IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1644, 98-1755

CATHERINE NATSU LANNING, ALTOVISE LOVE, BELINDA KELLY DODSON, DENISE DOUGHERTY, and LYNNE ZIRILLI,

Plaintiffs-Appellants

and

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 97-0593

BRIEF FOR APPELLANTS LANNING et al.

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STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction pursuant to 42 U.S.C. §§2000e-1 et seq. and 28 U.S.C. §§ 1331, 1343 (a)(1), (a)(3), (a)(4). This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

I. Whether the district court applied erroneous legal standards for determining whether an employment test with severe disparate impact was job-related and consistent with business necessity and whether SEPTA met its burden using the appropriate legal standards

II. Whether SEPTA failed to demonstrate the job-relatedness of its cutoff of 42.5 ml/kg.

III. Whether the district court applied erroneous legal standards for determining whether the Plaintiffs met their burden of proof that alternative less discriminatory alternatives existed.

IV. Whether the district court made erroneous findings of fact that mandate reversal.

STATEMENT OF THE CASE

This case is a class action lawsuit which was filed on January 25, 1997 and brought on behalf of female applicants for transit police officer positions who were denied employment with SEPTA, a governmental entity responsible for operating mass transit in Southeast Pennsylvania.[1] J.A., Vol. I at 3 (Docket #1) and 18 (Docket #129). The action was brought under a disparate impact theory of Title VII, 2 U.S.C. §2000e-1. A companion case, brought by the United States Department of Justice, was filed on February 18, 1997. The two cases

[1]"J.A." refers to the Joint Appendix. "FOF" designates the district court's Findings of Fact, "COL" references the trial court's conclusions of law contained in the district court's opinion attached to this brief.

were consolidated by Order entered April 21, 1997. J.A., Vol. I at 3. The plaintiff class was certified on August 10, 1997, pursuant to Fed.R.Civ.P. 23(b)(2), and is defined as:

> all 1993 female applicants, 1996 female applicants and future female applicants for employment as SEPTA police officers who have been or will be denied employment by reason of their inability to meet the physical entrance requirement of running 1.5 miles in 12 minutes or less.

FOF 2. J.A. Vol. I at 9 (Docket #55).

The matter was tried in the District Court in January, 1998. The trial court thereafter issued Findings of Fact and Conclusions of Law on June 25, 1998, and entered Judgment on behalf of Defendant SEPTA. A timely Notice of Appeal was filed in this Court on July 23, 1998.

STATEMENT OF FACTS

This case involves a challenge to a physical entrance test developed by Southeastern Pennsylvania Transportation Authority (SEPTA) for transit police candidates that requires all applicants to run 1.5 miles in 12 minutes (hereafter "the test"). There was no evidence of any other jurisdiction nationally that used such an exclusionary test. As a result of the test, 93% of the female class members were denied employment because of their performance on this single hiring measure. FOF 213. By contrast, approximately 56% of male applicants have passed the test during the class period, making them eligible to continue with the employment process. FOF 213. During the same period, numerous incumbent transit police officers could not meet the standard for applicants, but no officer ever was found to have failed to perform the job safely or satisfactorily. FOF 231-233, 256-259. Most importantly, no officer was found to have been unable to apprehend a fleeing suspect or provide effective backup or assistance to another officer because of not being able to meet the standard.

It was uncontested that SEPTA's test had a "severe" discriminatory impact upon women. FOF 209-216, COL 17. Consequently, the trial focus was upon whether SEOTA met its burden to justify the continued use of a discriminatory test. SEPTA made no argument that running 1.5 miles in 12 minutes was necessary to the job; rather, it contended that the test measured aerobic capacity at a level of 42.5 ml/kg/min and that persons with a lower aerobic capacity were not capable of performing the tasks of SEPTA police officers. FOF 125, J.A. Vol. II at 374-375.

Plaintiffs contend that the lower court applied wrong legal standards, errors of law that if corrected would require a ruling in favor of plaintiffs based upon the district court's findings of fact. Specifically, plaintiffs contend that once the district court found that the test was severely discriminatory in excluding women, it did not require SEPTA to meet the CRA of 1991's demanding burden of showing that the test was job related and a business necessity. Instead, the district court allowed SEPTA to keep a test that was easy for men but excluded most women even if the test was "neither required by nor necessary to" SEPTA's policing of the subways. By contrast, the district court required plaintiffs to meet too high a burden regarding whether there were alternative tests with less discriminatory impact, that would enable plaintiffs to prevail irrespective of whether SEPTA's test was job-related or a business necessity. Plaintiffs further contend that the district court made clearly erroneous factual findings, particularly regarding whether the 42.5 ml/kg/min cutoff was scientifically valid and essential to selecting transit police officers.

Plaintiffs have set forth the facts of this litigation with two designations: facts properly found by the trial court or otherwise not in dispute and facts found by the lower

court but challenged as clearly erroneous.[2]

1. Facts Found By The District Court Or Otherwise Not In Dispute.

Defendant SEPTA operates a transit police agency with concurrent jurisdiction with the Philadelphia Police Department in patrolling "zones" on the subway and elevated lines. The "zones" include "beats" which are patrolled primarily by a single officer; each "zone" has a patrol vehicle assigned as well. FOF 26.

A typical tour of duty for a SEPTA police officer involves having one "job," or contact of any sort, in eight hours. J.A., Vol. V at 1377. A Philadelphia police officer, by contrast, handles between ten and twenty-five "jobs" per shift. J.A., Vol. V at 1441. There is one Part I crime[3] on the entire SEPTA system per day and in many instances the Philadelphia Police, not SEPTA police, are the responding officers. J.A., Vol IX at 2717. By contrast, the Philadelphia Police force handles approximately 252 part I crimes per day. J.A. Vol, IX at 2601; J.A., Vol. IV at 1232-1234.

In an emergency situation, a SEPTA police officer either rides a train to the next station (if that is the site of the emergency) or run between stations. SEPTA police radio sends notification of emergencies to the Philadelphia Police, which broadcasts the alert city-wide and has officers respond in patrol vehicles, usually before the SEPTA officer arrives. FOF 260; J.A., Vol. V at 1376-1377, 1396-1397..

Prior to the inception of its zone system and the employment test at issue, SEPTA was

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[2]Factual findings are to be reversed where the record demonstrates that they are clearly erroneous. See Atacs Corp. v. Trans World Communs., Inc., 155 F.3d 659 (3d Cir. 1998); Rule 52(a), Fed.R.Civ.P.

[3]A Part I crime is a serious felony. The designation is that used for uniform crime reports. J.A., Vol II at 352.

concerned about crime on SEPTA's subway and elevated system. FOF 23. SEPTA implemented the zone system, which concentrated the efforts of its transit officers in the subway system and abandoned the policing of the bus system and protection of property at depots. FOF 26. Crime was reduced in 1991 by 50th percentile when SEPTA began to utilize the "zone system," *before the challenged test resulted in any new hires.* J.A., Vol. II at 386-387, J.A., Vol VIII at 2342; J.A., Vol VI at 1686-1687, J.A., Vol. VIII at 2341-2342. During the ensuing years, when crime was reduced further, SEPTA continued the numerical increase of its patrol force, from a low of approximately 70 to a current force of approximately 234. FOF 27, 57; J.A., Vol. VIII at 2333-2334. That force currently has only fourteen female police officers. FOF 208. In the six years from when the test began to be utilized until the time of trial, only 9 women passed SEPTA's running test as compared to 643 men.[4] FOF 209.

In 1991, SEPTA hired Paul Davis to develop a physical fitness test for hiring police officers. SEPTA's articulated goals were to "enhance the physical fitness, physical vigor and general productivity of its police force," which it viewed as a means to achieving a reduction in crime. FOF 38. Dr. Davis met with SMEs (subject matter experts) who assessed the various physical tasks SEPTA police performed. FOF 45-70. The SMEs estimated that a SEPTA police officer would have to run a mile at a pace of 11.78 minutes. FOF 70. Dr. Davis rejected that estimate in fashioning his proposed physical test. FOF 70. Davis did not conduct any actual physical tests with SEPTA incumbents to determine what level of physical

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[4]The lower court's chart at FOF 209 contains an error. It indicates that six women passed the run in 1991 but only five women actually passed; one additional woman, Officer Tracy Thomas, failed but was hired anyway. J.A., Vol. IX at 2559-2578.

fitness they needed for the job. J.A., Vol. VII at 2039. Dr. Davis also concluded that SEPTA police were already "above average" in physical fitness. J.A.,Vol. VII at 2041.

Dr. Davis selected an aerobic level of 42.5 ml/kg/min as the standard for SEPTA police applicants. FOF 110. Dr. Davis translated this standard into a test of running 1.5 miles in 12 minutes. FOF 120-121. This standard, according to national physical fitness norms, can be met by 47% of males and 12% of women aged 20-29. FOF 219. It was undisputed that the test was a proxy for aerobic capacity, and that SEPTA police are not expected to run 1.5 miles on duty. FOF 125; J.A., Vol. II at 374-375.

Beginning in 1991, SEPTA adopted a physical test for police applicants recommended by Dr. Davis. FOF 139. The first component after passing a written test was the 12 minute 1.5 mile run. A person who failed the running test, by even one second, was thereafter barred from continuing with the remainder of the employment process. FOF 136-139; 146. The relative ranking of individuals who pass the physical entrance test plays no role in the hiring decision. FOF 148. An offer of hire can be made up to two and one-half years after the running test is initially administered, FOF 150, there is no re-test prior to hire, and candidates are not directed to maintain any particular physical capacity between date of test and time of hire. FOF 150-151. Successful candidates are trained at the Philadelphia Police Academy with officer-cadets from the Philadelphia Police and other jurisdictions. The SEPTA candidates have the identical curriculum and do not need to run 1.5 miles in 12 minutes in order to graduate or commence employment with SEPTA. J.A., Vol. III at 834-835, 841; J.A., Vol. IX at 2663; J.A., Vol. IX at 2594. They must meet the Pennsylvania statewide fitness standards set by the Municipal Police Officers Education and Training Commission

which includes a 1.5 mile run but which need not be completed within 12 minutes. J.A., Vol. III at 844.

The contested run has been administered on at least four occasions.[5] Out of 83 reported female test takers, only 9, or 11%, passed; by contrast, out of 1080 male applicants, 643, or 59.5%, passed. FOF 209. In actuality, the pass rate is even lower for females, because there was another administration of the test not reported by SEPTA. FOF 215-217. SEPTA hired one female candidate who failed the run, and a second who failed other components of the physical test. J.A., Vol. II at 401-407; J.A., Vol. IX at 2559-2578. The data during the plaintiff class period is straightforward: only 7% of all female applicants passed as compared to 56% of all male applicants. FOF 213. The disparities between pass rates for men and women are highly statistically significant with a standard deviation of 5.56 and p-values of .00001. FFO 209, 211, COL 15.

The physical test has also been administered to incumbent SEPTA transit officers, FOF 231-233, and there have been 182 instances where one of SEPTA's 234 active-duty officers failed the 42.5 ml/kg/min aerobic capacity test. FOF 246. SEPTA has also promoted incumbent officers who have failed the physical test and given special recognition and commendations to officers who have failed a component of the physical fitness test. FOF 256-259. Most significantly, SEPTA has never disciplined, reassigned, suspended or demoted any officer "for failing to perform the physical requirements of the job." FOF 259. SEPTA

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[5]The trial court found that SEPTA had stated that it administered the run on three occasions, but that at least one additional run occurred in 1992. FOF 215. On that occasion, at least five females ran and all failed. Utilizing the court's data in FOF 209, this means that nine women [see footnote 4, supra] passed the run test between 1991 and 1996, out of at least 88, for a passing rate of 10%.

officials conceded that there has never been an instance of an incumbent officer who was below the 42 ml/kg/min threshold who was unable to perform his or her duties. J.A., Vol. II at 315; J.A., Vol. IX at 2752; J.A., Vol. VII at 2209. Similarly, there has never been an occasion in which a loss of life, damage to property or harm to an individual occurred as a result of a police officer having an aerobic capacity below 42.5 ml/kg/min. J.A., Vol. II at 391-392.

The plaintiff class includes highly skilled active-duty police officers from several police forces, including the Philadelphia Police and the tactical bike patrol of the University of Pennsylvania Police. FOF 153-184.

SEPTA has been aware of the disparate impact on women caused by the 1.5 mile 12 minute run. SEPTA never searched for alternative tests that would have a less discriminatory impact upon women. FOF 220. Similarly, prior to litigation SEPTA did not do any studies or take any steps to determine whether the test actually related to successful job performance. FOF 264, 326, 357, J.A., Vol. VIII at 2344.

The trial record provides numerous examples of alternative testing or hiring devices that could successfully select SEPTA transit police officers without causing adverse impact on women. Plaintiffs demonstrated that police and law enforcement agencies nationally did not use the 12 minute 1.5 mile run, or anything close, to hire agents and officers but instead relied upon training academies to get qualified officers. These other agencies included the United States Drug Enforcement Agency, the United States Secret Service, the FBI, numerous urban transit police departments, the Philadelphia Police, and the Pennsylvania Municipal Police Officers Education and Training Commission certification standards that govern 1,200

municipalities. J.A., Vol. VIII at 2464. [This Exhibit is reproduced herein, at the end of the Statement of the Case.]

Plaintiffs' expert, Dr. William McArdle, proposed an alternative non-discriminatory test that would require men and women to perform at the 50th percentile of their respective gender's capacity for each of four physical test components as a pre-condition to academy training and hiring. FOF 372-375. Another alternative would utilize the training academy as the training ground and measure for qualifying SEPTA Police Officers.[6]

In addition, SEPTA's experts have developed other less discriminatory tests for police officer applicants of other departments and could be ordered to develop a valid less discriminatory test for SEPTA. For example, SEPTA's expert Dr. Robert Moffatt does not use the 1.5 mile run in testing police officers, J.A., Vol. VII at 2182-2183, 2185-2187; and SEPTA's expert Dr. Norman Henderson had developed a physical fitness hiring test for police that had no adverse impact on women. J.A., Vol. VIII at 2265-2266.[7]

2. Facts Found By The District Court But Disputed As Clearly Erroneous.

Plaintiffs set forth in this section the principal factual findings made by the district court that are clearly erroneous. The findings are listed seriatim, followed by an abbreviated summary of the reasons each is clearly erroneous. A more complete demonstration of the

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[6]As noted above, individuals who passed SEPTA's run might not be hired and admitted to the Academy for one or two years after the run was administered, with no retest. In effect, therefore, the Academy was the accepted training modality for SEPTA police, who had no requirement to be able to run 1.5 miles in 12 minutes at time of training or commencement of actual police work.

[7]Plaintiffs proposed (in post-trial submissions), that these experts be utilized to devise a new hiring test, itself another alternative to defendant SEPTA's reliance on the 12 minute 1.5 mile run. J.A., Vol. VIII at 2379-2381.

erroneous nature of these findings is set forth in the Argument.

a) The district court found that the critical duties of SEPTA police were unique and required a level of walking and running not found in other departments. FOF 43. This finding is clearly erroneous because it ignores the fact that the Philadelphia Police deploy over 500 beat cops with similar assignments, and that Philadelphia police officers handle a substantial proportion of the crime committed on SEPTA property. The finding is also contradicted by the proof of the responsibilities and performances of police in other transit agencies. J.A., Vol. II at 346-347; J.A., Vol. IV at 1161-1166, 1195-1198, 1228-1232; J.A., Vol. V at 1422-1423, 1446; J.A., Vol. IX at 2717; J.A., Vol. IX at 2600.

b) The district court found as a fact that the failure of plaintiffs on the SEPTA test "demonstrated a cavalier attitude toward the position by not preparing or training for the running test." FOF 206. This finding is directly repudiated by the physiological differences between men and women, the normative data regarding aerobic capacity and the court's finding of severe disparate impact. FOF 217-219. This finding is directly contradicted by the court's separate finding that "research in the field of exercise physiology establishes that setting a cutoff score of 12 minutes on a 1.5 mile running test will have an adverse impact on women." FOF 217. The finding is further repudiated by the conduct of the individual Plaintiffs and their police work and preparation for the running test. J.A., Vol I at 102-106, 145; J.A., Vol. I at 167; J.A., Vol. V at 1425-1426, 1430-1431.

c) The court found that Dr. Davis "demonstrated that an aerobic capacity of 42.5 ml/kg/min is necessary to successfully perform the functions of a SEPTA transit officer." FOF 129. This finding is clearly erroneous for numerous reasons, including the

absence of empirical data in support thereof, J.A., Vol. VII at 2196-2197; the performance of SEPTA incumbents who lacked that aerobic capacity but fully and often heroically performed their responsibilities, J.A., Vol. II at 391-392; the fact that this exclusionary standard is not used by any major law enforcement or transit police agency, J.A., Vol. VIII at 2464; and the numerous studies authored by SEPTA's own experts showing that a lower aerobic capacity was sufficient to perform the work of a SEPTA transit officer. FOF 117; J.A., Vol. IX at 2774; J.A., Vol. VII at 2031-2032, 2039, 2133-2140; J.A., Vol. VII at 2182-2183, 2185-2187; J.A., Vol. VIII at 2265-2266.

d) SEPTA's expert, Dr. Robert Moffatt, conducted a series of tests demonstrating that persons with higher aerobic capacity have more strength after engaging in a run. FOF 342-347. The district court found that studies by Dr. Moffatt, conducted years after the running test was developed and only to defend the legal challenge, demonstrated job-relatedness and business necessity of SEPTA's 42.5 ml/kg cut off. FOF 326-356. These findings do not support a cut off of 42.5 ml/kg because the study of SEPTA officers included only one female, and that female performed the test fully and satisfactorily even though her aerobic capacity at the time was 35 ml/kg/min. J.A., Vol. VII at 2210-2211. In addition, Dr. Moffatt's laboratory studies showed that all of the people tested who had aerobic capacities ranging from 36 to 58 ml/kg/min were able to perform a simulation of SEPTA's worst case scenario. J.A., Vol. VII at 2216, FOF 340.

e) The court found that the post hoc statistical studies performed by Drs. Siskin and Griffin confirmed the validity of the 42.5 ml/kg/min cut off. FOF 264-325 These findings are clearly erroneous for numerous reasons. The statistical studies involved a

predominantly male sample. J.A., Vol. VII at 1823 SEPTA police at all levels of aerobic capacity satisfactorily performed their duties, without any evidence that a single officer was unable to catch a perpetrator due to inadequate aerobic capacity. Defendants' exhibits showed that the aerobic capacity corresponding with the highest number of arrests for all offenses was 33 ml/kg/min and individuals with aerobic capacity of 43, 44 and 45 ml/kg/min had arrest rates *lower* than the officer(s) at aerobic capacity 42 ml/kg/min. J.A., Vol. XI at 3396 & 3399. Additionally, the statistical correlations were too low to establish practical signficance.

f) The lower court found that Dr. Siskin proved that having more officers with a higher aerobic capacity would have resulted in an increase in the actual number of arrests made by SEPTA police, thereby making the transit system safer and proving the need for the higher aerobic capacity. FOF 303. But Dr. Siskin improperly equated "incidents," i.e., circumstances where a Part I crime was reported, with "opportunities" to make an arrest. J.A., Vol. VI at 1834-1835. Stated differently, Dr. Siskin posited a higher rate of arrest for officers with higher aerobic capacity, and then used that rate against the total number of reported crimes to extrapolate and conclude that there would have been more arrests if the higher arrest rate was in effect. There was no showing of a single incident reported by SEPTA in which an arrest was not made when a perpetrator was just out of reach of the officer or otherwise able to be arrested.

TABLE 1

AGENCY	REQUIRES APPLICANTS TO RUN 1.5 MILES IN 12 MINUTES OR LESS?	ANY RUN REQUIRED FOR APPLICANTS?	1.5 MILE EQUIVALENT
United States Drug Enforcement Administration ("DEA")	No	2 miles (men 16:30; women 18:45)	men 12:22; women 14:04
United States Secret Service	No	No	
Federal Bureau of Investigation ("FBI")	No	No	
AMTRAK Police Department (Mid Atlantic North Region)	No	No	
Washington, D.C. Metropolitan Transit Authority ("WMATA")	No	No	
Maryland Mass Transit Administration ("MTA")	No	1/4 mile (men 4:00; women 4:00)	men 24:00; women 24:00
Port Authority of New York and New Jersey	No	No	
New York City Transit Police	No	1.5 mile (men 15:30; women 15:30)	men 15:30; women 15:30
New York City Police Department	No	1.5 mile (men 15:30; women 15:30)	men 15:30; women 15:30
Philadelphia Police Department	No	No	
Pennsylvania Municipal Police Officers Education and Training Commission	No	No	
SEPTA	**Yes**	**1.5 mile (men 12:00; women 12:00)**	**men 12:00; women 12:00**

PLAINTIFF'S EXHIBIT 56

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no cases or proceedings pending in this Court related to this Appeal (other than the appeal of the United States of America, co-plaintiff below, at No. 98-1755). There are no cases or proceedings in the District Court related to this appeal.

STANDARD OF REVIEW

Questions of law, including a determination of whether the district court applied an incorrect legal standard, are subject to plenary review by this Court. See In re Tutu Wells Contamination Litig., 120 F.3d 368, 383 (3d Cir. 1997). This Court will review findings of fact and apply a "clearly erroneous" test; "[a] finding becomes clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.'" Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 525 (3d Cir. 1992)(citation omitted). Lesser deference is due to findings of fact that depend upon or incorporate a rule of law, where the district court has committed an error of law. See Daniels v. Essex Group, Inc., 937 F.2d 1264, 1269-1270 (7th Cir. 1991).

SUMMARY OF THE ARGUMENT

Plaintiffs, a class of females candidates for SEPTA transit police officer positions, challenge as unlawful a pre-employment requirement that applicants successfully run 1.5 miles in 12 minutes. SEPTA's restrictive test excluded 93% of the female class members, applicants who passed the written test. By contrast, approximately 56% of male applicants passed during the class period, making them eligible to continue with the employment process. SEPTA uses an employment test that is relatively easy for men but extremely

difficult for women. Police forces nationally do not use such an exclusionary test but employ officers who consistently perform proficiently in all areas of police work. This is true as well of a substantial portion of the incumbent SEPTA police force who do not meet this criterion.

This case involves a disparate impact challenge to SEPTA's 12 minute 1.5 mile run ("the test"). The district court found that plaintiffs met their burden of showing that the test has a discriminatory disparate impact against women. COL 3, 17. (SEPTA's "test has severe adverse impact against women"). Once discrimination was shown by plaintiffs, the burden of proof thus shifted to SEPTA "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity...." 42 U.S.C. § 2000e-2(k)(1)(A)(i). COL 3. However, even if SEPTA met its burden of persuasion, plaintiffs may still prevail if they demonstrate that an alternative employment practice that has less disparate impact "would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'" and the employer refuses to adopt such an alternative. COL 10; 42 U.S.C. § 2000e-2(k)(1)(A)(ii) & (C); Albemarle Paper v. Moody, 422 U.S. 405, 425 (1975).

The Civil Rights Act of 1991 (CRA 1991) amended Title VII to respond to limitations imposed by the Supreme Court's holding in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2. The amendments were explicitly designed to restore the scope and protections of the law to the standards "enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)." 42 U.S.C. § 1981.

Nevertheless in this case, the district court relied on repudiated Wards Cove standards

in sustaining a test that improperly excludes virtually all women from the SEPTA transit police force. The District Court repeatedly used the outdated Wards Cove standard, applying it to the issues of (1) whether SEPTA's test was a "business necessity;" (2) whether the test was "job related;" and (3) whether less discriminatory alternatives exist. This error of law warrants reversal. Indeed, based upon the facts found by the lower court, the proper application of the Civil Rights Act of 1991 warrants a grant of relief to plaintiffs by this Court, without remand.

The district court also erred when it concluded, as a matter of law, that SEPTA had proved that the specific cut-off employed for screening applicants, the 12 minute 1.5 mile run, was empirically valid as a "job-related" standard. The cut-off fails to predict who can perform successfully as a police officer. To the contrary, the record demonstrates that individuals who cannot meet the cut-off perform as superior police officers. SEPTA acknowledged that its incumbents who tested below the cut-off performed capably and at SEPTA's desired level, and that there had never been loss of life, injury, damage to property, or the failure to apprehend a suspect, caused by an officer's failure to meet this threshold. The court's conclusion was also repudiated by the performance of the Philadelphia Police (which handled much of the crime committed on SEPTA property) and that of the F.B.I., the D.E.A., the Secret Service, the Pennsylvania certification standards for over one thousand municipal police agencies and various nationally regarded transit agencies, none of which used a standard nearly as exclusionary.

Finally, the lower court erred in making, and relying on, clearly erroneous factual findings.

ARGUMENT

I. The District Court Applied Erroneous Legal Standards For Determining Whether An Employment Test With Severe Disparate Impact Was Job-related And Consistent With Business Necessity.

A. The district court applied a standard for business necessity which was rejected by Congress in the CRA 1991.

The district court used the "weakened" standard of business necessity set forth in Wards Cove Packing Co., Inc. v. Atonio that permitted employment practices that have a severe discriminatory impact even if they are "not necessary" to business interests. See 490 U.S. 642, 659 (1989)("the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.... [T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business. . ."). The lower Court held that a showing by the employer that its employment practices "significantly serve, but are **neither required by nor necessary to, the employer's legitimate business interests**" are permissible even though they have a severely disproportionate impact. COL 8 (emphasis provided). Thus, the district court approved a test that is much easier for men to pass and excludes most women without a showing that the test was necessary to SEPTA's policing.

It was precisely this "weakened" approach to disparate impact law and use of a minimal standard in Wards Cove that Congress overturned by adopting the CRA of 1991. Congress codified the concept of "business necessity" as set forth in Griggs and in other Supreme Court decisions decided *prior* to Wards Cove. See 42 U.S.C. § 1981; 401 U.S. 424 (1971). The pre Wards Cove cases made clear that the purpose of disparate impact law is to remove "arbitrary and unnecessary barriers" that do not fairly test men's and women's

abilities to do a particular job. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). See also Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (majority opinion only); Connecticut v. Teal, 457 U.S. 440 (1982); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

In disparate impact cases, a substantial exclusion of a group signals that the employment test must be scrutinized to ensure that it is accurately testing for a quality or skill truly necessary and related to the particular job and is not simply an "arbitrary and unnecessary barrier". See Griggs, 401 U.S. at 431. Plaintiffs must demonstrate discrimination by a substantial and statistically significant difference in the test's impact upon a protected group. Once a test is shown to have a discriminatory impact, the employer must prove that the test should still be used, in spite of its discriminatory effects. The focus is not on the employer's intent but on the accuracy of the testing instrument. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." Id. at 432.

Griggs set forth the disparate impact legal standard[8] as an inquiry into whether the employer can prove that the test is "job related" and a "business necessity." See id. at 431. This analysis involves "the question whether testing requirements...fulfill a genuine business need." Id. at 432.

The Griggs standard was thereafter applied in Dothard v. Rawlinson. See 433 U.S.

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[8]"[T]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs, 401 U.S. at 431.

321 (1977). At issue in Dothard were the established height and weight cutoff requirements for state prison guards which excluded 41 % of female applicants and less than 1% of male applicants.[9] See id. at 329-330. The defendants argued that the requirements served as a proxy for strength, but failed to provide evidence as to the "requisite *amount* of strength thought to be *essential* to good job performance." Id. at 332. (emphasis provided) The Supreme Court explicitly rejected the state's plea that it be subjected to a lesser burden, reiterating that "'[t]he touchstone is business necessity.'"[10] Id. at 331, n. 14.

In Connecticut v. Teal, 457 U.S. 440 (1982) the Court reaffirmed Griggs. The Court required that the employer meet this heavy burden even though the employer evened up the disparity by selecting more minorities to make up for the test's disproportionate impact. See id. at 444. The Supreme Court's holding showed that it disapproved of a faulty testing mechanism because it was excluding individuals based on their group membership and not on whether they could do the job. Evening the disparity up at the end by selecting more minority members, did not protect the individuals who were wrongfully excluded. "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." Id. at 453-54.

However, in this case, the district court articulated a substantially diluted version of the

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[9]These disparities were less than those presented in this case. At least 59% of women could meet the standard in Dothard as compared to only 6% in the plaintiff class. See Dothard, 433 U.S. at 329.

[10]The Court stated that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Id.

legal standard of "business necessity."[11] See COL ¶ 5-6. Specifically, the district court held in its Conclusions of Law that the Supreme Court:

> **implicitly approves employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests.** Thus, to demonstrate business necessity, SEPTA need only show that the 1.5 mile run component of its physical fitness test bears a manifest relationship to the position of SEPTA transit police officer.

COL ¶8 (emphasis provided). The district court's standard allows an *unnecessary* employment practice that excludes most women as long as it can be shown to serve a "legitimate" interest. The district court relied on Wards Cove[12] and on dicta from New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), for its weakened business necessity standards.

At issue in Beazer was whether New York City Transit Authority's rule excluding narcotics users from its mostly safety sensitive positions imposed a disparate impact on blacks and Hispanics and, if so, whether the rule was job-related and a business necessity. See 440 U.S. at 572. Beazer was primarily concerned with the statistical analysis used to establish disparate impact. The Court ruled that the statistical analysis was "at best...weak." Id. at 587.

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[11]The lower court specifically rejected the language from Dothard and stated that appellants "misinterpreted the Supreme Court's standard for business necessity by incorrectly relying on this dictum from Dothard." COL 5-6. The Dothard language on business necessity to which the Court takes issue is as follows: "'[t]he touchstone is business necessity,' Griggs, 401 U.S. at 431; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." 433 U.S. at 331, n. 14. This definition of "business necessity" was not an aberration and is in accord with all other Supreme Court holdings prior to Wards Cove aimed at eliminating "arbitrary and unnecessary barriers." See Griggs, 401 U.S. at 431.

[12]What was held permissible in Wards Cove was a hiring practice that was convenient to the employer's interests but which was not necessary to the hiring process. See 490 U.S. 642 (1989).

In a footnote, the Court stated in dicta[13]:

> Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency **require** the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are "safety sensitive." Finally, the District Court noted that those goals are significantly served by - even if they do not require - TA's rule as it applies to all methadone users including those who are seeking employment in nonsafety-sensitive positions. The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question."

Id. (emphasis provided, citations omitted).

In Wards Cove, the Supreme Court addressed "disputed questions of the proper application of Title VII's disparate impact theory of liability" because the Court had been "evenly divided" on those issues in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).[14] Wards Cove, 490 U.S. at 650-651. The Supreme Court proceeded to reverse nearly two decades of disparate impact law with respect to business necessity:

> Though we have phrased the query differently in different cases, it is generally well established that **at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.** See e.g., Watson v. Fort Worth Bank & Trust, 487 U.S., at 997-999; New York City Transit Authority v. Beazer, 440 U.S., at 587, n.31; Griggs v. Duke Power Co., 401 U.S., at 432. **The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. .... there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster:** this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above.

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[13]Teal was decided subsequent to Beazer and lends additional support for the Beazer footnote language as being mere dicta. See 457 U.S. 442.

[14]This statement in Wards Cove demonstrates that the "business necessity" discussion in Beazer was not precedential.

490 U.S. at 659 (emphasis provided).

Wards Cove merged disparate *impact* analysis into disparate *treatment* analysis in terms of burdens of proof and production.[15] See 490 U.S. at 656-60. The Wards Cove majority adopted the theory of disparate impact advocated by Justice O'Connor in the plurality opinion of Watson v. Fort Worth Bank & Trust and the premise that disparate impact analysis is "functionally equivalent to [the analysis of] intentional discrimination."[16] 487 U.S., at 987. The Wards Cove burden of merely producing evidence of some legitimate reason for the discriminatory practice is a substantially lower burden than the previous burden of proof that the practice is a business necessity.

Wards Cove's merging of disparate impact and disparate treatment analysis ignored "the crucial distinctions between the two forms of claims." Watson, 487 U.S. at 1002. (Blackmun, J., concurring). In a disparate impact case, plaintiff must *prove* that *discrimination* occurred in the test's *impact* as part of its prima facie case *before* the burden

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[15]Justice O'Connor proposed a major change in the allocation and weight of burdens of production and proof for disparate impact cases that mimics those traditionally used for *disparate treatment,* or intentional discrimination, analysis. See 487 U.S. 1002. See id. at 1004 (concurrence by Justices Blackmun, Brennan, Marshall)("the echo from the disparate-treatment cases is unmistakable.") Specifically, once plaintiff produces evidence of a prima facie case through statistical evidence of disparate impact the burden of *production* shifts to the employer to show that its "*employment practices are based on legitimate business reasons*" but plaintiff still maintains the actual burden of proof. (emphasis added, citing Beazer). 487 U.S. at 998. This parallels disparate treatment cases where once plaintiff produces evidence of a prima facie case, the employer has a burden of production "to articulate some legitimate nondiscriminatory reason" but plaintiff still retains the ultimate burden of proof. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[16]Justice O'Connor's view of the purpose of disparate impact theory is wholly inconsistent with that articulated in Griggs, that intent is irrelevant and that the effect of the testing process is what is important.

shifts to the employer. Then the employer must *prove* that the test is job-related and a business necessity and therefore justified in spite of its discriminatory effects. Griggs, 401 U.S. at 431. By contrast, in a disparate treatment case, plaintiff need only demonstrate an *inference of discrimination,* a minimal and not "onerous" prima facie case.[17] Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). This causes the *burden of production* to shift for the employer to simply articulate a legitimate nondiscriminatory reason for the employer's conduct. Plaintiff still maintains the *ultimate burden of proving discrimination.*[18] Id. at 253-257. Thus, in a disparate impact case discrimination has already been proven when the burden shifts to the defendant whereas in a disparate treatment case discrimination has not been proven, thereby justifying a less demanding burden for the employer. The violation alleged in a disparate treatment challenge focuses on the critical element of *intent*, while in disparate impact analysis *intent* is wholly irrelevant. The critical issue is the *effect* of the employment practice and whether it is a business necessity or an "arbitrary and unnecessary barrier" to employment. See 42 U.S.C. § 1981; Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-336, n.15 (1977); Watson, 487 U.S. at 1002 (Blackmun, J., concurring).

In a spirited dissent, four Justices of the Wards Cove Court led by Justice Stevens

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[17]This minimal burden for the plaintiff in its prima facie case recognizes the difficulty of proving intentional discrimination where direct evidence of intent may be elusive or subtle and where inferential and indirect evidence may be all that is available. Id.

[18]If plaintiff is able to prove discrimination then the employer's burden in a disparate treatment case is extremely heavy: it must show that it would have made the same business decision even if the discriminatory motive had not played a part in its decision. Price Waterhouse v. Hopkins, 490 U.S. 228 (1988).

(who authored Beazer) charged that the Court was "[t]urning a blind eye to the meaning and purpose of Title VII" and was "perfunctorily reject[ing] a longstanding rule of law." 490 U.S. 663 (Stevens, J., dissenting). The dissent explained that previous precedent had held that the employer's burden in a disparate impact case was "weighty" and that business necessity was an affirmative defense which required an employer "to justify the practice by explaining why it is necessary to the operation of the business." Id. at 670-671. The dissent stated that it was:

> astonished to read that the "'touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice...[T]here is no requirement that the challenged practice be...'essential'" ante, at 659. This casual--almost summary--rejection of the statutory construction that developed in the wake of Griggs is most disturbing."

Id. at 671-72 (citations omitted). Foreshadowing future developments in the law, the dissent stated that it was inappropriate for the Supreme Court to reject the Court's longstanding interpretation of Title VII even if it disagreed with it because "Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning." Id. at 672.

Indeed, Wards Cove prompted a substantial correction by Congress in the Civil Rights Act of 1991:

> The Congress finds that-
> ...
> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections;...

42 U.S.C. § 1981, Note, Congressional Findings. Congress focused on disparate impact in

identifying 2 of the 4 purposes[19] of the Act:

> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C.20003 et seq.);

Id., Note, Purposes of 1991 Amendments.

With the CRA 1991, Congress codified the concepts of "business necessity" and "job related" first articulated Griggs v. Duke Power Co.:

> An unlawful employment practice based on disparate impact is established under this title only if-
>
> (i) 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**; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S. C. § 2000e-2(k)(1)(A)(ii)(emphasis provided).

Moreover, the CRA 1991 further provides that if disparate impact is not demonstrated, the employer shall not be "required to demonstrate that such practice is *required* by business necessity." Id. at § 2000e-2(k)(1)(B)(ii)(emphasis provided).

The use of "necessity" is not mere surplusage. See Dunn v. Commodity Futures

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[19]Congress stated that the only legislative history that could be relied upon with respect to "construing or applying, any provision of this Act that relates to Wards Cove-Business necessity/cumulation/alternative business practice" was that set forth in an interpretive memorandum at Vol. 137 Congressional Record S. 15276 (daily ed. Oct. 25, 1991); 42 U.S.C. § 1981, Note, Legislative History for 1991 Amendment.

Trading Com'n, __ U.S. _, 117 S.Ct. 913, 917 (1997) ("[L]egislative enactments should not be construed to render their provisions mere surplusage."). The CRA 1991's specific statutory codification of "business necessity" and the burdens of proof and production constitute an unequivocal rejection of Wards Cove and the notion that disparate impact analysis should share the same burden shifting schemes as those used in intentional discrimination analysis. See 42 U.S.C. § 2000e-2(k)(1)(A)-(B).[20]

Federal courts interpreting the CRA 1991 have applied the heavier burden of Griggs in requiring the employer to prove business necessity when a business practice causes a disparate impact. See e.g., Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993); Garcia v. Woman's Hosp. of Texas, 97 F.3d 810 (5th Cir. 1996) (disparate treatment and disparate impact have different burdens of proof); Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107 (3d Cir. 1996) (disparate impact must be justified by business necessity); Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).

In Bradley v. Pizzaco, the court ruled that the CRA of 1991 "reinstated" the law as it existed before Wards Cove. See 7 F.3d at 797. The Court stated that under Wards Cove the employer bore only the burden of producing evidence of a legitimate business justification,

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[20]Congress imposed a burden of proof, rather than production, on the employer as required by Griggs. Moreover, the selection of language "job related and consistent with business necessity" rather than "business justification," "legitimate employment goals of the employer" or "manifest relationship" are instructive of the weighty burden on the employer in demonstrating business necessity, not one of a mere "justification" or "legitimate employment goal." Walters v. Metropolitan Educational Enterprises, _U.S. _, 117 S.Ct. 660, 664 (1997)("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") Congress also included an exception for disparate impact cases involving illegal drug users (Beazer). See 42 U.S.C. 2000e-k(3). Even after the CRA of 1991, Beazer stands in a different category than the typical disparate impact case.

but that the CRA of 1991 returned the burden of persuasion regarding business justification to the employer. See id. "This burden is a heavy one" and requires the employer to show that the practice has a manifest relationship to the job, a compelling need to maintain the practice, and that there is no alternative to the challenged practice. See id. at 798. Likewise in Fitzpatrick v. City of Atlanta, the court held that the CRA 1991 "statutorily reversed" Wards Cove on the issue of business necessity and that the employer "must demonstrate business necessity in order to avoid liability." Id. at 1118-1119, n. 6 ("merely asserting the safety rationale does not suffice to prove the defense", employers must demonstrate the "practice is in fact required....").

Under the Civil Rights Act of 1991, once disparate impact is shown, an employer must demonstrate that the employment practice is a business necessity. By contrast, the district court held that a showing that employment practices "significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests" are permissible, notwithstanding their harshly disproportionate impact. COL 8.

B. SEPTA's did not demonstrate the business necessity of its test.

SEPTA never demonstrated the business necessity of its test: it simply articulated a business purpose for its test that was not substantiated by the facts. The district court using the incorrect legal standards of Ward's Cove held this to be enough.

SEPTA implemented an aerobic capacity standard of 42.5 ml/kg (running 1.5 miles in 12 minutes), as a proxy for physical fitness and aerobic capacity. SEPTA's articulated business purpose was "to enhance the physical fitness, physical vigor and general productivity of its police force." FOF 38, COL 79. SEPTA further "believed that improving the physical

fitness of its police force was one of the best methods to achieve" its goal of reducing crime. FOF 38, COL 79.

Because the test has excluded 93% of all women who have applied since 1993, SEPTA must demonstrate that it serves a genuine business need, and is not an "unnecessary barrier" for women wishing to become transit police officers.

Prior to the implementation of Dr. Davis's male 50th percentile standard, SEPTA transit police officers were already above average in physical fitness. J.A., Vol. VII at 2041. The implementation of Dr. Davis's standards led to the exclusion of 93% of female class member applicants and a reduction of the number of women overall on SEPTA's police force. FOF 209. Indeed since 1993, only four women have even passed its test as compared to 416 men, thereby averaging less than one female pass per year. FOF 209.

In the year *preceding* the implementation of SEPTA's standards there was a 50 percent reduction in crime stemming from the implementation of the zone system. J.A., Vol. VI at 1686-1687, J.A., Vol. VIII at 188-189.. With the tripling of the police force from approximately 70 to 234 during the next six years and the concentrating of officers in a small geographic scope where most crime occurred, crime continued to drop but much more gradually. Id. FOF 27, 57.

Even though 60% of the incumbent police force failed to meet the aerobic capacity standard at some time, FOF 182, there has never been a single instance of an incumbent police officer who was unable to satisfactorily perform his or her duties. J.A., Vol. II at 315; J.A., Vol. IX at 2752; J.A., Vol. VII at 2209. Nor has there been loss of life, damage to property or harm to any individual stemming from an officer having an aerobic capacity

below 42.5 ml/kg. J.A., Vol II at 391-392. There is no evidence of an officer with an aerobic capacity below 42.5 ml/kg ever letting a suspect escape in the course of a chase. Id.

By contrast, SEPTA promoted, commended and specially recognized officers who did not pass the physical fitness test. FOF 256-259. SEPTA's hiring of Officer Tracy Thomas, *after* the test was implemented even though she could not run 1.5 miles in 12 minutes, is a particularly vivid demonstration by SEPTA of the lack of business necessity of its test. (J.A., Vol. IX at 2559-2578). Officer Thomas is in charge of defensive tactics training for all of SEPTA's officers, serves on foot patrol when she is not training officers and has been commended for her police officer performance. J.A., Vol. III at 775-777, 786-787, 800.

Numerous courts have recognized the relevancy of satisfactory performance by incumbents. See Griggs, 401 U.S. at 427; Albemarle, 422 U.S. at 434; Blake v. City of Los Angeles, 595 F.2d 1367, 1382 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980)(evidence that many male police officers were hired without using the pre-employment test "suggests that the practice is not essential to safe and efficient job performance"); Legault v. aRusso, 842 F.Supp. 1478 (D.N.H. 1994) (test which included 12 minute 1.5 mile run for firefighters was suspect because incumbent employees who did not pass the test demonstrated proficiency on the job).

This much larger workforce, which consisted of many people who could not meet SEPTA's standards but who had better than average physical fitness, was successful in reducing crime. By SEPTA's own assessment of satisfactory job performance of its officers individually and of its overall force's success in reducing crime generally, 42.5 ml/kg has not been shown to be necessary. The undisputed facts show that crime dropped independent of

transit officer aerobic capacity, undermining SEPTA's "belief" that adopting the male 50th percentile aerobic capacity standard was necessary[21] to policing.

In confirming that SEPTA's exclusionary standards are nonetheless a genuine business need, the standards of other law enforcement agencies with similar job tasks are also relevant. See Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981) (hiring policies of comparable businesses may shed light on feasible alternatives); Blake v. City of Los Angeles, 595 F.2d 1367, 1381 (9th Cir. 1979)(the standards of other police departments that did not have height requirement were relevant to showing the lack of business necessity); Officers for Justice v. Civil Serv. Comm'n, 395 F.Supp. 378, 383 (N.D. Ca. 1975)(fact that other police forces had no physical agility requirement, and instead "reli[ed] on academy training to develop the physical condition of the officers" made "defendants" burden particularly heavy" to show business necessity).

There was no evidence of a single police department or law enforcement agency that used an aerobic capacity application standard equal (or even close) to that of SEPTA's. J.A., Vol. VIII at 2464. These other police and law enforcement agencies use their training academies to get officers physically prepared to perform their job. Moreover, many of these departments handle more crime and more serious crimes than the SEPTA transit police. J.A., Vol. IX at 2601, 2717; J.A., Vol. IV at 1232-1234.

The lack of business necessity of SEPTA's test is also demonstrated by the successful police officer careers of the named plaintiffs at other departments that do not use exclusionary

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[21]These facts also call into question whether such standards were indeed even related to the drop in crime.

standards like SEPTA's. Plaintiff Catherine Lanning was hired by the University of Pennsylvania Police Department and was one of the first officers on the Department's elite tactical bicycle unit which patrols high crime areas at night. Plaintiff Lanning has received commendations for her outstanding performance. FOF 155. Plaintiff Altovise Love was hired by the Philadelphia Police Department, has engaged in foot patrol in high crime areas at night, has assisted SEPTA officers in arresting suspects, and is currently on the list to be promoted to detective. FOF 160. Prior to being rejected by SEPTA, Plaintiff Belinda Dodson had been recognized for her heroic work in arresting an armed suspect and she had served in law enforcement for 10 years. FOF 166. Plaintiff Lynne Zirilli was recently hired by the Philadelphia Police Department. FOF 173.

SEPTA was well aware that its standards had a severely disparate impact upon women, but it never considered less discriminatory alternatives to the test as required by the Guidelines. FOF 220; 29 C.F.R. § 1607.3 Before using a test that has an adverse impact, the employer has "an **obligation** pursuant to the *Uniform Guidelines* to explore alternative procedures and to implement them if they have less adverse impact...." Officers for Justice v. Civil Serv. Commissioners, 979 F.2d 721, 728 (9th Cir. 1992) (emphasis in original); See also Brunet v. City of Columbus, 1 F.3d 390,412 (6th Cir. 1993), cert. denied sub nom Brunet v. Tucker, 510 U.S. 1164 (1994) (employer is "obligated to conduct its own investigation of viable alternatives with lesser or no impact on the female applicants" and there was no showing that the City of Columbus explored alternatives thereby constituting error). This failure by SEPTA alone mandates relief.

It is noteworthy that SEPTA's experts have relied upon less discriminatory alternatives

in other contexts. Three years prior to recommending the 12 minute 1.5 mile run for SEPTA, Dr. Davis conducted a study of 150 police officers in Florida in which he concluded that the 12 minute 1.5 mile run was *not* related to successful performance on job related tasks. J.A., Vol. IX at 2774. Dr. Davis concluded in the study that the 1.5 mile run was *not* an important screening measure for applicants. Id. Moreover, Dr. Davis showed that there were at least five other physical criteria that were significantly related to successful performance as an officer and that these alternative criteria did not have a disparate impact upon female applicants. Id.

SEPTA expert Dr. Moffatt testified that he never uses a 1.5 mile run in developing tests for police officer applicants and incumbents and prefers alternative tests that more approximate the actual tasks of the officer. J.A., Vol. VII at 2206-2207. Moreover, in Dr. Moffatt's simulation of what SEPTA described as the critical job task of pursuing and apprehending a suspect, an officer with an aerobic capacity of 35 ml/kg successfully completed the task. J.A., Vol. VII at 2210-2211. This officer's successful performance demonstrates that SEPTA's cutoff of 42.5 ml/kg is not a business necessity. Dr. Moffatt's laboratory simulation further repudiates the business necessity of 42.5 ml/kg since people ranging from 36 to 58 ml/kg successfully performed. FOF 340.

Finally, SEPTA expert Dr. Norman Henderson testified that he had developed a physical abilities test for police officers that had no adverse impact. J.A., Vol. VIII at 2265-2266. Thus, SEPTA's own experts have demonstrated that there are less discriminatory alternative police tests and SEPTA failed to adopt them in violation of the CRA of 1991. 42 U.S. C. § 2000e-2(k)(1)(A)(ii); See also, 29 C.F.R. § 1607.3

The district court rejected the argument that evidence of SEPTA incumbents and incumbents of all other police departments whose officers were performing satisfactorily without meeting such rigorous standards was relevant to the issues of business necessity and job-relatedness. COL 78-83. The court stated that an employer cannot be bound by the standards met by incumbents or other departments or else it could never improve the "efficiency" of its workforce. See id. "This result is not required by Title VII and would, in application, prevent employers from improving the performance of its workforce." COL 82. Thus, the Court relies upon SEPTA's articulated "laudable" purpose as satisfying the business necessity standard. COL 79 This may have been sufficient under Wards Cove, but is inappropriate under the CRA 1991.

The district court's conclusion misapprehends the purpose of Title VII disparate impact analysis. When a testing mechanism has a discriminatory impact, it must actually measure skills that are necessarily related to the job. See Griggs, 401 U.S. 424; Dothard, 433 U.S. 321; Teal, 457 U.S. 440; Civil Rights Act of 1991, 42 U.S.C. 2000e-2(k)(1)(A)(i). Standards that "generally would improve the overall quality of the work force" were rejected in Griggs, 401 U.S. at 431 (where incumbents who did not meet the standards performed satisfactorily) and in Albemarle, 422 U.S. at 428, 431 ("certain verbal intelligence" level is discriminatory since it was not "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."). Likewise, in United States v. Virginia, 518 U.S. 515 (1996) the Supreme Court rejected the argument that women would "downgrade" military training school adding that:

> More recently, women seeking careers in policing encountered resistance based on fears that their presence would 'undermine male solidarity'; deprive male

> partners of adequate assistance, and lead to sexual misconduct. Field studies did not confirm these fears.

518 U.S. at 542, 544 (citations omitted).

The district court never required SEPTA to meet its burden of demonstrating business necessity finding instead that SEPTA's articulated "legitimate business purposes" were enough. On the extensive record before this Court, SEPTA could not meet the CRA 1991 burden of business necessity and thus, the district court's decision should be reversed. See Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795, 797 (when similar error was made, court reversed because the record was extensive and court did not want to further delay a remedy to plaintiffs by remanding the case).

C. The Court erred as a matter of law in subjecting SEPTA to a weakened burden for demonstrating that its test was job-related.

The district court applied an erroneous standard for job-relatedness by not subjecting SEPTA's justifications to the level of scrutiny demanded by the CRA 1991. The district court argued that "more recent Supreme Court cases" do not require an exacting analysis when showing job-relatedness, citing to the Watson plurality opinion:

> "In Watson, the Supreme Court explicitly *held* that '[o]ur cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance. 487 U.S. at 997"

COL 23 (emphasis provided). The district court further assumed that if employers introduce validation studies they need not comply with technical requirements of the Uniform Guidelines.[22] COL 23-25. The court used the Watson plurality opinion to allow scientifically

[22]Since the Watson plurality argued that the employer's burden was only one of production rather than proof, it follows that formal validation studies might not be necessary

flawed studies; however, Watson is not controlling law (if it ever was).

With the CRA 1991, the burden shifting premise of Watson and Wards Cove was expressly rejected. See 42 U.S.C. § 2000e-2(k)(1); 42 U.S.C. § 1981. The CRA 1991 reinstated the employer's burden of *proof (not production)* and of showing that the test was **"job related for the position in question and consistent with business necessity."** 42 U.S.C. § 2000e-2(k)(1)(emphasis provided).

In reinstating the Griggs standards, the CRA 1991 mandates a clear showing that a practice is job-related and makes the Guidelines a significant factor in determining the issue of job-relatedness. See Griggs, 401 U.S. at 433-34 (Uniform Guidelines were developed to assist employers in determining whether their employment tests are in fact "job-related"). See also Albemarle, 422 U.S. at 430-31 citing 29 C.F.R. § 1607.4(c) ("The message of these Guidelines is the same as that of the Griggs case--that discriminatory tests are impermissible unless shown, by professionally acceptable methods to be job-related") Gonzales v. Galven, 151 F. 3d 526, 529, n. 4 (6th Cir. 1998) (test with adverse impact is considered "discriminatory" unless it is "validated" in accordance with the Guidelines).

Griggs relied specifically on the Guidelines provision that requires:

> that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

Griggs, 401 U.S. at 434, n. 9, citing 29 C.F.R. § 1607. 4 (c). As the Court in Griggs stated, "[s]ince the Act and its legislative history support the Commission's construction, this affords

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to satisfy this rather minimal production burden.

good reason to treat the guidelines as expressing the will of Congress."[23] 401 U.S. at 434.

Thus, the district court's reliance on the weakened "job-relatedness" requirement set forth in the Watson plurality is error. The basic premise of Watson's plurality opinion of an employer's minimal burden of production on the job-relatedness question was soundly rejected in the CRA 1991, by Griggs and the Uniform Guidelines.

If the district court had required that SEPTA meet the proper legal standard for demonstrating job-relatedness as set forth in the CRA of 1991, SEPTA would have failed to meet that burden. SEPTA did not prove by professionally acceptable methods that its cutoff of 42.5 ml/kg actually "is predictive of or significantly correlated with important elements" of the transit officer job. Guidelines, 29 C.F.R. § 1607.4(c); Griggs, 401 U.S. at 434, n.9. The evidence of successful incumbent performance, the expert studies and the success of other departments across the country in reducing crime without using such an exclusionary standard cannot be ignored.

D. The district court failed to apply the requisite heightened standard for job-relatedness and business necessity.

The district court applied an erroneous legal standard with respect to SEPTA's burden of showing that its test is job-related. A heightened burden of proof is required where there is severe disparate impact, post hoc validation tests, low correlations or overemphasis on one

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[23]An employer who does not follow the Guidelines "must articulate some cogent reason for doing so and generally bears a heavier than usual burden of proving job-relatedness." Contreras v. City of Los Angeles, 656 F. 2d 1267, 1281 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); United States v. City of Chicago, 573 F.2d 416, 427 (7th Cir. 1978); Berkman v. City of New York, 536 F.Supp. 177, 208 (E.D.N.Y. 1982), aff'd, 705 F.2d 584 (2nd Cir. 1983). As will be discussed infra, SEPTA's cutoff of 42.5 ml/kg did not meet this higher burden.

aspect of job performance. In this case all factors existed thereby necessitating an substantially heavier burden of proof for SEPTA. In this section we demonstrate the significance of the court's legal error. In Section II, infra, we address the equally important issue that, as a factual matter, SEPTA never met its burden.

The Court concluded that SEPTA's test had a severe adverse impact upon women. COL 17 The test excluded 93% of all female applicants during the Lanning class period.[24] FOF 213 This is a near total exclusion of women.

When the disparate impact is severe as in this case, there is a higher burden on the employer to show job-relatedness and business necessity. See 29 C.F.R. § 1607.14B(6). See also Clady v. City of Los Angeles, 770 F.2d 1421, 1431 ("As a general principle, the greater the test's adverse impact, the higher the correlation which will be required."); Brunet v. City of Columbus, 642 F. Supp. 1214, 1249 (S.D. Ohio 1986), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); Dickerson v. U.S. Steel, 472 F. Supp. 1304, at 1350 (E.D. Pa. 1978) (Newcomer, J.) ("where the impact is quite severe, that factor would weigh heavily against use of the tests").

Once SEPTA's test was challenged legally, SEPTA attempted to correlate performance on the test with performance on the job as a police officer. Such post hoc tests are to be closely scrutinized due to the danger of non-objectivity. COL 21; Albemarle, 422 U.S. at

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[24]This disparity is 5.06 standard deviations with a p-value of 1/100,000 likelihood that this disparity was due to chance. Disparities of more than two or three standard deviations are deemed to establish a compelling case of discrimination and rule out the possibility that the numbers were reached by chance. Hazelwood School District v. United States, 433 U.S. 299, 308, n. 14 (1977); See also, Rivera v. City of Wichita Falls, 665 F.2d 531, 536, n.7 (5th Cir. 1982) ("a compelling inference of discrimination" is raised at two or three standard deviations).

433, n. 32. SEPTA's defense expert, Dr. Bernard Siskin, conducted a battery of statistical correlations in an effort to establish a correlation between aerobic capacity and arrests by officers, but he was only able to find weak statistical correlations with little practical significance.

All experts agreed that the correlations between aerobic capacity and arrests by officers were "low". COL 57-58; J.A., Vol. II at 543; J.A., Vol. XII at 3524-3525, 3582. When statistical correlations are low, the testing mechanism requires a higher level of scrutiny to meet job-relatedness and business necessity requirements. See 29 C.F.R. § 1607.14B(6); Clady, 770 F.2d at 1431-32; Dickerson, 472 F. Supp at 1349 (E.D. Pa. 1978).

SEPTA's test bars applicants on the basis of one trait -- aerobic capacity -- without consideration of other skills and abilities that they may bring to the job. Many of these candidates may have had better overall qualifications than candidates who were ultimately hired. Because the test excludes all other skills and abilities from consideration, it is must be subjected to closer scrutiny. See 29 C.F.R. § 1607.14B(6); Firefighters Inst. For Racial Equality v. City of St. Louis, 616 F.2d 350,359 (8th Cir. 1980); Brunet, 642 F. Supp. at 1249 (court criticized test because it "underweighs certain abilities that were thought to be important by firefighters."); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378, 384 (N.D. Cal. 1975)(test was invalidated in part because its proponents had "disregarded...other skills such as teamwork, intelligence, judgment, patience, and verbal skills as more important aids to patrol officers in emergency situations.")

Despite the existence of these factors, the district court failed to require that SEPTA meet a higher burden of proof.

II. SEPTA failed to demonstrate the job-relatedness of its cutoff of 42.5 ml/kg.

A. A cutoff score must be justified by empirical data.

Under the proper legal standards of the CRA of 1991 and even under the weakened legal standards of Ward's Cove used by the district court, SEPTA failed to demonstrate the job relatedness of the specific *cutoff of 42.5 ml/kg*. Plaintiffs do not contest the district court's finding that aerobic capacity is a relevant factor in the hiring of police officers. However, the district court erred in finding that SEPTA demonstrated that the *cutoff of 42.5 ml/kg* was job-related to the transit police officer position. COL 26-27, 31. Specifically, SEPTA never proved the *level* of aerobic capacity that was needed to successfully perform the job of a SEPTA transit police officer. The question is not whether police need to be physically fit to perform their jobs; rather, it is what *level* of physical fitness is necessary to do the job successfully.

The Court found that SEPTA's test of aerobic capacity was used as a "construct" of fitness that was linked to the ability to perform successfully as a police officer.[25] FOF 126-128. When a "construct" of job performance (e.g., aerobic capacity) is used in lieu of measuring actual performance on a job task (e.g., chasing and capturing a fleeing person), the Uniform Guidelines and caselaw require empirical evidence that the construct being measured is actually related to the work performance. 29 C.F.R. § 1607.14(B)(3); See Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 92 (2d Cir. 1980). Not only must the "construct" be linked to actual performance but it must be linked to the *level* of performance necessary to do

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[25]The Court found that the mandatory 12 minute 1.5 mile run was not a job task that a SEPTA transit officer was expected to do. FOF 125; J.A., Vol. II at 374-375.

the job. See id.

A cutoff score "should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the workforce." Guidelines 29 C.F.R. § 1607.6. See Burney v. City of Pawtucket, 559 F. Supp. at 1094. citing 29 C.F.R. § 1607.6H (cut-off score on a battery of physical tests was "fairly arbitrary and ... not derived either from the results of the validation study or from any meaningful assessment of the minimum level for successful job performance."); Accord, Evans v. City of Evanston, 695 F. Supp. 922, 928-929 (N.D. Ill. 1988), vacated and remanded on other grounds, 881 F.2d 382 (7th Cir. 1989) (invalidated cut-off score); Thomas v. City of Evanston, 610 F. Supp. 422, 431 (N.D. Ill. 1985)(invalidated test where incumbent police officers who could not pass were not shown to be performing incompetently).

The district court found that if aerobic capacity is related to the job, more of that skill is better. COL 75. However, the employer must "justif[y] the conclusion that possession of more of a particular ability is...better....[I]t may well be true that a firefighter requires enough of a particular ability to do the job well, and that any more of that ability is merely redundant." Brunet, 642 F. Supp. at 1249.

Here the evidence demonstrated that incumbents who could not meet this test performed successfully. Further evidence from other urban and transit police departments including those with officers who patrol on foot show the lack of job-relatedness of the specific cutoff score. Most important, as discussed below, SEPTA's experts could not justify the 42.5 ml/kg cutoff.

B. Dr. Davis's work shows there is no relationship between 42.5 ml/kg and the SEPTA transit police officer job.

Prior to litigation, SEPTA did not conduct any study to determine whether the level of SEPTA's construct of aerobic capacity, the 12 minute 1.5 mile test, was related to successful job performance. Dr. Davis had published a study of 150 metropolitan police officers that showed that the 1.5 mile run did not correlate significantly with successful performance on simulated job tasks including a foot pursuit and apprehend task. J.A., Vol. IX at 2774; J.A., Vol. VII at 2032-2033. This study was conducted for the express purpose of examining incumbent police officer performance, establishing acceptable performance levels and "establishing a physical performance examination useful for testing applicants and incumbents." J.A., Vol. IX at 2774; FOF 117. Dr. Davis's study showed that there was *no significant relationship* between the 12 minute 1.5 mile run and "work-related" tasks, including the foot pursuit of a fleeing suspect. J.A., Vol. IX at 2774. Dr. Davis never conducted any study of SEPTA incumbent officers to show that a 12 minute 1.5 mile run was job-related to counter his finding that it was not. J.A., Vol. VII at 2039.

The district court held that Dr. Davis's cutoff was "readily justifiable" in that he had relied upon a study in the Anne Arundel County, Maryland Police Department. COL 28. However, there was no evidence that the Anne Arundel study was properly validated or that there was proof that performing a 1.5 mile run in 12 minutes correlated with successful police officer performance. J.A., Vol. VI at 1898.

The Court recognized that Dr. Davis's validation study did not satisfy all the standards of the Guidelines. COL 30. Dr. Davis did not justify this cutoff with empirical data even though he expected the test would have a disparate impact upon women. J.A., Vol. X at 3115; J.A., Vol. VII at 2046-2047; J.A., Vol. VIII at 2271-2272; J.A., Vol. at 603-606.

SEPTA incumbent officers (SMEs or subject matter experts) who had 100 years of collective police officer experience reported to Dr. Davis that they could be expected to run a mile in full gear in about 11.78 minutes in the performance of their duties, a running time of 15 minute 40 seconds 1.5 mile run without gear.[26] FOF 70, J.A., Vol. VII at 2056.; J.A., Vol. VIII at 2431-2433.

Disregarding the SME recommendations and his Florida research, and without any empirical support, Dr. Davis recommended a cutoff that was equivalent to the 50th percentile for men aged 20-29 and did so using his "intuition" as "part of the process."[27] J.A., Vol. VII at 2050, 2071; see Harless v. Duck, 619 F.2d 611, 616 (6th Cir. 1980), cert. denied, 449 U.S. 872 (1980) (invalidating a test developed through an "intuitive process" of assessing types and levels of physical performance to be tested for employment as police officer); Brunet, 642 F. Supp. at 1249 ("Anecdotal evidence regarding the speed at which firefighters must work is not sufficient to justify a timed, competitive examination. There must be systematic evidence based upon a job analysis....[H]ard evidence...is necessary to justify an examination with

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[26]This is the approximate level required by the DEA after training. J.A., Vol. VIII at 2464.

[27]The Guidelines require that cutoff scores be based on objective, scientifically valid data, not "intuition." 29 C.F.R. § 1607.14(D)(6). Dr. Davis's selection of the male average based on his intuition is particularly disturbing in light of his testimony, which revealed biases and stereotypes about women. Dr. Davis testified that anyone with initiative, ambition and gumption could meet the cutoff. J.A., Vol. VII at 1932. According to Dr. Davis, women do not have the same problem-solving abilities as men and women do not use failure as positively as men in the physiological context. Id. at 2053, 2072 Dr. Davis believes that it is part of the "natural order" of things that men surpass women in all physical abilities with the exception of flexibility. Id. at 2075. In Dr. Davis's recommendation to SEPTA regarding the appropriate cut-off score, he stated: "Without question, considerable justification could be advanced that police officers should represent the epitome of fitness, however, such an approach would effectively eliminate all females from the field." J.A., Vol. VII at 2417.

adverse impact").

The evidence at trial amply demonstrated successful performance by officers with less than 42.5 ml/kg aerobic capacity. No officer with less than 42.5 ml/kg aerobic capacity physically failed to successfully perform on the job. J.A., Vol. II at 315; J.A., Vol. IX at 2752; J.A., Vol. VII at 2209. There has been no loss of life, harm to an individual, or damage to property due to an officer's lack of the 42.5 ml/kg/min aerobic capacity. J.A., Vol. II at 392. Most important, there was no evidence of an officer failing to apprehend a suspect or providing effective backup or assistance to another officer because of not having enough aerobic capacity.

Finally, Dr. Davis testified that structural firefighting requires *higher absolute levels* of aerobic capacity than law enforcement. Dr. Davis recommended a 33.5 ml/kg cutoff for Chicago firefighters based on a job performance study that proved satisfactory performance for the Chicago firefighters at that level.[28] J.A., Vol. VII at 2038-2039. A 33.5 ml/kg cutoff correlates to a 1.5 mile running time of about 15 minutes 40 seconds, which is equivalent to what the SEPTA SMEs recommended. J.A., Vol. VIII at 2466.

C. Dr. Moffatt's studies support a lower cut-off score.

Dr. Moffatt defended SEPTA's 1.5 mile run, but in another case he testified that he did not believe that a 1.5 mile run is job-related to a police officer job. J.A., Vol. VII at 2182-2183. Dr. Moffatt develops physical testing for police officer applicants and incumbents and does not include a 1.5 mile run or an aerobic capacity test. Dr. Moffatt prefers tests that

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[28]A 33.5 ml/kg aerobic capacity corresponds to approximately the 39th percentile for women ages 20-29 and thus would not have nearly the disparate impact upon female applicants as SEPTA's test did. J.A., Vol. VIII at 2466.

reflect the actual job tasks of a police officer. J.A., Vol. VII at 2185-2186. Dr. Moffatt testified that it was possible to develop a test that would not disproportionately exclude female applicants and would select police officers who were capable of doing the job at the end of a training period. J.A., Vol. VII at 2207.

Based on Dr. Moffatt's laboratory research that showed that people with a higher aerobic capacity have more reserve strength at the end of a run, FOF 342-347, the district court upheld SEPTA's 42.5 ml/kg cutoff, stating that individuals with lower aerobic capacity would be "less able" to engage in combative situations after a run. COL 73. However, Dr. Moffatt's research never demonstrated what *level* of aerobic capacity was necessary for satisfactory performance. Dr. Moffatt admitted that his expertise does not include an ability to determine a "cutoff" score. J.A., Vol. VII at 2184-2185. He also testified that his studies did not measure the level of performance that was necessary for the SEPTA transit job and that he was not aware of any evidence showing that police officers with less than a 42.5 ml/kg would be unable to perform successfully. J.A., Vol. VII at 2217-2218. Significantly, Dr. Moffatt's study shows that people with aerobic capacities as low as 35 ml/kg were able to successfully perform in SEPTA's worst case scenario.

1. SEPTA's simulation included only one woman.

Dr. Moffatt worked with SEPTA to develop a worst case scenario that a SEPTA officer might face in the course of his or her duties. Dr. Moffatt then had SEPTA officers run the worst case scenario as they would in the course of their duties in order to determine

the speed that a typical SEPTA officer would have to run.[29] FOF 331-332; J.A., Vol. VII at 2209. However, Dr. Moffatt's pace was based on a predominately male sample and included only one female.[30] J.A., Vol. VII at 2210-2211. See Albemarle, 422 U.S. at 435-436, citing Guidelines, 29 C.F.R. § 1607.14(B)(4), 1607.5(b)(1), 1607.5(b)(5) (studies must be representative). The average aerobic capacity of the baseline sample was 44 ml/kg and the average length run was 187 seconds. J.A., Vol. VII at 2211; FOF 339. Naturally, if one uses a male group to establish the necessary baseline pace for SEPTA officers, it is not surprising that one would conclude that an average male aerobic capacity level is what is necessary for the job. That reasoning is circular rather than scientific. Dr. Moffatt's simulation failed to create a baseline which was representative of the group of qualified male and female police officers.

2. The SEPTA Simulation supported aerobic capacity level of 35ml/kg.

The only woman in Dr. Moffatt's SEPTA simulation, Sgt. Santiago, had an aerobic capacity of 35 ml/kg. She successfully performed the worst case scenario simulation, thus demonstrating that an officer with at least an aerobic capacity of 35 ml/kg was able to successfully perform the job as SEPTA wanted.[31] J.A., Vol. XII at 3454-3455.

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[29]This "worst case scenario" was based on an actual SEPTA incident. However, the actual incident differed from the simulation in several respects. The actual incident involved a vendor dispute with a short scuffle with the passenger. The officer in this incident did not run and was assisted by several officers who arrived on the scene. J.A., Vol. XII at 3456-3459.

[30]The sample also included only SEPTA management personnel, rather than transit officers as the Guidelines require.

[31]SEPTA excluded the performance time of an officer who it believed did not perform at an acceptable level and only included those officers who performed acceptably. J.A., Vol. VII at 2212.

3. Laboratory Simulation supported aerobic capacity level of 36ml/kg.

Dr. Moffatt devised laboratory studies where he required subjects to run a simulation of SEPTA's worst case scenario at the SEPTA officers' baseline pace and then perform an anaerobic task. FOF 331, 340-346. This baseline pace was designed as the acceptable level of performance by SEPTA. FOF 331, 339. The studies included 95 individuals with aerobic capacities ranging from 36 to 58 ml/kg.[32] FOF 340. Every person in the study was able to run at the mandated SEPTA baseline pace and successfully perform the simulated anaerobic task. J.A., Vol. VII at 2215.

Given that people with aerobic capacities of 36 ml/kg were able to successfully perform the SEPTA designed worst case scenario, Dr. Moffatt's laboratory study fully supports an aerobic capacity of 36 ml/kg according to SEPTA's standards of acceptable performance.[33] Consequently, whatever might be said about SEPTA's articulated goal of wanting to raise its standards above historical levels, Moffatt's study reflects the actual performance SEPTA is now seeking since the baseline pace and simulated tasks incorporated SEPTA's designated performance standards.

D. Dr. Siskin's studies do not support SEPTA's cutoff of 42.5 ml/kg as being critical to successful police officer performance.[34]

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[32]The 50th percentile of aerobic capacity for women aged 20-29 is 35.2 ml/kg/min. J.A., Vol. VIII at 2476. Thus, even the laboratory simulation was based on a group where the lowest aerobic capacity was just above the female average. Little can be predicted, then, of the abilities of people with less than a 36 ml/kg/min aerobic capacity since they were not even tested.

[33]A still lower level may have been supported if people with an aerobic capacity of less than 36 ml/kg had been included.

[34]The United States addresses in depth the flaws in Dr. Siskin's statistical studies. We join in those arguments but for judicial economy do not restate them herein.

1. Dr. Siskin's correlations were too low to establish practical significance as a matter of law.

Dr. Siskin's post hoc studies do not demonstrate what level of aerobic capacity an officer must have in order to perform the job to SEPTA's satisfaction. Statistical correlations must be shown not just to be statistically significant, but to be "practically" significant. FOF 267, n. 6 Practical significance means that the correlations are high enough to describe something meaningful and predictive. Dr. Siskin admitted that the correlations he developed were low and "not a very good predictor" of performance. J.A., Vol. 3524-3525, 3582. The highest correlation that Dr. Siskin reported on a test event basis (which he described as the appropriate way to analyze the data) was +0.107 and on an officer event basis was 0.22.[35] COL 57-58. Correlations this low have routinely been rejected by the courts. See e.g., Clady, 770 F.2d at 1431-32; Dickerson, 472 F. Supp. at 1349 (E.D. Pa. 1978) (rejecting test as not job-related where all correlations -- including correlations of up to .274 -- are statistically significant but fall below .30 and therefore have no practical significance); Brunet v. City of Columbus, 1 F.3d 390, 410 (6th Cir. 1993)(test for firefighters), cert. denied sub nom, Brunet v. Tucker, 510 U.S. 1164 (1994)(same); Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1024 & n.13 (1st Cir. 1974)(same); cert. denied, 421 U.S. 910 (1975); Zamlen v. City of Cleveland, 686 F. Supp. 631, 649 (N.D. Ohio 1988)(correlation of .42 or above for firefighter position), aff'd, 906 F.2d 209 (6th Cir. 1990)(en banc), cert. denied, 499 U.S. 936 (1991).

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[35]Dr. Siskin speculated that if he had conducted an analysis that had controlled for what is known as restriction in range the correlation would have been as high as .33. COL 58; J.A., Vol. VI at 1771-1773.

The danger of relying on SEPTA's correlations as demonstrating practical significance is shown by the fact that the aerobic capacity of incumbent officers with the highest total arrests at SEPTA was 33 ml/kg. J.A., Vol. XI at 3396, J.A., Vo;. VI at 1836. In addition, individuals with an aerobic capacity of 33 ml/kg made more arrests for serious crimes than individuals with an aerobic capacity of 44, 45 and 46 ml/kg. J.A., Vol. VI at 1837.

2. The failure to include enough women in the studies increases the necessary scrutiny.

Dr. Siskin's studies were based on a sample of 95% men and 5% women. J.A., Vol. VI at 1823. Given the known physiological differences between the groups the failure to include women renders the study useless. Women as a group have only 70% of the aerobic capacity of men as a group.[36] Thus, the study can only tell about the performance of men. There is absolutely no statistical information that shows the correlation, if any, between aerobic capacity of women and arrest rates. The Supreme Court has emphasized the importance of including members of the group who are disparately excluded in studies which are used to validate the test. See Albemarle, 422 U.S. at 435-36, citing Guidelines, 29 C.F.R. § 1607.14(B)(4), 1607.5(b)(1), 1607.5(b)(5). In Albemarle, the Court rejected a validation study in a disparate impact case involving race which included only 4% blacks. See 422 U.S. at 430, 435-36. See also Burney, 559 F. Supp. 1089, 1102, citing 29 C.F.R. § 1607.14B(1)-(4) (validation study insufficient to justify a hiring practice if based on sample which was "too scanty and could not fairly be said to be representative of the population to be studied").

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[36]For example, the aerobic capacity of a male with an average level of physical fitness as measured by aerobic capacity would be equivalent to a woman with a superior level of physical fitness for her gender. J.A., Vol. III at 912-914, 941-944.

3. The perpetrator analysis demonstrates that an officer's aerobic capacity does not have to be equal to that of the perpetrator.

SEPTA attempted to estimate the aerobic capacity of alleged criminal "perpetrators" by estimating their aerobic capacity based on that of army recruits of the same age, gender and race.[37] FOF 314. Thus, SEPTA estimated that the average criminal's aerobic capacity was 48 ml/kg and that only 27% had less than 42.5 ml/kg. FOF 315. The Court then concluded that "it is beyond cavil that SEPTA officers, if possible, should be as physically fit as, if not more fit, than the perpetrators." COL 65. The court evidently believed that if most criminals are young males then only persons with the aerobic capacity of a young male could be SEPTA transit police officers. Under this test, of course, virtually all women would be excluded from law enforcement.

Even putting aside the disturbing effect of this remarkable conclusion, SEPTA's own data undermines the court's conclusion. Officers with aerobic capacities of 33 ml/kg made the most arrests (including more arrests for serious crimes) than those with 44, 45 and 46 ml/kg. J.A., Vol. VI at 1833-1837.

4. The commendations, promotions, and other special awards demonstrate nothing about the cutoff score.

The district court also relied on SEPTA's study that it gave more commendations, promotions and other special awards to officers with aerobic capacities above 42 ml/kg. This study was flawed in four ways. First, there was no demonstration that the award had anything to do with aerobic activity and, if so, what level of aerobic capacity was used. Second,

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[37]This analysis does not constitute a valid study under any possible validation strategy under the Guidelines.

officers with less than 42.5 ml/kg aerobic capacity were commended, promoted and given special recognition, thereby demonstrating that those below the 42.5 cutoff were effectively performing the job. Third, since the average aerobic capacity of the predominately male SEPTA force is 44 ml/kg, it is not surprising that most of those honored would have aerobic capacity above 42.5 ml/kg, once again demonstrating the dangers of using a mostly male sample to make predictions about female performance. FOF 317. Fourth, even though SEPTA has been commending, promoting and giving special recognition to officers for years, it inexplicably based its study on awards given only after 1994, the year the legal challenge was initiated. J.A., Vol. VI at 1746-1747. This choice, in spite of the availability of other data, demonstrates the dangers of post hoc validation studies. FOF 325, COL 39.

5. The prediction about increased arrests is not based on any empirical data.

By extrapolating the supposedly higher arrest rate of officers with higher aerobic capacity, SEPTA claimed and the court agreed that it could have made 470 additional arrests from 1991-1997 if all of its officers had an aerobic capacity of 42.5 ml/kg.[38] FOF 303, 301. Such an extreme prediction rests on two unproven assumptions: (1) that there is a causal relationship between aerobic capacity and arrests, not just an extremely low correlation,[39] J.A., Vol. VI at 1834, and (2) that there were 470 possible arrests that were not made by SEPTA because the officer's aerobic capacity was too low to catch or apprehend the suspect.

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[38]This analysis is also flawed because Dr. Siskin acknowledged that he had no way of knowing that the officer named on the report was the officer who actually made the arrest. J.A., Vol. VI at 1833.

[39]A causal relationship has never been made between arrests and aerobic capacity, only very low correlations between the two have been shown.

However, Dr. Siskin, who had access to all the arrest and non arrest data over that seven year period, admitted that there "is not one piece of information in that data base that says that there is even one case where somebody was just out of reach or just down the block...so that there was indeed an opportunity to arrest." J.A., Vol. VI at 1834.

III. The District Court Applied Erroneous Legal Standards For Determining Whether The Plaintiffs Proved That Less Discriminatory Alternatives Existed.

Even if SEPTA's test is found to be job-related and a business necessity, plaintiffs still prevail if they have demonstrated the existence of less discriminatory alternatives that SEPTA refused to adopt. COL 10; 42 U.S.C. § 2000e-2(k)(1)(A)(ii) & (C); See Albemarle, 422 U.S. at 425. The district court erred by rejecting Plaintiff's proposed less discriminatory alternatives and ignored the CRA 1991 standard.

The district court used the standard that any less discriminatory alternative must "equally" serve SEPTA's business goal. COL 92, 95, 98, 102. This standard rests on Wards Cove and the Watson plurality. See Wards Cove, 490 U.S. 642, 661; Watson, 487 U.S. 977, 998. The CRA 1991 specifically rejected the Wards Cove holding in that respect. 42 U.S.C. § 2000e-2(k) provides, in relevant part, that:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter [i]f
>
> (ii) the complaining party makes the demonstration described in subparagraph C with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Subparagraph C specifically states that:

> The demonstration referred to by subparagraph (A)(ii) **shall be in accordance with the law as it existed on June 4, 1989, with respect to the**

concept of "alternative employment practice."

(Emphasis provided)(Wards Cove was decided on June 5, 1989).

Under pre-Wards Cove caselaw and the CRA 1991, plaintiffs prevail if they "show that other tests or selection devices, without a similarly undesirable . . . effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" See Albemarle, 422 U.S. at 425; 42 U.S.C. § 2000(e)-2(k). Plaintiffs in disparate impact cases rarely have access to the workplace or the officers and, therefore, could not reasonably be expected to prove that an alternative is *equal* in effectiveness to the test with the discriminatory impact.[40]

The district court also required that plaintiffs show that the alternatives have been validated.[41] The Uniform Guidelines specifically state that they "do not require a user to conduct validity studies of selection procedures where no adverse impact results." 29 C.F.R. 1607.1(2). Likewise, under the CRA of 1991, if there is no disparate impact resulting from an employer's test, the employer is not required to validate that test.. See 42 U.S.C. § 2000e-2(k)(1)(B)(ii). Thus, where plaintiffs propose alternatives that have no disparate impact, they are not required to prove that the test is "valid" by scientific means. They must show only that the less discriminatory alternative "would also serve the employer's legitimate interest in

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[40]For example in this case, Plaintiffs sought to give their experts access to SEPTA workplace in order to evaluate SEPTA's test and to assess alternatives. This access was denied by SEPTA and approved by the Court. J.A., Vol. I at 8 (Docket #47).

[41]This finding is contrary to the lower court's holding that employers need not demonstrate that their tests, which have already been proven to have a discriminatory impact, are scientifically validated consistent with the Guidelines. COL 23-25. This is an example of the district court's demand that plaintiffs meet higher burdens than it is willing to impose upon defendant.

'efficient and trustworthy workmanship'" and the employer refuses to adopt such an alternative. Albemarle, 422 U.S. at 425.

Plaintiffs proposed three types of less discriminatory alternatives.[42] FOF 368; J.A., Vol. VIII at 2379-2381. None of the proposed alternatives had any disparate impact.

First, plaintiffs proposed the predominant national practice: the selection of medically fit applicants who must then pass an accredited training academy and physical fitness requirements at the end of the training. FOF 369; J.A., Vol. VIII at 2464.. See Guidelines 29 C.F.R. § 1607.5(F) & 1607.14(B)(4) (cautioning against testing for abilities or skills that can be learned). This is the practice of the Philadelphia Police Department which patrols SEPTA as part of its jurisdiction. Its candidates must train at the Philadelphia Police Academy and then pass state mandated physical fitness requirements which are gender weighted. FOF 370. The Court rejected this practice as "patently absurd on its face", in spite of its use by most law enforcement agencies and the U.S. military. COL 98.

The Court stated that plaintiffs had not demonstrated that this practice was "equal" to SEPTA's current practice. Besides the erroneous reliance on the "equal" standard, the undisputed evidence was that the Philadelphia Police Department was effective at combating crime both on and off SEPTA property. J.A., Vol. IX at 2596, 2717; J.A., Vol. II at346-347. In fact, SEPTA's Chief of Police admitted that Philadelphia Police officers had been very effective at combating crime on SEPTA and knew of no instances where they had not performed satisfactorily. J.A., Vol. IX at 2631-2634. Likewise, representatives from other

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[42]The district court did not acknowledge in its findings the third alternative proposed by plaintiffs that a less discriminatory alternative could be developed using proper validation procedures. FOF 368; J.A., Vol. VIII at 2379-2381.

transit police agencies testified that this method had worked effectively for their departments. These officers were physically capable of successfully performing their jobs. J.A., Vol. IV at 1161-1173, 1195-1204.

The district court ruled that "the Uniform Guidelines prohibit the transportation of a test from one jurisdiction to another that has not been validated, especially where there has been no demonstration through a competent job analysis that the positions are the same or substantially similar." COL 97. However, there was substantial evidence that policing is not different across jurisdictions. A common critical task is the chasing and apprehending of fleeing suspects. The Court permitted Dr. Davis to support his cutoff of 42.5 ml/kg from a study he conducted in another police jurisdiction that relied principally upon car patrol. COL 28. This constituted an unfair double standard: SEPTA was permitted to transport studies from other jurisdictions but Plaintiffs (who were denied the opportunity to study SEPTA police on the job) could not resort to other jurisdictions to demonstrate less discriminatory alternatives.

Second, plaintiffs proposed a standard designed by Dr. McArdle where applicants who are able to perform at the 50th percentile level for their age and gender on five physical tests including aerobic fitness would be selected to complete Academy training. FOF 375 For men between the ages of 20-29, the required aerobic capacity would be about 42.5 ml/kg, SEPTA's standard. Female candidates between 20-29 years would be required to have an aerobic capacity of about 35.2. J.A., Vol. VIII at 2476. Dr. McArdle's alternative requiring average or above physical fitness at the outset as measured by a battery of physical fitness measures (not just one skill such as aerobic capacity) would result in having applicants more

fit than all other departments but without having *any* disparate impact upon female applicants.

The district court, having found that aerobic capacity was related to the job of police officer, ruled that plaintiffs failed to prove that "general physical fitness" was job related.[43] COL 96 Assuming, as the Court found, that absolute aerobic capacity is correlated with successful police performance, it is difficult to understand why a process that selects applicants in the top 50th percentile of aerobic capacity (by age and gender) to begin an academy training program would not be job-related. That process, coupled with physical training during the academy, would produce police officers with higher than average aerobic capacity and by extension would, if the court's finding that aerobic capacity is correlated with successful performance, be correlated with good police officer performance.

Third, Plaintiffs proposed that SEPTA be directed to retain experts to develop a less discriminatory alternative that would serve its goal of having physically fit officers. J.A., Vol. VIII at 1279-1281. This alternative is supported by SEPTA's own experts who have developed tests for police officers that did not include a 12 minute 1.5 mile test and which had less disparate impact.

SEPTA has refused to adopt any of these less discriminatory alternatives, continuing instead to exclude 93% of women since 1993. Plaintiffs amply met their burden by presenting standards used by fourteen reputable law enforcement agencies, a proposal of 50th percentile physical fitness by age and gender and a SEPTA developed alternative.[44] The

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[43]The "series of studies" to which the Court alludes do not support this conclusion. The sample was too small and included too few women to make any valid predictions. J.A., Vol. XII at 3611-3613.

[44]Since SEPTA's standards are the most exclusionary for female applicants nationally, the standards used by almost any other department would constitute less discriminatory

district court's conclusion that all of these other departments are operating in a "dangerously irresponsible", COL 101, manner manifestly conflicts with reality: nationally other departments have reduced crime without standards which exclude almost all women and the record shows no negative outcomes at SEPTA or elsewhere from officers who did not have SEPTA's required level of aerobic capacity.

IV. The District Court Made Erroneous Findings Of Fact That Mandate Reversal

Factual findings are to be reversed where the record demonstrates that they are clearly erroneous. See Atacs Corp. v. Trans World Communs., Inc., 155 F.3d 659 (3d Cir. 1998); Rule 52(a), Fed.R.Civ.P. "A finding becomes clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.'" Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 525 (3d Cir. 1992)(citation omitted). Where findings of fact are dependent upon or incorporate a rule of law, lesser deference is due where, as here, the trial court has committed an error of law. See Daniels v. Essex Group, Inc., 937 F.2d 1264, 1269-1270 (7th Cir. 1991).

The challenged findings of the district court must be reversed because "on the entire evidence" it is clear that a mistake has been made. This is shown by the evaluation of the challenged findings set forth below, which meet the stringent test of Ezold. Moreover, when viewed in light of the trial court's error of law, which permeated the fact finding process, the reduced deference due to a lower court's determination of facts applies. See Daniels, 937

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alternatives.

F.2d at 1269-1270.

A. The duties of a SEPTA transit officer are not unique.

The trial court found that the critical duties of SEPTA police were unique and required a level of walking and running not found in other departments. FOF 43. This finding is clearly erroneous for the following reasons:

1. The chasing and apprehending of suspects are tasks critical to all police departments.

2. The Philadelphia Police Department deploys over 500 foot patrol officers, with foot beats equivalent in length and intensity to those patrolled by SEPTA Officers. This includes patrols in high-crime areas and areas including housing projects, where police must ascend stairs. J.A., Vol. IV at 1228-1232; J.A., Vol. V at 1422-1423, 1439.

3. Between 20 and 36% of crime on SEPTA property is responded to and handled by Philadelphia Police. J.A., Vol. IX at 2717; J.A., Vol. IX at 2600. All 911 emergency calls made from telephones on or adjacent to SEPTA property are responded to directly by Philadelphia Police, without interface with SEPTA police. J.A., Vol. II at 346-347.

4. Police for the Washington, D.C. Metro transit agency, the New York City transit authority, and AMTRAK, like SEPTA, are largely foot-based and patrols area with lengthy stairs. J.A., Vol. IV at 1161-1166; J.A., Vol. IV at 1195-1198.

B. Plaintiffs did not demonstrate a cavalier attitude toward the SEPTA transit officer position.

The trial court erred in finding as a fact that the failure of plaintiffs on the SEPTA test "all demonstrated a cavalier attitude toward the position by not preparing or training for the running test." FOF 206. This finding is clearly erroneous for the following reasons:

1. The finding is directly repudiated by the normative data regarding aerobic capacity and the court's finding of severe disparate impact. This finding is directly contradicted by the

court's separate finding that "research in the field of exercise physiology establishes that setting a cutoff score of 12 minutes on a 1.5 mile running test will have an adverse impact on women." FOF 217.

2. The Court explained the specific scientific basis for the disparity and it had absolutely nothing to do with a "cavalier attitude" or laziness. Specifically:

> Scientific studies show that males score higher on tests of VO2 max and endurance performance than their female counterparts due to physiological differences between men and women. This result is attributable to the well-documented sex differences in body composition and hemoglobin, the iron-containing compound in the blood responsible for oxygen transport because men have more muscle mass and less fat per unit of body weight than women. The most important factor determining one's capacity for oxygen consumption during exercise is the quantity of muscle mass a person possesses; this is because the site of aerobic metabolism occurs in the active muscles. It is partially because of this difference in the amount of potentially active muscle mass during exercise that men consistently score higher in VO2 max tests like the 1.5 mile run test administered by SEPTA. FOF 218

3. This finding is directly repudiated by the Cooper data, the largest accumulation of data available nationally regarding aerobic capacity. Those data, as the court found, show only 12% of women aged 20 to 29 being able to run the 1.5 mile distance in 12 minutes. FOF 219.

4. The finding is directly repudiated by the conduct of plaintiff Lanning. Officer Lanning paid to attend a police academy. When she trained to pass the SEPTA run, she developed a 1.5 mile course, practiced running it on a routine basis, and timed herself as she ran. J.A., Vol. I at 102-106, 145.

5. The finding is directly repudiated by the conduct of plaintiff Dodson. Plaintiff Dodson ran five miles two or three times weekly prior to the SEPTA running test. J.A., Vol. I at 167.

6. This finding is directly repudiated by the conduct of class member Kim French. In addition to performing her duties as a Philadelphia Police Officer, Officer French regularly exercised by riding a stationary bike and also ran in preparation for the SEPTA run. J.A., Vol. V at 1425-1426, 1430-1431.

C. The studies of SEPTA's experts did not demonstrate that the cutoff was necessary to successfully perform the transit officer job.

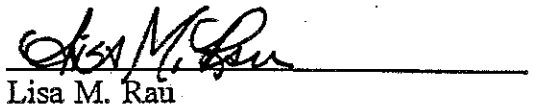
The court found as a factual matter that Drs. Davis, Moffatt and Siskin demonstrated that an aerobic capacity of 42.5 ml/kg/min is necessary to successfully perform the functions of a SEPTA transit officer. FOF 129. 264-325, 326-356 These findings are clearly erroneous as set forth in Section II, supra.

Since these findings by the district court are clearly erroneous, they must be reversed and not considered in assessing whether SEPTA met its burden of proving job-relatedness and business necessity nor whether Plaintiff met its burden of demonstrating less discriminatory alternative tests.

CONCLUSION

For the above reasons, the Court should reverse the district court's use of erroneous legal standards. This Court should apply the proper legal standards under the CRA of 1991 to the extensive record and find that SEPTA did not meet its heavy burden of proving business necessity and job-relatedness of the cutoff of 42.5 ml/kg/min and that Plaintiffs also demonstrated the existence of less discriminatory alternatives that SEPTA refused to adopt.

Respectfully submitted,



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December 9, 1998

CERTIFICATE OF BAR MEMBERSHIP

Lisa M. Rau, Esquire and Jules Epstein, Esquire, do hereby certify that we are members of the bar of the United States Court of Appeals for the Third Circuit.

Date: 12/7/98

Lisa M. Rau

Jules Epstein

CONCLUSION

For the above reasons, the Court should reverse the district court's use of erroneous legal standards. This Court should apply the proper legal standards under the CRA of 1991 to the extensive record and find that SEPTA did not meet its heavy burden of proving business necessity and job-relatedness of the cutoff of 42.5 ml/kg/min and that Plaintiffs also demonstrated the existence of less discriminatory alternatives that SEPTA refused to adopt.

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