

# EMPLOYMENT

## FACT SHEET

### How Disparate Impact Theory Has Expanded Employment Opportunities for Women

April 2013

*Women's entry into high-wage, high-skill, nontraditional occupations, such as firefighting, police work or construction, was made possible in large part by challenges to a variety of recruitment, hiring, and promotion practices that adversely affected women and would have otherwise remained unchanged but for the Title VII of the Civil Rights Act "disparate impact" theory of discrimination.*

The Supreme Court and Congress have long made clear that Title VII "prohibits employers from using employment practices that cause a disparate impact" based on sex and other protected classes. The doctrine of disparate impact allows for a remedy when an employment practice that may be neutral on its face has an unjustified adverse impact on members of a protected class. Use of employment practices such as written tests, height and weight requirements and subjective procedures violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by sex, race or another covered basis, unless the employer can justify the test or procedure is essential to the operation of the business.

#### Removing Roadblocks to the Advancement of Women in Nontraditional Fields

Unfortunate employment practices that impose a disparate impact have closed opportunities for women in nontraditional fields. In some cases, employment practices disadvantage women without any relationship to job performance. For example, employers have historically implemented height, weight or strength requirements in police departments, fire

departments, and in correctional facilities that are not at all related to job performance. In many cases, these practices reflect stereotypes about the skills required for a position but, upon examination, there are alternative practices that may both satisfy job performance demands and allow for a diverse workforce. This sort of discrimination helps to maintain predominately male working environments and serves as a roadblock to the advancement of women in high-wage fields. In the cases below, courts have applied the disparate impact standard to strike a few of the seemingly neutral employment practices that over time have limited women's access to jobs in higher paying, traditionally male fields.

#### **Height and Weight Requirements:**

Title VII's ban on disparate impact discrimination allowed individuals to challenge – and as a result largely eliminated – the use of height and weight requirements that disproportionately excluded women from firefighting, construction and police work. For example:

- The Supreme Court first applied the disparate impact standard to remedy sex-based disparate impact discrimination when it struck down the Alabama State

Penitentiary System’s minimum height and weight requirements for correctional counselors. Although the state argued that height and weight were related to the strength needed for the position, there was no evidence correlating height and weight requirements to strength. (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)).

- The Ninth Circuit struck down the height requirements utilized by the Los Angeles Police Department (LAPD) because they were not job related and had a disparate impact on women, who tend to be shorter than men. (*Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979)).

**Strength & Physical Tests:**

The disparate impact standard has led to changes to many employer physical ability and strength tests. Although some positions are physically demanding, the tests have in some cases been designed in ways that are unrelated to the job and have served as part of a strategy to exclude women from nontraditional fields:

- The Eighth Circuit recently struck down a newly implemented strength test used for workers in a sausage factory. The test was not job related; in fact, it was more physically demanding than the actual job and it had a gross disparate impact on women. (*Equal Employment Opportunity Comm’n v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006)).
- A court struck down a physical agility test used by a fire department in Rhode Island. The test’s designer admitted that the test favored men because it emphasized upper body strength, an area where men tend to outperform women. And the fire department was unable to show that the physical test was job-related. (*Legault v. aRusso*, 842 F.Supp. 1479 (D.N.H. 1994)).

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Because of the disparate impact standard, courts have been able to root out discriminatory exams and other requirements and in their place implement standards that do not disproportionately exclude women and that more accurately screen for qualified employees. Both a robust legal standard, and vigorous enforcement of that standard, are necessary to ensure that Title VII remains an effective tool to open doors previously closed to women and people of color.

**Oral and Written Examinations That Disadvantage Women:**

The disparate impact standard has also led courts to strike down discriminatory employer written and oral examinations. These tests have in some cases been designed in ways that are unrelated to job requirements and have served as part of a strategy to exclude women from nontraditional fields:

- In a case involving the examination process used by the Toledo, Ohio Police Department, in hiring and promotions. The court struck down both the physical ability and structured interview portion of the tests used in hiring and promotions, finding that neither was valid nor appropriately job-related. (*Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980)).
- The Ninth Circuit upheld a district court verdict striking down a written examination used by the City of Los Angeles Sheriff’s Department because it had a disparate impact on female applicants. (*Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991)).

**Other Standards That Disadvantage Women:**

- A court struck down a construction site policy prohibiting bathroom breaks. The employer told its female crane operators to follow the model set by their male colleagues and urinate off the back of the crane while working. This policy was not job-related and had a disparate impact on the ability of women to be employed as crane operators. (*Johnson v. AK Steel Corp*, 2008 WL 2184230 (S.D. Ohio May 23, 2008)).