

OPENING BRIEF AND SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

I. JURISDICTIONAL STATEMENT

Plaintiffs, African-American and Hispanic Chicago police sergeants, invoked the jurisdiction of the District Court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, to challenge the City of Chicago's 1994 police lieutenant promotional test.

The district court denied plaintiffs' application for a preliminary injunction. *Brown v. City of Chicago*, 917 F.Supp. 577 (N.D.Ill. 1996). (Short Appendix 1-21.) Following trial, the district court concluded that use of the promotional test for rank order promotions was permissible under Title VII, but concluded that the City had failed to use the equally valid, less discriminatory alternative of supplementing rank-order promotions with merit promotions. *Brown v. City of Chicago*, 8 F.Supp.2d 1095 (N.D.Ill. 1998). (Short Appendix 22-57.) The district court ordered the City to make the 13 merit promotions that had been barred by a state court injunction, but refused to require additional promotions. (Short Appendix 59-63.) The district court directed that the "merit promotees" receive full backpay and benefits and concluded that the named plaintiffs who were not among the merit promotees would each receive a fractional share of the economic value of a promotion. 19 F.Supp. 890 (N.D.Ill. 1998). (Short Appendix 58-63.)

Plaintiffs invoke the jurisdiction of this Court under 28 U.S.C. Section 1291 to challenge portions of the decision below upholding the use of test scores to make rank order promotions and refusing to order additional merit promotions. A final decision resolving all matters except for issues relating to fees

and costs was entered on January 12, 1999. (Record Item No. 167, Short Appendix 64-66.) Plaintiffs filed a notice of appeal from this order on February 3, 1999.¹ (Record Item No. 168.)

II. QUESTIONS PRESENTED

1. Did the district court apply the *Daubert* framework in considering the admissibility of opinion testimony?
2. Do the opinions of defendant's expert lack scientific validity?
3. Do the opinions of defendant's expert provide enough evidence to justify rank order promotions?
4. Is the district court's conclusion that the promotional test is content valid based on clearly erroneous factual determinations and application of an incorrect legal standard?
5. When plaintiffs prevail at trial after a district court had refused to grant a preliminary injunction to enjoin discriminatory promotions on the ground that injury could be redressed on entry of a final decision, does the district court have discretion to withhold full make whole relief because it is now "impracticable" to recreate the conditions and relations that would have existed if the preliminary injunction had been granted?

1. The district court docket sheet contains mistaken entries relating to an appeal in *Tari Marshall v. American Hospital Association*, docketed in this Court as number 97-2488. (Record Items 144-147.)

III. STATEMENT OF THE CASE

This case involves the police lieutenant promotional test administered for the City of Chicago in 1994. The test had an undisputed disparate impact on minority police officers, which, under 42 U.S.C. §2000e-2(k)(1)(A), required the City to show "that the challenged practice is job related for the position in question and consistent with business necessity."

There are two principal issues in this case: First, whether use of the test to make rank order promotions is an unlawful employment practice under Title VII of the Civil Rights Act of 1964, as amended. Issues relating to the admissibility of expert testimony are embedded in this issue. The second principal issue is whether a district court, after denying a preliminary injunction on the ground that full make-whole relief will be available after entry of a final decision, may withhold full relief after entry of a final decision because a complete remedy would be "impossible and disruptive."

IV. STATEMENT OF FACTS

A. The Promotional Test

The 1994 lieutenant promotional examination consists of three components: a 150 question multiple choice "job knowledge" test,² (Def.Ex. 14), a

2. The test questions were based on Police Department General Orders, Police Department Special Orders, Illinois statutes, sections of the Chicago municipal code, the entire FOP contract, and a booklet (Defendants' Exhibit 11) entitled "Together We Can." Candidates were expected to read and memorize these source materials, (Barrett Testimony, Tr. 674-676), and then answer the 150 multiple choice questions in two and one-half hours — one minute per question.

60 question multiple choice "in basket" test³ and an "oral examination."⁴ (Short Appendix 28.) Scores on the three tests were combined and the persons with the 108 highest scores were promoted to lieutenants as vacancies arose. (Short Appendix 28.)

The test was taken by 765 police sergeants: African-American and Hispanic police officers made up 31% of those taking the test, but nearly 95% of the 108 persons promoted to sergeant were white.⁵

B. The City's Attempt to Use Merit Promotions

In 1994, after reviewing the results of the test at issue in this case, the City attempted to supplement rank order promotions with merit promotions. (Short Appendix 53-54.) The City selected thirteen sergeants for promotion to

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3. The "in-basket" was a sixty question multiple choice test that candidates were required to answer after reviewing nearly one hundred pages of written materials. (Plaintiff's Exhibit 160.) The candidates were allowed two and one half hours to review the written materials and ninety minutes to answer the sixty questions. The candidates were not permitted to unstaple any of the written materials (Tr. 567) but were allowed to sort the stapled documents "any way you wish." (Plaintiff's Exhibit 160 at 2.)
 4. The oral examination consisted of reviewing twelve pages of information about a new gang and making an oral presentation that "contains only relevant and important information about this new gang that needs to be brought to the officers' attention, along with any relevant procedures to follow." (Plaintiff's Exhibit 165, page facing 2X.) The candidates were permitted 25 minutes to review the materials; their oral presentation, of not more than 10 minutes, was tape recorded.
 5. Of the 765 sergeants who took the test, 184 were African-American and 55 were Hispanic, (Short Appendix 7.)

Five of those promoted are African American and one is Hispanic. (Short Appendix 7.)

lieutenant irrespective of test scores but the state courts prohibited these promotions. *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 659 N.E.2d 1356 (1995).

C. The Preliminary Injunction Hearing

In 1996, the City announced its intention to make 54 additional promotions from the roster. (Short Appendix 11.) Slightly more than 94% of these promotions were slated for white officers.⁶ (Id.) Plaintiffs asked the district court to block these promotions, but following a hearing, the district court denied plaintiffs' application for a preliminary injunction. (Short Appendix 1-21.)

The district court concluded that plaintiffs could not establish irreparable harm because if plaintiffs prevailed after trial, "these plaintiffs can be promoted later." (Short Appendix 16.) In the view of the district court, "[i]n the event plaintiffs prevail, there is an adequate remedy at law: the court can order their promotion, back pay, pension benefits, and seniority in title. (Short Appendix 16-17.)

D. Trial

At trial, the City sought to defend the discriminatory impact of the test with testimony from Dr. Charles Barrett, the industrial psychologist who had constructed the test. Plaintiffs objected to the admissibility of Dr. Barrett's opinions, arguing that under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), there must be "scientific validity" (Tr. 376) for Barrett's

6. Of the 54 promotions, 51 went to white sergeants. (Short Appendix 10.)

opinions. The district court overruled plaintiffs' *Daubert* objections, finding that Dr. Barrett has "the expertise" to offer opinions. (Tr. 376.)

Over plaintiffs' standing *Daubert* objection (Tr. 377), the district court received Dr. Barrett's opinions that each component of the test concerned matters that a lieutenant needed to know. (Tr. 377, written test; Tr. 357, oral test; Tr. 394, in-basket.) The district court also received Dr. Barrett's opinion that final scores on the test could be used for rank order selection. (Tr. 417.)

Following trial, the district court relied on Dr. Barrett's opinions to conclude that each component of the test was job related and that use of the test scores for rank order promotions was "approved by the EEOC guidelines and industry standards in connection with a content valid test." (Short Appendix 52.)

The district court found that the City's plan to supplement rank order promotions with merit promotions was an equally valid, less discriminatory alternative and that the state court injunction did not make this alternative unavailable to the City. (Short Appendix 53-57.) Accordingly, the district court found in favor of plaintiffs. (Short Appendix 57.)

E. Ruling on Remedy

Following his decision on the merits, the district judge permitted 12 of the original merit promotees to intervene as plaintiffs,⁷ and ordered the City to

7. Alberta Raymond, one of the original merit promotees, was already a plaintiff.

promote the original merit promotees to lieutenant with full retroactive backpay and benefits. (Short Appendix 62.)

The district court declined to order any additional merit promotions because "[t]o attempt now to identify sergeants who were deserving of merit promotion three years ago would be conjectural and overly subjective." (Short Appendix 63.) Instead, each of the original plaintiffs who was not a merit promotee was awarded a 13/794 share of the economic value of a promotion.⁸ (Short Appendix 60 n.1.)

V. SUMMARY OF ARGUMENT

This case involves the police lieutenant promotional test administered for the City of Chicago in 1994. The test had an undisputed disparate impact on minority police officers, which, under 42 U.S.C. §2000e-2(k)(1)(A), required the City to show "that the challenged practice is job related for the position in question and consistent with business necessity."

The undisputed disparate impact of the test required the City to prove that the test was "job related" and that the method of scoring it served a legitimate employer purpose. *Evans v. City of Evanston*, 881 F.2d 382, 384 (7th Cir. 1989). The district court held that the City had met this burden, but concluded

8. The district court found that, but for the state court injunction, the City would have made an additional 13 merit promotions; in the view of the court below, all sergeants had an equal chance to be selected for a merit promotion. The probability that any particular sergeant would have been selected for a merit promotion was therefore 13 (the number of additional promotions) divided by 794 (the pool of sergeants from which the 13 promotees would be selected).

that the City had failed to use the equally valid, less discriminatory alternative of supplementing rank order promotions with merit promotions.

The district court's conclusion that the test is job related is based on clearly erroneous factual determinations and application of an incorrect standard of test validation.

The district court's conclusion that using test scores to promote those who received the 108 highest scores is job related is based on the opinion testimony of Dr. Charles Barrett, the industrial psychologist who prepared the test. Dr. Barrett's opinions lack scientific validity and were inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The district court declined to apply the *Daubert* framework and received Dr. Barrett's opinions on the finding that he had "expertise." (Tr. 376.) The district court was "deceived by the assertions of experts who offer credentials rather than analysis." *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1215 (7th Cir. 1997).

Even if the Dr. Barrett's opinions were admissible, his views failed to provide sufficient evidence to justify use of test scores to promote those who received the 108 highest scores. The City's method of setting the cutoff score is the same as that condemned by the Second Circuit in *Guardians v. Civil Service Comm'n*, 630 F.2d 79 (2d Cir.1980). There, the City "merely chose as many candidates as it needed, and then set the cutoff score so that the remaining candidates would fail." *Id.* at 105.

The district court's final error was to refuse to order additional merit promotions. The court below had denied a preliminary injunction on the ground that full make-whole relief will be available after entry of a final decision. But

when plaintiffs prevailed, the district judge concluded that ordering additional promotions would be "conjectural and overly subjective." (Short Appendix 63.) This Court has established a bright line rule that "some delay in promotion does not constitute irreparable injury." *Adams v. City of Chicago*, 135 F.2d 1150, 1154 (7th Cir. 1998). This rule necessarily implies that make-whole promotions will be made when, as in this case, plaintiffs prevail at trial.

VI. ARGUMENT

A. Standard of Review

1. Factual Findings

The district court's factual findings are reviewed under the clearly erroneous standard.

2. Expert Testimony

In reviewing a challenge to expert testimony, the Court reviews *de novo* whether the district court properly applied the *Daubert* framework. *United States v. Hall*, 165 F.3d 1095, 1101 (7th Cir. 1998). If the district court applied the proper legal standards, its decision to admit the expert testimony is reviewed under an abuse of discretion standard. *General Electric Company v. Joiner*, 118 S.Ct. 512, 514 (1997). The district court's factual determinations are reviewed under the clearly erroneous standard.

3. Legal Standards for Content Validity and Rank Order Promotions

The legal standards applied by the district court in considering plaintiff's challenge to rank order promotions are reviewed *de novo*.

4. Refusal to Require Additional Promotions

The district court's refusal to require additional promotions is reviewed under the tripartite standard set out in *In the Matter of VMS Securities Litigation*, 103 F.3d 1317, 1323 (7th Cir. 1996): "The abuse of discretion standard is

used to evaluate the . . . court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and *de novo* standards, respectfully," quoting *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 779-80 (7th Cir. 1992).

B. Gross Disparate Impact and the Compelling Need for a Representative Work Force

The starting point for this case is the conceded fact that as a group, African-American and Hispanic police sergeants are just as qualified as white police sergeants to be promoted to lieutenant. (Short Appendix 26.)

The conceded equality of capability is not reflected in the results of the 1994 lieutenants' test: Although 31% of those who took the test were African-American and Hispanic, minorities comprise about 6% of those promoted. This undisputed "serious adverse impact" (Tr. 16) reduced by half the representation of minorities in the lieutenant work force — in 1994, before any promotions were made from the test, minorities made up about 20% of the lieutenant work force; the minority representation is now about 10%. (Tr. 63.)

There are two explanations when 30% of the persons who take a test are minorities but minorities make up only 6% of those who pass.⁹ The first is that whites are simply better than minorities and are therefore selected at a higher

9. These are the statistics for the 1994 lieutenants test: although there was not a pre-determined passing score, only those who obtained the highest 108 scores have been promoted.

rate. The second hypothesis is that there is something wrong with the test.

The district court concluded that an expert's opinion that a test is "content valid" requires rejection of the second hypothesis. But opinion testimony that departs from observable reality must be examined with caution, especially when the opinion conflicts with the conceded fact that minorities are equally qualified to be promoted to lieutenant.¹⁰

The City's concession that minorities are equally qualified to be promoted to lieutenant is compelled by the results of the court ordered "quasi-experiment" that the City was required to conduct from 1976 until 1991.¹¹

- From 1976 until 1981, the City made promotions to sergeant in accordance with a 40% promotional quota. *United States v. City of Chicago*, 411 F.Supp. 218, 2150 (N.D. Ill. 1976), *aff'd* 549 F.2d 415 (7th Cir. 1977).
- From 1981 until 1987, the City made promotions to sergeant in accordance with a 25% "minority male" and 5% female quota following the

10. It was not that long ago that intelligence tests were used to prove that there was a large proportion of "mental defectives" among immigrants from Eastern and Southern Europe. See Gould, *The Mismeasure of Man* (1996).

11. A "quasi-experiment" is undertaken in a "natural social setting" when the experimenter can collect data but lacks "full control over the scheduling of experimental stimuli." Campbell & Stanley, *Experimental and Quasi-Experimental Designs for Research* (1966), 34. A classic "quasi-experiment" would be a study seeking to determine if a reduction in reported crime was related to a change in police practices.

decision of this Court in *United States v. City of Chicago*, 663 F.2d 1354 (en banc) (7th Cir. 1981).

- From 1984 to 1987, the City made promotions to lieutenant under a decree that required that 21.28 percent of those promoted to lieutenant be African-American and Hispanic police sergeants. (Plaintiffs' Exhibit 54 at 20.) The procedure was to superimpose a quota on the promotional roster — if the City was making 100 promotions, it would select from the list the 21 African-Americans and Hispanic sergeants with the highest scores, and the 79 whites with the highest scores. This process resulted in the promotion of minorities to lieutenant who had lower scores on the test than white sergeants.
- From 1988 through 1991, the City made promotions to sergeant and lieutenant in accordance with the "race normed" tests discussed in *United States v. City of Chicago*, 870 F.2d 1256, 1258 (7th Cir. 1989).

This judicially mandated quasi-experiment demonstrated that persons with lower test scores can perform as well, if not better, than persons with higher test scores. As the City's 1997 "Blue Ribbon Panel on Police Testing Hiring Promotion" concluded, "it is plainly incorrect to regard one candidate as better qualified than another or more deserving of a job simply because he or she scored slightly higher on a written test." (Plaintiffs' Exhibit 60 at 6.)

In this case, the district court accepted the City's argument that an industrial psychologist's opinion that a test is content valid satisfies the employer's burden to rebut a prima facie showing of disparate impact. We show below that Title VII requires more than opinion testimony when, as here, a test has a gross

disparate impact on equally qualified groups.

C. Legal Standards for “Job Relatedness”: Griggs, Its Progeny, and the Civil Rights Act of 1991

In Title VII, Congress forbid the use of employment tests that have a disparate impact "unless they are demonstrably a reasonable measure of job performance." *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). When Congress extended this prohibition to municipalities in 1972, it took special notice that a barrier to equal employment opportunity had been promotions on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." *Connecticut v. Teal*, 457 U.S. 440, 449 n.10, quoting U.S. Commission on Civil Rights, *For All the People . . . By All the People - A Report on Equal Opportunity in State and Local Government Employment* 119 (1969), reprinted in 118 Cong. Rec. 1817 (1972).

The Court summarized disparate impact standards in *Connecticut v. Teal*, 457 U.S. at 446-47 (1982):

Griggs and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. *Griggs, supra*, at 432. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination. (citations omitted)

The strict *Griggs* standard was lessened in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), where the Court moved the burden of persuasion to the employee and "lessened the ‘necessity’ in the ‘business necessity’ defense. *Allen v. Seidman*, 881 F.2d 373, 377 (7th Cir. 1989).

The relaxed *Wards Cove* standard was overruled by Congress in the Civil Rights Act of 1991, when Congress expressly reinstated the strict *Griggs* rule. In 42 U.S.C. §2000e-2(k)(1)(A), Congress placed back on the employer the burden of demonstrating "that the challenged practice is job related for the position in question and consistent with business necessity," and restored the "manifest relationship" standard of *Griggs* and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The Civil Rights Act of 1991 also reaffirmed the "equally valid less discriminatory alternative" recognized in *Albemarle*. 42 U.S.C. §2000e-2(k)(1)(A)ii provides that disparate impact discrimination has been established if the complainant establishes an "alternative employment practice" under pre-*Wards Cove* standards, i.e., "in accordance with the law as it existed on June 4, 1989." 42 U.S.C. §2000e-2k(1)(C).

In this case, the City conceded that its use of the lieutenant's test had a disparate impact on minorities. Thus, under 42 U.S.C. §2000e-2(k)(1)(A), the City was required to show that its use of test scores to make rank order promotions was "job related for the position in question and consistent with business necessity." The City sought to meet its burden by seeking to prove that the test is "content valid."

D. The Defense of Content Validity

This Court does not write on a clean slate in considering a claim of "content validity."

In *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), the Court described content validity by quoting from *Vulcan Society v. Civil Service Commission*, 490 F.2d 387, 395 (2d Cir. 1973) that "An examination has content validity if the content of the examination matches the content of the job."

549 F.2d at 433 n.22. The court of appeals also referred to the observations of the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976) that content validity is "demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant." 549 F.2d at 430 n.14. This Court repeated this language in rejecting the content validity defense: "Defendants' claim of content validity required them to show that the tasks on the examination substantially represented equivalent tasks on the job." 549 F.2d at 434.

The Court again applied a strict definition of content validity in litigation involving the Chicago fire department. *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978). There, the district judge had concluded that a promotional examination was content valid. The Court reversed and remanded for a determination of whether the examination tested "all or nearly all important parts of the job" of captain:

What is required on remand is for the district court to ascertain from the job analysis the various functions of the job of captain and then analyze the captain's exam to determine whether these various functions are tested in proportion to their importance. It is not enough, therefore, that the various functions of a captain be tested — there must be a correlation between the importance of a job function as determined by the job analysis and the weight given to this function on the examination. Without such findings comparing the job analysis to the test itself, no decisions can be made on whether the captain's examination is job related.

573 F.2d at 425-26.

The court also reiterated that "[f]or a test to be content valid, its content must closely approximate tasks to be performed on the job by the applicant," 573 F.2d at 425, and cited *Firefighters Institute for Racial Equality v. United States*, 549 F.2d 506 (8th Cir. 1977) for the proposition that a "promotional examination which did not measure supervisory skills was not content valid

even though the test did measure other necessary skills of the promotional job." 573 F.2d at 435 n.7.

This Court upheld a finding that a test was content valid in *Gillespie v. State of Wisconsin*, 771 F.2d 1035 (7th Cir. 1985). There, the court adopted the following definition of content validity:

The content validation strategy is utilized when a test purports to measure existing job skills, knowledge or behaviors. The purpose of content validity is to show that the test measures the job or adequately reflects the skills or knowledge required by the job. For example, a typing test given to prospective typists would be validated by the content validation method.

771 F.2d at 1040.

The *Gillespie* court approvingly cited the Uniform Guidelines¹² for the proposition that constructs cannot be measured with a content-valid test, and quoted from the Guidelines for the "test for determining whether a characteristic is too abstract to be measured by a content validated test:"

12. "The EEOC has issued 'Guidelines' for employers seeking to determine, through professional validation studies, whether their employment tests are job related. 29 CFR pt. 1607. These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association. The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S., at 433-434.

[T]o be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles the work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

771 F.2d at 1043, citing 29 CFR §1607.14(C)(4).

This Court again adverted to "content validation" in *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (en banc)

To validate a test for content means to establish that it tests for skills or knowledge used on the job: a typing test for secretaries, for example. The city designed the engineers' test as one that would be content validated, as distinct from a "criterion validated" test, which tests qualities predictive of or correlated with job performance (such as IQ). The law is clear that either method of validation is proper. *Gillespie v. State of Wisconsin*, 771 F.2d 1035, 1040-41 (7th Cir. 1985); 29 C.F.R. sec. 1607.5(A).

This Court's content validation teachings were applied by the district court in *Thomas v. Evanston*, 610 F.Supp. 422 (N.D.Ill. 1985). *Thomas* involved a physical agility test for police officers that was challenged as having a disparate impact on female applicants. After finding that the test was not content valid, Judge Aspen turned to the scoring system and

[C]onclude[d] that the scoring system is deficient in two ways. First, the City concedes that no evidence supports the proposition that an officer who received a high passing score will perform better on the job than one who receives a low passing score. This concession alone is enough to invalidate the rank ordering system,

which, as we held above, had a disparate impact on the members of the plaintiff class who passed. [citations omitted]

Second, the evidence does not, as it must, show that a passing score of 70 or better validly predicts successful job performance.

* * * The City has simply not presented any evidence that the scoring system validly predicts future job performance.

610 F.Supp. at 430-31.

This Court approvingly cited *Thomas* in its decision in *Evans v. Evanston*, 881 F.2d 382 (7th Cir. 1989). There, the City of Evanston had devised a content valid physical capability test.¹³ *Id.* at 384. Evanston had not established a fixed passing score on the test, but adjusted the passing score each time the case was administered to be "one standard deviation above the mean." 881 F.2d at 384. "The choice of one standard deviation above the mean was a decision to pass 84 percent of the test takers, and this meant that the passing score would depend on the average performance of those who happened to take it." *Id.*

This Court was skeptical of a passing score that turned on the quality of the applicant pool, noting that "the ability to perform firefighting tasks adequately depends not on relative but on absolute test performance," *id.*, and remanded to permit the district judge to reconsider under the *Wards Cove* standards whether the plaintiffs had established "that the test, because of its method of scoring, did not serve the legitimate ends of the employer but instead unreasonably excluded women." *Id.* at 385.

13. This finding of content validity was made under the "relaxed" *Wards-Cove* standard. 881 F.2d at 384.

This Court is not alone in closely examining an employer's attempt to defend discriminatory passing scores. In *Guardians Association v. Civil Service Commission*, 630 F.2d 79, 105-06 (2d Cir. 1980) the Second Circuit noted that "[I]f test scores produce disparate racial results, an employer who wants to use rank-ordering of the scores for hiring decisions faces a substantial task in demonstrating that rank-ordering is sufficiently justified to be used." The Court observed that "the task is by no means impossible," *id.* at 103, and suggested that one way for the City to meet its burden would be to show "that the exam measures ability with sufficient differentiating power to justify rank-ordering." *Id.* at 105. The Court's conclusion was that even though a test is content valid, "the City cannot use rank-ordering not shown to be job-related when test scores produce a disparate racial impact." *Id.* at 104.

The Fifth Circuit reached the same result in *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir. 1980), opinion following remand, 31 F.3d 1548. There, the Court concluded that use of a test for rank order selection "is justified only if there is evidence showing that those with a higher test score do better on the job than those with a lower test score." 616 F.2d at 822.

Similarly, in *Firefighters Institute v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980) the Court rejected use of scores on a content valid test to rank applicants without "empirical evidence of an association between levels of performance on the multiple choice examination and on the job." *Id.* at 358. The Court described the employer's evidence as "opinion and conjecture, not actual observation of the correlation between the extent of mastery of the knowledges and abilities sought to be measured by the test and job performance." *Id.* The same words are applicable to the City's evidence in this case.

E. Clearly Erroneous Findings and Incorrect Legal Standards

The district court concluded that each portion of the test was content valid by applying an incorrect legal standard to clearly erroneous factual determination.

1. The Written Job Knowledge Test

The district court found that the written job knowledge test "measure[d] the job knowledge required to perform the major work behaviors of the lieutenant job." (Short Appendix 41.) This finding is clearly erroneous.

The written test (Def. Exhibit 14) consisted of 150 multiple choice questions. 17 of the questions on the test were answered incorrectly by more than half of the sergeants who took the test.¹⁴ At least one question was incorrectly scored. The answer graded correct to Question 93 (Joint Exhibit 1) was based on the state curfew statute; none of the choices, however, are consistent with the controlling Chicago municipal ordinance, which specifically exempts a minor who is "going directly to or from any adult-supervised activity sponsored by any school, church, civic or not for profit organization." Chicago Municipal Code §8-16-020(c).

At least one question did not involve the duties of a lieutenant, but was concerned with the duties of a person of exempt rank. (Question 60, Tr. 850-53.) Another question (Question 88) included a typographical error that made a choice incomprehensible. (Tr. 966.) Other questions were confusingly worded:

14. These are questions 59, 65, 71, 75, 83, 84, 102, 106, 113, 120, 121, 123, 124, 131, 132, 133, and 139. See Joint Exhibit 1.

Question 16 is an example of a dangling participle.¹⁵ Question 110 inquired about a "garbage pile [which] was located on a strip of land in between both homes while his neighbor was on vacation."

The district court found that each question on the written examination "tested knowledge that is important for a lieutenant to have." (Short Appendix 48.) The district court made this finding by accepting the following incomprehensible explanation for question 150 (Tr. 823):

Q: And could you tell us why it is that a lieutenant who doesn't know the correct answer to this question [150] will be unable to effectively do his or her job?

Klein: One of the fundamental changes that this new policing strategy has brought about is the attempt to shift police officer activity from merely making arrests or merely responding to 911 calls. It's an attempt to shift their focus toward identifying problems upon which they have the ability to impact.

And one of the measures or one of the intended outcomes of the new policing strategy is that the officer's efforts will achieve either a reduction in the nature of the problem or elimination of the problem.

Q: Well, is that your answer for why a lieutenant has to know the correct answer to question 150?

15. The first sentence of question 16 reads as follows: "While driving down a City street on duty, a car pulled out in front of District Commander Wilson." Was Wilson driving down the street on duty? Or was the car that pulled out in front of him on duty?

A: Yes.

Q: Anything you would like to add to that?

A: No.

Question 150 is the type of trivia that is not actually "required by the job." *Gillespie v. State of Wisconsin*, 771 F.2d 1035, 1040 (7th Cir. 1985). Question 150 stated as follows:

When evaluating performance in the past, the Department primarily measured quantifiable activities. Under the Chicago Alternative Policing Strategy, the Department will also evaluate . . ."

The "job knowledge" test placed an "[u]necessary emphasis on applicant's ability to memorize written materials such as general orders and other department directives." (1997 Blue Ribbon Report, Plaintiffs' Exhibit 133 at 6.) The test was not content valid.

2. The In-Basket

The district court found that the "in-basket simulation was utilized to measure the administrative and organization component of the job."¹⁶ (Short Appendix 41.) The district court also found that the in-basket was "not intended to be an exact replica of the job."¹⁷ (Short Appendix 49.) These findings are the antithesis of the defense of content validity.

16. Plaintiffs challenge this finding as based on inadmissible (or valueless) expert opinion. See *infra* at 24-35.

17. Plaintiffs do not challenge this finding, which was based on undisputed evidence.

The Uniform Guidelines caution against use of a content validity strategy "to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability." 29 CFR §1607.14(C)(1). Under the Uniform Guidelines, the "test for determining whether a characteristic is too abstract to be measured by a content validated test," *Gillespie v. State of Wisconsin*, 771 F.2d 1035, 1043 (7th Cir. 1985), turns on the degree to which the test "approximate[s] the work situation." 29 CFR §1607.14(C)(4). "As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles the work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity." *Id.*

The "in basket" fails the basic test of content validity because it is a "simulation" and does not "consist of suitable samples of knowledge, skills or behaviors composing the job in question." *United States v. City of Chicago*, 549 F.2d at 434 n.25. *See infra* at 29-33.

3. The Oral Examination

The district court found that "[t]he oral briefing exercise was designed to measure . . . analytical ability and organizational and oral communication skills."¹⁸ This finding is based on Dr. Barrett's trial testimony that the oral test seeks to measure a construct:

18. Plaintiffs challenge this finding as based on inadmissible (or valueless) expert opinion. *See infra* at 24-35.

- "The oral test was designed to test the *oral communication skills* required by a police lieutenant." (emphasis supplied) (Tr. 347)
- "Analysis, organization, and oral communication were three main dimensions which we would be tapping in the oral." (Tr. 351.)
- "The oral briefing exercise is a test. It's an exemplar of oral communication." (Tr. 356)

Dr. Barrett's testimony makes plain that the oral examination cannot be defended as content valid — as an "exemplar," the test does not "approximate the work situation." *Gillespie v. State of Wisconsin*, 771 F.2d 1035, 1043 (7th Cir. 1985). The Uniform Guidelines make plain that a content validation approach is inappropriate for constructs such as analysis and organization abilities. Uniform Guidelines, 29 CFR §1607.14(C)(1). The district court applied an incorrect legal standard in finding that the oral examination was content valid.

F. Daubert and the Errors of the District Court

The only evidence in this record that the test "measures ability with sufficient differentiating power to justify rank-ordering," *Guardians v. Civil Service Comm'n*, 630 F.2d at 105, is the opinion testimony of Dr. Charles Barrett. Dr. Barrett's opinion that there is a relationship between test scores and promotability is the type of conjecture that should have been excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

1. The District Court Failed to Apply the Daubert Framework in Considering the Admissibility of Dr. Barrett's Opinions

Plaintiffs objected to opinion testimony from Dr. Barrett because there had not been a showing of "scientific validity" for his opinions. (Tr. 375.) The district court overruled plaintiffs' objections on the finding that Dr. Barrett has "the expertise" to offer opinions. (Tr. 376.) Plaintiffs reiterated their *Daubert*

admissibility objections in their post-trial brief, arguing that Dr. Barrett's opinions were "the sort of unsubstantiated expert opinion testimony that is inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)." (Record Item No. 102 at 50.) The district court did not advert to this issue in its decision on the merits, where it accepted each of Dr. Barrett's opinions.

The district court failed to apply the *Daubert* framework in ruling on plaintiffs' objections to the admissibility of Dr. Barrett's opinions. Proper application of *Daubert* would have resulted in exclusion of Dr. Barrett's opinions.

The first step in evaluating the admissibility of expert testimony under *Daubert* is to "consider whether the testimony has been subjected to the scientific method." *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir.1995). This is the "most significant *Daubert* factor." *Bradley v. Brown*, 42 F.3d 434, 438 (7th Cir. 1994). The district judge must conduct a "preliminary assessment" of the scientific validity of expert testimony before permitting an expert to testify. *Frymire-Brinata v. KPMG Peat Martick*, 2 F.3d 183, 187 (7th Cir. 1993). This preliminary inquiry is required because *Daubert* "says that courts must ensure that purportedly scientific testimony employs scientific methods to reach reliable conclusions." *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1086 (7th Cir. 1999).

In *Deimer*, proffered testimony was excluded because the expert had not conducted any studies or analysis to substantiate his opinion. *Id.* at 344. Similarly, in *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993), the Court held that opinion testimony had been properly excluded because the proffered expert admitted that he "could not point to studies, records, or data on

which he based his opinion." *Id.* at 614. In *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), a physician sought to offer his opinion that cataracts had been caused by exposure to radiation. The Court held that this testimony had been properly excluded because the physician's opinion was based solely on claimed personal observation, rather than on "personal study or experiments." *Id.* at 1007. In *Wintz v. Northrop Corporation*, 110 F.3d 508, 513 (7th Cir. 1997) the Court held that a toxicologist's "experience, knowledge, and methodology simply were not sufficient to permit him to offer an expert opinion applying the principles of toxicology to a human being in this case."

A preliminary inquiry into scientific validity prevents a judge from being "deceived by the assertions of experts who offer credentials rather than analysis." *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1215 (7th Cir. 1997). The district judge in this case declined to conduct the preliminary inquiry into scientific validity because the witness has "expertise." (Tr. 376.) Dr. Barrett's opinions — no matter how imposing his credentials may be — should have been excluded because they lack scientific validity.

2. Dr. Barrett's Opinions Lack Scientific Validity

Over plaintiffs' objection, Dr. Barrett was permitted to offer the opinion that "content validation [is] adequate to support use of an examination for rank order promotions." (Tr. 407.) Dr. Barrett asserted that this opinion was based on "the general scientific literature which shows a positive relationship between test scores and job performance." (Tr. 408.) This "scientific literature" consists of a single unpublished study. (Tr. 513.)

Dr. Barrett also sought to support his opinion that "content validation is adequate to support use of an examination for rank order promotions" with "the

job analysis, which shows in some detail that more job knowledge, greater administrative skills, oral communications, the more effective you are in that, the more effective you expect to be on the job itself." (Tr. 408.) On cross-examination, Dr. Barrett conceded that he did not have any data to relate either job knowledge (Tr. 517), the test of "administrative skills" (Tr. 609), or the test of "oral communication ability" (Tr. 535) to job performance. Dr. Barrett admitted that he has "never measured police performance in Chicago." (Tr. 618.)

Dr. Barrett also claimed that the "EEOC guidelines" and the "SIOP principles" support his opinion that "content validation [is] adequate to support use of an examination for rank order promotions."¹⁹ (Tr. 408.) This Court read the

19. The "SIOP" principles are the guidelines of the Society of Industrial and Organizational Psychology. (Defendant's Exhibit 28.) Contrary to Dr. Barrett's claims, these guidelines caution against using a content validation approach for jobs that require reasoning abilities; these guidelines recommend a construct validation approach:

There is disagreement among professional personnel researchers in the use of the terms content-oriented strategy and content validity. Some people restrict these terms to situations in which a job domain is defined through job analysis by identifying important tasks, behaviors, or knowledge and the test (or criterion) is a representative sample of task, behaviors, or knowledge drawn from that domain. Others apply these terms to selection procedures in which more general worker specifications (such as general skills or abilities) are measured and match well those inferred from the job domain. In this section of the document we will emphasize the former narrower definition of content-oriented strategy. *The second definition will be treated in the section on construct validity.* Either approach may be an appropriate basis for the use of a selection procedure. There are also inconsistencies in the ways in which personnel researchers have used the terms knowledges, skills, and abilities. Researchers have frequently called the knowledge or skill related to a small group of tasks an ability. When ability is defined in this very specific way, content-oriented strategies may be sufficient. When referring to more general abilities such as reasoning or spatial ability, a construct-oriented strategy is likely to be necessary.

Defendant's Exhibit 28 at 19 (emphasis supplied)

EEOC guidelines differently in *Gillespie v. State of Wisconsin*, 771 F.2d 1035, 1045 (7th Cir. 1985): "Use of a selection procedure on a ranking basis may be supported by content validity if there is evidence from job analysis or other empirical data that what is measured by the selection procedure is associated with differences in levels of job performance." [citing] EEOC Questions and Answers, Q. 62." In this case, Dr. Barrett admitted that he was unable to measure differences in levels of job performance.²⁰

As additional support of his opinions, Dr. Barrett stated that "[w]e also have the fact that we did test a broad representative basis of knowledge, skills, and abilities. In other words, we did not just test job knowledge, we tested job knowledge plus administrative skills, plus the oral communication component of the job." (Tr. 408.) These claims are also belied by the record.

a. The Test of "Administrative Skills"

Dr. Barrett was unable to present any scientific validity for the "in basket," his test of "administrative skills." The in-basket was a sixty question multiple choice test that candidates were required to answer after reviewing nearly one hundred pages of written materials. (Plaintiff's Exhibit 160.) The

20. Contrary to Dr. Barrett's protestations, quantitative social scientists are capable of measuring a variety of phenomena. Dr. Steven Levitt, an economist who testified for plaintiffs, stated that he had been able to measure the effect of police on crime (Tr. 885), the extent to which juvenile criminals respond to punishments, (id.), the impact on theft reduction of installing "Lojack" on automobiles (Tr. 885-86), and the question of whether or not white and nonwhite officers are equally effective in reducing crime. (Tr. 886.) Dr. Levitt offered what should have been the unremarkable opinion that police performance could be measured. (Tr. 900.) As Dr. Levitt explained, "all things are measurable." (Id.)

candidates were allowed two and one half hours to review the written materials and ninety minutes to answer the sixty questions.

The "in-basket" was scored by the number of questions the candidate was able to answer correctly within 90 minutes. (Barrett Testimony, Tr. 379.) This scoring system has never been subjected to scientific validation: Dr. Barrett admitted that he does not have any empirical evidence to show that scores on the in-basket are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 431. (Tr. 609.)

Dr. Barrett claimed that scientific validation was not required because "it's an objective approach, and when you have a highly reliable objective approach, your validity tends to increase." (Tr. 382.) This is precisely the sort of "hunch" that is inadmissible under *Daubert*.

Dr. Barrett sought to justify his "improved" in-basket by citing three research papers. (Tr. 651). These sources do not provide any support for Barrett's claims; on the contrary, two of these papers flatly contradict Barrett and state that an in-basket exercise should be experimentally validated.

Plaintiffs extensively cross-examined Dr. Barrett about the first research paper which he invoked, a 1966 report of the American Management Association by Felix Lopez. (Plaintiffs' Exhibit 161.) This report described an in-basket test administered for police lieutenant promotions that was quite unlike the Barrett in-basket (Tr. 586) and concluded that objective scoring procedures (which Dr. Barrett claims to have used) would require a "breakthrough." (Tr.

588-89.) Scores in the Lopez in-basket

[C]onsisted of an analysis of two separate variables: One, the actual content of the response, including the propriety and accuracy of the actions taken by the candidate and his knowledge of the rules, regulations, and technical aspects of police work; and, two, the style with which he performed his actions, such as the way he communicated, organized his work, made decisions and delegated.

Plaintiff's Exhibit 161 at 94.

Dr. Barrett agreed that his in-basket was not scored in this manner. (Tr. 590.)

Dr. Barrett also referred to an article published by Kesselman, Lopez and Lopez, *The Development and Validation of a Self-Report Scored In-Basket Test in an Assessment Center Setting*. (Plaintiffs' Exhibit 3.) This article states that an in-basket exercise should be experimentally validated — the approach which Dr. Barrett decried as impracticable. (Tr. 600.) Contrary to Dr. Barrett's self-serving claims of impossibility, the Kesselman study asserts that "[I]t is quite possible to derive objective measures of in-basket performance that can be correlated with other criteria." (Plaintiffs' Exhibit 3 at 229.)

Dr. Barrett's "in basket" was also quite different from that used in the Kesselman study. There, 85 first line supervisors at a public utility company (Plaintiff's Exhibit 3 at 231) were presented with "26 items," which "included notes from the manager's secretary; letters from his boss; a number of different periodic operations reports; letters to his staff; expense vouchers; telephone messages; notes from subordinates about various employee problems; and a series of incoming telephone calls that are strategically timed and placed during the two hour in-basket. Some of the problems are critically important while others are less important. Information given in certain documents is pertinent to questions

raised in other documents." (Id. at 234-35.) The test was scored by answers to "a listing of 684 possible actions." Id. at 235. For example, on the "Letter from Edwin Riddle Regarding Fuel Oil Additives" problem, the testee was asked whether he had worked on the problem and, if so, what he had done. The testee was also asked to rate the priority of his response to this problem and to estimate the number of words he had written to handle the problem. (Id. at 234.) The answers were scored by computing "the appropriateness of the action taken weighted by the priority of the item." (Id. at 236.) The Kesselman study is quite different from the multiple choice test of the Barrett "in-basket."

Dr. Barrett also asserted that the design of his in-basket was supported by a subsequently published article, Hakstian and Scratchley, *In-Basket Assessment by Fully Objective Methods: Development and Evaluation of a Self-Report System*, 57 Educ. & Psych. Meas. 607 (1997). This study, however, endorsed experimental validation. Id. at 616, 627. As in the Kesselman study, the Hakstian study objectively scored the in-basket by assessing the choices the testee made in responding to written materials. (Id. at 614.) These responses were scored by trained raters, who made judgments "concerning the actions actually taken for each item." (Id.) This study involves a test quite different from Dr. Barrett's reading comprehension multiple choice test.

The traditional way to score an in basket is for the assessors to "look at what the candidates have done in the in-basket. They look at the memos that they've written, the phone messages they plan to leave, the meeting agenda that they create, the tasks they delegate to others." (York Testimony, Tr. 213.) This, of course, is quite unlike answering multiple choice questions. Without empirical evidence, the district court should not have accepted Dr. Barrett's

opinions that there is validity to the new and improved "objective scoring system."

b. The Oral Communication Component

The district court also erred in accepting Dr. Barrett's opinion (Tr. 544) about the validity of scores on the oral examination. (Short Appendix 52.)

The oral examination consisted of reviewing twelve pages of information about a new gang and making an oral presentation that "contains only relevant and important information about this new gang that needs to be brought to the officers' attention, along with any relevant procedures to follow." (Plaintiff's Exhibit 165, page facing 2X.) The candidates were permitted 25 minutes to review the materials; their oral presentation, of not more than 10 minutes, was tape recorded.

Dr. Barrett did not have any empirical data to support the validity of the scoring system on the oral examination. Nor was Dr. Barrett able to relate the oral examination to any peer reviewed studies. The entirety of Dr. Barrett's explanation of the validity of the scoring system is that the test was "scored by three trained raters," who "independently rated each tape following a structured rating procedure." (Tr. 3623) Although Dr. Barrett stated that the rating system had "evolved over ten years in terms of our use of that sort of procedure," (Tr. 363), he admitted on cross-examination that none of this research had been peer reviewed by other industrial psychologists. (Tr. 534). Dr. Barrett admitted that he did not have any empirical evidence to show that scores on this test are related to job performance. (Tr. 535.) The district court should not have accepted Dr. Barrett's opinions about the validity of the oral test.

3. Dr. Barrett's Opinions About the Validity of the Scoring System Are "Unsupported Speculation"

The district court received Dr. Barrett's opinions because of his "expertise." (Tr. 376.) Instead of evaluating the admissibility of Dr. Barrett's opinions under the *Daubert* framework, the district court appeared to assume that anyone with "expertise" may testify as an expert. But as this Court recently noted in *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084 (7th Cir. 1999), "That just is not so. Expertise is a necessary but not a sufficient condition of admissibility under Rule 702." *Id.* at 1087.

Dr. Barrett's opinions are unsupported by empirical evidence and have not been subjected to peer review and publication. Nor are Dr. Barrett's opinions consistent with court decisions from this and other circuits considering challenges to tests which, when used for rank order selection, have a disparate impact. See *ante* at 18-20. Dr. Barrett's opinions are also inconsistent with the conclusion of a 1990 "Blue Ribbon Committee" of the City of Chicago that "[t]he nearly unanimous view of testing experts is that it is plainly incorrect to regard one candidate as better qualified than another or more deserving of a job simply because he or she scored slightly higher on a written test." (Plaintiffs' Exhibit 60 at 6; Tr. 616.)

Dr. Barrett's opinions are, at best, "unscientific speculation offered by a genuine scientist," *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996), and are entitled "to zero weight." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). Under *Daubert*, the district court should not have considered this "unsupported speculation." 509 U.S. at 589.

G. Even if Admissible, the Opinion Testimony Was Not Sufficient to Support Rank Order Promotions

A scoring system that has a disparate impact contravenes Title VII without "evidence showing that those with a higher test score do better on the job than those with a lower test score." *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir. 1980) *opinion following remand*, 31 F.3d 1548 (11th Cir. 1994). Such evidence is sorely lacking in this case.

The district judge did not explain his refusal to follow this precedent, stating only that rank order promotions was "a procedure that Dr. Barrett convincingly defended and that is approved by the EEOC Guidelines and industry standards in connection with a content valid test." (Short Appendix 52.)

Contrary to the district court's conclusion, the Uniform Guidelines provide that "[w]here 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." 29 CFR §1607.5(H). The cutoff score on the 1994 lieutenant's test has nothing to do with "normal expectations of acceptable proficiency" and was arbitrarily set to pass those with the 108 highest scores.

Defendant's method of setting the cutoff score is the same as that condemned by the Second Circuit in *Guardians v. Civil Service Comm'n*, 630 F.2d 79 (2d Cir.1980). There, the City "merely chose as many candidates as it needed, and then set the cutoff score so that the remaining candidates would fail." *Id.* at 105. This is the same procedure used by the City of Chicago — 108 sergeants were promoted to lieutenant in descending order of final test scores and the "cutoff score" is the score attained by the 108th on the list.

To validate the cutoff score, the City was required to come forward with evidence that "an officer who receives a high passing score will do better on the job than one who received a low passing score" and that the particular passing score "validly predicts successful job performance." *Thomas v. Evanston*, 610 F.Supp. 422, 429 (N.D.Ill. 1985). Defendant failed to meet this burden and judgment should have been entered in favor of plaintiffs.

H. The District Judge Abused His Discretion in Refusing to Order Additional Merit Promotions

This Court has established a bright line rule that "[i]n the context of public employment, the loss of wages, employee benefits, and opportunities for promotion during a period of suspension do not constitute irreparable injury and do not warrant the granting of a preliminary injunction." *Lasco v. Northern*, 733 F.2d 477, 481 (7th Cir. 1984). The district court applied this rule when it denied plaintiffs' application for a preliminary injunction. (Short Appendix 13-14.)

After plaintiffs prevailed at trial, however, the district court refused to order any additional promotions. The district court recognized that the equally valid, less discriminatory alternative of supplementing rank order promotions with merit promotions would have resulted in 13 additional merit promotions. (Short Appendix 60 n.1.) In the view of the court below, it was "conjectural and overly subjective" to attempt to determine who would have been selected for any of those merit promotions. (Short Appendix 62-63.) On this basis, the district court refused to order any additional promotions.

The reasoning adopted by the district court in this case is identical to an argument that this Court rejected in *Adams v. City of Chicago*, 135 F.2d 1150 (7th Cir. 1998). In *Adams*, the district court had denied a preliminary injunction

to prohibit promotions to sergeant; on appeal, the plaintiffs argued that the district court would be unable to fashion a full remedy if the promotions went forward and plaintiffs prevailed after trial. In the view of the *Adams* plaintiffs, the district court lacked "the power to unscramble eggs." (Brief of Appellant, *Adams v. City of Chicago*, 7th Cir., No. 96-1708, at 19.) The Court rejected the arguments of the *Adams* plaintiffs, holding that the plaintiffs had not been irreparably harmed because the district court has the authority to grant full make-whole relief, 135 F.3d at 1154, and "some delay in promotion does not constitute irreparable injury." [citing] *Cox v. City of Chicago*, 868 F.2d 217, 223 (7th Cir.1989); .

This Court's bright line rule that "some delay in promotion does not constitute irreparable injury" implies that make-whole promotions will be made when, as in this case, plaintiffs prevail at trial. The district court erred in refusing to order any additional merit promotions.

VII. CONCLUSION

For the reasons above stated, the order finding that the test could be used to make rank order promotions and the order refusing to require the City to make additional merit promotions should be reversed and the case should be remanded with instructions to fashion full relief.

Respectfully submitted,

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