IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3743

PERCY ALLEN, et al.

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 98 CV 7673 —**Joan B. Gottschall** *Judge.*

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
(312) 427-3200

Attorneys for Plaintiffs-Appellants

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

I. ARGUMENT IN REPLY

A. In this Circuit, Test Validation Does Not Require Empirical Evidence that a Selection Process Is an Accurate Predictor of Subsequent Job Performance

Defendant asserts that for plaintiffs to show that an alternative selection procedure is "equally valid" to the written test, plaintiffs must come forward with evidence to show that their alternative results in "equally accurate predictions of subsequent job performance." (Brief of Appellee at 14.) The flaw in this assertion is that, as defendant concedes (Def.Br. 33-34), there is no evidence about the extent, if any, to which the written test "predicts subsequent performance on the test." (Brief of Appellee at 34.)

Defendant's written test is job-related under the "content valid" approach adopted by this Court in *Bryant v. City of Chicago,* 200 F.3d 1092 (7th Cir. 2000) and *Bew v. City of Chicago,* 252 F.3d 891 (7th Cir. 2001). This approach does not require any data correlating performance on the test with performance on the job; under the *Bew-Bryant* standard, all that is required is evidence that the test was constructed to be related to the job.

Under the *Bew-Bryant* standard of test validation, defendant's merit selection system is equally valid: police supervisors, after receiving training, identified police officers whom they believed would be good sergeants; these nominees were then reviewed by a panel of police supervisors for their promotability. This approach is the archetype of job relatedness under the *Bew-Bryant* standard.

This Court held in *Bryant v. City of Chicago, supra* that, to show that a discriminatory selection procedure is valid, the City is not required to come

forward with empirical evidence showing the extent to which the selection is correlated with job performance. 200 F.3d at 1098. The same standard should be applied to Title VII plaintiffs who are seeking to show that a less discriminatory alternative in "equally valid" — plaintiffs should not be required to come forward with evidence to show a correlation between their alternative procedure and job performance. Defendant's claim that plaintiffs must establish that merit selection results in "equally accurate predictions of subsequent job performance" (Brief of Appellee at 14) should be rejected.

B. Plaintiffs Have Not Waived the Argument They Advanced in the District Court

In the district court, Subclass B described its position as follows:

> Subclass B has moved for summary judgment on its claim that the City's decision to limit the non-discriminatory merit promotions to 30% is contrary to the "equally valid less discriminatory alternative" provision of Title VII, 42 U.S.C. §2000e-2(k)(ii). Subclass B seeks, *inter alia,* to require the City to make all promotions through its non-discriminatory merit selection system.

Plaintiffs' Memorandum in Support of Motion of Subclass B for Summary Judgment on Liability, Record Item No. 53 at 2-3.

Defendant argues that plaintiffs waived this argument in the district court. (Brief of Appellee at 37-38.) This waiver theory is contrary to the de novo standard of review applied in summary judgment appeals, *Price v. City of Chicago,* 251 F.3d 656, 658 n.2 (7th Cir. 2001), and cannot be squared with the above quoted argument that plaintiffs advanced in the district court. Defendant's waiver theory should be rejected.

C. Defendant Is Unable to Support Its Decision to Impose the 30% Arbitrary Ceiling on Merit Promotions

Defendant is unable to show any empirical basis to justify its defendant's thirty percent ceiling on merit promotions. The entirety of defendant's argument to support its decision to impose the thirty percent ceiling on non-discriminatory

merit promotions is set out at pages 42-43 of its brief:

> [T]here is ample evidence in he record justifying the 30% limitation. For example, the Task Force's initial recommendation to include a limited merit component in the examination recognized the inherent limitations found in selection systems based on past performance. R. 54, Ex. 1 at 11; R. 48, pars. 134-35; R. 66, par. 134-25. Although the City has used merit promotions in the contest of promotions to detective and youth officer, these promotions were limited to no more than 20% R. 58, pars. 102-04; R. 66, pars. 102-04. With evidence only of the feasibility of merit promotions limited to 20%, and with knowledge of the limitations of performance based selection systems generally, R. 58, pars. 175-77; R. 61-1, Exh. 2, par. III.07, the decision to cap merit promotions to sergeant at 30% cannot be said to be arbitrary. Moreover, this decision is supported by the judgment of Robert [43] Joyce, a former Deputy Commissioner in the City's Department of Personnel with extensive experience in developing CPD examinations, and the consultants who developed the 1998 examination. R. 58, pars. 183-87; R. 61-1, Exh. 2, pars. III.03, III.05-07.
>
> Brief of Appellees at 42-43.

None of these conclusory assertions amounts to "ample evidence."

- The only explanation that Joyce was able to offer for his "judgment" is that the "task force, advisory panel suggested that we have — that we look at a process of merit appointments based upon performance, and I forget exactly how they said that, but they said to make up to 30 percent using that strategy." Record Item No. 54, Exhibit 10 at 28, par. 50. Joyce may well have "extensive experience in developing CPD examinations," (Brief of Appellee at 43), but his parroting the recommendation of the task force cannot be fairly characterized as a "judgment."

- The "consultants who developed the 1998 examination" were ordered by defendant to impose a thirty percent ceiling on merit promotions; defendant did not request any advice from its consultant about the

appropriateness of this ceiling at the time it gave this order. (Record Item No. 61, Exhibit 2 at 5, paragraph III.05.) The consultant admitted that he had not been "not instrumental in setting the particular value of 30%" and conceded that he did not have any opinion about this ceiling when he "was first informed of the City's decision to use that number." (Record Item No. 61, Defendant's Exhibit 2 at 5, par. III.05.)

- Defendant fails to mention that merit promotions to the detective and youth officer position are "limited to 20%" because an arbitration award established that ceiling. (Record Item No. 66, par. 104.)

D. The Undisputed Evidence Shows the Feasibility of Increasing the Percentage of Merit Promotions

The primary objection offered by defendant to plaintiff's proposal to increase the percentage of merit promotions is that "Subclass B's proposal would eliminate the Superintendent's role in the merit selection process altogether," (Brief of Appellee at 45), because "the Superintendent would not be able to eliminate even one nominee forwarded to him by the ASB." Id. The undisputed evidence shows that "the Superintendent's role in the merit selection process" is unstructured, rife with possibilities for abuse, and completely unvalidated.

Each member of the the command staff who nominated police officers for merit promotions received training to "avoid assessment errors, such as personal likes and dislikes, similarity, and biases and stereotypes." (Record Item No. 54, Exhibit 10 at 41, par. 69(a).) These nominations were then reviewed by a five person "Academic Selection Board" who rejected about half of the candidates and divided the remainder into two groups ("outstanding" and "good"). (Record Item No. 54, Exhibit 10 at 58, par. 109.) The final selection of merit promotions was made by the Superintendent, who disregarded the grouping of the

candidates by the Board.

The Superintendent is many levels above patrol officers. In a police department of more than ten thousand police officers, it is absurd to assert that the Superintendent has reliable knowledge about the job performance of patrol officers. The Superintendent's role in merit promotions could easily be eliminated without impairing the job relatedness of this selection procedure.

E. Increasing the Percentage of Merit Promotions Would Result in Less-Discriminatory Promotions

Defendant is unable to deny that its use of merit promotions — in the selection of detectives and youth officers, sergeants, and lieutenants — has been non-discriminatory. Nor is defendant able to deny that its written tests for the same ranks all have a significant disparate impact on minorities. Defendant argues, however, that "it is impossible to determine whether additional merit promotions would or would not increase the proportion of minorities promoted." (Brief of Appellee at 46.)

Defendant's argument is similar to that applied by the Illinois courts in cases involving the computation of damages for breach of a lifetime employment contract. In *Mt. Hope Cemetery Ass'n v. Weidenman* (1891), 139 Ill. 67, 28 N.E.2d 834 (1891) the Illinois Supreme Court held that damages could only be computed up to the date of entry of judgment; any damages for future lost earnings would be speculative.[1] Defendant applies this reasoning to argue that

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1. The Illinois courts continue to apply this rule. See er. *Lewis v. Loyola University of Chicago,* 149 Ill.App.3d 88, 500 N.E.2d 47 (1986); *Myers v. Mundelein,* 331 Ill.App.3d 710, 714-15, 771 N.E.2d 1113, 1116 (2002).

   In this circuit, however, damages are routinely awarded for lost future earnings. See, e.g, *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.,* 223 F.3d 585, 591 (2000); *Koosman v. Northeast Illinois Regional Commuter R.R. Group,* 211 F.3d 1031, 1033 n.1 (7th Cir. 2000).

we cannot know whether additional merit promotions would continue to be non-discriminatory.

Contrary to defendant's arguments, it is not uncommon to assume that past performance will predict future performance: a pair of dice that has consistently comes up a seven will be expected to continue that pattern. Similarly, a merit selection process that has consistently produced non-discriminatory results will be expected to continue that pattern.

The first wave of 73 "merit promotions" to sergeant consisted of 40 white, 23 African-American, 9 Hispanic, and 1 other: 55% white, 32% African-American, 12% Hispanic, and 1% other. (Record Item No. 58 at 34, paragraph 198.) The second wave of 45 merit promotions was made up 24 white, 14 African-American, and 7 Hispanic: 53% white, 31% African-American, and 16% Hispanic. (Record Item No. 58 at 36, paragraph 201.) These non-discriminatory results are consistent with the non-discriminatory use of merit selection in promotions to the "D-2" rank and to the rank of lieutenant.

The non-discriminatory history of merit promotions provides ample confidence that future merit promotions will continue to be non-discriminatory. Defendant's arguments to the contrary should be rejected.

II. CONCLUSION

For the reasons above stated and those previously advanced, the judgment in favor of defendant should be reversed, and the case remanded with instructions to enter judgment on liability in favor of Subclass B and to set the case for trial on the claims of Subclass A.

Respectfully submitted,

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KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
(312) 427-3200
attorney for plaintiffs-appellants

CIRCUIT RULE 31(e) CERTIFICATE

The undersigned, attorney of record for plaintiff-appellant, certifies that he filed a digital version of the foregoing reply brief via the Internet this 21st day of April, 2003.

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Kenneth N. Flaxman