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Third Circuit's Lanning v. SEPTA Decision: 'Business Necessity' Requires Setting Minimum Standards.

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The Civil Rights Act of 1991 defined the employer's rebuttal to a "disparate impact" discrimination claim involving objective assessment as "job related for the position in question and consistent with business necessity." As the Third Circuit Court of Appeals noted, neither other circuit courts nor the Supreme Court have interpreted this language. The Civil Rights Division of the U.S. Department of Justice who was a party in this case, however, was successful in advocating the following: "the 'business necessity' burden is separate and addition to the 'job relatedness' burden," that even with criterion-related validity, the employer "must still demonstrate the 'practical significance' of any correlation between those criteria and the test," and "Even where a test itself is demonstrably job-related, an employer must still show that the chosen cutoff score predicts successful job performance and distinguished applicants who will be successful performers on the job from those who will be unsuccessful." The Justice briefs were signed by the controversial *Acting* Attorney General, Bill Lann Lee, head of the Civil Rights Division. Because the legislative history of the Act had conflicting interpretations of what was meant by "business necessity," the adversarial process of interpreting the meaning of this burden has now begun.

Background

In upgrading the Philadelphia transit police (SEPTA), SEPTA's consultant, an exercise physiologist, determined that running, jogging and walking were important tasks for patrol officers. Incumbent subject matter exert officers (SMEs) estimated that it was reasonable to expect to run one mile in full gear (26 lbs) in 11.78 minutes. SEPTA's consultant rejected this estimate as too low based upon his determination that any individual could meet this requirement. Ultimately, he recommended a 1.5 mile run within 12 minutes requiring that an officer possess an aerobic capacity of 42 mL/kg/min. He initially decided that an aerobic capacity of 50/mL/kg/min was necessary to perform the job, but after determining that such a high standard would have a draconian effect on women applicants, he decided that the goals of SEPTA could be satisfied by using a 42.5 mL/kg/min standard.

Between 1991-93, SEPTA 's 1.5 mile, 12-minute physical fitness test was passed by 12% of the female and 60% of the male applicants. The pass rates during the time period under challenge were 6.7% and 55.6% respectively. At the time of trial in 1997, the work force of 234 had 190 officers 16 of whom were women. Concurrent with implementation of the new physical test for applicants in 1991, SEPTA began testing the aerobic capacity of incumbent officers. Not surprisingly, particularly among older incumbents, running 1.5 miles in 12 minutes was a condition of employment that drew the union's attention. By 1996 after conditioning, however, 86% of incumbents were able to pass the aerobic test required of applicants.

The aerobic capacity test was scored on a pass/fail basis and was administered after a pass/fail written exam. Candidates were then ranked on their scores based on a

panel interview. The 59% / 12% male/female pass-rate was a 5.56 standard deviation disparity. Five unsuccessful female applicants filed a Title VII class-action suit in January, 1997 challenging the 1.5 mile 12 minute run. The Civil Rights Division of the U.S. Department of Justice joined the case in February 1977. After litigation commenced, SEPTA hired expert statisticians who demonstrated a statistically significant correlation between aerobic capacity and arrests, arrest rates and commendations. The district court consolidated the cases, held a bench trial in January, 1998, and rendered an opinion in favor of SEPTA in June, 1998. Based on the consultant's reports, the district court held that SEPTA had established that its aerobic capacity requirement was job related and consistent with business necessity. This decision was appealed to the Third Circuit which handed down their decision (excerpts below) on June 29, 1999, remanding the case back to the district court for further developing the record as to what is meant by "business necessity" – an invitation for outside parties to submit *amicus* briefs to the court. Because the meaning of the Civil Rights Act of 1991's "business necessity" rebuttal burden is being defined in this circuit court's "first impression," it is likely that future issues of TIP will follow this case.

U.S. Department of Justice Brief to Third Circuit

"In responding to questions about the most arduous tasks they may be required to perform, the SMEs estimated that a SEPTA officer should be able to run one mile in full gear in 11 minutes and 47 seconds. This pace on a one mile run in full gear corresponds to running 1.5 miles without gear in 15 minutes and 40 seconds, in that both require an aerobic capacity of approximately 33.5 mL/kg/min."

"(SEPTA's physiologist) dismissed the SMEs' judgment as 'wholly unrealistic' and a 'ridiculous pace which anyone including my grandmother, probably could have achieved.' Instead of setting the cutoff at 15 minutes and 40 seconds, (he) unilaterally set the cutoff score at 12 minutes, which….represented an aerobic capacity of 42.5 mL/kg/min. In so doing, (he) rejected the judgment of SEPTA's experienced officers. (His) selection of 42.5 mL/kg/min also was made despite the fact that he previously recommended a level of aerobic capacity of 33.5 mL/kg/min for structural firefighters, a job that is more aerobically demanding than that of SEPTA transit police officers."

"(SEPTA's physiologist' report) provided to SEPTA in support of his recommendations does not contain a justification for the cutoff score of 42.5 mL/kg/min. At trial, (he) testified that he chose the cutoff score of 42.5 mL/kg/min using, in part, intuition. (He) further testified that the link between aerobic capacity and job performance of SEPTA officers was 'common-sensual' and testified that it is 'obvious' that the better a person's cardiovascular system is, the 'more of the job' that person can do. (He) did not conduct a study to determine whether having an aerobic capacity of 43.5 mL/kg/min correlated with successful performance as a SEPTA transit officer. A previous study (he) conducted for a metropolitan sheriff's department in Florida with over 900 employees demonstrated that performance on a 1.5 mile running test does not correlate with successful police officer performance."

"Although SEPTA was at all times relevant to this litigation aware of the disparate impact upon women caused by its aerobic capacity test, it never attempted to determine whether an alternative test with a less severe impact existed."

"SEPTA was unable to identify any instance in which an incumbent officer who failed the test (given to incumbents since 1991) was unable to perform the physical requirements of the job… It is undisputed that on many occasions, SEPTA officers with aerobic capacity below 42 mL/kg/min have performed in outstanding, and in some instances, heroic, manner… SEPTA has promoted and given special recognition for outstanding performance to a number of such officers."

"After this litigation began, SEPTA hired several additional experts in an effort to defend its aerobic capacity test… (They) performed a criterion-related validation study which examined the statistical relationship between the aerobic capacity of incumbent officers and three 'criterion measures' based on data made available by SEPTA – number of arrests, arrest rates, and commendations. These 'criterion measures' were neither derived from (the physiologist's) job analysis nor selected by an industrial psychologist. SEPTA has never used these criteria to measure performance of its officers. No SEPTA employee testified that SEPTA, as opposed to an expert retained after litigation began, believes that the chosen criteria are reliable and meaningful indicators or measures of SEPTA transit police officer performance."

(SEPTA's expert) testified that he was not qualified to select the cutoff score on the aerobic capacity test and he never determined the level of aerobic capacity required for successful performance as a SEPTA transit police officer. Rather, (his) studies and testimony were offered to show the statistical relationship between aerobic capacity and the available data. (He) first found a statistically significant correlation between aerobic capacity of incumbent officers and the number of arrests made by such officers. (His) analysis considered only the number of arrests, not the circumstances or quality of the arrests. (He) did not analyze whether the arrests required aerobic capacity or running any distance, were made with assistance of other officers, resulted in convictions, lawsuits or judgments against SEPTA or injuries to bystanders, involved excessive force, or whether probable cause existed for the arrests."

"Second, (he) created the concept of an 'arrest rate'[1] and concluded that a statistically significant correlation existed between the aerobic capacity of incumbent officers and their 'arrest rates.' SEPTA itself has never used the concept or the term 'arrest rate' in assessing the job performance or an individual officer or in any other fashion. SEPTA recognizes that not every incident to which an officer responds should result in an arrest… including 'unfounded incidents' defined by SEPTA regulations as incidents 'which, upon investigation, prove to be groundless; that is, 'no offense was committed or attempted'."

"(He) calculated several different correlation coefficients between the aerobic capacity of incumbent officers and those officers' numbers of arrests and 'arrest rates'… the highest correlation between aerobic capacity and any 'criterion' was +0.107 (the correlation between aerobic capacity and the number of arrests for the more serious offenses)… (He) conceded that this correlation was low and that therefore aerobic capacity was not a good predictor of numbers of arrests or 'arrest rate'."

[1] "Arrest rate" = number of arrests divided by number of incidents to which the officer responded.

"In addition, (he) compared officers whose aerobic capacity was always at least 42 mL/kg/min with those whose aerobic capacity was always below that level. Based on a regression analysis of these data, (he) estimated that SEPTA could have made 470 additional arrests during the period 1991 through 1996, including 70 additional arrests for Part 1 crimes, if all of its officers had maintained an aerobic capacity of 42 mL/kg/min or above."

"(He) also reviewed 207 commendations awarded to incumbent patrol officers between 1994 and 1996, i.e., 3-5 years after SEPTA required incumbent officers to possess and maintain an aerobic capacity of 42 mL/kg/min. Such commendations do not measure overall performance; rather they are given for singular acts of outstanding performance. (He) found that 4% of the officers who received such commendations had an aerobic capacity of less than 42 mL/kg/min. Finally, (he) analyzed data concerning 953 perpetrators arrested for Part 1 offenses. On the basis of the perpetrators' sex, race, and age, and by assuming that the perpetrators' aerobic capacities were equivalent to those of U.S. Army recruits, he estimated that 76% of the perpetrators had an aerobic capacity of at least 42 mL/kg/min. With respect to the commendation and perpetrator analyses, (he) did not calculate any correlation coefficients."

"…Neither the Philadelphia Police Department, the (DC Metro) Police, the New York City Transit Police Department, the AMTRAK Police Department, the Maryland Mass Transit Administration, the Port Authority of New York and New Jersey, the Federal Bureau of Investigation, the U.S. Drug Enforcement Administration, nor the U.S. Secret Service require their applicants to have an aerobic capacity of 42.5 mL/kg/min or more. No evidence was presented at trial that any other law enforcement agency has such a requirement…Women constitute 22.4% OF Philadelphia police officers, 13% of (DC Metro) police officers, and 16% of AMTRAK officers…, but only 7% of SEPTA officers."

"SEPTA's requirement that transit police officer applicants demonstrate an aerobic capacity of 42.5 mL/kg/min by completing a 1.5 mile run in 12 minutes is unreasonably stringent and indisputably has a severe adverse impact on women. The test goes far beyond what is actually required for satisfactory or effective police officer performance, and thus needlessly excludes the overwhelming majority of women from even being considered for employment. In holding that SEPTA had established that this requirement is 'job related…and consistent with business necessity,' the district court committed a number of serious legal and factual errors."

"First, the district court applied an overly lenient legal standard when it refused to require SEPTA to show any business necessity for the 42.5 mL/kg/min aerobic capacity requirement. By suggesting that SEPTA need only show that the requirement significantly serves a legitimate business interest, the district court ignored the express language of the statute. In particular, the court failed to note that, in the Civil Rights Act of 1991, Congress emphatically rejected the Supreme Court's adoption of this precise standard in Wards Cove Packing Co. v. Atonio… and instead codified the 'business necessity' language of Griggs v. Duke Power Co. and its progeny… (T)he court should have examined SEPTA's business necessity defense with particular care, given the test's severe adverse impact on women."

"Second, the district court disregarded significant evidence showing that SEPTA's 42.5 mL/kg/min aerobic capacity requirement was not justified by business necessity. In fact, a majority of SEPTA's own incumbent officers have failed the test while continuing to perform their jobs in a satisfactory or even outstanding manner. SEPTA provided no evidence that any of these incumbent officers were unable to meet the physical requirements of the job. SEPTA was also unable to point to a single other law enforcement agency in the country that imposes a comparable requirement of police officer applicants. Indeed, plaintiffs presented extensive evidence that other law enforcement agencies with equally demanding job duties successfully rely on selection procedures with significantly less adverse impact. In light of these facts, SEPTA simply cannot justify a requirement with such a sever impact on women."

"Finally, neither (SEPTA's expert's) original report nor any of the other expert reports provided by SEPTA demonstrates that the 42.5 mL/kg/min aerobic capacity requirement is 'job related … and consistent with business necessity.' Even if SEPTA had succeeded in demonstrating that a test of aerobic capacity is job-related, it provided no justification whatsoever for selecting the cutoff score of 42.5 mL/kg/min. In addition, the district court erred in holding that (their expert's) study made no effort to show that a 42.5 mL/kg/min aerobic capacity is necessary for effective performance as a SEPTA transit police officer."

"The district court also erred in finding that the various statistical analyses conducted by (SEPTA's expert statistician) demonstrate the job-relatedness and business necessity of the test. Not only were the selection criteria – number of arrests, 'arrest rates,' and commendations – inappropriate and unreliable measures of job performance, but the correlations (he) found using these criteria were also too low to demonstrate any practical significance (emphasis added). Nor did (his) 'perpetrator analysis' demonstrate the job-relatedness of the test under any accepted test validation theory…"

"In sum, the record is devoid of evidence that SEPTA's 42.5 mL/kg/min aerobic capacity requirement, which excludes almost all women from consideration for positions as transit police officers, is in any way necessary to, or even related to, successful job performance."

"By requiring employers to demonstrate that a challenged practice is 'job related for the position in question and consistent with business necessity,' Title VII makes clear that the 'business necessity' burden is separate and in addition to the 'job relatedness' burden (emphasis added). … The district court thus committed a serious error of law in requiring SEPTA to show only that the challenged test was manifestly job-related without any showing of business necessity… (T)he court should have scrutinized the alleged necessity of the test with particular care in this case because of the severity of the 12-minute cutoff's adverse impact on women… the greater the adverse impact the greater a showing of job-relatedness that is required."

"The Unites States recognizes that an employer may seek to improve its workforce through applicant testing, so long as the employer demonstrates that the test it uses is valid and that the standard it seeks to impose is actually necessary for safe and effective job performance. …SEPTA has failed to demonstrate an adequate basis for selecting a cutoff that more than half its workforce has failed on at least one occasion to

meet, and that excludes the overwhelming majority of female applicants from even being considered for employment."

"A number of other law enforcement agencies….do not eliminate applicants on the basis of an aerobic capacity test; they instead provide physical training after hire to ensure that applicants can meet the physical requirements of the job."

"Neither SEPTA nor the district court…cited any evidence suggesting that officers employed by these other law enforcement agencies are failing to perform their jobs effectively because their aerobic capacities are below 42.5 mL/kg/min. In the absence of any such evidence, the district court erred in holding that SEPTA had established a business necessity for its stringent cutoff."

"Title VII requires an employer to do more than simply 'articulate a justification' for a cutoff score, particularly where the cutoff has the effect of excluding almost 90% of female applicants. Even where a test itself is demonstrably job-related, an employer must still show that the chosen cutoff score predicts successful job performance and distinguished applicants who will be successful performers on the job from those who will be unsuccessful" (emphasis added).

"Thus, even where a test itself if valid, selection of a higher than necessary cutoff score violates Title VII if the selected cutoff score has disparate impact" (emphasis added).

"Title VII does not permit a test developer to substitute his own subjective judgment or opinion for the evidence or judgments provided by subject matter experts…"(emphasis added).

(SEPTA's expert statistician's) finding of a 'linear' relationship between aerobic capacity and arrests and arrest rates does not compel a different conclusion. A 'linear' relationship simply means that a correlation coefficient greater than zero exists. The existence of a 'linear' relationship or positive correlation is not legally sufficient to establish the job-relatedness and business necessity of a chosen cutoff score (emphasis added). Rather…SEPTA must separately demonstrate that the cutoff score is required for or predicts successful job performance. To the extent that the court concluded to the contrary, it erred as a matter of law."

"(T)he district court ignored the fact that SEPTA knew that…(the) test would have a severe adverse impact on women, but failed to search for an alternative test that would have less adverse impact…"(emphasis added).

"The district court committed a fundamental error in concluding that numbers of arrests, 'arrest rates,' and commendations of incumbent officers were appropriate criterion measures to determine whether SEPTA's aerobic capacity test predicts successful job performance. Criterion measures must be reliable and meaningful measures of job performance; they should not be chosen merely on the basis of availability of data… numbers of arrests, arrest rates, and commendations are not reliable or meaningful measures of SEPTA transit police officer performance. SEPTA has never used (the expert's) criteria in assessing the performance of its officers. Nor is there any evidence that SEPTA itself considers them reliable and meaningful measures of job

performance. Criterion measures used in a criterion-related validity study must be derived from a proper job analysis" (emphasis added).

"SEPTA presented no evidence establishing that any perpetrator outran or outstruggled an officer or otherwise escaped arrest because the aerobic capacity of an officer was below 42 mL/kg/min."

"Commendations are awarded for 'singular act(s) of outstanding performance,' rather than for overall job performance… (SEPTA's expert) never determined whether officers had an equal opportunity to receive a commendation…(and) failed to show that commendations were uniformly and fairly given for similar acts."

"Assuming, arguendo, that the selected criteria were appropriate, SEPTA must still demonstrate the 'practical significance' of any correlation between those criteria and the test…(emphasis added). The district court rejected the settled case law that practical significance is measured by the magnitude of the correlation coefficient. Instead, the court concluded that SEPTA had established practical significance based on (SEPTA's expert's) projection that SEPTA would have made an additional 470 arrests for Part 1 crimes, had officers with an aerobic capacity below 42 mL/kg/min maintained and aerobic capacity of at least 42 mL/kg/min. By relying on (the expert's) projections rather than examining the magnitude of the correlation coefficient in light of the severe adverse impact of the test, the court erred as a matter of law… This Court need not reach the issue of whether a correlation of +0.30 or higher is required to satisfy the 'practical significance' requirement (emphasis added). In this case, the district court relied on a correlation of +0.107. Such a correlation is by any measure far too low to be meaningful, especially since it does not even represent a correlation between aerobic capacity and overall job performance… (T)he highest correlation reported…is +0.22…(and) the court further concluded that if the +0.22 coefficient were corrected for restriction in range, it would reach the magnitude of +0.33… (I)t is improper to correct the correlation coefficients for restriction in range" (emphasis added).

"Although the court considered it 'obvious' and 'plain common sense' that SEPTA officers need a high aerobic capacity to apprehend perpetrators, 'an assumption is not an acceptable substitute for evidence of validity'…(the) employer's burden cannot be carried by 'obvious' relationship between selection standards and qualities thought necessary to job performance."

Third Circuit Court of Appeals Decision

"In this appeal (Lanning v. Southeastern Pennsylvania Transportation Authority (3d C.A., June 29, 1999), we must determine the appropriate legal standard to apply when evaluating an employer's business justification in an action challenging an employer's cutoff score on an employment screening exam. We hold today that under the Civil Rights Act of 1991, a discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge (emphasis added). Because we find that the District Court did not apply this standard in evaluating the employer's business justification for its discriminatory cutoff score in this case, we will reverse the District Court's judgment and remand for reconsideration under this standard."

"This appeal focuses our attention on the proper standard for evaluating whether SEPTA's 1.5 mile run is 'job related for the position in question and consistent with business necessity' under the Civil Rights Act of 1991."

"The Supreme Court has yet to interpret the "job related for the position in question and consistent with business necessity" standard adopted by the Act. In addition, our sister courts of appeals that have applied the Act's standard to a Title VII challenge have done so with little analysis. Because the Act proscribes resort to legislative history with the exception of one short interpretative memorandum endorsing selective case law, our starting point in interpreting the Act's business necessity language must be that interpretive memorandum. The memorandum makes clear that Congress intended to endorse the business necessity standard enunciated in Griggs[2] and not the Wards Cove[3] interpretation of that standard. By Congress' distinguishing between Griggs and Wards Cove, we must conclude that Congress viewed Wards Cove as a significant departure from Griggs. Accordingly, because the Act clearly chooses Griggs over Wards Cove, the Court's interpretation of the business necessity standard in Wards Cove does not survive the Act."

"In the context of a hiring exam with a cutoff score shown to have a discriminatory effect, the standard that best effectuates this mission is implicit in the Court's application of the business necessity doctrine to the employer in Griggs, i.e., that a discriminatory cutoff score is impermissible unless shown to measure the minimum qualifications necessary for successful performance of the job in question (emphasis added). Only this standard can effectuate the mission begun by the Court in Griggs; only by requiring employers to demonstrate that their discriminatory cutoff score measures the minimum qualifications necessary for successful performance of the job in question can we be certain to eliminate the use of excessive cutoff scores that have a disparate impact on minorities as a method of imposing unnecessary barriers to employment opportunities."

"Our conclusion that the Act incorporates this standard is further supported by the business necessity language adopted by the Act. Congress chose the terms 'job related for the position in question *and* consistent with business necessity.' Judicial application of a standard focusing solely on whether the qualities measured by an entry level exam bear some relationship to the job in question would impermissibly write out the business necessity prong of the Act's chosen standard. With respect to a discriminatory cutoff score, the business necessity prong must be read to demand an inquiry into whether the

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[2] In Griggs in 1971, the Supreme Court stated that what is required by Title VII is "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" and that in evaluating practices fair in form but discriminatory in operation, "the touchstone is business necessity." The Court was unclear in articulating what an employer must show to demonstrate "business necessity."

[3] In Wards Cove in 1989, the Supreme Court stated "The dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral practices. At the same time though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business necessity for it to pass muster."

score reflects the minimum qualifications necessary to perform successfully the job in question. See also EEOC Guidelines, 29 C.F.R. ¶ 1607.5(H) (noting that cutoff scores should 'be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force.')."

Footnote #15: "We need not be concerned that implementation of this standard will result in forcing employers to adopt quotas… If an employer can demonstrate that its discriminatory cutoff score reflects the minimum qualifications necessary for successful job performance, it will be able to continue to use it. If not, the employer must abandon that cutoff score, but is free to develop either a non-discriminatory practice which furthers its goals, or an equally discriminatory practice that can meet this standard… (I)t does not follow that SEPTA would then be required to hire women in equal proportion to men. For example, SEPTA could: (1) abandon the test as a hiring requirement but maintain an incentive program to encourage an increase in the officer's aerobic capacities; (2) validate a cutoff score for aerobic capacity that measures the minimum capacity necessary to successfully perform the job and maintain incentive programs to achieve even higher aerobic levels; or (3) institute a non-discriminatory test for excessive levels of aerobic capacity such as a test that would exclude 80% of men as well as 80% of women through separate aerobic capacity cutoffs for the different sexes. Each of these options would help SEPTA achieve its stated goal of increasing aerobic capacity without running afoul of Title VII and none of these options require hiring by quotas" (emphasis added).

"The District Court upheld this cutoff because it was 'readily justifiable.' The validation studies of SEPTA's experts upon which the District Court relied to support this conclusion demonstrate the extent to which this standard in insufficient under the Act. The general import of these studies is that the higher an officer's aerobic capacity, the better the officer is able to perform the job. Setting aside the validity of these studies, this conclusion alone does not validate…(the) 42.5mL/kg/min cutoff under the Act's business necessity standard. At best, these studies show that aerobic capacity is related to the job of SEPTA transit officer. A study showing that 'more is better,' however, has no bearing on the appropriate cutoff to reflect the minimal qualifications necessary to perform successfully the job in question (emphasis added)." (The employer's expert's) testimony is particularly instructive on this point. (He) testified that in view of the linear relationship between aerobic capacity and the arrest parameters, any cutoff score can be justified since higher aerobic capacity levels will get you more field performance (i.e., 'more is better'). Under the District Court's understanding of business necessity, which requires only that a cutoff score be 'readily justifiable,' SEPTA, as well as any other employer whose jobs entail any level of physical capability, could employ an unnecessarily high cutoff score on its physical abilities entrance exam in an effort to exclude virtually all women by justifying this facially neutral yet discriminatory practice on the theory that more is better. This result contravenes Griggs and demonstrates why, under Griggs, a discriminatory cutoff score must be shown to measure the minimum qualifications necessary to perform successfully the job in question (emphasis added). This is not to say that studies that actually prove that 'more is better' are always irrelevant to validation of an employer's discriminatory practice. For example, a content validated exam, such as a typing exam for the position of typist, which demonstrates that the applicants who score higher on the exam will exhibit better job performance may

justify a rank-ordering hiring practice that is discriminatory. In such a case, a validation study proving that 'more is better' may suffice to validate the rank-order hiring. This is true, however, only in the rarest of cases where the exam tests for qualities that fairly represent the totality of a job's responsibilities (emphasis added). It is unlikely that such a study could validate rank-hiring with a discriminatory impact based upon physical attributes in complex jobs such as that of police officer in which qualities such as intelligence, judgment, and experience surely play a critical role…"

"The District Court rejected as irrelevant the plaintiffs' evidence that incumbent officers had failed the physical fitness test yet successfully performed the job and that other police forces function well without an aerobic capacity admission test. Under the standard implicit in Griggs and incorporated into the Act, this evidence tends to show that SEPTA's cutoff score for aerobic capacity does not correlate with the minimum qualifications necessary to perform successfully the job of SEPTA transit officer. Accordingly, this evidence is relevant and should be considered by the District Court on remand."

"For the foregoing reasons, it is clear to us that the District Court did not employ the business necessity standard implicit in Griggs and incorporated by the Act which requires that a discriminatory cutoff score be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge. We will therefore vacate the judgment of the District Court and remand this appeal for the District Court to determine whether SEPTA has carried its burden of extablishing that its 1.5 mile run measures the minimum aerobic capacity necessary to perform successfully the job of SEPTA transit police officer. Because this is the first occasion we have had to clarify the Act's business necessity standard, on remand the District Court may wish to exercise its discretion to allow the parties to develop further the record in keeping with the standard announced here" (emphasis added).

Dissenting Third Circuit Opinion

"Aerobic capacity is an objective, measurable factor which gauges the ability of a human being to perform physical activity. The aerobic demands on the human system are affected by absolutes such as the distance traveled, the speed, the number of steps to be climbed, and similar factors. Governmental agency pronouncements will not shorten distances, reduce the number of steps, or decrease the aerobic capacity of perpetrators to match the reduced standards of officers, male or female. Some males and more females cannot meet the necessary requirements. Based on the facts established at trial, those individuals simply cannot perform the job efficiently. To the extent that they cannot, their hire adversely affects public safety."

"The Civil Rights Act of 1991 presents another potential barrier to the relative fitness test. (The Act) prohibits 'in connection with the selection or referral of applicants or candidates for employment…to…use different cutoff scores…for employment related tests on the basis of….sex.' By its plain language, (the Act's race norming prohibition) arguably prohibits a relative fitness test. The District Court concluded that this provision did not apply. I have some doubt on that ruling, but need not reach that issue because I would affirm it on other bases."