

WALDON DECISION

Southern District of Ohio Rules That Discharged Employees Have Legally Sufficient Disparate Impact Claims Arising From School District's Statutorily-Mandated Criminal Background Checks

The District Court for the Southern District of Ohio recently ruled that two African-American plaintiffs stated legally sufficient disparate impact race discrimination claims based upon their terminations pursuant to the defendant School District's implementation of statutorily-mandated criminal background checks. *Waldon v. Cincinnati Public Schools*, No. 1:12-CV-00677 (S.D. Ohio, April 24, 2013).

Background

The Waldon plaintiffs, Gregory Waldon and Eartha Britton, are two African-Americans who had been employed by the Cincinnati Public Schools for close to 30 years and 18 years, respectively. Plaintiff Waldon worked as a "systems monitor"; he had no contact with school children. Plaintiff Britton was an instructional assistant.

In 1977, Waldon was convicted of felonious assault and imprisoned for two years. In 1983, Britton was convicted of acting as a go-between in the purchase of \$5.00 of marijuana.

Effective November 14, 2007, the state of Ohio enacted H.B. 190, which amended Ohio law to require criminal background checks of current school employees. If an employee had been convicted of any of a number of specified crimes, no matter how far in the past the conviction occurred, the legislation required that the employee be terminated.

The Cincinnati School District conducted the statutorily-mandated criminal background checks and in late 2008 terminated plaintiffs Waldon and Britton for their decades-old convictions. At the time of the plaintiffs' discharge, there was no exception allowing for plaintiffs to demonstrate rehabilitation so that they could keep their jobs. (After plaintiffs' terminations, O.A.C. 3301-20-03 was amended to allow such proof of rehabilitation, but the plaintiffs did not apply for re-employment). The School District fired ten employees, nine of whom were African-American.

The plaintiffs sued the School District for race discrimination in violation of federal and state law, asserting that their terminations were based on state legislation that had a racially discriminatory impact.

The School District's Motion to Dismiss

The School District moved to dismiss the plaintiffs' complaint on the ground that the District had simply followed Ohio law when it terminated the plaintiffs' employment -- that it was a business necessity for the School District to follow Ohio law. Moreover, the School District argued, it had no way of knowing whether the facially neutral criminal record disqualification resulted in a statewide disparate impact.

The district court decision on the School District's motion sets forth the analysis applicable to a disparate impact claim. Illegal disparate impact results when a facially neutral employment practice has a disproportionately negative effect on a protected group and that practice cannot be justified by business necessity. The claim is based on statistical evidence; no showing of discriminatory motive is required.

The School District asserted that because its criminal background checks were mandated by Ohio law, the state law must “purport” to discriminate for it to be trumped by Title VII. The district court rejected that argument, noting that such a requirement would gut Title VII disparate impact claims. Thus, the School District could defend against the plaintiffs’ prima facie showing of disparate impact only by establishing that the plaintiffs’ disqualifying crimes were job related and consistent with business necessity.

The School District argued that its practice of barring convicted criminals served a purpose that is critical to its mission -- managing the risk of harm to the young students whom the District has a duty to protect during the school day. The court acknowledged that it was a “close call” as to whether the District’s firing of the plaintiffs was a business necessity, but determined that it could not conclude, as a matter of law, that the firing of these plaintiffs was necessary:

The Court finds the policy at issue in this case a close call. Obviously the policy as applied to serious recent crimes addressed a level of risk the Defendant was justified in managing due to the nature of its employees’ proximity to children. However, ***in relation to the two Plaintiffs in this case***, the policy operated to bar employment when their offenses were remote in time, when Plaintiff Britton’s offense was unsubstantial, and when ***both had demonstrated decades of good performance***. These Plaintiffs posed no obvious risk due to their past convictions, but rather, were valuable and respected employees, who merited a second chance. * * * Under these circumstances, the Court cannot conclude as a matter of law that Defendants’ policy constituted a business necessity. (Emphasis added).

Lessons To Be Learned

As the saying goes, bad facts make bad law. Clearly, the School District had no choice but to implement the criminal background checks, and fire the plaintiffs, as mandated by the Ohio legislature. The district court suggested that the School District was not required to implement the law and fire the plaintiffs -- “Defendant could have raised questions with the stated board” -- but that assertion is unrealistic. Moreover, in light of numerous tragedies that have occurred at schools across the country (which may have been the impetus for the criminal background check legislation in the first place), the School District could do nothing other than perform the background checks and fire the plaintiffs. Indeed, if the School District had not implemented the law and a District employee with a disqualifying criminal record harmed a student, the District might be deemed to have been negligent as a matter of law, or worse. The School District had no choice but to carry out the mandate of the legislature.

On the other hand, the Waldon plaintiffs had been employed by the School District for decades. They were valued and trusted employees. They had never caused harm to a student. The district court noted that after the plaintiffs’ terminations, Ohio had amended administrative rule O.A.C. 3301-20-03 to allow affected employees, such as the plaintiffs, to avoid termination (or be re-hired) by demonstrating that they had been rehabilitated. The district court’s denial of the School District’s motion to dismiss can be viewed as an effort by the court to suggest to the parties a practical, and just, way to resolve their dispute – have the School District reinstate the plaintiffs based on their rehabilitation, pursuant to the amended administrative regulation.