

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

09-0576A

In the case no. 19-P-835

SPENCER TATUM & others

vs.

COMMONWEALTH & another.

Pending in the Superior

Court for the County of Suffolk

09-0576A

Ordered, that the following entry be made on the docket:

RECEIVED

AUG 19 2020

SUPERIOR COURT-CIVIL
MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

So much of the judgment entered January 14, 2019, as dismissed count I of the plaintiffs' third amended complaint stating claims for interference arising under G. L. c. 151B, § 4 (4A), is reversed. In all other respects, the judgment is affirmed. The case is remanded to the Superior Court for further proceedings consistent with the memorandum and order of the Appeals Court.

By the Court,

Joseph F. Stanton, Clerk
Date July 22, 2020.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-835

SPENCER TATUM & others¹

vs.

COMMONWEALTH & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This is a disparate impact discrimination case challenging certain Statewide promotional examinations created and administered by the human resources division (HRD) of the Commonwealth. The plaintiffs appeal from a judgment on the pleadings entered in the Superior Court in favor of the defendants. See Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). We reverse so much of the judgment as dismissed the plaintiffs' interference claims arising under G. L. c. 151B, § 4 (4A).

Background. We recite only so much of the history of the case that is relevant to the issues in this appeal. In 2007,

¹ Gwendolyn Brown, Louis Rosario Jr., and Francisco Baez, individually and on behalf of a class of similarly situated individuals.

² Personnel administrator of the human resources division of the Commonwealth.

the plaintiffs sued the Commonwealth and HRD (collectively, State defendants), as well as their direct employers in the United States District Court for the District of Massachusetts under both G. L. c. 151B and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (Title VII). See Lopez vs. Lawrence, U.S. Dist. Ct., No. 07-11693 (D. Mass. September 5, 2014), *aff'd*, 823 F.3d 102 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1088 (2017) (Lopez I). In an appeal from an interlocutory ruling in Lopez I, the Court of Appeals for the First Circuit subsequently ruled that the State defendants were not "employers" within the meaning of Title VII, and thus they were entitled to immunity under the Eleventh Amendment to the United States Constitution, but that the plaintiffs' claims "against the city defendants and the MBTA" could still proceed. Lopez v. Massachusetts, 588 F.3d 69, 72 (1st Cir. 2009).

Following the assented-to dismissal, without prejudice, of their G. L. c. 151B claims against the State defendants in Lopez I, the plaintiffs filed this action in the Superior Court. The four named plaintiffs, and all members of the large class they represent, are African-American and Hispanic police officers employed by cities and towns that are subject to the State civil

service laws.³ Each took at least one promotional examination for the position of sergeant in 2005, 2006, 2007, 2008, 2010, and 2012, for which eligibility lists were established by HRD. All either failed an examination or were not promoted.

Relying in part on the 2009 First Circuit decision, a judge of the Superior Court dismissed the entire case. Although the Supreme Judicial Court affirmed most of the judgment, it rejected the State defendants' sovereign immunity claims and allowed the plaintiffs' interference claim under G. L. c. 151B, § 4 (4A), to proceed.⁴ See Lopez v. Commonwealth, 463 Mass. 696, 701-702, 706 (2012) (noting that statutory provision extends liability to all persons, not just employers).

The plaintiffs' Title VII claims against their employers in Lopez I eventually proceeded to a bench trial. In a lengthy,

³ On September 18, 2013, a judge certified a class consisting of all minority police officers who took HRD's Statewide examination between 2005 and 2012, as to liability only. On February 3, 2014, a judge allowed the motions of the plaintiffs to substitute Francisco Baez for Pedro Lopez as one of the named plaintiffs.

⁴ The court decided that an interference claim could be established by evidence of disparate impact and concluded that the plaintiffs' complaint stated a plausible claim that HRD's Statewide examination has a disparate impact on African-American and Hispanic test takers. See Lopez v. Commonwealth, 463 Mass. 696, 710-712 (2012). The court clarified that in order to state an interference claim, the plaintiffs did not need to allege that the use of HRD's examination "led to a disparate impact on promotions in any particular, identified, employing municipality." Id. at 712. The court sanctioned the use of significant Statewide statistics to show disparate impact. See id. at 712-713 & n.21.

unpublished decision, a Federal District Court judge found and ruled that while the promotional examinations of the city of Boston (Boston) in 2005 and 2008 caused a disparate impact based on race, a point conceded by Boston, Boston had established that the tests were nevertheless job-related for the position in question and consistent with business necessity; and that the plaintiffs failed to prove that Boston had refused to adopt an alternative employment practice that would have equally or better served its business needs with less disparate impact.⁵ See Lopez I, slip op. at 37, 46-47. The First Circuit affirmed the judgment. See Lopez I, 823 F.3d at 121-122.

Discussion. The Superior Court judge ruled that the defendants were entitled to judgment on the pleadings because the plaintiffs' discrimination claim was barred under the doctrine of issue preclusion by virtue of the disposition of Lopez I. See TLT Constr. Corp. v. A. Anthony Tappe & Assocs., 48 Mass. App. Ct. 1, 4-5 (1999) ("doctrine of issue preclusion prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a

⁵ With respect to all other employers, the District Court judge found that due to the small sample sizes, the plaintiffs' statistical evidence did not establish that the use of the challenged promotional exams had any adverse impact on African-American and Hispanic test takers. The judge rejected the plaintiffs' attempts to aggregate the test data across the employing municipalities and across exam years in particular jurisdictions.

different claim, between the same parties or their privies" [quotation omitted]).

An issue is precluded from being relitigated in a subsequent action if (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication and was essential to the earlier judgment. See Kobrin v. Board of Registration in Med., 444 Mass. 837, 843-844 (2005). The issue must have been actually litigated in the prior action. Id. at 844. We review the judge's decision allowing judgment on the pleadings de novo. See UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019).

Although there is no dispute that Lopez I concluded with a final judgment on the merits, none of the other elements of issue preclusion were met. The defendants failed to establish that the parties in the two litigations were the same. While three of the named plaintiffs in the present action were also named plaintiffs in Lopez I, Francisco Baez was not a party in the prior action. Moreover, Lopez was no longer a named plaintiff in this action by the time the defendants moved for judgment on the pleadings.

As for privity, the question turns on "the nature of the nonparty's interest, whether that interest was adequately represented by a party to the prior litigation, and whether binding the nonparty to the judgment is consistent with due process and common-law principles of fairness." DeGiacomo v. Quincy, 476 Mass. 38, 43-44 (2016). Because the District Court judge had denied the plaintiffs' request for class certification in Lopez I, Baez and the class of minority officers who took the Statewide examination between 2005 and 2012 were not officially represented by anyone in that case.⁶ See Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) ("[n]either a proposed class action nor a rejected class action may bind nonparties"); Massachusetts Prop. Ins. Underwriting Ass'n v. Norrington, 395 Mass. 751, 754 (1985) ("[I]t creates no privity between two parties that, as litigants in two different suits, they happen to be interested in proving or disproving the same facts" [quotation omitted]). Moreover, the plaintiffs in the present action, who were employed in municipalities other than Boston, did not have a full and fair opportunity to litigate their disparate impact claim against the State defendants in Lopez I.

⁶ As the plaintiffs concede, the claims of a "few" individuals who took the 2005 and 2008 Boston examinations are precluded by Lopez I.

The defendants also failed to satisfy the identity element of issue preclusion. See DeGiacomo, 476 Mass. at 42 (issue in prior adjudication must be "identical to the issue in the current adjudication, . . . essential to the earlier judgment, and . . . actually litigated in the prior action" [quotation omitted]). In Lopez I, the District Court judge and the Federal Circuit upheld the validity of only two tests given in Boston in 2005 and 2008. These tests, found to be "minimally valid," differed, in fundamental respects, from the general Statewide examination at issue in the present action.⁷ Neither the validity of the unmodified Statewide HRD examinations in 2005 and 2008 nor the validity of the other Statewide HRD examinations taken by the plaintiffs in the present action was actually litigated, and essential to the judgment, in the prior adjudication. See Smith v. Boston, 267 F. Supp. 3d 325, 337 & n.3 (D. Mass. 2017). Contrast TLT Constr. Corp., 48 Mass. App. Ct. at 7. For all these reasons, the application of issue preclusion was inappropriate.⁸ Contrast Alba v. Raytheon Co., 441 Mass. 836, 841-842 (2004).

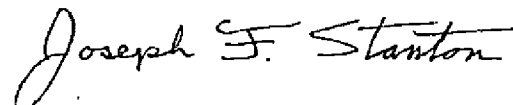
⁷ Boston supplemented the HRD's 2005 and 2008 tests with Boston-specific questions. See Lopez I, 823 F.3d at 109 n.4. Boston also used specific methods and approaches to improve the validity of the tests. In contrast, virtually all the employers involved in this case used HRD's unmodified examination. See Lopez, 463 Mass. at 699.

⁸ In a joint motion to stay the Superior Court action pending final resolution of Lopez I, the parties stated that such stay

Conclusion. So much of the judgment entered January 14, 2019, as dismissed count I of the plaintiffs' third amended complaint stating claims for interference arising under G. L. c. 151B, § 4 (4A), is reversed. In all other respects, the judgment is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Sullivan,
Kinder & Singh, JJ.⁹),


Clerk

Entered: July 22, 2020.

would be warranted because "the sergeants promotional exam at issue in the state action is the same test that is at issue in the federal action," and because the "plaintiffs in the state action are the plaintiffs in the federal action." On appeal, the defendants argue that the plaintiffs should be judicially estopped from disputing identity of parties and issues. The decision to apply the equitable doctrine of judicial estoppel in a particular case rests in the sound discretion of a motion judge. See Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640 (2005). Absent a discretionary ruling to review, we decline to reach the defendants' judicial estoppel arguments, which are raised for the first time on appeal. See Cariglia v. Bar Counsel, 442 Mass. 372, 379 (2004).

⁹ The panelists are listed in order of seniority.