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Chicago Teachers Union Claim Doesn't Survive Summary Judgment on Race Discrimination Claim

On September 22, 2021, the Seventh Circuit Court of Appeals affirmed the district court's grant of summary judgment in a class action in favor of the Board of Education of the City of Chicago in connection with an action in 2011 to lay off teachers and paraprofessionals. *Chicago Teachers Union v. Board of Education of City of Chicago,* No. 20-1167, 2021 WL 4304963 (7th Cir. Sept. 22, 2021). This decision is a reminder of the difficult burden a plaintiff must tow when pleading a disparate impact claim.

The District Court Proceedings

It has been ten years since the board laid off approximately 1,077 teachers and 393 paraprofessionals in the summer of 2011. 2021 WL 4304963 at *1. The Chicago Teachers Union and a class of teachers (collectively "CTU") filed a lawsuit against the board in 2021 claiming that the layoffs discriminated against African American employees in violation of Title VII of the Civil Rights Act of 1964 (Title VII), Pub.L. No. 88-352, Title VII, 78 Stat. 253, and the Civil Rights Act of 1991 (CRA '91), Pub.L. No. 102-166, 105 Stat. 1071. *Id.* (NOTE: This case included both disparate impact and disparate treatment claims, but the focus of this article is on the disparate impact claim. Summary judgment was granted on both counts.)

As is true with disparate impact cases, the underlying facts of this case are driven by data, statistics, and policy/procedures. The board decided during the 2010 – 2011 school year that it would need to layoff teachers and paraprofessionals because of a significant projected budget deficit and declining enrollment in certain schools. *Id.* The board's spending cuts and layoffs were significant, as evidenced by a total of 1,470 layoffs.

In the 2010 – 2011 school year, the majority of African American students attended schools corresponding geographically to the south and west sides of Chicago, which were also the schools with declining enrollment. Consistent with its past practice, the board used a formula-based approach to determine the number of positions to lay off relying on projected enrollment numbers for each school. The board laid off faculty and staff from three types of positions: (1) quota positions; (2) instructional or programmatic positions; and (3) discretionary fund positions. All positions were tied in some way to enrollment. Principals then decided which positions to eliminate based on their own assessments and the seniority and certification provisions in the collective-bargaining agreement (CBA) between the board and CTU. 2021 WL 4304963 at *2.

Before the 2011 layoffs, African Americans comprised roughly 30 percent of the board's teach and paraprofessional workforce. *Id.* In contrast, over 40 percent (630 individuals) of those tha received layoff notices were African American and [] many worked at the schools where

enrollment had declined the most. *Id.* By the start of the 2011 – 2012 school year, more than half of these individuals had found other full-time employment with the board, and several more retired from the Chicago Public Schools (CPS) system. *Id.* The expert report submitted by CTU showed a statistically significant disparate impact on African American employees in connection with the layoff decision. *Id.*

CTU offered several alternatives to layoffs: (1) transferring class members to open positions; (2) conducting an adverse impact analysis preceding the layoffs; (3) avoiding the use of enrollment projections to determine layoffs; or (4) using other sources of funding instead of laying off employees. 2021 WL 4304963 at *4.

The district court did not find CTU's alternatives persuasive and granted summary judgment in favor of the board. 2021 WL 4304963 at *3. Specifically, the court found that the board's demonstration of tying the layoffs to declining enrollment was consistent with business necessity and that CTU failed to provide evidence that the board could have accomplished the same business objective in an equally efficient and less discriminatory way. *Id.* CTU appealed.

The Seventh Circuit Affirms

The Supreme Court has long recognized that Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.,* quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849, 853 (1971). This prohibition on employment practices with a disparate impact was later codified in CRA '91, codified at 42 U.S.C. §1981(a), *et seq.*

A plaintiff establishes a prima facie violation of the disparate impact statute by demonstrating that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(k)(1)(A)(i). A defendant must then establish "that its method is job-related and consistent with business necessity." *Chicago Teachers Union, supra,* 2021 WL 4304963 at *3, quoting *Price v. City of Chicago,* 251 F.3d 656, 659 (7th Cir. 2001). The burden then shifts back to the plaintiff to show that the employer refused to use an available yet equally valid and less discriminatory practice. *See Puffer v. Allstate Insurance Co.,* 675 F.3d 709, 717 (7th Cir. 2012).

On appeal, neither party disputed a showing of a prima facie case of disparate impact with the evidence that African American individuals comprised approximately 30 percent of Union members at the time of the layoffs but made up just over 40 percent of Union members receiving layoff notices. *Chicago Teachers Union, supra,* 2021 WL 4304963 at *4. Nor did they dispute that the board's decision to tie layoffs to declining enrollment in schools was legitimate, job-related, and consistent with business necessity. *Id.*

The remaining issue on appeal was whether CTU met its burden of establishing that the board had an equally efficient and less discriminatory way to conduct the layoffs. *Id.* CTU made two primary arguments in support of its appeal: (1) class members could have been transferred instead of receiving layoff notices (given the fact that more than half were placed in other positions by the start of the next school year); and (2) the district court erred by failing to consider all of its proposed alternatives together instead of each one in isolation. *Id.* It is at this final prong of the burden-shifting method where CTU hit the red light.

As to the first argument, the Seventh Circuit found that the mere fact that over half of the employees were ultimately able to move into other open positions does little to satisfy its burden

"to demonstrate a viable alternative and give the employer an opportunity to adopt it." *Id.,* quoting *Allen v. City of Chicago,* 351 F.3d 306, 313 (7th Cir. 2003) (citing 42 U.S.C. §2000e-2(k)(1)(A)). The court noted that CTU's proposed transfer runs afoul of the Illinois School Code, which expressly provides that vacancies must be filled "by the principal," not the board. *Chicago Teachers Union, supra,* 2021 WL 4304963 at *4, citing 105 ILCS 5/24-8.1. Further, CTU's proposed transfer concept was not consistent with the CBA, which sets forth procedures for handling teacher and paraprofessional layoffs and reassignments when there is a "drop in enrollment," as was the case here. 2021 WL 4304963 at *5. Thus, CTU failed to meet its burden to demonstrate an existing viable alternative to the board's enrollment-based layoffs. *Id.*

Turning to the second argument, the Seventh Circuit determined that CTU did not carry its burden of establishing an equally valid, less discriminatory alternative the board could have used in lieu of layoffs based on enrollment numbers because CTU did not provide the court with any detail on how the board would have carried out their "combination of ideas." *Id.*

Key Takeaway

When offering the court an "equally efficient and less discriminatory way" to have taken the adverse employment action, a plaintiff must be able to clearly demonstrate to the court that the "way" is viable and does not conflict with other laws, contracts, policies, or procedures and that the outcome would, in fact, be different. Otherwise, the case may not survive summary judgment.

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