

Fitness Standards: Developing effective and legal tests for public safety professionals

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Abstract

Over the last century, public safety professionals have made extensive and frequent changes both to their duties and to the fitness standards required to attain and maintain these esteemed roles. When such yardsticks accurately measure the ability to perform essential job functions, first responders are safer and more effective. Irrelevant or inaccurate assessments, however, can result in reduced trust and collaboration during emergencies, endangerment of life or property, and extensive litigation. Only departments with a keen awareness of this landscape can avoid these pitfalls by crafting fitness paradigms that are legally defensible.

Introduction

On the morning of November 15, 1982, a District of Columbia Metropolitan Police Department officer arrived in plain clothes and an unmarked car at a home in suburban Maryland to ascertain the whereabouts of a suspect who had an outstanding warrant for armed robbery.¹ To the officer's surprise, the suspect was inside the residence and agreed to accompany the officer to the station. After changing clothes, however, the suspect slipped out through a bedroom window and attempted to commandeer a nearby vehicle.

1. In *Parker v. District of Columbia*, 850 F.2d 708, the criminal charges against the suspect were eventually dropped. (D.C. Cir. 1987).

Believing, incorrectly, that the suspect was armed and actively threatening the driver of the car, the officer ordered the suspect to freeze. As the suspect turned towards him, the officer fired four shots, striking the suspect in the abdomen and spine.

During the ensuing litigation against the district, the officer's physical fitness was put on trial. Noting that he had not received any physical training for four years prior to the incident and was simply "not in adequate physical shape," the court ruled that the officer posed a foreseeable risk of harm to others. Because the district's deficient physical training program was found to be the immediate cause of the suspect's injuries—"[H]is most effective method for subduing the objects of his pursuits would be the use of a firearm as opposed to the application of physical force"—it was liable to the full extent of the jury verdict.²

Despite happening more than three decades ago, the case's legacy continues.³ It and its progeny stand for the proposition that departments with lax or no fitness standards can be found negligent through their deliberate indifference.

Implementing extremely demanding physical fitness standards is no panacea for a department's litigation woes, either. Hiring and retention of personnel becomes more difficult with each added requirement. Individuals willing to meet the challenges of the profession and who are otherwise qualified can be excluded by a higher physical measure. If standards are based on, relative to, or disparately impact members of a protected class,⁴ then rejected applicants may allege discrimination under state or federal law. By validating that fitness criteria are tied to actual job requirements, however, departments can strike the delicate balance between under-exclusivity and over-exclusivity, avoiding liability altogether.

Fit responders save more lives

Ensuring that a public safety professional is capable of performing essential job functions directly impacts the well-being of everyone from the individual and department peers to the community they serve. These risks are applicable to new hires and incumbents alike, but relatively few departments have continued requirements of the latter group.⁵ Team members with poor fitness are harder to trust in critical moments, and this level of trust is directly tied to team performance and success.⁶

Though some may believe that the daily demands of the job will be enough to maintain adequate levels of fitness, this is a faulty and dangerous assumption. A study by the Cooper Institute for Aerobics Research found

2. The \$425,046.67 award, adjusted for inflation, would be more than \$1 million today (Bureau of Labor Statistics, 2015).
3. For instance, a suspect shot in the back while fleeing on foot sued under the theory that the officer's poor physical condition prevented him from using less-lethal force in apprehension *Hutton v. City of Martinez*, 219 F.R.D. 164 (N.C. Ca. 2003).
4. Protected classes include those based on race, color, religion, national origin, age and disability.
5. Though large fire departments are more likely to maintain a general fitness and health program, 70 percent overall do not (Hofman, 2012).
6. When dangerous calls were more frequent, trust in high-reliability tasks proved a more positive predictor of performance (Colquitt, LePine, Zapata & Wild, 2011).

that, compared with the general population, officers' average fitness levels are below normal in aerobic fitness, body fat, and abdominal strength.⁷

Beyond the nature of public safety—the work is mostly sedentary, with intermittent periods of extremely high exertion—one causal factor of poor fitness is aging. Physical strength, lung capacity, the five senses, and reaction speed all naturally decline over time,⁸ resulting in up to a 32 percent reduction in performance levels after 16 years.⁹

Poor fitness may cause officers to react as if deadly force is the only option in an encounter. While this presents a real risk to the public, its frequency pales in comparison to the personal exposure of first responders on a daily basis. Out-of-shape personnel are significantly more likely to have work-induced medical problems. Accordingly, more than 25 percent of EMTs and paramedics suffer career-ending injuries within their first four years,¹⁰ and 14 percent of police officers are forced to take early retirement for medical reasons.¹¹ Moreover, the FBI has revealed that offenders are more prone to attack weak officers.¹² The best way to prevent these injuries and deaths, according to research by the California POST, is through proper training and standards.¹³

Investing in a fitness program pays immediate dividends by curtailing these incidents, litigation, and related costs. An in-service heart attack for a law enforcement officer typically costs a department between \$400,000 and \$700,000,¹⁴ and the estimated annual cost of firefighter injuries is between \$2.8 and \$7.8 billion.¹⁵ As such, there is a lower average cost of workers' compensation claims in departments with fitness programs.¹⁶

Avoiding discriminatory practices are equally important, as settlements and verdicts can represent a sizable portion of a department's annual budget: two physical agility tests having a disparate impact on women recently resulted in payouts of \$700,000¹⁷ and \$2 million.¹⁸

Recognizing this multi-faceted role that fitness plays in the lives of first responders, some accrediting bodies delineated their own requirements for these programs.¹⁹ As public safety continues to evolve and the benefits of these programs become more pronounced, others will certainly follow.

Modern fitness standards are shaped by litigation

Much like the military, the public safety sector traditionally enlists young and middle-aged men to risk their lives in the service of others. With the women's rights movement and increased life expectancies, others willing and able to bear that responsibility began vying for public safety careers.

7. Officers were also just average in upper-body strength and lower-back flexibility (Quigley, 2008). Moreover, when 4,524 California Highway Patrol officers were subjected to a wellness program, many were found to be overweight or obese (Gaines, 1993).
8. Through most of the 19th century, employees continued until they could no longer work (Worsnop, 1997).
9. Despite slower reaction times, an analysis of more than 2,000 published studies revealed a relatively low correlation between age and officer death (Lagestad, 2014; Landy, 1992).
10. Approximately 50 percent of EMS professionals suffer from chronic back pain, and are seven times more likely to miss work due to injury (NAEMT, 2012).
11. An additional 6 percent die while employed as officers (Cooper, 2005).
12. FBI interviews revealed the deciding factor was whether the offender believed they could "take them" (Quigley, 2008).
13. This arises from a 1994 follow-up study of physical abilities (Lonsway et al., 2003).
14. The smallest percentage of officers who are the least fit comprise the majority of compensable injuries (Quigley, 2008).
15. While not all of these costs are preventable, there is a "known positive impact that fitness has on injury prevention" (TriData Division, 2005).
16. The average claim in departments with annual assessments was \$677.54, compared to \$2795 for those without. The difference in the number of claims filed, however, was not statistically significant (Allen, 2005).
17. In *U.S. v. City of Corpus Christi*, No. 2:12-cv-00217 (S.D. Tex. 2012).
18. In *Vasich v. City of Chicago*, No. 1:11-cv-04843 (N.D. Ill. 2013).
19. CALEA requires a fitness or wellness program for department accreditation (FitForce, 2013), and NFPA set standards on health-related fitness programs for fire departments (NFPA, 2015).

Departmental and legislative responses to these societal changes varied widely. Regarding the tenure of older workers, Congress began by enacting the Civil Service Retirement Act of 1930. This law, characterized as a reward for years of service, granted early retirement for aging FBI agents.²⁰ This voluntary program was eventually expanded in 1948 for all federal employees with law enforcement duties. When Congress enacted the Age Discrimination in Employment Act of 1967, it seemingly reinforced the notion that elderly workers served a valuable role, not only in public safety, but also in the national workforce generally.

They reversed course in 1974, however, by implementing a mandatory retirement system for federal law enforcement officers and firefighters beyond age 55 with more than 20 years of service. In 1986, the Age Discrimination in Employment Act was amended to provide that public safety personnel in particular should not be entitled to its protections. When this provision lapsed after seven years, Congress worked quickly to permanently reinstate it.

Today, federal law enforcement and firefighters must retire at age 57, while state or local laws requiring mandatory retirement for public safety personnel aged 55 or older are presumptively valid.²¹

Likewise, sex discrimination became a driving force behind fitness standards. Because policies could not explicitly state that officers must be male, departments began instituting height and weight requirements to effectively accomplish that goal. By 1956, 85 percent of departments had a height requirement.²² The Supreme Court eventually rejected this practice,²³ and that in conjunction with Title VII of the Civil Rights Act of 1964 led to a search for more pragmatic and gender-neutral solutions.

Steadily, most departments began linking fitness requirements to either physical agility tests or health-based screening.²⁴ While either of these may involve the performance of simulated job tasks (e.g., body drag) or representative muscle-group tests (e.g., push-ups), the primary difference between them is that health-based standards vary by age and gender.

As outlined herein, a fitness test is an effective and legal device for screening first responders only when designed and implemented in a particular way. To demonstrate the need for careful navigation, consider that the 1991 Amendments to Title VII prohibit the use of testing mechanisms with a disparate impact on women. Stated otherwise, if women fail a physical agility test at a higher rate than men, it may violate federal law.

20. The legislation also served to stabilize the FBI into a career service (Fox, 2000).

21. Mandatory retirement applies to those in covered positions. An exemption up to age 60 is granted if less than 20 years of service have been completed. 29 USC § 623(j).

22. The average requirement was 5'8" tall (Lonsway, 2003).

23. In *Rothard v. Rawlinson*, 433 U.S. 321 (1977).

24. Fitness tests are used by 89 percent of police departments (Lonsway et al., 2003) and 84 percent of fire departments for hiring purposes (Pope, 2006). Smaller departments are more likely to rely on screening at the academy level (*Eison v. City of Knoxville*, 1983), with as few as 24 percent of police departments using fitness tests in communities having a population under 2,500 (Hickman & Reaves, 2003).

However, if different cutoff scores in health-based screening attempt to compensate for these rates, a department may run afoul of § 106 of the same law.²⁵ Reconciling these provisions is a worthwhile endeavor, but remains something few departments have achieved.

Maintaining status quo invites discrimination lawsuits

While administrators often have the mistaken belief that there is an inverse relationship between a selection process's ability to accurately predict job performance and its lawfulness, crafting effective and permissible standards are not mutually exclusive. Nevertheless, fitness tests have proven to be legally risky when created or administered in a discriminatory fashion.²⁶ By comparing how departments currently operate to industry best practices, common areas of concern can be highlighted.

Even though the most common tasks performed by first responder professionals do not involve physical exertion, the primary goal of training and fitness should be to ensure that first responders are able to get to, control and remove a public safety problem.²⁷

Disciplines tend to vary on whether these capabilities are assessed through generic exercises or simulations. The former method tends to be preferred in law enforcement, where testing procedures and cutoff scores vary widely on a department-by-department basis.²⁸ The latter method is used predominately in firefighter testing, with the CPAT implemented by more than 1100 departments nationwide.²⁹

Aside from using the collective expertise of the first responder network, national standards provide departments with better top cover from litigation. Although budget concerns impaired immediate adoption by small fire departments,³⁰ CPAT's debut in 2006 directly correlates with a decline in the number of discrimination lawsuits filed (*see Figure 1*).

This effect may be attributable, at least in part, to the fact that 68 percent of women pass the CPAT compared to only 49 percent on other fitness tests. In determining whether or not to invest in a national test, departments should factor in the savings from defending fewer lawsuits and the increased likelihood of courtroom success for the cases that are filed.

For instance, in *United States v. Wichita Falls*, a federal district court upheld a police department's physical assessment because it was a "**nationally accepted** and popular test for determining the general fitness of an individual" that "accurately identify[d] characteristics necessary to perform a job."³¹ The court suggested that the test would be even better if it had "taken a true national sampling [of] general physical health."

25. "It shall be unlawful employment practice for a respondent, in the connection with the selection or referral of applicants or candidates for employment or promotion, to...use different cutoff scores for... employment related tests on the basis of... sex[.]"

26. Fitness tests produce 3.5 times as much litigation as would be expected from their frequency of use (Terpstra, 1999).

27. The most frequent tasks are sitting, standing, walking, climbing stairs, manipulating objects, twisting & turning, pushing & pulling, running, bending or kneeling, lifting, and carrying (Anderson, 2001).

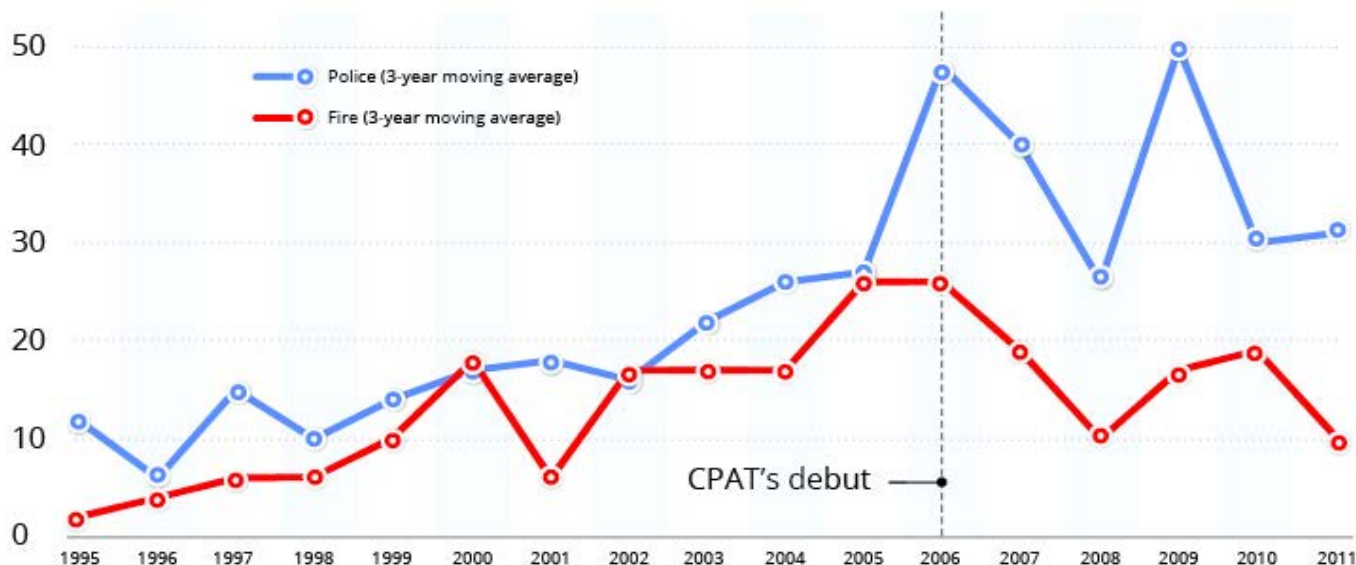
28. A compilation of the minimum standards across 77 federal, state, and municipal agencies showed ranges of 14:40 to 15:54 for completing the 1.5 mile run, 64.3 to 66.0 seconds for completing the 300 meter run, 151 to 165 pounds for the freeweight bench press (or 78 percent to 84 percent of body weight), 25 to 34 push-ups, 30 to 38 sit-ups, and 15.5 to 16 inches for the vertical jump (The Cooper Institute, 2004).

29. Developed by IAFF/IAFC in conjunction with 10 leading fire departments, the Candidate Physical Ability Test requires firefighters to perform a stair climb, hose drag, equipment carry, ladder raise & extension, forcible entry, rescue drag, search, and ceiling breach within the prescribed time limit (IAFF, 2006).

30. In Iowa, for example, less than 1.5 percent of departments use CPAT, well below the national average of 21 percent. As a result, more than half use home-grown tests and standards. 24 percent have tests developed from outside sources (Kiernan, 2013).

31. 704 F. Supp. 709, 715 (N.D. Tex. 1988) (emphasis added).

Fitness Test Lawsuits Against Police and Fire Departments



Regardless of the selection device, departments must ensure that cutoff scores are not assigned arbitrarily. Plaintiffs in sex discrimination lawsuits do not need to demonstrate that tests were developed or administered with any bad intentions, but rather only allege that a disproportionate number of men or women failed.³² On average, departments with physical fitness testing have 31 percent fewer sworn women, so this is often the case.³³

Recognizing that equal passing rates are practically impossible to attain, the Equal Employment Opportunity Commission, Department of Justice, Department of Labor, and Department of the Treasury established a bright-line rule that they would not sue departments when a disadvantaged group passes at least 80 percent as often as the favored group.³⁴

Prior to 1991, health-based standards were particularly appealing because passing rates could be equalized with gender-normed scores. That year, however, Title VII was amended to prohibit this practice for employment-related tests.³⁵ What options do departments have when passing rates between men and women would otherwise vary significantly?

First, a department can elect to have a single set of standards, even if it has a disparate impact, upon demonstrating that the requirements are consistent with business necessity.³⁶ Thus, departments must show that the inability to meet a certain aerobic threshold or perform a simulated task would significantly jeopardize public safety.³⁷

In *U.S. v. City of Erie*, a federal court rejected a police fitness test that disproportionately disqualified women after the department failed to

Figure 1. Raw number of fitness test lawsuits against police and fire departments relative to CPAT's release in 2006. Data may not include all settlements or state court cases (LexisAdvance, 2015).

32. Departments bear the burden of proof in demonstrating that there is no disparate impact (Brooks, 2001).

33. Other research supports this finding that use of physical agility tests as part of the selection process adversely impacts gender representation in law enforcement agencies (Lonsway, 2003).

34. (EEOC, 1979). Conversely, the Department of Justice recently filed suit against Pennsylvania, where men passed a fitness test 90 percent of the time compared to 70 percent of women. *U.S. v. Commonwealth of Pennsylvania*, No. 1:14-cv-01474 (M.D. Pa. 2014).

35. See footnote 9, supra. 42 U.S.C. § 2000(e)-2(l).

36. 42 U.S.C. § 2000(e)-2(k)(1)(A)(i).

37. In *Lanning v. Southeastern Pennsylvania Transportation Authority*, 308 F.3d 286 (3d Cir. 1999).

demonstrate that its sit-up and push-up thresholds were absolutely necessary to successful job performance.³⁸ Likewise, another federal court held that completion of a 1.5 mile run with a disparate impact on women was not shown to be essential for work at a correctional facility.³⁹ However, a 1.5 mile run was upheld as being consistent with business necessity when a department was able to show how frequently their officers were required to perform this task while in uniform, and that officers meeting the timing requirements were able to make arrests that otherwise would not have been made.⁴⁰

Second, a department can maintain gender-normed standards if they can demonstrate that gender is a bona fide occupational qualification (“BFOQ”).⁴¹ This narrow exception requires that “a job qualification . . . relate to the essence, or to the central mission of the employer’s business.”⁴²

The FBI’s gender-normed standards were recently challenged under Title VII in federal court after a male applicant failed the test when unable to complete the requisite number of push-ups for his gender.⁴³ Because the FBI did not test incumbent agents, it could not demonstrate that the separate cutoffs for men and women were linked to actual performance. As they offered no support that different requirements advanced its central mission, the FBI lost.⁴⁴

In many ways, however, increasing female employment as first responders does promote greater public safety. Female police officers, on average, are better at handling domestic violence situations. This is due to better communication skills, fewer targeted insults and threats than male officers, and a lower risk to engage in misconduct or be sued.⁴⁵ These benefits do not necessarily involve any trade-offs, as research has consistently shown that women are just as successful in duty, are equally capable of patrol requirements, and that strength does not translate to an ability to handle dangerous situations.⁴⁶

Likewise, disallowing the employment of officers beyond the federally-permissible mandatory retirement age has its drawbacks. Laws or policies that force out the most knowledgeable and experienced responders are predicated on stereotypes depriving departments of invaluable resources. Motivated senior citizens actually have greater aerobic capacity than sedentary 40-year-olds and, on average, officers older than 60 years old are in better physical shape than those between ages 50 and 59.⁴⁷

As has been noted by many authorities, public safety is best served by a testing regimen, not age limitations.⁴⁸ The Age Discrimination in Employment Act provided that old-but-fit officers should be able to take a

38. 411 F. Supp. 2d 524 (W.D. Pa. 2005).

39. In *Easterling v. State of Connecticut*, 783 F. Supp. 2d 323 (D. Conn. 2011).

40. *Lanning*, 308 F.3d 286. Firefighter tests having a disparate impact have also been upheld upon a showing of necessity. *Berkman v. City of New York*, 812 F.2d 52 (2d Cir. 1987); accord *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990).

41. Specifically, 42 U.S.C. § 2000e-2(e) provides that “it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . in those certain instances where . . . sex . . . is a [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise[.]”

42. In *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

43. The number of push-ups would have been sufficient under the cutoff scores for a female. *Bauer v. Holder*, No. 1:13-cv-93 (E.D. Va. 2014).

44. Shortly after the opinion was issued, FBI director James B. Comey circulated a memo notifying incumbent agents that they would be subject to annual fitness tests moving forward. The test consists of sit-ups, push-ups, a 300 meter run, and a 1.5 mile run. As each still has age- and gender-normed cutoffs, it must be assumed that the FBI stands ready to defend gender as a BFOQ (Schmidt, 2015).

45. Despite comprising 12.7 percent of large agencies, 8.1 percent of rural agencies, and 14.4 percent of federal agencies, women are responsible for only 5 percent of excessive force complaints, 2 percent of sustained allegations, and 6 percent of the money spent on litigation and settlements (Lonsway et al., 2003; Lonsway, 2003).

46. Perhaps in recognition of these benefits, FDNY recently lowered its physical testing requirements to grow its number of female firefighters (Gonen & Short, 2014).

47. Survival of the fittest is the most-cited theory to explain this phenomenon (Edwards, 1993).

48. (Landy & DeBusk, 1992). The GAO has been critical of age limitations, stating that aging is a poor predictor of physical or mental performance (Roybal, 1984).

test to allow them to continue working past the mandatory retirement age. However, the National Institute for Occupational Safety and Health has never appropriated the requisite funds from Congress to create that test.⁴⁹

Existing standards may also unfairly discriminate against those with disabilities. Section 102(a) of the American with Disabilities Act of 1990 provides that departments shall not “discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employee, employee compensation, job training, and other terms, conditions, and privileges of employment.”

The primary applicability of the ADA is in the context of health-based screening standards, because health is relative to the norm.⁵⁰ Notably, § 103(a) of the ADA provides a complete defense if the “qualification standards, tests, or selection criteria . . . [have] been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.” Thus, departments must develop descriptions for jobs that encompass its essential functions and incorporate that into a proper screening format.⁵¹

Implementing new standards can be challenging

To ensure that fitness standards or tests will accurately identify candidates’ abilities to perform essential job functions, departments must conduct a two-tiered analysis.

First, the tasks must be representative of the skills demanded of the position. Field exercises or simulated events—such as climbing stairs to test the ability to climb stairs on the job—certainly demonstrate this criterion-based validity, but may be impractical for some purposes. Danger is inherent in the duties of first responders, and exposing candidates to such risks is unwarranted if safer, predictive alternatives exist.⁵²

As the testing activity becomes more attenuated from the skill it intends to measure (e.g., using maximum heart rate to determine ability to climb stairs), departments must have evidence that the two things really are linked. To this end, much of the groundwork is already done if departments choose common testing mechanisms. An aggregation of validation studies shows that aerobic power (as measured by the 1.5 mile run), anaerobic power (300 meters), upper-body absolute strength (bench press), upper-body muscular endurance (push-up), abdominal muscular endurance (sit-up), explosive leg power (vertical jump), and agility (Illinois

49. Officers challenging the mandatory retirement provisions because no test was available were unsuccessful, with the court noting that there was “no indication that Congress intended that the exemption lose its legal force if the EEOC failed to propose guidelines.” *Police Benevolent Ass’n of the N.Y. State Troopers v. Bennett*, 477 F. Supp. 2d 534 (N.D.N.Y. 2007).

50. A recent applicant for the Pennsylvania State Police, dependent on hearing aids since age 4, was denied employment due to his inability to pass the hearing test without them. Comparatively, prospective officers were allowed to use eyeglasses for the vision test. Though the disability discrimination lawsuit was dropped after the plaintiff was hired by a nearby sheriff’s department, this case represents an additional angle public safety employers must take under consideration in crafting standards. *Furman v. Pennsylvania State Police* (M.D. Pa. 2010).

51. Gaines, Falkenberg and Gambino suggested a strategy for developing acceptable physical agility screening to overcome such problems (Gaines, 1993).

52. The NFPA reports one exertional heat stroke death per year, sometimes afflicting trainees (NIOSH, 2010). As a result of general testing dangers, some fire departments have started to use other validated measures of fitness. The Texas Department of Public Safety uses the Concept2 Rower to measure the amount of oxygen utilized per minute (VO2 max) to predict endurance. Candidates can choose traditional screening methods or can row 2000 meters on the low-impact device.

run) are predictive factors that determine first responders' capabilities of performing essential physical tasks.⁵³

Second, the cutoff scores on the tests must provide a meaningful distinction between capable and incapable individuals. This can be a difficult process. To be consistent with federal law, as summarized by the "Uniform Guidelines on Employee Selection Procedures," a department must start with a representative sample of incumbents, adjust the scores for the gap in experience between incumbents and applicants, remove outliers, correct for sampling error, account for test reliability, and combine the computation values for both.⁵⁴

In *Blake v. City of Los Angeles*,⁵⁵ the LAPD conducted two separate validation studies that were found to be insufficient:

The first study attempted to correlate performance on the five events used in the physical abilities test with 11 measures of success during Policy Academy Training. The study found that four of the five events used in the physical abilities test had some significant correlation with at least seven of the 11 measures of training success. The second study concluded that performance on the physical abilities test had some significant correlation with performance of foot pursuit, field shooting, and emergency rescue simulations.

However, because the studies excluded candidates who had failed the test, they could not possibly demonstrate that the test excluded those persons who would be unsuccessful officers. Likewise, in *United States v. City of Erie*⁵⁶, a federal court was critical of a validation study that averaged a non-representative sample of 19 volunteers who were performing their jobs at least adequately. Instead, the department should have determined the scores that distinguished successful from unsuccessful incumbents, and used those to select the appropriate applicants.

Validation studies can also be expensive.⁵⁷ In an attempt to avoid these costs, some departments apply another agency's standards outright.⁵⁸ This practice has the least amount of defensibility when challenged in a courtroom since the copycat department needs not only to substantiate how and why the standards were developed, but also why these measures are relevant to its personnel. A better practice, then, is to conduct a transferability study to establish that your department has a strong degree of similarity to an agency that already has validated standards. This not only promotes more consistent and effective testing for first responders, but eliminates the need for departments reinvent the wheel by conducting costly and duplicative validation research. These benefits are shared as each new department comes onboard. Thus, perhaps the best and most cost-

53. Analysis of 15 years of fitness data is supported by 34 prior physical performance studies involving over 5,500 incumbent officers across 75 agencies (Collingwood, Hoffman, & Smith, 2004).

54. While 88 percent of fire departments use physical agility tests to pre-screen firefighters, only 25 percent include PATs as part of annual maintenance (Bell, 2013).

55. 595 F.2d 1367 (9th Cir. 1979).

56. 411 F. Supp. 2d 524, 570 (W.D. Pa. 2005).

57. A study of police and firefighter testing found that criterion-related studies ranged from \$24,000 to \$673,000 and content validity studies ranged from \$8,000 to \$1,245,000 (Outerbridge, 1979).

58. Options less expensive than validation, such as transferability studies or applying another agency's absolute standards, may prove costly in terms of legal defensibility (The Cooper Institute, 2004).

effective practice—as informed by case law⁵⁹ and the success of the CPAT in the firefighting industry—would involve the creation of nationally-validated standards for all other domains of public safety.

Though the checkbook represents the first obstacle departments must clear in implementing defensible fitness standards, it is certainly not the only one. While incumbent officers and firefighters strongly favor physical testing for new hires (90 percent and 87 percent, respectively), substantially fewer want to be tested themselves (47 percent and 20 percent).⁶⁰ On a similar note, only 53 percent of police support mandatory retirement.⁶¹ By opening a dialogue regarding the benefits of proper fitness and soliciting feedback about proposed changes, administrators can try to stage transitions without losing this key source of support.

Conclusion

First responders are entrusted with upholding the law and protecting lives, so it is only proper that they should adhere to stringent fitness standards befitting that great responsibility. Nevertheless, a department using single cutoff scores on its fitness tests must recognize the disparate impact this practice may have on older or female recruits. Departments will only survive the scrutiny of a discrimination lawsuit if the cutoff is actually linked with successful performance.⁶² Alternatively, a department using gender- or age-normed cutoff scores must be prepared to argue that employing more members of the protected class relates to the essence of public safety.

Regardless of the exact mechanisms, standards are always legally defensible if they are designed and proven to measure the ability to complete essential job functions. Validation studies, though, can be prohibitively expensive for many departments. Inappropriate standards not only make departments more susceptible to litigation, but also lower the quality of their workforce.

The development of national standards, as indicated by case law and supported by the success of the CPAT, is a simple premise that may bridge the divide between effective and cost-effective public safety testing. By investing resources in fitness, aligning with national standards as they become available, and challenging the status quo, departments can establish themselves at the forefront of their respective industries in the twenty-first century and beyond.

59. See note 31 above.

60. Interestingly, slower personnel who only barely managed to pass the tests themselves actually want future applicants to have less time (Bissett, 2012; Bell, 2013).

61. Allowing officers to work past 55 years old may compromise state pension systems, but some contend that if crafted carefully, pensions themselves can create an incentive to retire at the appropriate time (Reader Polls, 2010; Worsnop, 1997; Gokhale, 2004).

62. Thus, if recruits are required to complete x number of push-ups, a department must be prepared to show, at a minimum, that incumbent officers able to reach that threshold are effective, and that incumbent officers unable to reach that threshold are ineffective.

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