

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

No. 02-3743

PERCY ALLEN, et al.

*Plaintiffs-Appellants,*

v.

CITY OF CHICAGO, et al.

*Defendants-Appellees.*

---

---

Appeal from the United States District Court  
for the Northern District of Illinois  
No. 98 CV 7673 —**Joan B. Gottschall** Judge.

---

**OPENING BRIEF AND SHORT APPENDIX  
OF PLAINTIFFS-APPELLANTS**

KENNETH N. FLAXMAN  
122 South Michigan Avenue  
Suite 1850  
Chicago, Illinois 60603  
(312) 427-3200

*Attorney for Plaintiffs-Appellants*

## DISCLOSURE STATEMENT

The undersigned, attorney of record for plaintiff-appellant, furnishes the following list in compliance with Circuit Rule 26.1(b):

1. I represent the plaintiffs-appellants Percy Allen, Yvette Clinkscale, Paul Gergoire, Marshall T. Massey, Christopher Meaders, Jeane A. Moore, Carolyn Y. Tovar, Thomas Wheeler, Jr., Rose Gordon, Rene Daniels, and Eugene Jackson, individually and for the two subclasses certified by the district court. The district court certified the following two subclasses:

All present African-American and Hispanic Chicago police officers who (a) applied in 1998 for promotion to sergeant, (b) met the time-in-grade requirements for promotion to sergeant, (c) took the written test component of the promotional process, (d) have not been promoted to sergeant, and

Subclass A — Were not considered for a merit promotion to sergeant because they did not pass the written test, and

Subclass B — Passed the written test and took the assessment exercise, but have not been promoted to sergeant.

Subclass A was subsequently redefined to exclude Hispanic officers. (Short Appendix 4. n.2)

2. I represented the plaintiffs-appellants in the district court.
3. Not applicable

Dated: January 6, 2002

---

Kenneth N. Flaxman

# INDEX

|  |    |
|--|----|
| I. JURISDICTIONAL STATEMENT . . . . .  | 1  |
| II. ISSUES PRESENTED FOR REVIEW . . . . .  | 1  |
| III. STATEMENT OF THE CASE . . . . .   | 2  |
| IV. STATEMENT OF FACTS . . . . .   | 3  |
| A. Past Discrimination in Police Hiring and Promotion by the City<br>of Chicago . . . . .  | 3  |
| B. Efforts to Remedy Discrimination in Promotion within the Chi-<br>cago Police Department . . . . .   | 4  |
| 1. Quota Remedies . . . . .  | 4  |
| 2. Race Norming . . . . .  | 5  |
| 3. Affirmative Action . . . . .  | 5  |
| 4. Merit Promotions . . . . .  | 6  |
| 5. The 1998 Sergeant’s Promotional Process . . . . .   | 8  |
| a. Applicant Flow Statistics . . . . .   | 8  |
| b. Creation of the 1998 Promotional Process . . . . .  | 9  |
| V. SUMMARY OF ARGUMENT . . . . .   | 10 |
| A. The Claims of Subclass B . . . . .  | 10 |
| B. The Claims of Subclass A . . . . .  | 11 |
| VI. ARGUMENT . . . . .   | 12 |
| A. Standard of Review . . . . .  | 12 |
| B. Burden of Proof in this Disparate Impact Case . . . . .   | 12 |
| C. Summary Judgment Should Have Been Entered in Favor of Sub-<br>class B . . . . .   | 14 |
| 1. The Undisputed Statistical Evidence Establishes a Prima<br>Facie Case of Disparate Impact Discrimination Against Each<br>Subclass . . . . . | 14 |

|   |    |
|---|----|
| 2. Selection by Merit and Selection by Test Scores Are Equally Valid . . . . .  | 17 |
| 3. There Is No Empirical Basis for the Thirty Percent Ceiling . . . . .   | 18 |
| 4. There Is a Compelling Business Necessity for Racial Parity in Promotions to Sergeant in the Chicago Police Department . . . . .        | 19 |
| 5. The Undisputed Evidence Shows the Feasibility of Increasing the Percentage of Merit Promotions . . . . .                               | 21 |
| 6. Increasing the Percentage of Merit Promotions Would Be Equally Valid and Less Discriminatory than the Thirty Percent Ceiling . . . . . | 22 |
| D. Defendant Is Not Entitled to Summary Judgment on the Claims of Subclass A . . . . .  | 24 |
| VII. CONCLUSION . . . . .   | 25 |

## TABLE OF AUTHORITIES

|   |              |
|---|--------------|
| <i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....   | 12           |
| <i>Barnhill v. City of Chicago</i> , 142 F.Supp.2d 948 (N.D.Ill. 2001),<br>appeal dismissed sub. nom. <i>Angelo v. City of Chicago</i> ,<br>No. 01-1738, April 27, 2001 ..... | 6, 16, 17    |
| <i>Bew v. City of Chicago</i> , 252 F.3d 891 (7th Cir. 2001) .....  | 16, 23       |
| <i>Brown v. City of Chicago</i> , 8 F.Supp.2d 1095, 19 F.Supp.2d 890,<br>aff'd sub. nom. <i>Bryant v. City of Chicago</i> ,<br>200 F.3d 1092, 1095 (7th Cir. 2000) .....      | 7, 16, 19    |
| <i>Bryant v. City of Chicago</i> , 200 F.3d 1092 (7th Cir. 2000) .....  | 6-7, 23      |
| <i>Deveraux v. City of Chicago</i> , 14 F.3d 328 (7th Cir. 1994) .....  | 5            |
| <i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....   | 12           |
| <i>Hardin v. S.C. Johnson &amp; Son, Inc.</i> , 167 F.3d 340 (7th Cir. 1999) .....  | 12           |
| <i>Hendricks-Robinson v. Excel Corp.</i> , 154 F.3d 685 (7th Cir. 2001) .....   | 12           |
| <i>Majeske v. City of Chicago</i> , 218 F.3d 816 (7th Cir. 2000) .....  | 3, 6         |
| <i>McArdle v. Rodriguez</i> , 277 Ill.App.3d 365, 659 N.E.2d 1356 (1995) .....  | 7            |
| <i>Metropolitan Life Ins. Co. v. Johnson</i> , 297 F.3d 558 (7th Cir. 2002) .....   | 12           |
| <i>Myers v. Hasara</i> , 226 F.3d 821 (7th Cir. 2000) .....   | 12           |
| <i>Petit v. City of Chicago</i> , ____ F.Supp.2d ____, 2002 WL 31409589<br>(N.D.Ill. 2002), appeal pending Nos. 02-4151, 02-4241 .....  | 3-4, 5-6, 20 |
| <i>Price v. City of Chicago</i> , 251 F.3d 656 (7th Cir. 2001) .....  | 12, 12       |
| <i>Reynolds v. City of Chicago</i> , 296 F.3d 524 (7th Cir. 2002) .....   | 4, 5, 20     |
| <i>United States v. City of Chicago</i> , 1984 WL 1435,<br>38 Empl.Prac.Dec. par. 35,606 (N.D.Ill. 1984) .....  | 4-5          |
| <i>United States v. City of Chicago</i> , 1988 WL 128694 *2 (N.D.Ill.1988) .....  | 5            |
| <i>United States v. City of Chicago</i> , 411 F.Supp. 218 (N.D.Ill. 1976),<br>aff'd 549 F.2d 415 (7th Cir. 1977) .....  | 4            |
| <i>United States v. City of Chicago</i> , 663 F.2d 1354 (7th Cir. 1981) .....   | 4            |
| <i>United States v. City of Chicago</i> , 796 F.2d 205 (7th Cir. 1986) .....  | 4            |
| <i>United States v. City of Chicago</i> , 870 F.2d 1256, 1258 (7th Cir. 1989) .....   | 5            |

|  |                |
|--|----------------|
| <i>Vitug v. Multistate Tax Comm'n</i> , 88 F.3d 506, 513 (7th Cir. 1996) ..... | 13             |
| <i>Watson v. Fort Worth Bank and Trust</i> , 487 U.S. 977 (1988) .....         | 10, 11, 13, 17 |
| 42 U.S.C. §2000e-2(k) .....  | 12, 13, 22     |
| 29 C.F.R §1607.4.D .....   | 16             |
| <i>Bryant v. City of Chicago</i> , No. 99-1272, Brief of Appellant .....       | 223            |

# OPENING BRIEF AND SHORT APPENDIX OF PLAINTIFF-APPELLANT

## I. JURISDICTIONAL STATEMENT

Plaintiffs<sup>1</sup> brought this action under Title VII of the Civil Rights Act of 1964, invoking the jurisdiction of the District Court under 42 U.S.C. Section 2000e et seq.

Judgment was entered on September 30, 2002. (Short Appendix 12.) Plaintiffs filed their notice of appeal on October 18, 2002. (Record Item No. 72.)

This is an appeal from a final decision resolving all claims against all parties. Plaintiffs invoke the jurisdiction of the Court of Appeals under 28 U.S.C. §1291.

## II. ISSUES PRESENTED FOR REVIEW

1. Does the undisputed evidence show that defendant's arbitrary thirty percent ceiling on non-discriminatory merit promotions is neither job related nor consistent with business necessity?
2. Would increasing the non-discriminatory merit promotions beyond the 30% ceiling be an equally valid, less discriminatory alternative to using

---

1. Plaintiffs are Percy Allen, Yvette Clinkscale, Paul Gergoire, Marshall T. Massey, Christopher Meaders, Jeane A. Moore, Carolyn Y. Tovar, Thomas Wheeler, Jr., Rose Gordon, Rene Daniels, and Eugene Jackson, individually and for the two subclasses certified by the district court. (Moore and Tovar represent Subclass A; the remaining plaintiffs represent Subclass B.)

discriminatory test scores for 70% of all promotions?

3. Did defendant present admissible evidence to support its cross-motion for summary judgment on the claims of Subclass A, who challenged the disparate impact of defendant's use of a "written qualifying test" as a prerequisite for all merit promotions?

### **III. STATEMENT OF THE CASE**

This Title VII employment discrimination class action challenges promotions to the rank of sergeant in the Chicago Police Department that were made as a result of the 1998 promotional process. Pursuant to the district court's order of April 19, 2001, as amended in its decision on the merits, (Short Appendix 4 n.2) this case proceeded as a class action for two subclasses of minority police officers who were adversely affected by the 1998 promotional process.<sup>2</sup>

- 
2. The district court certified the following two subclasses: "All present African-American and Hispanic Chicago police officers who (a) applied in 1998 for promotion to sergeant, (b) met the time-in-grade requirements for promotion to sergeant, (c) took the written test component of the promotional process, (d) have not been promoted to sergeant, and

Subclass A — Were not considered for a merit promotion to sergeant because they did not pass the written test, and

Subclass B — Passed the written test and took the assessment exercise, but have not been promoted to sergeant.

Subclass A was subsequently redefined to exclude Hispanic officers. (Short Appendix 4. n.2)

The 1998 promotional process consists of two selection procedures: objective test scores (used to make 70% of the promotions) and merit selection (for the remaining 30%). (Short Appendix 3.) Only police officers who passed a written test could be considered for a merit promotion. *Id.*

"Test score" promotions have a disparate impact on minority applicants.<sup>3</sup> (Short Appendix 4.) Merit promotions have been race neutral. (Short Appendix 5.)

Subclass B moved for summary judgment on its claim that defendant's decision to impose a thirty percent ceiling on the non-discriminatory merit promotions resulted in a violation of Title VII. (Record Item No. 52.) Defendant City of Chicago cross-moved for summary judgment against both subclasses. (Record Item No. 59.) The district granted summary judgment in favor of defendant, (Short Appendix 1-11), and this appeal follows.

#### **IV. STATEMENT OF FACTS**

##### **A. Past Discrimination in Police Hiring and Promotion by the City of Chicago**

The City of Chicago has recently admitted that it engaged in a long standing pattern of discrimination against African-Americans and Hispanic in hiring and promotions in its police department. This discrimination involved the selection of detectives, *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000), promotion to police sergeant, *Petit v. City of Chicago*, \_\_\_\_ F.Supp.2d

---

3. The statistics are set out *infra* at 8-9.

\_\_\_, 2002 WL 31409589 (N.D.Ill. 2002), appeal pending Nos. 02-4151, 02-4241, and promotion from sergeant to lieutenant, *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002).

## **B. Efforts to Remedy Discrimination in Promotion within the Chicago Police Department**

### **1. Quota Remedies**

In 1976, the City of Chicago was found to have discriminated against black, Hispanic, and female police officers in hiring and in promotions to the position of sergeant in its police department, *United States v. City of Chicago*, 411 F.Supp. 218 (N.D.Ill. 1976), *aff'd* 549 F.2d 415 (7th Cir. 1977). One part of the remedy was to superimpose quotas on the promotional rosters that had been arranged in rank order scores: African-American and Hispanic officers were placed on a separate promotional roster from which 4 out of each 10 promotions were made. *United States v. City of Chicago*, 411 F.Supp. at 243. The quota was modified following the *en banc* decision of the Court of Appeals in *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) to be 25% "minority male" and 5% female.<sup>4</sup>

The City offered a new promotional examination in 1979. This test had a greater discriminatory impact than the previous tests and was found to be not job related. *United States v. City of Chicago*, 1984 WL 1435, 38 Empl.Prac.Dec.

---

4. Minority women were considered together with white women under the "female quota." This arrangement held back minority women, whose efforts to modify the "female quota" were rejected in *United States v. City of Chicago*, 796 F.2d 205 (7th Cir. 1986).

par. 35,606 (N.D.Ill. 1984). Promotions continued under the quota system until 1987, when the district court prohibited future promotions until a new test was devised. *United States v. City of Chicago*, 1988 WL 128694 \*2 (N.D.Ill.1988).

## **2. Race Norming**

The City prepared a new promotional roster in 1988; to avoid any disparate impact, the City "race normed" scores on the test and achieved a promotional roster that did not have any disparate impact.<sup>5</sup> The district court permitted the City to make promotions from the "race normed" list.<sup>6</sup> *United States v. City of Chicago*, 1988 WL 128694 \*2 (N.D.Ill.1988).

"Race-norming" was outlawed by the Civil Rights Act of 1991, the enactment of which caused the City to stop making promotions from the 1988 list. *Deveraux v. City of Chicago*, 14 F.3d 328 (7th Cir. 1994).

## **3. Affirmative Action**

In addition to "race norming," the City made affirmative action promotions of African-American and Hispanic police officers. The City has to date been able to justify this "reverse discrimination" because of the "operational needs" of the police department, *Reynolds v. City of Chicago*, 296 F.3d 524, 529-30 (7th Cir. 2002) (promotion of Hispanic sergeant to lieutenant), and as a remedy for past discrimination in promotions to sergeant. *Petit v. City of Chicago*, \_\_\_\_ F.Supp.2d at \_\_\_\_, 2002 WL 31409589 (N.D.Ill. 2002), appeal pending Nos.

---

5. "Race norming" is discussed in *United States v. City of Chicago*, 870 F.2d 1256, 1258 (7th Cir. 1989).

6. Claims that the "race normed" list discriminated against white police officers are before this Court in *Petit v. City of Chicago*, Nos. 02-4151, 02-4241.

02-4151, 02-4241.

#### **4. Merit Promotions**

In 1989, the City administered a written test for promotion to the "D-2" (detective) rank; "[a]fter reviewing the results of the written exam, the CPD concluded that advancing applicants based solely on ranking in the written test would significantly reduce the number of African-American and Hispanic applicants eligible for promotion to detective." *Majeske v. City of Chicago*, 218 F.3d 816, 818 (7th Cir. 2000). The City decided to supplement strict rank order test results with two alternative selection procedures, including promotions "based solely on merit." *Id.* at 819.

The merit selection procedure that the City adopted for "D-2" promotions was summarized in *Barnhill v. City of Chicago*, 142 F.Supp.2d 948 (N.D.Ill. 2001): "Individual exempt unit commanders were asked to submit names of the employees under their command whom they considered to be superior performers. Once a list of these candidates was compiled, the Superintendent himself selected 26 from that list by considering their performance, absenteeism, disciplinary records, and commendations." *Id.* at 952.

The City administered sergeant's and lieutenant's promotional tests in 1994 and 1995. The City's original plan was to make all promotions in rank order by test scores; the City's attempt to alter this approach for lieutenant promotions was fairly summarized by this Court in *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000):

When the scores from the 1994 examination resulted in promotions in a racial pattern significantly different from the racial make-up of the applicant pool, the City attempted to rectify the situation by combining merit promotions with the rank-order promotions. Under this approach, twenty percent of the promotions would be

based on a merit selection system rather than the examination results. The Superintendent of Police ordered highly-placed police officials to review the sergeants under their command and to nominate sergeants who met performance-related criteria such as education, seniority, prior assignments, discipline, and productivity. Those nominations were screened by an Academic Selection Board comprised of deputy superintendents and command personnel. As a result, the Superintendent approved merit promotions of thirteen additional sergeants to the rank of lieutenant.

*Bryant v. City of Chicago*, 200 F.3d at 1095.

The procedure used for the "D-2" merit selection process was the framework for the merit selection procedure that the City sought to adopt in 1995 for promotions to lieutenant. As summarized in *Bryant*,

The Superintendent of Police ordered highly-placed police officials to review the sergeants under their command and to nominate sergeants who met performance-related criteria such as education, seniority, prior assignments, discipline, and productivity. Those nominations were screened by an Academic Selection Board comprised of deputy superintendents and command personnel.

*Bryant v. City of Chicago*, 200 F.3d at 1095.

As with the D-2 promotions, the final selection of merit promotees to lieutenant was made by the police superintendent.

Although the state courts prohibited the City from making any merit promotions to lieutenant, *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 659 N.E.2d 1356 (1995), the district court in *Brown v. City of Chicago*, 8 F.Supp.2d 1095, 19 F.Supp.2d 890, *aff'd sub. nom. Bryant v. City of Chicago*, 200 F.3d 1092, 1095 (7th Cir. 2000), found that merit promotions were an "equally valid, less discriminatory" alternative and mandated that merit promotions to lieutenant go forward. 8 F.Supp.2d at 1112.

## 5. The 1998 Sergeant's Promotional Process

The 1998 sergeant's promotional process began with a "Written Qualifying Test," which is a multiple choice test of job knowledge. (Record Item No. 58, pars. 30-31.)

### a. Applicant Flow Statistics

The written qualifying test was taken by 3201 officers: 1672 white, 1074 African-American, 414 Hispanic, and 41 other. (Record Item No. 57 at 9, response to III.01.) 2682 officers passed the test: 1518 white, 787 African-American, 340 Hispanic, and 37 other. (Record Item No. 57 at 10, response to III.02.) Minorities comprised about 42% of those who passed the test. The test had an adverse impact on African-American officers. (Record Item No. 58, par. 89.)

Police officers who passed the "Written Qualifying Test" were eligible to be considered for a merit promotion (Record Item No. 58, par 29), and to undergo further testing. (Record Item No. 58, par 28.)

Defendant made 285 promotions from test scores and 118 through merit selection.<sup>7</sup> Minorities comprised 43% (51 of 118) of those promoted through

---

7. On August 9, 1998, the City promoted 251 officers to the rank of sergeant, 178 from test scores and 73 through merit selection. (Record Item No. 58 at 34, paragraph 198.) Minorities made up 20% percent of those promoted from test scores, as compared to 45% of those promoted through merit selection.<sup>8</sup>

The 178 "test score promotions" were made up of 140 white, 26 African-American, 10 Hispanic, and 2 other: 79% white, 14.5% African-American, 5.5% Hispanic, and 1% other. (Record Item No. 58 at 34, paragraph 198.)

The 73 "merit promotions" consisted of 40 white, 23 African-American, 9 Hispanic, and 1 other: 55% white, 32% African-American, 12% Hispanic, and 1% other. *Id.*

The City repeated this pattern when it next made sergeant promotions. Of the 152

merit selection and 24% of those promoted through test scores.

**b. Creation of the 1998 Promotional Process**

The 1998 sergeant's test was designed for defendant by an outside consultant, Jeanneret and Associates. (Record Item No. 58, par. 1.) The consultants proposed that all promotions be made on the basis of a pass-fail written qualifying test and a rank order assessment exercise. (Record Item No. 58, par. 28.) After receiving this proposal, defendant instructed the consultants to include a merit selection system. (Record Item No. 58, par. 29.)

As part of its instruction to include merit selection, defendant ordered its consultant to limit merit promotions to be 30% of all promotions; defendant did not request any advice from its consultant about the appropriateness of this ceiling at the time it gave this order. (Record Item No. 61, Exhibit 2 at 5, paragraph III.05.)

---

promotions the City made on June 20, 1999. 107 were from test scores and 45 were through merit selection. (Record Item No. 58 at 36, paragraph 201.) Minorities made up 28% of those promoted from test scores, as compared to 47% of those promoted through merit selection.<sup>9</sup>

The 107 test score promotions were made up of 77 white, 19 African-American, and 11 Hispanic officers: 72% white, 18% African-American, and 10% Hispanic. (Record Item No. 58 at 36, paragraph 201.)

The 45 merit promotions were made up 24 white, 14 African-American, and 7 Hispanic: 53% white, 31% African-American, and 16% Hispanic. *Id.*

## **V. SUMMARY OF ARGUMENT**

The written test used in the 1998 sergeant promotional process had a disparate impact on African-American and Hispanic police officers; merit promotions do not, and the two methods are equally valid. The primary question in this appeal is whether the thirty percent ceiling on the non-discriminatory merit promotions is job related and consistent with business necessity. This issue should be resolved in favor of Subclass B. The question raised for Subclass A is whether defendant came forward with enough admissible evidence to show its entitlement to summary judgment. This question should be resolved in favor of Subclass A and the claims of Subclass A remanded for trial.

### **A. The Claims of Subclass B**

The plaintiff in a Title VII disparate impact case has the burden of "identifying the specific employment practice that is challenged." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). Subclass B challenges defendant's "specific employment practice" of imposing a 30% ceiling on merit promotions.

Defendant requires police officers to pass a "Written Qualifying Test" to be eligible for promotion. Minorities comprised 42% of those who passed the test and slightly less than 30% of these promoted.

Defendant made 285 promotions from test scores and 118 through merit selection. The merit promotions were non-discriminatory — minorities comprised 43% (51 of 118) of those promoted through merit selection. The test score promotions had a discriminatory impact: minorities comprised 24% of these promoted through test scores. Defendant has conceded that its promotion process had a disparate impact on the members of Subclass B, minority police

officers who passed the "Written Qualifying Test."

Defendant sought to answer the prima facie case of disparate impact discrimination by showing that the written test and the merit selection system were each job related. This argument does not respond to the claim of Subclass B: "the specific employment practice that is challenged" by Subclass B, *Watson v. Fort Worth Bank and Trust*, 487 U.S. at 994, is defendant's decision to impose a thirty percent ceiling on merit promotions.

Selection by merit and selection by test scores are equally valid selection procedures. There is no empirical basis for defendant's thirty percent ceiling on merit promotions and the undisputed evidence shows the feasibility of raising the ceiling on merit promotions. Raising this ceiling would have minimized the overall disparate impact of defendant's promotional process on minority officers and would have furthered the compelling business necessity for racial parity in promotions to sergeant in the Chicago Police Department. Accordingly, summary judgment on liability should have been entered in favor of Subclass B.

#### **B. The Claims of Subclass A**

Subclass A challenges defendant's "specific employment practice" of requiring a passing score on the written test as a condition precedent for a merit promotion. Defendant conceded that this employment practice had a disparate impact on African-American officers and sought summary judgment on the argument that a merit promotion system without the written test would be less valid than the present process. (Short Appendix 11.) Defendant failed to support this argument with admissible evidence, relying instead on "pure speculation." (Id.) On its motion for summary judgment, it was defendant's burden to come forward with admissible evidence to show the absence of any material question of

fact. Defendant failed to meet this burden and was not entitled to summary judgment on the claims of subclass A.

## **VI. ARGUMENT**

### **A. Standard of Review**

The Court reviews de novo the grant of summary judgment. *Price v. City of Chicago*, 251 F.3d 656, 658 n.2 (7th Cir. 2001). The Court does not conduct a "paper trial," *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344 (7th Cir. 1999), but views the record "in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party." *Myers v. Hasara*, 226 F.3d 821, 825 (7th Cir. 2000). This standard is applicable even when, as here, there have been cross-motions for summary judgment. *Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 561-62 (7th Cir. 2002); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 2001).

### **B. Burden of Proof in this Disparate Impact Case**

The burdens of proof in a disparate impact case were set out by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and recently restated by this Court in *Price v. City of Chicago*, 251 F.3d 656 (7th Cir. 2001).<sup>10</sup> The plaintiff

---

10. The plaintiff in *Price* argued that 42 U.S.C. §2000e-2(k)(ii), adopted as part of the 1991 amendments to Title VII, changed the *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) standard of "equally valid less discriminatory alternative" and permitted a Title VII plaintiff to prevail without showing a disparate impact; the plaintiff in *Price* argued that she could prevail simply by demonstrating that the defendant had failed to use a less discriminatory alternative employment practice. The Court rejected this argument, holding that the 1991 amendments did not change the "equally valid less discriminatory alternative" standard of *Albemarle Paper Co.*, *supra*. 251 F.3d at 660.

"must make out a prima facie case by showing that the method of promotion she challenges has an adverse impact on minorities." *Id.* at 659. The burden then shifts to the defendant to "demonstrate that its method is job-related and consistent with business necessity." *Id.* If the employer is able to establish job relatedness, the employees may still prevail by showing that "there are less discriminatory alternatives that the employer refused to adopt." *Id.*

The plaintiff in a Title VII disparate impact case has the burden of "identifying the specific employment practice that is challenged." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). It is plaintiff's burden to identify "a specified employment practice," *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 513 (7th Cir. 1996), and then "demonstrate that each particular challenged employment practice causes a disparate impact." 42 U.S.C. §2000e-k(1)(B)(i).

In this case, Subclass A challenges defendant's "specific employment practice" of requiring a passing score on the written test as a condition precedent for a merit promotion. Subclass B challenges defendant's "specific employment practice" of imposing a 30% ceiling on merit promotions.

The claims of subclass B are presented on cross-motions for summary judgment. We show below that the statistical evidence makes out a prima facie case of disparate impact discrimination for Subclass B, see *infra* at 14-15. We then show that defendant's decision to impose a thirty percent ceiling on merit promotions is neither job-related nor consistent with business necessity and that summary judgment on liability should be entered in favor of Subclass B.

The claims of subclass A are presented on defendant's motion for summary judgment. We show below at 24-25 that defendant failed to meet its summary judgment burden and that a trial is required on the claims of subclass A.

**C. Summary Judgment Should Have Been Entered in Favor of Subclass B**

**1. The Undisputed Statistical Evidence Establishes a Prima Facie Case of Disparate Impact Discrimination Against Each Subclass**

Defendant's decision to impose a thirty percent ceiling on merit promotions has a disparate impact discrimination upon minority police officers.

Defendant requires police officers to pass the "Written Qualifying Test" to be eligible for promotion.<sup>11</sup> Minorities comprised 42% of those who passed the test,<sup>12</sup> and slightly less than 30% of those promoted.<sup>13</sup>

Defendant made 285 promotions from test scores and 118 through merit selection.<sup>14</sup>

---

11. This requirement is challenged by Subclass A. See *infra* at 24-25.

12. The written qualifying test was taken by 3201 officers: 1672 white, 1074 African-American, 414 Hispanic, and 41 other. (Record Item No. 57 at 9, response to III.01.) 2682 officers passed the test: 1518 white, 787 African-American, 340 Hispanic, and 37 other. (Record Item No. 57 at 10, response to III.02.)

13. Defendant made 403 promotions to sergeant; 281 (or 70%) of those promoted were white.

14. Of the test score promotions, 217 were to white officers, 45 to African-American officers, 21 to Hispanic officers, and 2 to officers of other races. Of the merit promotions, 64 were to white officers, 37 to African-American officers, 16 to Hispanic officers, and 1 to an officer of another race.

The merit promotions were non-discriminatory: minorities comprised 45% (53 of 118) of those promoted through merit selection.<sup>15</sup> The test score promotions reflect a far different pattern: minorities comprised 24% of those promoted through test scores.<sup>16</sup> Confronted by this statistical evidence, defendant wisely conceded that its promotion process had a disparate impact on the members of Subclass B. (Short Appendix 4-5.)

---

15. Defendant made a total of 118 merit promotions: 63 to white officers, 37 to African-American officers, 16 to Hispanic officers, and 1 to an officer of another race.

16. On August 9, 1998, the City promoted 251 officers to the rank of sergeant, 178 from test scores and 73 through merit selection. (Record Item No. 58 at 34, paragraph 198.) Minorities made up 20% percent of those promoted from test scores, as compared to 45% of those promoted through merit selection.

The 178 "test score promotions" were made up of 140 white, 26 African-American, 10 Hispanic, and 2 other: 79% white, 14.5% African-American, 5.5% Hispanic, and 1% other. (Record Item No. 58 at 34, paragraph 198.)

The 73 "merit promotions" consisted of 40 white, 23 African-American, 9 Hispanic, and 1 other: 55% white, 32% African-American, 12% Hispanic, and 1% other. *Id.*

The City repeated this pattern when it next made sergeant promotions. Of the 152 promotions the City made on June 20, 1999. 107 were from test scores and 45 were through merit selection. (Record Item No. 58 at 36, paragraph 201.) Minorities made up 28% of those promoted from test scores, as compared to 47% of those promoted through merit selection.<sup>17</sup>

The 107 test score promotions were made up of 77 white, 19 African-American, and 11 Hispanic officers: 72% white, 18% African-American, and 10% Hispanic. (Record Item No. 58 at 36, paragraph 201.)

The 45 merit promotions were made up 24 white, 14 African-American, and 7 Hispanic: 53% white, 31% African-American, and 16% Hispanic. *Id.*

Raising the ceiling on merit promotions would have reduced the overall disparate impact of sergeant promotions. If defendant had chosen to make 70% of the 403 promotions through its merit system, it would have made 282 merit promotions and 121 test score promotions. Assuming that merit promotions continued to be non-discriminatory, defendant would have promoted 121 minorities and 161 white officers through merit selection, and 29 minorities and 92 white officers through test scores. A 70% ceiling on merit promotions would therefore have resulted in the promotion of 150 (37%) minority officers and 253 (63%) white officers. The overall result of a 70% ceiling on merit promotions would not be an actionable disparate impact under the "80% rule" of the EEOC guidelines.<sup>18</sup>

Defendant sought to answer the prima facie case of disparate impact discrimination by showing that the written test and the merit selection system were each job related. Subclass B does not dispute either factual proposition.<sup>19</sup>

---

18. Under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4.D, "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." As this Court stated in *Bew v. City of Chicago*, 252 F.3d 891 (7th Cir. 2001), [u]nder EEOC guidelines, disparate impact is deemed established if minority pass rates are 80% or less than the pass rate for non-minorities." *Id.* at 893.

19. Subclass B conceded that the written test is job related under the standards applied by this Court in *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000). The City established that its merit selection system is job related in *Barnhill v. City of Chicago*, 142 F.Supp.2d 948 (N.D.Ill. 2001), *appeal dismissed sub. nom. Angelo v. City of Chicago*, No. 01-1738, April 27, 2001.

Defendant's argument, however, does not respond to the claim of Subclass B: "the specific employment practice that is challenged" by Subclass B, *Watson v. Fort Worth Bank and Trust*, 487 U.S. at 994, is defendant's decision to impose a thirty percent ceiling on merit promotions. We show below that defendant is unable to show that its thirty percent ceiling on merit promotions is job related and consistent with business necessity.

## **2. Selection by Merit and Selection by Test Scores Are Equally Valid**

Defendant proved that the validity of "subjective" procedures, such as those it uses in merit promotions, are comparable to those found for written tests when it successfully defended merit promotions in *Barnhill v. City of Chicago*, 142 F.Supp.2d 948 (N.D.Ill. 2001), *appeal dismissed sub. nom. Angelo v. City of Chicago*, No. 01-1738, April 27, 2001.

The "subjective evaluation of job performance, such as that used in the Merit Process, is used frequently to assist in making employment decisions related to promotion, termination, training, and discipline. (citations omitted) Job performance can be characterized by many criteria, but subjective assessments of job performance by supervisors familiar with the employees' work are most common. (citation omitted) One reason for the frequent use of subjective supervisory assessments is that objective performance measures may suffer from criterion deficiency (i.e., be unable to measure some important components of performance (citation omitted) — a point similar to that made by Murphy (1989).

Dr. Cramer [plaintiff's expert in *Barnhill*] provided no evidence that "subjective" measures are less valid than objective measures of performance. Structured interviews that are linked to job analysis results have demonstrated validity coefficients as high as .42, .51, and .61 (citations omitted). A meta-analysis of assessment centers found the validity for such "subjective" processes to be .37 and as high as .53 when used to predict potential. (citation omitted) These validity coefficients of "subjective" procedures are comparable to those found for written tests. (citation omitted)

\* \* \*

The clear implication is that subjective measures are capable of being shown to be as valid as objective measures for various human resource decisions (e.g., selection, promotion, etc.). Therefore, it is perfectly legitimate to rely on informed decisions of highly qualified experts of the Chicago Police Department to select sergeants.

Record Item No. 54, Exhibit 6 at 7.

Plaintiffs wholeheartedly agree that "it is perfectly legitimate to rely on informed decisions of highly qualified experts of the Chicago Police Department to select sergeants." It is not "perfectly legitimate," however, to impose an arbitrary thirty percent ceiling on merit promotions.

### **3. There Is No Empirical Basis for the Thirty Percent Ceiling**

The City does not have any empirical basis for its adoption of the thirty percent ceiling for merit promotions. Robert Joyce, the Deputy Commissioner of defendant's Department of Personnel when the test at issue in this case was being developed, stated in related litigation<sup>20</sup> that defendant had adopted the thirty percent cap on merit promotions

Because the task force, advisory panel suggested that we have — that we look at a process of merit appointments based upon performance, and I forgot exactly how they said that, but they said to make up to 30 percent using that strategy."

Record Item No. 54, Exhibit 10 at 28, par. 50.

The "Task Force" did not have any reasoned basis for its recommendation to cap merit promotions at thirty percent. James Holzhauer, the chairman of the

---

20. *Barnhill*, 142 F.Supp.2d at 956,

task force testified as follows in the *Barnhill* litigation:<sup>21</sup>

Q: \* \* \* How did the Task Force come up with not greater than 30 percent as the percentage for merit selection?

Holzhauser: Hit and miss. We knew that the percentages in detectives, I believe, had been 20 percent; maybe a bit higher at some point, but 20 percent was the number I remember. We had a feeling that — and we discussed with a number of people, you know, can it be 100 percent, can it be 50 percent. People were uncomfortable with it being that large of a percentage and with the validity of it at that large of a percentage or the practicability of it at that large a percentage. We determined that it was successful at 20 percent, and it would probably be successful at something other than 20 percent, but at this point we weren't willing to recommend any more than 30 percent.

(Holzhauer Dep. 178.)

This "hit or miss" approach falls short of meeting the job-relatedness standard of Title VII.

#### **4. There Is a Compelling Business Necessity for Racial Parity in Promotions to Sergeant in the Chicago Police Department**

The City of Chicago has established in other litigation that it has a compelling business necessity for racial parity in promotions in its police department.

---

21. This Court described Holzhauser as "obviously qualified" to sit on the 1990 "Mayor's Blue Ribbon Panel of Police Testing, Hiring and Promotion." *Bryant v. City of Chicago*, 200 F.3d at 1096.

In *Reynolds v. City of Chicago*, 296 F.3d 524 529-30 (7th Cir. 2002), the City asserted that the "operational needs" of the police department justified the affirmative action promotion of an Hispanic sergeant to lieutenant. *Id.* at 529. The Court accepted this rationale, emphasizing that an effective police department was especially important "in a period of heightened public concern with the dangers posed by international terrorism." *Id.* at 530.

In *Petit v. City of Chicago*, \_\_\_ F.Supp.2d at \_\_\_, 2002 WL 31409589 (N.D.Ill. 2002), appeal pending Nos. 02-4151, 02-4241, the City defended affirmative action promotions of African-American and Hispanic police officers to sergeant. In finding for the City, the district court found that the City had established that the racial composition of its police sergeants should reasonably represent the racial composition of the patrol ranks. \_\_\_ F.Supp.2d at \_\_\_, 2002 WL 31409589 \*26. This is because there is "a consensus of opinion among experts . . . that police is a human service activity where 'issues of communication, issues of trust, issues of understanding are absolutely crucial to the effectiveness of a police department.'" \_\_\_ F.Supp.2d at \_\_\_, 2002 WL 31409589 \*22.

The City also demonstrated in *Petit* that minority sergeants "increase the effectiveness of a police organization internally, by decreasing overt racism within a department. . . and by serving as mentors and role models for minority police officers." \_\_\_ F.Supp.2d at \_\_\_, 2002 WL 31409589 \*23.

The City's self-imposed thirty percent ceiling on merit promotions disserves its compelling interest in having the racial composition of its police sergeants mirror the racial composition of the patrol ranks.

## **5. The Undisputed Evidence Shows the Feasibility of Increasing the Percentage of Merit Promotions**

Defendant would not have encountered any difficulty if it had increased the percentage of merit promotions beyond the thirty percent ceiling. This is true even if defendant had increased the ceiling of minority promotions to 70% and made 282 merit promotions.

Defendant's merit selection process begins with nominations made by "all exempt command staff below the rank of chief who had sworn members assigned or detailed to their command." (Record Item No. 61, Exhibit 5 at 65.) Each nominator received training to identify merit candidates. (Record Item No. 61, Exhibit 5 at 67.) The training "included detailed discussion of relevant job dimensions, and provided ample time for questions regarding process and nominator's role." (Record Item No. 54, Exhibit 10 at 41, par. 69(a).) The goal of the training was to "avoid assessment errors, such as personal likes and dislikes, similarity, and biases and stereotypes." *Id.*

The 75 nominators were allowed "to identify and nominate either police officers in their chain of command or at large." (Record Item No. 54, Exhibit 10 at 44, par. 75(a).) Each nominator was permitted to designate between one and five police officers; the nominators identified 272 police officers for further consideration for a merit promotion. *Id.* Each nominator selected an average of 3.6 (272/75) police officers.

The nominations made by command staff was reviewed by the "Academic Selection Board." (Record Item No. 61, Exhibit 5 at 68.) This board reviewed background material about each nominee and discussed the nominee's "dimensions, assignments, leadership, and mentoring." (Record Item No. 54, Exhibit 10 at 57, par. 108.) The Board culled the 272 nominations to 148, a 54%

acceptance ratio. (Record Item No. 61, Exhibit 5 at 71.) Although the "Academic Selection Board" divided the candidates into two groups ("outstanding" and "good"), (Record Item No. 54, Exhibit 10 at 58, par. 109), the Superintendent "found no distinction" between the two groups because "there were some officers in the good list that he thought were better than those on the outstanding list and vice versa." (Record Item No. 54, Exhibit 10 at 63, par. 125.)

Increasing the ceiling on merit promotions to 70% would have resulted in 281 merit promotions out of the 403 total promotions. Assuming the same culling rate (54%) by the "Academic Selection Board," defendant's nominators would have been required to make a total of 520 nominations, or an average of slightly less than seven nominations per nominator. This small increase in the number of merit promotions would not have caused any of the problems feared by defendant's expert — the nominators would still be making "a relatively small number of nominations." (Record Item No. 61, Exhibit 2 at 7.) Instead of selecting up to five of "their very best performers," *id.*, a 70% ceiling on merit promotions might have required each nominator to select up to seven of their "best performers."

Defendant's decision to impose a thirty percent ceiling on non-discriminatory merit promotions is the type of "built-in headwinds," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971), outlawed by Title VII. Summary judgment should have been entered in favor of Subclass B.

## **6. Increasing the Percentage of Merit Promotions Would Be Equally Valid and Less Discriminatory than the Thirty Percent Ceiling**

Judgment in favor of Subclass B is also required if plaintiff's proposal that defendant increase its ceiling on merit promotions is viewed as an "equally valid less discriminatory alternative" under U.S.C. §2000e-2(k)(ii).

This Court recently reviewed the standards for validation of an employment test in *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000) and *Bew v. City of Chicago*, 252 F.3d 891 (7th Cir. 2001).

In *Bryant, supra*, this Court upheld a test that defendant had used to make promotions to police lieutenant. The test in *Bryant*, which had a significant disparate impact on minorities, consisted of three components: a written job knowledge test, an "in-basket" exercise, and an oral presentation. 200 F.3d at 1096-97. The plaintiffs in *Bryant*, minority police sergeants, argued that to show the job relatedness of each subtest, the City needed to come forward with empirical evidence to show a relationship between test scores and job performance. (*Bryant v. City of Chicago*, No. 99-1272, Brief of Appellant at 31.) This Court rejected the standard urged by plaintiffs, and upheld the test because "[i]t would be unrealistic to require more than a reasonable measure of job performance." *Id.* at 1098.

The Court reaffirmed this validation standard in *Bew v. City of Chicago, supra*, when it held that empirical evidence is not required to show a relationship between scores on a written test and job performance.<sup>22</sup> 252 F.3d at 895.

---

22. The Court postulated that because "[t]he exams mirrored the content and emphasis of the police academy curriculum," test scores therefore "creat[ed] a correlation between a probationary officer's score and her mastery of the knowledge necessary to be a police officer." 252 F.3d at 895.

Merit promotions and test score promotions are equally valid under the *Bew-Bryant* standard: as defendant's expert explained, the "validity coefficients of 'subjective' procedures are comparable to those found for written tests." Record Item No. 61, Exhibit 5 at 7.

**D. Defendant Is Not Entitled to Summary Judgment on the Claims of Subclass A**

Subclass A challenges defendant's "specific employment practice" of requiring a passing score on the written test as a condition precedent for a merit promotion. Defendant conceded that this employment practice had a disparate impact on African-American officers, (Short Appendix 4), and sought summary judgment on the argument that a merit promotion scheme without the written test would be less valid than the present process. (Short Appendix 11.)

Defendant supported this argument with a "report" from Dr. Morton McPhail (Record Item No. 61, Exhibit 2), the industrial psychologist primarily responsible for development of the test. Dr. McPhail's report intermixes opinions with self-serving factual contentions, such as the assertion that "We conducted a thorough and detailed analysis of the Sergeant position." (Record Item No. 61, Exhibit 2 at 2, paragraph II.02.) Section III of Dr. McPhail's report relates to merit selection. (Record Item No. 61, Exhibit 2 at 3-9.)

Dr. McPhail's opinion about the requirement for a written test as a condition precedent for a merit promotion consists of an unadorned conclusion:

In the absence of these conditions (i.e, candidates not screened for minimally adequate job knowledge or a substantially larger number of promotions made using the merit criteria), the resulting process would *not* be the same as that actually used. (emphasis in original)

(Record Item No. 61, Exhibit 2 at 4, paragraph III.03.)

This conclusion falls short of establishing that merit selections cannot be made without the written job knowledge test. Just as raters were trained to "avoid assessment errors, such as personal likes and dislikes, similarity, and biases and stereotypes," (Record Item No. 54, Exhibit 10 at 41, par. 69(a).) raters could also have been trained to assess job knowledge without requiring officers to pass a paper and pencil test.

On its motion for summary judgment, it was defendant's burden to come forward with admissible evidence to show the absence of any material question of fact. Defendant failed to meet this burden and was not entitled to summary judgment on the claims of subclass A.

## **VII. CONCLUSION**

For the reasons above stated, the judgment in favor of defendant should be reversed, and the case remanded with instructions to enter judgment on liability in favor of Subclass B and to set the case for trial on the claims of Subclass A.

Respectfully submitted,

---

KENNETH N. FLAXMAN  
122 South Michigan Avenue  
Suite 1850  
Chicago, Illinois 60603  
(312) 427-3200  
*attorney for plaintiffs-appellants*

# INDEX TO APPENDIX

|   |    |
|---|----|
| Defendant's Rule 56.1 Statement of Facts .....  | 1  |
| Plaintiff's Local Rule 56.1 (b)(3)(A) Response to Defendant's Statement of Facts .....  | 6  |
| Plaintiff's Local Rule 56.1 (b)(3)(B) Statement of Additional Facts that<br>Require the Denial of Summary Judgment .....            | 11 |
| Defendant Michael Pauley's Response to Plaintiff's 56.1(b)(3)(B)<br>Statement and Additional Facts Requiring Summary Judgment ..... | 31 |

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

|                        |   |                          |
|------------------------|---|--------------------------|
| PERCY ALLEN, et al.,   | ) |                          |
|                        | ) |                          |
| Plaintiffs,            | ) | Case No. 98 C 7673       |
| v.                     | ) |                          |
|                        | ) |                          |
| <b>CITY OF CHICAGO</b> | ) | Judge Joan B. Gottschall |
|                        | ) |                          |
| Defendant.             | ) |                          |

**MEMORANDUM OPINION AND ORDER**

In this class action suit, two subclasses of minority police officers allege that City of Chicago violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, when it selected other officers for promotion to the rank of sergeant in August 1998. One subclass has moved for *summary* judgment. The City has cross-moved for *summary* judgment **as** to both subclasses. For the reasons set forth below, the City's motion is granted.

Some historical context is helpful.' Since 1970, the City has been defending itself against allegations of racial discrimination in the hiring and promotion of police officers. *United States v. City of Chicago*, 411 F. Supp. 218,225 (N.D. Ill. 1976), *aff'd*, 549 F.2d 415,438-39 (7th Cir. 1977). In 1976, Judge Marshall found that the 1973 sergeant examination had a disparate impact and was not a valid predictor of performance on the job. *Id.* at 236-39. The City operated under promotion quotas until 1988, when the district **court** approved a new promotion roster based on race-normed examination results. *United States v. City of Chicago*, No. 73 C 2080, 1988 U.S. Dist. LEXIS 13242 (N.D. Ill. Nov. 21, 1988). After passage of the Civil Rights Act of 1991, the City abandoned this approach.

---

To the extent the parties object to any of the historical facts outlined below as irrelevant and immaterial, their objections are overruled.

“When the scores from the 1994 [lieutenant] examination resulted in promotions in a racial pattern significantly different from the racial make-up of the applicant pool, the City attempted to rectify the situation by combining merit promotions with the rank-order promotions.” *Bryant v. City of Chicago*, 200 F.3d 1092, 1095 n.1 (7th Cir. 2000). The Superintendent selected 13 sergeants for promotion on the basis of merit selection (20% of promotions) and 54 on the basis of their examination score and rank on a promotion list. A police sergeant, James McArdle, filed suit in state court seeking to enjoin merit promotions on the theory that they were not permitted by then-existing rules. The state court granted McArdle a preliminary injunction and that order was affirmed on appeal. *McArdle v. Rodriguez*, 659 N.E.2d 1356 (Ill. App. Ct. 1995). While *McArdle* was pending, a group of African-American sergeants challenged the 1994 lieutenant examination in federal court on disparate impact grounds. After a trial on the merits, Judge Gettleman held that the examination was valid and consistent with business necessity, but that the City failed to use a less discriminatory, equally valid selection device—namely, making 20% of lieutenant promotions **through** merit selection. *Brown v. City of Chicago*, 8 F. Supp. 2d 1095, 1110-13 (N.D. Ill. 1998), *aff’d sub nom., Bryant*, 200 F.3d at 1092.

While the lieutenant-promotion litigation was working its way through the courts, a group of African-American police officers filed a disparate impact challenge to the 1994 sergeant examination. After an evidentiary hearing, Judge Nordberg denied the plaintiffs’ motion for a preliminary injunction and permitted rank-order promotions to be made. *Adams v. City of Chicago*, No. 94 C 5727, 1996 U.S. Dist. LEXIS 3567 (N.D. Ill. Mar. 25, 1996), *aff’d*, 135 F.3d 1150 (7th Cir. 1998). Among other things, Judge Nordberg rejected plaintiffs’ proposals that cut-off scores and merit promotions be used as alternative selection mechanisms. *Id.* at \*47-49.

After the **1994** examinations that gave rise to *Adams* and *Brown*, the City empaneled a task force to reassess the police department's promotion processes. The task force's recommendations (including the **30%** merit component described below) were embodied in the 1998 sergeant examination that is the subject of the present litigation.

The selection process for sergeant promotions in August **1998** consisted of three components: **(1)** a written qualifying test, **(2)** an assessment exercise, and **(3)** a merit selection process. Only candidates who achieved a sufficiently high score on the written test were eligible for promotion either through the assessment exercise or through merit selection. Seventy percent of promotions were awarded to the highest scorers on the assessment exercise. The remaining 30% of positions were filled through merit selection, whereby trained command staff nominated up to a prescribed number of candidates (based on the number of officers supervised), a committee identified the most qualified nominees, and the Superintendent of Police ultimately selected from among this group.

**This** case is not the only challenge to the **1998** sergeant promotions. In *Barnhill v. City of Chicago*, **142 F. Supp. 2d 948** (N.D. Ill. 2001), a group of unsuccessful sergeant candidates, all white men, claimed that the merit component "was a **mask** for an illegal affirmative action program" and that it "had a disparate impact on 'non-minority males.'" *Id.* at **950**. Judge Pallmeyer eventually entered *summary* judgment in favor of the City on a combination of standing and substantive grounds.

Plaintiffs in the case at bar attack the promotion process from the opposite direction, arguing for expansion rather than elimination of the merit component. Subclass A consists of minority candidates who failed to pass the written test; Subclass B consists of minority

candidates who passed the written test, but nonetheless failed to be promoted. *Allen v. City of Chicago*, No. 98 C 7673, 2001 U.S. Dist. LEXIS 11103, at \*12-13 (N.D. Ill. Apr. 19, 2001).

Neither subclass alleges intentional discrimination. Rather, each asserts that the selection process had an impermissible disparate impact:

In a Title VII disparate impact case, the plaintiff bears the initial burden of establishing a prima facie case by showing that the promotional method in question had an adverse impact on minorities. If the plaintiff makes this required initial showing, the burden then shifts to the employer who must prove that the evaluation method is valid by showing that it is “job related” and “consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i). The evaluation method may be shown to be job related under any one of three tests: criterion related, content validity, or construct validity. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5B. If the employer succeeds in validating the evaluation method, the burden shifts back to the plaintiff to prove that there was another available method of evaluation which was equally valid and less discriminatory that the employer refused to use. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

*Bryant*, 200 F.3d at 1094. The Supreme Court and statute describe the last stage of this analysis as follows: the plaintiff must show “that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest[s],” *Albemarle*, 422 U.S. at 425 (internal quotation marks omitted), and that the employer “refuses to adopt such alternative employment practice.” 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

It is undisputed that the written test had a disparate impact on African-American candidates’ and that the assessment exercise had a disparate impact on both African-American and Hispanic candidates. The passage rates on the written test by race and ethnicity were: White,

---

<sup>2</sup>In light of the undisputed fact that the written test had no disparate impact on Hispanic candidates, plaintiffs’ request to modify the definition of Subclass A to exclude Hispanics is granted. *Cf. Allen*, 2001 U.S. Dist. LEXIS 11103, at \*12-13 (defining Subclass A to include both African-Americans and Hispanics).

90.8%; African American, 73.3%; Hispanic, 82.1%; and Other, 90.2%. The success rates on the assessment exercise were: White, 9.8%; African American, 3.4%; Hispanic, 3.1%; and Other, 5.7%. The merit selection component, on the other hand, had no disparate impact. The success rate for each group was between 2.7% and 3.0%. All three components of the selection process are conceded to be “job related” under the content validity method and “consistent with business necessity.” To succeed, plaintiffs must therefore show that there “was another available method of evaluation which was equally valid and less discriminatory that the employer refused to use.” *Bryant*, 200 F.3d at 1094.

Understanding the concept of validity is crucial in this case. As noted above, there are three acceptable methods of demonstrating validity:

Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

29 C.F.R. § 1617.5B (citations omitted).

Although there is no general preference under Title VII for one validation method, *Gillespie v. Wisconsin*, 771 F.2d 1035, 1041 (7th Cir. 1985), it has been said that

the conceptual core of validation is criterion validation. Tests are valid if, and only if, they predict performance, although content or construct validation may be cheaper and more convenient techniques to use. Content or construct validity are simply plausible predictions that true criterion validity would in fact exist if tested for.

Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 Harv. L. Rev. 1158, 1171 n.35 (1991). Selection mechanisms are instrumentally, not intrinsically, valuable. The mere fact that a test "is representative of important aspects of performance on the job" (as content validity requires) matters only because it is reasonable to suppose that such a test will usefully distinguish among candidates—in other words, that using the test in selection will likely lead to a better performing workforce. For example, it is often said that "a typing test given to prospective typists would be validated by the content validation method." *Gillespie*, 771 F.2d at 1040 n.3. The implicit assumption is that performance on a typing test is correlated with performance as a typist. If for some bizarre reason this assumption were false, then random selection would do as well and the test would not be valid, no matter how representative it might be of a typist's job duties. It is only because the past is a decent predictor of the future that the concept of content validity (or, indeed, validity generally) makes sense. Predictive validity is the gold standard—content validity, construct validity, and, given measurement error, even criterion-related validity are valuable only as proxies.

This general discussion leads to a more specific point. That a content-valid test can usefully identify a small percentage of outstanding candidates or usefully exclude a small percentage of unqualified candidates does not necessarily justify its use as a rank-order selection mechanism. *Guardians Ass'n of New York City Police Dep't v. Civil Service Comm'n*, 630 F.2d 79, 100 (2d Cir. 1980). The reason is that "content validity is not an all or nothing matter; it comes in degrees." *Id.*

This last point is fatal to plaintiffs’ motion. Subclass B argues that increasing merit promotions beyond the 30% ceiling would be an equally valid, less discriminatory alternative to the present system. Plaintiffs offer no specific percentage—the City assumed in its response that plaintiffs sought to **shift** entirely to merit selection; in their reply brief, plaintiffs use 35%, 40%, and 50% interchangeably. Even assuming that such a vague and indefinite proposal could qualify **as** an “alternative employment practice,” 42 U.S.C. § 2000e-2(k)(1)(A)(ii), plaintiffs’ proffered evidence does not conclusively establish that using the merit selection for more than 30% of promotions would be **as valid as** the present system. Plaintiffs rely solely on statements made by the City and one of its expert consultants to the effect that the merit selection process was “a substantially equally valid selection procedure.” (Pls.’ Rule 56.1 Statement ¶¶ IV.13 to ¶¶.15.) When each statement is read in context, however, it is perfectly clear that the City was comparing the content validity of the 30% merit selection scheme to the alternative of no merit selection, not to the alternative of 35%, 40%, or 50% merit **selection**.<sup>3</sup>

In effect, the City was claiming that the least qualified candidate promoted via the merit route was as about as likely to perform well **as a sergeant** as was the candidate with the lowest successful score on the assessment exercise. Because plaintiffs concede the validity of both selection methods **as** applied, to fill more positions through merit selection would necessarily diminish the validity of the overall process in the sense of reducing the expected performance of

---

<sup>3</sup>For example, the City’s answer to paragraph nine of the amended complaint states: “Defendant admits only that the merit selection process that was included in and used as part of the 1998 police sergeant examination process (including, but not limited to, the fact that the merit selection promotions were limited to less than 30% of all promotions and that the remaining promotions were based on the results of the assessment exercise component), was a substantially equally valid selection procedure.” (Def.’s Rule 56.1(b)(3) Resp. ¶ IV.14.)

the selected candidates. If, **as** plaintiffs suggest, each commander nominated six instead of five candidates for merit selection, the sixth nominee (assuming no ties) would be less qualified than the fifth or she would have been selected in the first instance. Perfect mathematical equality, however, cannot be the standard. A certain amount of imprecision is inevitable and must be tolerated if employers are ever to be permitted (or required) to adopt alternative practices. To succeed on an alternative employment practice claim, a plaintiff must show only that the actual practice and a refused alternative have substantially, not perfectly, equal validity. Plaintiffs here offer no evidence comparing the 30% merit selection regime to any alternative with greater reliance on merit selection. Indeed, plaintiffs admit that “[a]s the number of persons to be nominated increases, it becomes more and more difficult to select highly qualified people **and** the closer the system comes to facing the problems inherent in performance rating systems.” (Pls.’ Resp. Def.’s Rule 56 Statement ¶ 165.) Plaintiffs have clearly failed to demonstrate that they are entitled to **summary** judgment.

The City has cross-moved for **summary** judgment as to Subclass B. In deciding this motion, all reasonable inferences must be indulged in plaintiffs’ favor. A slight alteration in the present system would almost certainly have only a slight impact on overall predictive validity. The undisputed fact that merit selection and the assessment exercise had substantially equal validity at the 30% to 70% ratio suggests that they would have substantially equal validity at a slightly different ratio. It is also reasonable to infer from the fact that the merit selection component, unlike the assessment exercise component, had no disparate impact that a shift toward merit selection would reduce the overall disparate impact. But these inferences can be drawn whenever **an** employer partially modifies a selection system in order to alleviate a

disparate impact. *So* long as some disparate impact remains, the employer can be accused of not going far enough. Given the inherent imprecision of validation, defending a particular level of emphasis on the new component is a difficult task. There is a good reason Congress placed the burden of demonstrating a valid alternative on those who would challenge an employment practice, not on the employer. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). Otherwise, employers would have a powerful incentive not to consider, let alone expend resources validating, less discriminatory alternative practices: as here, the employer's own validation efforts could be used against it. At a minimum, challengers in such cases must specify a particular alternative practice to create a triable issue of fact. Plaintiffs here fail to meet even this minimal burden, so the City is entitled to *summary* judgment.

This conclusion is bolstered by the apparent reasonableness of the City's efforts to devise a less discriminatory alternative to pure rank-order selection based on the assessment exercise. The 1998 sergeant promotion system represents but one iteration in a process dating back at least to the 1970s. It is undisputed that the task force recommending the 30% figure knew that a 20% merit selection scheme had been successful in detective promotions, and that the task force considered 50% and 100% alternatives but were concerned about validity and practicality at those larger percentages. (Pls.' Rule 56 Statement ¶ V.05.) Plaintiffs' characterization of the 30% figure as "arbitrary" is dubious at best. (*Id.*) In any event, the EEOC regulations appropriately recognize that a certain degree of arbitrariness is inevitable, explaining that reasonable consideration of alternatives should generally immunize a valid selection system from immediate disparate impact challenges. "If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these

guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency.” 29 C.F.R. § 1607.3B; *see also Watson v. Ft. Worth Bunk & Trust*, 487 U.S. 977,999 (1988) (opinion of O’Connor, J.) (“In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that courts are generally less competent than employers to restructure business practices, and unless mandated to do *so* by Congress they should not attempt it.”) (internal quotation marks omitted). The City has already (successfully) defended itself against claims that merit selection amounted to affirmative action and that the overall scheme imposed a disparate impact on whites. That both minority and non-minority officers are upset is itself indicative of reasonableness.<sup>4</sup>

The City’s motion for summary judgment as to Subclass A requires less analysis. Subclass A, which consists of African-American officers who failed the written test, does not challenge the written test generally,<sup>5</sup> only its use as a prerequisite for merit promotion. The

---

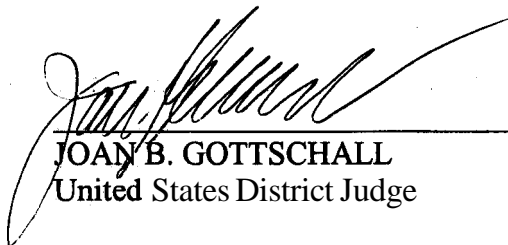
<sup>4</sup>It is worth noting the City chose to emphasize merit selection *more* heavily in sergeant promotions than the level that had proven successful in detective promotions, which tends to undermine plaintiffs’ contention that it did not go far enough.

To be clear, nothing in this opinion should be taken to suggest that **30%** is the **only** defensible level, only that the City has in fact adequately defended it against plaintiffs’ attack. The City can and should reexamine its sergeant promotion system with reasonable regularity. 29 C.F.R. § 1607.3B

<sup>5</sup>In their response to the City’s fact statement, plaintiffs argue that the choice of passing score on the written test was not supported by empirical data and that choosing a lower cut-off would have minimized the disparate impact. (Pls.’ Resp. Def.’s Rule 56 Statement ¶ 90.) Plaintiffs cite no record evidence to support this argument, refer to this argument nowhere in their briefs, and do not attempt explain the inconsistency with their express disavowal in a response to interrogatories of any intent to litigate the passing score issue. (Def.’s Rule 56.1(b)(3)(B) Statement Ex. 7 ¶ 5.) This argument is waived. Even if it were not, plaintiffs have not even argued that using a lower cut-off score would result in a process as valid as the present system.

undisputed facts, however, foreclose this claim. As noted above, the written test is conceded to be content valid, job-related, and consistent with business necessity. (Pls.' Resp. Def.'s Rule 56 Statement ¶ 70.) It is also undisputed that the merit selection process does not purport to assess specific job knowledge as is measured on the written test and "was not designed nor was its validity supported as a stand-alone procedure." (Id. ¶¶ 167, 168.) It necessarily follows that a merit promotion scheme without the written test would be less valid than the present process. The reduction in validity (as with an increase in the 30% figure) could be insubstantial, but based on the present record that is pure speculation. All of the statements in the record concerning the validity of the merit selection component assume that it will be used in combination with the written test. There is simply nothing in the record from which one can reasonably infer the merit component's stand-alone validity. The City's motion for summary judgment as to Subclass A is therefore granted.

ENTER:



---

JOAN B. GOTTSCHALL  
United States District Judge

DATED: September 30, 2002

**United States District Court**  
**Northern District of Illinois**  
Eastern Division

**DOCKETED**  
**SEP 30 2002**

Percy Allen, et al

**JUDGMENT IN A CIVIL CASE**

v.

**Case Number: 98 C 7673**

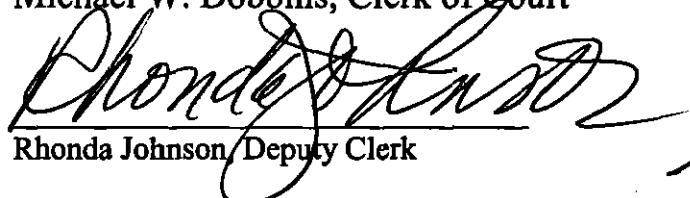
**City of Chicago**

- Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that **summary** judgment is entered in favor of Defendant, City of Chicago and against Plaintiffs. Subclass B Plaintiffs' motion for **summary** judgment on liability is denied. **Subclass** A is redefined to include only African American officers.

Date: 9/30/2002

Michael W. Dobbins, Clerk of Court

  
Rhonda Johnson, Deputy Clerk