IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

SCHUSTER CO.,

Defendant.

No. 19-CV-4063-LRR

ORDER

The matters before the court are Plaintiff Equal Employment Opportunity Commission's ("E.E.O.C.") "Motion for Partial Summary Judgment Regarding Liability" ("E.E.O.C.'s Motion") (docket no. 47), which the E.E.O.C. filed on January 15, 2021; and Defendant Schuster Co.'s ("Schuster") Motion for Summary Judgment ("Schuster's Motion") (docket no. 49); which Schuster filed on January 15, 2021. On February 5, 2021, Schuster filed a Resistance ("Schuster's Resistance") (docket no. 60) to the E.E.O.C's Motion. Also, on February 5, 2021, the E.E.O.C. filed a Resistance ("E.E.O.C.'s Resistance") (docket no. 61) to Schuster's Motion. On February 16, 2021, Schuster filed a Reply Brief ("Schuster's Reply") (docket no. 73) in support of its summary judgment motion. On the same date, the E.E.O.C. filed a Reply Brief ("E.E.O.C.'s Reply") (docket no. 75) in support of its motion for partial summary judgment.

SUMMARY JUDGMENT STANDARD

When considering a motion for summary judgment, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show'" an absence of a genuine dispute as to a material fact. *Hilde v. City of Eveleth*, 777 F.3d 998, 1003 (8th Cir. 2015) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)). "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case." *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1157 (8th Cir. 2016) (quoting *Gazal v. Boehringer Ingelheim Pharm., Inc.*, 647 F.3d 833, 837-38 (8th Cir. 2011)). "The movant 'bears the initial responsibility of informing the district court of the basis for its motion,' and must identify 'those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact.'" *Torgerson*, 643 F.3d at 1042 (alterations in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the movant has done so, "the nonmovant must respond by submitting evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Celotex Corp.*, 477 U.S. at 324).

On a motion for summary judgment, the court must view the facts "in the light most favorable to the nonmoving party." *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and summary judgment is appropriate. *Ricci*, 557 U.S. at 586 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "The nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts. . . .'"

Torgerson, 643 F.3d at 1042 (quoting *Matsushita*, 475 U.S. at 586). Instead, "[t]o survive a motion for summary judgment, the nonmoving party must substantiate [its] allegations with sufficient probative evidence [that] would permit a finding in [its] favor based on more than mere speculation, conjecture, or fantasy." *Williams v. Mannis*, 889 F.3d 926, 931 (8th Cir. 2018) (third alteration in original) (quoting *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 801 (8th Cir. 2011)). Mere "self-serving allegations and denials are insufficient to create a genuine issue of material fact." *Anuforo v. Comm'r of Internal Revenue*, 614 F.3d 799, 807 (8th Cir. 2010). "Evidence, not contentions, avoids summary judgment." *Reasonover v. St. Louis Cty.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

DISCUSSION

On March 20, 2020, the E.E.O.C. filed the First Amended Complaint (docket no. 20). In the First Amended Complaint, the E.E.O.C. alleges sex discrimination in violation of Section 703(a)(1) and (2) of Title VII, 42 U.S.C. § 2000e-2(a)(1) and (2). *See generally* First Amended Complaint ¶¶ 13-19. Specifically, the E.E.O.C. alleges that Schuster's use of an isokinetic strength test developed by Cost Reduction Technologies ("CRT Test") "has a disparate impact on female job applicants for driver positions because of sex." *Id.* ¶¶ 13, 17. In the E.E.O.C.'s Motion, the E.E.O.C. states that, "from June 2014 to present, [Schuster] violated Title VII by refusing to hire women who failed a pre-employment physical test [(CRT Test)] . . . that has a disparate impact on women." E.E.O.C.'s Motion at 1.

In the E.E.O.C.'s Motion, the E.E.O.C. points out that, "[u]nder Title VII, if a plaintiff demonstrates that an employer uses a selection device that has a disparate impact on women, then the employer has the burden of proving that the selection device is job

related and consistent with business necessity. E.E.O.C.'s Motion at 1 (citing 42 U.S.C. § 2000e-2(k)(1)(a)(i)). The E.E.O.C. argues that:

> The unrebutted testimony of E.E.O.C.'s expert regarding impact demonstrates that Schuster's use of the CRT test has a statistically significant, adverse, disparate impact on women.
>
> Schuster cannot raise an issue of fact as to whether the CRT test is job related and consistent with business necessity when (1) it cannot explain how the test is scored or whether the passing score relates to the physical demands of the job; (2) the test did not accomplish Shuster's stated goals of reducing workers' compensation injuries or costs; and (3) Schuster retains incumbent drivers who failed the test.
>
> Many incumbent drivers failed the CRT test yet remain employed by Schuster, but Schuster refused to hire more than two dozen women who failed the test, and many of those women scored higher than incumbent drivers who failed but were retained. A test that screens out so many women, that has no explanation for how it works, and that Schuster does not require all its drivers to pass cannot be related or consistent with business necessity.

Id. at 1-2.

In Schuster's Motion, Schuster argues that it is entitled to summary judgment because: (1) "[t]he CRT test at issue in this case does not have a disparate impact on female applicants for the position of truck driver"; (2) "[Schuster] is entitled to use a physical abilities test that has been validated"; (3) "[Schuster's] use of the CRT test is job related and consistent with business necessity"; and "[the E.E.O.C.] has failed to demonstrate the existence of reasonable alternatives that would effectively serve [Schuster's] needs while resulting in hiring more female applicants." Schuster's Motion at 1.

42 U.S.C. § 2000e-2(k)(1)(A)(i) provides that "[a]n unlawful employment practice based on disparate impact is established . . . if . . . a complaining party demonstrates that

a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]" *Id.* "If a plaintiff establishes a prima facie case of disparate impact from a testing procedure, then the employer has the burden to justify the procedure by demonstrating that it is related to safe and efficient job performance and is consistent with business necessity." *Firefighter's Institute for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 904 (8th Cir. 2000). However, "[e]ven if the employer can meet this burden, the plaintiff can still prevail if he can show that there is an alternative selection method that has substantial validity and a less disparate impact." *Id.*

In order to show a prima facie case in a disparate impact case, "a plaintiff must identify . . . a facially-neutral employment practice, demonstrate a disparate impact upon the group to which he or she belongs, and prove causation." *Langlie v. Onan Corp.*, 192 F.3d 1137, 1140 (8th Cir. 1999) (quoting *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997)).

Here, E.E.O.C. expert, Dr. Erin George, a labor economist, found that, "[d]uring the period of June 2, 2014 to February 10, 2020, 95.0% of [CRT] tests taken by male conditional hires to the driver position received a passing score whereas only 76.6% of tests taken by female conditional hires to the driver position received a passing score[.]" E.E.O.C.'s "Statement of Undisputed Material Facts in Support of Its Motion for Partial Summary Judgment Regarding Liability" ("E.E.O.C.'s SUMF") (docket no. 47-2) ¶ 77. "The disparity between male and female pass rates was 8.9 standard deviations." *Id.* ¶ 78. "The likelihood of this happening due to chance, if women and men were equally likely to pass the CRT test, is less than 1 in 1,000,000,000." *Id.* Schuster does not dispute Dr. George's analysis. *See* Schuster's Reply to E.E.O.C.'s SUMF ¶¶ 77-78.

Additionally, Dr. George considered "only the highest CRT [test] score for each test taker" and "found that 96.1 percent of men received a passing score and 81.6 percent of women received a passing score," which results in a "disparity in passing rates [that] is statistically significant at 7.2 standard deviations." E.E.O.C. SUMF ¶ 79. Dr. George also considered "only the score on the first [CRT] test taken by each conditional hire" and "[o]f the first test taken by men, 95.3 percent resulted in a passing score, while 76.8 percent of the first tests taken by women resulted in a passing score," which demonstrates that "[t]he difference in passing rates is statistically significant at 8.6 standard deviations." *Id.* ¶ 80. Again, Schuster does not dispute Dr. George's analysis. *See* Schuster's Reply to E.E.O.C.'s SUMF ¶¶ 79-80.

In its Resistance Brief (docket no. 65), Schuster relies solely on 29 C.F.R. § 1607.4(D), which explains the "4/5 Rule," and argues that the E.E.O.C. "has not established that Schuster's use of the CRT test has a disparate impact on female conditional hires." Schuster's Resistance Brief at 4. Schuster quotes the following from 29 C.F.R. § 1607.4(D):

> 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.

Schuster's Resistance Brief at 4 (quoting 29 C.F.R. § 1607.4(D)). Relying on the 4/5 Rule, Schuster asserts that:

> What cannot and has not been disputed is that Schuster met the four-fifths test. No matter how Dr. George manipulated the data, no matter how studiously she avoided any reference to this most basic standard, Schuster always met the four-fifths rule. Dr. George found that between June 2, 2014 and February 10, 2020, 95.0% of the male conditional hires passed while 76.6% of female conditional hires passed. . . . Such results in a calculation of 80.6% (76.6 divided by 95.0). Then, Dr. George only

> considered the highest CRT [test] score for each test taker, finding that 96.1% of male conditional hire[s] passed while 81.6% of female conditional hires passed. . . . Such results in a calculation of 84.9% (81.6 divided by 96.1). Dr. George also considered only the first [CRT] score obtained, finding that 95.3% of male conditional hires passed while 76.8% of female conditional hires passed. . . . Such results in a calculation of 80.5% (76.8 divided by 95.3). [The] E.E.O.C.'s reliance on sophisticated multiple regressions and bloated standard deviations is no more than an attempt to distract this [c]ourt from the fact that no matter how the data is evaluated, the four-fifths rule is satisfied; thus, there is no inference of disparate impact.

Schuster's Resistance Brief at 4-5.

Schuster greatly overreaches with its 4/5 Rule argument. First, Schuster conveniently leaves out the next sentence of 29 C.F.R. § 1607.4(D), which reads:

> Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on ground of race, sex, or ethnic group.

Id. Second, Schuster's own calculations (80.6%, 84.9% and 80.5%) barely even meet the 4/5 Rule. Third, and most significant, "[a]lthough the four-fifths rule may serve as a helpful benchmark in certain circumstances, both the Supreme Court and the E.E.O.C. have emphasized that courts should not treat the rule as generally decisive." *Jones v. City of Boston*, 752 F.3d 38, 51 (1st Cir. 2014); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988) (discussing the 4/5 Rule and noting that the rule "has been criticized on technical grounds . . . and has not provided more than a rule of thumb for courts"); *Clady v. Los Angeles County*, 770 F.2d 1421, 1428 (9th Cir. 1985) ("[T]he 80 percent rule has been sharply criticized by courts and commentators"); *Stagi v. Nat'l R.R. Passenger Corp.*, 391 Fed. App'x 133, 138 (3d Cir. 2010) ("[T]he 'four-fifths rule' has come under substantial criticism, and has not been particularly persuasive"); 44 Fed. Reg. 11996-01 (stating that the 4/5 Rule was "not intended as a legal definition" and was

"not intended to be controlling in all circumstances"). Further, while the 4/5 Rule may have some "practical utility, [t]here is simply nothing in that utility, however, to justify affording decisive weight to the rule to negate or establish proof of disparate impact in a Title VII case." *Jones*, 752 F.3d at 52. Based on the foregoing, and, based on Dr. George's Report, the court finds that, for purposes of summary judgment, the E.E.O.C. has demonstrated a prima facie case of disparate impact.

Next, in considering the issues of (1) Schuster's burden to demonstrate that the CRT Test is related to safe and efficient job performance and is consistent with business necessity and (2) the E.E.O.C's demonstration of an alternative selection method that has substantial validity and a less disparate impact, the court has carefully reviewed the arguments presented by the E.E.O.C. in its "Memorandum in Support of Its Motion for Partial Summary Judgment Regarding Liability" (docket no. 47-1); its "Brief in Opposition to Defendant's Motion for Summary Judgment (docket no. 64); and its Reply Brief (docket no. 75); and the court has also carefully reviewed the arguments presented by Schuster in its "Brief in Support of Motion for Summary Judgment" (docket no. 53); its "Brief in Resistance to Plaintiff's Motion for Partial Summary Judgment" (docket no. 65); and its Reply Brief (docket no. 73). Having fully considered the arguments of the parties and fully considered the applicable law, the court finds that there are material facts in dispute precluding summary judgment for either party.

CONCLUSION

In light of the foregoing, the E.E.O.C.'s Motion for Partial Summary Judgment (docket no. 47) is **DENIED**; and Schuster's Motion for Summary Judgment (docket no. 49) is **DENIED**.

IT IS SO ORDERED.

DATED this 13th day of April, 2021.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA