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Joanna Grossman

*Maurice A. Deane School of Law at Hofstra University*

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## WHAT DEFINES "BUSINESS NECESSITY" IN THE DISCRIMINATION CONTEXT? A Federal Appellate Case Grapples With How Fast Transit Police Officers Must Run



By **JOANNA GROSSMAN**  
[lawjlg@hofstra.edu](mailto:lawjlg@hofstra.edu)

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How fast should an applicant be able to run 1.5 miles if she wants to be a transit police officer in Philadelphia? That is the question at the heart of a recent opinion by the Third Circuit Court of Appeals, in the case of [Lanning v. Southeastern Pennsylvania Transit Authority \(SEPTA\)](#).

The plaintiffs are five unsuccessful female applicants, who, according to SEPTA, could not run fast enough to become transit officers. They have sued under Title VII, the main federal anti-discrimination statute. In their complaint, the five women allege that the transit authority's fitness requirements constitute "disparate impact discrimination" - that is, they discriminate against women candidates because they result in very few women being hired as officers.

*Lanning* also provides a cautionary tale about the way in which an appropriate legal standard - here, the standard for disparate impact discrimination - can be undermined if courts misapply it.

### How the Running Test Was Devised

The test the women are challenging was developed by an exercise physiologist, Dr. Paul Davis. In 1991, SEPTA hired Dr. Davis to develop a fitness test for its police officers.

To do so, Dr. Davis accompanied existing transit officers on the job for two days to gain an understanding of their day-to-day job tasks. He also conducted a study with twenty experienced officers to determine what physical abilities and what level of fitness were required for adequate performance of their jobs. He concluded that applicants must run, jog, and walk on the job.

The officers in the study suggested that an applicant should be able to run a mile in 11.78 minutes, while wearing full gear. But Dr. Davis rejected that standard as too low, based on his assessment that any individual could do that. He also considered heightening the standard to force applicants to demonstrate an aerobic capacity of 50 mL/kg/min, but he dismissed that option because of the "draconian effect" it would have on women.

Finally, Dr. Davis decided that something in between would be just right, and recommended that SEPTA insist on an aerobic capacity of 42.5 mL/kg/min. To prove they had this capacity, applicants would have to run 1.5 miles in 12 minutes.

That was the standard ultimately adopted by SEPTA. Transit officers rarely if ever have to actually run 1.5 miles on the job. However, the test was used as a proxy for measuring the aerobic capacity Dr. Davis felt the applicants would need to perform actual job functions successfully.

It turned out that only a very small percentage of female applicants, between 6 and 12 percent, could pass this test. In contrast, a majority of male applicants could. That difference resulted in a hiring pattern that significantly favored men over women.

### Disparate Impact Analysis: What the Supreme Court Requires

Then, in 1991, Congress amended the statute to expressly recognize that Title VII prohibits disparate impact discrimination. According to the amended statute, disparate impact analysis involves a three-step inquiry by the court.

First, the court asks, Has the plaintiff-employee made out her prima facie (that is, threshold) case, by showing that the application of a facially neutral standard has resulted in a discriminatory hiring pattern? If so, the court asks, Has the employer, who now bears the burden, proven that the particular standard or practice is justified by "business necessity"?

That leads to another important question, though: What constitutes "business necessity"? After *Griggs*, an increasingly conservative Supreme Court weakened the standard so that almost any job requirement could be justified as a business necessity.

But then, in the Civil Rights Act of 1991, Congress overruled the Supreme Court and went back to the initial, stringent standard, under which "necessity" truly means necessity - not, say, convenience. After that, appellate courts had to re-interpret the standard consistent with Congress' direction.

If the employer has not borne its burden to show "business necessity," the plaintiff wins. If it has, the court goes on to yet another question: Has the plaintiff proved that the employer rejected an alternative employment practice that would both have a less disparate impact and satisfy its legitimate business interest? If so, the plaintiff still wins.

Disparate impact litigation revolves around experts. Each side typically calls its own expert: the plaintiff's expert is used to make the initial statistical showing of disparate impact, and the employer's expert is used to validate the practice--that is, to show that it is indeed necessary.

Experts are particularly central to cases that, like *Lanning*, involve a strength or fitness requirement. In such case, they must analyze the nature of a particular job and then translate it into concrete fitness requirements: For instance, how many push-ups should a firefighter be able to do in order to show her ability to carry out her job functions?

### **The First Appellate Decision: *Lanning I* Interprets "Business Necessity"**

The *Lanning* case actually went to the appeals court twice - first in 1999, and then this year, as discussed above. capacity; the question was, how much?

As a result, the first appellate decision, [\*Lanning I\*](#) revolved only around the following question: Did SEPTA prove that the fitness requirement was "consistent with business necessity"?

Answering the question was complicated by the fact that *Lanning I* was the case in which the U.S. Court of Appeals for the Third Circuit first responded to the 1991 Civil Rights Act's command to reinterpret - and heighten - the "business necessity" standard.

Thus, the Third Circuit there considered two possible interpretations of "business necessity."

SEPTA argued for what was roughly a "more is better" standard: Transit officers need to be able to apprehend perpetrators and make arrests, and better fitness levels will make them better at those jobs. More fitness is always better, so a demanding test is necessary.

But under this approach, an employer could set a standard so high that virtually all women would be excluded. Surely that could not be right.

The appellate court concluded instead that businesses must prove that the standard enforces a "minimum qualification necessary for successful performance of the job in question." The court was particularly concerned about "excessive cutoff scores that have a disparate impact on minorities." If the employee could perform the job's requirements, the court decided, "business necessity" could not be used to justify further qualifications.

The court thus remanded the case to the district court with instructions to determine, among other things, whether having the particular aerobic capacity Dr. Davis's standard required (42.5 mL/kg/min) was a "minimum qualification." Could someone with a lesser aerobic capacity successfully perform the tasks required of a transit officer? If so, the fitness requirement would be invalid.

On remand, the district court made new factual findings. But it reached the same conclusion it had reached the

first time: the fitness requirement was consistent with business necessity. The plaintiffs then appealed to the Third Circuit again- leading to the 2002 decision I discussed at the start of the column, which I will call *Lanning II*.

## **Lanning II: Misapplying the Standard and Thwarting Congress's Intent**

Although the panel paid lip service (as it had to) to the earlier panel's articulation of the legal standard, it did little to see that the standard had been implemented correctly by the lower court.

With only a cursory review of the evidence, the majority upheld the district court's conclusion that applicants who fail the fitness test would be much less likely to "successfully execute critical policing tasks."

Shooting fish in a barrel, the dissenting judge pointed out the myriad flaws in the evidence put forth by SEPTA to defend its fitness requirement as a "minimum" qualification. (SEPTA's own expert, Dr. Davis, admitted he had used "intellectual creativity" to come up with the requirement, suggesting it was hardly written in stone.)

If the appellate court had looked at the evidence more carefully, it would have been obvious that - as the dissenting judge concluded - the fitness requirement was no minimum qualification. Several points make this very clear.

### **Why It's Clear the Fitness Requirement Was Not A Minimum Qualification**

First, the fitness requirement was not used to disqualify existing transit officers, many of whom could not satisfy it. Incumbent officers were given incentives to meet the goal. Yet there were no consequences for failing.

Obviously - unless SEPTA viewed all those who failed as unqualified - the test was not in fact a "minimum qualification" necessary for performance of the job. Indeed, many officers who failed did their jobs nonetheless. (One female officer who had failed the fitness test, but been hired by mistake, was even repeatedly commended for her work.)

Second, the fitness test is given only upon application, not upon beginning work two, or two-and-a-half years later. Fitness at the time of application is certainly not a job qualification, even if fitness as an officer might be (though not at this level).

Evidence in the record suggests that, with moderate training over the interim period, a significantly greater number of female applicants could meet the standard by the time they begin work. But SEPTA did not offer this training, or even give the applicants an opportunity to improve their running times on their own and then be re-tested.

In sum, if SEPTA truly believed the fitness test were a minimum job qualification, it would administer it just before employees started, and periodically thereafter, and fire everyone, incumbent or not, who failed. It did not.

Third, while the "1.5 miles in 12 minutes" standard SEPTA settled on may not sound harsh to runners, it is stricter than the standard imposed by many branches of the U.S. military, the FBI, and the New York City transit authority. It is not clear why being a transit officer in Philadelphia would be so much more demanding than these other positions.

Fourth, the studies used to defend the necessity of the fitness requirement were vulnerable to serious criticism. For example, one study purported to measure the speed of an "average perpetrator" as a basis for determining how fast officers would need to run to apprehend them. That's fine in theory, but in practice, as the dissent pointed out, the average perpetrator's speed was measured based on a group of individuals, 2/3 of whom were high school or college track stars--and thus probably much, much more fit than the average turnstile jumper in Philly.

### **The Lessons of *Lanning***

The *Lanning* case is important on a number of levels. First, it is distressing because it allows SEPTA to employ a standard that will result in significantly fewer women being hired for the job of transit police officer - perpetuating the unfortunate reality that most law enforcement jobs are held by men. And it does so for no good reason: This standard is not really a minimum qualification for the job, and female officers (as one has shown) can succeed well without meeting it

The *Lanning* case also tells a cautionary tale about the limited power of law to change culture. Here, the first appellate panel - in *Lanning I* - established a strict legal standard designed to eliminate discriminatory hiring practices, and to ensure that greater numbers of women were given the opportunity to obtain the job of transit

officer. Yet the district court repeated its initial conclusion despite the new, stricter standard, and then - in *Lanning II* - the next appellate panel rubberstamped the district court's decision.

The solution to hiring practices that create discriminatory gender patterns may thus have to come from outside the legal system.

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*Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination Law, among other subjects. Grossman's other articles on sex discrimination may be found in the archive of her pieces on this site. As part of her research for this column, Grossman ran 1.5 miles in 11 and a half minutes.*

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