IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHARON ISABEL, RICHARD PARKER, GREGORY SANDERS, AND WALTER WILLIAMS, JR.,	)	
Plaintiffs,	)	
DOUGLAS F. BARNES, et al.,	)	
Intervenors,	)	**No. 01-2533 Ml/Bre**
v.	)	
CITY OF MEMPHIS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs, sergeants in the Memphis Police Department, brought this suit against their employer, the City of Memphis (the "City"), alleging that they had been discriminated against based on their race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), 42 U.S.C. §§ 1981 and 1983; Tenn. Code Ann. § 4-21-401. Plaintiffs also allege Defendant violated its civil service laws, § 250.1 of the City Charter and §§ 9-3 and 9-4 of the Memphis City Code of Ordinances. Specifically, Plaintiffs allege that the written test and cutoff score used in the year 2000 promotional process to

lieutenant resulted in disparate impact on African-American candidates.

A non-jury trial was held in this matter on January 21, 22, 23, and 24 of 2003. For the reasons set forth below, the Court finds that the Plaintiffs have demonstrated by a preponderance of the evidence that the written knowledge test as applied had an illegal adverse impact based on race in violation of Title VII, and, therefore, judgment on the bifurcated liability question is ENTERED in favor of Plaintiffs.[1] Judgement is entered for the Defendant City of Memphis on the Plaintiff's claims of intentional racial discrimination under 42 U.S.C. §§ 1981 and 1983 and Plaintiff's claims under the civil service laws.

Because the "stated purpose and intent of the Tennessee Act is to provide for execution within Tennessee of the policies embodied in the federal civil rights laws," Campbell v. Florida Steel Corp., 919 S.W.2d 26, 30 (Tenn. 1996), citing Tenn. Code Ann. § 4-21-101(a)(1) (1991), Tennessee courts consistently use the same framework to evaluate THRA claims as federal courts use to evaluate Title VII and ADEA actions. See Bruce v. Western Auto Supply Co., 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). The Tennessee Supreme Court follows federal civil rights law when analyzing claims under the THRA. See Cambell v. Florida Steel Corp., 919 S.W.2d 26, 31 (Tenn. 1996) (finding that the purpose

[1] The Court underscores that this opinion is limited to a finding of liability in favor of the Plaintiffs and does not opine as to any relief due these Plaintiffs at this time.

of the THRA is to apply the policies of the federal civil rights laws on the state level). Thus, this court's analysis of Plaintiffs' discrimination claim is the same under both Title VII and the THRA.

FINDINGS OF FACT

Plaintiffs are African Americans who are employed as sergeants in the Memphis Police Department ("MPD"). Plaintiffs competed for promotion to lieutenant in the 2000 promotion process, a process which entailed an initial 100-question multiple choice written test. Those who passed the test proceeded to the other three components of the process to determine promotion eligibility: a practical video test, performance evaluation scores, and seniority credit. A total of 120 candidates competed for promotion in 2000. Of those candidates, 63 were African Americans and 57 were white.[2]

On February 11, 1999, the City contracted with Performance Associates, an outside consulting firm, to develop and administer the promotional test for the MPD. Dr. Mark Jones, an industrial psychologist, was primarily responsible for the development of the promotional test. Dr. Jones had developed and administered the test for the 1996 promotional process of the MPD.

Dr. Jones first conducted a job analysis, substantially

[2] The Court notes that Plaintiffs and Defendant disagree on one individual. Plaintiffs contends that one applicant is classified as "other" and, for statistical purposes, Plaintiffs includes that applicant in the number of minorities. Conversely, Defendant includes this individual in its number of white applicants.

similar to the one he used in 1996, to assess the requirements of the position of lieutenant. In developing the test, he relied on the assistance of subject matter experts ("SMEs") to construct test items. These SMEs were Memphis police officers selected from various ranks who were identified as having expertise in their profession. Because the promotion tests for sergeant, lieutenant, major and inspector were done simultaneously, once a test for a certain level was concluded, the SMEs of that rank ceased further involvement with the test developing process; i.e. once the sergeant's test was concluded, the sergeants took leave of the test development process so that they were not privy to the development of a written test for lieutenant, a test that they might be subject to for future promotion. (Tr. Jones Direct at 34.) Dr. Jones provided these SMEs with "training on how to construct a good test item. . . ." (Tr. Jones Direct at 36.) The SMEs identified specific pieces of information that were most critical to performing an identified set of tasks and then drafted the items. Dr. Jones then edited these items to his satisfaction. (Tr. Jones Direct at 36-8.) Once Jones completed editing the items, he placed them on an overhead projector and the SMEs would critique the items as a group. During these critique sessions, Dr. Jones asked the SMEs if the problem was plausible, if the distractors were realistic and to estimate the percent of minimally qualified candidates who could answer the

question correctly. (Tr. Jones Direct at 39.)

Since July 1, 1984, the Memorandum of Understanding between the City and the MPD has provided that in order to be eligible for promotion to lieutenant, a candidate must achieve a passing score of 70 on a written job knowledge test. (Def. Trial Exh. 11.) Specifically, the agreement also provided that if "technological, legal or professional considerations as determined by the City" make changes required or desirable, then the City can implement those changes after notifying the Union and soliciting its recommendations. (Id.) Thus, before Jones drafted the 2000 written test, the City had already negotiated with the Memphis Police Department and established the passing score as 70. (Id.)

Dr. Jones did not use, nor did he recommend using, a cutoff score in the 1996 promotion process. The Union objected after the exam was administered and filed a grievance against Dr. Jones alleging that Jones had violated the contract, resulting in an arbitration hearing. (Tr. Jones Direct at 66.) In pursuant discussions regarding the development of the 2000 promotion test, the Union underscored that "it was essential to have a cut score on a comprehensive job knowledge test...." (Tr. Jones Direct at 69.) As a result of the Union's directives, Dr. Jones implemented the cut score.

The test was administered on May 23, 2000. Using 70 as the

cutoff score resulted in adverse impact under the Equal Employment Opportunity Commission's ("EEOC") four-fifths rule. Specifically, adverse impact was shown because the passing rate for African American candidates was less than 45% of that of non-minorities.[3] To avoid adverse impact, Dr. Jones advised the City to lower the cutoff score by four points to 66, an adjustment made by considering the standard error, which, for this test, was 3.84. (Tr. Jones direct at 116.)

Additionally, in scoring the test, Dr. Jones deemed nine of the 100 questions faulty and determined that those questions should be eliminated. To make this adjustment, each candidate received credit for the nine questions. This procedure allowed scores to remain on a 100 point scale. Of course, if a candidate had answered the questions "correctly," s/he did not receive additional credit.

Using these grading procedures, ninety-eight candidates achieved a passing score of 66 or higher. (Pl. Trial Exh. 13.) Of these candidates, 51 were white and 47 were African American. Plaintiffs' scores were below the cut off score; specifically,

[3]The four-fifths rule is determined for each group by dividing the number of candidates passing the test by the total number of candidates. The passing rate for minorities is then divided by the passing rate for non-minorities. Fifty-seven candidates passed the written test when the City applied a cut score of 70: 19 African Americans and 38 non-minorities. Nineteen out of 64 African Americans achieved a 70, yielding a minority passing rate of 29.69% (19/64 = .2969). Thirty-eight out of 56 non-minorities passed the test, yielding a passing rate of 67.86% (38/56 = .6786). Dividing the minority passing rate into the majority passing rate (29.69/67.86) yields a selection rate of 43.75 percent. Since this number is far below 80 percent, the cut score results in adverse impact under the EEOC's four-fifths rule.

Plaintiffs' scores were as follows: Gregory Sanders (65); Sharon Isabel (64); Walter Williams (63); Richard Parker (57). (Pl. Trial Exh. 12.)

Those candidates that passed the written examination went on to participate in the video assessment on June 2, 2000. On July 12, 2000, the City issued an Information Bulletin identifying all eligible officers who successfully completed the promotional process and who the MPD anticipated promoting over the next two years. (Pl. Trial Exh. 11.) This Bulletin, of course, included only officers who received a score of 66 or above on the initial written examination, since officers who received a lower score were not allowed to proceed to the video assessment.[4]

CONCLUSIONS OF LAW

I. Title VII

The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1974), set forth the tripartite burden of proof standard for determining whether the use of a particular employment practice has a disparate impact. Plaintiffs must first establish a prima facie case by showing that the business practice at issue is

[4]It should be noted that in the 2000 promotion processes within the MPD for the positions of major and inspector, the City did not use a cutoff score. (Pl. Mot. for Summ. J., Exh. 4, pg. 144-5.) Additionally, the City does not generally use cutoff scores in its promotion tests in the other divisions of City government. (Pl. Mot. for Summ. J., Exh. 6.)

discriminatory. Plaintiffs may do so by proving that the employer used a particular employment practice that had a significantly disproportionate or adverse impact on minorities. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Watson v. Fort Worth Bank and Trust Co., 487 U.S. 977 (1988).

Once plaintiffs have set out a prima facie case, i.e. have shown that the tests in question select applicants for promotion in a racial pattern significantly different from that of the pool of applicants, the employer must meet "the burden of showing that any given requirement [has]...a manifest relationship to the employment in question." Griggs, 401 U.S. at 432. Albemarle explained that "[i]f the employer meets the burden of proving that the tests are 'job-related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." Albemarle Paper Co., 422 U.S. at 432.

Adverse Impact

The Uniform Guidelines on Employee Selection Process, 29 C.F.R. § 1607.4d (1993), adopted by federal civil rights enforcement agencies, including the Equal Employment Opportunity Commission (the "Guidelines")[5] define adverse impact as "[a]

[5] The Sixth Circuit has stated that these guidelines are only used "to the extent that they are useful in the particular setting of the case under consideration, for advancing the basic purposes of Title VII." Police Officers for Equal Rights v. The City of Columbus, Ohio, 916 F.2d

substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." 29 CFR § 1607.16(B). There are several ways to measure adverse impact, one of which is the four-fifths rule as defined in the Guidelines:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. 29 C.F.R. Section 1607.4(d) (1986).

In the case at bar, out of 120 test takers, 47 African Americans and 51 whites passed the written exam with a score of 66 or above. The selection rate of African Americans, therefore, was 83.4% of the selection rate for whites. Since the selection rate of minorities was, therefore, greater than 80% of the rate for whites, the four-fifths rule is not violated.[6]

Moreover, Plaintiffs agree that, analyzed under the four-fifths rule, there is no adverse impact. However, Plaintiffs'

1092 (6th Cir. 1990) citing Espinoza, 414 U.S. at 94.

[6] Applying a cut score of 66 resulted in 47 out of 63 African-American candidates passing the test. Forty-seven divided by 63 equals .746. Fifty-one out of 57 non-minority candidates passed the test. Fifty-one divided by 57 equals .895. Comparing these two numbers (.746/.895) yields a selection rate of .834, or 83.4 percent. Since this number is greater than eighty percent, it does not violate the EEOC's four-fifths rule.

expert, Dr. Richard DeShon[7], asserts that other indices show adverse impact. (Tr. DeShon Rebuttal at 1.) Dr. DeShon testified that other statistical evidence supports a finding that the written test and the cutoff score resulted in substantial disparity based on race: the independent groups T-test, the Z-test for independent proportions, and the D-index, a measure of effect size. (Tr. DeShon Direct at 37-42.)

Comparing the mean scores in a T-test analysis yielded a statistically significant result. Minority candidates had a mean score of 69.17 while white candidates had a mean score of 75.59, creating a difference between the groups of 6.42. The effect size was .9, which Dr. DeShon stated was a large difference. (DeShon Affidavit, Para. 21-22.)

The Z-test for independent proportions showed that white candidates passed the test at about a rate of 90%, or .8947, and African Americans passed the test using the cut score of 66 at a rate of 74.6 percent. The difference in those percentages is 15 percent, which Dr. DeShon asserted is statistically significant, yielding a Z score of 2.35.

For purposes of this case, the Court concludes that the analysis using alternative indices to the four-fifths rule is more appropriate to measure adverse impact. The Court finds that

[7] Dr. Richard DeShon, an industrial psychologist, is currently an associate professor of psychology at Michigan State University in East Lansing, Michigan.

Plaintiffs' statistical evidence shows that adverse impact has indeed occurred, and accordingly, there has been discrimination. "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence." Bazemore v. Friday, 478 U.S. 385, 400 (1986).

The Court notes that the Supreme Court has not adopted the four-fifths rule as a strict test of impact discrimination. The First Circuit in Fudge v. City of Providence Fire Dept., 766 F.2d 650, 658 (1st Cir. 1985), noted that "the better approach is for the courts to require a showing that the disparity is statistically significant, or unlikely to have occurred by chance, applying basic statistical tests as the method of proof." Of course, one way of showing that is the four-fifths rule, but it is not the only way of showing discriminatory impact.[8] Dr. DeShon testified further that the four-fifths rule is more applicable to larger sample sizes and should not be used in cases such as this where there are 120 individuals. (Tr. DeShon Rebuttal at 6.)

[8] Similarly, the Seventh Circuit affirmed a district court's denial of summary judgment for the defendant when the city argued that the comparative pass rate of 98.24% for African Americans legally precluded a finding of disparate impact under the four-fifths rule. Bew v. City of Chicago, et al., 252 F.3d 891 (7th Cir. 2001). The court of appeals found that "the district court properly noted that the 80% guideline may be ignored when other statistical evidence indicates a disparate impact." Id. In that case, the "district court found that the 'test for difference between independent proportions' yielded a Z-score more than five standard deviations from the norm, and that this statistic established prima facie disparate impact." Id.

Furthermore, the commentary to the EEOC regulations even allows for exceptions: "Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, and ethnic origin." 29 C.F.R. § 1607.4(d).

Business Justification

Once the Plaintiff establishes that there has been adverse impact, the burden shifts to the Defendant to show a business justification for the challenged practices. The Supreme Court made clear in Wards Cove that this burden is not one of persuasion, but is one of production of evidence: "In this stage, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff." Wards Cove, 490 U.S. at 2126.

Written test

To prove a selection procedure is job-related, the employer must show "by professionally acceptable methods, [that the test is] 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." Black Law Enforcement Officers Ass'n v. City of Akron, 824 F.2d 475, 480 (6th Cir. 1987)(brackets in original)(internal quotation marks

omitted)(quoting Albemarle Paper Co., 422 U.S. at 431). A test that has a discriminatory impact on hiring or promotion of members of any race or ethnic group is considered discriminatory unless it is validated in accordance with the guidelines. Williams v. Ford Motor Co.,187 F.3D 533 (6th Cir. 1999) citing Gonzales v. Galvin, 151 F.3d 526, 529 n.4 (6th Cir. 1998). Under the Guidelines, employers may use three types of studies to validate an employee selection procedure: content, construct, or criterion-related validity studies. 29 C.F.R. § 1607.5 (a). See also Zamlen v. City of Cleveland, 906 F.2d 209, 218 (6th Cir. 1990).

Defendant's expert Dr. Jones attempted to validate the test at issue through content validity studies. Content validity studies are based on data showing that the content of the test is representative of important aspects of performance on the job for which the candidates are to be evaluated. 29 C.F.R. § 1607.16(d). In other words, a test will have content validity if there is a direct relationship between the test contents and the job contents. Police Officers for Equal Rights, 644 F. Supp. at 414.

Content validation first entails a job analysis to determine the important knowledge, skills and abilities required to perform the job at issue. Next, the test developer must carefully select tests to assess the requisite knowledge, skills and ability. In doing so, the test developer must demonstrate that those tests

utilized in the selection system appropriately weigh the knowledge, skills and abilities to the same extent they are required on the job. (Tr. DeShon Direct at 28.)

The Court concludes that the evidence does not support the necessary inference that those who perform better on the written test will be better performers on the job. The test, which operated as an initial hurdle to proceed in the promotion process, only measured one component needed for the job of lieutenant, and not the entire domain. Dr. Jones testified that he designed the written test only to test job knowledge, and sought to measure the "other major elements of the job" in the remaining components of the promotion process. (Tr. Jones Direct at 23-4.) Job knowledge is only a limited part of the job analysis for the position of lieutenant; the written test did not test interpersonal skills and management abilities also included in the job analysis. (Tr. DeShon Rebuttal at 17.)

Dr. DeShon testified that the written test was not adequately validated because it only tested for one component instead of all the components in order to come up with a rank ordering. Accordingly, he asserted those rank orderings could not be trusted to be related to actual job performance. (Tr. DeShon Rebuttal at 16.) In order for a test to be valid, the test must measure the full set of knowledge, skills and ability to support the inference that the higher scorer on the test is going to be

the better job performer. Dr. DeShon testified:

> "And in situations such as this, there are many, many other factors, as the job analysis demonstrates, there are many other facts that contribute to job performance, not just job knowledge, so internal personal skills, responsibility, integrity, planning. The issue here is can I have the job knowledge test that is job-related, and yet if I don't assess the conglomerate, the set of knowledge, skills and abilities required to perform the job, I have no idea of the person's standing on these other components. I don't know how they would score rank order on these other components and, therefore, I cannot use one test to justify the inference that just because I score higher on one test will mean I will result in higher levels of performance." (Tr. DeShon Direct at 22)

Dr. DeShon testified that the final report that Dr. Jones developed in the job analysis clearly demonstrates that there is much more to job performance than job knowledge and would require other assessments to capture those important knowledge, skills and abilities, such as personality variables. (Tr. DeShon Direct at 51.)

Most striking to the Court is the evidence regarding one particular candidate, Susan Lowe. Ms. Lowe scored a 66 on the written test, high enough to survive the initial hurdle and proceed to the other components of the promotion process. After the written test, she was number 71 in the rank order of lieutenants that remained eligible for promotion. (Pl. Tr. Exh.

11.) However, the final list of those who qualified for promotion to lieutenant completed after the conclusion of the remaining components of the promotion process included Ms. Lowe as the second most qualified candidate. (Pl. Tr. Exh. 14.) This piece of evidence clearly dispels any inference that the written test approximated job performance.

Furthermore, Dr. Jones did not pilot test the written test outside the MPD. The only pilot testing within the organization was to have "two or three senior level people" review a final version of the test "a day or two before the test was to be printed." (Tr. Jones Direct at 45.) Moreover, the SMEs were not qualified test developers; they only received the brief training that Dr. Jones provided prior to drafting test items. There also exists evidence that some of the candidates who assisted in the drafting of the promotion tests encountered similar questions on the lieutenant tests.

Cutoff score

To validate the use of a cutoff score, the inference that must be drawn is that the cutoff score should measure minimal qualifications. The Guidelines provide that "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." 29 U.S.C. § 1607.6(h). The Third Circuit has held that "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 Penn. Transp. Auth., 181 F.3d 478 (3d Cir. 1999). In order to be valid, therefore, the cutoff score of 66 must appropriately measure the minimum qualifications necessary for successful performance of the job of lieutenant in the Memphis Police Department.

There is nothing in the record to indicate that the cutoff score was validated. (Tr. DeShon Direct at 29.) In fact, the test developer stated that the cutoff score was not validated:

> Q: "You didn't attempt to, quote, validate the cut score, did you?"
>
> A: "No." (Tr. Jones Direct at 122-23.)

The original cutoff score of 70 was arbitrary, and was only implemented at the Union's directive. Dr. Jones testified that he did not condone the usage of a cutoff score, and referred to it as "totally inappropriate", (Tr. Jones Direct at 27), "a logical absurdity", (Tr. Jones Direct at 20) and "ludicrous", (Tr. Jones Direct at 20). The only reason he consented to its usage was because the Union insisted: "...they made it crystal clear that they were not willing to accept what we had done in '96, vis-a-vis the cut score." (Tr. Jones Direct at 71.)

It was only after adverse impact under the four-fifths rule

was found that the City agreed to lower the cutoff score to 66. Jones testified to this effect, adding that he recommended dropping the cutoff score by a measure of the standard error, approximately four points.(Tr. Jones Cross at 32.)

In response to a question regarding the rationale for the cut score, Jones replied: "The rationale was to set it at a level that would yield no adverse impact and that would produce a percent of passing employees, it would satisfy or possibly satisfy the organization needs to fill vacancies." (Tr. Jones Cross at 32.)

Avoiding adverse impact under the four-fifths rule, approximating the number of candidates to fill open slots, and following the Union's directives do not constitute a rationale that justifies an arbitrary cutoff score, nor does it allow the Defendant to escape the necessary requirement that the cutoff score must measure minimal qualifications. The Second Circuit has held that "when an exam produces disparate racial results, a cutoff score requires adequate justification and cannot be used at a point where its unreliability has such an extensive impact as occurred in this case." Guardians Assn of New York City Police Dept. v. Civil Service Comm., 630 F.2d 79, 86 (2d Cir. 1980). No evidence in the record suggests that a cutoff score of 66 was necessary for, or "related" to the position of lieutenant.

Dr. DeShon testified that the cut score is incapable of

distinguishing between candidates who can and cannot perform the job of police lieutenant. (Tr. DeShon Rebuttal at 8.) Dr. DeShon based this conclusion partly on his analysis of the Cruder Richardson reliability coefficient, which was .76 for this test. This number results in a standard error measurement of 3.84, which Dr. DeShon testified was a large standard error measurement, yielding a confidence interval of eight points. Translated to layman's terms, Dr. DeShon stated that the confidence interval means that someone with a cutoff score of 66 on the MPD written test could have really had job knowledge of someone who scored a 58 or someone who scored a 74.

Furthermore, the arbitrary use of a cutoff score in the 2000 promotion test is underscored when comparing it to the promotion process of 1996. In that process, Dr. Jones did not use a cut score as an initial hurdle. Regarding the use of cut score in 2000, Jones stated,

> "I did not recommend the cut score. I certainly did not recommend a cut score of 70. I tried to make the point at this meeting that to set a cutting score before the test was even drafted was inappropriate, in large part, because there was no way to know how difficult the test would be, therefore, setting a cutting score without that information, we had no way of guesstimating what the potential outcome would be...So I thought it was ludicrous to set a cut score absent that kind of information, a fixed cut score such as a 70. I would have had the same opinion if the score had been 60 or 90, it didn't matter."

(Tr. Jones direct at 70-71.)

In fact, if the 1996 promotion process had been implemented in 2000, 19 of the 22 candidates who did not achieve a 66 on the written test would rank higher than a candidate who has been promoted. (Deshon Aff., Para. 39.)

When asked why he did not consider eliminating the cut score completely after realizing the cut score of 70 resulted in adverse impact, Dr. Jones testified that changing the score to 66 more nearly approximated the decision model of the Union. It is the test developer's responsibility, not the Union's, to determine what the cut score should be for the City.

As Dr. DeShon testified, the test developer, through the content validity studies, should be in a position to determine what weight to assign the various components of the selection system.

> "It's the test developer's responsibility to determine what the cut score should be for the City or for the Union. It's the test developer's responsibility to determine through this content validity process what the weight should be that are assigned to the components of the selection system. It's analogous to having a pilot who flies planes tell somebody who builds aircrafts how they should build their aircraft. Building an aircraft is an extremely complex technology, just as is building a selection system. And to have a person or a group who isn't knowledgeable in the technology required to build a selection system and determine how that selection system

> should function and how it should be build is absolutely beyond professional standards."(Tr. DeShon Direct at 69.)

Accordingly, the Court finds that the cutoff score was nothing more than an arbitrary decision and did not measure minimal qualifications. Therefore, the Court finds that Defendant City of Memphis did not meet its burden of showing that the written test with a cutoff score as an initial hurdle had a business justification.

Alternative Practices

Once the employer identifies a legitimate, non-discriminatory business reason for the employment practice in question, the burden shifts back to the plaintiff to show that the reason is pretextual or to show the existence of an alternative employment practice that reduces the disparate impact but serves the employer's legitimate interests. Watson, 487 U.S. at 998. Because the Court did not find that Defendant has shown a business justification for use of the written test with a cut score as an initial hurdle in the promotion process, the Court need not reach this inquiry.

II. Violation of Civil Service Laws

Plaintiffs also allege that Defendant's actions violated its own civil laws by failing to correctly score the written test.[9] In

[9] **City Charter**
Sec [250.1]. Examinations for applicants for employment.

All applicants for employment in positions protected by this article,

support of their argument, Plaintiffs assert that the City incorrectly scored eight of the 100 questions on the written exam. Also, Plaintiffs assert that the City should have applied the cutoff score as a percentage to the highest achieved score instead of using it as an absolute bar.

The Court finds that Defendant did not violate its civil service laws. First, Plaintiffs present no evidence showing that Defendant had to apply the passing score as a percentage to the highest achieved score. Second, even if Plaintiff was correct in that the eight test questions at issue were scored incorrectly, the City's actions do not amount to a violation unless it was willful under Section 9-4. There is no evidence that the City intentionally discriminated or purposefully scored the written

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shall be subjected to competitive job-related examinations under such rules and regulations as may be adopted by the Director of Personnel. The examinations to be provided for shall be of a practical nature and relate to such matters as will fairly test the relative competency of the applicant to discharge the duties of the particular position. These examinations should be developed in conjunction with other tools of personnel assessment and complemented by sound programs of job design to aid significantly in the development and maintenance of an efficient work force and in the utilization and conservation of human resources. No question in any examination shall relate to political or religious opinions or affiliations. The examination shall be conducted and controlled by the Director of Personnel. (Ord. No. 3233, Section 4, 8-31-82).

City Ordinances

Section 9-3. Examinations for applications for employment

(A) All applicants for employment in positions protected by this article shall be subjected to competitive job-related examinations under such rules and regulations as may be adopted by the director of personnel.

(B) The examinations to be provided for shall be of a practical nature and relate to such matters as will fairly test the relative competency of the applicant to discharge the duties of the particular position. No question in any examination shall relate to political or religious opinions or affiliations. The examination shall be conducted an controlled by the director of personnel.

test erroneously.

III. 42 U.S.C. § 1981

Plaintiffs also allege that the City discriminated against them in violation of 42 U.S.C. §§ 1981.[10] Claims under § 1981 must entail an element of intent. There is no evidence in the record that suggests that the discrimination by the City of Memphis was intentional. Moreover, an adverse impact claim, which is the issue in the case at bar, may not be brought under § 1981. Accordingly, the Court finds for the Defendant on Plaintiffs' § 1981 claims.

III. 42 U.S.C. § 1983

To allege a prima facie case under § 1983, a plaintiff must allege two elements: (1) that the government action occurred "under color of law" and (2) that the action is a deprivation of a constitutional right or federal statutory right. Parratt v. Taylor, 451 U.S. 527, 535 (1981). See also Bloch v. Ribar, 156 F.3d 673, 677 (6th Cir. 1998). Section 1983 does not create substantive rights, but instead merely serves as a "method for vindicating federal rights elsewhere conferred . . . ." Baker v. McCollan, 443 U.S. 137, 144 n. 3 (1979). "The first step in any such claim is to identify the specific constitutional right allegedly infringed." Albright v. Oliver, 510 U.S. 266, 271 (1994). In their Complaint, Plaintiffs assert that Defendant has violated their rights under the Fourteenth Amendment. The Supreme

[10] Section 1981 guarantees all persons the same rights "enjoyed by white citizens." 42 U.S.C. § 1981(a). Intent to discriminate is a necessary element of a claim under § 1981. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985).

Court in Washington v. Davis, 426 U.S. 229 (1976), established, however, that discrimination under the Fourteenth Amendment must be intentional. 426 U.S. 229 (1976). See also Feeney v. United States, 523 U.S. 1085 (1998). Again, there is no evidence in the record that the discrimination that occurred in the case at bar was intentional. Accordingly, the Court finds for the Defendants on Plaintiffs' § 1983 claims.

ENTERED this ___ day of February 2003.

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JON P. McCALLA
UNITED STATES DISTRICT JUDGE