LAW ENFORCEMENT PHYSICAL FITNESS STANDARDS AND TITLE VII

by Michael E. Brooks, J.D.
Supervisory Special Agent
Office of the General Counsel
Legal Instruction Unit
FBI Academy
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In deciding to establish physical fitness standards for potential or on-board law enforcement employees the law enforcement administrator must be cognizant of the requirements imposed by Title VII of the Civil Rights Act of 1964[1] and by the Civil Rights Act of 1991.[2] This federal legislation requires that all employers of more than 15 employees must refrain from policies and procedures which either expressly or effectively discriminate against specified categories of individuals except under limited circumstances.

BACKGROUND:

The Civil Rights Act of 1964 prohibits various forms of discrimination based on racial, color, gender, national origin or religious characteristics. Title VII of this act prohibits such discrimination in the workplace when the discrimination results in the loss of an employment benefit. Virtually all employment actions fall under the purview of Title VII. The U.S. Supreme Court has ruled that Title VII prohibits not just express discrimination (disparate treatment) but also prohibits neutral employment actions which have the effect of discriminating against a particular group protected by the act (disparate impact).[3] The Civil Rights Act of 1991

established burdens of proof and other procedural requirements in litigating a Title VII action. As a result of this legislation the only defense an employer has when a facially neutral employment standard effectively discriminates against a protected group is by proving that the standard is "job related for the position in question and consistent with business necessity."[4]

How do these laws apply in the area of physical fitness standards? They apply when a physical fitness standard limits the employment rights of a group protected by Title VII. Most notably they apply when a particular physical fitness standard has a disparate impact on women when compared to how the same standard effects men. An ongoing case from Pennsylvania demonstrates the impact of these laws.

***LANNING V. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY*:**

In 1991, as a part of an effort to upgrade its 234 officer police force, the Southeastern Pennsylvania Transportation Authority (SEPTA) which operates a commuter rail system in Philadelphia and its suburbs, instituted a series of physical fitness requirements for both on-board and potential police officers. Among these was a requirement that applicants complete a 1.5 mile run in 12 minutes. Failure to meet this standard disqualified an applicant from employment as a police officer. Prior to instituting this standard SEPTA contracted with a noted exercise physiologist, Dr. Paul Davis, to develop a physical fitness test for its police officers. Dr. Davis conducted extensive studies to determine what physical abilities are required for a SEPTA police officer.[5] Dr. Davis determined that SEPTA officers are often called upon to run various distances

in the performance of their duties. He further determined that a specific aerobic capacity was necessary for an officer to adequately perform the physical requirements of a SEPTA officer. After determining that this aerobic capacity would have a, ". . .draconian effect on women applicants," Dr. Davis decided that a slightly lower aerobic capacity would meet the goals of SEPTA in improving the physical abilities of its police officers as well as their job performance. Dr. Davis advised SEPTA that applicants who could run 1.5 miles in 12 minutes would possess this slightly lower aerobic capacity.[6]

During the years 1991, 1993 and 1996 almost 60 percent of male applicants to the SEPTA police met the 1.5 miles in 12 minutes standard while an average of 12 percent of female applicants met the standard. SEPTA also began a physical fitness test of incumbent officers which included an aerobic capacity test. Because of a grievance filed by their police union SEPTA stopped disciplining officers who failed the test shortly after instituting it. Instead the agency rewarded those officers who met the fitness standards.[7]

In 1997 five women who had been rejected by SEPTA because of their inability to meet the 1.5 miles run in 12 minutes standard filed a Title VII class action lawsuit on behalf of all women who applied to SEPTA in 1993 and 1996 and were rejected for this reason as well as on behalf of all future women who would be similarly rejected. The United States Department of Justice, after investigating SEPTA's employment practices under Title VII, joined the lawsuit in opposition to the standard. In 1998 the U.S. District Court for the Eastern District of Pennsylvania entered judgement for SEPTA after hearing evidence which included SEPTA studies

showing that there was a statistically high correlation between high aerobic capacity and arrests, and commendations among SEPTA officers, and that officers with the aerobic capacity approved by Dr. Davis were better able to perform physical tasks after running for three minutes than were officers without that aerobic capacity. The District Court ruled that SEPTA had established that the aerobic capacity standard was job related and consistent with business necessity, and that there was a "manifest relationship of aerobic capacity to the critical and important duties of a SEPTA officer."[8] The women and the United States appealed to the United States Court of Appeals, Third Circuit.

The Third Circuit ruled that the lower federal court had erred because it did not find that the 1.5 miles run in 12 minutes standard was a "minimum qualification necessary for the successful performance of the job in question."[9] The Circuit Court reviewed U.S. Supreme Court case law and the Civil Rights Act of 1991 to conclude that Congress intended to reject the Supreme Court's interpretation of Title VII in a 1989 case when it ruled that in disparate impact cases an employer can prevail if the standard significantly serves a legitimate employment goal.[10] Instead Congress, in passing the 1991 law, reinstated an earlier Supreme Court interpretation of Title VII which had held that in such circumstances the employer only prevails by showing that the standard is "consistent with business necessity," and "bears a manifest relationship to the employment in question."[11] The Third Circuit ruled that this means that any such standard must measure a minimally necessary skill to perform the job.

The Third Circuit also rejected an argument that the employer's burden to justify a

standard which causes a disparate impact on a protected group is lessened when the job involves public safety.[12] The court reasoned that had Congress intended such a distinction for public safety jobs it would have codified it with the 1991 act. The dissent noted that several other circuits had recognized that public safety is a consideration in determining what is a business necessity justifying a disparate impact.[13] However, with the exception of cases from the 8th, 10th and 11th Circuits, all of theses cases predate the 1991 act which contained the language relied upon by the majority of the Third Circuit in ruling there can be no special consideration of the public safety nature of the job.

SEPTA appealed the Third Circuit ruling to the U.S. Supreme Court but that Court refused to hear the case.[14] The case was then sent back to the District Court for the purpose of determining if the 1.5 miles run in 12 minutes standard was minimally necessary to demonstrate the ability to perform the job of a SEPTA police officer.

On December 7, 2000 the District Court ruled that the SEPTA standard does measure a minimum characteristic (the specific aerobic capacity) necessary to perform the duties of a SEPTA police officer.[15] The District Court exhaustively reviewed all of the evidence presented during the original 1998 trial and concluded that, "meeting SEPTA's aerobic capacity standard is clearly the minimum required to perform the critical tasks of the job such as pursuits, officer back-ups, officer assists and arrests. Any lesser requirement simply would not satisfy the minimum qualifications for the job of SEPTA transit police officer and would endanger the public and undermine deterrence of crime and apprehension of criminals."[16]

DISCUSSION:

The law enforcement administrator should remember that Title VII is statutory, not constitutional law. The Supreme Court has ruled that in order for a governmental entity (the only type of entity restricted by the constitution) to discriminate under the equal protection clause of the Fourteenth Amendment a plaintiff must prove an intent to discriminate.[17] Title VII contains no such requirement. As a federal statute it is subject to judicial interpretation and to revision by Congress. Of course any revisions are also subject to judicial interpretation. Many of the Title VII standards have never been interpreted by the Supreme Court. Even when they have been defined the federal circuit courts have differed on what these definitions mean. This presents an administrator with the burden of insuring that judicial interpretations and legislative revisions are continuously monitored. What passes muster today may be in violation of the statute tomorrow. Also, what one court says is permissible may not be controlling law in another jurisdiction.

Physical fitness standards are only subject to scrutiny under Title VII when they either expressly discriminate against a Title VII protected group or, more commonly, when they have the effect of discriminating against such a protected group. Where there is no express discrimination a plaintiff has the burden of proving to a court that the physical fitness standard has the effect of discriminating against a protected group. Once such a showing is made the employer has the burden, "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[18] As discussed above, this provision was added in the Civil Rights Act of 1991 after the Supreme Court had ruled that the plaintiff, not the

employer, has the burden of showing that a challenged standard both has a disparate impact and that the standard does not, "serve in a significant way, the legitimate employment goals of the employer." [19] Therefore, Congress not only shifted the burden of proving the necessity of such a standard to the employer they arguably increased the standard by requiring "business necessity" instead of "significantly serving a legitimate employment goal." An employer could certainly argue that a requirement, although not absolutely required to meet a legitimate employment goal, could still significantly serve that employment goal. Congress has precluded that argument.

How does a plaintiff prove that a physical fitness standard has a disparate impact? The Supreme Court has ruled that the plaintiff must show that a facially neutral standard results in a, "significantly discriminatory pattern."[20] The Equal Employment Opportunity Commission (EEOC) is a federal agency charged with promulgating federal regulations to implement Title VII and other federal anti-discrimination legislation. These regulations do not have the force of law and are not binding on federal courts interpreting federal legislation. However courts will consider these guidelines in ruling on Title VII issues. The EEOC has provided that a selection procedure which results in a protected group's selection rate of less than 80 percent of the group with the greatest success will be considered to have resulted in a disparate impact.[21] While this is a significant issue in most Title VII litigation, it usually does not become an issue in challenges to physical fitness standards. For example, in the *Lanning* case SEPTA conceded that the 1.5 mile run in 12 minutes standard had a disparate impact on women.[22] Commentators have concluded that most physical fitness tests will legally have a disparate impact on women due to the inherent physical differences between the sexes.[23]

Where a physical fitness standard has a disparate impact on women the concern of the law enforcement administrator then becomes how to successfully justify the physical fitness standard under the statutory requirement. Unfortunately the Supreme Court has never ruled what "job related for the position in question and consistent with business necessity" means. As discussed above, the Third Circuit ruled in the *Lanning* case that this provision requires that an employer must show that the standard is a "minimum qualification necessary for the successful performance of the job in question." Other circuits have not been so restrictive. For example the Eleventh Circuit has ruled that an employer meets the statutory standard of business necessity by showing, ". . .that the practice or action is necessary to meeting a goal that, as a matter of law, qualifies as an important business goal."[24] The EEOC has stated that a selection policy which has a discriminatory impact on members of a Title VII protected classification is inconsistent with EEOC guidelines unless the policy has been validated pursuant to the guidelines.[25] The guidelines then lists three means to validate such a policy: criterion related validity, content validity, and construct validity.[26] Each of these means of validation are defined in the guidelines.[27] All of these means of validation appear less restrictive than the Third Circuit standard expressed in *Lanning.*

Of particular importance to the law enforcement administrator attempting to justify a physical fitness requirement is whether the courts will consider the public safety nature of law enforcement work in establishing the business necessity of such a standard. While the Third Circuit in *Lanning* ruled that the public safety nature of a job will not change the Title VII requirement of business necessity, there is no reason to believe that public safety should not play a role in justifying a physical fitness standard as a business necessity. In the most recent *Lanning*

District Court ruling the court noted that SEPTA's studies had shown that SEPTA officers, who did not possess the aerobic capacity established by Dr. Davis for the applicants, had failed to make 470 arrests during the study period due to their inability to physically perform their job after running. The court noted the significant threat to public safety that resulted from these lost arrests in the transit system.[28] The court also noted numerous SEPTA studies which showed that individuals who could meet the aerobic standard could perform the specific job tasks of a transit police officer. These jobs included chasing criminal violators on foot, running to a request for officer backups and assists, and subduing subjects after running distances up to three blocks.[29] In its conclusions of law the court held that these tasks are the job of a SEPTA transit officer and failure to be able to perform them compromises the safety of the officer, other officers and the public at large. The court ruled that this establishes that the aerobic capacity is a minimum trait necessary to perform this job.[30]

Regardless of what standard of business necessity is applied the law enforcement administrator is going to be required to show at least a significant relationship between the physical fitness requirement and the responsibilities of members of their department. It is insufficient to simply claim that law enforcement is a physically demanding job and expect a court to uphold a physical standard that has a disparate impact on women. In *Lanning* the SEPTA Police Department has been forced to conduct at least seven studies justifying the 1.5 miles in 12 minutes standard. These studies were all conducted by outside experts, including physicians, physiologists and statisticians, and utilized both SEPTA personnel and others as subjects.[31] The studies did not justify law enforcement physical requirements in general but instead only justified

the SEPTA standard as it related to that one department. The latest District Court ruling noted repeatedly that the job requirements of a SEPTA officer were unique to that one department, even to the exclusion of other transit agencies. For example, the strongest justification of the SEPTA standard is the requirement that SEPTA officers be able to run from one station to another to back-up another officer. The SEPTA studies noted that their officers are required to do this on a monthly basis.[32] Unless another agency can produce similar statistical evidence the likelihood of justifying a similar physical standard under any business necessity requirement is nil. One can only surmise the thousands of dollars SEPTA has spent conducting these studies.

Even if an agency successfully justifies a pre-employment physical standard under the business necessity requirement what is the effect of not requiring on-board personnel to meet the same standard? The Third Circuit in the *Lanning* case noted that SEPTA had mistakenly hired a female officer in 1991 who failed to meet the 1.5 miles in 12 minutes standard. This officer later received several awards, was nominated for "Officer of the Year" and was selected as a defensive tactics instructor. The court insinuated that it found it difficult to understand how the 1.5 miles in 12 minutes standard is justified as a business necessity if this officer is not only on the force, but performing at a high level.[33] The District Court, in its most recent ruling, rejected the plaintiff's argument in this area by simply noting that SEPTA is unable to discipline on-board personnel who fail to meet the standard due to its collective bargaining agreement.[34] It remains to be seen if the Third Circuit will accept this rationale under its strict business necessity standard.

A law enforcement administrator may decide to avoid these problems by avoiding a

disparate impact on women. This can be accomplished by simply setting physical standards so low that few will fail. However such a course will not accomplish much, if anything, for an administrator trying to improve an organization. Another course is to set different standards for men and women in recognition of the differences in physiology between the sexes. However, such an approach raises another federal statutory issue. When Congress enacted the Civil Rights Act of 1991 it included a provision stating, "It shall be an unlawful employment practice. . .in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, (or) use different cutoff scores, . . .on the basis of race, color, religion, sex or national origin."[35] Here the challenge would come from a male who could not meet the male standard but could meet the female standard. Such an action amounts to express disparate treatment of the male. Disparate treatment, like disparate impact, is only permissible under the business necessity justification.[36] The administrator, who uses different physical selection standards for female applicants, would therefore have to show what business necessity justifies such a practice.

CONCLUSION:

The law enforcement administrator who chooses to use physical fitness standards must be prepared to negotiate a veritable minefield of legal issues when those standards have the effect of discriminating against a Title VII protected class such as women. As has been demonstrated,

even the most well-documented justifications may fail to meet the federal statutory requirements to which such standards are subject.

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1. Title 42, U.S. Code, Section 703(a)(1).

2. Public Law 102-166, Sections 3(1), (3), and (4).

3. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

4. Title 42, U.S. Code Section 2000e-2(k)(1)(A)(i).

5. These studies are detailed in the opinion of *Lanning v. Southeastern Pennsylvania Transportation Authority* 1998 WL 341605 (E.D.Pa., 1998).

6. From the facts discussion *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 481-82 (3rd Cir., 1999)

7. Id. at 482-83.

8. Id. at 484.

9. Id. at 491.

10. *Wards Cove Packing Co. v. Antonio* 490 U.S. 642 (1989).

11. *Griggs v. Duke Power Co.* at 431-33.

12. *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 490-91 footnote 16 (3rd Cir., 1999).

13. Id., Justice Weis dissenting, at 499-500. Among these circuits are the 9th (*Harris v. Pan American World Airways* 649 F.2d 670 (9th Cir., 1980)); the 5th (*Davis v. City of Dallas* 777 F.2d 205 (5th Cir., 1985)); the 6th (*Zamlen v. City of Cleveland* 906 F.2d 209 (6th Cir., 1990); the 11th (*Fitzpatrick v. City of Atlanta* 2 F.3d 1112 (11th Cir., 1993)); the 10th (*York v. American Telephone and Telegraph* 95 F.3d 948 (10th Cir., 1996) and the 8th (*Smith v. City of Des Moines* 99 F.3d 1466 (8th Cir., 1996)).

14. *Southeastern Pennsylvania Transportation Authority v. Lanning* 528 U.S. 1131 (2000).

15. *Lanning v. Southeastern Pennsylvania Transportation Authority* 2000 W.L. 1790125 (E.D.Pa., 2000).

16. Id. at page 25.

17. *Washington v. Davis* 426 U.S. 229, 238-39 (1976). Where a literacy test for police was challenged on equal protection grounds because it had the effect of discriminating against minority applicants.

18. Title 42, U.S. Code Section 2000e-2 (k)(1)(A)(i).

19. *Wards Cove Packing v. Atonio* 490 U.S. 642, 659 (1989).

20. *Dothard v. Rawlinson* 433 U.S. 321, 329 (1977).

21. 29 Code of Federal Regulations Section 1607.4 (D) (2000). For example if 90 percent of men meet a physical fitness requirement, at least 72 percent of women (80 percent of 90) must meet the same requirement or a disparate impact is presumed.

22. *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 485 (3rd Cir., 1999).

23. See David E. Hollar, *Physical Ability Tests and Title VII*, 67 University of Chicago Law Review 777, 784 (Summer, 2000).

24. *Fitzpatrick v. City of Atlanta* 2 F.3d 1112, 1118 (11th Cir., 1993). In this case African American firefighters challenged a no beard rule as discriminatory under Title VII because it had a disparate impact on them due to a higher incidence of a physical condition among African American men which restricts the ability to shave. The city successfully countered by presenting proof that firefighters must be clean shaven to successfully use a breathing device when fighting fires.

25. 29 Code of Federal Regulations Section 1607.3 (2000).

26. 29 Code of Federal Regulations Section 1607.5 (2000).

27. 29 Code of Federal Regulations Section 1607.16 (2000). Content validity requires data showing that the content of a selection procedure is representative of important aspects of performance on the job. Construct validity requires data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. Criterion-related validity requires data showing that the selection procedure is predictive or significantly correlated with important elements of work behavior.

28. *Lanning v. Southeastern Pennsylvania Transportation Authority* 2000 WL 1790125 at pg. 10 (E.D.Pa.).

29. Id. at pgs. 11-16.

30. Id. at pgs. 24-25.

31. Id. at pgs. 2-11.

32. Id. at pg. 24.

33. *Lanning v. Southeastern Pennsylvania Transportation Authority* 181 F.3d 478, 483 (3rd Cir. 1999).

34. *Lanning v. Southeastern Pennsylvania Transportation Authoirty* 2000 WL 1790125 at pg. 26.

35. Title 42, U.S. Code Section 2000e-2(l).

36. 29 Code of Federal Regulations Section 1607.11 (2000).