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) October 14, 2010

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs, Cherie Easterling and the class, submit this Memorandum of Law in support of their motion for summary judgment. Plaintiffs challenge the physical exam used by Defendant Connecticut Department of Correction ("DOC") to screen applicants for entry-level Correction Officer ("CO") positions because it has an unlawful disparate impact on women in violation of Title VII of the Civil Rights Act of 1964. Specifically, Plaintiffs challenge DOC's use of a 1.5-mile run test as a pass/fail screening device with cut scores that disproportionately eliminated female candidates for the CO job. Plaintiffs are entitled to summary judgment because the uncontested facts establish that the challenged practice has caused a statistically significant disparate impact on the basis of sex, and the DOC cannot establish that the way it used the test is job related for the CO position and consistent with business necessity. In the alternative,

Plaintiffs are entitled to summary judgment because the undisputed facts show that there is a less discriminatory alternative employment practice – a 300 meter run test -- that would serve the DOC's legitimate operational interests, which the DOC refused to adopt until confronted with this case.

Accordingly, the Court should grant summary judgment in favor of Plaintiffs.

FACTUAL BACKGROUND

I. THE PARTIES

A. Plaintiff Cherie Easterling and the Class

Plaintiff Cherie Easterling is a resident of Bloomfield, Connecticut. (Ex. 4; Ex. 3). Ms. Easterling applied for a CO position with the Connecticut DOC between July 6, 2004 and August 12, 2004. (Ex. 1). She was twenty-five years old at the time she applied for and took the exam. (Ex. 4). Ms. Easterling successfully passed the written component of the exam on or about August 25, 2004, earning a score of 80. (Ex. 4; Ex. 3). On October 26, 2004, Ms. Easterling passed the "Sit and Reach Test," the "One-Minute Sit-Up Test," and the "One-Minute Push-Up Test." However, she did not pass the "1.5-mile run Test." (Ex. 4). As a result of failing the 1.5-mile run test, Ms. Easterling was precluded from moving forward in the selection process and was unable to obtain a CO position with the DOC.(Id.).

The Class, certified by this Court on January 4, 2010, consists of all female applicants for the position of CO at the DOC who participated in the CO selection process and failed the 1.5-mile run portion of the physical fitness test at any time from June 28, 2004 and continuing to the date of final judgment in this matter. Easterling v. Connecticut, Dept. of Correction, 265 F.R.D. 45 (D. Conn. 2010).

B. Defendant State of Connecticut Department of Correction

The stated mission of the Defendant, DOC, is to "protect the public, protect staff, and provide safe, secure and humane supervision of offenders with opportunities that support successful community reintegration." (Ex. 34). The DOC operates eighteen correctional facilities throughout Connecticut. (Id.). COs are responsible for the "confinement, safety, control and monitoring of sentenced and/or unsentenced inmates and security of the facility." (Id.).

II. CORRECTION OFFICER SELECTION PROCESS

A. Application and Testing for the Correction Officer Position

To qualify for a CO position, an applicant must possess a high school diploma or G.E.D., be at least 21 years of age by the close of the application filing period, be in good health, have a good educational and/or work record and excellent moral character, and be free from any felony convictions. (Ex. 1; Ex. 2; Ex. 5, at 9-10). CO candidates complete an initial application on-line. (Ex. 1; Ex. 2). Approximately two weeks after the application period closes, CO candidates sit for a written test administered by the Department of Administrative Services ("DAS") in conjunction with the DOC. (Id.) The written test consists of multiple-choice questions that purport to measure observation, memory, problem solving, judgment, logical reasoning, reading comprehension, skill in counting and basic math, interpersonal skills, written communication skills, work behaviors, styles, preferences and interests. (Id.; Ex. 6 at 8). Candidates who pass the written test are eligible to take the Physical Fitness Test ("PFT") administered by the DAS in conjunction with the DOC (Ex. 5 at 14). The PFT includes exercises purported to measure muscular strength, cardiovascular endurance, and flexibility. (Ex.3; Ex. 2). (The PFT, which is at the heart of this suit, is described in greater detail in section

II.b. below). Upon the successful completion of the PFT, CO candidates participate in a structured interview and background investigation. (Ex. 1; Ex. 2; Ex. 5 at 9-10; Ex. 6 at 8-9).

Applicants who successfully complete this process become a part of the "hiring pool" from which the DOC hires candidates to enter the training academy as CO Cadets. Prior to academy entrance, candidates must pass a drug test and complete a medical examination. (Ex. 6 at 9). Individuals who become a part of this candidate list are "more than likely" to be hired. (Ex. 6 at 37). The hiring pool may remain active for up to three years. (Ex. 6 at 13; Conn. Gen. Stat. § 5-217).

B. The 2004, June 2006, and October 2006 Physical Fitness Test

The Department of Administrative Services posted exam announcements on its web site for the CO position on or about July 2004 ("2004 Exam") and on or about April 2006 ("June 2006 Exam"). In addition, the DAS administered an exam on or about October 2006 ("October 2006 Exam"). (Ex. 1; Ex. 7; Exs. 7-12).

The 2004 Exam, the June 2006 Exam, and the October 2006 Exam consisted of the written and physical tests outlined in section II.a. above. Focusing on the physical portion of the test, the PFT consisted of four discrete events:

(1) Sit and reach test, measuring the number of inches that an applicant can reach beyond his or her toes from a sitting position.

(2) One-minute sit-up test, measuring the number of bent leg sit-ups an applicant can complete in a one-minute period.

(3) One-minute push up test, measuring the number of push-ups an applicant can complete in a one-minute period. (Female applicants are permitted to perform modified push-ups.)

(4) Timed 1.5-mile run test, measuring how long an applicant takes to run/walk 1.5 miles.

(Ex. 13). During the class liability period, a CO candidate must have passed each event in order to pass the PFT and continue in the selection process. (Id.).

The pass/fail cut scores used for each component of the PFT were not based on absolute standards; rather, success on each component was measured by normative standards that varied depending on age and gender, as shown in the chart below:

FEMALE:	**AGE GROUP:**			
Exercise	**21-29**	**30-39**	**40-49**	**50+**
Sit and Reach	19.1/4”	18.1/4”	17.1/4”	16.3/4”
1 Minute Sit-Ups	32	25	20	14
1 Minute Push Up (Modified)	23	19	13	12
1.5-mile run	14:49	15:25	16:12	17:14

MALE:	**AGE GROUP:**			
Exercise	**21-29**	**30-39**	**40-49**	**50+**
Sit and Reach	16.1/2”	15.1/2”	14.1/4”	13.1/4”
1 Minute Sit-Ups	38	35	29	24
1 Minute Push Up	29	24	18	13
1.5-mile run	12:25	12:51	13:46	14:50

(Id.). The PFT and the pass/fail cut scores were identical for the 2004, June 2006 and October 2006 Exams. (Ex. 10; Ex. 11; Ex. 12). The DOC and DAS selected cut scores for each component of the PFT based on the 40th percentile of the Cooper Institute’s[1] age and gender norms for fitness. (Ex. 5 at 43; Ex. 16 at 14). The DOC and DAS based the cut scores on the 40th percentile by age and gender because such norms were purported to correspond to a “fair”

[1] The Cooper Institute is a nonprofit organization dedicated to preventive medicine research and education that provides data and advice to government agencies about fitness programs in law enforcement and public safety.

level of fitness relative to the population used by the Cooper Institute to develop its standards. (Ex. 16, at 57). These percentile rankings were used as pass/fail cut scores despite the Cooper Institute's admonition that "[u]sing **percentile rankings** of the Cooper norms for **standards** is **not defensible**. The percentile rankings do not predict the ability to do the job and do not demonstrate criterion validity." (Ex. 20; Ex. 21)(emphasis in original). The Cooper Institute emphasized that "**[t]he percentile scores (whether age and gender norms or single norms) have no validity data for predicting who can and who cannot do the job**." (Ex. 20; Ex. 21)(emphasis in original).

C. The 2004 and 2006 Female CO Applicants

In 2004, 201 women passed the written test and were eligible to take the PFT. Of those individuals, 148 were eligible to participate in the 1.5-mile run portion of the PFT. Only sixty-two percent (62%) of the women passed the 1.5-mile run component of the PFT while eighty-two percent (82%) of the men passed. Stated another way, ninety-three (93) women passed the PFT and fifty-five (55) failed. (Ex. 7). This resulted in a shortfall of 23 female applicants who should have continued in the hiring process but were prematurely disqualified. (Ex. 24).

In June 2006, 286 women passed the written test and were eligible to take the PFT. Of those individuals, 172 were eligible to participate in the 1.5-mile run portion of the PFT. Only fifty-nine percent (59%) of the women passed the 1.5-mile run component of the PFT while eighty-four percent (84%) of the men passed. Stated differently, 101 women passed and seventy-one (71) failed. (Ex. 8). This resulted in a shortfall of 35 female applicants who should have continued in the hiring process but were prematurely disqualified. (Ex. 24).

In October 2006, 78 women passed the written test and were eligible to take the PFT. Of those individuals, 59 were eligible to participate in the 1.5-mile run portion of the PFT.

Approximately forty-six percent (46%) of the women passed the 1.5-mile run component of the PFT while seventy-seven percent (77%) of the men passed. Stated differently, twenty-seven (27) women passed and thirty-two (32) failed. (Ex. 9). This resulted in a shortfall of 13 female applicants who should have continued in the hiring process but were prematurely disqualified. (Ex. 24).

As discussed in the next section, these numbers establish that for each administration of the PFT during the liability period, female applicants failed the 1.5-mile run component of the PFT at a statistically significant higher rate than male applicants.

D. The 2004, June 2006, and October 2006 Physical Fitness Test's Disparate Impact on Female CO Applicants

Defendant acknowledges that female CO applicants failed the 1.5-mile run component of the PFT at a higher rate than the men taking the test. (Ex. 17 Anderson at 32 ("females have a tougher time with the 1.5-mile run for that specific job…they seem to fail at a higher rate")). In fact, for each of the three PFT administrations in question, female applicants performed less than 80% as well as male applicants on the 1.5-mile run test. (Ex. 5 at 82; Ex. 16 at 33-34).[2]

Plaintiff's counsel retained expert Dr. Alex Vekker to analyze the PFT data provided by the Defendant. Dr. Vekker is the Vice President of Econsult Corporation, an economic consulting and litigation support firm in Philadelphia, Pennsylvania. Dr. Vekker holds a Ph.D. in Economics, with a concentration in labor economics and applied econometrics. Dr. Vekker analyzed the test results from nine (9) test administrations. (Ex. 23; Ex. 24). Dr. Vekker performed an initial analysis based on data provided by Defendant, finding that the physical fitness test outcomes for the position of CO at DOC are not gender neutral. Dr. Vekker concludes

[2] The "80% Rule" is a measure of practical significance discussed in greater detail below.

in his Report that "[t]here is a big statistically significant gender disparity in test outcomes." (Ex. 23 at 3). Moreover, "[t]he probability that a gender disparity of this size or more could have occurred at random or by chance with a gender neutral selection process is 7.3e-064." (Id.) This means that 64 decimal places must be put in front of 7.3 to express this probability. Dr. Vekker analogizes the disparity to "less than the probability of getting 200 straight heads when flipping a fair coin." (Id.). In other terms, the gender disparity for all tests from 1998 to 2006 exceeds 7 standard deviations. (Id. at 4).

Subsequent to Dr. Vekker's work on the initial report, Defendant produced additional data focusing on the 1.5-mile run test for the three administrations in 2004 and 2006. Dr. Vekker ran a statistical analysis on this data, using the same methodology as in his initial report, but isolating the 1.5-mile run test from the other three portions of the PFT. Dr. Vekker concluded that the gender disparities *increased* from those reported in his initial report. (Ex. 24). In fact, the gender disparity for each administration of the test *exceeded four (4) standard deviations*. (Id.).

The DOC and the DAS were long aware of the disparate impact the PFT had on female applicants. (Ex. 5 at 82) ("…[W]hen we first administered the [PFT] exam in '97, we did not meet the 80 percent rule…"). Furthermore, the Permanent Commission on the Status of Women emphasized to the DAS and the DOC that the PFT had a disparate impact on female applicants, and urged the agencies to cease using the discriminatory selection device. (See, e.g., Ex. 25) ("We urge you [Commissioner Lantz] to ask the DAS to …hold up the scores and discuss options if disparate impact occurs…DAS does not deny that the test they are using in fact has resulted in adverse impact on the employment of female applicants each and every time it has been used."; "You [Drs. Libby and Anderson] did not dispute the evidence that the tests the DAS

has been using have resulted in substantial disparate impact each and every time the tests have been used."); (Ex. 26 at 3; Ex. 19 at 64-65; Ex. 27 at 3).

III. PHYSICAL REQUIREMENTS OF THE CORRECTION OFFICER POSITION AND ROLE OF THE TRAINING ACADEMY

The DOC tests CO applicants for "general physical fitness." (Ex. 28 at 99). Plaintiffs do not dispute that it is a legitimate operational interest of the DOC to hire physically fit COs. The physical fitness test is, in part, to determine if a CO candidate will be able to meet the requirements for graduation at the academy. (Ex. 14 at 7-8). The physical fitness test is not designed to predict a candidate's future job performance or success in the academy training program. Rather, the test is used to select male and female applicants of equivalent fitness level as to their preparedness to begin academy training. (Ex. 22 at 4). Physical fitness is an integral part of the academy. Cadets have physical fitness training every day. The physical training component of the academy makes up 10-15% of the curriculum. (Ex. 28 at 97).

Although the 1.5 mile run component of the physical fitness test can be used to measure aerobic capacity, DOC has never calculated the level of aerobic capacity required to perform the CO job. (Ex. 19 at 87; Ex. 14 at 14; Ex. 19 at 125). Additionally, DOC did not use the 1.5 mile run test as a measure of aerobic capacity; rather, DOC used the test as a partial measure of general physical fitness. (Id.).

Plaintiffs retained Dr. William D. McArdle, an exercise physiologist, to analyze data provided by the Defendant regarding the physical components of the CO position and evaluate videotape of COs engaged in their duties in order to assess the position's physical requirements. Dr. McArdle holds a Ph.D. in Exercise Physiology and is Professor Emeritus in the Department of Family, Nutrition and Exercise Science at Queens College. He is currently a Fellow of the

American College of Sports Medicine and has served on the Board of Associate Editors and as a reviewer for several scientific journals in the exercise science area. The National Institutes of Health, the Office of Naval Research, and the U.S. Medical Research and Development Command have funded Dr. McArdle's research. He has published more than 40 papers in peer-reviewed scientific journals and is currently senior author of three major textbooks in the exercise science area. (Ex 22).

Plaintiffs also retained Dr. Harold W. Goldstein, an Industrial and Organizational ("I/O") Psychologist, to analyze the use of the PFT employed by the DOC, evaluate the cut score standards used for the 1.5-mile run test, and opine on whether the practices used by the DOC and DAS are consistent with professional practice in his field. Dr. Goldstein holds a Ph.D. in I/O Psychology and is an Associate Professor at Baruch College in the Department of Psychology. He has published more than 25 books and papers in peer-reviewed journals. Dr. Goldstein has served as an expert witness for the United States Department of Justice since 2001 and has provided expert testimony in approximately a dozen cases. (Ex. 15).

After reviewing the data, Dr. Goldstein found that physical activities requiring any level of aerobic capacity make up only a narrow component of the CO position, and are only a narrow part of the physical abilities required to successfully perform the CO job. (Ex. 15 at 4-9; Ex. 30 at 44-45). Rather, CO duties demand sprint-type, anaerobic (short-term) power output and not aerobic (long-term) endurance. (Ex. 22 at 9-11; Ex. 15 at 15-16). The energy systems activated by groups of officers performing cell extractions and suppressing inmate altercations, for example, demand a high level of anaerobic energy with less demand on aerobic capacity. (Ex. 22 at 11).

Even in responding to emergency situations that are likely to involve physical tasks, there are knowledge, skills, and abilities other than aerobic capacity that must be used by COs to address such situations. (Ex. 19 at 110). Experience, technique, and training can be used to compensate for lower aerobic capacity. (Ex. 19 at 137). Success as a CO requires a broad set of knowledge, skills, abilities, and personal characteristics. Individuals in superior physical condition are not necessarily superior performers as COs. (Ex. 14 at 104-06; Ex. 18 at 111-12). The relative importance of a CO's physical fitness is reflected in the weight the DOC puts on it in performance evaluations. Although COs are evaluated in approximately a dozen different areas, they are not evaluated on physical fitness. (Ex. 28 at 128-33). In fact, incumbent COs are not subjected to any physical fitness standards at any point in their career following the academy. (Ex. 28).

IV. THE 300-METER RUN TEST: A LESS DISCRIMINATORY ALTERNATIVE

In 2007, the DOC replaced the 1.5-mile run component of the PFT (that had been used since 1997) with a 300-meter run test as a "pilot" program. (Ex. 5 at 22; Ex. 31; Ex. 32). The 300-meter run test measures anaerobic capacity. (Ex. 30 at 48. Ex. 22 at 10). The statistics provided by the DOC indicate that the 300-meter run test does not have a disparate impact on women. (Ex. 33; Ex. 16 at 76; Ex. 17 at 4). The DOC has now utilized the 300-meter run test as part of its PFT for CO applicants during two application cycles. (Ex. 6 at 49). In both 2007 and 2009, the 300-meter run test did not result in disparate impact against women. (Ex. 18 at 10-15). Indeed, the Defendant acknowledges that that there is less disparity under the current physical fitness test than the DOC had with the 1.5-mile run. (Ex. 18 at 92).

To date, DOC has hired between 350 and 500 COs – 10% of the total CO workforce - who are actively employed with the DOC who were hired during the period the DOC has been

utilizing the 300-meter run test in the 2007 and 2009 application processes. (Ex. 6 at 49; Ex. 28 at 100; Ex. 18 at 10-16). No concerns have been expressed to the DOC concerning these CO's performance at the training academy and they have satisfactorily performed their jobs. (Ex. 5 at 38; Ex. 6 at 49-50; 66; Ex. 16 at 158-59; Ex. 28 at 107-108). No COs who joined the DOC under the 300-meter run test have been unable to fulfill their duties because they were not physically fit. (Ex. 28 at 102-03; 107; 108). Furthermore, COs who joined the DOC under the 300-meter-run test have not put incumbent COs or inmates at risk because they were not physically fit. (Ex. 28 at 110-11; Ex. 18 at 46).

Moreover, incumbent officers, when surveyed by the DAS and DOC about their duties, equally weigh the importance of short-term anaerobic physical effort and longer-term aerobic physical effort. (Ex. 22 at 10). Since anaerobic tasks had higher frequency and importance ratings in the job analysis than the aerobic tasks, the 300-meter run test may actually increase the validity of the physical fitness test as a whole. (Ex. 15 at 15-16). To date, the DAS has not examined any data concerning the performance of COs who came into the DOC under the 300-meter run test. Although it would take the DAS two to three months to assess the data to consider the adequacy of the 300-meter run test, it has not done so. (Ex. 14 at 21, 26; Ex. 18 at 46-48).

PROCEDURAL HISTORY

On May 30, 2008, Plaintiff Cherie Easterling filed a class-action Complaint in the United States District Court for the District of Connecticut on behalf of herself and similarly situated individuals. In response to the Plaintiff's Complaint, the Defendant filed a motion seeking the dismissal of the action claiming that the Department of Administrative Services was a necessary party to this lawsuit. Plaintiff opposed the motion to dismiss and, in an abundance of caution,

also filed a cross motion to amend the Complaint to add the Department of Administrative Services as a party. On February 9, 2009, this Court denied both the Defendant's motion to dismiss and the Plaintiff's motion to amend the complaint. To date, Defendant has not answered the Complaint. On January 4, 2010, this Court granted Plaintiffs motion for class certification.

LEGAL STANDARD

The moving party has the initial burden of showing that the requisites of Rule 56(c) are met. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once a moving party meets its Rule 56(c) burden, the non-movant "may not rely merely on allegations or denials in its own pleading," Rule 56(e), but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986); see also SEC v. Research Automation Corpo., 585 F.2d. 31, 33 (2d Cir. 1978). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)(internal quotations omitted). It cannot resist summary judgment through "mere speculation or conjecture as to the true nature of the facts," Lipton v. Nature Co., 71 F.3d. 464, 469 (2d Cir. 1995)(citations omitted), or through affidavits amounting to "self-serving conclusions." BellSouth Telecomm. v. W.R. Grace, 77 F3d 603, 615 (2d Cir. 1996). A "material fact is one that would 'affect the outcome of the suit under the governing law,' and a dispute about a genuine issue of material fact occurs if the evidence is such that 'a reasonable [factfinder] could return a verdict for the nonmoving party.'" Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 224 (2d Cir. 2006) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)).

When the motion for summary judgment involves issues upon which the non-movant carries the burden of proof at trial, the moving party meets its Rule 56 burden by "pointing out to

the district court that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. Nothing more is required of the moving party in such circumstances:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. 317-318.

This principle applies when expert opinion is necessary to establish an element of the non-movant's case. Summary judgment against that party is appropriate when the expert fails to provide either the necessary opinion or the underlying facts upon which that opinion is based. Miller v. Pfizer, Inc., 356 F3d 1326, 1335 (10th Cir. 2004)(summary judgment granted to defendants where plaintiffs' report was excluded on Daubert grounds, leaving plaintiffs without scientific evidence of causation).[3]

[3] See also Firefighter's Inst. for Racial Equality ex rel. Anderson v. City of St. Louis, 220 F.3d 898, 904 (8th Cir. 2000)(affirming grant of summary judgment where non-moving party failed to comply with filing deadline for expert report and therefore lacked basis to challenge defendant's expert testimony on job-relatedness of the fire battalion chief exam); Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 191 (5th Cir. 1991)(summary judgment affirmed where non-moving party's expert failed to offer testimony on whether placement of crane cover was unsafe or substandard, an opinion critical to the non-movant's case); Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd., 476 F.Supp.2d 1143, 1155 (N.D. Cal. 2007)(summary judgment granted where non-moving party failed to obtain underlying evidence that would permit expert to calculate royalty damages – a necessary element of the non-movant's case); New Mexico v. General Elec. Co., 322 F.Supp.2d 1237, 1256 (D.N.M. 2004)(in public nuisance case arising from hazardous chemical contamination in groundwater, summary judgment entered for defendant in light of plaintiff's expert's failure to testify to the existence of a contaminant plume).

ARGUMENT

I. PLAINTIFFS SATISFY TITLE VII'S BURDEN-SHIFTING TEST FOR ESTABLISHING DISPARATE IMPACT

As articulated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), Title VII prohibits employment practices that, although "fair in form," are "discriminatory in operation." Thus, Title VII requires "'the removal of employment obstacles, not required by business necessity, which create built-in headwinds and freeze out protected groups from job opportunities and advancement.' Robinson v. MetroNorth Commuter Railroad Co., 267 F.3d 147, 160 (2nd Cir. 2001) (quoting EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir.2000)). Unlike disparate treatment claims, disparate impact claims are concerned with whether employment practices that "were not intended to discriminate have nevertheless had a disparate effect on the protected group." (Id.).

To establish a *prima facie* case of disparate impact, a plaintiff must demonstrate that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i). The burden then shifts to the employer to attempt to prove, as an affirmative defense, "that the challenged practice is job related for the position in question and consistent with business necessity." (Id.; Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 383 (2d. Cir. 2006) ("the basic rule has always been that 'discriminatory tests are impermissible unless shown, by professionally accepted methods, to be 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'"), quoting Albermarle Paper v. Moody, 422 U.S. 405, 431; Pietras v. Board of Fire Commissioners of the Farmingville Fire District, 180 F.3d 468, 472 n.5 (2d. Cir. 1999) (town's arbitrary

selection of 4 minute cutoff for physical agility test for probationary firefighters did not reflect needs of the job and was discriminatory). A plaintiff also may establish employer liability by demonstrating the existence of a less discriminatory "alternative employment practice" that would serve the employer's legitimate operational interests. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

II. DEFENDANT CONCEDES THAT THERE IS STATISTICALLY SIGNIFICANT GENDER-BASED ADVERSE IMPACT

When establishing a *prima facie* case, once the challenged practice is identified, statistical evidence typically is used to show that the observed disparity is substantial or significant. Robinson, 267 F.3d at 160; see Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 987 (1988). Indeed, "a plaintiff may establish a *prima facie* case of disparate impact discrimination by proffering statistical evidence which reveals a disparity substantial enough to raise an inference of causation. That is, a plaintiff's statistical evidence must reflect a disparity so great that it cannot be accounted for by chance." EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus., 186 F .3d 110, 117 (2d Cir. 1999).

The statistical proof garnered by Plaintiff in the reports submitted by Dr. Vekker conclusively establishes that DOC's use of the 1.5-mile run test resulted in a disparate impact on female applicants for the CO position. There can be no genuine dispute with the statistics and conclusions of disparate impact resulting from Dr. Vekker's analysis, as they are based on data provided by Defendant and standard deviation methodology that is universally approved in the statistical field and by the courts. See Guardians Ass'n of New York City Police Dep't v. Civil Serv. Comm'n of the City of New York, 630 F.2d 79, 86 n.4 (2d Cir. 1980); see also Smith v. Xerox Corp., 196 F.3d 358, 365-66 (2d Cir. 1999), *overruled on other grounds*, Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006). Moreover, Plaintiff's expert's

statistical analysis merely confirms the disparate impact Defendant has explicitly recognized for years. (Ex. 24) (expressing DOC concession that it has known of a "substantial disparate impact each and every time the tests have been used."); (Ex. 16 at 32 (State official's admission that "females have a tougher time with the 1.5-mile run for that specific job…they seem to fail at a higher rate")). Indeed, Defendant's experts agree that the 1.5-mile run test had statistically significant adverse impact on women. (Exs. 19, 26, 27).

Focusing on details of the expert analysis in this case, Dr. Vekker initially analyzed nine administrations of the PFT as a whole (all four components together) between 1998 and 2006. The statistical results from Dr. Vekker's supplemental report are reproduced in Table I below. As DOC has acknowledged, women passed the 1.5-mile run test at a statistically significantly lower rate than men. The disparity between the passing rates, as expressed in standard deviations exceeding four (4), is more than sufficient to establish a *prima facie* case of disparate impact.[4]

[4] Where an observed disparity is statistically significant, one can conclude that it is not due to chance. Statistical significance is most reliably measured by standard deviation analysis. The number of standard deviations corresponds to the likelihood that a disparity as large as the one observed would occur by chance. Guardians, 630 F.2d at 86. The likelihood that a disparity equivalent to two standard deviations would occur by chance is approximately 5%, and the likelihood that a disparity equivalent to three or more standard deviations would occur by chance is less than 1%. Id. The Second Circuit has explained that if the observed disparity "is greater than two or three standard deviations, a *prima facie* case is established." Id. (citing Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977)); see also Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.14 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977); Malave v. Potter, 320 F.3d 321, 327 (2d Cir. 2003); Smith v. Xerox, 196 F.3d at 366; Waisome v. Port Auth. of New York & New Jersey, 948 F.2d 1370, 1376 (2d Cir. 1991).

Table I. Analysis of Gender Shortfall for 1.5-mile run Exercise

Approximate Exercise Time	Expected Number of Female Applicants Who Pass	Actual Number of Female Applicants Who Pass	Shortfall	Probability of Occurring by Chance	Standard Deviations
Test 7 (2004)	116	93	23	6.048e-007	4.9
Test 8 (June 2006)	136	101	35	6.807e-012	More than 6
Test 9 (September 2006)	40	27	13	1.551e-005	4.2

In terms of practical effect, as shown in Table I, 71 additional women would have passed this portion of the PFT if the DOC had used a gender-neutral device, and a substantial number of those additional women would have successfully completed the remainder of the selection process and been hired. Furthermore, the disparity in passing rates between men and women is so severe that, for each administration of the 1.5-mile run test during the liability period, female applicants performed less than 80% as well as male applicants. [5]

Based on Defendant's concession and the analyses explained above, Plaintiffs are entitled to summary judgment on the issue on which they bear the burden: the disparate impact of DOC's manner of use of the 1.5 mile run test.

[5] The 80% Rule is a measure of practical significance suggested by the Uniform Guidelines on Employee Selection Procedures as a "rule of thumb" to guide federal enforcement agencies. 29 C.F.R. §1697.4(D). The 80% Rule is a ratio calculated by dividing the pass rate of the group disadvantaged by a selection practice by the pass rate of the other group. A ratio of *less* than 80% indicates a substantial difference in pass rates. "Essentially, this means that if the minority group performs less than 80% as well as the highest performing group, disparate impact will generally be inferred." United States and Vulcan Society, Inc. v. City of New York, 637 F. Supp. 2d 77 (E.D.N.Y. 2009) ("Vulcans II"); Green v. Town of Hamden, 73 F.Supp.2d 192, 198 (D. Conn. 1999) (granting preliminary injunction to prevent town from hiring firefighters based on test resulting in a less than 80% pass rate by minority candidates).

III. THERE IS NO GENUINE ISSUE OF FACT AS TO JOB-RELATEDNESS AND BUSINESS NECESSITY

Once plaintiffs have established that "a particular employment practice [] causes a disparate impact," plaintiffs are entitled to judgment unless the defendant can "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). It is not enough for a defendant to show that the test it uses measures an attribute that is needed to do the job; rather, the defendant must show that its manner of use of the test is job related and consistent with business necessity.

A. DOC Cannot Demonstrate That The Cut Scores It Used On The 1.5-Mile Run Test Are Legally Valid

The employment practice at issue in this case is DOC's use of the 1.5-mile run test as a pass/fail hurdle with the particular cut scores DOC used. DOC cannot carry its burden by showing only that the test measures an aspect of physical fitness, and that and some level of physical fitness is needed to perform the CO job; or, more specifically, that the 1.5-mile run test is a measure of aerobic capacity and that some level of aerobic capacity is required to perform the CO job. Indeed, those contentions are not in dispute. To establish the job-related/business-necessity defense, DOC must show that the *cut scores* it used separate those applicants who are likely to be able to do the job from those who are not.

DOC's attempts to justify its cut scores on the 1.5-mile run test are unavailing for two main reasons. First, DOC used cut scores based on norms drawn from a sample population assessed at the Cooper Institute. As explained in greater detail below, the use of norm-based cut scores is intended to avoid disparate impact and obviate the need to defend the cut scores as job related and a business necessity. But where the strategy of using normed cut scores fails to avoid

disparate impact, the employer is liable under Title VII because normed cut scores, by definition, are not related to the specific requirements of the job.

Second, DOC has not even attempted to show that the normed cut scores that caused disparate impact against female applicants correspond to the specific amount of aerobic capacity needed to perform the CO job. Indeed, DOC cannot make such a showing because DOC has never determined what amount of aerobic capacity is required to perform the CO job. Without that information, DOC cannot establish the job-related/business-necessity defense, because "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." Lanning v. SEPTA, 181 F.3d 478, 481 (3d Cir. 1999) ("Lanning I"), *quoted with approval in* Lanning v. SEPTA, 308 F.3d 286, 287 (3d Cir. 2002) ("Lanning II").

i. DOC Used Norm-Based Cut Scores that Cannot be Validated as Job Relevant or Consistent with Business Necessity

There are two main approaches to setting cut scores on tests of physical capabilities in an employment setting: the use of absolute standards and the use of normative standards. Under the absolute standard approach, the employer quantifies the physical demands of particular job tasks, constructs a test that simulates those demands (sometimes called a "physical agility" or "physical abilities" test), and applies the same cut score to all applicants who take the test. Such absolute cut scores are designed to discriminate between those who can and those who cannot perform the particular physical tasks of the job. Because of physiological differences between men and women, the absolute standard approach often results in disparate impact against women, but if

the cut scores correspond to the minimum level of the attribute needed to perform the job, the cut scores can be defended as job related and a business necessity.

Under the normative standard approach, the employer uses a test to select male and female applicants of equivalent fitness levels by using cut scores that differ by age and sex (sometimes called a "physical fitness test"). Unlike the absolute standard approach, the normative approach is not designed to identify applicants who can or cannot perform particular job tasks; rather, the normative approach is designed to select male and female applicants of equivalent fitness level to begin academy training to learn the skills and techniques needed to perform the physical tasks of the job. (See Ex. 22 at 4). Because the cut scores are not set to correspond to the minimum level of the attribute measured that is needed to perform particular job tasks, the cut scores cannot be defended as job related and consistent with business necessity.[1] (See Ex. 15 at 11) ("[N]orm-based data does not indicate anything regarding who can or cannot perform essential functions of the job. The norm data does not tie in any way to job performance. Therefore, quite simply, cutoff standards based on norms are not job relevant and thus not valid."). However, where the pool of men and women that comprise the normative group are of equivalent fitness and training status, the use of norm-based cut scores should eliminate disparate impact and obviate the need to defend the cut scores against a disparate impact challenge. See 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (if a specific employment practice does not cause disparate impact, the employer is not required to demonstrate that the practice is required by business necessity).

[1]Not only are norm-based cut scores incapable of being defended as job related and a business necessity, any attempt to use the absolute standard approach with different cut scores based on sex would affirmatively violate Title VII, 42 U.S.C. § 2000e-2(*l*).

Here, DOC chose to screen applicants for the CO job using the normative standard approach. DOC used cut scores derived from a sample population studied by the Cooper Institute. In using such an approach, DOC expected to avoid disparate impact and never have to defend the cut scores. Unfortunately, as explained above, the cut scores DOC used caused a disparate impact against women. As described in detail in the expert report of Dr. McArdle, an exercise physiologist, 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. As Dr. McArdle explains, "women should achieve a test score on the 1.5-mile run test (and other measures of aerobic fitness) equivalent to between 70 and 80% of the male's score in order to be ranked at a similar level (percentile) for physical fitness," but the standard used by DOC required that "women achieve a value that is 85% of that achieved by men of similar age." (Ex. 22 at 7; see also Ex. 15 at 13-14) (describing flaws in Cooper norms).

Because DOC used the normative standard approach to setting cut scores, but failed to avoid disparate impact, the Court should enter summary judgment for plaintiffs on this basis alone. Norm based cut scores, by definition, are not job related and a business necessity because they are not set with reference to the requirements of the job, but with reference to a sample population. As this Court recognized in its ruling on plaintiffs' motion for class certification, "[t]here appears to be no dispute that the physical fitness test has not been shown to be predictive of who can and cannot perform the essential or critical physical functions of the job of CO." Easterling v. Connecticut, Dept. of Correction, 265 F.R.D. at 49. Indeed, this is why the Cooper's Institute cautions that "[u]sing **percentile rankings** of the Cooper norms for **standards** is **not defensible**. The percentile rankings do not predict the ability to do the job and do not demonstrate criterion validity." (Ex. 18; Ex. 19)(emphasis in original). Further, the Cooper

Institute emphasizes that "**[t]he percentile scores (whether age and gender norms or single norms) have no validity data for predicting who can and who cannot do the job**." (Ex. 20; Ex. 21)(emphasis in original).

ii. The Discriminatory Cut Scores at Issue do Not Correspond to the Minimum Qualifications for the Job

Each of DOC's proposed experts admits that no attempt has been made to determine whether the cut scores used on the 1.5-mile run test correspond to the minimum level of aerobic capacity necessary to successfully perform the CO job. Mr. Brull admitted that he had not made such a determination "with any level of exactness through a statistical test or empirical validation," (Ex. 19 at 87), and that he could not describe the minimum level of aerobic capacity required to do the job. (Id. at 90). Dr. Anderson testified that DOC had not "measured the specific cardiovascular capacity required" to perform the tasks of the CO job, (Ex. 14 at 14), and that, with regard to the 1.5-mile run test, he had not determined that the cut scores corresponded to the minimum level of aerobic capacity necessary to perform the CO job. (Id. at 102). Dr. Libby admitted that she could not correlate the minimum level of aerobic capacity necessary to perform the CO job with the cut scores used on the 1.5-mile run test, (Ex. 18 at 116), and she stated that she had no opinion as to the minimal level of aerobic capacity necessary to adequately perform the CO job. (Id. at117-118). These admissions show that DOC cannot carry its burden of proving that the discriminatory cut scores it used on the 1.5-mile run test were "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

The leading case applying the job-relatedness/business-necessity standard to the use of a discriminatory cut score on a test of physical abilities is the Third Circuit's decision in Lanning I. In Lanning, plaintiffs challenged the use of a 1.5-mile run test with a 12 minute cut score to

select candidates for a transit police officer job. The cut score in Lanning was not based on a normative approach; rather, it was an absolute standard designed to correspond to an aerobic capacity of 42.5 mL/kg/min. The cut score had a disparate impact on women, and the issue in the first appeal was the proper standard for judging whether the manner of use of the test was job related and a business necessity. In a carefully reasoned opinion that examined the history of the business necessity doctrine, the court in Lanning I explained that "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." 181 F.3d at 481. The Third Circuit also made clear that professional judgment alone is insufficient to validate an employer's discriminatory practices. (Id. at 491). On appeal following remand, the Third Circuit reiterated the "minimum qualifications necessary" standard that it had announced in Lanning I, and affirmed the district court's conclusion, based on an expanded record, that the employer had "proven that its 42.5 mL/kg/min aerobic capacity standard measures the minimum qualifications necessary for the successful performance of the job of [] transit police officers." Lanning II, 308 F.3d at 289. The minimum qualifications standard articulated by the Third Circuit in the Lanning cases has been cited with approval by several other courts, including district courts in the Second Circuit. *See*, e.g., Vulcans II, 637 F. Supp. 2d at 125 (granting summary judgment for plaintiffs in Title VII disparate impact case where "the City has presented no evidence that its chosen cutoff scores bear any relationship to the necessary qualifications for the job" and where the City "conceded that the cutoff scores were not selected in order to measure the minimum level of the tested skills, abilities, or other characteristics necessary for successful performance of the job") (citation and internal quotes omitted); United States v. Delaware, 2004 WL 609331, *1 (D. Del.

Mar. 22, 2004) (finding that although the written test at issue was "a valid and reliable test for law enforcement employment screening," the defendant had failed to meet its burden of showing that the discriminatory cut scores corresponded to "the minimum qualifications necessary for successful performance of the job"); Green v. Town of Hamden, 73 F. Supp. 2d 192, 199-200 (D. Conn. 1999) (granting preliminary injunction to enjoin further hiring of firefighters pending trial on discrimination claims where written test had disparate impact and, even assuming the test validly measured certain important abilities required for the job, employer had not demonstrated a relationship between the cut score and "the minimum skill level required for adequate job performance").

B. Defendant Cannot Rely on a "More is Better" Defense

From the testimony provided by DOC's witnesses in this case, Defendant appears to rationalize its use of the normed cut-scores on the 1.5 mile run test on the basis that more is better. For example, Mr. Brull testified that "it's reasonable to assume [that] higher levels of fitness correlate with more positive outcomes and fewer negative outcomes. The higher the cut score, the lower the probability of negative outcomes and the higher probability of positive outcomes." (Ex. 19 at 116). This position is undermined by the fact that DOC has not attempted to quantify the aerobic demands of the diverse physical activities performed by COs, and DOC's experts have not observed any statistically significant correlation between aerobic capacity and CO job performance. (Ex. 19 at 125).

Even if Mr. Brull had demonstrated, rather than assumed, a linear relationship between fitness and some measure of job performance, that relationship would not be sufficient to justify a cut score under the theory that "more is better." In Lanning I, the Third Circuit rejected the argument advanced by the employer that where there is a linear relationship (positive

correlation) between test score and job performance, any cut score can be justified. 181 F.3d at 492. The court explained that because the "more is better" theory does not address the question of what cut score corresponds to the minimum qualifications needed to perform the job, the theory is irrelevant in all but "the rarest of cases where the exam tests for qualities that fairly represent the totality of the job's responsibilities." (Id. at 493 n.23). Rejection of the "more is better" defense has a psychometric and statistical rationale as well. Specifically, the use of a non-representative test with a cut score that exceeds the point that defines the lowest level of acceptable performance may be counterproductive to the organizational goal of hiring the best overall performers, because an unnecessarily high cut score may eliminate applicants who would have been better overall performers because of their strengths in other job-relevant areas. See Goldstein Report at 4-5, 9-10.

It is undisputed that the attribute measured by the 1.5-mile run test—aerobic capacity—is only a narrow part of the physical abilities relevant to the CO job, and that physical abilities are only a narrow part of the overall job domain. Dr. Goldstein reviewed job analytic data gathered by DOC in 1999 and 2005 and found that, in both cases, aerobic capacity was only a narrow part of the job and did not stand out as one of the most critical abilities needed for CO job performance. (Id. at 5-9). DOC's experts concur. Mr. Brull testified that, even in responding to emergency situations that are most likely to involve physical tasks, there are knowledge, skills, and abilities other than aerobic capacity that must be used by a CO to address such situations, (Ex. 19 at110), and he explained that experience, technique, and training can be used to compensate for lower aerobic capacity. (Id. at 137). Drs. Anderson and Libby both testified that success as a CO requires a broad set of knowledge, skills, abilities and personal characteristics, and that individuals in superior physical condition are not necessarily superior performers as

COs. (Ex. 14 at 104-106; Ex. 18 at. 111-112). Indeed, Mr. Callahan explained that COs are evaluated in about a dozen different areas, but they are not evaluated on physical fitness. (Ex. 28 128-133).

Thus, there are no material issues of fact upon which the Court could find that DOC has met its burden of demonstrating that its manner of use of the 1.5-mile run test was "job related for the position in question and consistent with business necessity," and Plaintiffs are entitled to judgment as a matter of law. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

IV. THERE IS NO GENUINE ISSUE AS TO THE AVAILABILITY OF A VALID ALTERNATIVE WITH LESS ADVERSE IMPACT

Title VII provides that even where a defendant meets its burden of establishing job relatedness and business necessity, plaintiff can establish liability by showing the existence of a less discriminatory "alternative employment practice" that would serve the employer's legitimate operational interests and which the employer refuses to adopt. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). Here, Plaintiffs present undisputed facts establishing the existence of just such a less discriminatory alternative. Specifically, DOC could have reduced the disparate impact of its use of the 1.5-mile run test during the years at issue by substituting the 300-meter run test that it eventually implemented in 2007, in response to this case. Both the 1.5-mile run test and the 300-meter run test measure aspects of physical fitness, and DOC admits that the purpose of its physical testing program is to measure physical fitness generally, rather than the ability to perform any particular job task. Moreover, plaintiffs' experts have concluded that the 300-meter run test more closely measures the type of tasks performed by COs.

A. DOC's Use of the 300-Meter Run Test is Less Discriminatory than the 1.5-Mile Run Test

DOC admits that its use of the 300-meter run test since 2007 has caused less disparate impact against women than its use of the 1.5-mile run test in earlier years. Anderson and Libby report, (Ex. 17 at 4). Dr. Libby testified that in both 2007 and 2009, the 300-meter run test did not result in disparate impact against women, Ex. 18 at 88, and she testified that "we have less disparity under the current physical fitness test with the 30th percentile and the 300-meter than we had with the 40th percentile and the 1.5." (Id. at 92). Thus, DOC's use of the 300-meter run test is less discriminatory than DOC's use of the 1.5-mile run test.

B. DOC's Use of the 300-Meter Run Test Serves DOC's Needs at Least as Well as the 1.5-mile Run Test

DOC uses a run test as part of its physical fitness battery, not to simulate any particular CO job task, but simply to assess fitness in general. Both the 1.5-mile run test and the 300-meter run test assess physical fitness, but the 1.5-mile run test is focused on aerobic capacity and the 300-meter run test is focused on anaerobic capacity. To the extent that DOC argues that the 300-meter run test cannot be considered an alternative to the 1.5-mile run test because the two tests focus on different aspects of physical fitness, DOC is wrong. Even if the 300-meter run test does not measure aerobic capacity, it is undisputed that it measures physical fitness, which is the construct DOC's test was designed to target through its use of the physical fitness battery. This point is reinforced by reference to the seminal case on less discriminatory alternatives, Dothard v. Rawlinson, 433 U.S. 321 (1977), where the Supreme Court found that the substitution of a strength test for a height/weight requirement was a less discriminatory alternative, even though the strength test measured different attributes than height or weight.

The issue of whether the 300-meter run test is an alternative to the 1.5-mile run test is not determined by identifying the particular aspect of physical fitness measured by each test; rather, the issue is whether the 300-meter run test serves DOC's needs at least as well as the 1.5-mile run test. Significantly, DOC has hired 500 COs from the 2007 selection process that used the 300-meter run test, and an additional 100-120 COs from the 2009 selection process that used the 300-meter run test. (Ex. 18 at 10-16). Although DOC has collected academy and job performance data for those COs, DOC has chosen not to analyze the data. (Ex. 18 at 46-48; Ex. 14 at 21). Thus, DOC asserts that it cannot say whether the COs hired with the 300-meter run test have performed as well as the COs hired with the 1.5-mile run test. Nevertheless, DOC admits that it has no reason to believe that the COs hired with the 300-meter run test have not performed as well, and DOC's witnesses testified that using the 300-meter run test had not placed anyone at risk. Libby Dep. 46:22-48:11; Callahan Dep. 110:24-111:9. Indeed, Mr. Callahan testified that more than 10 percent of the incumbent COs have been hired with the 300-meter run test and he is not aware of a single CO who was unable to perform his or her duties because of a lack of physical fitness. (Ex. 28 at102-103; 107; 108-09). Because DOC cannot identify a single individual hired with the 300-meter run test who did not have an adequate level of physical fitness to do the job, it is clear that the 300-meter run test adequately serves DOC's interest in hiring candidates who are physically fit.

Moreover, plaintiffs' experts examined DOC's job analytic data and concluded that the physical performance aspects of the CO job draw on anaerobic power to an equal or greater extent than aerobic power. (Ex. 22 at 9-10; Ex. 15 at 15-16). Dr. Goldstein found that because anaerobic tasks had higher frequency and importance ratings in the job analysis than the aerobic tasks, substituting the 300-meter run test for the 1.5-mile run "may actually increase the validity

of the battery as a whole." (Ex. 15 at 15-16). Indeed, Dr. McArdle concluded that, based on his observations of the physical demands of the CO job, physical effort by COs is often broken up into intermittent physical activity intervals, leading to the conclusion that the 300-meter run test "closely matches the physical fitness requirements of the job." (Ex. 22 at 10).

Thus, there is no material dispute as to whether the 300 meter run test is a less discriminatory alternative that meets DOC's legitimate operational needs. On that basis, the Court should grant summary judgment to Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment, based on a finding that DOC's use of the 1.5-mile run test caused a disparate impact against female applicants for the CO position, and that DOC has failed to demonstrate that its manner of use of the 1.5 mile run test is job related and consistent with business necessity, or, in the alternative, that there is a less discriminatory alternative that would serve DOC's legitimate operational interests..

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Respectfully submitted,

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