What does *THAT* have to do with being a cop?

Employment Standards in Law Enforcement

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Presented by

Alan Andrews,
Police Attorney - High Point, N.C.

and

Julie Risher,
Public Safety Attorney - Winston-Salem, N.C.

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Introduction

As many departments have discovered, mandatory measures to improve officers' performance and competence may pose legal issues. Managing to implement successfully physical, educational, and psychological standards can spawn challenges under Title VII, the ADA, and individual state's laws. And, as some chiefs and city and county managers have learned, the defense "well, the state POST makes us" may not be a winner. This manuscript explores some of the issues and challenges departments implementing standards face.

I. PHYSICAL FITNESS

Some of the most essential job functions for law enforcement require a certain level of physical fitness. To ensure that incoming officers can meet the physical demands of the job, some departments and state certification agencies have mandated physical fitness requirements.[1] In response to actual or anticipated litigation or discrimination suits, some states and departments do not have an explicit physical fitness requirement.[2] Instead, these entities have developed physical ability tests to determine the general fitness of potential officers rather than establish a minimum physical requirement.

[1] One such state is North Carolina.
[2] One such state is Ohio.

A. Gender and/or Age Norm Standards

Gender and/or age norms are standards that allow the applicant's sex and age to impact their scores.[3] Because gender and/or age norms explicitly violate Title VII, agencies that choose this approach have to be careful in applying the norms. Rather than establishing gender and/or age normed physical fitness skills tests as the minimum physical requirements necessary for police work, agencies that adopt these tests use them as a way to determine general physical fitness. Under this rationale, gender and/or age normed physical fitness tests are used as a filter to separate the physically fit from the unfit.

In a recent Michigan case challenging the validity of these age and gender-normed tests, the court, using heightened scrutiny, determined that the gender based classification of the scores could repel a challenge because the classifications were more substantially related to the important government interest of including viable female candidates than excluding viable male candidates.[4] The court found special significance in the fact that the norming procedures were meant to be inclusive (increasing the number of qualified applicants) rather than exclusive (excluding members of certain groups).[5] The gender norms in this instance were used to get the most physically fit group while accounting for

[3] The most commonly accepted gender and age normed tests are those published by the Cooper Institute, at http://www.cooperinst.org/.
[4] Alspaugh v. Comm'n on Law Enforcement Standards, 634 N.W.2d 161, 167 (Mich. Ct. App. 2001).
[5] *Id.* at 167-68.

the inherent physiological differences between men and women.[6] The reader should note that only Michigan courts have followed this case.

B. Gender Neutral Tests

Gender neutral tests are have standards that epitomize the idea of "same job=same standard." Absolute gender neutral standards represent the minimal fitness requirements for a law enforcement position. By making such tests mandatory, potential discrimination challenges arise.

C. Legal Challenges

General Framework: Physical job-related requirements have been upheld as being legally valid.[7] When legal challenges to physical hiring criteria do occur, plaintiffs usually advance a Title VII disparate impact theory alleging disparate impact on female applicants. Under Title VII, Congress required the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[8] Theoretically, anyone in a protected class could attack physical hiring tests as violating Title VII. While most published cases claiming physical fitness tests lead to disparate impact are generally

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[6] *Id.* at 168.
[7] 14A C.J.S. *Civil Rights* §§ 240, 255 (2006).
[8] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

brought by female applicants alleging gender discrimination,[9] some cases have been filed recently on the behalf of men.[10]

Challenges to physical ability tests under Title VII are analyzed under the *Griggs* framework. Through the use of statistics, a plaintiff shows that the employer, without intent to discriminate, used a facially neutral employment test that harmed a protected group. An employer can defend itself by (1) showing that the test did not cause a disparate impact; or (2) arguing that the plaintiff's statistics are wrong and then provide its own statistics; or (3) admitting that the test caused disparate impact, but then offer proof that the test is job-related and consistent with business necessity. Even if the employer proves the test is job-related and consistent with business necessity, the plaintiff may still prevail if the plaintiff can show that a less discriminatory alternative to adequately screen job candidates is available to the employer.[11]

Two recent cases have further developed disparate impact theory in the face of gender neutral tests. The cases are practical applications of the theories discussed below.

Lanning I: In Lanning v. SEPTA (*Lanning I*),[12] the issue was whether a job requirement of a one and a half mile run in 12 minutes was job-related and consistent with business necessity for transit officers. SEPTA also had in-service officers perform the aerobic-capacity test, and a large number of successful officers did not meet the cutoff score. The plaintiffs claimed that the test had a disparate impact on women who

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[9] *See* David E. Hollar, *Comment: Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, n.63 (2000).
[10] Alspaugh, 634 N.W.2d at 161; *In re* Grievance of Scott, 779 A.2d 655, 660-61 (Vt. 2001) (holding that a man will have a harder time successfully demonstrating discrimination because in most situations men are not members of a protected class).
[11] Lanning v. SEPTA, 181 F.3d 478, 485 (3d Cir. 1999) (*Lanning I*).
[12] *Id.*

physiologically have smaller aerobic capacity than men generally. Acknowledging that the test was discriminatory, SEPTA hired statisticians to prove mathematically that there was a significant mathematical correlation between high aerobic capacity and arrests, arrest rates and commendations. Finding that expert judgment alone was insufficient to validate the discriminatory practice, the appeals court remanded the case. Also in its holding the court instructed the district court to apply the correct standards, namely that the business necessity prong of the Civil Rights Act of 1991 must be read to demand an inquiry into whether the cutoff score reflects the minimum qualifications necessary to perform successfully the job in question.

Erie: In United States v. Erie, a 20-year veteran of the Erie, PA Police Department, on the orders of his captain, developed a pre-hire physical fitness test based on his own field experiences.[13] The components of the tests were limited to those that simulated actual tasks an officer might encounter on a chase. Nineteen in-service officers (all volunteers, the majority of whom were S.W.A.T. team members) took the test; the average score of these 19 officers was then rounded up to determine the cutoff score for new recruits. Both parties agreed that the tests were not job-related or consistent with business necessity. The court criticized using the individual police officers to establish that the tests were statistically valid. The determination of a 90 second cutoff score was also deemed arbitrary without statistical or expert opinions supporting the score. The court found for the plaintiff.

D. Standards of Proof

[13] United States v. Erie, 411 F.Supp 2d 524 (W.D. Pa. 2005).

When a plaintiff brings a claim attacking pre-hire physical fitness testing, statistical evidence standing alone may be sufficient to prove a prima facie case of disparate impact.[14] With such a low preliminary proof threshold, these cases generally turn on the business necessity and job-related defense. However, this defense is still rather imprecise in the context of physical ability tests: "the exact contours of this defense are still unclear, and lower courts have used a number of different standards when evaluating the defense, thereby confusing plaintiffs and defendants alike."[15]

The determination of whether a physical ability test is job-related and consistent with business necessity has been evaluated by four different standards: (1) whether the test bears a manifest relationship to the job; (2) whether the physical test imposes standards that measure the minimum qualifications needed for successful job performance; (3) the close approximation test; and (4) the *Spurlock* public safety doctrine.

Manifest Relationship Test: The most lenient and widely used standard under a Title VII analysis of physical ability tests draws support from the requirement in *Griggs* that an employer must show "that any given requirement [has] a manifest relationship to the employment in question."[16] Under the manifest relationship standard, the test will be upheld if the employer shows that a test will effectively carry out a legitimate business purpose.[17] In *Eison*, the employer needed only to demonstrate that the cutoff score was

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[14] 14A C.J.S. *Civil Rights* § 401 (2006).
[15] Hollar, *supra* note 9, at 777.
[16] *Griggs*, 401 U.S. at 432.
[17] Eison v. City of Knoxville, 570 F. Supp. 11, 13 (E.D. Tenn. 1983); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971); Hollar, *supra* note 9, at 786.

not arbitrary; the employer was not required to introduce any evidence of a specific correlation between successful performance on the test and job success.[18] However, a test designed solely using intuition rather than a validation method will not be upheld.[19] "The manifest relationship is thus placed primarily on the employer's need for the skill in question and a credible demonstration of some relationship between the test and the skill required for successful job performance."[20]

Minimum Qualifications Test: Applied in *Lanning*, the minimum qualifications standard is the strictest standard. The Third Circuit held that the proper inquiry when determining whether a test is justified by business necessity is to determine whether the test's cutoff score measures the minimum qualifications necessary for successful performance of the position.[21] "Courts are more likely to uphold a police department's test that requires an applicant to scale a six-foot wall or run one and one-half miles in twelve minutes under this approach than if the test required doing a set of push-ups in a specified time because the former requirements are considered 'critical duties' typically performed in the course of employment, whereas the latter task is not."[22]

Close Approximation Test: The close approximation standard differs from the other standards in that it looks at the *form* of the test itself rather than the *skills* tested. This is closely related to the screening test of content validation *(see p. 11)*, which determines if the content of the tests is sufficiently matched to job content. Essentially,

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[18] *Eison*, 570 F. Supp. at 13; Hollar, *supra* note 9, at 786.
[19] Harless v. Duck, 619 F.2d 611, 616 (6th Cir. 1980).
[20] Hollar, *supra* note 9, at 787.
[21] *Lanning I*, 181 F.3d at 489.
[22] Michael R. Sarno, *Issues in the Third Circuit: Employers Who Implement Pre-Employment Tests to Screen Their Applicants, Beware (Or Not?)*, 48 VILL. L. REV. 1403, 1416 (2003).

this theory stresses the importance of correlating the content of the screening test with the observable behaviors of the job.[23] In jurisdictions applying the close approximation standard, employers must demonstrate that the test measures the tasks or duties actually used in the job, such as writing tests used to determine an applicant's ability to communicate in written English.

***Spurlock* Public Safety Test:** The *Spurlock* doctrine requires courts to show more deference to employers who can demonstrate a public safety concern.[24] Thus, in jurisdictions that follow this approach, the physical fitness test will be upheld if the employment test seems calculated to account for safety concerns. An example of the public safety doctrine is a requirement that police applicants not have more than three hazardous traffic violations in the previous year in order to maintain traffic safety.[25] However, this approach is rather controversial, mostly because the vast majority of the cases successfully applying the *Spurlock* doctrine in this context were decided prior to the Civil Rights Act of 1991.[26]

II. VALIDATION

For a physical test that has a disparate impact to survive the job related inquiry, generally the employer must show that the test is valid under professionally accepted

[23] *See* EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers) Question 73, available at http://www.uniformguidelines.com/qandaprint.html.
[24] Spurlock v. United Airlines Inc., 475 F.2d 216 (10th Cir. 1972).
[25] *Id.* at 787.
[26] *Id.* at 788-89; *see also Lanning I,* 181 F.3d at 490.

methods.[27] These methods are generally considered those adopted by the Society for Industrial and Organizational Psychology (SIOP).[28] The EEOC Guidelines urge employers to use the validation techniques contemplated by the Guidelines "if technically feasible."[29] But if the EEOC Guidelines and the accepted professional standards differ, the federal regulations prevail.[30]

Pursuant to the Guidelines, an employer may validate a test using one of the three following studies: a criterion-related validity study (the preferred method), a content validity study, or a construct validity study (the least favored method).[31] Because studies done in response to litigation may lack objectivity, courts will examine studies instigated by litigation with "great care."[32]

A. Criterion-related

A screening test has criterion-related validity because performance on the test is statistically related to job performance. A criterion-related validity study should consist of empirical data showing that the test is predictive of, or significantly correlated with,

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[27] 14A C.J.S. *Civil Rights* § 401 (2006). For an overview of one test's validation, see Thomas R. Collingwood et al., *Underlying Physical Fitness Factors for Performing Police Officer Physical Tasks*, POLICE CHIEF MAG. (Mar. 2004).
[28] *See Standards for Education and Psychological Testing* (1999) and *Principles for the Validation and Use of Personnel Selection Procedures* (4th ed. 2003).
[29] 29 C.F.R. § 1607.6 (2006).
[30] *See e.g.*, United States v. City of Erie, 411 F.Supp 2d 524, 569 (W.D. Pa. 2005) (noting that *Lanning I* disregarded a reliance on the *Principles* and *Standards* only because they were in conflict with the EEOC Guidelines. The *Erie* court held that the *Principles* and *Standards* could be used to help determine the validity of a test so long as they do not contradict the EEOC.)
[31] 29 C.F.R. § 1607.5 (2006). *See also* 14A C.J.S. *Civil Rights* § 401(2006).
[32] Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975); *see also Erie*, 181 F.3d at 481.

important elements of job performance. An employer can establish criterion-related validity by showing that scores on its test (even scores as basic as "pass v. fail") relate in a meaningful way with some measure of job performance (i.e., a "criterion"). Some examples of how employers demonstrate criterion-related validity of a test include showing a correlation of test scores of accepted candidates with their subsequent successful job performance, a correlation of test scores with subsequent scores on another test, or correlation with scores of present employees with their current job performances (although some authorities reject this method).

B. Content validation

A screening test can measure what is important to or included within the job. This kind of screening tests requires an evaluation to determine if the content of the test is adequately matched to the job's physical requirements. A job task analysis should be performed to obtain information about the content and physical requirements. Content validation tests are not appropriate for skills and abilities an applicant is expected to learn on the job.[33] A content validation strategy usually takes the form of a work-sample test or one that simulates important aspects of the job. The tests should sample information actually used by employees on the job.[34] An example of a content validation test for

[33] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers) Question 77, available at http://www.uniformguidelines.com/qandaprint.html.
[34] 14A C.J.S. *Civil Rights* § 164 (2006); EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers) Question 79, available at http://www.uniformguidelines.com/qandaprint.html.

police officers would be a running test designed to correlate to the department's specific duty requirements.

C. Construct validation

A screening test supported by construct validation requires both a showing that (1) the test measures a particular identifiable characteristic (or "construct"); and (2) the construct is related to job performance. To fulfill the second requirement, the user needs to prove empirically that the test validly relates the particular construct measured by the test to the performance of critical or important work behavior(s). This often requires a criterion-related study.[35]

Departments may support their own tests by using validity studies conducted by other agencies.[36] However, courts are unlikely to uphold tests that are validated elsewhere unless the employer can show that both departments have substantially similar duty requirements.[37] This can be done by performing a job task analysis to show the similarities between the same positions in the two departments.

D. State Standards

[35] For a thorough discussion of validation methods, see *Erie* in Section I.A.
[36] *See* 29 C.F.R. § 1607.7 (2006).
[37] *See Lanning I*, 181 F.3d at 492, n.18 (noting that "absent a finding that the work of [a police officer in another county] is comparable to SEPTA transit officer work…reliance on this validation study [used by another county] is misplaced").

Some states have adopted POPATs[38] or other forms of state-wide agency tests that set the minimum standards for all state and municipal departments within their jurisdictions. Agencies may adopt different standards from the POPATs so long as they are stricter than those imposed by the state. But if a department decides to deviate from the state-wide standard test, it must provide separate validation for its different tests to ensure that they are truly valid. POPATs, like individual municipal agency tests, are also potentially at risk for validation attacks. The POPAT standards are generally created from studies and surveys of various agencies from within a state. This data is compiled to determine which essential job elements are common to the greatest number of departments. An individual police department that adopts the POPAT standard may have to perform a job task analysis to show the validity of the POPAT in relation to the particular agency's needs. Also, if a municipal department adopts a POPAT, but then alters the sequence of events, or adds or deletes events, validation once again becomes an issue. POPATs are validated as a whole, meaning that the test has been approved in a specific order, with particular time requirements and event sequencing. Any deviation from this makes the validation of the POPAT questionable and exposes a department to potential liability.

III. MINIMAL PERFORMANCE SCORES

The minimal performance ("cutoff") score for a physical ability test is usually the crux of the plaintiff's objection to pre-hire standards. The EEOC Guidelines provide that

[38] POPAT stands for Police Officer Physical Agility Test.

"where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force."[39]

> Courts will closely scrutinize the test's cut-off score by looking at whether the employer legitimately set the cut-off based on sufficient evidence that that score measures only the minimum abilities for the job, rather than the employer arbitrarily setting the score. For instance, when establishing an effective cut-off score, an employer cannot rely solely on its experts' subjective judgments, nor can it simply reason that "the higher the performance, the better the applicant will be at the job," and so set the score unnecessarily high. On the contrary, an employer will have to use a variety of experts, studies and statistics to establish a valid cut-off score and to prove that those who meet its score are, in a real sense, more likely to be able to do the job effectively.[40]

While common sense may lead one to conclude that the better an individual performs on a test, the better the individual will perform on the job (the "more is better" rationale), the EEOC and the courts have almost completely rejected this theory in the employment context. The EEOC argues that criterion-related and construct validation show a relationship between test and job performance. An employer who uses tests validated with these theories needs statistical evidence showing the higher tests scores meant better job performance. In addition, content validation can only be used for ranking if there is evidence that the ability the test measures correlates to ability in job performance.[41] The

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[39] 29 C.F.R. § 1607.5 (2006).

[40] Sarno, supra note 21, at 1418-19 (2003).

[41] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers) Question 62, available at http://www.uniformguidelines.com/qandaprint.html. The "more is better" rationale is acceptable when the selection procedure is used for ranking in jobs where better test performance equals better job performance. The most common example of this is secretaries. The quicker a secretary's error-free typing speed, the better the secretary's job performance will be. EEOC, Uniform Employee Selection Guidelines Interpretation

minimum performance standard, although strict, is not unattainable; some courts have found that the employer needed only to provide "competent evidence" that its test measured minimum qualifications.[42]

On the other hand, police departments have a valid interest in setting a minimum performance score sufficiently high to adequately protect and promote the employer's interest of protecting the public and the lives of its officers. Although the *Lanning* majority strongly opposed a *Spurlock* public safety standard to evaluate SEPTA's defense, it acknowledged that if cutoff scores were too low, a law enforcement agency could risk public safety and the safety of its officers.[43] The court believed that safety concerns were adequately addressed by the business necessity standard "because the standard itself takes public safety into consideration."[44] The court explained that "if, for example, SEPTA can show on remand that the inability of a SEPTA transit officer to meet a certain aerobic level would significantly jeopardize public safety, this showing would be relevant to determining that level is necessary for successful job performance. Clearly a SEPTA officer who posses a significant risk to public safety could not be considered to be performing his/her job successfully."[45]

Further, employers must be aware that the use of gender-norming physical standards as a hiring standard is a "discriminatory use of test scores."[46] "It shall be an unlawful employment practice for a respondent, in connection with the selection or

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and Clarification (Questions and Answers) Question 62, available at http://www.uniformguidelines.com/qandaprint.html.

[42] Lanning v. SEPTA, 308 F.3d 286, 288 (3d Cir. 2002) (*Lanning II*) (upholding the finding for the plaintiff in *Lanning I*).

[43] *Lanning I*, 181 F.3d at 490.

[44] *Id.*

[45] *Id.*

[46] 42 U.S.C. § 2000e-2(l) (1996).

referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." Curiously, the Third Circuit recommends that adopting separate physical ability standards for male and female applicants "would help SEPTA achieve its stated goal of increasing aerobic capacity without running afoul of Title VII and none of these options require hiring by quota."[47] It is unclear at this point if this is just dicta or if it will be a problematic issue that will be dealt with in future litigation.

IV. EXPERTS

Regardless of the standard applied when analyzing business necessity or job-relatedness, it seems that any physical test designed through an "intuitive process" with no validation will not survive judicial scrutiny.[48] The *Erie* court noted that the employer should have performed or considered professional analysis of the job task and duties of the police officer position or of the knowledge, skills, or abilities required for successful performance in that position.[49]

The *Erie* court painstakingly set out the testimony and qualifications of the parties' experts at trial. The court was critical of the employer's expert witness, Dr. Paul Davis

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[47] *Lanning I*, 181 F.3d at 490.
[48] *See* Hollar, *supra* note 9, at 786; *see also* United States v. Erie, 411 F.Supp. 2d 524, 553 (W.D. Pa. 2005) (discrediting incumbent officer's testimony regarding the history of PAT [Physical Ability Test], their experiences taking the test, and their personal views about the PAT's relevance to police duties and instead relying on experts' opinions for the job-related and business necessity analysis).
[49] *Erie*, 411 F.Supp. 2d at 554.

(the same expert used by SEPTA in *Lanning I*). The court discredited Dr. Davis' evaluation of the PAT because he relied on a "common sense model" and his "experience" rather than validation techniques.[50] EEOC Guidelines require that pre-hiring tests be created consistently with commonly accepted professional standards such as the *Principles for the Validation of Personnel Selection Procedures* (*Principles*) and *Standards for Educational and Psychological Testing* (*Standards*), both promulgated by SIOP. The primary reason why Dr. Davis' work on the physical fitness tests in *Erie* and *Lanning I* was rejected by the courts was because he did not create or validate the tests using the *Principles* or *Standards*.

Thus, in terms of choosing an expert to validate, or even create a test, employers must not solely rely on what the expert says. If a court finds that a test was incorrectly made or validated, the court holds the test user, not the creator liable.[51] Realistically, the courts and the EEOC have looked most favorably on tests and validation studies done by industrial-organizational psychologists in conjunction with statisticians.[52]

V. IN-SERVICE OFFICERS

A major concern in the area of physical fitness tests concerns in-service standards. It is logically difficult to defend the position that incoming officers must meet physical fitness standards that incumbent officers do not have to meet. In *Lanning I*, the fact that

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[50] *Id.* at 555.
[51] EEOC, Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers) Question 39, available at http://www.uniformguidelines.com/qandaprint.html.
[52] *Id.* at Question 42; *Erie*, 411 F.Supp 2d at 553-56.

at least half of the current employees of the agency could not pass the fitness test weakened its predictive use. If a large number of the successful officers in a department cannot pass a hiring test, it is unrealistic to think that the test is any kind of predictor of what the job actually requires. At the same time there is concern that a police department could be held liable for officers who do not meet general physical fitness statements.[53]

Law enforcement agencies have developed numerous measures to try to address this area of concern. Some departments have instituted agency-wide wellness programs that advocate better health and fitness, or just minimum physical fitness standards.[54] Departments can either choose to make these programs mandatory or voluntary.

But if these standards are mandatory, various legal issues arise, including claims of disparate impact. If a department adopts specific physical fitness requirements for its incumbent officers, it must give the officers adequate time to train to meet the standards. Even when physical standards are mandated by a police department, though, the courts have found that agencies are not required to give officers work time to exercise.[55] Making firing and/or promotion actions that are dependent on the outcome of physical fitness tests may lead to loss of officers with substantial experience and knowledge. Some departments have older, more experienced officers who simply cannot or will not get in shape to meet a physical fitness standard. If they lose their jobs, they take with

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[53] *See* Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988) (holding that a police department was liable for the improper training of an officer who was not physically fit). This holding has not been repeated since this case was decided.
[54] For considerations in implementing a wellness program, see Drs. Jeffrey C. Lee and Stephen Mallory, *A Guide for Implementing a Physical Fitness Maintenance Training Program in a Criminal Justice Agency*, SMART ONLINE J. (Fall 2004).
[55] Dade County v. Alvarez, 124 F.3d 1380 (11th Cir. 1997).

them years of experience and expertise and the department must wait months or even years to fill the knowledge void they leave.

For agencies that mandate an in-service physical fitness standard, there must be a system in place for dealing with failure to meet the standards. New Hampshire, the one state that has gone so far as to statutorily mandate a physical fitness standard for all law enforcement officers, has a long and drawn out process that allows the in-service officers to take the tests multiple times; if the test is not passed within an allotted amount of time, the officer is fired.[56]

One way to avoid the problems raised by mandatory physical fitness requirements is to legislate like New Hampshire and "grandfather in" a physical fitness standard requiring all officers hired after a certain date to conform to the agency fitness standard as a condition of employment. Officers hired before the effective date would not be required to meet the fitness standard and would eventually be replaced by younger officers. In departments that have tracked such a statute and have contract negotiation or collective bargaining, it is unknown if a physical fitness standard would have to be explicitly adopted in the union contract or if it would be enough that the contract was in compliance with all state laws.

Although most agree that all officers should be physically fit, the majority of departments choose to make physical fitness standards voluntary to avoid the aforementioned problems.[57] If the programs are voluntary, then the agency can adopt

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[56] *See* N.H. REV. STAT. ANN. 188-F:27 (2005).

[57] For a departmental analysis and model, see Lt. David Lapum, *The Maintenance of Police Officer Health Through a Mandatory Wellness Program*, *available at* http://www.emich.edu/cerns/downloads/papers/PoliceStaff/; J.E. Smith Jr. and G. Gregory Tooker, *Health and Fitness in Law Enforcement: A Voluntary Model Program*

tests like the Cooper Institute's, which integrate age and gender norms. One of the most popular methods of creating officer interest in voluntary fitness standards is to give monetary incentives, whether a pay increase or reimbursement for a gym membership.

Another potential measure a department could take is the creation of separate standards for field officers and executive staff, much like the military model of enlisted personnel and officers. A dual standard would be most feasible in larger agencies when the executive staff had primarily administrative duties while field officers meet requirements to perform more physical tasks. Individuals could be placed on an "executive" or "field officer" track at hiring and would have different employment requirements throughout their tenure. In larger agencies, having a dual standard would be feasible. Though a dual standard would be feasible in larger agencies, this scenario would be impossible in a small agency. In a smaller agency, a chief may be expected to perform the same physical tasks as the field officers, thus making an "executive" standard unrealistic. Problems could also arise if an individual on the "executive" track is demoted or disciplined to the "field officer" track. Departments would have to determine what a reasonable time for a demoted officer to meet the newly applicable physical fitness standard.

VI. ADA

Response to a Critical Issue, at http://www.calea.org/newweb/newsletter/No87/healthfintess.htm.

Any discussion of mandatory physical ability tests requires consideration of disability discrimination, the ADA[58] and the Rehabilitation Act.[59] Under the ADA and the Rehabilitation Act, an employer cannot discriminate against disabled individuals who are otherwise qualified to perform the essential functions of the job with or without reasonable accommodations.[60]

Some case law has developed regarding the ADA in the context of police hiring or employment. In *Clark v. City of Chicago*,[61] a five-year police veteran was involved in a car accident, severely impairing his ability to walk. When recovered enough to return to work, the officer submitted a request for reasonable accommodation in the form of a limited duty assignment. The department responded by saying all officers had to be qualified on a firing range no matter where their assignment was. The officer passed the test in a wheelchair, but the department said the test was invalid because the officer was not standing when he shot. The officer contended that limited duty was a reasonable accommodation for his disability. The department, citing a general order in effect before the officer's injuries, said that the ability to shoot while standing and to independently ambulate were essential job functions. The court found that essential job functions are not the same for full and limited duty officers and ordered the department to give the officer a limited duty position.

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[58] 42 U.S.C. § 12101 *et seq.* (2006).
[59] 29 U.S.C. § 794 (2006).
[60] For a detailed analysis of the ADA and how it specifically applies to police departments, see Keith Alan Byers, *No One is Above the Law When it Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies*, 30 LOY. L.A. L. REV. 977 (1997).
[61] No. 97 C 4820, 2000 WL 875422 (N.D. Ill. June 28, 2000)

One of the most significant cases in police hiring and the ADA is *Ethridge v. State of Alabama*.[62] In *Ethridge*, an officer was denied permanent employment because he had restricted use of his right arm and hand. Due to these limitations, he was unable to shoot in the modified Weaver stance Alabama required. The court held that the ability to shoot safely had been established as an essential job function for Alabama police officers and therefore the state had the right to not hire the plaintiff if he was unable to perform the task. In addition, the court found that even if the ability to shoot safely was not an established essential job function, it would be considered an undue hardship to require the police to hire an individual who could not fire safely or accurately.

Congress did consider the idea of public safety, though, with the inclusion of the "direct threat" defense in the ADA. The "direct threat" defense allows employers not hire an otherwise qualified individual whose disability poses "a direct threat to the health or safety or other individuals in the workplace."[63] The direct threat rationale must be based on actual scientific knowledge that the potential employee's disability will pose a danger to others. It cannot be argued on the basis of stereotypes or unsubstantiated beliefs.[64]

Departments must also take care to stay current with what is considered a disability under the ADA. For example, alcoholism is currently considered a covered

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[62] 860 F. Supp. 808 (M.D. Ala. 1994).
[63] 42 U.S.C. § 12113(b) (2006).
[64] *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279 (2001).

disability but drug addiction is not.[65] In addition, there is ongoing debate over whether certain conditions, such as obesity, should qualify for ADA protection or not.[66]

In addition, whether a measure is an undue hardship or a reasonable accommodation depends on the particular department. For instance, *Clark* involved reasonable accommodations within Chicago's extremely large police department.[67] Smaller departments may not have comparable organizational structures. What would be a reasonable accommodation for the city of Chicago may not be reasonable for the Flatland County (Montana) Sheriff's Department.[68]

Also, another concern is that if a department follows the mandates of the state legislature it may face lawsuits for discrimination. Compliance with state statutes does not qualify a local municipality for government immunity.[69] According to some courts, a municipal department cannot argue governmental immunity because the municipality

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[65] For an in-depth discussion of the drug addiction and/or drug history as it relates to police qualifications, see Matthew Antinossi, Note, *Respect for the Law is No Excuse: Drug Addiction History & Public Safety Officer Qualifications . . . Are Public Employers Breaking the Law?*, 60 OHIO ST. L.J. 711 (1999).

[66] While there has been no definitive case law, cases in this area seem to point to the conclusion that simple obesity is not a disability protected by the ADA. *See* Andrews v. State of Ohio, F104 F.3d 803 (6th Cir. 1997); Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984).

[67] As of July, 2006, the Chicago Police Department employed 13,000 officers and staff.

[68] As of July, 2006, the Flatland County (Montana) Sheriff's Department employed 113 people.

[69] This point was upheld in Conroy v. City of Philadelphia, 421 F.Supp 2d 879 (E.D. Pa. 2006). *See also* Jessica R. Manley, Comment, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 NW. U. L. REV. 967 (2006); Michael Avery et al., Police Misconduct: Law and Litigation, § 4:17. Specific Theories of municipal liability—Ordinances, regulations and written policies (2005).

should have done independent constitutional assessments of the state's laws before implementing them.[70]

VII. EDUCATIONAL REQUIREMENTS

While many states require only a high school diploma as a prerequisite for police work, some states have begun to require some college credits. These differing educational requirements are part of an ongoing debate over the need, or lack thereof, for more education for police officers.[71] Advocates in support of the idea of more formally educated police officers cite the general proposition that the "Bubba" image can be erased by enforcing more "professional" standards.[72] Also, by requiring further education, officers will be more well-rounded and better able to understand and communicate more effectively with the public. Studies have in fact found that college-educated officers actually have less citizen complaints.[73]

Opponents to raising education requirements for incoming officers cite the potentially discriminatory impact that such requirements could have on women and

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[70] *See* Davis v. City of Camden, 657 F. Supp. 396 (D. N.J. 1987).

[71] For a general history of this debate, see Jeremy Travis, *Education in Law Enforcement: Beyond the College Degree* (Feb. 10, 1995), at http://www.ojp.usdoj.gov/nij/speeches/police.htm. A department currently entangled in this dilemma is the Guam Police Department. *See also* Mindy Fothergill, *Survey Weighs Education Against Experience at GPD* (June 27, 2006), *available at* http://www.kuam.com/modules/article-printable.aspx?headline=18299.

[72] For a discussion of police professionalism, see Agnes L. Baro & David Burlingame, *Law Enforcement and Higher Education: Is There an Impasse?*, J OF CRIMINAL JUSTICE EDUC. (Spring 1999).

[73] But 2-year degree graduates have been found to have even fewer complaints than 4-year degree graduates. Lisa Kay Decker & Robert G. Huckabee, *Raising the Age and Education Requirements for Police Officers*, POLICING (2002).

minority candidates.[74] In addition, there is very little explicit data that supports the proposition that increasing of educational standards for officers. Surveys of college-educated officers have shown higher turnover rates due to heightened frustration levels from the lack of job challenges. Smaller agencies are unable to afford to pay college educated officers at a level at which the officers can pay off their college expenses. Finally, opponents ask if a college education is really required in police work.

At least one other state has approached this debate in a different light. In 1977, the Minnesota P.O.S.T. was the first in the nation to require new officers to have a 2-year degree. The state legislature approached the P.O.S.T. in 1990 to see if an increased requirement to a 4-year degree was necessary. Based on its own internal study in 1991, the P.O.S.T. concluded that the skills a potential officer needed to learn at college were actually learned in the first two years.[75] Any additional education after that was determined not to contribute substantially to an officer's ability to do his or her job more effectively. Therefore, the Minnesota study rejected a mandatory 4-year degree hiring requirement.[76]

If a department does mandate a certain educational level as a hiring requirement, the requirement must be job-related and validated. The job task analysis done to support any physical fitness tests may be adapted to determine the amount and kind of educational achievement needed to perform the job as well.

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[74] A recent study of the Indianapolis Police Department has found that raising the education levels would eliminate a large majority of traditionally successful candidates with the most substantial impact on the hiring of successful black female applicants. *Id.*
[75] Michael G. Breci, *Higher Education for Law Enforcement: The Minnesota Model*, FBI LAW ENFORCEMENT BULLETIN (Jan. 1994), *available at* http://www.findarticles.com/p/articles/mi_m2194/is_n1_v63/ai_15155536/print.
[76] Minnesota P.O.S.T., *A Study of the Minnesota Professional Peace Officer Education System* (Jan. 1991) (portions of copy on file with author).

Some states, rather than having a college requirement, have implemented basic reading and writing tests for pre-hires.[77] These departments have done so based on job tasks analyses that show that officers spend a substantial part of time writing reports and reading various types of information. The job task analyses have shown that these skills are used so often by officers that they are considered an essential job skill for a police officer. But there are controversial aspects to these tests as well. Some written tests are racially and culturally biased and the departments that have used such tests have been successfully sued for discrimination.[78]

A concern that arises about educational requirements, just as with physical fitness standards, is what to do in regards to incumbent officers. Again, departments can choose to make educational achievement voluntary through pay incentives or tuition reimbursement programs. Or, if a department decides to implement a mandatory agency-wide educational standard, in-service officers must be given sufficient time and notice to get the credits necessary to meet the standard. An agency taking this mandatory tact may encounter problems defending it because of the overwhelming number of officers who do not have college educations who have successfully performed their jobs. More success with mandatory educational requirements would be found to grandfather in current in-service officers by putting the policy in effect for all officers hired after a certain date. Perhaps the creation of higher mandatory educational requirement could be successfully

[77] For example, Pennsylvania requires all police candidates to take the Nelson-Denny Reading Comprehension Test and pass at least at a ninth-grade level. See MPOETC Home Page, *available at* http://www.mpoetc.state.pa.us/mpotrs/site/. The Nelson-Denny Reading Comprehension Test evaluates vocabulary, comprehension and reading rate. A similar is the DELPOE, which is required by the Charlotte, NC Police Department.
[78] *See* Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005).

developed if "grandfathered in," just as suggested for statutes mandating physical fitness requirements for in-service officers.[79]

Another concern in mandating certain educational standards involves learning disabilities and the ADA. Learning disabilities may be covered disabilities, but whether a particular individual's learning disability is sufficient for ADA protections must be determined on a case-by-case basis,[80] the disability must substantially limit a major life activity. If the learning disability meets this standard, an agency's responsibility to accommodate the individual will depend what is considered a business necessity for the job and if accommodations are reasonable under the circumstances.

Finally, questions arise about the strength of the connection between the skills agencies are looking for and what is actually learned in today's college environment. With the widespread proliferation of colleges and online coursework,[81] there is concern amongst educators about grade inflation and actual content learning.[82] Academics have labeled the latter concept degree inflation. Degree inflation is when people are given degrees regardless of whether or not they have learned the content necessary to earn the degree by merit.[83] Because of this, departments requiring more education may have to

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[79] *See supra* notes 56-57 and accompanying text.
[80] *See* Learning Disabilities Association of America, *The ADA and Rehabilitation Act in Post-Secondary Education and Employment*, at http://www.ldanatl.org/aboutld/adults/civil_rights/qanda.asp.
[81] For a discussion of the validation concerns in regards to online courses and validation problems, see M.O. Thirunarayanan, *Technology and Degree Inflation*, UBIQUITY (2001), *available at* http://www.acm.org/ubiquity/views/m_thirunarayanan_4.html.
[82] See, e.g. Robert J. Exley, *Academic Rigor in the Open-Door College*, NISOD Innovation Abstracts (Aug. 30, 2002).
[83] M.O. Thirunarayanan, *Higher Education's Newest Blight: Degree Inflation*, AFT on Campus (Oct. 2001), available at http://www.aft.org/publs-reports/on_campus/2001/oct/technology.htm.

investigate issues of school accreditation and possibly to choose courses that are job and content-related for police work.

VIII. LANGUAGE OR SPECIAL SKILLS

A number of departments look for recruits with special skills, particularly language skills.[84] While police departments are statutorily required to provide certified American Sign Language interpreters or speakers for individuals who are deaf or hard of hearing,[85] many departments around the country actively seek Spanish-speaking officers.

To serve large numbers of Spanish-speaking victims, suspects and complainants,[86] police departments have developed several ways to encourage the hiring and/or training of Spanish-speaking employees. Many have developed incentive programs giving pay raises to officers who pass Spanish certification tests.[87] Other departments actually give points to Spanish speakers in the hiring process.[88]

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[84] For a statistical breakdown of tests or examinations required for new officer selection as of 2003, see U.S. Department of Justice, *Local Police Departments 2003*, at 8 (Table 14) (May 2006). The Boston Police Department has used special skills as a tool of insuring the diversity of the police force. *See* C.J. Chivers, *From Court Order to Reality: A Diverse Boston Police Force*, N.Y. TIMES, Apr. 4, 2001, at A1.

[85] Under the ADA, people who are deaf or hard of hearing are entitled to the same services law enforcement agencies provide to anyone else. Police departments must try to communicate effectively with people who are hard of hearing, so long as it does not result in an undue burden or fundamental change in the nature of the services being provided. *See* ADA, Title II, 42 U.S.C. § 12131 (2005). For specific information about law enforcement officers and the ADA protections for the deaf, see U.S. Department of Justice Civil Rights Division, *Communicating with People Who Are Deaf or Hard of Hearing*, *available at* http://www.usdoj.gov/crt/ada/policeinfo.htm and National Association of the Deaf, *Police and Law Enforcement Agencies*, at http://www.nad.org/.

[86] According to the 2000 U.S. Census, nearly 11%, or 28.1 million people, primarily speak Spanish at home.

[87] Examples of departments that give pay incentives for Spanish speakers include Oklahoma City, OK and Salt Lake City, UT.

[88] Such a practice would probably be upheld by the courts so long as the points were added after the applicant had passed his/her tests. For a comparable rationale, see *infra* Section IX. An example of a department with this policy is Union Colony, Colorado.

Departments that do not consider Spanish-speaking ability in the hiring process sometimes offer Spanish classes or training in "survival Spanish" for officers to learn essential law enforcement phrases.[89] In addition, some agencies reimburse officers for education credits, treating language classes the same as any other college coursework. All of these hiring and pay incentives are conditioned on the particular linguistic needs of the community the hiring police department services.

Many potential problems could arise within the area of preferential or different treatment for multiple language speaking officers. Departments that do not have any set program acknowledging the diverse linguistic and cultural needs of their communities expose themselves to complaints of racial discrimination. Many departments are in the process of mediation between civil rights groups and the U.S. Department of Justice.[90] Employers who give some kind of hiring or pay preference to officers for language skills may face some legal challenges and concerns. While Texas recruits are required to perform at least 16 hours of training in Spanish, veteran Texas officers are not required to have any Spanish training.[91] It may be difficult to justify a language requirement for recruits if the agency does not have a similar requirement for Spanish-speaking skills.[92]

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[89] Pennsylvania offers free Spanish courses at regional training centers for state and local officers. *See* Brian C. Rittmeyer, *Police Hone Spanish Skills*, Pittsburgh Tribune-Review, Apr. 18, 2006. As of Sept. 2001, the Texas Commission on Law Enforcement Standards and Education requires all new recruits to take 16 hours of training in Spanish. *See* TCLEOSE Home Page, at http://www.tcleose.state.tx.us/basicspnsh.pdf.

[90] For a recent example of a report from one of these mediation agreements, see the Minneapolis Police Department and U.S. Department of Justice Mediation Agreement Progress Report (Jan. 30, 2006), *available at* http://www.ci.minneapolis.mn.us/police/about/mcu/progress-preportJan2006.pdf.

[91] A recent incident exemplifies this. During a Jan, 2005, traffic stop, a 28-year non-Spanish speaking veteran of the Irving, Texas police department pulled over a man who did not speak English. When the man did not respond to the officer's commands due to a lack of a common language, the officer pepper-sprayed and struck the man with his

Departments should also be concerned with potential discrimination litigation. Although the Supreme Court has upheld the basic idea of giving some sort of hiring preference for knowledge of a second language, there have been other legal attacks.[93] One such attack was based on the mistreatment of Spanish speaking officers. In a series of cases in the 1980s, Spanish-speaking officers filed suit claiming that they were denied promotions because they could speak Spanish. The arguments in these cases were that because of their language abilities, these officers were pulled away from their own work to translate for other officers. Because their skills were so valuable, they were denied promotions and transfers to other departments.[94] The court eventually found the FBI liable and awarded the plaintiffs their rightful seniority. In contrast, recently in 2004, seven white Dallas, TX officers filed a suit against the city and department claiming discrimination and denial of promotions because they did not speak Spanish or because they were white.

IX. VETERAN PREFERENCES

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baton. The officer was put on trial for assault and eventually found not guilty. *See* Holly Yan, *Spanish Requirements for Officers Inconsistent*, Dallas Morning News, Apr. 26, 2006.

[92] This logic tracks the rationale followed in *infra* Section IX.

[93] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (holding that hiring preferences for a second language are not classifications based on language that require heightened scrutiny in terms of equal protection rights, but rather state conferred benefits that need to be analyzed under rational basis scrutiny). *See also* Bradford v. State of Hawaii, 846 F.Supp. 1411, 1420 (D. Haw. 1994) (deciding that a surveyors' test requiring knowledge of some Hawaiian terms did not violate an individual's equal protection rights because it was sufficiently rational in terms of protecting the public to pass a rational basis test).

[94] *See, e.g.*, Perez v. FBI, 707 F.Supp. 891 (W.D. Tex. 1988). For a more recent case with similar arguments, see Contreras v. Ridge, 305 F. Supp 2d 126 (D. D.C. 2004).

Veteran preferences have been addressed in different ways by police departments throughout the country. First, some states do not mandate a veteran preference at all and thus leave that decision up to the individual departments. Secondly, according to a recent study, 10% of all police departments offer pay incentives to officer candidates who have prior military experience.[95] Thirdly, some states have specific legislation that requires a veteran preference for civil service hiring.[96] These laws have been upheld in court so long as the points to improve a person's position on the hiring list are added after the person has initially passed the test.[97] The courts have upheld veteran preferences due to the fact that states have held military preferences for so long.[98]

Finally, some departments place a veteran preference on par with a special skill. The rationale is that the similarities between the military and the police department are such that the skills and organization learned in the military are easily transferred to the police department. Veterans are thought to be more highly proficient and more quickly productive in their respective police duties. Proponents of this theory also believe that veterans are generally in peak physical condition, and therefore can withstand training and are more likely to complete the police training course successfully. Opponents of this rationale question its validity. Not all honorably discharged veterans of the military were good military personnel or understood the organizational structure, so one cannot safely assume that all prior military personnel will perform well because of the military

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[95] *Local Police Departments, 2003*, *supra* note 1, at 12 (Table 21) (May 2006).
[96] States that have such legislation include Texas (TEX. GOV'T CODE ANN. §§ 657.001-657.003 (2005)), Florida (FLA. STAT. § 98-33 (2005)), and Michigan (MICH. DEPT. OF CIVIL SERVICE r. 3-8 (2005)).
[97] *See* Denton v. Civil Serv. Comm'n of the State of Illinois, 679 N.E.2d 1234 (Ill. 1997); Commonwealth *ex rel.* Graham v. Schmid, 333 A.2d 701 (Penn. 1939); 67 C.J.S. Officers § 49: Validity of preferences (2005).
[98] Some came into being after the Civil War. *Graham*, 3 A.2d at 703.

background. Also, not all military personnel are physically fit or adequately trained.[99] All of these arguments call into question the true amount of overlap between the military and police.

X. PSYCHOLOGICAL EXAMINATIONS

As of 2003, 67% of municipal police departments required psychological exams.[100] Amongst the states that do require psychological exams, there is a wide spectrum of requirements. On one side, as evidenced in North Carolina regulations, only a licensed clinical psychologist's examination of a candidate to determine the recruit's emotional and mental stability to fill the role of a police officer is required.[101] The middle road, demonstrated a state such as Washington, requires a psychological exam consisting of any standardized clinical test that is widely used and in compliance with accepted psychological standards.[102] At the complete other end of the spectrum, states like Arkansas lay out very specific requirements, including the specific tests and procedures and standards for passing.[103] As evidenced by these examples, there is no set standard for what states require in terms of psychological tests, or even if they require the tests at all.[104] Some states[105] only require psychological testing when there has been a documented problem with mental conditions in the past.

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[99] For example, most military personnel are trained in firing machine guns, while police firearms training focuses on handguns.
[100] *See Local Police Departments 2003*, *supra* note 84, at 8 (Table 14) (May 2006).
[101] 12 N.C. ADMIN. CODE 9B.0101(6) (2006).
[102] WASH. REV. CODE §§ 43.101.080(19), 43.101.095(2)(a)(i) (2005).
[103] ARK. CODE R. § 1002(3)(e) and Specification S-7 (2006).
[104] According to *Local Police Departments*, *supra* note 84, the larger the size of the police department, the more likely it is to require a psychological exam. Smaller

For states that do require psychological exams, the battery should be done in compliance with accepted psychological standards and consist of commonly accepted tests.[106] Other major concerns in regards to psychological testing include possible racial and disability discrimination. Some applicants and commentators believe that psychological tests are culturally biased and screen out viable minority candidates for police enforcement positions.[107]

At the same time, psychological examinations raise possible ADA issues.[108] A recent court case has found that psychiatric examinations as part of a conditional job offer were not medical tests, but even if they were considered medical tests, they were sufficiently job related and consistent with business necessity so as not to violate the ADA.[109] Although there are different ADA standards depending on if the recruit is an applicant, and applicant with a conditional offer on the examination, or a current

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agencies probably do not require psychological examinations due to the cost and overall lower numbers of recruits.

[105] For example, see Alaska's regulation at 13 ALASKA ADMIN. CODE tit. 13, § 85.010(c)(6) (2005).

[106] For a basic set of guidelines for psychological hiring tests, see IACP Police Psychological Services Section, *Pre-employment Psychological Evaluation Services Guidelines* (2004), at http://www.theiacp.org/div_sec_com/sections/Pre-employmentPsychologicalEvaluation.pdf. Commonly accepted and validated tests include the California Psychological Inventory (CPI), the 16PF, and the Minnesota Multiphasic Personality Inventory (MMPI).

[107] *See* G.R. Anderson, Jr., *Psyched Out: Is the MPD's Hiring Process Skewed Against Minority Applicants?*, CITY PAGES, May 3, 2006.

[108] For a general instructive guide, see U.S. Department of Justice, *Questions and Answers: The ADA and Hiring Police Officers* (Mar. 25, 1997), *available at* http://www.usdoj.gov/crt/ada/copsq7a.htm.

[109] DiFazio v. Exelon Serv., Inc., 2004 WL 741563 at *5 (D. Minn. 2004). *See also* 45A AM. JUR. 2D *Job Discrimination* § 487 (2005) ("What Constitutes a Medical Examination").

employee,[110] most law enforcement recruits are considered applicants who have been tendered conditional offers of employment. Police departments need to know if applicants have any conditions that would impair their ability to perform the essential functions of the job. "Courts will readily find a business necessity if an employer can demonstrate that a medical examination or inquiry is necessary to determine . . . whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties."[111] No other cases further up the chain have addressed this issue, but it is clear that the courts are willing to allow psychological hiring tests to continue.[112]

Conclusion:

The preceding discussion highlights key issues a department seeking to implement standards faces. Thoughtful preparation and advice of legal counsel are essential components of any such program. Chiefs and other administrators should be prepared to defend their decisions and should ensure that in their quest to improve their departments they do not encourage discrimination.

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[110] *See* 42 U.S.C. § 12112(d)(2), (3), (4) (2005). *See also* Deborah F. Buckman, Annotation, *Construction and Application of § 102(d) of Americans with Disabilities Act (42 U.S.C.A. § 12112 (d)) Pertaining to Medical Examinations and Inquiries*, 159 A.L.R. FED. 89 (2006).

[111] Conroy v. New York State Dept. of Corr. Servs., 333 F.3d 88, 98 (2d Cir. 2003).

[112] For further discussion of the validity of the use of personality and psychological tests as preemployment screening devices, see Gregory R. Vetter, *Is a Personality Test a Pre-Job-Offer Medical Examination Under the ADA?*, 93 NW. U. L. REV. 597 (1999); Maureen E. Mulvihill, *Karraker v. Rent-A-Center: Testing the Limits of the ADA, Personality Tests, and Employer Preemployment Screening*, 37 LOY. U. CHI. L.J. 865 (2006).

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Bureau of Justice Assistance, U.S. Department of Justice, Training and Technical Assistance, at http:/www.ojp.usdoj.gov/BJA/tta/index.html

City of Orlando (Florida) Police Department, at http://www.cityoforlando.net/police/Training/tng_philosophy.htm

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Community Policing Consortium, Recruitment and Selection for Community Policing, available at http://www.communitypolicing.org/recruit/sec1.html

Cooper Institute, at http://www.cooperinst.org/

FBI Library, Physical Fitness in Law Enforcement, at http://fbilibrary.fbiacademy.edu/Templates/B=physicalfitnessinLE.htm

International Municipal Lawyers Association (IMLA), at http://www.imla.org

Little Egg Harbor Township (New Jersey) Police Department, at http://www.leht.com/departments/personnel5.php

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