly in the fact that the sum is less than one of the parts.

The Court finds, on the basis of Dr. Landy's concurrent criterion-related validity study that there is a high correlation between an applicant's score on the PCT and performance on the job.

Dr. Cranny testified that for rank order scoring, there must be a linear relationship between test results and job performance across the range of scores used to rank the candidates. Cranny believes that there is a lack of evidence of such linearity and that additional studies, such as the construction of scatter diagrams, are necessary to demonstrate it. Landy testified that the presence of a linear relationship is implicit in the high correlation coefficients between the test events and performance measures.

***9** Dr. Cranny testified that a step-wise regression analysis of the various PCT events combined with the CAT revealed that while each of the PCT events alone added validity to the overall examination, two or more in combination did not increase its validity. It was Cranny's

opinion therefore that since each event had an adverse impact on women, there was no justification for using more than one of the PCT events. Cranny feels that the test events may all be measuring the same underlying characteristics. According to Cranny, continuing to consider events that operate to the disadvantage of women but do not serve the legitimate purpose of identifying qualified firefighters is clearly discriminatory. Landy rejected Cranny's multiple regression analysis on the grounds that his job analysis demonstrated that all of the PCT events were important parts of the job and that the PCT and the CAT should each be given equal weight.

Cranny's first reference to scatter diagrams and multiple regression analysis was in his testimony at the December 19th hearing. While Landy had the opportunity to respond briefly in a subsequent telephonic deposition, the Court does not feel that the present record on these issues is adequate. In the event the City decides to use the PCT for rank order scoring, the Court will hear additional evidence on these two issues.

The Court notes that both experts agree that the CAT is sufficiently reliable for rank order scoring and that it has no adverse impact against women. The provisions of the consent decree which required the City to use this component of the test only on a pass/fail basis is not justified.

Based on the foregoing analysis, the consent decree of February 27, 1989 is hereby set aside and the City is enjoined from selecting firefighters in the manner provided therein.

The City must design a nondiscriminatory selection procedure for entry level firefighters. There are no doubt a number of options from which the City may choose.

The Court will hold a status conference in the near future to discuss the remaining issues in this case, including the procedure to be utilized in determining what damages or remedies the *Tucker* plaintiffs may be entitled to other than injunctive relief. Any remedies ordered by this Court may well depend upon any new system of hiring which the City would propose to use in the absence of the consent decree.

It is so ORDERED.

All Citations

Not Reported in F.Supp., 1992 WL 540716