UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

CHERIE EASTERLING, individually and on behalf of all others similarly situated, Plaintiffs, v. STATE OF CONNECTICUT DEPARTMENT OF CORRECTION, Defendant.	CIVIL ACTION NO. 08 CV 826 (JCH) November 24, 2010

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Seth M. Marnin (ct 27308)
Adam T. Klein (phv02892)
Samuel Miller (phv03523)
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016
P: (203) 363-7888
F: (646) 509-2070
Email: smm@outtengolden.com

Michael T. Kirkpatrick (phv02893)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
Telephone: (202) 588-1000
Facsimile: (203) 588-7795
Email: mkirkpatrick@citizen.org

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INTRODUCTION

In its opposition to Plaintiffs' motion for summary judgment, Defendant Connecticut Department of Correct ("DOC") makes three main arguments, none of which is legally sufficient to defeat Plaintiffs' motion.

First, DOC admits that the cut scores it used on the 1.5 mile run test caused a disparate impact against female applicants for the Correction Officer ("CO") job. Nevertheless, DOC argues that Plaintiffs have failed to establish a *prima facie* case because combining the CO applicant pool with the applicant pools for other jobs that are not at issue would reduce the magnitude of the disparity between male and female passing rates. As explained below, DOC's argument is legally irrelevant because the particular employment practice at issue is DOC's use of cut scores that disproportionately eliminated female applicants for the *CO job*. DOC further argues that the disparate impact against female CO applicants can be explained by special recruitment efforts that resulted in an atypical group of female applicants, but DOC offers no evidence to support that theory and ignores completely the testimony of Plaintiffs' expert exercise physiologist who explained that it is the females in the normative sample on which the cut scores were based that are atypical, rather than the female applicants for the CO job.

Second, DOC insists that it can establish the job-related/business-necessity defense simply by pointing to the undisputed fact that the 1.5 mile run test measures an attribute that is used in performing the CO job, without regard to whether the cut scores correspond to the minimum qualifications necessary for successful CO job performance. Because DOC has failed to even attempt to justify its cut scores under the applicable legal standard, DOC's discriminatory cut scores cannot survive this disparate impact challenge.

Third, DOC argues that so long as it refuses to admit the ultimate legal conclusion that the 300 meter run test is a less discriminatory alternative employment practice within the meaning of Title VII, Plaintiffs cannot rely on the 300 meter run test to establish DOC's liability. DOC's argument is specious, because DOC has hired hundreds of COs since switching to the less-discriminatory 300 meter run test and there is no evidence that the COs hired since the switch have performed less well than those hired with the 1.5 mile run test. Moreover, DOC has offered no rebuttal to the testimony of Plaintiffs' experts that the 300 meter run test measures an aspect of physical fitness that more closely matches the demands of the job. Finally, DOC is reduced to arguing that it never "refused" to adopt the 300 meter run test, even though it knew of the disparate impact of the cut scores it used on the 1.5 mile run test, was asked to modify its selection process to avoid that impact, and refused to heed such entreaties until sued. Given these facts, DOC's assertion that no liability can attach absent a specific demand for the 300 meter run test is insufficient to defeat Plaintiffs' motion for summary judgment.

ARGUMENT

I. Plaintiffs Have Established a Prima Facie Case of Disparate Impact.

DOC does not dispute that the cut scores it used on the 1.5 mile run test disproportionately eliminated female applicants for the CO job. See Doc. 112 at 14 (comparing male and female pass rates). Rather, DOC argues that Plaintiffs should not have focused on the particular employment practice at issue, but instead should have examined the impact of the test on a combined pool of applicants for *three different jobs*. DOC's argument fails for several reasons. First, the disparate impact theory of discrimination, as set forth in Title VII, requires that the "complaining party demonstrate[] that a respondent uses a *particular employment practice* that causes a disparate impact" and that, to avoid liability, the respondent must

"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) (emphasis added). It makes no sense to evaluate the impact of the test on applicants for other jobs when the impact of the test on applicants for the position in question is clear. Indeed, as explained in Plaintiffs' memorandum in opposition to DOC's motion for summary judgment, the three different jobs that previously utilized the same test have divergent minimum qualifications, training standards, and job requirements. Plaintiffs' Opp Brief at 3-5. Moreover, the cases DOC relies on as support for aggregating data for disparate impact analysis use aggregation to increase the statistical power of the analysis in situations where small sample sizes for the disaggregated data would mask the disparate impact. Plaintiffs' Opp Brief at 3-5. In this case, no such aggregation is necessary because analysis of the results of CO application process demonstrate the disparate impact of the cut scores DOC used to assess actual applicants for the CO job.

DOC also argues that it should not have to justify the discriminatory cut scores used to assess CO applicants, on the theory that special recruitment efforts resulted in an atypical pool of female applicants for the CO job. DOC's argument fails for at least two reasons. First, DOC assumes that the applicant pool must have been atypical because use of the Cooper's norms should have resulted in equivalent pass rates for men and women. But DOC ignores the undisputed evidence that the sample population used by Cooper to set the norms was comprised of women who were relatively more fit than the men in the sample. Ex. 22 at 6-9. Thus, it is the atypical nature of the women in the Cooper's normative sample, rather than in the CO applicant pool, that accounts for the failure of the normed cut score strategy to eliminate disparate impact. DOC also argues that its recruitment efforts must have changed the fitness profile of the female candidates for the CO job, but DOC offers no evidence to support that theory.

II. DOC Has Failed to Demonstrate That Discriminatory Cut Scores It Used Are Job Related and Consistent With Business Necessity.

In its opposition, DOC does not address the relevant issue with regard to its job-related/business-necessity defense—whether the discriminatory cut scores correspond to the minimum level of physical fitness required to perform the CO job. See Lanning v. SEPTA, 181 F.3d 478, 481 (3d Cir. 1999) ("Lanning I") ("A discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge."), quoted with approval in Lanning v. SEPTA, 308 F.3d 286, 287 (3d Cir. 2002) ("Lanning II"). Instead, DOC recites facts that Plaintiffs have never disputed; specifically, that the 1.5 mile run test measures an aspect of physical fitness (aerobic capacity), some level of which is needed to perform the CO job. These undisputed facts are necessary but insufficient to establish that the job-relatedness and business necessity of the particular employment practice at issue—the use of the 1.5 mile run test as a pass/fail hurdle with the specific cut scores used. Because DOC has come forward with no evidence indicating that the cut scores it used separate those applicants who possess the required level of fitness to perform the CO job from those who do not, DOC's defense must fail.

Plaintiffs' opening brief explained that, by definition, norm-based cut scores cannot be shown to be job related and consistent with business necessity because they are not set with reference to the requirements of the job, but only with reference to a sample population. Plaintiffs' Opp. Brief at 20-23. Apparently lacking any argument to the contrary, DOC ignores this point.

Indeed, DOC's attempt to justify the cut scores is based entirely on two points, neither of which meets the minimum qualifications standard. First, DOC argues that cut scores set at the

40th percentile of the Cooper's normative sample are "appropriate" because Cooper's labels the 40th percentile as dividing those whose fitness level is "fair" from those whose fitness level is "poor." Plaintiffs' Opp. Brief at 23. As explained in Plaintiffs' opening brief, these labels are meaningless for present purposes because they do not correspond to the specific fitness levels required to perform the CO job. Moreover, because the Cooper's sample was comprised of women who were relatively more fit than the men in the sample, using the Cooper's normative standards resulted in holding female CO applicants to a higher standard of relative fitness than male applicants. Second, DOC argues its cut scores can be justified based on Mr. Brull's opinion that using the 40th percentile as a cut score is "reasonable" based on the hypothesis that in a job that requires physical fitness, decreasing levels of fitness will increase the probability of negative outcomes. Even if Mr. Brull's opinion was based on empirical data—which it is not—Mr. Brull's opinion is simply a restatement of the "more is better" defense that was rejected by the Third Circuit in Lanning I. Plaintiffs' Opp. Brief at 11-12. Significantly, DOC ignores this point completely.

III. Plaintiff Has Shown That The 300 Meter Run Test is a Less Discriminatory Alternative to the 1.5 Mile Run Test.

Because DOC cannot carry its burden of proving that its discriminatory cut scores on the 1.5 mile run test are job related and consistent with business necessity, Plaintiffs need not rely on the alternative employment practice method of establishing liability. Nevertheless, should the Court reach this issue, it should reject DOC's arguments for avoiding liability.

DOC does not dispute that the 300 meter run test as used since 2007 is less discriminatory than DOC's manner of use of the 1.5 mile run test. Rather, DOC argues that because the 1.5 mile run test is focused on aerobic capacity and the 300 meter run test is focused on anaerobic power, the new test "*may* not reliably predict a CO candidate's ability to perform

duties that require a sustained level of physical activity." Def. MOL at 27, (emphasis added). This argument suffers from three flaws. First, it is based on pure speculation and lacks any evidentiary support. Second, it is undisputed that hundreds of COs have been hired since the switch to the new test, and none have been unable to perform their job tasks because of a lack of physical fitness. Third, DOC admits that the physical fitness test "is an overall measure of physical fitness, not an agility test that measures an individual's ability to perform a specific task." Def. MOL at 21. Indeed, if DOC was using a test to predict a CO candidate's ability to perform specific duties, it would use an absolute standard rather than a norm-based cut score. Moreover, DOC does not dispute, and simply ignores, the testimony of Plaintiffs' experts that the 300 meter run test more closely matches the physical performance aspects of the CO job. Plaintiffs' Opening Brief at 29-30.

Finally, DOC argues that unless there was a specific demand that DOC adopt the 300 meter run test in lieu of the 1.5 mile run, DOC could not have "refused" to do so within the meaning of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A)(ii). DOC cites no authority for its narrow interpretation of the term "refused," and does not acknowledge the undisputed facts that: 1) DOC knew for many years that its cut scores on the 1.5 mile run had a disparate impact against female CO applicants; 2) DOC was asked specifically to change its practice with regard to the 1.5 mile run test to avoid such disparate impact; and 3) DOC refused to change its practice until confronted with this lawsuit. Plaintiffs submit that these facts are sufficient to establish that DOC refused to adopt the less discriminatory 300 meter run test.

IV. Defendant's 56(a)2 Statement Fails To Meet Requirements of Local Rules.

The Local Rules require papers opposing a motion for summary judgment include a document ("Local Rule 56(a)2 Statement") that states whether each of the facts asserted by the

moving party is admitted or denied. L.Civ.R. 56(a)2. In addition, each denial in the statement must be followed by a specific citation to admissible evidence. Id. Defendant has failed to meet these requirements.

A. Defendant Fails to Justify its Denials With Admissible Evidence

Defendant denies ¶¶ 15, 19, 20, 25, 26 - 28, 36, 38, 40, 47, 48, 59, 60, and 61 but does not support its denials with admissible evidence as required by the Local Rule 56(a)3. Defendant denies the undisputed material facts and merely states that the documents submitted do not support the statement, without providing admissible evidence. A party may not create a genuine issue of material fact by presenting contradictory or unsupported statements. Fleet Dev. Ventures, LLC v. Brisker, 3:06-CV-0570(HBF), 2008 WL 4000611 (D. Conn. Aug. 26, 2008).[1]

B. Plaintiffs' Expert Opinions Are Admissible

Plaintiffs rely on expert reports and testimony of its experts to establish undisputed material facts, ¶¶ 31- 35, 37, 39, 41, 56, 58, 76. Defendant claims that the statements are "not an assertion of fact but statement of an expert opinion that is not based on admissible evidence." Defendant offers no admissible evidence in support of its denial as required by Local Rule 56(a)3, discussed *supra*.

Defendant's contention that the opinions of Plaintiffs' experts which are not based on admissible evidence should be excluded flies in the face of well-settled case law and the plain language of Federal Rules of Evidence 703. The Court recently held that "*by its plain terms*, Rule 703 permits experts to base their opinions on inadmissible evidence . . . so long as that evidence is of the type 'reasonably relied upon by experts' in that particular field." Master-Halco, Inc. v. Scillia, Dowling, & Natarelli, *LLC*, 2010 WL 1553784 at *2 (D. Conn 2010)

[1] Due to a pagination error, certain pages of Plaintiffs' exhibits were mis-numbered in Plaintiffs' 56(a)1 Statement, and Plaintiffs are simultaneously submitting a corrected version with this reply.

(quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595, 113 S.Ct. 2786) (1993) (emphasis added). Therefore, the opinions of Plaintiffs' experts must be admitted as required by the Federal Rules of Evidence.

C. Defendant May Not Rely Dr. Libby's Conclusory Affidavit

Defendant relies nearly exclusively on Dr. Pamela Libby's Affidavit of November 4, 2010, despite an abundant record of fact and expert discovery. Libby's affidavit is riddled with conclusory opinions with virtually no evidence to support her assertions.

A party may not create a genuine issue of material fact by presenting contradictory or unsupported statements. See Securities & Exchange Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir.1978); Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir.1993) (holding that party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible). A self-serving affidavit which reiterates conclusory allegations of the party in affidavit form is insufficient to preclude summary judgment. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). "The nonmovant, plaintiff, must do more than present evidence that is merely colorable, conclusory, or speculative and must present concrete evidence from which a reasonable juror could return a verdict in her favor." Page v. Connecticut Department of Public Safety, 185 F.Supp.2d 149, 152 (D.Conn.2002) (citations and internal quotation marks omitted).

If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, Defendant's reliance on Dr. Libby's unsupported and conclusory declaration undermines its opposition to summary judgment.

CONCLUSION

Plaintiffs respectfully submit that their motion for summary judgment should be granted.

DATED: New York, NY
November 24, 2010

Respectfully submitted on behalf of Plaintiffs,

By: ________/s/____________

Seth M. Marnin (ct 27308)
Adam T. Klein (phv02892)
Samuel Miller (phv03523)
Outten & Golden LLP
4 Landmark Square, Suite 201
Stamford, CT 06901
Telephone: (203)363-7888
Facsimile: (203)363-0333
Email: smm@outtengolden.com

Michael T. Kirkpatrick (phv02893)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
Telephone: (202) 588-1000
Facsimile: (203) 588-7795
Email: mkirkpatrick@citizen.org

CERTIFICATE OF SERVICE

I hereby certify that on a copy of the foregoing was sent electronically on November 24, 2010 to the following counsel of record:

Maria Rodriguez
Margaret Chapple
Office of the Attorney General
55 Elm Street
4th Floor
Hartford, CT 06106
MariaC.Rodriguez@po.state.ct.us
margaret.chapple@po.state.ct.us

By:____________/s/______________

Seth M. Marnin (ct 27308)
Outten & Golden LLP
Four Landmark Square, Suite 201
Stamford, CT 06901
P: (203) 363-7888
F: (203) 363-0333
E-Mail: smm@outtengolden.com