

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KAREN SHARR; ET AL.,)	
)	
Plaintiffs,)	Civil No. 02-1513-JO
)	
v.)	<u>OPINION AND ORDER</u>
)	
NCS PEARSON, INC.,)	
)	
Defendant.)	

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JONES, Judge:

On September 11, 2001, the United States experienced horrific acts of terrorism, familiar to all, when foreign terrorists hijacked four commercial airplanes and crashed them, full of passengers and crew members, into the World Trade Center, the Pentagon, and the Pennsylvania countryside, precipitating a national crisis unprecedented in recent history. In response to the airport security breakdown that allowed the hijackings, on November 19, 2001, Congress enacted the Aviation Transportation Security Act ("ATSA"), Pub.L. 107-71, emergency legislation designed to help secure the nation's vulnerable commercial airports.

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The ATSA federalized airport security, created the Transportation Security Administration ("TSA"), and charged the Under Secretary of Transportation for Security¹ with day-to-day security screening operations at commercial airports nationwide. The ATSA mandated minimum standards for hiring and training security screening personnel; directed that "notwithstanding any provision of law," TSA establish airport screener qualifications and standards consistent with the ATSA minimum standards; and, by November 19, 2002, TSA hire, train, and deploy sufficient federal security screeners to conduct screening of all passengers and property at the nation's commercial airports. TSA solicited bids from contractors to support it in this great endeavor, and effective February 25, 2002, awarded the contract to NCS Pearson, Inc., the defendant in the present action.

In the process of federalization, private sector security screeners lost their jobs. TSA, through defendant, recruited both these "incumbent screeners," like plaintiffs, and new applicants to fill the newly created federal airport security positions. The plaintiffs in this action failed the initial testing,² which took place in Portland, Oregon, from early September 2002, through October 18, 2002. On November 7, 2002, plaintiffs filed this action.

THE PRESENT MOTION

Defendant NCS Pearson moves for summary judgment (# 257) on plaintiffs' disparate impact discrimination claims under Title VII, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"), as alleged in their Sixth Amended

¹ Now known as the "Administrator."

² At the hearing on the present motion, the court was informed that one or more plaintiffs, including plaintiff Karen Sharr, have since reapplied and obtained airport screener positions with TSA.

Complaint,³ arguing that the ATSA preempts those claims. This issue is solely a question of law and for purposes of this motion, defendant does not challenge the factual merits of plaintiffs' disparate impact claims. See Defendant's Memorandum of Law in Support of Motion for Summary Judgment, p. 2 n.1.

I agree with defendant that the ATSA preempts plaintiffs' Title VII, ADA, and ADEA disparate impact claims. In enacting the ATSA, Congress, obviously aware of the federal labor and employment laws, included specific provisions granting TSA great flexibility with respect to security screeners. Section 111(d) of the ATSA, codified as a note to 49 U.S.C. § 44935, clarified Congress' decision that:

Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

In legislating minimum qualifications and standards for the Under Secretary's program for hiring and training security screeners, Congress mandated that the Under Secretary apply those minimum qualifications and standards "notwithstanding any provision of law." 49 U.S.C. § 44935(e)(2)(A) (hiring qualifications) and § 44935(f)(1) (employment standards for screening personnel).

³ As part of their response, plaintiffs filed a motion to strike (# 333) certain testimony of Stephen Maier, defendant's former Vice President of Homeland Security, set forth in his Declaration in Support of Defendant's Motion. As I ruled during the hearing on February 21, 2006, plaintiffs' motion is granted with respect to Maier's statement that defendant applied the standards for qualifying for federal security screener positions "uniformly * * * to screener candidates across the nation" based on his lack of personal knowledge.

The plain language of the ATSA evinces Congress' intent to exempt TSA from the intricacies of the otherwise applicable labor and employment laws to expedite the process of hiring and training the necessary workforce. The result was a facially neutral testing process designed to ensure that airport security screeners are bright, capable, literate, and physically and mentally able to perform the demanding requirements of a job that is, in essence, a front-line position in the effort to protect this nation's borders via the commercial airports. Under the facially neutral test and regardless of race, ethnic background, age, or other potentially protected class, only persons who passed the test were eligible and suitable for hire.

I conclude that the language "[n]otwithstanding any other provision of law" signals Congress' intent that the screener-specific provisions of the ATSA override more general conflicting statutory provisions to the extent that they might otherwise apply to screeners. In this I agree with the Federal Circuit in Conyers v. Merit Systems Protection Board, 388 F.3d 1380 (Fed. Cir. 2004), that the "'[n]otwithstanding *any other provision of law*' language renders inapplicable general federal statutes that otherwise would apply to the Under Secretary's power to 'employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment of Federal service' for screener positions." 388 F.3d at 1382 (emphasis in original).

Consequently, I hold that the ATSA preempts plaintiffs' disparate impact claims under Title VII, the ADA, and the ADEA and therefore grant defendant's motion.⁴

CONCLUSION

⁴ Issues as to whether or to what extent, if any, the ATSA preempts plaintiffs' disparate treatment claims and state common law claims are not presently before the court in this motion and are not addressed by this ruling.

Defendant's motion for summary judgment (# 257) on plaintiffs' disparate impact claims is granted. Plaintiffs' motion to strike (# 333) certain testimony of Stephen Maier is granted.

DATED this 23rd day of February, 2006.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge