

Case Alleging That Hair Follicle Drug Testing Has Disparate Impact on African-Americans Allowed To Proceed

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A municipal employer that conducted hair follicle drug testing on police officers was not entitled to summary judgment on a Title VII disparate impact claim, because a reasonable jury could conclude that an alternative to hair follicle drug testing would have met the employer's legitimate needs, according to the United States Court of Appeals for the First Circuit. More specifically, the Court held that a reasonable factfinder could conclude that hair testing plus a follow-up series of random urine tests for those officers who tested positive on the hair test would have been as accurate as the hair test alone. *Jones v. City of Boston*, Case No. 15-2015 (1st Cir. Dec. 28, 2016).

The employer, the City of Boston, conducted hair follicle drug testing on thousands of police officers, cadets and job applicants. Officers who tested positive could admit to drug use, receive an unpaid suspension, undergo rehabilitation, and submit to random urinalysis for a period of three years. A positive test result otherwise resulted in termination of employment. The results were negative for over 99% of Caucasian employees tested and over 98% of African American employees tested.

A group of African American police officers claimed that hair follicle drug testing had a disparate impact. They argued that hair testing was not 100% accurate because it could not always distinguish between ingestion of drugs and contamination of the hair by environmental exposure to drugs. The officers' experts testified that this could cause disparate impact because black hair, especially if damaged by some cosmetic treatments more commonly used by black individuals, is more likely to absorb and retain contaminants to which the hair might be exposed.

Initially, the United States District Court for the District of Massachusetts granted summary judgment in favor of the City, concluding the one percent difference between pass rates was too small to be of practical significance. In 2014, the First Circuit vacated summary judgment for the City, concluding the employees had established that hair follicle drug testing caused a cognizable disparate impact on African American employees. The Court remanded the case to the district court to consider: (1) whether the drug testing program was job-related and consistent with business necessity, and, if so, (2) whether the City refused to adopt an alternative that would have met the City's legitimate needs while having less of a disparate impact. On remand, the District Court concluded the City met both elements, and again granted summary judgment.

On appeal, the First Circuit affirmed the portion of the lower court's ruling that held the drug testing program was job-related and consistent with business necessity. It was undisputed that abstaining from drugs was an important aspect of a police officer's position. Although a reasonable jury could find the test to be less than 100% reliable, the Court reasoned the City had established hair follicle drug testing was consistent with business necessity based on the "undisputed high degree of accuracy" of the testing.

However, the Court vacated the part of the lower court's ruling that held there was no compelling evidence that the City refused to adopt an alternative equally valid procedure with a less disparate impact. The officers argued the City could have administered random urinalysis testing for a period of 90 days (the same detection period as hair follicle testing) for those officers who failed the hair follicle test. The Court held that a reasonable jury could have found this alternative to be reasonable, especially since the City uses urinalysis drug testing in other situations (suggesting that the City agrees urinalysis is an acceptably reliable method of drug testing on a targeted, rather than mass, basis). In addition, the Court held that a jury also could find that the "hair testing plus urinalysis" alternative would have generated less of a disparate impact, and that there were issues of fact as to whether the City refused to adopt the alternative proposed by the officers. The Court therefore remanded the case for resolution of these questions by a jury.

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