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

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Summary judgment is about evidence. Defendant's cross-motion for summary judgment ("Def. MOL") asserts unsupportable arguments absent any evidence.

Plaintiffs' complaint challenges Defendant Connecticut Department of Correction's ("DOC") use of age and gender normed cut scores on the 1.5-mile run test as a pass/fail screening device that disproportionately eliminated female candidates for the entry-level Correction Officer ("CO") position in violation of Title VII of the Civil Rights Act of 1964. . This Court should deny Defendant's cross motion, and grant Plaintiffs' motion for summary judgment, because the uncontested material facts establish that the challenged practice has caused a statistically significant disparate impact on the basis of sex, and DOC cannot establish that the cut scores it used are job related for the CO position and consistent with business necessity. In the alternative, Defendant's motion should be denied and Plaintiffs' motion granted because the undisputed facts show that there is a less discriminatory alternative employment practice – a 300 meter run test – that serves the DOC's legitimate operational interests and which the DOC refused to adopt until confronted with this case.[1]

In support of its motion, DOC relies nearly exclusively on Dr. Pamela Libby's Affidavit of November 4, 2010, despite an abundant record, including nine depositions, six expert reports, and thousands of pages of documents. Libby's affidavit is riddled with conclusory opinions with virtually no evidence to support her assertions. In addition, in both this opposition and Plaintiffs' 56(a)2 Statement, Plaintiffs have identified issues of material fact that are in dispute that would preclude a grant of summary judgment for Defendant For these reasons and the reasons set out

[1] Defendant submitted its opposition to Plaintiffs' motion for summary judgment and its memorandum of law in support of motion for summary judgment in one brief. Plaintiffs will submit their opposition to Defendant's motion for summary judgment and reply to Defendant's opposition to Plaintiffs' motion for summary judgment separately.

more fully below, the Court should deny Defendant's motion for summary judgment and grant summary judgment in favor of Plaintiffs.[2]

ARGUMENT

I. Plaintiffs Have Established a *Prima Facie* Case of Discrimination.

A. Plaintiffs Have Identified the Employment Practice at Issue

The employment practice at issue is DOC's use of a 1.5 mile run test with age and gender normed cut scores that disproportionately eliminated female applicants for the CO job. Ex. 6 at 64-65; Exs. 7-9; 10-12: Ex. 14 at 103. Defendant does not dispute that Plaintiffs have satisfied the first requirement for a prima facie case.

B. There is No Dispute That The Cut Scores DOC Used Had a Disparate Impact Against Female Correction Officer Applicants

The age and gender normed cut scores Defendant used for the 1.5 mile run test have a disparate impact against female CO applicants. The data is clear and uncontested. During the liability period, women CO applicants failed the 1.5 mile run test at a statistically significantly higher rate than male CO applicants. See Ex. 24. Defendant's own expert agrees:

> Q: Does the 1.5 mile run test have a adverse impact against female candidates? Your answer to that question would be yes, correct?
> A [Mr. Brull]: Correct.
> Q. And do you have any basis to disagree with any of Dr. Vekker's statements in his reports?
> A. No.
> Q.And you don't have any basis to disagree with Dr. Vekker's statistical methodology, do you?
> A. No.

Ex. 19 at 63-64; see also Ex. 25 at 3. Furthermore, Defendant admits in its Memorandum of Law and Statement of Undisputed Facts that the cut scores the DOC used for the 1.5 mile run test had a disparate impact against female CO applicants. Def. MOL, p. 14 ("[I]n 2004, the selection

[2] Plaintiffs provided a comprehensive accounting of the factual background in Plaintiffs' memorandum of law in support of their motion for summary judgment.

ratio under the 4/5ths Rule for the position of the Correction Office [sic] in the 1.5 mile run was 76.6%. In 2006, the section ratio for the position of the Correction Officer Cadet in the 1.5 mile run was 74.6%") (internal citations omitted). See also Defendant's Statement of Undisputed Facts, ¶ 28. Indeed, the gender disparity for each administration of the test *exceeded four (4) standard deviations*. Exs. 23 and 24.

i. Defendant's Aggregation Argument Is Specious.

Defendant attempts to avoid liability by insisting that Plaintiffs have analyzed the wrong applicant pool. (Def. MOL, p. 7-13). Defendant argues that Plaintiffs should have included data for applicants for other, unrelated jobs, with other employers. The only rationale (*not* evidence) Defendant offers for aggregating the data is that the test was given at the same time for the different jobs. Def. MOL, p. 7. Taken to its logical conclusion, this argument could include applicants for *any* job for *any* employer that utilizes the same cut scores on the 1.5 mile run test. Defendant has provided *no* evidence to support its argument that data for CO applicants should be combined with data for candidates for other positions with other employers.

Defendant's attempt to conceal the adverse impact of the 1.5 mile run test on CO applicants by aggregating data from unrelated, non-CO, law enforcement officer applicant pools flies in the face of Title VII and well-settled case law. In Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989) superseded by statute on other grounds, Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k), the Supreme Court rejected an employer's attempt to defeat the plaintiff's disparate impact claims by comparing the racial composition of different classes of job categories in determining whether there existed disparate impact with respect to one particular job category. (The "proper comparison is between the racial composition of the *at-issue jobs* and the racial composition of the qualified ... population in the relevant labor market." Wards Cove

Packing Co., Inc. v. Atonio, 490 U.S. 642, 650, (1989), citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977))(emphasis added, internal quotations omitted); see also Moore v. Hughes Helicoptors, Inc., a Div. of Summa Corp., 708 F.2d 475, 482 (9th Cir. 1983) (disparate impact should always be measured against the actual pool of applicants unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate).

Plaintiffs do not dispute that, under certain circumstances – none of which are present here -- it may be appropriate to aggregate data. For example, in Paige v. California, 291 F.3d 1141, 1148 (9th Cir. 2002), cited by Defendant, the court aggregated data based on a concern that the particularly small sample size may distort the statistical analysis. See also Pietras v. Bd. of Fire Com'rs of Farmingville Fire Dist, 180 F.3d 468 (2d Cir. 1999). Here, DOC does not claim that sample size is an issue. Moreover, the Paige Court found there was "sufficient commonality among the duties and skills required by the various supervisory positions to justify aggregation." Id. In contrast, here the CO, State Police Trooper Trainee ("SPTT"), and Protective Services Trainee ("PST") positions are distinct jobs, attracting different applicant pools. Applicants for the CO position are recruited more broadly, and reflect a more diverse population. See Ex. 18 at 70-71 (comparing DOC recruitment with the recruitment of SPTT and PST recruitment, "[The DOC] do[es] a more generalized recruitment. So they will go to events, motor vehicle sites, other places, and hand out applications and do recruiting, as opposed to [SPTT and PST recruiters] maybe going to a military site or going to a gym …"). Logically, recruiting at a military site or gym will yield a fitter applicant pool – a pool that is more analogous to the Cooper women. See Plaintiffs' MOL in Support of Summary Judgment, p. 22;

Ex. 22, 6-9. Additionally, the positions have different minimal qualifications, and different duties, skills, and training. See, e.g. Ex. 35-37.[3]

The remainder of the caselaw cited by Defendant is unavailing. Defendant cites Eison v. City of Knoxville, 570 F.Supp. 11 (E.D. Tenn. 1983), arguing that the court was "of the opinion that all cadets who have taken the test should be included in the sample for comparison," implying that the Eison court endorsed combining applicants for different jobs in a sample for analysis. However, the Eison court considered a test for a *single job* with *one employer* – the only aggregation was to include all three test administrations rather than just the one in which plaintiff participated. Id. at 13.

Defendant similarly misdirects this Court to Stagi v. Nat'l R.R. Passenger Corp, 09-3512, 2010 WL 3273173 (3d Cir. Aug. 16, 2010), where the court aggregated data for all class members, and not for anyone in other positions or with other employers. Cook v. Boorstin, 763 F.2d 1462 (D.C. Cir. 1985), also cited by Defendant, does not even address the issue of aggregation. Rather, the court ruled in a disparate treatment case that evidence of discrimination may extend beyond plaintiffs' particular job category to company-wide discrimination Id. at 1468. In sum, no case upon which Defendant relies supports its position that the data should be aggregated to evaluate disparate impact. Defendant's position that Plaintiffs analyzed the "wrong applicant pool" is thus without merit.

ii. The CO Applicant Pool is Not Atypical.

Defendant next attempts to justify the disparate impact against female CO applicants caused by its manner of use of the 1.5 mile run test by seizing upon a narrow exception in the

[3] CO position identifies *five* qualification requirements; SPTT identifies *eight*; SPTT identifies *ten*; the SPTT and PST selection processes include polygraph examination and psychological evaluation, whereas the CO position does not; the CO training program is a 10 week program whereas the SPTT lasts up to six months and recruits are required to live at the Academy.

Uniform Guidelines that excuses adverse impact "where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group." 29 C.F.R. § 1607.4(D). Defendant insists that "[t]he disparity…is partially explained by the atypical applicant pool and the recruiting efforts by the DOC," (Def. MOL, p. 14), whereby it purportedly employed "aggressive" recruitment efforts to improve the diversity of the workforce, but states those recruitment efforts pre-date the liability period. (Ex. 16 at 48, 52; Ex. 14 at 118-23)

However, the Defendant fails to provide *any* evidence of any tactics it may have employed or how, if at all, such tactics changed the characteristics of the female applicant pool in a manner that drove the disparate impact. The number of women applicants who advanced to the PFT, as both a percentage of the total pool of candidates who advanced and the actual number of women who advanced, has remained consistent for the entire period of time for which DOC has produced data. The data is summarized in Tables I and II below. The statistics confirm that the gender composition of the applicant pool was not affected by any alleged special recruiting.

Table I. Percentage of Men and Women Who Participated in the PFT.[4]

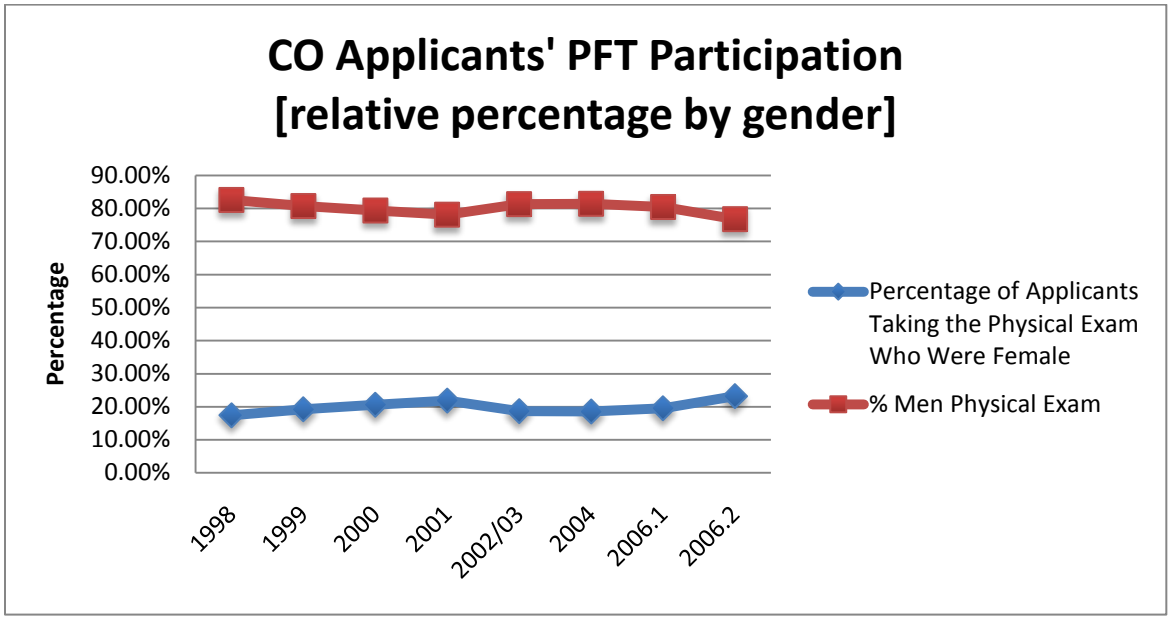
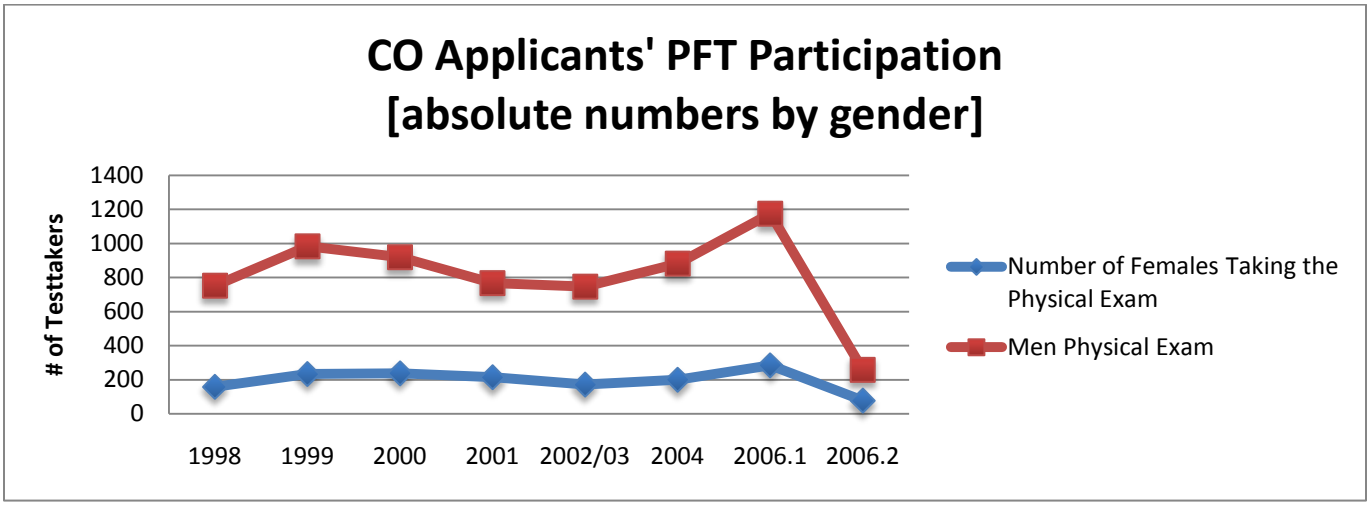


Table II. Number of Men and Women Who Participated in the PFT.



Furthermore, the sole case Defendant cites to support its position shows the dramatic circumstances required to fit this exception. The defendant in Clady v. County of Los Angeles experienced disparate impact against minority candidates when the percentage of minority

[4] Data extrapolated from Exs. 7-9.

applicants was nearly *double* the normal pool of applicants from that group as a result of the county's affirmative action efforts. 770 F.2d 1421, 1432 (9th Cir. 1985). Here, in contrast, the composition of Defendant's pool remained comparatively unchanged from 1998 through 2006 – and certainly does not reflect an atypical applicant pool. The Uniform Guidelines' exception is to encourage employers' affirmative action efforts to diversify their workforce – it certainly is not a free pass for a decade of disregarding disparate impact.

It is also worth noting that the atypicality in this case exists not in the applicant pool, but in the pool of women in Cooper's normative sample. Plaintiffs' expert Dr. McArdle reached this conclusion based on his analysis of DOC data and review of exercise physiology literature. He explains that the women who participated in establishing the Cooper norms are, relative to the men, more lean and fit than the general population. Ex. 22 at 6-9.

Defendant's argument that female CO applicants' lack of preparation for the PFT caused the disparate impact is similarly without merit.[5] The composition of the pool – whether well-prepared or ill-prepared – has remained consistent since 1998, as reflected in the disparate impact against women over the same period. Defendant has not provided any evidence concerning the actual fitness of the CO applicant pool or that the preparedness of the CO applicant pool – or any other relevant aspect of the DOC candidate pool – has changed over time as a result of its recruiting efforts. Moreover, courts have rejected precisely this contention. See Thomas v. City of Evanston, 610 F. Supp. 422, 428 (N.D. Ill. 1985) (City argued that their female applicants were clumsier and in poorer shape than women generally, thus causing impact, an argument which the court soundly rejected).

[5] In addition, Defendant relies only on the *dissent* in Lanning v. SEPTA to support its argument that any alleged failure to adequately prepare for the physical fitness test "caused" disparate impact. Def. MOL, p. 16.

C. Defendant Does Not Dispute that there is a Causal Relationship Between the Cut Scores It Used and the Disparate Impact Against Female CO Candidates

The age and gender normed cut scores selected by DOC for the 1.5 mile run test to eliminate candidates from the CO application process caused a disparate impact against female CO applicants. Defendant does not dispute this causal relationship. Plaintiffs' statistical expert, Dr. Vekker, isolated the 1.5 mile run test data for the three test administrations in 2004 and 2006. Dr. Vekker ran a statistical analysis on this data, using the same methodology as in his initial report, but separating 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. 28). In fact, the gender disparity for each administration of the test *exceeded four (4) standard deviations*. Id. Although not required to prove causation to any degree of certainty, Plaintiffs' statistical evidence reflects a disparity so great that it cannot be accounted for by chance. Bazemore v. Friday, 478 U.S. 385, 400 (1986); Waisome v. Port Authority of New York and New Jersey, 948 F.2d 1370, 1375 (2d Cir.1991). This Court should therefore deny Defendant's motion for summary judgment.

II. Defendant Has Not Shown - And Cannot Show - That the Cut Scores it Used are Job Related and Consistent with Business Necessity.

A. Age and Gender Normed Cut Scores, By Their Very Nature, Are Neither Job Related nor Consistent With Business Necessity

At issue is *only* whether the selected *cut scores*, set by the DOC at the 40th percentile of the Cooper's normative sample, correspond to the level of aerobic capacity that CO applicants need prior to entering the academy. DOC argues at length that the 1.5 mile run test itself is a valid means of assessing aerobic capacity. Def. MOL, p. 17-25. However, Plaintiffs have never disputed that the 1.5 mile run test measures aerobic capacity and that some level of aerobic capacity is necessary for the performance of the CO position. DOC has offered no evidence that

the pass/fail scores it selected – that is, the age and gender normed cut scores – are job related and consistent with business necessity. DOC has failed to acknowledge that aspect of Plaintiffs' argument or dispute it. Because Defendant has not provided any evidence that the cut scores it selected are job related and consistent with business necessity, the Court should deny Defendant's motion for summary judgment.

B. Defendant Cannot Validate the Cut Scores it Used for the 1.5 Mile Run Test

Defendant admits that it has done nothing to validate the discriminatory cut scores it used for the 1.5-mile run test.[6] See, e.g., Ex. 14 at 103. Subjective labels such as "fair" or "reasonable" are insufficient to sustain Defendant's burden and are not a proper validation method. Defendant merely states that "DAS used standards developed by the Cooper Institute" Def. MOL, p. 21; these standards are "national norms" Def. MOL, p. 22; and the standards are used by many state, federal and municipal law enforcement agencies, including the City of Erie. Def MOL, 22. Defendant represents that DOC and DAS decided the 40th percentile on the 1.5-mile run test was the appropriate cut score based primarily on a purported job analysis done for the CO position, which suggested aerobic capacity, among others skills, was "important" for the job. Def. MOL, 23. However, Defendant has *never* evaluated what particular level of aerobic capacity is necessary in order to perform the duties of the CO position and has not submitted any evidence even suggesting that it has done so. Ex. 14 at 103. Furthermore, DOC offers no evidence, despite its burden, to demonstrate that using the 40th percentile cut scores distinguishes between CO candidates who can do the CO job and those who cannot. Id.

[6] Defendant quotes Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1998) for the proposition that employers are not required to introduce validation studies, even when defending standardized or objective tests. Def. MOL, p. 18. However, the Second Circuit has determined that this is an erroneous reading of Watson. See Gulino v. New York State Educ. Dept., 460 F.3d 361, 385 (2d Cir. 2006).

Nor may Defendant rely on Mr. Harold Brull's unsupported assertions to demonstrate the job relatedness or business necessity of the cut scores. Mr. Brull concludes, with no basis, that "10 percent in either direction of the 50th percentile would not be excessive." Def MOL. p. 25; Ex. 19 at 98. Indeed, Defendant acknowledges that Mr. Brull does not know what the minimum level of fitness required to fulfill the duties of a CO ("According to Mr. Brull, there is not, in an absolute sense, a minimum level of qualification in terms of physical fitness for the CO position." Def. MOL, p. 24.

Defendant's selection of the 40th percentile as its cut score is analogous to Farmingville's decision to use a four-minute cut score in Pietras, 180 F.3d 468, 475 n.5. In Pietras, Farmingville selected the four-minute figure simply by taking the average of all the test scores and then arbitrarily adding some extra time. The district court, with the approval of the appellate court, noted that there was "no evidence at all to indicate that the time chosen for the test reflected the needs of the job." Id. Similarly, Defendant has not provided any evidence to sustain its burden to demonstrate that the age and gender normed cut scores it selected to screen out CO applicants is job related and consistent with business necessity. This Court should therefore deny Defendant's motion for summary judgment.

C. Arguing That "More is Better" Cannot Establish The Job-Relatedness and Business Necessity of a Cut Score

Defendant relies on Mr. Brull's hypothesis that as physical fitness diminishes, the chance of negative outcomes increases. Def. MOL, p. 24-25. However, DOC's position is undermined by the fact that DOC has not even 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 478, 492 (3d Cir. 1999). 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. Here, Plaintiffs' experts have demonstrated that aerobic capacity is a small part of the physical component of the CO position, so this cannot be considered such a rare occasion.

Thus, the DOC has not met its burden of demonstrating that its manner of use of the 1.5-mile run test's cut scores was "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Therefore, Defendant's motion for summary judgment must be denied.

III. The 300-Meter Run Test Presently Used By the DOC is a Less Discriminatory Alternative.

Under the framework of 42 U.S.C. § 2000e-2(k)(1)(A)(ii), even if Defendant can demonstrate that the cut scores it used are job related and consistent with business necessity, Plaintiffs may establish liability by demonstrating the existence of an equally valid, less discriminatory employment practice. As a result of the 1991 Amendments to the Civil Rights Act, Pub.L. 102-166, § 105(a), 105 Stat. 1071, 1074 (1991) (codified at 42 U.S.C. § 2000e-2(k)), plaintiffs seeking to demonstrate a less discriminatory alternative must do so under the law that existed prior to the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S.

642, 109 (1989). See 42 U.S.C. § 2000e-2(k)(1)(C); see also Price v. City of Chicago, 251 F.3d 656, 660 (7th Cir.2001). Prior to Wards Cove, the Supreme Court expressed the controlling principle in Albemarle. "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Albermarle Paper v. Moody, 422 U.S. 405, 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, (1973)). The proposed alternative must be available, equally valid and less discriminatory. See Bryant v. City of Chicago, 200 F.3d 1092, 1094 (7th Cir.2000); Allen v. City of Chicago, 351 F.3d 306, 312 (7th Cir. 2003).

The DOC admits that it refused to substitute a less discriminatory alternative prior to 2007. (Def. MOL, p. 27 ("DAS chose not to use the 300 meter run prior to 2007"). Defendant has previously acknowledged – and this Court has recognized – that Defendant only implemented a less discriminatory alternative – the 300 meter run test - in the face of litigation. 265 F.R.D. 45, 54 (D. Conn. 2010); Ex. 5 at 22. See, e.g., Ex. 38[7]; Ex. 39[8]; Ex. 40[9]; Ex. 41.[10] Knowing it had impact, and, despite pleas to change it, failing to modify the test until sued, amounts to "refusal."

Moreover, despite its alleged concerns about the validity of the 300-meter run test, DOC has hired 500 COs from the 2007 selection process that used the 300-meter run test, and an

[7] "Judge Hodgson and I were disappointed by your response to our recommendation that either the use of the test or the cut-off scores be suspended or the scores be held"
[8] "We urge you to ask the DAS to allow all applicants to complete all four segments of the test and to hold up the scores and discuss options"
[9] "for the next hiring cycle, DAS intends to see a job-related physical fitness test or standard with less (or no) disparate impact on female candidates"
[10] "we believe the administration of the existing physical fitness test…is likely to have a disparate impact on female candidates for employment as Correction Officers"; "we recommend that you not administer or use this physical fitness test as the basis for disqualifying candidates"

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. Ex. 18 at 46-48; Ex. 28 110-111. 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 at 102-103; 107; 108. 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.

Although Dr. McArdle was the *only* exercise physiologist to evaluate the physical requirements of the CO position and opine on the suitability of the 300-meter run test as a less discriminatory alternative to the 1.5 mile run test, Defendant's motion fails to even mention Plaintiffs' exercise physiologist's name or challenge any of his conclusions. Defendant received Dr. McArdle's expert report, took his deposition, and surely had ample time to identify its own exercise physiologist to evaluate the efficacy of the 300-meter run test. Instead, however, Defendant opted not to do so.

Furthermore, Defendant's argument that the 300-meter run test is not a less discriminatory alternative because it measures anaerobic capacity rather than aerobic capacity is specious. DOC admits in its brief that it used the PFT to measure overall fitness, and not

specifically for the ability to perform specific aerobic tasks. Def. MOL, p. 21; see also, Ex. 28. Defendant cannot then argue that the 300-meter run is not a valid alternative because it does not test aerobic capacity, when the DOC is evaluating overall fitness.

As discussed in IV., *infra*, Defendant may not rely on the unqualified testimony of Dr. Libby or Dr. Anderson to support its assertion that the 300-meter run test is not a less discriminatory alternative. In addition, Defendant has offered nothing more than the conclusory opinion that "the 300 meter run may not reliably predict a CO candidate's ability to perform duties that require a sustained level of physical activity…" Def. MOL, p. 27. However, Defendant offers no evidence to support this conclusion.

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. Moreover, 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.

Plaintiffs have provided ample evidence that the 300-meter run test is a less discriminatory alternative that meets DOC's legitimate operational needs. Defendant has failed to provide any evidence to the contrary. Choosing to use the test, despite knowing it has impact and pleas to change it, until sued, amounts to "refusal." On that basis, the Court should deny Defendant's motion for summary judgment.

IV. Defendant May Not Rely on Drs. Libby and Anderson's Expert Testimony On Job Relatedness/Business Necessity Or Less Discriminatory Alternatives As They Are Unqualified to Offer Such Testimony.

The DOC identified Dr. Pamela Libby and Dr. Martin Anderson as expert witnesses concerning the job relatedness and business necessity of the 1.5 mile run and the 300 meter run test as a less discriminatory alternative. Both offer opinions, however neither is qualified to give testimony on these subjects. Neither is an exercise physiologist, nor does either have any professional experience that would qualify either to testify concerning such matters. Moreover, both fail to comport with the legal standards for expert testimony. Drs. Libby and Anderson make general assertions, but do not demonstrate the methodology used to reach their conclusions. Sufficient facts that underlie their opinions are not set forth. Neither cites any authority and instead each relies on their own "knowledge of all the history and the way things have gone."[11] Collectively, these deficiencies demonstrate that Drs. Libby and Anderson are not experts in the area of practice for which they were asked to testify.

Plaintiffs do not dispute that Drs. Libby and Anderson may be fact witnesses, capable of relaying the administrative logic behind the DOC's manner and use of the discriminatory employment practice. They are not, by their own admission, exercise physiologists, and therefore are not qualified to opine on the job relatedness and business necessity of the cut scores used by the DOC on the 1.5 mile run test or the efficacy of the 300-meter run test as a less discriminatory alternative. Ex. 18 at 80[12], 132[13]; Ex. 14 at 93:2-7.[14]

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[11] Ex. 14 at 152.

[12] Q: Are you able to state that opinion as an expert?
A: I'm not an expert in physiology. Only from what I have read about aerobic and anaerobic exercise."

[13] Q: Okay. Do you have any background in exercise physiology?"
A: I do not.

For example, Libby and Anderson assert in their report that"[The 1.5 mile run test] is important for successfully performing certain duties of the Correction Officer position"[15] and "the 300 meter run is not an alternate[sic] to the 1.5 mile run."[16] However, neither identifies what particular level of aerobic capacity or physical fitness is required to successfully perform the CO position, and both fail to articulate *any* basis for their conclusions.[17]

Additionally, their reports are devoid of any methodology, analytical or empirical, used to determine how the 300-meter run compares to the 1.5-mile run in predicting CO job performance. They also fail to examine the 300-meter run as a predictor of general fitness, only stating that it "was not needed." Their report cites no authority to support the assertion that the 300-meter run could not serve as a predictor for "certain duties of the Correction Officer position," including "running or walking for short or moderate distances" and "running up and down stairs."[18] Furthermore, Drs. Libby and Anderson fail to address Plaintiffs' exercise physiologist's conclusion that the 300 meter run test is, in fact, a *better* predictor of job performance than the 1.5-mile run test. Drs. Libby and Anderson simply offer this Court their subjective belief and unsupported conclusions; information that does not aid this Court in understanding the evidence or determining a fact in issue and therefore their testimony should be stricken from the record.

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[14] Q: Okay. Do you have the physiological expertise to opine on whether the [hypothetical] situation I've given you, where part of the time is crouching, whether that would be considered continual aerobic activity?
A: The expertise, no, I don't. I can only tell you what I did observe [correction officers] doing."

[15] Ex. 27 at 3.

[16] Id.

[17] The Cooper Institute itself describes these norms as indefensible if discriminatory impact is found. See Ex. 20.

[18] Ex. 27 at 3.

Expert testimony is admissible under Fed. R. Evid. 702, but the Rule assigns to a trial judge the gatekeeping obligation of "ensur[ing] that any and all scientific testimony . . . is not only relevant, but reliable." Kumho Tire Co., Ltd. V. Cannichael, 526 U.S. 137, 145 (1999) citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 589 (1993). Rule 702, as amended, requires:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The amended rule adopts the standard outlined by the Supreme Court in Daubert for determining the admissibility of expert testimony. See Advisory Committee Notes (2000 Amendment).

Rule 702 and Daubert require a trial judge to determine whether the proposed expert's testimony consists of (1) reliable, (2) specialized knowledge that (3) will assist the trier of fact to understand or determine a fact in issue. Fed. R. Evid. 702; Daubert, 509 U.S. at 591. The purpose of this scrutiny is to ensure the testimony's validity and applicability to the facts in issue. Daubert, 509 U.S. at 591. If proffered expert testimony in the form of an expert report is excluded as inadmissible under the Federal Rules of Evidence, summary judgment determinations are made on a record that does not include the testimony. See Cacciola v. Selco Balers, Inc., 127 F.Supp.2d 175, 180 (E.D.N.Y. 2000) citing Raskin, supra.

Testimony from a proffered expert, predicated on "subjective belief and unsupported [factual] speculation" violates the Supreme Court's directives with respect to expert testimony,

and should be excluded from the record.[19] GST Telephone Communications, Inc. v. Irwin, 192 F.R.D. 109, 111 (S.D.N.Y. 2000) (citing Daubert, 509 U.S. at 590). Beyond the scope of Daubert, courts may also look to other factors to justify the exclusion of expert testimony where an expert does have the appropriate experience or education necessary to opine on a particular issue. See Quintanilla v. Komori America Corp., 2007 WL 1309539 (E.D.N.Y. 2007) (granting motion to disqualify expert and motion for summary judgment on claims supported by disqualified expert's report where expert engineer had no experience with the particular products which caused injury in product liability litigation); Newport Electronics, Inc. v. Newport Corp., 157 F.Supp.2d 202 (D. Conn. 2001) (motion to strike expert testimony granted where it was unclear that expert had ever performed a similar analysis or if his methods were accepted by experts who performed similar studies). Moreover, "nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." Country Road Music, Inc. v. MP3.com, Inc., 279 F.Supp.2d 325, 330 (S.D.N.Y. 2003), quoting General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

Drs. Anderson and Libby's reports include only conclusory opinions, unsupported by the methodology, necessary training, or experience required to be admissible expert testimony under the Federal Rules of Evidence. Nor is either qualified, by their own admission, to opine on issues properly reserved for an exercise physiologist. Therefore, the testimony of, and expert reports by, these witnesses as experts should be excluded.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's motion for summary judgment, based on a finding that DOC's use of the 1.5-mile run test caused

[19] The courts may apply these standards when reviewing both scientific and non-scientific testimony. Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137 (1999).

a disparate impact against female applicants for the CO position, and that the 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, there is a less discriminatory alternative that would serve DOC's legitimate operational interests.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **November 24, 2010** a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

By /s/_____

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