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PHYSICAL ABILITIES TESTING: A REVIEW OF COURT CASES, 1992-2006

A Thesis
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By

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PHYSICAL ABILITIES TESTING: A REVIEW OF COURT CASES, 1992-2006

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Selection procedures are designed with the goal to select the most qualified applicant for the job. A variety of selection tests are used in organizations today, including physical ability tests, which are often used in police agencies and fire departments. A total of 22 physical ability testing cases at the Appellate and Supreme Court level were identified to be included as part of a review to examine the outcome of litigation. Of the 22 cases, only 6 cases involved a female plaintiff, while 1 involved a Hispanic plaintiff. There were five race-based claims and nine gender-based claims (three of the gender-based were reverse discrimination cases). There was not a statistical difference between the number of race-based and gender-based claims. Only six cases had information regarding whether the test had been validated (four were validated, two were not). The courts ruled in favor of the defendant in the four cases where the test was validated. In all 22 cases, public safety was found to be an issue of concern. Of the 22 cases, 15 found for the defendant, 2 found for the plaintiff, and 3 were remanded, indicating that when public safety is a concern the defendant is likely to prevail. It was hypothesized that the courts would rule in favor of the defendant when the selection test was a work sample or job simulation versus a pure ability test. This hypothesis was not supported. For 20 of the 22 cases, no information was provided whether practice was
offered to the applicant prior to testing. In the two cases where practice was offered, the defendant prevailed.
Introduction

There are a variety of selection tests that are used to make employee decisions in organizations today. The type of selection test utilized by an organization typically depends on the job in question. Police officer and firefighter job applicants often are required to pass a physical abilities test (PAT) in order to be selected for a position. According to one national study, 97% of fire departments in the USA have physical performance requirements for hiring (Sothmann, Gebhardt, Baker, Kastello, & Sheppard, 2004). Organizations must be aware of the potential legal implications related to the selection procedures they choose to employ. Less favorable applicant reactions may be associated with the use of PATs and applicant reactions may be related to the likelihood of litigation (e.g., Ryan, Greguras, & Ployhart, 1996; Terpstra, Mohamed, & Kethley, 1999).

History of PAT

Arvey, Nutting, and Landon (1992) indicated police agencies and fire departments once used general height and weight requirements as a standard for selecting job applicants prior to the Civil Rights Act (CRA) of 1964. Subsequent to the CRA, agencies were required to show evidence that these standards were job related. Due to the adverse impact that these requirements resulted in for certain applicants, particularly females, there was a shift from general physical requirements to the use of PATs after agencies failed to show the job relatedness of height and weight requirements (Dorthard v. Rawlinson, 1977). Physical ability tests, however, result in adverse impact against the same protected groups that are most adversely affected by the height and weight standards (Maher, 1984).
Title VII protects minorities and females from employment practices that discriminate against them (Hollar, 2000). Physical ability testing results in adverse impact against females, as well as Hispanics and Asians, such that a much higher percentage of these applicants are screened out. This has resulted in litigation and legal scrutiny regarding the use of PATs for selection (Arvey et al., 1992). Physical ability tests have been used to measure several major physiological constructs including muscular strength, cardiovascular endurance, and movement quality (Hough, Oswald, & Ployhart, 2001). Hough et al. reported mean-score differences between men and women on physical abilities. Men, on average, scored higher than women did on muscular strength ($d = 1.66$), and cardiovascular endurance ($d = 1.09$). Women, however, scored higher on movement quality, which included flexibility, balance, and coordination ($d = .20$). Sothmann et al. (2004) observed that females scored significantly poorer than males on all tests in the predictor test battery for firefighters, which included arm endurance, arm lift, dummy drag, and hose drag/high rise pack. No ethnic differences were found across the tests. Additionally, in a research sample of 1,181 applicants for deputy sheriff, 93.2% of males passed compared to 16.2% of females. However, Maher (1984) noted that policewomen have been found to be as capable as or better than men at handling violent situations. Arvey et al. (1992) added that females do relatively better on tests of endurance rather than strength. Tests may be weighted more heavily on strength rather than endurance, therefore unfairly screening out qualified female applicants who tend to be smaller in stature and possess less strength compared to male applicants.

Cutoff scores are often used to make a distinction between what is consider acceptable versus unacceptable performance on a selection test (Guion, 1998). If the
score is too high, it could have adverse impact on certain groups of qualified job applicants, such as females. If the score is set too low, issues of public safety come into play. For example, a firefighter who is physically incapable of carrying a person out of a burning building creates a public safety concern (Biddle & Sill, 1999). Hollar (2000) indicated that a cutoff score is unacceptable unless it is demonstrated to measure the minimum qualifications necessary for successful performance on the job in question. If a selection procedure has adverse impact against a protected group, legally the organization may be required to search for an alternative method that is equally valid with less adverse impact (Uniform Guidelines on Employment Selection Procedures, EEO 1978). This requirement leads many organizations to feel that their choice is either to use a highly predictive selection device that is legally defensible but risky because of adverse impact, or to use a less predictive selection device with no adverse impact and less risk of litigation (Terpstra et al., 1999).

Types of PATs

Different forms of PATs can be used to select candidates. There are three common forms of PATs: job simulation exercises, physical agility and/or stamina tests, and physical fitness or wellness tests. A combination of these forms may also be used (Hoover, 1992). Job simulation exercises replicate or simulate an on-the-job behavior. It may not be safe to perform some on-the-job behaviors in the context of testing; therefore, this testing approach may not be practical. Also, it is important that job applicants can perform the exercise safely without any prior training (Hoover). Research has found that job applicants perceived job simulation tests as more job-related than traditional PATs, such as pure strength tests (Ryan et al., 1996).
Physical agility/stamina tests offer some benefits over job simulation exercises as they are typically safer and more convenient to administer to applicants and typically are less costly to develop and administer. These tests are made up of a set of exercises (e.g., one-mile run) that are used to measure general physical strength or stamina. A problem that arises using this testing method is the question of how to translate job behaviors into specific cut-off scores. In addition, females typically do not score as well as males on agility/stamina tests. These issues have led the courts to require that such tests are an absolute business necessity and that there is no equally valid alternative technique (Hoover, 1992).

Related to the physical agility testing approach is the physical fitness norms approach. Fitness norms tests incorporate physical exercises with a few variations. This approach, developed by the Institute for Aerobics Research in Dallas, Texas, contains elements of physical fitness including cardiovascular/aerobic fitness, percent body fat, flexibility, abdominal muscular endurance, and relative strength (Hoover, 1992). A large number of people are tested on these elements in order to establish performance standards or norms for both age and gender categories. This is done in an effort to reduce adverse impact against qualified applicants, as each applicant’s performance is compared only to norms set for their specific age and gender categories. An issue to consider, however, is where to set the cut-off score. One argument is that it can be set low, because performance will improve after candidates complete their basic training (Hoover).

Validation Issues

According to the Uniform Guidelines on Employment Selection Procedures (EEO, 1978) the use of any selection procedure which has an adverse impact on a
protected group will be considered discriminatory unless the procedure has been validated. The guidelines warn that under no circumstances will the general reputation of a selection procedure be accepted as a substitute for evidence of validity. Maher (1984) noted that most PATs are validated by a content validation approach. This estimate of validity is based on the assumption that the test events are representative of major and important duties and constitute a form of “work sample” (Arvey et al., 1992). A job analysis is conducted to establish that the identified test events are important elements of the job. Issues such as infrequently performed tasks or the relationship between the test events and the job may arise if a content-valid test is challenged in court. A possible alternative to content validity is to use a construct validity approach.

Construct validity deals with constructs, such as strength and endurance, which are generally regarded as theoretical and unobservable in nature, but their indicants (sets of behaviors, pencil-and-paper tests) are regarded as relatively concrete and observable features (Arvey et al., 1992). A job analysis should identify behavior required for effective performance and constructs believed to underlie effective behavior (Guion, 1998).

In response to performance issues related to physical ability testing, some research has focused on the effects of preparing job applicants for testing. In 2000, the Indianapolis Fire Department (IFD) incorporated a candidate physical ability test (CPAT) into its applicant process (Muegge et al., 2002). The process included access to training materials and up to 40 hours of practice, which gave applicants the opportunity to know what was expected of them and allowed them to practice to improve in areas such as their physical activity level. The majority of firefighter applicants who took the PAT felt that
the training materials were useful, understandable, and fair. Ryan et al. (1996) found that firefighter candidates believed training to prepare for the tests was important and that providing training programs before testing was a good idea. Maher (1984) indicated that evidence exists to show that training in some cases will aid persons, especially women in passing PATs. Consequently, practice and training for PATs can affect passing rates and reduce adverse impact.

Court Decisions

The court system has struggled to clarify rules for analyzing physical test cases. In effect, four major standards have been developed which include: manifest relationship, the Spurlock public safety doctrine, close approximation, and minimum qualifications (Hollar, 2000).

The manifest relationship requires the defendant (i.e., employer) to prove a clear relationship between the PAT and successful job performance. The manifest relationship was used in Eison v. City of Knoxville (1983). In this case, a female police trainee challenged a requirement that all recruits be able to pass test events including sit-ups, push-ups, leg lifts, squat thrusts, pull-ups, and a two-mile run (Hollar, 2000). The court required that the employer show that the test was “job-related” and that there was a rationale behind the set cut-off scores. The court found in favor of the police department who showed evidence addressing these concerns.

The Spurlock doctrine is similar to the manifest relationship, but it places less responsibility on the employer. This doctrine deals with whether the job in question is involved with public safety concerns. The rationale is that employers should face a lighter burden in proving “business necessity” when public safety is related to job

Close approximation to job tasks focuses on the nature of the test selected by the defendant employer. When a physical test closely approximates a task the candidate would actually perform on the job, it is likely to be upheld. In *Hardy v. Stumpf* (1978), there was a requirement by the Oakland police department that each job applicant had to scale a six-foot wall. This test was deemed valid by the court because it reflected a critical duty for the position (Hollar, 2000).

*Lanning v. Southeastern Pennsylvania Transportation Authority* (1998) involved running 1.5 miles in under 12 minutes for the applicants applying for a police officer position. A total of 55.6% of men passed, while only 6.7% of women performed successfully. Under the Civil Rights Act of 1991, the burden of proof was upon the defendant to prove that the test was a business necessity. Relying on the close approximation to job tasks, the district court held that the defendant had proved that the test was a business necessity (Hollar, 2000).

**Past Research**

Terpstra et al. (1999) found that applicants may have unfavorable reactions to PATs and that their reactions may be related to the likelihood of litigation. Among the different types of PATs, fitness tests were found to be the most frequently challenged. However, this could simply be due to organizations using fitness tests more often than
other PAT methods. Little research observed in a literature review has examined the outcome of litigation beyond what Terpstra et al. provided.

*The Present Study*

The present study examined factors that determined outcomes of physical ability testing court cases from 1992 through 2006. Only cases determined after 1991 were included because the Civil Rights Act passed in November 1991 produced significant changes to the court rulings. The Civil Rights Act of 1991 reinstated the burden of demonstrating the job relatedness and business necessity of a test to the defendant (Shoenfelt & Pedigo, 2005).

Prior to 1989 (*Wards Cove Packing v. Atonio*, 1989), as established in *Griggs* (1971), the burden was on the employer to demonstrate that the test was job related. The judicial scenario was such that the initial burden was on the plaintiff to establish a *prima facie* case of Title VII discrimination, typically by demonstrating disparate impact on members of a protected group. With a successful *prima facie* case by the plaintiff, the burden of production shifted to the defendant, who was required to establish that the test in question was job related and consistent with business necessity. If the defendant was successful, the burden fell back on the plaintiff to establish either that the articulated reason was a pretext for discrimination or that an equally valid yet less discriminatory alternative test existed. In *Wards Cove* (1989), the Court held that the burden was on the plaintiff to demonstrate that the defendant’s test was not job related. During the period between 1989 and 1991, plaintiffs had the burden of persuasion that the test did not serve the legitimate business needs of the employer. Plaintiffs were frequently at a disadvantage during this time because they often lacked the knowledge of test validity,
the access to selection tests, and the financial resources needed. The Civil Rights Act of 1991 enacted into law the judicial scenario set forth by Griggs. The 1991 Civil Rights Act also added jury trials. Before 1991, jury trials were not available under Title VII. Juries tend to favor plaintiffs more often than judges do and tend to impose greater financial costs to organizations that lose in court (Gutman, 2000).

**Hypotheses**

The following hypotheses were tested in the present study.

Arvey et al. (1992) found support that females, Hispanics, and Asians are screened out of PATs at a much higher percentage compared to other applicants.

**Hypothesis 1:** The majority of plaintiffs will be females, Hispanics, or Asians.

Sothmann et al. (2004) found no ethic difference on a selection test for firefighters, yet found that women performed poorer compared to the male applicants.

**Hypothesis 2:** The frequency of race-based claims will be less than the frequency of gender-based claims.

In past cases, courts have ruled that if a selection test results in adverse impact, that test must be validated (e.g., *Griggs v. Duke Power Company*, 1971).

**Hypothesis 3:** Courts will rule in favor of the defendant when the test used for selection is validated.

Employers face a lighter burden in proving “business necessity” when public safety is related to job performance (Hollar, 2000).

**Hypothesis 4:** Courts will rule in favor of the defendant when public safety is an issue of concern.
Job applicants perceive job simulation tests as more job-related than traditional PATs, such as pure strength tests (Ryan et al., 1996). Courts require that pure ability tests are an absolute business necessity and that there is no equally valid alternative technique (Hoover, 1992).

**Hypothesis 5:** Courts will rule in favor of the defendant when the selection test is a work sample or a job simulation versus a pure ability test.

Ryan et al. (1996) found that firefighter candidates believed training to prepare for PATs is important. Maher (1984) indicated that evidence exists to show that training in some cases will aid persons, especially women, in passing PATs.

**Hypothesis 6:** Courts will rule in favor of the defendant when practice time or training materials were offered to applicants prior to testing.
Method

Court cases included in the review were identified using the Lexis-Nexis Search Engine for legal documents. After reviewing the current literature on physical ability testing, the following keywords and combination of these words were identified and used in the search: *Physical Ability Test, Physical Agility Test, Physical Fitness Test, Physical Capability Test.*

According to Werner and Bolino (1997), cases at the Appellate Court level have far more legal precedence than decisions made at the District level; therefore, only cases found at the level of the Court of Appeals and the Supreme Court that took place after November of 1991 were included in this review. A total of 43 cases were identified and then reviewed to determine whether physical ability testing was the primary issue of the case rather than the secondary concern (See Appendix A).

Shoenfelt and Pedigo’s (2005) coding scheme, which was based on Werner and Bolino’s (1997) scheme used in a review of performance appraisal court cases, was utilized in the current study (See Table 1). Three advanced Industrial/Organizational Psychology graduate students served as coders. Two graduate students independently coded each case. A licensed Industrial/Organizational Psychologist coded the variable in the event that a tie occurred. Thirteen variables were coded for each of the cases, which resulted in 196 judgments. The first and second rater agreed on 88 of 91 judgments, resulting in 96.7% interrater agreement. The first and third rater agreed on 97 of 105 judgments, resulting in 89.8% interrater agreement. There was total agreement on 185 of 196 judgments, resulting in 94.4% interrater agreement.
Table 1

**Coding Factors**

<table>
<thead>
<tr>
<th>Coding Factor</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender of Plaintiff</td>
<td>Is the plaintiff male or female?</td>
</tr>
<tr>
<td>Race/Ethnicity of Plaintiff</td>
<td>What is the plaintiff’s race/ethnicity?</td>
</tr>
<tr>
<td>Basis for Lawsuit (Claim)</td>
<td>What does the plaintiff argue as the basis for discrimination?</td>
</tr>
<tr>
<td>Industrial, Professional, or Civil Service Work</td>
<td>What type of job is in question in the lawsuit?</td>
</tr>
<tr>
<td>Class Action or Individual Plaintiff</td>
<td>Is the plaintiff one person, or is this a class action lawsuit?</td>
</tr>
<tr>
<td>Work Sample/Job Task or Other Type of PAT</td>
<td>Does the test consist of on-the-job behaviors or other general physical conditions, such as strength or stamina?</td>
</tr>
<tr>
<td>Standardized/Professionally Develop Test</td>
<td>Was the test used in the selection procedure standardized or professionally develop?</td>
</tr>
<tr>
<td>In-House or Consultant</td>
<td>Was the test developed in-house or by a consultant?</td>
</tr>
<tr>
<td>Test Validation</td>
<td>Was the test that was used for selection validated?</td>
</tr>
<tr>
<td>Practice or Training Available</td>
<td>Were training materials or practice time offered prior to testing?</td>
</tr>
<tr>
<td>Public Safety Issue</td>
<td>Is public safety an issue of concern related to job performance?</td>
</tr>
<tr>
<td>Additional Selection Tests</td>
<td>Were there additional tests that were used as part of the selection process?</td>
</tr>
<tr>
<td>Court Verdict</td>
<td>Did the court rule in favor of the defendant or the plaintiff (note if: summary judgment, remanded, or preliminary injunction in favor of the plaintiff or defendant)?</td>
</tr>
</tbody>
</table>
Results

A total of 43 physical ability court cases were identified by the Lexis-Nexis Search Engine. After reviewing the cases, the researcher determined that in 21 cases the courts did not rule on physical ability testing. These cases were excluded from further analyses. The remaining 22 cases were coded based on the 13 identified factors. A summary of the court cases with the coded factors is found in Appendix B. A summary of the breakdown in percentages for each coded factor is found in Appendix C.

Hypothesis 1 stated that the majority of plaintiffs will be females, Hispanics, or Asians. One case, International Union v. Lockheed (1998), was excluded from this analysis because the case did not contain information on either the race or the gender of the plaintiff. Of the remaining 21 cases, there were 1 Hispanic and 6 female plaintiffs; no cases involved an Asian plaintiff. Hypothesis 1 was not supported, \( t(20) = -1.58, p > .05 \).

Hypothesis 2 stated that the frequency of race-based claims will be less than the frequency of gender-based claims. Of the 21 cases analyzed, there were 5 race-based claims and 9 gender-based claims. The remaining seven cases consisted of four Americans with Disabilities-based (ADA) claims and three age-based claims. While there were a larger number of gender-based claims compared to race-based claims, the difference was not statistically significant; therefore, Hypothesis 2 was not supported, \( t(13) = -1.08, p > .05 \).

Hypothesis 3 stated that courts will rule in favor of the defendant when the test used for selection is validated. Out of the 22 cases, only 6 cases had information on whether the test was validated or not. Four of the tests were validated, while two were
not. In three of the four cases that were validated, the court found for the defendant. In the other case, there was a split decision where the court decision favored the defendant concerning the physical ability issue. However, in the two cases in which the test was not validated, the court found for the defendant in one case and for the plaintiff in the other case. Hypothesis 3 was not supported, $t(4) = -1.63, p > .05$.

Hypothesis 4 stated that the courts will rule in favor of the defendant when public safety is an issue of concern. In all 22 cases, public safety was an issue of concern. Of 22 cases, 15 found for the defendant, 2 found for the plaintiff, 3 were remanded, and 2 had split decisions. When examining the split decision cases, it was determined that one found for the defendant, while the other found for the plaintiff. Therefore, based on this sample of data, Hypothesis 4 is supported, $t(18) = 9.80, p < .01$.

Hypothesis 5 stated that the courts will rule in favor of the defendant when the selection test is a work sample or a job simulation versus a pure ability test. There were a total of six cases that involved a work sample/job simulation (four found for the defendant, two split decisions which resulted in one ruling for the defendant and one for the plaintiff), nine involved a pure ability or fitness test (seven found for the defendant, two found for the plaintiff), and seven involved another type of physical ability test (four found for the defendant, three were remanded). Based on the current sample, Hypothesis 5 was not supported, $t(13) = .25, p > .05$.

Hypothesis 6 stated that the courts will rule in favor of the defendant when practice time or training materials were offered to applicants prior to testing. Of the 22 cases, 20 did not provide information concerning whether or not practice time or training materials were offered. In the remaining two cases for which information was provided,
both offered applicants practice time. In both of the cases the courts found for the defendant. Nonetheless, Hypothesis 6 could not be tested because of the small number of cases with information concerning practice.
Discussion

Selection tests are designed to select the most qualified applicants for a position. PATs have been found to result in adverse impact against protected groups, including women, Hispanics, and Asians (Arvey et al., 1992). It was hypothesized that the majority of plaintiffs would be either females, Hispanics, or Asians. Of the 22 cases that were included in the analysis, only 6 cases involved a female plaintiff, while 1 involved a Hispanic plaintiff. There were no cases that involved an Asian plaintiff. Hypothesis 1 was not supported. Considering that these specific groups tend to be adversely affected by PATs, it was surprising that only one-third of the plaintiffs were female or Hispanic and that no plaintiffs were Asian.

Previously in a selection test for firefighter, no ethnic differences were found in performance on a PAT; however, female applicants performed poorer compared to male applicants (Sothmann et al., 2004). Therefore, it was hypothesized that the frequency of race-based claims would be less than the frequency of gender-based claims. Of the 21 cases that were included in the analysis, there were 5 race-based claims and 9 gender-based claims (3 of the gender-based were reverse discrimination cases). Gender-based claims did out number race-based claims in cases reviewed. However, there was not a statistical difference between the number of race-based and gender-based claims; therefore Hypothesis 2 was not supported. Of the remaining seven cases, four were ADA claims and three were age-based claims. It was of interest that plaintiffs made ADA claims regarding PATs. There was no indication from the literature review that ADA claims would be likely in challenges of PATs, particularly those involving civil service jobs such as firefighter and police officer. The common perception of these incumbents
does not include individuals with acknowledged, permanent physical disabilities as would be required in an ADA claim.

In past cases, courts have ruled that if a selection test results in adverse impact, that test must be validated (e.g., *Griggs v. Duke Power Company*, 1971). It was hypothesized that courts would rule in favor of the defendant when the test used for selection is validated. Of the 22 cases included in this review, only 6 had information regarding whether the test had been validated. It was of interest that the majority of the cases did not provide information on whether the test had been validated. It was reasoned that this information may have been provided in the lower level court hearings; however, these cases were unavailable on Lexis-Nexis for review. Of the six cases with validity information, four of the tests were validated, while two were not. The courts ruled in favor of the defendant in three of the four cases where the test was validated. In the remaining case where the test was validated, there was a split decision; however, the courts found in favor of the defendant concerning the PAT issue. In the remaining two cases where the test was not validated, the courts found for the defendant in one case and found for the plaintiff in the other case. Hypothesis 3 was not supported.

In *Peightal v. Metropolitan Dade County* (1994), the courts found for the defendant when the test was not validated. In this case, the plaintiff brought a reverse discrimination claim against the defendant, who was hiring pursuant to an affirmative action plan. The courts reasoned that the defendant’s plan satisfied both prongs for the strict scrutiny analysis because it demonstrated a compelling government interest in remedying the effects of prior discrimination and that the plan was narrowly tailored in that the program will end when the hiring goal is achieved. The other case where the test...
was not validated, *Pietras v. Board of Fire Commissioners of the Farmingville Fire District* (1999), the court found that the test was not job related, found that the test discriminated against women, and ruled for the plaintiff.

According to Hollar (2000), employers face a lighter burden in proving “business necessity” when public safety is related to job performance. It was hypothesized that the courts would rule in favor of the defendant when public safety was an issue of concern. In all 22 cases, public safety was found to be an issue of concern. Of the 22 cases, 15 found for the defendant, 2 found for the plaintiff, 3 were remanded, and 2 had split decisions. When examining the split decision cases, it was determined that one found for the defendant, while the other found for the plaintiff concerning the PAT issue.

Hypothesis 4 was supported. It was of interest that all of the cases involved public safety. Twenty of the 22 cases involved civil-type work, which typically is concerned with public safety. The remaining two industrial cases involved a nuclear power plant and driving machinery at night, both of which could pose a threat to public safety.

Job applicants have been found to perceive job simulation tests as more job-related than traditional PATs, such as pure strength tests (Ryan et al., 1996). In addition, courts require that pure ability tests are an absolute business necessity and that there is no equally valid alternative (Hoover, 1992). It was hypothesized that the courts would rule in favor of the defendant when the selection test was a work sample or job simulation versus a pure ability test. Six of the 22 cases involved a work sample/job simulation (4 found for the defendant, 2 had split decisions which resulted in 1 finding for the defendant and 1 for the plaintiff), 9 involved a pure ability or fitness test (7 for the
defendant, 2 for the plaintiff), while 7 involved another type of physical ability test (4 for the defendant, 3 remanded). Hypothesis 5 was not supported.

According to one study, firefighter candidates believed training to prepare for PATs is important (Ryan et al., 1996). In addition, Maher (1984) indicated that evidenced exists to show that training in some cases will aid persons, especially women, in passing PATs. It was hypothesized that the courts would rule in favor of the defendant when practice time or training materials were offered to applicants prior to testing. For 20 of the 22 cases, no information was provided whether practice was offered. For the remaining two cases, both indicated that practice was offered to the applicants. In both cases where practice was offered, the defendant prevailed. Based on the small number of cases, though, no conclusion can be made.

There were a total of three cases in which the plaintiff prevailed, including a split decision case in which the plaintiff prevailed on the physical ability test issue. In Pietras v. Board of Fire Commissioners of the Farmingville Fire District (1999), the courts found for the plaintiff ruling that Pietras was subjected to a physical ability test that was not work-related and that the test had disparate impact on women. In Holiday v. City of Chattanooga (2000), the courts ruled in favor of the plaintiff because the defendant disqualified Holiday because of his HIV status, stating that Holiday was not physically able to perform the duties of the job, without any indication that Holiday’s condition actually impeded his ability to perform. In Davoll v. Webb (1999), there was a split decision, but the courts found for the plaintiffs on the issue of physical ability testing. The courts ruled that the police department assessed the plaintiffs’ limitations based on physical appearance and not their ability to perform the task. Thus, the plaintiff prevailed
when the test was not valid (gender claim) or when the defendant failed to assess the plaintiff's actual capability to perform the job rather than presumptions about their abilities (ADA claims).

Limitations

The most notable limitation of the current study is the small sample of cases. Lexis-Nexis identified a total of 43 cases that contained physical ability test, physical agility test, physical fitness test, or physical capability test as keywords; however, after closer review, it was determined that in 21 cases the courts did not rule on physical ability testing. One explanation for the small number of cases is that cases may have been settled out of court. This may occur for a number of reasons, including being more cost effective for both the plaintiff and the defendant. A defendant may wish to settle out of court to avoid any negative publicity that may come from the trial. In addition, plaintiffs may realize that if the selection test has been validated and used appropriately, they are unlikely to prevail in court; likewise, the defendant may realize that if a test is being utilized that is not validated, it is unlikely to withstand legal scrutiny and it is more prudent to settle the case (Shoenfelt & Pedigo, 2005).

Of the 22 cases dealing with PATs, a total of 6 contained information on whether or not the physical ability test was validated. Additional information on the lower court proceedings of these cases was unavailable on Lexis-Nexis to investigate this issue further. Another limitation is that some of the information in the cases was unclear, making it difficult to code. However, this limitation was addressed by having two independent raters code each case.
Conclusions

There were a total of 22 cases that were included in this review. The majority of the cases were gender-based claims and involved civil-type work. All of the cases were concerned with public safety and 21 of the 22 cases included additional tests in their selection procedure (information was not provided for one case). Considering this information, physical ability testing may be a useful part of a battery of tests used to select applicants for civil-type positions, such as a police officer or firefighter. By basing a selection decision on selection instruments in addition to a PAT, the adverse impact against females could be reduced. In addition, only two of the cases in the sample offered practice. While both of these cases involved gender-based claims, Maher (1984) indicated that training in some instances will aid persons, especially women, in passing PATs. Perhaps this is an area that could be utilized to assist women in enhancing their performance on PATs.

The plaintiff prevailed in only 3 of 22 cases. One case involved a PAT with adverse impact against women without the test having been validated. The other two cases were ADA cases where the applicant was not tested but presumed to be unable to perform the job. Clearly, the defendants in these three cases violated principles for good personnel practice with regard to EEO concerns.

Based on this review, defendants are likely to fare well in court when practice is offered to applicants prior to testing. In addition, defendants face a lighter burden in proving business necessity when public safety is related to job performance and are therefore likely to fare well when public safety can be demonstrated to be a concern. While PATs can be a useful selection tool for civil-type positions, it is suggested that the
test be validated, practice is offered to applicants, and the PAT is used in addition to other selection tests. By making use of these suggestions, an employer is likely to fare well in court if the test is challenged.
References


*Davis v. Dallas* (CA5 1985) 777 F. 2d 205

*Dothard v. Rawlinson* (1977) 433 US 321


*Hardy v. Stumpf* (1978) 567 P. 2d 1342


*Hyland v. Fukada* (CA9 1978) 580 F. 2d 977

*Lanning v. SEPTA* (1998) 181 F. 3d 478


*New York City v. Beazer* (1979) 440 U.S. 568


Appendix A:

List of Court Cases Reviewed
Anchorage Police Dep’t Employees Assoc. v. International Assoc. of Firefighters (2001) 24 P. 3d 574; 2001 Alas. LEXIS 80
Brunet v. City of Columbus (1993) 1 F. 3d 390; 1993 U.S. App. LEXIS 19315
International Union, United Plant Guard Workers v. Lockheed Martin Util. (1998)
97-3495; 1998 U.S. App. LEXIS 16234


Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow (1999) 191 F. 3d 1192;
1999 U.S. App. LEXIS 19281

Slater v. GSA (2000) 00-3130; 2000 U.S. App. LEXIS 16942


Watson v. Dep’t of the Navy (2001) 262 F. 3d 1292; 2001 U.S. App. LEXIS 18574
Appendix B:

Coded Factors
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<th>Action</th>
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Note: Gender of plaintiff: Male, Female, Both, NA (not available); Race of plaintiff: White, Afro-American, Hispanic, Asian, Native American, NA (not available); Basis for Lawsuit: Gender, Age, Race, ADA, NA (not available); Type of Work in Lawsuit: Civil, Industrial, Professional; Class Action or individual plaintiff: Individual, Class; Type of Physical ability test: Work sample, Fitness, Other type; Standardized/Professionally developed test: No, Yes, NA (not available); In-house/Consultant developed: In-house, Consultant, NA (not available); Validated test: No, Yes, NA= (not available); Practice or training available to applicants: No, Yes, NA (not available); Issue of Public Safety: No, Yes; Additional tests used in selection: No, Yes; Verdict of the Court: Plaintiff, Defendant, Split Decision, Remanded.
Appendix C:
Frequency of Coded Factors in Physical Ability Testing Court Cases (N = 22)
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