

# Chapter 12

## EMPLOYEE RIGHTS AND DISCRIMINATION

### Learning Objectives

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*Upon completion of this chapter, you should be able to:*

- Identify the major employment discrimination laws impacting the fire service.
- Explain the difference between disparate treatment and disparate impact.
- Explain equal opportunity employer and affirmative action.
- Identify the three standards of review that courts apply to governmental actions that are challenged as being discriminatory.

## INTRODUCTION

*The firefighters flowed into the union hall. At the front of the room, the executive board sat stone-faced, as the union president began to speak.*

*“A decision has been issued in the promotion case. The 1990 consent decree that we asked to be rescinded has instead been upheld by the court. That means the promotions will go forward next week. For every white male firefighter promoted to lieutenant, one minority or woman firefighter will also be promoted. We have a commitment from all parties that after this round of promotions, the consent decree will be rescinded. According to the latest information, after next week’s promotions, the city’s affirmative action goals will have been met.”*

*A mixture of emotions ran through the room. “Do you understand this?” asked one firefighter to another standing beside him.*

*“Not me. I don’t understand any of it. How can it be a consent decree if the union didn’t consent?”*

*“Well, at least this will be the last time. Fifteen years is long enough.”*

## CONSTITUTIONAL RIGHTS

The United States Constitution provides us with a number of important rights, including the right to free speech, freedom of the press, freedom of religion, due process, and equal protection. These rights collectively are called our civil rights. While the Constitution identifies these rights, it is silent about how these rights are to be protected.

A variety of laws at both the state and Federal levels are aimed at protecting constitutional rights, and in particular addressing discrimination and inequities in the workplace. Workplace discrimination is a complex topic that will undoubtedly become even more complex as time goes on. Before we look at employment discrimination, we need to look historically at employment discrimination laws.

## CIVIL RIGHTS LAWS

The first civil rights law was the Civil Rights Act of 1866. The primary focus of this legislation was to prohibit discrimination against the recently freed slaves by government and public officials, and provide a means of enforcing the rights that were granted. Violations of the act were punishable as misdemeanors, and jurisdiction over civil rights cases was given to the Federal courts. Over the years, the Act has been amended and updated, and is now

codified in 42 USC §1981 et. seq. One important component that has been added to this act is 42 UCS §1983, which allows civil suits against those acting under “color of law” who violate the constitutional rights of others.

**EXAMPLE**

**42 USC §1983. Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

While the Civil Rights Act of 1866 has been amended and updated, its scope remains limited to “state actions” or actions by governmental officials under “color of law.” One of the most significant laws designed to take the theory of civil rights and transform it into tangible results was the Civil Rights Act of 1964. The scope of the Civil Rights Act of 1964 was not limited to state action, but extended protection for the first time to private acts of discrimination. The Civil Rights Act of 1964 addressed a broad range of issues, including voting rights, public accommodation, education, and employment (**Figure 12-1**).

Title VII of the Civil Rights Act of 1964 addressed employment discrimination, and provided:

**EXAMPLE**

SEC. 703. (a) It shall be an unlawful employment practice for an employer

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.



**Figure 12-1** A civil rights march in 1963. (Photo by U.S. Census Bureau.)

Title VII of the Civil Rights Act of 1964 is codified in 42 USC 2002e-2. In addition to prohibiting employment discrimination, Title VII created the Equal Employment Opportunity Commission (EEOC), whose task it was to oversee implementation and enforcement of Title VII.

A host of other Federal statutes have since been passed to prohibit various forms of discrimination in employment. These laws include the

- Equal Pay Act of 1963 (29 U.S.C. § 206)
- Rehabilitation Act of 1973 (29 U.S.C. §§ 791, 793, 794(a))
- Americans with Disabilities Act of 1990 (42 U.S.C. Chapter 126)
- Age Discrimination in Employment Act (29 U.S.C. §§ 621–634)
- Pregnancy Discrimination Act (an amendment to Title VII of the Civil Rights Act of 1964)
- Civil Rights Act of 1991 (amended the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, provide damages in cases of intentional employment discrimination, and clarify provisions regarding disparate impact actions)

Collectively these laws prohibit a wide range of discriminatory practices, and provide victims of discrimination with a variety of tools to remedy acts of discrimination.

## WHAT IS DISCRIMINATION?

The term discrimination refers to an act that treats another person differently because of a prohibited classification. The Fourteenth Amendment's equal protection clause is the constitutional basis for the prohibition against illegal discrimination. The very word "discrimination" refers to the fact that we make distinctions. Distinctions, and thus discrimination, are a part of everyday life. We decide where we will shop, where we will eat, who cuts our hair, and even who we allow to pull out in front of us in traffic. Examinations in courses purposefully discriminate. The important question to consider is: on what grounds is the discrimination taking place? When the grounds for discrimination is a person's race, religion, national origin, sex, disability, or age, and the discrimination involves employment, housing, or other activity to which discrimination laws apply, the discrimination is illegal.

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) collectively prohibit employment discrimination that is based on race, national origin, sex, religion, disability, or age. Discrimination is prohibited in

- testing, hiring, firing, and discipline of employees
- compensation, assignment, or classification of employees
- transfer, promotion, layoff, or recall
- recruiting and advertising
- training and apprenticeship programs
- fringe benefits, retirement plans, and disability leave
- other terms and conditions of employment

Illegal discrimination includes harassment of, or retaliation against, an individual who has made a complaint of discrimination, cooperated with an investigation, or opposed discriminatory practices, as well as employment decisions based on perceived stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities.

## PROOF OF DISCRIMINATION

Establishing that someone has been the victim of unlawful discrimination is usually not a simple matter. In the absence of the person responsible for the discrimination giving a blatant admission or expressing his or her actual intent in writing, circumstantial evidence is required to prove discrimination. Most authorities recognize two types of discrimination: disparate treatment and disparate impact.

**disparate treatment**

a form of discrimination in which a particular victim (or group of victims) is treated differently because of a prohibited classification; disparate treatment discrimination is based upon an intentional act of discrimination

**Disparate Treatment**

**Disparate treatment** refers to discrimination in which a particular victim (or group of victims) is treated differently because of a prohibited classification. Proof of disparate treatment requires proof that a decision, action, or pattern of behavior was directed at a particular person or group of people because of their race, sex, religion, or other prohibited classification. Disparate treatment discrimination is based upon an *intentional* act of discrimination.

**Watts v. City of Norman**

270 F.3d 1288 (10th Cir., 2001)

*United States Court of Appeals for the Tenth Circuit*

. . . Watts, who terms himself an Afro-American, was a captain in the Norman fire department when he became involved in a physical confrontation with one of his subordinates, whom Watts describes as Caucasian. After this incident, the department disciplined Watts by demoting him from captain to firefighter. Watts retired rather than accept the demotion. He sued the City under Title VII of the Civil Rights Act of 1964 . . . alleging that the City terminated his employment on account of his race. . . .

The City's decision to demote Watts arose out of the events of October 31, 1998. About seven o'clock that morning, firefighter Charles Wilson complained to Watts about Watts's personal use of the station laundry facilities. According to a written narrative Watts made later that day, the exchange was already acrimonious. Watts wrote, "[S]hortly after 7am [sic], Firefighter Chuck Wilson viciously and virulently, verbally blew up at me in the rear bedroom by the washing/drying machines." Watts also described Wilson's speech in the bedroom as a "vile barrage of words." Wilson said, in crude language, that Watts was annoying him and "everyone" else.

Watts left the bedroom and prepared to shave, but before shaving he went to ask two other firefighters about what Wilson said. According to Watts, "To better gauge this incident, I briefly inquired about how I was operating the Station with two other 'A' Crew Firefighters, Brian Starkey and Paul Harvey. . . ." Then Watts shaved, "while reflecting on what had transpired," as he said.

At eight o'clock, an hour after the first incident, Watts again looked up Starkey and Harvey, to talk more with them about Wilson's assertion that Watts was annoying everyone. Watts said, due to the hot temper and ill will displayed by Firefighter Wilson, at 8:00 am I asked Firefighter Starkey and then Firefighter Harvey to visit with me one at a time in the truck room. To avoid tunnel vision and to keep a broad and flexible perspective, I asked each one for their observations of how I was operating the Station.

Watts next asked Wilson to come talk to him in the truck room of the station. Wilson did not come. After waiting a while, Watts went and asked Wilson again

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to come to the truck room. Still Wilson did not come. Watts sent Starkey and Harvey to ask Wilson to come. When Wilson still did not come, Watts said he went to Wilson and “told him in a clear and precise cuss language that he should comply.” Wilson did not.

Watts decided to have his talk with Wilson on the spot. Watts began to pace, which according to other testimony was a habit of his. According to Watts, Wilson began to imitate his pacing:

*“I used Civility, Patience and Empathy as I paced back and forth. Firefighter Wilson then began to mimic my pacing in a bizarre and erratic fashion, with a stooped-over posture and to imitate my attempts to have him communicate with me about how I was running the station. This temper tantrum display continued for a few minutes.*

*As I stopped pacing and stood still, Firefighter Wilson started ranting and raging in a loud contemptible voice reflected with an exaggerated facial expression, about how he felt I was paranoid. He then came in front of me, stopped mimicking my pacing, and stood up erect.*

*Finally, he got in my face about one foot distance, squared off, never answering the root question of how he felt I operated the station and continued to argue. Without warning Firefighter Wilson viciously head butted me. He stuck his forehead into my forehead and continued to aggressively lean into me. The head butt sounded loud and for an instant I saw stars. With no premeditation, I instinctively removed his head from my face with my opened right hand, protecting myself, and did not follow up with further re-action [sic] to being struck on my forehead by Firefighter Wilson.”*

Wilson immediately telephoned Assistant Fire Chief Johnny Vaughn. Vaughn came to the station to investigate. The first thing Vaughn did was talk to Watts. Vaughn testified in his deposition that Watts began talking about defending himself. Vaughn testified:

*And all of a sudden and I am not positive about what it was that Greg said that triggered my thought pattern, but I asked I said, “Greg, what have you done here? Did you hit him?” And by this time, even in the conversation, Greg was very upset. He was mad. And it was something to the nature of doing his hands like this (indicating) clapping real loud. And he said, “You [sic] goddam right. Right up side his head.” Vaughn testified that Watts claimed Wilson had butted his head, but Vaughn observed that “Captain Watts didn’t show any redness or a knot or anything else to where I could be sure that he had been head-butted.” At this point, Vaughn decided that Watts was too agitated to run the fire station that day, so he sent him home for the day. Vaughn asked Watts to provide him with a written statement about the incident, and Watts provided two different statements (which formed the basis for the foregoing statement of facts).*

Next, Vaughn interviewed Wilson. Vaughn understood that Wilson had a reputation of being “about half hard to get along with” and that he was “one of the  
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guys that will fly off the handle real fast.” According to Vaughn, Wilson said that he and Watts “got into it about the laundry.” Then Wilson either said that Watts had slapped him or that he had punched him at his deposition, Vaughn wasn’t sure which Wilson had said. Vaughn could see that the left side of Wilson’s face was swollen and red down to his ear. He told Wilson that Watts said Wilson butted him in the head, and Wilson denied this, saying that although their heads were close, he did not touch Watts. Vaughn decided Wilson was also too agitated to stay at work, so he sent him home. Wilson, too, provided a written statement of his side of the story. Vaughn mentioned that in his written report, Wilson stated that the two men’s foreheads “may have touched.” (Wilson’s report actually says that Watts advanced on Wilson, who stood his ground so that “our foreheads touched, eyeball to eyeball.”)

Vaughn also requested written reports from Firefighters Harvey and Starkey. Their accounts were very similar. . . . Harvey wrote: “As I was walking off I saw Greg jump into Chuck’s face and at the top of his lungs yell to Chuck, ‘I’m f . . . in charge here. You’re not f . . . in charge.’” Starkey wrote, “Before turning and leaving, I saw Greg step very close to Chuck and did what I would describe as ranting and raving, flailing his arms and screaming obscenities. The best I can recall, Greg said, “I’m running this f . . . place you. . . .” Both men said that they rounded the corner at that point and therefore could no longer see Watts and Wilson, but that they heard a loud slap. Both men also said that when they saw Wilson a short time later, Wilson asked if they had seen Watts hit him. They said that Wilson’s face was “very red and puffy,” “from his ear down the whole side of his cheek.” Wilson was assigned to another station while the department investigated the incident. Vaughn concluded that it was impossible to say which of the two men was the aggressor since there were no third-party witnesses and the two antagonists had contradictory stories: “It was his word against his word.” Vaughn conveyed to the Fire Chief, John Dutch, the results of his investigation, consisting of his memorandum and the written statements of Watts, Wilson, Harvey, and Starkey. Vaughn’s personal opinion was that both Wilson and Watts should be dismissed because “the rules and regulations of our fire department stated that no firefighter would ever strike another under any circumstances. It doesn’t address captain, firefighter, or anything else. It’s just no firefighter shall have an altercation.” However, Fire Chief Dutch’s decision was that Wilson would not be disciplined because the department could not prove “through statements or visuals or anything else, about the head-butt.” There was a pre-disciplinary hearing to consider Watts’s case, attended by Watts and his attorney, a city attorney, a city personnel employee, the union president, Fire Chief Dutch and Vaughn. After the hearing, Fire Chief Dutch submitted a memorandum to the city personnel director, George Shirley, proposing that the City terminate Watts’s employment. Dutch wrote:

*In summary, it is my finding that Captain Watts did verbally abuse a subordinate, using loud, offensive, profane, and vulgar language; that Watts did direct physically aggressive movements toward a subordinate; that Watts’ [sic] actions*  
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*have, in fact, intimidated and frightened employees in the Fire Department; and that Watts did physically strike a subordinate employee.*

Shirley concurred with Dutch's decision. Dutch's proposal was subject to further review by city Manager Ron Wood.

Wood determined that Watts should be disciplined, but that the discipline should be demotion from captain to firefighter, rather than termination of employment. Wood wrote in a letter to Watts that the decision to discipline him was based on two grounds: first, the evidence that Watts struck a subordinate was very strong, while Watts's claim of self-defense was not corroborated, despite investigation; and second, regardless of who made the "initial contact," Watts failed in his duty as a supervisor by allowing the conflict to escalate to the point of violence, rather than simply sending Wilson home. Despite the gravity of Watts's conduct, Wood concluded that in light of Watts's long record of service with the City, demotion to a non-supervisory position, rather than firing, was the appropriate sanction.

Watts resigned rather than accept the demotion. He brought this suit against the City, alleging discriminatory termination of his employment on account of his race, in violation of Title VII, 42 U.S.C. § 2000e-2(a) (1994). . . .

For this appeal, the City does not dispute that Watts presented a prima facie case, and Watts does not dispute that the City articulated a legitimate, nondiscriminatory reason for disciplining him. Therefore, the only issue presented on appeal is whether there is evidence of pretext—in other words, evidence that a discriminatory reason more likely motivated the City or that the reason the City gave for its treatment of Watts was unworthy of belief. . . .

One of the established methods of proving pretext is to show that the employer treated the plaintiff "differently from other similarly-situated [sic] employees who violated work rules of comparable seriousness." . . . Watts argues that he showed pretext by showing that the City did not discipline Wilson for violating the rule against fighting. Watts bears the burden of establishing that he and Wilson were similarly situated. . . .

The City responds that Watts and Wilson were not similarly situated because Watts was a supervisor and therefore had a greater responsibility not only to avoid fighting, but to actively defuse the explosive situation before it escalated into violence. Under our precedent, employees may not be "similarly situated" when one is a supervisor and the other is not. . . .

The distinction between supervisors and non-supervisors is clearly relevant to whether we would expect the employees in this case to be treated the same in the absence of discrimination. An employer who entrusts greater authority to its supervisors than to ordinary employees surely can be expected to exact greater responsibility from them. Supervisors often have to manage difficult employees. The record in this case shows that the City had heightened expectations of its supervisory employees and also gave them authority to neutralize a deteriorating situation by such measures as sending a subordinate home. . . .

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Wood said that while Watts's long record of service and lack of prior disciplinary problems argued in his favor, "it does concern me that even in our meeting on January 8, that you failed to recognize that you mishandled the situation as a Supervisor and continue to claim that you are the 'victim.' I have no confidence in your continuing in a supervisory capacity with the City of Norman." Regardless of who hit whom, Watts's own statements gave the City reason to conclude that Watts escalated a situation rife with potential for violence and in fact used his position as supervisor to do so. . . .

Watts's managerial failure fundamentally distinguishes his situation from Wilson's. After all, the challenged discipline here was to reduce Watts to Wilson's rank. Because of the difference in their positions of employment, we cannot hold that Watts and Wilson were similarly situated or that the City's decision to discipline only Watts is proof of pretext. . . .

The City investigated the incident thoroughly before making any decision, holding a pre-disciplinary hearing at which Watts was represented by counsel. The City had the statements of Starkey and Harvey that an agitated Watts sought out Wilson and sent them away so he could be alone with Wilson; that Watts was shouting obscenities at Wilson; that they heard a slap; and that Wilson's face was red and swollen immediately afterwards. The City had Vaughn's evidence that Watts had admitted striking Wilson in the head, that Watts had no marks of a blow on his head, and that Wilson's face was red and swollen. The City had conflicting statements by Wilson and Watts, each claiming the other hit him and each denying hitting the other. . . .

On the other hand, the City lacked objective evidence that Wilson had struck Watts. Whereas Vaughn reported that Watts admitted striking Wilson, Wilson always denied striking Watts. City Manager Wood wrote to Watts, "There is no corroborating evidence to support your claim that you were head butted such as a bruise or swelling or observation by other employees. Whether you were head butted by the subordinate appears to be your word against the subordinate's word." Fire Chief Dutch decided not to discipline Wilson because the City could not prove he struck Watts "through statements or visuals or anything else," except, of course, for the word of his antagonist. . . .

This Court has no need and no authority to determine what really happened between the two men or what discipline would have been appropriate to each. . . . Our task in this case is only to say whether the men were "similarly situated" so that the City's different disposition of their two cases is evidence of pretext. The existence of corroborating evidence in Watts's case and the absence of such evidence in Wilson's case is a crucial difference from the point of view of an employer trying to decide what disciplinary measures it ought to mete out to the respective employees and, for that matter, what actions it could later defend if challenged by the disciplined employee. Wilson was therefore not similarly situated to Watts, and the Wilson case therefore does not provide the pretext evidence Watts needs. . . .

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Because the City's announced reason for disciplining Watts was failure to live up to responsibilities which were not a part of Wilson's job, and because the evidence available to the City about the two men's misconduct differed qualitatively, different treatment of the two men does not amount to evidence of pretext. Nor does Watts adduce other evidence sufficient to carry his burden of proving that his demotion was based on intentional discrimination. . . . We must affirm the district court's entry of summary judgment against Watts.

**Case Name:** Watts v. City of Norman

**Court:** United States Circuit Court of Appeals, 10th Circuit

**Summary of Main Points:** A case for disparate treatment (intentional race discrimination) cannot be proven simply because two employees who engaged in an altercation received differing treatment. The differing treatment was based upon differences in their rank and factual circumstances surrounding the altercation. In other words, the two men were not similarly situated, and therefore the fact that they were treated differently cannot be presumed to have been based on race.

Employers will frequently offer seemingly legitimate reasons for an employment decision that adversely affects an employee in a protected class. The burden then shifts to the employee to establish that the stated reason was not the real reason for the employment decision, and that the stated reason was merely a pretext for an act of discrimination. Proof of a pretext can be established by showing that others who were similarly situated, but not in the protected class, were treated differently.

### Disparate Impact

Some types of employment decisions appear to be nondiscriminatory, but have the effect of discriminating. The proof of such discrimination is evident only from looking at a statistical analysis. This type of discrimination is called **disparate impact**. In these cases, it may be difficult if not impossible to clearly identify the specific reasons for the statistical difference, and just as impossible to prove that the discrimination was intentional. For example, the entrance examination used for a particular job, or neutral-appearing prerequisites, may have a tendency to eliminate minority or protected class candidates more frequently than white males. Irrespective of the employer's actual motivations for using such an examination or prerequisites, when the statistics show that a protected class has been unlawfully impacted, the disparate impact theory will apply.

Disparate impact cases also differ from disparate treatment cases in another important regard. In disparate treatment cases, such as the *Watts* case,

#### disparate impact

a form of discrimination that appears on its face to be nondiscriminatory, but that has the effect of discriminating based upon a prohibited classification; disparate impact can be proven only through statistical analysis

**class action lawsuit**

a suit brought by certain named individuals on behalf of all persons similarly situated

**consent decree**

a court order, the terms of which have been agreed to by the parties to a lawsuit, and which is overseen and enforced by the court; once entered, consent decrees are considered to be binding decisions of the court

the identity of the injured party is usually quite clear. In disparate impact cases, it may be impossible to identify a particular victim. In fact, in many disparate impact cases, the suit is filed as a class action. A **class action lawsuit** is a suit brought by certain named individuals on behalf of all persons similarly situated.

Disparate impact cases often lead to law suits where both the employer and the individuals who are alleging discrimination agree that a statistical disparity exists, and as a remedy the employer needs to take affirmative steps to address the numerical imbalance. As a result the parties may enter into consent decrees. A **consent decree** is a court order, the terms of which have been agreed to by the parties to the suit, and which is overseen and enforced by the court. Once entered, consent decrees are considered to be binding decisions of the court.

As the *Cleveland* and the *Dallas* cases below indicate, consent decrees are frequently attacked by those who are negatively affected by the decree. Prior to the *Cleveland* case, it was unclear if courts could provide relief under Title VII that benefited individuals who were not the actual victims of discrimination.

**Firefighters (IAFF Local 93) v. City of Cleveland**

478 U.S. 501 (1986)

*United States Supreme Court*

JUSTICE BRENNAN delivered the opinion of the Court. . . .

On October 23, 1980, the Vanguards of Cleveland (Vanguards), an organization of black and Hispanic firefighters employed by the City of Cleveland, filed a complaint charging the City and various municipal officials (hereinafter referred to collectively as the City) with discrimination on the basis of race and national origin “in the hiring, assignment and promotion of firefighters within the City of Cleveland Fire Department.” . . . The Vanguards sued on behalf of a class of blacks and Hispanics consisting of firefighters already employed by the City, applicants for employment, and “all blacks and Hispanics who in the future will apply for employment or will be employed as firemen by the Cleveland Fire Department.” . . .

The Vanguards claimed that the City had violated the rights of the plaintiff class under the Thirteenth and Fourteenth Amendments to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. §§ 1981 and 1983. Although the complaint alleged facts to establish discrimination in hiring and work assignments, the primary allegations charged that black and Hispanic firefighters “have . . . been discriminated against

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by reason of their race and national origin in the awarding of promotions within the Fire Department.” . . . The complaint averred that this discrimination was effectuated by a number of intentional practices by the City. The written examination used for making promotions was alleged to be discriminatory. The effects of this test were said to be reinforced by the use of seniority points and by the manipulation of retirement dates so that minorities would not be near the top of promotion lists when positions became available. In addition, the City assertedly limited minority advancement by deliberately refusing to administer a new promotional examination after 1975, thus cancelling out the effects of increased minority hiring that had resulted from certain litigation commenced in 1973. . . .

[T]he Vanguards’ lawsuit was not the first in which the City had to defend itself against charges of race discrimination in hiring and promotion in its civil services. In 1972, an organization of black police officers filed an action alleging that the Police Department discriminated against minorities in hiring and promotions. . . . The District Court found for the plaintiffs, and issued an order enjoining certain hiring and promotion practices and establishing minority hiring goals. In 1977, these hiring goals were adjusted and promotion goals were established pursuant to a consent decree. Thereafter, litigation raising similar claims was commenced against the Fire Department and resulted in a judicial finding of unlawful discrimination and the entry of a consent decree imposing hiring quotas. . . . In 1977, after additional litigation, the . . . court approved a new plan governing hiring procedures in the Fire Department.

By the time the Vanguards filed their complaint, then, the City had already unsuccessfully contested many of the basic factual issues in other lawsuits. Naturally, this influenced the City’s view of the Vanguards’ case. As expressed by counsel for the City at oral argument in this Court:

*[W]hen this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland. You don’t have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of the city to comply with the law fully. . . .*

Thus, rather than commence another round of futile litigation, the City entered into “serious settlement negotiations” with the Vanguards. . . .

On April 27, 1981, Local Number 93 of the International Association of Firefighters . . . which represents a majority of Cleveland’s firefighters, moved . . . to intervene as a party-plaintiff. The District Court granted the motion and ordered the Union to submit its complaint in intervention within 30 days.

Local 93 subsequently submitted a three-page document entitled “Complaint of Applicant for Intervention.” Despite its title, this document did not allege any causes of action or assert any claims against either the Vanguards or the City. It expressed the view that “[p]romotions based upon any criterion other than competence, such as a racial quota system, would deny those most

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capable from their promotions, and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force, and asserted that Local #93's interest is to maintain a well trained and properly staffed fire fighting force and [Local 93] contends that promotions should be made on the basis of demonstrated competency, properly measured by competitive examinations administered in accordance with the applicable provisions of Federal, State, and Local laws." . . . The "complaint" concluded with a prayer for relief in the form of an injunction requiring the City to award promotions on the basis of such examinations. . . .

In the meantime, negotiations between the Vanguard and the City continued, and a proposed consent decree was submitted to the District Court in November, 1981. This proposal established "interim procedures" to be implemented "as a two-step temporary remedy" for past discrimination in promotions. . . . The first step required that a fixed number of already planned promotions be reserved for minorities: specifically, 16 of 40 planned promotions to Lieutenant, 3 of 20 planned promotions to Captain, 2 of 10 planned promotions to Battalion Chief, and 1 of 3 planned promotions to Assistant Chief were to be made to minority firefighters. . . . The second step involved the establishment of "appropriate minority promotion goal[s]," . . . for the ranks of Lieutenant, Captain, and Battalion Chief. The proposal also required the City to forgo using seniority points as a factor in making promotions. . . . The plan was to remain in effect for nine years, and could be extended upon mutual application of the parties for an additional 6-year period. . . .

The District Court held a 2-day hearing at the beginning of January to consider the fairness of this proposed consent decree. Local 93 objected to the use of minority promotional goals and to the 9-year life of the decree. In addition, the Union protested the fact that it had not been included in the negotiations. This latter objection particularly troubled the District Judge. Indeed, although hearing evidence presented by the Vanguard and the City in support of the decree, the Judge stated that he was "appalled that these negotiations leading to this consent decree did not include the intervenors . . .," and refused to pass on the decree under the circumstances. . . . Instead, he concluded: "*I am going to at this time to defer this proceeding until another day, and I am mandating the City and the [Vanguard] to engage the Fire Fighters in discussions, in dialogue. Let them know what is going on, hear their particular problems.*" . . . At the same time, Judge Lambros explained that the Union would have to make its objections more specific to accomplish anything:

*"I don't think the Fire Fighters are going to be able to win their position on the basis that, 'Well, Judge, you know, there's something inherently wrong about quotas. You know, it's not fair.' We need more than that."* . . .

A second hearing was held on April 27. Local 93 continued to oppose any form of affirmative action. Witnesses for all parties testified concerning the proposed consent decree. The testimony revealed that, while the consent decree dealt only

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with the 40 promotions to Lieutenant already planned by the City, the Fire Department was actually authorized to make up to 66 offers; similarly, the City was in a position to hire 32, rather than 20, Captains, and 14, rather than 10, Battalion Chiefs. After hearing this testimony, Judge Lambros proposed as an alternative to have the City make a high number of promotions over a relatively short period of time. The Judge explained that, if the City were to hire 66 Lieutenants, rather than 40, it could “plug in a substantial number of black leadership that can start having some influence in the operation of this fire department” while still promoting the same nonminority officers who would have obtained promotions under the existing system. . . . Additional testimony revealed that this approach had led to the amicable resolution of similar litigation in Atlanta, Georgia. Judge Lambros persuaded the parties to consider revamping the consent decree along the lines of the Atlanta plan. The proceedings were therefore adjourned, and the matter was referred to a United States Magistrate.

Counsel for all three parties participated in 40 hours of intensive negotiations under the Magistrate’s supervision, and agreed to a revised consent decree that incorporated a modified version of the Atlanta plan. . . . However, submission of this proposal to the court was made contingent upon approval by the membership of Local 93. Despite the fact that the revised consent decree actually increased the number of supervisory positions available to nonminority firefighters, the Union members overwhelmingly rejected the proposal.

On January 11, 1983, the Vanguard and the City lodged a second amended consent decree with the court and moved for its approval. This proposal was “patterned very closely upon the revised decree negotiated under the supervision of [the] Magistrate . . . ,” and thus its central feature was the creation of many more promotional opportunities for firefighters of all races. Specifically, the decree required that the City immediately make 66 promotions to Lieutenant, 32 promotions to Captain, 16 promotions to Battalion Chief, and 4 promotions to Assistant Chief. These promotions were to be based on a promotional examination that had been administered during the litigation. The 66 initial promotions to Lieutenant were to be evenly split between minority and nonminority firefighters. However, since only 10 minorities had qualified for the 52 upper-level positions, the proposed decree provided that all 10 should be promoted. The decree further required promotional examinations to be administered in June, 1984, and December, 1985. Promotions from the lists produced by these examinations were to be made in accordance with specified promotional “goals” that were expressed in terms of percentages and were different for each rank. The list from the 1985 examination would remain in effect for two years, after which time the decree would expire. The life of the decree was thus shortened from nine years to four. In addition, except where necessary to implement specific requirements of the consent decree, the use of seniority points was restored as a factor in ranking candidates for promotion. . . .

The District Court approved the consent decree on January 31, 1983. Judge Lambros found that “[t]he documents, statistics, and testimony presented at the  
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*January and April, 1982, hearings reveal a historical pattern of racial discrimination in the promotions in the City of Cleveland Fire Department.” . . . He then observed:*

*While the concerns articulated by Local 93 may be valid, the use of a quota system for the relatively short period of four years is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department. It is neither unreasonable nor unfair to require nonminority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy. Furthermore, the amended proposal is more reasonable, and less burdensome, than the nine-year plan that had been proposed originally. . . .*

The Judge therefore overruled the Union’s objection and adopted the consent decree “as a fair, reasonable, and adequate resolution of the claims raised in this action.” . . . The District Court retained exclusive jurisdiction for “all purposes of enforcement, modification, or amendment of th[e] Decree upon the application of any party.” . . .

The Union appealed the overruling of its objections. A panel for the Court of Appeals for the Sixth Circuit affirmed, one judge dissenting. . . . The court rejected the Union’s claim that the use of race-conscious relief was “unreasonable,” finding such relief justified by the statistical evidence presented to the District Court and the City’s express admission that it had engaged in discrimination. The court also found that the consent decree was “fair and reasonable to nonminority firefighters,” emphasizing the “relatively modest goals set forth in the plan,” the fact that “the plan does not require the hiring of unqualified minority firefighters or the discharge of any nonminority firefighters,” the fact that the plan “does not create an absolute bar to the advancement of nonminority employees,” and the short duration of the plan. . . .

Local 93 petitioned this Court for a writ of certiorari. The sole issue raised by the petition is whether the consent decree is an impermissible remedy under § 706(g) of Title VII. Local 93 argues that the consent decree disregards the express prohibition of the last sentence of § 706(g) that “[n]o order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.” . . . According to Local 93, this sentence precludes a court from awarding relief under Title VII that may benefit individuals who were not the actual victims of the employer’s discrimination. The Union argues further that the plain language of the provision that “[n]o order of the court” shall provide such relief extends this limitation to orders entered by consent, in addition to orders issued after litigation. Consequently, the Union concludes that a consent decree

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entered in Title VII litigation is invalid if—like the consent decree approved in this case—it utilizes racial preferences that may benefit individuals who are not themselves actual victims of an employer’s discrimination. The Union is supported by the United States as *amicus curiae*.

We granted the petition in order to answer this important question of federal law. . . . [C]ourts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant’s discriminatory practices. We need not decide whether this is one of those cases, however. For we hold that, whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree. We therefore affirm the judgment of the Court of Appeals.

II We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. . . . This view is shared by the Equal Employment Opportunity Commission (EEOC), which has promulgated guidelines setting forth its understanding that Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity. . . .

It is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination. . . . [In *Weber*]. . . we concluded that “[i]t would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had “been excluded from the American dream for so long” constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.” . . . Accordingly, we held that Title VII permits employers and unions voluntarily to make use of reasonable race-conscious affirmative action, although we left to another day the task of defin[ing] in detail the line of demarcation between permissible and impermissible affirmative action plans. . . .

[A]bsent some contrary indication, there is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in *Weber* is rendered impermissible by Title VII simply because it is incorporated into a consent decree. . . .

III Relying upon *Firefighters v. Stotts*, 467 U.S. 561 (1984), and *Railway Employees v. Wright*, 364 U.S. 642 (1961), Local 93—again joined by the United States—contends that we have recognized as a general principle that a consent decree cannot provide greater relief than a court could have decreed after a trial. They urge that, even if § 706(g) does not directly invalidate the consent decree, that decree is nonetheless void because the District Court “would have been powerless to order [such an injunction] under Title VII, had the matter actually gone to trial.” . . .

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We concluded above that voluntary adoption in a consent decree of race-conscious relief that may benefit nonvictims does not violate the congressional objectives of § 706(g). It is therefore hard to understand the basis for an independent judicial canon or “common law” of consent decrees that would give § 706(g) the effect of prohibiting such decrees anyway. . . . [A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial. . . .

IV Local 93 and the United States also challenge the validity of the consent decree on the ground that it was entered without the consent of the Union. They take the position that, because the Union was permitted to intervene as of right, its consent was required before the court could approve a consent decree. This argument misconceives the Union’s rights in the litigation.

A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes, and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent. . . . Here, Local 93 took full advantage of its opportunity to participate in the District Court’s hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections, and explained why it was rejecting them. Accordingly, “the District Court gave the union all the process that it was due. . . .”

The only issue before us is whether § 706(g) barred the District Court from approving this consent decree. We hold that it did not. Therefore, the judgment of the Court of Appeals is Affirmed.

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**Case Name:** Firefighters (IAFF Local 93) v. City of Cleveland

**Court:** United States Supreme Court

**Summary of Main Points:** Employers may agree to use race-conscious affirmative action goals in an effort to correct imbalances of minority members in the workplace. Similarly, consent decrees may also embody the use of race-conscious remedies without violating the constitutional rights of nonminority members.

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Employment discrimination cases tend to be very complex, with numerous parties involved. Cases may drag on for a decade or more and may involve repeated detours from trial court, up to appellate courts, and back down to the trial court, before final resolution. The *Dallas* case below is a perfect example. The controversy dates back to a 1976 consent decree, and subsequent voluntary affirmative action policies adopted by the City. Nonminority

employees challenged the continued use of race- and sex-conscious promotions starting in 1990, culminating in the following decision in 1998.

### **Dallas Firefighters v. Dallas**

150 F.3d 438 (5th Cir., 1998)

*United States Court of Appeals for the Fifth Circuit*

POLITZ, Chief Judge:

The Dallas Fire Department (DFD) has the following rank structure, beginning with the entry level position: (1) fire and rescue officer, (2) driver-engineer, (3) lieutenant, (4) captain, (5) battalion chief, (6) deputy chief, (7) assistant chief, and (8) chief. Positions are filled only from within the department. The city manager appoints the chief who in turn appoints the assistant and deputy chiefs. For battalion chief and below, firefighters become eligible to take a promotion examination for advancement to the next highest rank after a certain amount of time in grade. Those passing the examination are placed on an eligibility roster, listed in accordance with their scores. Vacancies occurring thereafter are filled by promoting individuals from the top of the eligibility list, unless there is a countervailing reason such as unsatisfactory performance, disciplinary problems, or non-paramedic status.

In 1988 the City Council adopted a five-year affirmative action plan for the DFD, extending same for five years in 1992 with a few modifications. In an effort to increase minority and female representation the DFD promoted black, hispanic [sic], and female firefighters ahead of male, nonminority firefighters who had scored higher on the promotion examinations. Between 1991 and 1995 these promotions occasioned four lawsuits filed by the Dallas Fire Fighters Association on behalf of white and Native American male firefighters who were passed over for promotions. These actions were consolidated by the district court.

The plaintiffs consist of four groups, three of which contend that the DFD impermissibly denied them promotions to the ranks of driver-engineer, lieutenant, and captain respectively. Additionally, a fourth group of plaintiffs challenges the fire chief's appointment of a black male to deputy chief in 1990. The plaintiffs claim that the City and the fire chief, Dodd Miller, acting in his official capacity, violated: (1) the fourteenth amendment of the United States Constitution, (2) the equal rights clause of the Texas Constitution, (3) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and (4) article 5221k of the Texas Civil Statutes. . . .

#### 2. The Out-of-Rank Promotions

##### A. Race-Conscious Promotions

To survive an equal protection challenge under the fourteenth amendment [sic], a racial classification must be tailored narrowly to serve a compelling governmental interest. That standard applies to classifications intended to be remedial, as well as to those based upon invidious discrimination. A governmental body has a

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compelling interest in remedying the present effects of past discrimination. In analyzing race conscious remedial measures we essentially are guided by four factors: (1) necessity for the relief and efficacy of alternative remedies; (2) flexibility and duration of the relief; (3) relationship of the numerical goals to the relevant labor market; and (4) impact of the relief on the rights of third parties.

We conclude that on the record before us the race-based, out-of-rank promotions at issue herein violate the equal protection clause of the fourteenth amendment. The only evidence of discrimination contained in the record is the 1976 consent decree between the City and the United States Department of Justice, precipitated by a DOJ finding that the City engaged in practices inconsistent with Title VII, and a statistical analysis showing an underrepresentation of minorities in the ranks to which the challenged promotions were made. The record is devoid of proof of a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more serious measures in other cases. We are aware that the out-of-rank promotions do not impose as great a burden on nonminorities as would a layoff or discharge. In light of the minimal record evidence of discrimination in the DFD, however, we . . . must conclude that the City is not justified in interfering with the legitimate expectations of those warranting promotion based upon their performance in the examinations.

There are other ways to remedy the effects of past discrimination. The City contends, however, that alternative measures employed by the DFD, such as validating promotion exams, recruiting minorities, eliminating the addition of seniority points to promotion exam scores, and initiating a tutoring program, have been unsuccessful, as evidenced by the continuing imbalance in the upper ranks of the DFD. That minorities continue to be underrepresented does not necessarily mean that the alternative remedies have been ineffective, but merely that they apparently do not operate as quickly as out-of-rank promotions.

#### B. Gender-Conscious Promotions

Applying the less exacting intermediate scrutiny analysis applicable to gender-based affirmative action, we nonetheless find the gender-based promotions unconstitutional. The record before us contains, as noted above, little evidence of racial discrimination; it contains even less evidence of gender discrimination. Without a showing of discrimination against women in the DFD, or at least in the industry in general, we cannot find that the promotions are related substantially to an important governmental interest.

#### C. Title VII

Having struck down the out-of-rank promotions as unconstitutional, we need not address their validity under Title VII or Texas article 5221k.

#### 3. The Deputy Chief Appointment

The City contends . . . Chief Miller's appointment of Robert Bailey, a black male, to deputy chief violated neither Title VII nor article 5221k. To determine the

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validity of the appointment we must examine whether it was justified by a manifest imbalance in a traditionally segregated job category and whether the appointment unnecessarily trammelled the rights of nonminorities or created an absolute bar to their advancement. The plaintiffs do not dispute that there is a manifest imbalance in the rank of deputy chief and we therefore limit our discussion to the second prong of the *Johnson* test.

The only . . . evidence specific to the Bailey appointment is the affidavit of Chief Miller in which he states:

*In 1990, I selected Robert Bailey as Deputy Chief because I believed he was capable of performing the job responsibilities of the position of Deputy Chief, and he was recommended by my executive staff. In addition, the appointment of Chief Bailey was made pursuant to the City of Dallas Affirmative Action Plan.*

The City contends that Chief Miller's statement reflects that, in appointing Bailey, he considered race as one factor among many, making the appointment permissible under *Johnson*. The plaintiffs concede that Bailey was qualified but insist that the reference to the affirmative action plan, and the failure of Chief Miller to explain how Bailey compared to other candidates, established that Chief Miller based his final decision solely upon race. The plaintiffs also contend that the promotional goals in the affirmative action plan are out of proportion to the percentage of available candidates, demonstrating that the appointment was made to fulfill impermissible goals and, thus, unnecessarily trammelled the rights of nonminorities.

The plaintiffs' position is that any employment decision utilizing the affirmative action plan is illegal. We decline to accept that contention, particularly in light of the fact that the validity of the affirmative action plan is not in question herein. We are persuaded beyond peradventure that the mere reference to the affirmative action plan does not create a fact issue concerning whether Chief Miller had an impermissible motive in promoting Bailey. The only relevant summary judgment evidence reflects that Chief Miller chose Bailey based upon substantially more than just his race, and the opponents have failed to produce any acceptable material evidence to the contrary. We therefore conclude that the appointment did not unnecessarily trammel the rights of nonminorities or pose an absolute bar to their advancement. Accordingly, the appointment was consistent with Title VII and article 5221k. . . .

**Case Name:** Dallas Firefighters v. Dallas

**Court:** United States Circuit Court of Appeals, 5th Circuit

**Summary of Main Points:** Based on the facts of the case (which do not show a pervasive history of discrimination), the continued use of race-conscious remedies violates the rights of nonminority members.

**strict scrutiny**

a standard of review applied by courts when reviewing the constitutionality of a governmental policy, action, or law, such that the policy, action, or law must be narrowly tailored to address a compelling governmental interest in order to be upheld

**intermediate level of scrutiny**

a standard of review applied by courts when reviewing the constitutionality of a governmental policy, action, or law, such that the policy, action, or law must be substantially related to important governmental objectives in order to be upheld

**rational basis standard**

a standard of review applied by courts when reviewing the constitutionality of a governmental policy, action, or law, such that the policy, action, or law will be upheld provided it is rationally related to a legitimate governmental interest; the rational basis standard is a deferential standard that usually results in the reviewing court upholding the government's action, except where no rational basis for the governmental action exists

## STANDARD OF REVIEW FOR CONSTITUTIONAL CLAIMS OF DISCRIMINATION

As mentioned in the *Dallas* case, when a constitutional challenge is brought against a governmental entity under the Fourteenth Amendment equal protection clause of the United States Constitution, the standard of review applied by the courts differs depending upon the type of discrimination under review. The most exacting scrutiny is reserved for governmental policies, actions, and laws that discriminate on the basis of race or national origin. The term often used when courts analyze race discrimination cases is **strict scrutiny**. In order for a policy, action, or law to be upheld under strict scrutiny, it must be “narrowly tailored to address a compelling governmental interest.” While the language might not seem significant, when reviewing cases of race discrimination, courts are extremely demanding when looking at the justification for a policy, action, or law that results in discrimination based on racial classifications. Strict scrutiny is also applicable when courts review governmental action that impacts fundamental rights, such as freedom of speech, freedom of religion, and freedom of the press.

In cases in which a governmental policy, action, or law involves classifications based on a person's sex, an **intermediate level of scrutiny** is applied. This intermediate level of scrutiny is commonly defined as “substantially related to important governmental objectives.” While not as demanding as the scrutiny applied to racial classifications, the intermediate standard nevertheless requires the governmental entity to have some “exceedingly persuasive justification” for the policy, action, or law to be upheld.

The third level of review is called the **rational basis standard**, and applies to all other types of alleged discrimination. Under the rational basis standard a governmental policy, action, or law will be upheld provided it is rationally related to a legitimate governmental interest. The rational basis standard is a deferential standard that usually results in the reviewing court upholding the government's action except where no rational basis for the governmental action exists.

The *Evanston* case below is a sex discrimination case challenging a physical abilities test, in which the court applies the intermediate level of scrutiny. Physical abilities testing will be discussed later in this chapter.

### **Evans v. City of Evanston**

881 F. 2d 382 (7th Cir., 1989)

*United States Court of Appeals for the Seventh Circuit*

POSNER, Circuit Judge

This is a class action under Title VII of the Civil Rights Act of 1964 on behalf of the 39 women who failed the physical agility test given by the Evanston fire department

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[sic] to applicants for firefighting jobs in 1983. Eighty-five percent of the women who took the test failed (only seven percent of the men failed) and were thereby disqualified, and there are no women among Evanston's 106 firefighters although at one time there were two. The test is conceded to have had a "disparate impact" on women. So unless the test (more specifically the method of scoring it — the focus of the plaintiff's attack) serves a legitimate interest of the employer, it violates Title VII. The district judge found a violation and gave judgment for the class. . . . The city appeals, challenging the finding of liability; the plaintiff also appeals, challenging the adequacy of the equitable relief that the judge ordered. . . .

The physical agility test that the Evanston Fire Department used in 1983 (and also in 1981 and 1985) consisted of a group of tasks which were to be performed consecutively by each applicant without a break, while wearing a firefighter's uniform. The tasks were: climbing to the top of a 70-foot ladder; climbing an extension ladder twice while carrying a hose pack; removing a ladder from a firetruck [sic], carrying the ladder to a wall, leaning it up against the wall, and then removing it and returning it to the truck; connecting a hose to a fire hydrant, turning the hydrant on and off, and disconnecting the hose; and dragging a section of hose filled with water fifty feet, dragging a tarpaulin to the top of a hill, carrying the tarp through ten tires, and again dragging a section of hose filled with water fifty feet. The test was timed. The mean time in 1983 was 628 seconds, and the Fire Department chose one standard deviation above this mean as the passing score, with the result that anyone who took more than 767 seconds to complete the test flunked.

The physical agility test is only the first hurdle an applicant must clear to become a firefighter. Next come tests of intelligence and of psychological stability, and in the end only nine of the 839 persons who applied for firefighter jobs in 1983 were hired—all men. The fire department's choice of one standard deviation above the mean as the passing score was not consistent. In 1985 the passing score was 915 seconds, which was 2.8 standard deviations above the mean for that year. In 1981 the passing score had been 890 seconds, which was 1.7 standard deviations above the mean, but had been raised in order to enable three of the four women who took the test to pass it.

The district judge found that the test itself was fine. . . . The test was designed by firefighters, consists of tasks that faithfully imitate the tasks that firefighters are called on to perform in their work, tests for speed, skill, endurance in—in a word, aptitude for—performing those tasks, and was pretested on the Evanston firefighter force before being given to applicants. It seems clearly related to the employer's legitimate need for physically strong firefighters, and the plaintiff has suggested no alternative that would serve that need as well yet be less difficult for women. . . .

The rub is in the scoring of the test. Since men are on average stronger and faster than women, the higher the passing score on a test such as Evanston's physical agility test (that is, the shorter the time in which it must be completed) the smaller the percentage of women likely to pass it. To satisfy its burden of

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producing evidence that the test—which means all aspects of the test including the method of scoring it—served a legitimate employer purpose, the city was obliged to produce evidence that the method of determining who passed the test in 1983 was related to the city’s need for a physically capable firefighting force. . . .

The city did produce evidence relating to this question but it consisted of little more than testimony that one standard deviation above the mean is a frequent cut-off point on tests and that the cut-off point for the physical agility test was generous to the candidates and quite possibly should have been lower. It is not surprising that Judge Zagel was not persuaded by this evidence. The choice of one standard deviation above the mean was a decision to pass 84 percent of the test takers, and this meant that the passing score would depend on the average performance of those who happened to take it. But the ability to perform firefighting tasks adequately depends not on relative but on absolute test performance. If one year all the applicants were superbly fit, it would be irrational to disqualify the entire bottom 16 percent. For it is not only physical abilities that the fire department is after—as is made plain by the fact that no preference is given to candidates who do exceptionally well on the physical agility test, as opposed to those who barely pass it. The department wants firefighters who are intelligent and stable, as well as strong and swift. If it cuts off from further consideration persons who are perfectly able physically—although less so than some other applicants who may, however, be their inferiors in intelligence and stability—it is shooting itself in the foot. No explanation was offered, moreover, for why different pass rates were selected in 1981 and 1985, the effect being to enlarge markedly the time allowed to complete the test compared to what it had been in 1983. There was some evidence that the weather was bad in 1985, but that would explain only why the mean would be higher—not why the department would allow a higher number of standard deviations above the mean.

One would think the rational way of scoring the physical agility test would be to determine the maximum time in which a firefighter who had no training or practice—for remember that the test is for applicants—ought to be able to complete the test, and make that the cutoff [sic] point. Applicants who passed the test would then take the other two tests (intelligence and stability), which presumably would have their own cut-offs. Among those who passed all three tests, those whose composite score, weighted by the relative importance of the tests, was the highest would be hired. This was not the procedure followed by the Evanston Fire Department (the record is unclear on what procedure was followed), and no satisfactory reasons for departing from it were presented. . . .

The judge ordered the city to submit for his consideration a new test (or rather a new method of scoring the old test), and neither side questions that relief. But he refused to order the city to hire any of the members of the plaintiff class or even to allow them to advance to the next test. The plaintiff argues that those class members whose times of completing the 1983 test were within the passing range on the 1985 test (915 seconds, compared to only 767 in 1983) should be excused from having to retake the physical agility test and be allowed to move on to the other tests.

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Judge Zagel was within his remedial discretion in declining to take this step. When he issued his order, it was five years since the class members had taken the physical agility test, and they offered no evidence that their agility had not declined in the interim. The importance of competent firefighting to the safety of the people of Evanston, as well as of the firefighters themselves, whose safety depends in part anyway on each other's physical fitness and agility, justified the city in insisting that all applicants have taken the test in the recent rather than remote past. An equity court must always consider the possible impact of a decree on innocent third parties. . . .

While there is much talk in the cases about "make whole" relief . . . this talk has reference to cases where it is reasonably clear that, had it not been for the discriminatory behavior, the plaintiff would have got (or retained) the job or other employment benefit in issue, and where making the plaintiff whole would not unduly injure innocent third parties. . . . As only 1.2 percent of the applicants who passed the Evanston fire department's physical agility test were actually hired, what the class members lost was not a job but a long-shot chance at a job. They will be restored to the place they would have occupied if they pass a new physical agility test approved by the district court. Depending on their performance on that test and on the other tests required of applicants, they may eventually be in a position to show that but for unfair scoring of the 1983 test they would have been hired in 1983, and if so they can then claim additional backpay [sic]. . . .

The case is remanded for further consideration in light of this opinion. . . .

**AUTHOR'S NOTE:** On remand, the district court concluded that the passing score Evanston selected was arbitrary and had a disparate impact on women in violation of Title VII.

**Case Name:** Evans v. City of Evanston

**Court:** United States Circuit Court of Appeals, 7th Circuit

**Summary of Main Points:** In cases of alleged sex discrimination, the appropriate level of review is the intermediate level. While a practice may be discriminatory (in this case the physical ability test had a disparate impact upon women), the trial judge has the discretion to fashion an appropriate remedy for such discrimination. The law does not require that the women who failed the test be hired. The judge's decision to restore them to their rightful place on the list of applicants was adequate.

## PROCEDURAL ISSUES IN DISCRIMINATION

Congress has established a strict enforcement procedure for all employment-based claims of race, sex, age, national origin, religious, and disability discrimination under Title VII of the Civil Rights Act of 1964, as amended, the

Civil Rights Act of 1991, the ADA, and the ADEA. Complaints must initially be filed with the Equal Employment Opportunity Commission or with designated state human rights agencies. Complaints made under Title VII must be filed within 180 days of the act of discrimination, or within 300 days provided the complaint is also covered by state or local discrimination laws. These agencies are charged with investigating the complaint and, where appropriate, prosecuting the violators.

Victims of discrimination are generally not allowed to file suit against those who committed the discrimination unless the EEOC has issued a right-to-sue letter. The right-to-sue letter authorizes the victim to file litigation against the employer. In cases of alleged discrimination involving a state or municipal employer, if the EEOC determines there is reasonable cause to believe that a violation has occurred, and efforts to resolve the dispute are unsuccessful, the EEOC will refer the complaint to the Department of Justice (DOJ). The DOJ will then either initiate litigation on the complaint or issue a right-to-sue letter.

Victims of unlawful discrimination may also choose to proceed under state anti-discrimination laws. State anti-discrimination laws frequently have longer time frames in which victims may file their claims, beyond the 300-day time frame allowed by Federal law.

## AFFIRMATIVE ACTION—EQUAL OPPORTUNITY

Two terms that are commonly discussed with regard to employment discrimination are equal employment opportunity (EEO) and affirmative action. The two terms are related, but refer to different aspects of unlawful employment discrimination.

**Equal employment opportunity** refers to the right of a person to compete for a job and/or be promoted on the basis of his or her knowledge, skills, and abilities, free from unlawful discrimination (**Figure 12-2**). EEO laws require the elimination of unlawful barriers to employment. Employers are required to post notices in the workplace to advise employees of their EEO rights and their right to be free from retaliation for exercising those rights (**Figure 12-3**).

**Affirmative action** refers to positive steps taken to increase the presence of minorities and women in the workforce and in education. The term was first used in 1965 in Executive Order 11246, issued by President Lyndon B. Johnson to mandate that Federal contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”

Affirmative action policies go beyond equal employment opportunities and seek to increase the representation of minorities and women in schools and employment through recruiting, and the use of race, sex, or ethnicity as

### equal employment opportunity

the right of a person to compete for a job and/or to be promoted on the basis of his or her knowledge, skills, and abilities, free from unlawful discrimination

### affirmative action

positive steps taken to increase the presence of minorities and women in the workforce and in education

**Figure 12-2** *Equal employment opportunity refers to the right of a person to compete for a job and/or be promoted on the basis of his or her knowledge, skills, and abilities, free from unlawful discrimination.*



a factor, among a multitude of factors, upon which otherwise qualified candidates may be considered. In other words, race, gender, and ethnicity may be viewed as additional criteria in choosing from among the qualified candidates, just as are other factors such as grade point average, schools attended, and work experience.

Affirmative action policies could call for an employer faced with two similarly qualified applicants to choose a minority candidate over a white candidate, or for a manager to recruit and hire a qualified woman for a job instead of a man. Affirmative action decisions are not to be based upon the use of quotas, and are not supposed to give any preference to unqualified candidates. In addition, affirmative action policies must be based upon statistical analysis that indicates an underrepresentation of woman or minorities in the workforce.

### **AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)**

The Americans with Disabilities Act of 1990 prohibits discrimination against a person on account of a disability, including employment discrimination (**Figure 12-4**). Prior to the ADA, the Rehabilitation Act of 1973 was the primary law under which a person with a disability could challenge employment decisions that were based on physical or mental abilities. However, the

# Equal Employment Opportunity is THE LAW

## Employers Holding Federal Contracts or Subcontracts

Applicants to and employees of companies with a Federal government contract or subcontract are protected under the following Federal authorities:

### **RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN**

Executive Order 11246, as amended, prohibits job discrimination on the basis of race, color, religion, sex or national origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

### **INDIVIDUALS WITH DISABILITIES**

Section 503 of the Rehabilitation Act of 1973, as amended, prohibits job discrimination because of disability and requires affirmative action to employ and advance in employment qualified individuals with disabilities who, with reasonable accommodation, can perform the essential functions of a job.

### **VIETNAM ERA, SPECIAL DISABLED, RECENTLY SEPARATED, AND OTHER PROTECTED VETERANS**

38 U.S.C. 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, prohibits job discrimination and requires affirmative action to employ and advance in employment qualified Vietnam era veterans, qualified special disabled veterans, recently separated veterans, and other protected veterans.

Any person who believes a contractor has violated its nondiscrimination or affirmative action obligations under the authorities above should contact immediately:

The Office of Federal Contract Compliance Programs (OFCCP), Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20219 or call (202) 693-0101, or an OFCCP regional or district office, listed in most telephone directories under U.S. Government, Department of Labor.

## Private Employment, State and Local Governments, Educational Institutions

Applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under the following Federal laws:

### **RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN**

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex or national origin.

### **DISABILITY**

The Americans with Disabilities Act of 1990, as amended, protects qualified applicants and employees with disabilities from discrimination in hiring, promotion, discharge, pay, job training, fringe benefits, classification, referral, and other aspects of employment on the basis of disability. The law also requires that covered entities provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardship.

### **AGE**

The Age Discrimination in Employment Act of 1967, as amended, protects applicants and employees 40 years of age or older from discrimination on the basis of age in hiring, promotion, discharge, compensation, terms, conditions or privileges of employment.

### **SEX (WAGES)**

In addition to sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended (see above), the Equal Pay Act of 1963, as amended, prohibits sex discrimination in payment of wages to women and men performing substantially equal work in the same establishment.

Retaliation against a person who files a charge of discrimination, participates in an investigation, or opposes an unlawful employment practice is prohibited by all of these Federal laws.

If you believe that you have been discriminated against under any of the above laws, you should contact immediately:

The U.S. Equal Employment Opportunity Commission (EEOC), 1801 L Street, N.W., Washington, D.C. 20507 or an EEOC field office by calling toll free (800) 669-4000. For individuals with hearing impairments, EEOC's toll free TDD number is (800) 669-6820.

## Programs or Activities Receiving Federal Financial Assistance

### **RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX**

In addition to the protection of Title VII of the Civil Rights Act of 1964, as amended, Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin in programs or activities receiving Federal financial assistance. Employment discrimination is covered by Title VI if the primary objective of the financial assistance is provision of employment, or where employment discrimination causes or may cause discrimination in providing services under such programs. Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex in educational programs or activities which receive Federal assistance.

### **INDIVIDUALS WITH DISABILITIES**

Sections 501, 504 and 505 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination on the basis of disability in any program or activity which receives Federal financial assistance in the federal government. Discrimination is prohibited in all aspects of employment against persons with disabilities who, with reasonable accommodation, can perform the essential functions of a job.

If you believe you have been discriminated against in a program of any institution which receives Federal assistance, you should contact immediately the Federal agency providing such assistance.

**Figure 12-3** *All employers covered by EEO laws are required to display this poster in the workplace.*

**Figure 12-4** *The Americans with Disabilities Act prohibits discrimination against anyone because of a disability, and requires buildings to be made accessible.*



Rehabilitation Act was limited to Federal agencies and those entities receiving Federal funds. The ADA applies to all businesses with 15 or more employees, as well as to state and local governments, and provides significantly more protection than the Rehabilitation Act.

The ADA has important ramifications for the fire service. Due to the arduous physical nature of firefighting, and the consequences to the member, other firefighters, and the public if firefighters are physically incapable of performing their duties, a person's physical abilities are a critical factor in determining whether a particular person should be hired as a firefighter, or be allowed to continue working as a firefighter. It is important to understand several key definitions under the ADA:

- *Individual with a disability* refers to a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As a general rule, persons with a temporary condition or impairment are not regarded as having a disability.
- *Major life activities* are activities that an average person can perform with little or no difficulty, such as walking, breathing, seeing, hearing, speaking, learning, and working. Recent case law has placed greater emphasis on the analysis of the degree of limitation of major life

activities. The Supreme Court made it clear that a person who has a physical impairment that prevents him or her from performing one type of job, but who is not prevented from performing other types of jobs, does not have a substantial limitation of a major life activity, and thus does not have a disability under the ADA. This interpretation substantially narrows the number of people who can sue under the ADA.

- *Qualified individual with a disability* is someone who has the requisite skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.
- *Reasonable accommodation* is a modification or adjustment to a job or work environment that will enable a qualified individual with a disability to perform essential job functions. Reasonable accommodation includes changes to an application process that will allow a qualified individual with a disability to participate in the application process. Reasonable accommodation may require making existing facilities accessible to and usable by persons with disabilities, job restructuring, modifying work schedules, providing additional unpaid leave, reassignment to a vacant position, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters. Reasonable accommodation may be necessary to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal-use items, such as eyeglasses or hearing aids. An employer is not required to reassign responsibility for performing an essential function of a job to another employee as a reasonable accommodation.
- *Essential functions* of a job are those fundamental duties of a position that a person must be able to perform, with or without the assistance of reasonable accommodations. Job duties that are not fundamental or essential are characterized as marginal functions. The determination of what duties are essential functions for a particular job must be made on a case-by-case basis. Great deference is usually given to the duties outlined in written job descriptions. In addition, other factors come into play, such as the fact that the position exists to perform that function; the amount of time actually spent performing the function; and how many other employees can or must perform the function.
- *Undue hardship* refers to an action that requires significant difficulty or expense when considered in relation to factors such as a business's size, financial resources, and the nature and structure of its operation.

An employer is required to make a reasonable accommodation to a qualified individual with a disability, unless doing so would impose an undue hardship on the operation of the employer's business.

### **Prohibited Inquiries and Examinations**

Under the ADA, an employer may not ask job applicants whether or not they have a disability, or the nature or severity of a disability, prior to making an offer of employment. Also prohibited are questions that are calculated to cause an applicant to disclose a disability, such as asking whether the candidate has had any serious illnesses, or taken any extended time out of work. Applicants may be asked about their ability to perform the essential functions of the job.

Medical examinations may not be required of applicants prior to a job offer being extended. A job offer may be conditioned on the results of a medical examination, but only if the examination is required of all new employees in that job category. Medical examinations of employees must be job-related and consistent with business necessity.

### **Drug and Alcohol Use**

For purposes of the ADA, employees and applicants with drug addictions, or who are currently using illegal drugs, are not included within the definition of a person with a disability. Illegal use of drugs is not protected by the ADA, and an employer is allowed to take action against employees or applicants on the basis of such use. Tests for use of illegal drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on pre-employment medical examinations.

Employees who abuse alcohol are treated somewhat differently than drug abusers under the ADA. An employer is not prohibited by the ADA from taking action against an employee who comes to work intoxicated, or who consumes alcohol while at work in violation of the employer's regulations, even if the employee is an alcoholic. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees. However, an employer cannot take action against an employee or applicant solely because of the medical condition of being an alcoholic.

In addition, employees and applicants who have a history of drug use or alcoholism, but who are no longer using such drugs, or who have successfully been rehabilitated, cannot be discriminated against based solely on their past medical history. There are many cases that have defined the line between a person who has a history of addiction to drugs or alcohol, and someone who is currently using drugs and alcohol. Most of these cases come down to a factual determination, with the understanding that the ADA does not protect



**Figure 12-5** *Physical abilities testing of firefighters is important, given the arduous nature of the job.*

or immunize those who are currently using drugs or who violate an employer's rules on the use of alcohol from adverse employment actions.

### **Physical Abilities Testing**

Physical abilities testing has become commonplace throughout the fire service for both new hires and incumbent members (**Figure 12-5**). Any physical abilities test that a fire department uses today must be validated in order to withstand an ADA or EEO challenge. Physical abilities testing of both candidates and incumbent firefighters has come under increased scrutiny, as a result of the ADA and Title VII sex discrimination cases. Under the ADA and Title VII, physical abilities tests are limited to tests that validly measure the ability to perform essential functions. The validation process starts with a job task analysis, conducted by a credentialed expert, who identifies the essential functions for the job. A relationship must then be empirically established between the essential functions and the physical abilities test.

A physical abilities test that requires a candidate to perform 20 push-ups or run a mile in eight minutes would be more difficult to validate than one requiring a candidate to remove a roof ladder from an engine, carry a hose up several flights of stairs, or drag a 1½" attack line a given distance, because push-ups and running involve measuring physical abilities not directly required as an essential function of firefighters. Tests that simulate



**Figure 12-6** *Physical abilities tests that replicate essential functions of a job are more easily validated.*

actual fireground activities can more easily be validated (**Figure 12-6**), provided a job task analysis is conducted, which properly establishes those tasks to be essential functions. For this reason, many fire departments have chosen to utilize a physical abilities test that simulates the execution of essential functions.

There is no generic set of essential functions applicable to every fire department in the United States. Each department must conduct its own job task analysis and develop its own set of essential functions based on local equipment and conditions, in order for its physical abilities test to be validated. In the absence of a formal job task analysis, those activities listed in a job description will be presumed to be essential functions for ADA purposes. However, use of a job description to establish essential functions can be challenged by a qualified person with a disability.

**SIDEBAR****What is a Job Task Analysis?**

A job task analysis is essentially a process to identify and establish the various tasks and activities that make up a job. It involves observing and documenting all the actions, movements, and skills that are involved in a job. There are a variety of methodologies and techniques used to conduct a job task analysis. For some jobs, such as firefighter, the job task analysis can be a challenging and complex endeavor, while for other jobs it may be relatively simple. The results of a job task analysis can be used to identify the job functions related to a particular position. Those functions that are vital to the job are considered to be essential functions. All other functions are called marginal or non-essential functions.

**Medical Requirements**

Like physical abilities testing, medical requirements for firefighters implicate ADA and EEO concerns (**Figure 12-7**), while at the same time impacting the ability of a fire department to safely fulfill its mission. Medical examinations



**Figure 12-7** *Medical requirements for firefighters implicate ADA and EEO concerns.*

and requirements must be based on the actual demands of the job, as well as the associated environmental hazards. These issues again require consideration of essential functions and an empirical relationship between the job and the medical requirements.

In *Hegwer v. Board of Civil Service Commissioners of Los Angeles*, 5 Cal. App. 4th 1011, 7 Cal. Rptr. 2d 389 (Cal.App.Dist.2, 1992), an overweight female paramedic was suspended and disciplined for repeatedly failing to conform her weight to department standards. The paramedic sought to have her suspensions reversed based upon the city's affirmative action policy and state anti-discrimination laws. The court upheld the discipline, finding that the city had documented the relationship of weight to job performance. The court's reasoning focused on the medical evidence to support the standards, and the city's repeated efforts to assist the paramedic in complying with the requirements.

While the *Hegwer* case was going through the state court system, a second case was filed in Federal Court on Ms. Hegwer's behalf by her union, citing state and Federal constitutional issues.

### **United Paramedics of Los Angeles v. City of Los Angeles**

936 F.2d 580 (9th Cir., 1991)

*United States Court of Appeals for the Ninth Circuit*

#### MEMORANDUM

The Los Angeles City Fire Department enforces an employee body weight limitation program. The United Paramedics of Los Angeles ("UPLA"), a labor union, represents Emergency Medical Services employees subject to the Fire Department's weight program. UPLA and four members sued to invalidate the weight program as unconstitutional. The district court granted summary judgment to the City. UPLA and the four employees appeal.

#### I. EMS Employees' Fundamental Right to Privacy

UPLA does not assert a privacy right to control one's own body. Instead, UPLA asserts that constitutional privacy protects the collection and dissemination of data on EMS employees' body weight. In the wake of cases permitting urinalysis of employees for drug use despite federal constitutional privacy rights, UPLA does not vigorously press this claim as a federal privacy right. The union does, however, assert the California constitution's privacy guarantee in a pendant state law claim. The parties do not dispute that California's constitutional right of privacy is broader than the federal one.

UPLA characterizes EMS employees' weight as private medical information protected by the state constitution. . . . Absent a compelling government interest,

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UPLA argues, the California constitution protects EMS employees' private medical information from disclosure and dissemination through the Fire Department's weight control program.

. . . As in federal privacy analysis, California courts evaluate an asserted state privacy right through examination of an employee's reasonable expectation of privacy. . . . Where an employee has little or no reasonable expectation of privacy, the California courts will not vindicate the asserted right. . . . Even where employees may reasonably expect privacy, moreover, California courts balance the asserted right to privacy against the rationale for intrusion on that privacy right. . . .

In this case, we rely on several factors to hold that EMS employees have no reasonable expectation of privacy concerning their weight under these circumstances. First, as the district court reasoned, body weight is both public and generally obvious to anyone looking at an EMS employee. . . . Second, the close living quarters of EMS personnel while on duty undermines their assertion of a privacy expectation of their body weight. General assessments of EMS personnel's body weight are presumably available to all Fire Department employees with whom they closely work and live. Third, EMS employees must submit to biannual medical examinations, including weight assessment, in any event. All of these factors, undermine EMS employees' assertion of a reasonable expectation of privacy. We therefore hold that UPLA and the employees have failed to assert a privacy interest protected by the California constitution.

Even if we recognized EMS employees' privacy interest in data about their body weight, we would still have to balance any legitimate privacy interest against the Fire Department's asserted health and safety justification for the weight control program. . . . Indeed, neither party disputes the Fire Department's responsibility to assure employee health and fitness, even at the expense of privacy interests, where employee health and fitness bear on safety concerns. UPLA argues that the Fire Department failed to demonstrate a compelling relationship between its weight control program and safety. We conclude that the weight control program's intrusion upon EMS employees' asserted privacy interest in data about their body weight is, at most, minimal. Assuming *arguendo* that that privacy interest arises to state constitutional importance, the Fire Department has sufficiently justified the minimal intrusion.

We therefore affirm the district court's judgment on the privacy claim.

## II. EMS Employees' Procedural Due Process Rights

UPLA contends that the weight control program and consequent discipline embody an unconstitutional "conclusive presumption" of EMS employee unfitness. As tenured Civil Service employees, EMS personnel hold a vested property interest in continued employment. . . .

UPLA argues that due process requires the Fire Department to determine each EMS employee's fitness individually before subjecting him or her to the punitive weight control program. Due process does not permit, UPLA argues, the

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Fire Department to rely on a conclusive presumption that an overweight EMS employees must be unfit and therefore subject to discipline.

The parties argue extensively in their briefs about the continued viability of “conclusive presumption analysis” in due process law. Suffice it to say here that we have rejected [the UPLA’s] conclusive presumption analysis [argument]. . . .

Nonetheless, UPLA urges that subjecting EMS personnel to the weight control program without an individualized determination of unfitness violates due process. We construe this claim as an allegation that the weight control program violates EMS employees’ procedural due process rights. EMS employees’ vested property interests do not trigger strict scrutiny of the weight control program itself, of course. Instead, assertion of the EMS employees’ property interests triggers inquiry into whether sufficient process protects EMS employees prior to deprivation of those property interests.

We note that EMS personnel do not face discharge or discipline without benefit of procedural remedies. EMS employees may grieve the imposition of discipline. They may also appeal any six-day suspension or more drastic discipline to the Civil Service Commission. Moreover, EMS employees may receive individualized evaluations under the weight control program by submitting their own medical evidence. Because EMS employees have procedural remedies available and because they may rebut any “presumptions” inherent in the program with their individual medical evidence, the Union and the employees have failed to show how the program violates their procedural due process rights.

We therefore affirm the district court’s judgment on the due process claim.

### III. EMS Employees and Equal Protection of the Law

UPLA contends that the weight control program denies EMS employees equal protection of the law because it classifies them in a program not bearing even a rational relationship to legitimate government interests. The City failed to demonstrate, UPLA contends, that the weight control program advances the health or safety of either employees or the public. Noting that, under equal protection analysis, a classification of the type involved here need only not be irrational, the district court upheld the validity of the program.

We affirm this conclusion. Application of the rational basis test requires a two-step analysis. . . . First, we must determine whether the weight control program has a legitimate purpose. . . . The City’s ostensible purpose of furthering employee and public health and safety is certainly legitimate.

Second, we must determine whether the program serves this purpose. . . . This determination does not depend on a “tight fitting relationship” between the program and its purpose. . . . We need merely discern a “plausible,” “arguable,” or “conceivable” relationship between the program and its purpose. . . . The general statistical evidence of increased risks of illness and injury associated with being overweight creates the necessary nexus between the weight control program and the purpose of health and safety.

UPLA argues finally that we should not pay to the weight control program the ordinary deference due to a legislative enactment. When evaluating a

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legislative enactment for a rational basis, courts must defer to legislative wisdom and expertise. . . . No legislature, however, but rather Chief Manning alone promulgated the weight control program. UPLA urges we accord no deference to the Chief's administrative fiat.

We need not defer to a governmental entity, however, in order to perceive a rational relationship between the weight control program and a legitimate government purpose. Regardless of who proposed the program, it appears to us to be rationally related to health and safety. UPLA does not propose that administrative fiats require strict scrutiny. Reviewing for a rational relationship, and without paying anyone deference, we conclude that the weight control program passes constitutional scrutiny.

Conclusion

UPLA failed to assert a fundamental right infringed by the weight control program. Accordingly, we review the program under rational basis analysis. The Fire Department's concern for health and safety sufficiently justifies the program. Moreover, procedural due process sufficiently protects the EMS employees' property interests in their employment. Accordingly, the judgment of the district court is AFFIRMED.

**Case Name:** United Paramedics of Los Angeles v. City of Los Angeles

**Court:** United States Circuit Court of Appeals, 9th Circuit

**Summary of Main Points:** A fire department may institute a weight control program without infringing upon an employee's constitutional rights, nor violating any employment discrimination laws.

## STATE LAW DISABILITY DISCRIMINATION

In addition to the ADA, most states have laws that prohibit discrimination based on disability in a wide variety of settings, including employment, housing, and education. Many local jurisdictions have adopted prohibitions against disability discrimination in their charters and ordinances. As a result, persons who may not be able to sue under the ADA may nonetheless have some recourse under state and local law.

## AGE DISCRIMINATION

The Age Discrimination in Employment Act (ADEA) prohibits discrimination based on a person's age. While the law has been amended significantly over the years, at the present time the ADEA applies to discrimination against

persons over the age of 40. Like the ADA, the ADEA has important ramifications for the fire service.

Any type of fire department policy or program that impacts personnel on the basis of age has the potential to raise a claim under the ADEA. Policies that adversely impact older workers, including physical abilities testing and medical requirements, must be developed with the ADEA in mind. As the *Smith* case below demonstrates, the business necessity of a given policy is a vitally important consideration for fire departments.

### **Jerry O. Smith v. City of Des Moines, Iowa**

99 F.3d 1466 (8th Cir. 1996)

BOWMAN, Circuit Judge.

Appellant Jerry O. Smith brought suit against the City of Des Moines, claiming that he was fired from his position as a city firefighter in violation of the Age Discrimination in Employment Act of 1967 . . . and the Americans With Disabilities Act of 1990. . . .

At the time of his dismissal, Smith had been a firefighter with the Des Moines Fire Department for thirty-three years and had risen to the rank of fire captain. In 1988, the city began to require annual testing of all firefighters at the rank of captain or below to determine whether they could safely fight fires while wearing a self-contained breathing apparatus (SCBA). Each firefighter underwent spirometry testing, which gauges pulmonary function by measuring the capacity of the lungs to exhale. Any firefighter whose forced expiratory volume in one second (FEV1) exceeded 70% of lung capacity was approved to wear a SCBA. If a firefighter scored less than 70%, he or she was required to take a maximum exercise stress test, which measures the capacity of the body to use oxygen effectively. The city required firefighters to establish a maximum oxygen uptake (VO<sub>2</sub> max) of at least 33.5 milliliters per minute per kilogram of body weight in order to pass the stress test.

Smith failed both tests in 1988 and was not approved to wear a SCBA that year. In 1989, 1990, and 1991, Smith passed the spirometry test and was approved for SCBA use. In August 1992, Smith narrowly failed the spirometry test and was referred to Dr. Steven K. Zorn, a consultant to the city, for further testing. In Dr. Zorn's office, Smith passed the spirometry test but registered a VO<sub>2</sub> max of only 22.2 on the stress test. The fire department placed Smith on sick leave. In January 1993, Smith returned to Dr. Zorn but scored only 21.1 on a stress test. The fire department offered to allow Smith to remain on sick leave until April, when he would turn age fifty-five and thus be eligible for retirement.

In the interim, the fire department sent Smith to another physician, Dr. John Glazier, for a second opinion. Additionally, when Smith did not file for retirement in April, the fire chief filed an application for disability retirement on

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Smith's behalf. Before ruling on this application, the state pension board required Smith to be examined by a panel of three additional physicians. Dr. Glazier did not perform a stress test, but the panel of three physicians did (Smith's VO2 max was 28.9). All four physicians concluded that Smith was physically capable of working as a firefighter. After receiving these recommendations, the pension board denied the application for disability retirement, finding that Smith was not disabled from working as a firefighter.

The fire department did not permit Smith to return to work but did offer to place him on leave of absence with benefits until July 1, 1994, when he would be eligible for maximum pension benefits. Smith did not file for retirement at that time, however, and the city discharged him on July 18, 1994 for failure to meet the fire department's physical fitness standards.

After obtaining right-to-sue letters from the Equal Employment Opportunity Commission (EEOC) and the Iowa Civil Rights Commission, Smith brought suit against the city in federal district court, raising claims under the ADEA, the ADA, and the Iowa Civil Rights Act. . . . The District Court granted summary judgment in favor of the city on all counts. The court, assuming Smith could establish that the city's testing standards have a disparate impact on older firefighters, held that the city had established a "business necessity" defense because firefighters require "a high standard of physical fitness." Similarly, Smith's ADEA disparate treatment claim failed because he was not qualified for the job, and the state law claim failed because Iowa law mirrors federal law. The District Court also concluded that Smith did not have a disability and granted summary judgment for the city on his ADA claim. Smith's appeal raises only the disparate impact and ADA claims. . . .

A. We consider first the city's argument, which the District Court rejected, that a claim of disparate impact is not cognizable under the ADEA. Disparate impact claims challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." . . . A disparate impact plaintiff need not prove a discriminatory motive. . . .

Like Title VII of the Civil Rights Act of 1964, to which the disparate impact theory was first applied . . . the ADEA contains two prohibitions relevant here:  
*It shall be unlawful for an employer—*

*(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age*

*(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .*

29 U.S.C. SS 623(a) (1994).

We have on several occasions applied disparate impact analysis to age discrimination claims. . . . We conclude that disparate impact claims under the ADEA are cognizable.

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B. We assume, as the District Court did, that Smith has established a prima facie case of disparate impact, that is, that he has demonstrated “that a facially neutral employment practice actually operates to exclude from a job a disproportionate number of persons protected by the ADEA.” . . . We therefore turn to Smith’s argument that the District Court erroneously granted summary judgment to the city based on the so-called “business necessity” defense.

This defense is derived in part from the cases in which the Supreme Court developed the disparate impact doctrine under Title VII, . . . and in part from a provision of the ADEA which states that an employment practice is not unlawful “where the differentiation is based on reasonable factors other than age.” . . . We recognize that in the Title VII context the business necessity defense has undergone several transformations in recent years. . . .

We conclude that the city met its burden on the business necessity defense by supporting its motion with evidence. . . . On the job-relatedness issue, the city presented undisputed evidence that a captain is frequently involved in fire suppression activities when a company arrives at a fire scene and that the captain wears a SCBA under those circumstances. . . . This evidence alone is sufficient to carry the city’s burden of showing that its fitness standard has a “manifest relationship” to the position in question. . . .

The other element of the defense is whether the standard is necessary to safe and effective job performance. The city’s evidence on this issue is more complicated and begins with some of the extensive regulations governing the manner in which the city operates its fire department. Federal regulations require the fire department to provide firefighters with SCBAs “when such equipment is necessary to protect the health of the employee.” 29 C.F.R. SS 1910.134(a)(2) (1995). The city may not assign firefighters to tasks requiring use of a SCBA unless they are “physically able to perform the work and use the equipment.” . . . The city must review the medical status of SCBA users periodically. . . . The American National Standards Institute (ANSI) standard on physical qualifications for respirator use recommends spirometry testing as a screening mechanism for SCBA users and suggests stress testing for persons who use SCBAs under strenuous conditions. . . . ANSI recommends a 70% FEV1 threshold for spirometry testing but does not specify an acceptable result for stress testing. . . .

To reach its determination that a VO2 max of 33.5 was the appropriate threshold for stress testing, the city relied on a review of the relevant medical literature by Dr. Zorn. A number of studies suggest that firefighters consume between 25 and 35 milliliters of oxygen per kilogram per minute while suppressing a fire. . . . One study in particular involved 150 firefighters performing a series of tasks in a simulated fire-suppression environment. . . . The authors of that study determined that a VO2 max of 33.5 was the minimum required to allow the firefighters to complete the simulation successfully. . . . The authors then repeated the simulation with 32 additional firefighters. *Id.* Of those with a VO2 max less than 33.5, only 40% (4 of 10) completed the simulation successfully.

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Id. On the other hand, of those with a VO<sub>2</sub> max of 33.5 or more, 86% (19 of 22) completed the simulation successfully. . . . After reviewing this study and others, Dr. Zorn concluded that 33.5 was the minimum satisfactory VO<sub>2</sub> max requirement for the Des Moines firefighters. . . . This evidence would clearly be sufficient to entitle the city to a directed verdict on the issue of necessity if it were uncontroverted. . . .

To summarize our conclusions: fitness and the ability to perform while wearing a SCBA are undoubtedly job-related and necessary requirements for firefighters. The dispute in this case is not whether firefighters must be physically fit, but how fitness can be most appropriately measured and how the city may distinguish those firefighters who are probably capable of performing the job from those firefighters who are probably not capable. The city has not proceeded arbitrarily, but rather has carefully developed a standard based upon the available medical literature and using the best test available for measuring fitness, the stress test. . . . The literature indicates that a high proportion of firefighters with a VO<sub>2</sub> max above 33.5 can perform fire suppression tasks successfully, but a much lower proportion of those with a VO<sub>2</sub> max below 33.5 can do so. Smith argues, and the physicians' evaluations suggest, that some firefighters with lower VO<sub>2</sub> max scores—Smith in particular—may be able to perform their jobs. This may well be true, but the law does not require the city to put the lives of Smith and his fellow firefighters at risk by taking the chance that he is fit for duty when solid scientific studies indicate that persons with test results similar to his are not. The lack of a precise or universally perfect fit between a job requirement and actual effective performance is not fatal to a claim of business necessity, particularly when the public health and safety are at stake. . . . We conclude that Smith has not met his burden of presenting a triable issue on the business necessity defense.

C. Smith also argues that he presented evidence of an alternative means of assessing fitness that would have less of a disparate impact on older firefighters. In particular, he suggests that the city use the spirometry and stress tests to determine which firefighters may be unfit for the job, then require those firefighters to undergo a physical examination and “a battery of tests” to determine whether they are actually fit for duty. . . .

We have not previously had the occasion to determine whether this branch of the Title VII disparate impact doctrine applies to the ADEA. For purposes of this appeal, however, we assume that the Title VII framework applies: once the defendant has met its burden of demonstrating business necessity, the plaintiff may still prevail by showing “that other selection devices without a similar discriminatory effect would also serve the employer’s legitimate interest in efficient and trustworthy workmanship.” . . . For several reasons, Smith’s argument on this point is unavailing.

First, it does not appear from the record that Smith advanced this argument before the District Court. We will not reverse a grant of summary judgment

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on the basis of an argument not presented below. . . . Even if the argument were proper, however, Smith has not made any showing that his proposed alternative (which is in any case rather vague) would have less of a disparate impact on older firefighters than the city's present system does. At most, Smith has asserted that he would be able to pass his proposed battery of tests, but he has not shown the effect of his system on other firefighters. Nor has he shown that his more subjective approach would serve the city's legitimate interest in the fitness of its firefighters as well as the current system. Smith has failed to raise a genuine issue of material fact on this branch of the disparate impact doctrine. . . .

The judgment of the District Court is affirmed.

**Case Name:** Jerry O. Smith v. City of Des Moines, Iowa

**Court:** United States Circuit Court of Appeals, 8th Circuit

**Summary of Main Points:** A fire department may impose reasonable medical requirements upon firefighters that adversely impact members on the basis of age, where such requirements are a "business necessity." There are two aspects of the business necessity defense: (1) that the requirements have a "manifest relationship" to the position in question; and (2) the requirements are necessary for safe and effective job performance.

As the *Smith* case demonstrates, whenever a fire department policy impacts older workers, the fire department must be prepared to establish valid scientific reasons to support its contention that the policy is essential due to business necessity.

### **Firefighters and Mandatory Retirement Age**

The ADEA has been subject to a number of changes and amendments since it was first enacted. One area that has seen several changes involves mandatory retirement ages for firefighters and police officers. The current status of the ADEA is that firefighters and police officers may be required to retire at a specific age, provided it is pursuant to a bona fide retirement plan. The primary concern related to firefighters and police officers is that the retirement plan is not being used as a subterfuge to permit age-based discrimination. Provided there is a bona fide retirement plan, mandatory retirement age may be set as low as 55 years for firefighters and police officers.

The *Minch* case discusses the various changes to the ADEA, as well as the current state of the mandatory retirement exception.

**Minch v. City of Chicago**  
**Drnek v. City of Chicago**

No. 02-2588 No. 02-2587 (7th Cir. 04/09/2004)

ROVNER, Circuit Judge.

In 1996, Congress restored to the Age Discrimination in Employment Act (“ADEA”) an exemption permitting state and local governments to place age restrictions on the employment of police officers and firefighters. . . . Four years later, the Chicago City Council exercised its authority under this exemption to reestablish a mandatory retirement age of 63 for certain of the City’s police and firefighting personnel. Police officers and firefighters who were subject to the age restriction filed two suits asserting in relevant part that the reinstated mandatory retirement program amounted to subterfuge to evade the purposes of the ADEA. . . .

I. Historically, Chicago, like many other state and local governments, has placed age limits on the employment of its police and firefighting personnel. As early as 1939, for example, Chicago’s municipal code required city firefighters to retire at the age of 63.

As it was originally enacted in 1967, the ADEA by its terms did not apply to the employees of state and local governments. Congress amended the statute to include those employees in 1974. . . . State and local rules establishing maximum hiring and retirement ages for police officers and firefighters were now vulnerable to challenge; only if it could be shown that age was a bona fide occupational qualification for these positions would the rules survive scrutiny under the ADEA. . . . The Equal Employment Opportunity Commission (“E.E.O.C.”) began to challenge these age limits as discriminatory. Chicago, seeing the handwriting on the wall, raised the mandatory retirement age for its firefighters and police officers to 70, the maximum age at which employees enjoyed the protection of the ADEA at that time.

Responding to the concerns expressed by state and local governments, Congress in 1986 amended the ADEA to exempt the mandatory retirement of state and local police and firefighting personnel from the statute’s coverage. . . . Congress enacted the exemption in recognition that there was, as of that time, no consensus as to the propriety of age limits on employees working in the realm of public safety. . . . The exemption thus permitted any state or local government which, as of March 3, 1983 . . . had in place age restrictions on the employment of police officers and firefighters, to restore those restrictions. In 1988, Chicago took advantage of the exemption and reinstated a mandatory retirement age of 63 for its firefighters and police officers.

Pursuant to a sunset provision in the 1986 legislation, the exemption permitting the reinstatement of these age limits expired at the end of 1993. . . . In the ensuing years, Chicago, along with other state and local governments, were again compelled to drop their age restrictions on the employment of police and firefighting personnel.

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In 1996, however, Congress reinstated the exemption, this time without any sunset provision, and retroactively to the date that the prior exemption had expired in 1993. . . . The 1996 legislation also broadened the exemption, allowing cities and states which had not imposed age restrictions on their police and firefighters prior to the *Wyoming* decision to enact such limits. As relevant here, the exemption, codified at 29 U.S.C. § 623(j),<sup>4</sup> permits a public employer to discharge a police officer or firefighter based on his age, subject to two principal conditions. First, section 623(j)(1) specifies that the employee must have attained either the age of retirement that the state or municipality had in place as of March 3, 1983 or, if the age limit was enacted after the date the 1996 exemption took effect, the higher of the retirement age specified in the post-1996 enactment or the age of 55. Second, section 623(j)(2) requires that the state or city discharge such an employee pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of the statute. Four years later, the Chicago City Council adopted a mandatory retirement ordinance (“MRO”) reinstating a mandatory retirement age of 63 for its police officers and for its uniformed firefighting fire personnel. In the preamble to that ordinance, the City Council indicated that its purpose in restoring the retirement age was to protect the safety of Chicago residents.

The four plaintiffs were Chicago police officers and uniformed firefighters who were 63 or greater when the MRO took effect and thus were forced to take immediate retirement. They filed two actions against the City asserting, in relevant part, that the City was not actually motivated by public safety purposes in enacting the MRO. The cases were consolidated in the district court. Although the plaintiffs do not dispute at this juncture that the MRO and their involuntary retirement pursuant to the MRO satisfy the criteria set forth in section 623(j)(1), they allege that the MRO amounts to a subterfuge to evade the purposes of the ADEA and for that reason amounts to illegal age discrimination. Among other motives for enacting the MRO, the plaintiffs assert, the City wanted to get rid of what one city council member described as “old-timers” and “deadbeats” in the police and fire departments and to make room in those departments for younger, more racially and ethnically diverse individuals who would work harder and bring “fresh” ideas with them. This amounts to age discrimination in violation of the ADEA, in the plaintiffs’ view. The district court denied the City’s motion to dismiss the plaintiffs’ ADEA claims. . . . In the court’s view, the question of whether the city reinstated a mandatory retirement age of 63 as a subterfuge for age discrimination was one of fact that necessitated inquiry beyond the statement of purpose set forth in the preamble to the MRO into the true motive or motives behind the legislation. . . . “Age-based retirement is tolerated in limited circumstances under § 623(j), but not for the wrong reasons, i.e. not for reasons that are merely a coverup for the type of ageism prohibited by the ADEA.” . . . Here, the plaintiffs were able to point to the remarks of the sponsor of the MRO and of high-ranking city officials as proof that the City may have been motivated impermissibly by stereotypes and bias against older members of the police and fire departments when it enacted the MRO. The plaintiffs also represented that

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the City had delayed reinstating the retirement age of 63 until after a close friend of the Mayor (who otherwise would have been forced to retire) voluntarily retired at age 68. The district court found these allegations, suggesting that the City did not actually enact the MRO for legitimate, safety-related reasons, sufficient to state a viable claim for subterfuge. . . .

II. This appeal calls upon us to consider under what circumstances a mandatory retirement program for public safety personnel might constitute a subterfuge to evade the purposes of the ADEA. . . . A plaintiff can establish subterfuge if he or she can demonstrate that a state or local government took advantage of the exemption and imposed a mandatory retirement age for police and firefighting personnel in order to evade a different substantive provision of the statute. However, because the ADEA expressly permits employers like Chicago to reinstate mandatory retirement programs for police and fire personnel and thus to discharge employees based on their age, proof that local officials exercised this right for impure motives will not in and of itself suffice to establish subterfuge for purposes of section 623(j)(2). Given that the plaintiffs' theory of subterfuge in these cases relies solely on proof that Chicago City Council members and other City officials may have harbored discriminatory attitudes about older workers when they reinstated a mandatory retirement age of 63 for police officers and firefighters and that they adopted the MRO for illicit motives unrelated to public safety, the plaintiffs have failed to state an ADEA claim on which relief may be granted. . . .

Evidence that City officials had impure motives for reinstating a mandatory retirement age, however, will not by itself support an inference of subterfuge. . . . The ADEA does not forbid Chicago from making age-based retirement decisions as to its police and firefighting personnel; it expressly allows state and local governments to make such decisions so long as they act within the parameters set forth in section 623(j)(1), which Chicago did. The statute does not condition the validity of such retirement programs on proof that the public employer has adopted the program genuinely believing that it is justified in the interest of public safety. Instead, recognizing that there was not yet any national consensus as to the relationship between age and one's fitness to serve as a police officer or firefighter, Congress opted simply to restore the status quo ante, permitting states and cities to continue imposing age limits on these positions as they had been able to do prior to the ADEA's extension to state and municipal employers and *Wyoming's* 1983 holding sustaining that extension. . . .

Thus, proof that Chicago resumed mandatory retirement for police and fire personnel based in whole or in part on stereotypical thinking—that older individuals are not up to the rigors of law enforcement or firefighting and should make room for younger, “fresher” replacements—or [sic] for reasons wholly unrelated to public safety, will not establish subterfuge because it does not reveal a kind of discriminatory conduct that the ADEA by its very terms forbids. . . .

What is necessary to establish subterfuge is proof that the employer is using the exemption as a way to evade another substantive provision of the act. . . . Here

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then, a viable claim of subterfuge would require the plaintiffs to allege and prove that Chicago took advantage of the statutory authorization to mandatorily retire police officers and firefighters as a means of discriminating in another aspect of the employment relationship—that is, other than in the discharge decision—in a way that the statute forbids. . . .

III. Having answered the question certified for interlocutory review, we REMAND these cases to the district court with directions to DISMISS the plaintiffs' ADEA claims and to conduct such further proceedings as may be consistent with this opinion.

**Case Name:** Minch v. City of Chicago

**Court:** United States Circuit Court of Appeals, 7th Circuit

**Summary of Main Points:** A fire department may impose a mandatory retirement age, provided such is not a subterfuge for unlawful age-based discrimination. Proof of subterfuge requires more than proof that city officials had discriminatory motives in re-implementing the mandatory retirement age.

## SUMMARY

Employment discrimination remains one of the most heavily litigated areas for fire departments, and will likely remain so for the foreseeable future. A variety of laws at both the state and Federal levels prohibit a broad variety of discrimination, including discrimination based on race,

national origin, sex, religion, disability, and age. Collectively, these laws create a comprehensive prohibition against employment discrimination that impacts fire departments when recruiting, hiring, promoting, disciplining, terminating, and retiring personnel.

## REVIEW QUESTIONS

1. What was the first law aimed at protecting and enforcing civil rights?
2. Define discrimination.
3. Explain disparate treatment and how it differs from disparate impact.
4. What standard of review is usually applied to cases that challenge a governmental action that violates a person's equal protection rights based upon racial classifications?
5. What is a reasonable accommodation under the ADA?
6. Are there any laws that prohibit an employer from giving an applicant a medical examination?

7. Whom does the Age Discrimination in Employment Act protect?
8. What did the Civil Rights Act of 1964 do that the Civil Rights Act of 1866 did not do?
9. Can the same action by an employer violate both the ADA and the ADEA?
10. Does the ADEA prohibit a fire department from implementing a mandatory retirement age?

## DISCUSSION QUESTIONS

1. Why would some fire departments choose to become equal employment opportunity employers, affirmative action employers, or both? Would every fire department choosing to become an equal employment opportunity employer or affirmative action employer have to adopt the same goals, or would they vary from department to department?
2. Before people can sue their employers for a violation of Title VII, what procedural step or steps must they take? In your home state, where would these steps need to be taken?
3. The *Minch* case concerned mandatory retirement age. What if a fire department refused to provide life insurance coverage to members over the age of 60, where such coverage is provided to all members pursuant to a collective bargaining agreement? Would it matter if the union agreed to it?