

8th Circuit: Multi-Phase Firefighter Application Process Nondiscriminatory

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By Nicole H. Bermel

Reversing a three-judge panel, the full 8th U.S. Circuit Court of Appeals found in a close 6-5 decision that a multi-phase firefighter application process by the City of Rochester (Minn.) was not discriminatory on the basis of gender or national origin and, thus, upheld summary judgment for the employer.

Under the city's multi-phase application process, the plaintiffs took a written firefighter entry-level examination and an employment inventory/customer service inventory (Phase I), took a physical agility test (Phase II), and interviewed with a three-person panel (Phase III). Based on an applicant's scores in all three phases, the city created an eligibility list of 48 qualified applicants ranked in order of their combined scores. The plaintiffs' combined scores ranked them 40th and 45th out of the 48 qualified applicants. When a vacancy occurs, the Fire Civil Service Commission certifies to the city council the names of people eligible for appointment. The city council makes the final hiring decision but generally follows the commission's recommendation.

A state statute requires the commission to certify the three "most qualified" applicants (i.e., those highest on the eligibility list) for each vacancy, but the commission may also include in the final stage process protected-group candidates who are ranked on the eligibility list.

The city sought to fill seven firefighter positions from the eligibility list; three of the seven positions were funded by a grant that promoted appointing protected-group applicants. The commission selected the top nine ranked candidates and the three protected-group applicants who made the eligibility list (including the plaintiffs) to proceed to the final stage of the hiring process, where they underwent background checks as well as medical and psychological examinations and interviewed with the fire chief and his deputy. For the top-ranked candidates, the fire chief interview was designed to uncover any concerns that the application process might have missed. For the protected-group candidates, the fire chief interview was intended to determine if the candidates displayed the qualities or characteristics of a strong candidate despite having lower scores. The fire chief did not recommend any of the protected-group candidates to the commission, the commission did not present any of the protected-group candidates to the city council for review, and the city council did not appoint any of the protected-group candidates to the vacant firefighter positions.

The plaintiffs argued that there was both direct and circumstantial evidence that the city discriminated against them in violation of federal and state anti-discrimination laws. The 8th Circuit considered whether the following statements were evidence of discrimination:

*A commissioner's statement that had he known the grant funding three of the available firefighter positions required hiring protected-group candidates, he would not have recommended taking the grant.

*Another commissioner's statement that one applicant had been recommended despite having a criminal history because "he was a big guy and that he'd make a good firefighter."

The six-judge majority held that these statements created no genuine issue of material fact. It held that the statement about the grant did not demonstrate discriminatory animus because it opposed only preferential hiring, not hiring of protected groups in general. In addition, the "big guy" statement was made about a specific applicant (not one of the plaintiffs), was not related to the female plaintiff's abilities and, thus, did not evidence gender discrimination.

The five-judge dissent strongly disagreed, finding that both statements could be construed as discriminatory. The dissent opined that the majority opinion improperly usurped the role of the jury by construing the statements in a light most favorable to the party moving for summary judgment.

Torgerson v. City of Rochester, No. 09-1131 (June 1, 2011).

Professional Pointer: While the result in this case was good for the city, employers are reminded to use objective criteria to evaluate subjective screening processes, such as interviews.

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Editor's Note: *This article should not be construed as legal advice.*

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