

Iowa Supreme Court Narrowly Upholds Portion of Waterloo, Iowa's "Ban the Box" Ordinance: What Does It Mean for Other Iowa Municipalities?

by William J. Miller

In the fall of 2019, the Waterloo, Iowa City Council approved the state's first "Ban the Box" ordinance. Generally speaking, that ordinance made it illegal for any employer to ask about an applicant's criminal history on a job application. For employers with fifteen or more employees, the ordinance also made it illegal to ask about an applicant's criminal history prior to making a conditional offer of employment, to make hiring decisions based on arrests or charges that had not yet resulted in convictions or on expunged records, and to make adverse hiring decisions based on an applicant's criminal record without a legitimate business reason for doing so.

Shortly after the City Council approved the ordinance, the Iowa Association of Business and Industry ("ABI") challenged it in court. That challenge eventually made its way to the Iowa Supreme Court, which issued a ruling on the ordinance's legality on June 18, 2021.

According to the City of Waterloo, which characterized its efforts as "the Fair Chance Initiative," the ordinance served four goals: 1) remove barriers to employment, 2) judge employment applicants on their qualification, 3) reduce recidivism, and 4) promote good business practice and workforce needs.

ABI, on the other hand, argued that the ordinance violated a 2017 law which states:

A city shall not adopt, enforce, or otherwise administer an ordinance, motion, resolution, or amendment providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to a minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment.

Iowa Code § 364.3(12)(a). ABI argued that Waterloo's ordinance was stricter than the Iowa Civil Rights Act ("ICRA") as to hiring practices and other terms or conditions of employment, and therefore cities are prohibited from enacting such ordinances under Iowa Code § 364.3(12)(a). In initially upholding the enforceability of the ordinance, the district court agreed with the City that the ICRA itself provided the authority for the

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ordinance, specifically the provision that states:

Nothing in this chapter shall be construed as indicating any of the following:

. . .

c. Limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices.

Iowa Code § 216.19(1)(c). The city further argued that rather than expanding the law, the ordinance simply implemented existing civil rights laws. The Supreme Court was not persuaded.

In rejecting the city's argument, the Court looked back to a six-year old class action lawsuit brought against the State of Iowa alleging racially discriminatory hiring practices in state government. While the Court acknowledged that "Waterloo has the highest African-American population, at sixteen percent, of any city in the state," and that "African-Americans and other persons of color are disproportionately represented in the criminal justice system, not only in the United States generally but more specifically in Waterloo," the Court nonetheless found that the ordinance's application to all employers, regardless of whether those employers' hiring practices actually disparately impacted African American applicants, took the ordinance beyond simply implementing existing civil rights law.

In other words, the Court found that the city did not provide "targeted proof" that Waterloo employers' use of applicants' criminal history in hiring decisions resulted in employment discrimination on the basis of race in violation of civil rights law.

Despite all that, the Court did not strike down the ordinance in its entirety. Comparing Iowa Code § 364.3(12)(a) to similar but different statutes in Michigan, Indiana, Mississippi, and New Jersey, the Court determined that the Iowa legislature only meant to prohibit laws that impacted "terms and conditions of employment, including hiring practices that constitute terms and conditions of employment." The Court held that the Waterloo ordinance's prohibitions against asking about an applicant's criminal history on a job application and, for employers with fifteen or more employees, asking about an applicant's criminal history prior to making a conditional offer of employment, did not constitute a regulation of the "terms and conditions of employment." The Court characterized those two prohibitions as procedural rather than substantive, and left them intact, while striking down the rest of the ordinance.

Whether the Court's ruling is a victory for civil rights advocates, for Iowa cities, or for employers, probably depends on who you ask. On the one hand, proponents of the ordinance succeeded in saving some of it and prevented it from being entirely struck down. This leaves room for other cities to enact similar, albeit limited, ordinances. On the other hand, one has to wonder how much "teeth" these ordinances will really have in their pared down format. Employers are still permitted to make decisions based on applicants' criminal history, they just can't do so until after extending a conditional offer of employment. Perhaps some applicants will succeed in their efforts to persuade prospective employers that they should be given a chance at employment despite their

criminal background, but employers will still be free to reject such efforts if they so choose.