

# PETITION FOR REHARING AND SUGGESTION FOR REHEARING EN BANC

## I. REQUIRED STATEMENT FOR EN BANC RECONSIDERATION

1. The panel decision involves a question of exceptional importance because the outcome of this case will determine whether minority officers will continue to be excluded from the supervisory ranks of the Chicago police department.
  - a. The specific legal question is whether an employer may meet its burden under Title VII of proving the job relatedness of a discriminatory employment test with opinion testimony — unsupported by empirical evidence — that a test is a "reasonable measure of job performance" (slip op. 13, reproduced at Appendix 13, *infra*) or whether Congress required more when, in the Civil Rights Act of 1991, it reaffirmed the strict standard of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) "that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' [citing] 29 CFR 1607.4 (c)."
  - b. The panel's resolution of this issue is in conflict with the decision of the Third Circuit in *Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478, 485 (3d Cir. 1999).

- c. The conclusion of the panel that "[i]t would be unrealistic to require more than a reasonable measure of job performance," (slip op. 13, Appendix 13, *infra*), is at odds with the 1999 *Standards for Educational and Psychological Testing*, adopted (while this appeal was pending) by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. The 1999 APA *Standards* require "evidence that scores are linked to different levels or likelihoods of success," as uniformly required in other public employment testing cases. E.g., *Guardians Association v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980); *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir. 1980), opinion following remand, 31 F.3d 1548; *Firefighters Institute v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980).
- d. The panel's relaxed test validation standard is also contrary to the standard applied in prior litigation in this Circuit involving police promotions in the City of Chicago and police hiring in the City of Evanston, Illinois. *United States v. City of Chicago*, 411 F.Supp. 218, 238 (N.D.Ill. 1974), *aff'd in pertinent part*, 549 F.2d 415 (7th Cir. 1977); *Bigby v. City of Chicago*, N.D.Ill., 80 C 5246, Mem.Op., April 18, 1984, 19; *Thomas v. Evanston*, 610 F.Supp. 422 (N.D.Ill. 1985).
- e. The panel's relaxed test validation standard, if allowed to stand, will cause minorities to continue to be excluded from the supervisory ranks of the Chicago police department. An inescapable fact of

standardized tests is that minorities do not do as well as whites. Jencks, C., & Phillips, M., *The Black-White Test Score Gap* (1998). The disparity in test scores in this case (minorities made up 31% of those who took the test, but comprised less than 6% of those who received the highest 108 scores) was also present in the City's 1997 promotional examination. The City's plan of supplementing rank-order promotions with merit promotions does not undo this disparate impact, because merit promotions have been made at exact parity with the applicant pool.

2. The panel decision to uphold a a 65% percent reduction in fees and a 80% reduction in costs — when plaintiffs secured an economic benefit of nearly two million dollars — is in conflict with the *Hensley* standard that the focus in arriving at the appropriate fee award should be on "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).
  - a. Plaintiffs secured relief worth nearly two million dollars: As a result of plaintiff's victory on the "equally valid, less discriminatory alternative," the district court ordered the promotion, with full back-pay and benefits, of 13 sergeants to lieutenant, including seven minority sergeants; the district court also ordered backpay to the named plaintiffs.
    - i. The value of a promotion from sergeant to lieutenant (as determined by the City's economic expert) is about \$190,000. The value of the seven promotions is therefore about

\$1,330,000.

- ii. The City paid \$544,045.70 as backpay to the merit promotees. (Appendix 19-20, *infra*), The City paid \$336,802.50 to the seven minority sergeants who were among the merit promotees. (Id.)
  - iii. The City also paid a total of \$103,502.02 to the plaintiffs who were not among the merit promotees. (Appendix 20-21, *infra*.) The total back salary that the City paid to minority sergeants is therefore \$440,304.52.
- b. Plaintiffs obtained *more* relief by showing the existence of an "equally valid, less discriminatory alternative" that if they had succeeded on their challenge to test validity. The district court would not have ordered *any* promotions if plaintiffs had prevailed on their challenge to test validity — in the view of the court below, as affirmed by this Court (slip op. 4, Appendix 4 *infra*), it "would be conjectural and overly subjective" to seek to identify those who would have been promoted but for discrimination. The amount of backpay that the district court would have awarded on a finding that the test was invalid would have been less than than half the size of the recovery that plaintiffs actually secured.
- c. The panel appeared to agree with plaintiff that the district court had applied an erroneous legal standard in refusing to award a fully compensatory fee.<sup>1</sup> (slip op. 17, Appendix 17, *infra*.) Prior

decisions of this Court make plain that a remand is required when a district judge applied an erroneous legal standard in ruling on an application for attorneys' fees. *Jaffee v. Redmond*, 143 F.3d 409 (7th Cir. 1998); *Fasa Corporation v. Playmates Toys*, 108 F.3d 140, 144 (7th Cir. 1997); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991), The panel refused to remand the fee issues for reconsideration under the appropriate legal standard.

- d. The panel decision is also in conflict with the decision of this Court in *Rex Slane v. Mariah*, 164 F.3d 1065, 1068 (7th Cir. 1999) that a

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1. In ruling on plaintiffs' application for fees under 42 U.S.C. §2000e(5), the district court concluded that plaintiffs' challenge to the validity of the test and its scoring system was unrelated to the "equally valid, less discriminatory alternative" (Appendix 2-3.) In the view of the court below, plaintiff had prevailed on a "discrete claim." (Appendix 3.)

Contrary to the district court's conclusion, plaintiffs asserted a single claim in this litigation: that defendant's promotional test had a disparate impact on minorities and deprived plaintiffs of equal employment opportunities secured by Title VII. To establish this claim, plaintiffs were required to establish that the test had a disparate impact. Defendant could rebut the statistical showing of disparate impact by showing that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A). If defendant succeeded in making this showing, plaintiffs could still prevail by proving the existence of an "equally valid, less discriminatory alternative."

The disparate impact of the test is "a single course of wrongful conduct." *Spanish Action Comm. v. City of Chicago*, 811 F.2d 1129, 1132 (7th Cir. 1987). The issues of job relatedness and the existence of an "equally valid, less discriminatory alternative" involve both a "common core of facts" and "related legal theories." *Jaffee v. Redmond*, 142 F.3d 409, 413 (7th Cir. 1998). Moreover, determining whether two promotion procedures are "equally valid" requires an inquiry into the "validity" of each procedure.

party should be awarded costs under Federal Rule of Civil Procedure 54(d)(1) (without any deduction for "partial success") when it obtains "substantial relief," even "if it doesn't win on every claim."

## **II. GROUNDS FOR REHEARING BY THE PANEL**

The panel's conclusion that, for fee purposes, plaintiffs' victory should be viewed as "partial success" had not been urged by defendant, either in this court or in the district court. Defendant's sole defense of the district court's fee decision (reproduced in the Appendix *infra* at 22-26) was to argue that plaintiff's challenge to test validity was "unrelated to the claim on which plaintiffs ultimately prevailed." (Def.Supp.Br. 19.)

## **III. ARGUMENT**

### **A. The Relaxed Job Relatedness Standard Applied by the Panel in Approving the Cutoff Score Should Be Reviewed by the En Banc Court**

Title VII requires an employer to validate the scoring system of an employment test that has a disparate impact.<sup>2</sup> In this case, more than 900 police

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2. 42 U.S.C. §2000e-2(k)(1)(A) provides as follows:

#### **(k) Burden of proof in disparate impact cases**

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
- (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice

sergeants took a promotional test; those with the 108 highest scores were promoted to lieutenant. African-American and Hispanic police sergeants made up 31% of those who took the test, but comprise less than 6% of those with the 108 highest scores. There is no dispute that the cutoff score (those with the 108 highest scores get promoted) had a disparate impact on minority sergeants.

The panel concluded that the City of Chicago had met its burden of justifying the cutoff score by showing that the test "is job related and representative" (slip op. 12, Appendix 12, *infra*) and that the test had been *constructed*<sup>3</sup> "to ensure [its] reliability." (slip op. 13, Appendix 13, *infra*.) We show below that the panel confused reliability with validity and applied the relaxed job-relatedness standard of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) that was overruled by Congress in the Civil Rights Act of 1991.

### **1. The Panel Confused Reliability with Validity**

While this appeal was pending, the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education adopted the *1999 Standards for Educational and Psychological Testing*. The *1999 APA Standards* make plain that the panel confused reliability with validity. Moreover, the *1999 APA Standards* require a far more exacting standard for validity than that adopted by the panel.

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and the respondent refuses to adopt such alternative employment practice.

3. The panel did not appear to require any empirical measure of reliability.

The validity of a passing score, under Standard 14.7 of the *1999 APA Standards*, depends on "evidence that scores are linked to different levels or likelihoods of success." Standard 14.7 states as follows:

If tests are to be used to make job classification decisions (e.g., the pattern of predictor scores will be used to make differential job assignments), evidence that scores are linked to different levels or likelihoods of success among jobs of job groups is needed.

Reliability — the concept relied on by the panel — is different from validity and "refers to the consistency of such measurements when the testing procedure is repeated on a population of individuals or groups." *1999 APA Standards* at 25.

A test may be *reliable* because applicants will consistently receive the same score, but the score is not *valid* unless it is an accurate predictor of future performance. For example, height can be reliably measured — repeated measures of an applicant's height will produce the same value. But the reliability of this measure does not mean that height is a valid predictor of success on the job.

## **2. The Panel Decision Stands Alone in Upholding a Discriminatory Cutoff Score Without Evidence that Scores Are Linked to Job Performance**

With the exception of the panel decision in this case, the courts that have considered challenges to a cutoff score that has a disparate impact have required that the employer produce "evidence that scores are linked to different levels or likelihoods," as required by the *1999 APA Standards*.

In *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir. 1980), *opinion following remand*, 31 F.3d 1548, persons who achieved a passing score were placed on a list of eligibles, and those with the highest scores were hired. 616 F.2d at 816. This use of test scores had a disparate impact on minority

applicants; the Fifth Circuit held that the test was lawful "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.

The requirement of the *1999 APA Standards* for "evidence that scores are linked to different levels or likelihoods" was also adopted by the Eighth Circuit in *Firefighters Institute v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980). There, the municipality intended to promote to fire captain those who had received the highest scores on a test. The Court of Appeals held that "[b]ecause test results were used to rank candidates, St. Louis must prove that the results are associated with different levels of job performance." *Id.* at 357. The Eighth Circuit specifically required "empirical evidence of an association between levels of performance on the multiple choice examination and on the job," *id.* at 358, and explained that it was "logical and reasonable to require something concrete to validate an examination that has an adverse impact on blacks." *Id.* at 359.

The requirement of the *1999 APA Standards* for "evidence that scores are linked to different levels or likelihoods" was followed in earlier challenges to Chicago police promotional tests. In *United States v. City of Chicago*, 411 F.Supp. 218, 238 (N.D.Ill. 1974), *aff'd in pertinent part*, 549 F.2d 415 (7th Cir. 1977), the district court held that Chicago must demonstrate that scores are "a valid predictor of performance on the job." The same district judge applied the same principle in sustaining the challenge to Chicago's 1977 lieutenant's promotional test, holding that "[e]mpirical evidence is necessary to validate rank order selection from a test which has a disparate impact." *Bigby v. City of Chicago*, N.D.Ill., 80 C 5246, Mem.Op., April 18, 1984, 19.

The requirement of the *1999 APA Standards* for "evidence that scores are linked to different levels or likelihoods" was also followed in *Thomas v. Evans-ton*, 610 F.Supp. 422 (N.D.Ill. 1985), a challenge to a physical agility test for police officers that had a disparate impact on female applicants. There, the district court

[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.

### **3. The Panel Decision Applied the Relaxed Wards-Cove Job Relatedness Standard Overruled in the Civil Rights Act of 1991**

Rather than require "evidence that scores are linked to different levels of likelihoods" as required by the *1999 APA Standards*, the panel held that an employer need only show that a test is "a reasonable measure of job performance."<sup>4</sup> (slip op. 11, Appendix 11, *infra*) As applied to the facts of this case,

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4. The Third Circuit recently noted that the "reasonable measure of job performance" is one of four articulations of the employer's burden set out in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

The Court [in *Griggs*], however, was unclear in articulating what an employer must show to demonstrate business necessity. The Court couched the employer's burden in terms of showing that its practice is "related to job performance"; "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used"; has "a manifest relationship to the employment in question"; and is "demonstrable a reasonable measure of job performance." *Id.* at 431.

the panel's "reasonable measure of job performance" is the business necessity test articulated by the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and overruled in the Civil Rights Act of 1991.

In *Wards Cove*, the Court "lessened the 'necessity' in the 'business necessity' defense." *Allen v. Seidman*, 881 F.2d 373, 377 (7th Cir. 1989) and rejected the strict test validation standard that it had articulated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Rather than require, as it had in *Albemarle*, that the employer show that test scores 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," 422 U.S. at 431, the Court, in *Wards Cove*, held that

[T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. [citations omitted] The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit

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In applying this standard, however, the Court rejected the employer's justification in *Griggs* that its standardized intelligence tests and diploma requirements generally would improve the overall quality of the work force in its power plant. The Court held that, although these requirements may be useful, they could not be used to exclude disproportionately a protected group when the employer failed to show that they do not test an applicant's ability to perform the job in question. *Id.* at 431-33.

*Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478, 485 (3d Cir. 1999).

discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .  
*Wards Cove*, 490 U.S. at 659.

Congress overruled *Wards Cove* in the Civil Rights Act of 1991, Pub L. 92-102-166, 105 Stat. 1071 (1992) and "the Court's interpretation of the business necessity standard in *Wards Cove* does not survive the act." *Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478, 488 (3d Cir. 1999). As the Third Circuit concluded in *Lanning*, under the Civil Rights Act of 1991,

[A] discriminatory cutoff score is impermissible unless shown to measure the minimum qualifications necessary successful performance of the job in question. Only this standard can effectuate the mission begun by the Court in *Griggs*; only by requiring employers to demonstrate that their discriminatory cutoff score measures the minimum qualifications necessary for successful performance of the job in question can we be certain to eliminate the use of excessive cutoff scores that have a disparate impact on minorities as a method of imposing unnecessary barriers to employment opportunities.

\* \* \*

Taken together, *Griggs*, *Albemarle*, and *Dothard* teach that in order to show the business necessity of a discriminatory cutoff score an employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question.  
*Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d at 489.

The panel in this case excused the City's inability to produce evidence that those with the 108 highest scores were best qualified to be lieutenants by mistakenly relying on *Guardians Association v. Civil Service Commission*, 630 F.2d 79, 105-06 (2d Cir. 1980). In the view of the panel, *Guardians* stands for

the proposition that a cutoff score is permissible if a test "is job related and representative" and "reliable." (slip op. 12, Appendix 12, *infra.*) The panel misread *Guardians*.

One issue in *Guardians* was whether a content valid test could be used to make promotions in rank order. 630 F.2d at 100. In resolving this issue, the Second Circuit held that "close scrutiny" was required when results of a content valid test are used to make promotions in rank order. *Id.* The Court expressly held that "[p]ermissible use of rank-ordering requires a demonstration of such substantial test validity that it is reasonable to expect one- or two-point differences in scores to reflect differences in job performance." *Id.* at 100-01. (emphasis supplied) Under *Guardians*, the employer must show "that the exam measures ability with sufficient differentiating power to justify rank-ordering." *Id.* at 105.

The City acknowledged in its brief in this appeal that the record does not contain any evidence of the "differentiating power" of test scores: the City asserted that the district court had "*rejected* [the City's] evidence that defended strict rank-order use of the examination results." (emphasis supplied) (Def.Br. 47.)

The panel did not accept the City's concession that its evidence failed to justify strict rank-order use of the test scores. Instead, the panel concluded that "the City's use of rank-ordering is valid." (slip op. 13, Appendix 13, *infra.*)z

The "job relatedness" standard adopted by the panel sets this circuit apart from uniform decisions in other circuits and is a radical break with prior law in this circuit. The panel decision should be reviewed by the en banc court.

**B. The 65% Reduction in Fees and Costs, When Plaintiffs Obtained Relief Worth Nearly Two Million Dollars, Should Be Reconsidered**

The panel appeared to agree that the district court had applied an erroneous legal standard in reducing the lodestar fees by nearly \$350,000.<sup>5</sup> The district court held that plaintiffs had succeeded on a "discrete claim" and limited its fee award to the amount of fees that was reasonably incurred in pursuing the *successful, discrete claim* that defendant should have used merit selection in combination with rank order promotions from the exam." (emphasis supplied) (Appendix 3, *infra.*)

Plaintiffs argued to the panel that the district court was incorrect in its view of "discrete claims" — the disparate impact of the test is "a single course of wrongful conduct." *Spanish Action Comm. v. City of Chicago*, 811 F.2d 1129, 1132 (7th Cir. 1987). The issues of job relatedness and the existence of an "equally valid, less discriminatory alternative" involve both a "common core of facts" and "related legal theories." *Jaffee v. Redmond*, 142 F.3d 409, 413 (7th Cir. 1998). Moreover, determining whether two promotion procedures are "equally valid" requires an inquiry into the "validity" of each procedure.

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5. There was no dispute in the district court about the "market rate" of plaintiffs' attorneys. Nor was there any dispute (other than trivial disagreements that the district court resolved in plaintiffs' favor) about the reasonableness of any of the time expended.

The district court applied the same erroneous legal standard to reduce the taxable and non-taxable costs by \$40,900.75. Plaintiffs sought \$15,085.30 in statutory costs under 28 U.S.C. §1920 and \$37,257.00 in expert fees and non-taxable costs. The district court awarded a total reimbursement for costs (including expert costs and non-taxable costs) in the amount of \$11,441.55.

The panel appeared to accept plaintiffs' argument, but upheld the drastic reductions in fees and costs because of "limited success." (slip op. 17, Appendix 17, *infra*. In adopting this rationale — which had not been urged by defendant either in the district court or on appeal — the panel overlooked the magnitude of the overall relief actually secured by plaintiffs.

Neither the district court nor the panel abided by the accepted and ordinary rule that the focus in arriving at the appropriate fee award should be on "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

As set out above at 3-4, plaintiffs obtained relief with a value of about \$1,750,000. Plaintiffs' lodestar fees of \$518,445.85 are proportional to the value of the results obtained.

In prior litigation, this Court has remanded fee matters when it has concluded that the district court applied an erroneous standard. *Jaffee v. Redmond*, 143 F.3d 409 (7th Cir. 1998); *Fasa Corporation v. Playmates Toys*, 108 F.3d 140, 144 (7th Cir. 1997); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991), The panel's decision to uphold the drastic reduction in fees on a theory that had not been urged by the appellee, and a theory which is inconsistent with the magnitude of the recovery, should be reconsidered.

#### **IV. CONCLUSION**

For the reasons above stated, this appeal should be reheard.

Respectfully submitted,

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