

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JASON P. SPELLER)	
)	Civil Action No.: 7:99cv00904
Plaintiff,)	
)	
)	<u>MEMORANDUM OPINION</u>
)	By: Judge James C. Turk
v.)	United States District Judge
)	
CITY OF ROANOKE,)	
)	
Defendant.)	

The Plaintiff, Jason Speller, filed this employment discrimination action against the City of Roanoke (the “City”) under 42 U.S.C. § 2000e *et seq.* after the City refused to hire him for a position in the Roanoke City Fire Department. He alleges that he was not hired because of his race or, in the alternative, that the psychological tests that the City uses to evaluate its potential firefighters result in the disproportionate exclusion of African-American applicants. Because the Plaintiff has been unable to produce evidence legally substantating either claim, the Court will grant the City’s motion for summary judgment.

I. FACTUAL BACKGROUND

In 1997 the Plaintiff, an African-American, applied for a position with the Roanoke City Department of Fire/EMS (the “Department”). The Department actively had been seeking to recruit minority applicants under a program instituted in 1991, and at various points of the hiring process City officials encouraged Mr. Speller to apply. The applicants to the Department who meet certain

initial qualifications undergo a rigid battery of tests, including a written test, a physical agility test, and a psychological evaluation. At each stage of the process, candidates were eliminated based on their performance. In August, 1998, the Department informed Mr. Speller that he was not among the 15 applicants that the Department ultimately hired. Roanoke Fire Chief James Grigsby explained to the Plaintiff that he was not hired because he placed in Category II on the psychological evaluation,¹ a low score, and because based on their observations during the hiring process members of the Department considered him to be a ‘maverick’ or a ‘hotdog.’ *See* Affidavit of Winston Simmons ¶ ¶ 5, 7, Def. Brief in Supp. of S.J. Mot. James P. Beatty, the City Personnel Administrator, recommended to Chief Grigsby that the Department reconsider its decision. Nevertheless, the Department still did not hire the Plaintiff.²

The Plaintiff filed an initial complaint with the Equal Employment Opportunity Commission (“EEOC”) on September 25, 1998, and received his right-to-sue letter on September 7, 1999. Shortly thereafter, he instituted this action seeking \$6,175,000.00 in damages.

II. THE LAW

Title 42 U.S.C. § 2000e-2 (1994) provides that

¹ The Department evaluates applicants using the TIAS Attentional and Interpersonal Style Inventory, the PRF Personality Research Form, and the IS5 Inwald Survey Five. *See Memorandum in Support of Plaintiff’s Motion for Dismissal of Summary Judgement* (sic) Attachment 1. The Plaintiff alleges that Chief Simmons told him that from the personality tests, the Department knew that he was “prone to violence, stealing, unstable or questionable character.”

² Plaintiff ultimately obtained a position with the Roanoke County Fire Department. However, the County Fire Department terminated him from that position sometime after December 2, 1999.

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 or employment, because of such individual's race, color, religion, sex, or national origin, or
- (2) to limit, segregate, or classify his employees or applicants for employment 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.

Title 42 U.S.C. § 2000e-5(f) (1994) creates a private cause of action to enforce these provisions, which accrues when the EEOC declines to pursue the action itself and informs the plaintiff of its decision. Under the statute, the plaintiff can show a *prima facie* case of discrimination by demonstrating that (1) he was the member of a racial minority; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after the rejection, the employer continued to seek applicants from persons with the plaintiff's qualifications. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972). One may satisfy the fourth prong of the test by showing that the employer actually hired someone for the position who was not a member of the protected race group and who had the same qualifications as the plaintiff. Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994).

These elements are necessary in order to establish a case of racial discrimination under the statute, and, importantly, it is the plaintiff's burden and responsibility to produce evidence showing, as an initial matter, that the four conditions exist. McDonnell Douglas, 411 U.S. at 802. Once the plaintiff has done so, the burden of production shifts to the employer to demonstrate some legitimate,

nonracial reason for its decision. Id. Finally, if the employer demonstrates a legitimate reason, the burden shifts back to the plaintiff who must show that the employer's given reason is merely a pretext for racism. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 508 (1993).

With regard to the disparate impact claim, the EEOC will consider an employment test discriminatory if minority applicants pass it at a rate less than 80% of the rate at which the best-performing racial group passes it. 29 C.F.R. § 1607.4 (D) (2000). If a test has a discriminatory impact, the course of testing must be related to job performance in order to pass muster under the statute. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970).

Finally, the Court must keep in mind the appropriate standards for summary judgment. Upon a motion for summary judgment, the Court must view the facts, and inferences to be drawn from those facts, in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986); Nguyen v. CNA Corp., 44 F.3d 234, 236-37 (4th Cir. 1995). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1985).

III. THE EMPLOYMENT DISCRIMINATION CLAIM

The parties do not dispute that the plaintiff, an African-American, has satisfied the first prong of the four prong test. They have spent considerable time, however, arguing about Mr. Speller's qualifications. Mr. Speller has produced considerable evidence of his skills as a firefighter/EMT and of the respect with which former colleagues in North Carolina view him. He has included affidavits

in his submissions. He also dwells considerably upon what he views as the City's misuse of the psychological tests for employment evaluation purposes. However, this evidence is all inapposite to the employment discrimination claim. Mr. Speller must show that he was "qualified" for the Department's position. The Department has determined (at least in 1998) that in order to be qualified for a position, an applicant must score above a Category II on its psychological evaluations. This determination is for the City to make, and this Court is not in a position to evaluate the wisdom of the City's decision so long as the test itself is not skewed against minorities, a claim the Court will address below. See Holder v. City of Raleigh, 867 F.2d 823, 825 (4th Cir. 1989) ("We do not believe that [the statute] authorizes courts to declare unlawful every arbitrary and unfair employment decision.").³

Because the City has established a test score of Category III or above as a qualification to become a firefighter, the Plaintiff must demonstrate under McDonnell that a member of a non-protected race group who scored under Category III on the psychological test was hired. He has produced no evidence that this is so. Indeed, the only evidence within the record indicated that at least in 1998, the Department hired no applicants who received Category II test scores. See Def. Motion for S.J., Affidavit of Winston Simmons, ¶ 6. Thus, Plaintiff has not established a *prima facie* case and his employment discrimination claim must fail.

The Court notes that even if Mr. Speller had established a *prima facie* case, which would shift the burden to the City to articulate legitimate business reasons for its decision, the City appears to

³ In contrast to the Plaintiff's contentions in his final brief, the City *does* have the right to rely upon "non-definitive data and a theoretical hypothesis to make hiring decisions," so long as racist motives do not influence the decisions. See Memorandum (sic) in Support of Dismissal of Defendant's Motion for Summary Judgement (sic) at 2.

have done so. The Department maintains that it did not hire the Plaintiff because Department authorities had reservations about the way he conducted himself during the interview process. They considered him a “hotdog” or a “maverick.” Id. ¶ 7; Def. Mot. For S.J., Affidavit of James Grigsby ¶ 6. The Plaintiff admits that he acted as a coach or instructor to the other applicants during the physical agility portion of the hiring process. The City might reasonably consider it inappropriate for someone who is in the position of applying for a job to presume to instruct the other applicants. See Mem. in Support of Pl.’s Mot. For Dismissal of S.J. at 4. Furthermore, the active minority recruitment program that the Department maintains mitigates against suggestions that the City’s reasons are merely pretextual. The Plaintiff has no evidence to rebut the Department’s stated reasons besides conclusory accusations insufficient to withstand a summary judgment motion. There is no basis upon which a jury could conclude that the reasons are merely pretextual.

For all these reasons, the Defendant’s motion for summary judgment is granted as to the employment discrimination claim.

IV. THE DISPARATE IMPACT CLAIM

Mr. Speller also alleges that the psychological tests that the Department uses disproportionately exclude minorities from becoming Roanoke City firefighters in violation of 42 U.S.C. § 2000e-2(a)(2) (1994).⁴ This claim, also, must fail. As the Plaintiff, Mr. Speller must

⁴ Plaintiff also cited to 42 U.S.C. § 2000e-2(ii)(c)(1), which the Court is unable to locate. See Memorandum in Support of Plaintiff’s Motion for Dismissal of S.J. at 10. Form the quote, however, it appears he means to cite to 42 U.S.C. § 2000e-2(l), which prohibits employers from adjusting on account of race the results of employment tests that they administer. Because no one has alleged here that the Department has adjusted anyone’s test score, the section is inapposite.

demonstrate that the Department employed tests that had the effect of limiting or segregating applications for employment based on race. 42 U.S.C. § 2000e-2(k)(1)(A)(1) (1994). He points out that in 1998, the tests eliminated the only minority applicant—him. Citing to 29 C.F.R. § 1607.4(D), he argues that his elimination demonstrates the test’s disparate impact on minorities. That section provides that

a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Even assuming *arguendo* that this regulation establishes a standard for court to follow in adjudicating disparate impact claims, Mr. Speller is unable to demonstrate that the test in this case has a disparate impact on minorities.

Plaintiff argues that in this case, the test eliminated 100% of minority applicants, making the test discriminatory *per se* because 100% is higher than 80%. However, the regulation contemplates that a test is discriminatory not if it merely passes fewer than 80% of minority applicants, but only if it produces a minority pass rate of less than 80% of the pass rate of the highest group. If, for example, Caucasians performed best on the tests and passed at a rate of 60%, then the EEOC would consider the test discriminatory against African-Americans if they passed a rate of less than 48% (60% X .8). In order to determine whether a test has a disparate impact under the regulation, it is necessary to know the pass rate of the racial group that performs best on the test. Mr. Speller has produced no evidence of the rate at which any specific racial groups pass the test, except his evidence that he did not pass it. Thus, he has failed in his obligation to make out a *prima facie* case of

disparate impact under the regulation.

Furthermore, the record reveals evidence of only one instance in which the test eliminated a minority from consideration– the test’s elimination of Mr. Speller. Title 29 C.F.R. § 1607.4 (D) (2000) provides further that

where the user’s evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact.

The only evidence Mr. Speller has produced that the test eliminated *any* minority is the evidence that it eliminated him. The elimination of one person is clearly too small a number to show reliable evidence of adverse impact, and Mr. Speller has produced no statistics about the number of other minorities that the tests eliminated over a longer period of time.⁵ Thus, he has failed to make out a *prima facie* case of adverse impact.

V. CONCLUSION

It is evident that the Plaintiff believes that the Department failed to hire him because of his race. However, the evidence in the record does not support his contention and fails to raise an issue of fact regarding his claims. The Defendant is entitled to judgment as a matter of law. Thus, the City’s motion for summary judgment is **GRANTED**. An appropriate order will follow.

⁵ It is obvious that *some* minorities do well on the psychological test. No one disputes that minorities work at the Roanoke County Fire Department, and the Department apparently requires that all its applicants take the psychological test.

DATED:

Hon. James C. Turk
United States District Judge

