

## **EMPLOYER'S USE OF PRE-EMPLOYMENT STRENGTH TEST HAS UNLAWFUL DISPARATE IMPACT ON WOMEN**

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The Equal Employment Opportunity Commission (“EEOC”) brought an action under Title VII against the Dial Corporation (“Dial”) on behalf of a number of women who had applied for work with the company. The Dial Corporation is an international company that, among other things, produced canned meats in its Fort Madison, Iowa plant. Employees applying for an entry level position in that plant are typically hired in the sausage packing area in a job that required the employee to transport and lift approximately thirty-five (35) pounds of sausage repeatedly throughout the course of the day. Employees working in this entry level position suffered a disproportionate number of injuries as compared with the other employees in the facility. In an effort to address this disparity, Dial implemented several measures designed to reduce the number of injuries, including job rotation, the institution of a team approach, lowering the height employees were required to lift to and a pre-employment strength test called a Work Tolerance Screen (“WTS”).

The WTS required employees to transport thirty-five (35) pound packages and lift them to a height of thirty (30) inches, repeatedly, for a seven (7) minute period. The prospective employee’s performance was observed by an occupational therapist and by the plant nurse, both of whom documented the performance. The plant nurse reviewed the test forms and had the ultimate hiring authority for these entry level positions.

Prior to the implementation of the WTS, forty-six percent (46%) of new hires in the plant were women. That number dropped to fifteen percent (15%) over the three years after the test was implemented. Although the number of injuries in the plant decreased after the implementation of the WTS, there was no statistical evidence presented demonstrating that the WTS was responsible for the reduction instead of other programs implemented by Dial.

At trial, the EEOC offered testimony from an industrial organization expert. He explained that the test was more difficult than the daily work required of the entry level employees in the plant. His examination of the injury reports in the plant revealed that women were injured less than men in the years before the WTS was used. Finally, the EEOC expert testified that the evaluations documented by the plant nurse revealed that, in cases where similar comments appeared on male and female test reports, more males than females were offered employment and some tests misevaluated the performance of women who completed the tests.

Dial defended the implementation of the pre-employment test by establishing that it related to safe and efficient job performance and was consistent with business necessity. An employer using this defense must prove that the practice was related to the specific job and the required skills and physical requirements of the position. However, even if the employer demonstrates business necessity, a plaintiff may still prove discrimination by showing there is a

less discriminatory alternative available. The trial court concluded that the WTS had a discriminatory effect on women and, therefore, was impermissible under Title VII.

On appeal Dial argued that the test was tailored to mimic the actual working conditions of the employees and that the number of injuries to employees after its implementation was decreased, but this was not sufficient to establish that this particular test was a business necessity. The court pointed out that the evidence presented by the EEOC expert, the fact that the injury rate for women was lower than that for men in two (2) of the three (3) years prior to the test's implementation and that Dial had not conclusively established whether the implementation of the test or the other programs were responsible for the decrease in the number of injuries overall all supported the jury's conclusion.

It is important to note that the implementation of a pre-employment strength test is not expressly prohibited by the court. However, there are a number of legal hurdles related to physical fitness testing which if not carefully maneuvered will lead to liability. Finally, an employer that implements pre-employment testing should monitor the impact of the program on their hiring practices so disparity issues can be addressed and remedied before a suit is filed.