Voting in Members and Discrimination in Volunteer Fire Companies

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The history of organized firefighting in the United States dates back to the 1700s with the formation of Mutual Fire Societies, organizations of neighbors volunteering with each other to combat fires. According to Dennis Smith's book, The History of Firefighting in America:

> "*The Mutual Fire Societies became social as well as protective associations, setting a pattern for organized volunteer firefighting groups, which would one day be the backbone of firefighting in America and would dominate it for a century and a half*."

These organizations were created independently from local government as membership associations and eventually corporations. Membership in these organizations was treated like any other decision made by the associations and handled in accordance with parliamentary procedures that had been adapted for use by similar types of civic organizations. This practice of voting in new members was in accordance with the social and fraternal nature of these organizations.

Many volunteer fire companies continue to carry on a tradition of admitting new members through a parliamentary-based voting process. Most utilize a voting process to elect organizational officers (president, vice president, secretary, etc.) and some operational positions (fire chief) as well.

THE PROBLEM

Laws at the federal, state and local levels prohibit discrimination in a variety of contexts, including employment, public accommodations, and service delivery. These laws create a patchwork of protections available to someone who believes he/she has been the victim of discrimination.

As a result discrimination suits have been filed by unsuccessful applicants to volunteer fire companies challenging membership vote. When challenged, fire companies commonly raise a number of affirmative defenses, including:

- First Amendment – *freedom of association* ["when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association … may be implicated." *Roberts v. United States Jaycees*, 468US 609 (1984)]
- Volunteers may not meet the definition of an employee under a given employment discrimination law, or the volunteer fire company may not meet the definition of an employer under such a law;
- Volunteer fire companies may not meet the definition of an entity subject to the discrimination law (ie. not a public sector entity; not engaged in interstate commerce; not offering a public accommodation, a fraternal organization exempt from discrimination laws[1], etc.)

These affirmative defenses have met with varying degrees of success based upon the particulars of each case.

The bigger question that confronts volunteer fire companies: continue to utilize voting as a mechanism to admit new members? Said another way, does the use of voting to admit new members expose a volunteer fire company to an unnecessary risk of litigation?

The Law

There is nothing inherently illegal with a private membership organization such as a volunteer fire company utilizing voting as a process to admit new members. The problem arises when an applicant is denied membership and that person is a member of a protected class.

While certainly subject to vigorous defenses, a volunteer fire company facing a discrimination claim over the denial of membership will be in for a long and expensive journey through an administrative investigation process overseen by the Equal

Employment Opportunity Commission (EEOC) or a state human relation's commission. Once that process is complete, there awaits an even longer and inevitably more expensive journey through the court system.

To keep the actual risk in perspective, my data suggests that lawsuits over membership voting discrimination constitute less than 0.2% of all civil lawsuits involving fire departments. To put that in perspective, employment related suits constitute 56.4%, sexual harassment lawsuits constitute 9%, sliding pole injury suits constitute 0.6%, and lawsuits alleging drunk driving of fire apparatus constitute 0.2%.

Nevertheless, when a member of a protected class is denied membership in a volunteer fire company, it may be difficult for the department to prevail against a claim of discrimination if the affirmative defenses are unsuccessful. It is important to recognize that ***the risk here is not dependent upon the membership having committed intentional discrimination***. Any organization guilty of intentional discrimination should be held accountable, and nothing in this writing should be misunderstood as an effort to defend such practice.

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[1] Pennsylvania Human Relations Act, 43 P.S.§ 955

The concern here is that a volunteer fire company that denies an applicant membership for a legitimate non-discriminatory reason, may find itself in a very difficult position in defending its action when the applicant is a member of a protected class. The challenge is the difficulty in rebutting the inference of discrimination that is created when a member of a protected class is denied membership.

Are the benefits of using membership voting worth the risk? That can only be determined by each organization, but in light of the alternatives to voting in new members, many fire companies may choose to step away from membership voting as a mechanism for admitting new members. Some of the alternatives to voting that may be used to admit members include the following:

- Objective qualifications that include physical abilities and general knowledge
- Medical examination
- Criminal background check
- Reference checks
- Interview process
- Successful completion of formalized probationary period
- Successful completion of preliminary training program
- Successful interview process completed before the fire chief, command staff, or screening committee

FOR ATTORNEYS

While there is nothing inherently illegal in using membership voting as a mechanism to admit new members to volunteer fire companies, there is an inherent risk associated with the use of voting whenever a member of a protected class is denied membership. The risk is based in large part upon the various tests applied by courts in discrimination cases that shift the burden to the fire company to explain a legitimate, non-discriminatory reason for the denial.

There are two sets of anti-discrimination laws that generally come into play with regards to membership voting cases. The first are those prohibiting discrimination in employment and the second are those prohibiting discrimination in public accommodation. Such laws exist at both the federal and state levels, and may in some instances be supplemented by anti-discrimination laws at the local levels (county and/or municipality).

Title VII of the Civil Rights Act of 1964 states:

> ***42 U.S.C. § 2000e-2****. (a) Employer practices. It shall be an unlawful employment practice for an employer –*
>
> *(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or*
>
> *(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.*

Title II of the Civil Rights Act of 1964 states:

> ***42 U.S.C. §2000a*** *(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.*

State laws may go even further. Consider the Minnesota Human Rights Act (Act), which provides in part:

363A.11 PUBLIC ACCOMMODATIONS.

Subdivision 1.Full and equal enjoyment of public accommodations.

(a) It is an unfair discriminatory practice:

(1) to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability; …

363A.12 PUBLIC SERVICES.

Subdivision 1.Access to public service*.*

It is an unfair discriminatory practice to discriminate against any person in the access to, admission to, full utilization of or benefit from any public service because of race, color, creed, religion, national origin, disability, sex, sexual orientation, or status with regard to public assistance or to fail to ensure physical and program access for disabled persons unless the public service can demonstrate that providing the access would impose an undue hardship on its operation.

Cases go both ways as to whether volunteer fire companies are employers subject to employment discrimination, as well as whether the department is subject to the public accommodation laws. The cases are typically fact dependent and look at a range of factors including compensation, remuneration, benefits, degree of control over the volunteer, degree of control exercised over the fire company by the local municipality, services provided, public policy, and related factors.

If a volunteer fire company is found to be subject to discrimination laws, the analysis then shifts to the specifics of the allegations. Discrimination allegations fall into two categories: disparate treatment and disparate impact.

Disparate treatment discrimination occurs when a particular person or group of people are treated differently because of a prohibited classification such as race, ethnicity, national origin, religion, gender, age or disability. Proof of disparate treatment requires proof that a decision, action, or pattern of behavior was directed at a particular person or group of people because of their race, sex, religion, or other prohibited classification. Disparate treatment discrimination is based upon an *intentional* act of discrimination.

Disparate impact discrimination occurs when an adverse employment decision appears to have been made for nondiscriminatory reasons, but has the effect of discriminating. The proof of disparate impact discrimination is evident only from looking at a statistical analysis. In these cases, it may be difficult if not impossible to clearly identify the specific reasons for the statistical difference, and just as impossible to prove that the discrimination was intentional. For example, the entrance examination used for a particular job, or neutral-appearing prerequisites, may have a tendency to eliminate minority or protected class candidates more frequently than white males. Irrespective of the employer’s actual motivations for using such an examination or prerequisites, when the statistics show that a protected class has been unlawfully impacted, the disparate impact theory will apply.

In the membership voting context, both types of discrimination may be implicated. Disparate treatment discrimination may appear to be less of a concern than disparate impact discrimination given difficultly in proving that members who voted against a certain person did so because of a protected classification. However, the courts have developed a burden-shifting analysis that actually makes defending the fire company in such cases quite difficult.

In most disparate treatment cases, an unsuccessful application (plaintiff) will lack direct evidence of intentional discrimination and will seek to establish discriminatory intent by inference. This "intentional discrimination by inference" has been expressly permitted under framework developed by the U.S. Supreme Court in the case of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The McDonnell Douglas burden-shifting formula applies as follows:

1. The plaintiff must establish a prima facie case of discrimination by demonstrating membership in a protected class, is otherwise qualified for the position, and that despite being qualified he/she has been denied the position;
2. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions;
3. If the employer is successful in demonstrating a legitimate, nondiscriminatory reason for its actions, the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination, or that a less

The problem for a volunteer fire company will be that once an applicant establishes that he/she is a member of a protected class, is qualified and has been denied membership (thereby shifting the burden to the fire company), how does the fire company establish a "legitimate, non-discriminatory reason" for its actions? While the fire company can point to the fact that a membership vote went against admitting the applicant, it is virtually impossible to rebut the inference of discrimination. The case will likely be decided by a summary judgment.

The fire company fares no better under a disparate impact claim, where a similar burden shifting applies. *Griggs v. Duke Power Co*., 401 U.S. 424 (1970); *Grant v. Bethlehem Steel Corp*., 635 F.2d 1007 (1980); *Wards Cove Packing Company, Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

1. The plaintiff must establish a prima facie case that neutral appearing criteria are having a disparate impact upon members of a protected class. This is done by use of statistics showing that neutral appearing criteria substantially burden a protected class more heavily than whites/males.
2. The burden then shifts to the employer to establish that the criteria are job-related and consistent with business necessity.
3. If the employer is successful, the burden shifts back to the plaintiff to establish that a less discriminatory employment practice is available, or that the practice was a pretext for discrimination

Applying the disparate impact theory to the volunteer fire company voting process, when the voting results in a disparate impact upon a minority class, then despite the fact that no one intentionally discriminated against a candidate, the fire company is placed in virtually an impossible position of defending the use of voting as "job related consistent with business necessity".

The EEOC has established an 80% rule intended to serve as the threshold for disparate impact discrimination. When the acceptance rate of members of a protected class is less than 80% of the majority class, a prima facia case of disparate impact discrimination is established.

By way of example, if 10 white males apply for membership and are voted in, they have a 100% acceptance rate. If 10 black males apply and 7 are voted in their selection rate is 70%. Because the acceptance rate of blacks is less than 80% of the white acceptance rate, there is a prima facia case of race discrimination.

A volunteer fire company in this situation must establish that the voting process is "job-related consistent with business necessity", which as stated above is likely to be an impossible burden. Assuming the departments were somehow to be able to shift the burden back to the applicant, the applicant would merely have to show some other less-discriminatory process for admitting applicants in order to prevail.

The combined effect of both disparate treatment and disparate impact burden shifting is such that if a volunteer fire company cannot successfully plead an affirmative defense, the case will likely be lost.

CONCLUSION

While there is nothing inherently illegal in using membership voting to admit new members to a volunteer fire company, the risk of a discrimination challenge is certainly something that fire companies ought to consider.

While discrimination laws may not apply to all volunteer fire companies, it is certainly safer to assume they will. It is also safer to assume that if a member of a protected class is denied membership, the department will have to be able to defend its decision in court.

Each organization needs to determine whether the benefits of using membership voting are worth the risk. While the overall risk of a challenge will vary from community to community and overall remains quite small, it should not be ignored. There are numerous alternatives to voting in new members that rely upon the use of objective criteria to evaluate applicants. Some of the alternatives include the following:

- Objective qualifications that include physical abilities and general knowledge
- Medical examination
- Criminal background check
- Reference checks
- Interview process
- Successful completion of formalized probationary period
- Successful completion of preliminary training program
- Successful interview process completed before the fire chief, command staff, or screening committee