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Employers Who Implement Pre-Employment Tests to Screen Their Applicants, Beware (or Not): An Analysis of Lanning v. Southeastern Pennsylvania Transportation Authority and the Business Necessity Defense as Applied in Third Circuit Employment Discrimination Cases

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EMPLOYERS WHO IMPLEMENT PRE-EMPLOYMENT TESTS TO SCREEN THEIR APPLICANTS, BEWARE (OR NOT?): AN ANALYSIS OF *LANNING V. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY* AND THE BUSINESS NECESSITY DEFENSE AS APPLIED IN THIRD CIRCUIT EMPLOYMENT DISCRIMINATION CASES

I. INTRODUCTION

Suppose that in order to merely qualify for an interview for a position as a firefighter, each applicant—within four minutes and while wearing a twenty-pound vest—has to carry a fifty-pound hose up six flights of stairs and then drag the equivalent of a 175-pound person one hundred feet.[1] Suppose further that this test results in only a small percentage of women passing, compared to a large percentage of men. As a result, female applicants who had failed the test sue the fire department for discrimination and quickly meet their prima facie burden by showing that the test has a disparate impact on women. In response, the department argues that despite its discriminatory impact, the test is necessary to screen out unqualified applicants who may pose a threat to public safety if they are hired as firefighters. Can the defendant prevail with such a justification?

This Casebrief attempts to answer the aforementioned question and, in doing so, it explores the difficult issues that arise when courts formulate standards to determine whether an employer's justification for a job-selection test with a disparate impact satisfies Title VII of the 1991 Civil Rights

1. *See* Barbera v. Metro-Dade County Fire Dept., 117 F. Supp. 2d 1331, 1334 (S.D. Fla. 2000) (providing basis for above hypothetical). *Barbera* has similarities to, but is fundamentally different from, the above hypothetical. For instance, *Barbera* involved, *inter alia*, a fire department that employed a physical ability test (PAT) as one of four job-selection methods to screen applicants and select its employees. *See id.* (stating facts). The PAT first required applicants to complete five tasks in eight minutes: while wearing a twenty-two-pound weight vest, the applicant had to (1) carry a fifty-pound hose up six flights of stairs; (2) pull a forty-eight-pound weight inside a fourth story window; (3) hammer a resistant beam with a nine-pound mallet; (4) pull a one-hundred-pound section of hose; and (5) drag the equivalent of a 175-pound person one hundred feet. *See id.* at 1334 n.3 (describing test). The department, however, modified the test twice in order to fix certain problems with the test's administration. *See id.* at 1334-35 (noting employer's procedure for creating its test). Subsequently, a group of white males sued the department claiming that its hiring practices were favorable to females and, thus, had a disparate impact on males. *See id.* at 1336 (providing case's history). The plaintiffs argued that the department illegally modified its testing procedures, resulting in more females passing the PAT and being included in the applicant pool. *See id.* (stating plaintiffs' arguments). Ultimately, the court held that the plaintiffs failed to show that the test or its modifications had a disparate impact on men. *See id.* at 1336-38, 1340-41 (explaining court's holding). It further held that the department adequately showed that the test accurately measured an applicant's physical aptitude to serve as a firefighter. *See id.* at 1338-39, 1341 (providing court's decision).

Act ("the Act" or "the 1991 Act").[2] The pervasive issue in such cases typically is "What burden does the law impose on employers when proving a business necessity for their employment practices in a disparate impact case?"[3] Thus, if the standard is too strict for employers to meet, they may impermissibly use quotas in hiring to avoid litigation;[4] if it is too lenient, employers will be able to adopt a multitude of facially neutral policies that have discriminatory effects on a protected class and easily defend them with business necessity.[5]

This Casebrief further focuses specifically on the development of the law in the United States Court of Appeals for the Third Circuit surrounding employment discrimination cases under the disparate impact theory of discrimination and the "business necessity defense," particularly in cases where employers utilize a pre-employment test to screen job applicants.[6] Part II explains the origins and substance of the disparate impact theory, which gives rise to the defense.[7] Part III examines in detail the history of the business necessity defense and its present state among the federal circuits.[8] Part IV analyzes the Third Circuit's approach to the business necessity defense by reviewing its most recent decisions in *Lanning v.*

2. For a further discussion of the different standards used by the federal circuits for measuring whether an employer's justification for using a pre-employment test to screen applicants complies with the 1991 Civil Rights Act, see *infra* notes 43-69 and accompanying text.

3. *See* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1154 (1993) (explaining key question in disparate impact cases). For a further discussion of the standards employed by the federal circuit courts for measuring an employer's business necessity defense and whether the standard is relatively strict or lenient, see *infra* notes 43-69 and accompanying text.

4. *See* Carvin, *supra* note 3, at 1154 (explaining consequences if employer's burden of proving business necessity is too harsh); *see also* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287, 381-82 (1993) (discussing Congress's anti-quota sentiment). Browne notes that during the legislative debates and drafting of the 1991 Civil Rights Act, Congress seriously considered arguments against codifying a strict business necessity standard because polls showed that the majority of American citizens not only opposed rigid quotas, but also the "whole notion of racial and sexual preferences." *Id.* at 381. Browne argues that the Act is responsive to such sentiments and that courts should interpret it accordingly. *See id.* at 381-82 (giving author's thesis).

5. *See* Carvin, *supra* note 3, at 1154 (projecting consequences if employer's burden of proving business necessity is weak). Carvin explains that the standard must consider both interests in order for employment practices to be fair to both employers and protected classes. *See id.* (stating author's opinion).

6. For a further discussion of the disparate impact theory, see *infra* notes 13-17 and accompanying text. For a further discussion of the business necessity defense, see *infra* notes 24-42 and accompanying text.

7. For a further discussion of the history of the disparate impact theory and the rationale for shifting the burdens of proof between the litigating parties, see *infra* notes 13-23 and accompanying text.

8. For a further discussion of the business necessity defense and the different standards for measuring it within the federal circuit courts, see *infra* notes 24-69 and accompanying text.

Southeastern Pennsylvania Transportation Authority ("*Lanning I*")[9] and *Lanning v. Southeastern Pennsylvania Transportation Authority* ("*Lanning II*")[10] (collectively referred to as "*Lanning*") and provides relevant considerations for those who use the defense in litigation.[11] Finally, Part V discusses the overall impact of *Lanning* and its future implications for practitioners.[12]

II. TITLE VII'S DISPARATE IMPACT THEORY

A. *The Disparate Impact Theory and Its Basis*

The disparate impact theory of discrimination, which was judicially created in the United States Supreme Court case of *Griggs v. Duke Power Co.*,[13] applied under Title VII of the 1964 Civil Rights Act when a facially neutral employment practice disproportionately affected a particular group on the basis of the group's race, color, religion, sex or national origin.[14] In *Griggs*, the Court acknowledged that even though Title VII did not specifically provide for the disparate impact cause of action, it intended to prohibit both overt discriminatory practices *and* practices that are neutral in form, yet have a discriminatory effect on a protected group.[15] The *Griggs* Court cautioned, however, that Title VII "does not

9. 181 F.3d 478 (3d Cir. 1999) (remanding case for district court to apply new business necessity standard).

10. 308 F.3d 286 (3d Cir. 2002) (affirming district court's findings after it applied new minimum qualifications standard that SEPTA proved that its pre-employment test was business necessity).

11. For a further discussion of *Lanning I* and *Lanning II* and their impact on litigants in the Third Circuit, see *infra* notes 70-127 and accompanying text.

12. For a further discussion of the potential consequences of *Lanning I* and *Lanning II* for practitioners, see *infra* notes 128-36 and accompanying text.

13. 401 U.S. 424 (1971).

14. *See* Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 583 (7th Cir. 2000) (explaining concept of disparate impact theory); *Lanning I*, 181 F.3d at 485 (discussing origins of disparate impact theory for Title VII employment discrimination cases); *see also* Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 259-69 (1993) (arguing that *Griggs* was necessary to eliminate serious barriers to equal employment opportunities); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 656-57 (2001) (noting how disparate impact cases often arise from employer's pre-employment tests to screen applicants).

15. *See Griggs*, 401 U.S. at 431 (discussing Congress's intent in enacting Title VII of 1964 Civil Rights Act). The Court noted that Congress's objective was:

> [T]o achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Id. at 429-30; *see also* 110 CONG. REC. 7213 (1964) (memorandum of Sens. Clarke and Case) (stating that employers under Title VII do not have to abandon "bona fide qualifications tests" if members of some groups outperformed members of other groups); Ramadanah Salaam, Adams v. Florida Power Corp.: *Federal Circuits*

command that any person be hired simply because he was formerly the subject of discrimination," for the Act only seeks to remove "unnecessary" employment barriers that operate to discriminate on the basis of unlawful classifications.[16] Subsequently, Congress codified the disparate impact cause of action for Title VII under the 1991 Civil Rights Act.[17]

Disagree on the Validity of ADEA Claims Pursued Under the Disparate Impact Theory of Liability, 26 AM. J. TRIAL ADVOC. 225, 226 (2002) (acknowledging that before *Griggs*, courts analyzed evidence supporting disparate impact theory under disparate treatment theory of liability). The disparate treatment theory of liability is drastically different from the disparate impact theory. *See id.* at 226 (contrasting two theories). The disparate treatment theory alleges that the employer has intentionally discriminated against plaintiffs, whereas the disparate impact theory does not require intentional discrimination. *See id.* (describing key differences between theories); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1481 (1996) (noting that despite strong evidence showing that Congress intended only to hold employers liable for intentional discrimination, *Griggs* authorized disparate impact causes of action in Title VII). An example of a case that involves Title VII's disparate impact theory of discrimination is *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993). In that case, a Domino's pizza franchise policy stated that no employee who delivered pizza could have facial hair, which was implemented in response to perceived customer preferences about bearded employees. *See id.* at 796, 798-99 (stating facts). Many African-American men, however, have the skin condition *pseudofolliculitis barbae*, which makes shaving either impossible or extremely difficult. *See id.* (noting plaintiffs' problem with following employer's policy). As a result, Domino's did not employ many African-American men to fill its delivery positions. Consequently, a group of African-American men sued Domino's under the disparate impact theory. *See id.* (providing procedural posture of case). The Eighth Circuit struck down the policy on the ground that it had a disproportionate impact on African-American men and that Domino's failed to justify the rule by showing it was a business necessity, for perceived customer preferences did not make the practice a business necessity. *See id.* at 798-99 (providing court's holding).

16. *Griggs*, 401 U.S. at 430-31 (explaining how Congress did not intend Title VII "to guarantee a job to every person regardless of qualifications"). The Court asserted that Congress only required the "removal of artificial, arbitrary, and unnecessary barriers" to employment that have a discriminatory effect. *Id.* at 431. The Court further stated that the "touchstone [of disparate impact cases] is business necessity," indicating that an employer with a neutral policy that has a disparate impact must justify it by showing that the policy is a business necessity, otherwise the practice is prohibited. *Id. But see* Alfred W. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 6 (1987) (arguing that *Griggs* makes it permissible for employers to adopt race-based, affirmative action programs). Thus, Blumrosen notes that "[o]nce disparate impact is identified, voluntary action to ameliorate it is necessary to avoid liability in the absence of business necessity." *Id.*

17. *See* 42 U.S.C. § 2000e-2(a) (2003) (codifying disparate impact cause of action). The statute reads in pertinent part:

> (a) It shall be an unlawful employment practice for an employer . . .
>
> (2) to limit, segregate, or classify his employees or *applicants* for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id. (emphasis added).

B. *The Burdens of Proof in a Disparate Impact Case*

Although Title VII seeks to eliminate discriminatory and arbitrary barriers to equal employment opportunity, it attempts to do so while preserving legitimate employer discretion.[18] These two competing interests are reflected in the statute's burden-shifting approach for disparate impact claims.[19] For example, once plaintiffs demonstrate that a selection procedure has a disparate impact on their protected class, both the burden of production and persuasion shift to the employer to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."[20] If the employer, in response, demonstrates

18. *See* Spiropoulos, *supra* note 15, at 1528 (explaining how Congress intended for limits to exist with respect to courts interfering with employers' practices). Spiropoulos states that "courts must interpret Title VII in a manner that will both facilitate the removal of arbitrary barriers to equal employment opportunities and protect legitimate employer prerogatives." *Id.*; *see also* H.R. REP. NO. 88-914, at 29 (1963) (comments made by Rep. William M. McCulloch) (remarking that Title VII still gives employers discretion in hiring). Representative McCulloch stated that:

> [T]he Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in [Title VII] permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms, are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Id.

19. *See* Spiropoulos, *supra* note 15, at 1528 (noting that § 2000e-2(h) of Title VII protects right of employers to give professionally developed ability tests).

20. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2003) (stating burdens of proof under Title VII disparate impact theory). The statute reads in pertinent part:

> (1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity . . . .

Id.; *see also* Davis v. City of Dallas, 777 F.2d 205, 207 (5th Cir. 1985) (allowing plaintiffs to meet prima facie case by showing through statistics that policy had disparate impact on blacks); Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 393-94 (1996) (discussing how disparate impact cases begin with plaintiff establishing through statistical evidence that employment practice has disparate impact on protected class). Grover notes that in order to shift the burden to employers to prove the business necessity prong, plaintiffs typically must prove "that the challenged practice 'select(s) applicants for hire or promotion in a . . . pattern significantly different from that of the pool of applicants.'" *Id.* at 394 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)); *see also* Memorandum from Michael E. Brooks, Office of the General Counsel, to the Legal Instruction Unit of the FBI Academy 1 (2001) (on file with author) (discussing applicable law for creating physical fitness tests). Brooks discusses how a plaintiff proves that an employment practice has a disparate impact:

business necessity, the plaintiffs can still prevail if they can show that "an alternative employment practice has a less disparate impact [on their group] and would also serve the employer's legitimate business needs."[21]

> The Supreme Court has ruled that the plaintiff must show that a facially neutral standard results in a "significantly discriminatory pattern." The Equal Employment Opportunity Commission (EEOC) is a federal agency charged with promulgating federal regulations to implement Title VII and other federal anti-discrimination legislation. These regulations do not have the force of law . . . . However[,] courts will consider these guidelines in ruling on Title VII issues. The EEOC has provided that a selection procedure which results in a protected group's selection rate of less than 80 percent of the group with the greatest success will be considered to have resulted in a disparate impact. While this is a significant issue in most Title VII litigation, it usually does not become an issue in challenges to physical fitness standards.

Id. at 7; *see also* Lanning v. Southeastern Pa. Transp. Auth. (Lanning I), 181 F.3d 478, 487 (3d Cir. 1999) (explaining how burden of persuasion in establishing policy's business necessity rests with employer). It should be noted that in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court held that the employer only bears the burden of production and that the burden of persuasion remained on the plaintiff at all times. *See id.* at 659 (stating burden of persuasion for parties in disparate impact case at that time). Congress, however, explicitly overruled that holding and placed the burden of persuasion on the employer to prove business necessity. *See* 42 U.S.C. § 2000e-2(k) (providing new shift in employer's burden for disparate impact cases).

21. *Lanning I*, 181 F.3d at 485 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)) (discussing burdens of proof in disparate impact case); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (stating burdens of proof in Title VII cases). The statute reads, in pertinent part, that after the employer has demonstrated business necessity, the plaintiffs may demonstrate "an alternative employment practice and [that] the [defendant] refuse[d] to adopt [the] alternative employment practice." *Id.*; *see also* Smith v. City of Des Moines, 99 F.3d 1466, 1473-74 (8th Cir. 1996) (holding that plaintiff has not met his burden under alternative practice prong). In *Smith*, the plaintiff sued under a disparate impact theory when the city fired him as a firefighter because he could not pass the physical fitness test required in order to wear a self-contained breathing apparatus that was essential for his job. *See id.* at 1468 (stating facts). Plaintiff claimed that the test had a disparate impact on him due to his age. *See id.* at 1467 (describing plaintiff's argument). Once the plaintiff established that the test had a disparate impact, the city defended by showing that the test was job-related because often firefighters must wear the breathing apparatus when they go to the scene of a fire. *See id.* at 1471 (providing defendant's argument). The city also showed that the standard was necessary for safe and effective job performance because it protected the health of the employee. *See id.* (describing further defendant's rebuttal argument). In response, the plaintiff attempted to show that a less discriminatory alternative means of assessing fitness for older firefighters exists. *See id.* at 1473 (noting plaintiff's response). He suggested that the city use spirometry and stress tests to determine which firefighters may be unfit for the job and then require them to undergo multiple physical examinations to determine fitness for the job. *See id.* (providing plaintiff's suggestion for alternative less discriminatory test). The court held that the plaintiff did not meet his burden because he did not show that his proposed alternative would have a less discriminatory impact on older firefighters than the city's present system. *See id.* (stating court's holding). Hence, the plaintiff only showed that he could possibly pass the alternative test, but he did not show the test's effects on other firefighters. *See id.* (explaining court's reasoning).

Nevertheless, the statute gives employers a business necessity defense, thereby protecting their business interests and allowing them possibly to continue a legitimate policy even if it has a disparate impact on a protected group.[22] As for the precise contours of the business necessity defense, however, the Supreme Court has yet to interpret the 1991 Act's language of "job related for the position in question and consistent with business necessity," which has led the federal appellate courts to interpret it in varying ways, yielding different standards for employers to meet in various jurisdictions.[23]

III. THE BUSINESS NECESSITY DEFENSE

The lower federal courts have had difficulty in consistently defining the 1991 Civil Rights Act's requirements for a successful business necessity defense.[24] The Act specifically instructs that in interpreting its business necessity language, "[n]o statements other than [a two-paragraph] interpretative memorandum" shall be considered or "relied upon in any way" as legislative history.[25] In essence, the interpretative memorandum states that "the terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated . . . in [*Griggs*] and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*."[26] Therefore, in order to understand the current conflict between the federal circuits over the correct standard for analyzing the business necessity defense, it is neces-

22. *See* Spiropoulos, *supra* note 15, at 1528 (concluding that Title VII protects employer's legitimate prerogatives).

23. *See Lanning I*, 181 F.3d at 488 (explaining how Supreme Court has yet to interpret standard adopted by 1991 Civil Rights Act); David E. Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, 785-93 (2000) (stating conflicting standards of business necessity defense between federal circuit courts).

24. *See* Hollar, *supra* note 23, at 785-93 (noting how lower federal courts have interpreted Act's mandates differently, which has led to different approaches in assessing employer's business necessity defense).

25. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992); *see also Lanning I*, 181 F.3d at 488 (restating substance of interpretative memorandum). In its entirety, § 105(b) provides that:

> [N]o statements other than the interpretative memorandum appearing at Vol. 137 Congressional Record S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of the Act that relates to Wards Cove Business necessity/culmination/alternative business practice.

Id.; *see also* Grover, *supra* note 20, at 392-93 (explaining that legislative memorandum is only legislative history available for courts to use to interpret Act, per Congress's directions). Grover notes that because the Court's decisions prior to *Wards Cove* were somewhat ambiguous, multiple interpretations of the business necessity standard among the lower courts have arisen. *See id.* (stating problem for lower courts as result of Court's ambiguous holdings).

26. 490 U.S. 642 (1989); *see also* 137 CONG. REC. 28,680 (1991) (providing interpretative memorandum to 1991 Civil Rights Act); *Lanning I*, 181 F.3d at 488 (discussing role of interpretative memorandum).

sary to briefly mention the evolution of the defense from *Griggs* leading up to the passage of the Act.[27]

A. *The History of the Business Necessity Defense*

1. *Providing a Framework for the Defense: From* Griggs *to* Wards Cove

After the Supreme Court first adopted the disparate impact theory in *Griggs*, the Court endeavored to define "business necessity" in light of the plaintiff's and employer's competing interests.[28] For instance, the *Griggs* Court ultimately held that the employer's use of an intelligence test and educational requirements to screen applicants for a coal handler position violated Title VII because the defendant did not prove that the requirements measured job performance.[29] In doing so, the Court noted that the "touchstone" of a disparate impact case with a pre-employment test is "business necessity," yet it was imprecise and used different language throughout its opinion when stating the correct standard for a successful business necessity defense: *Griggs* concurrently held that a challenged employment practice must be "related to job performance;" have a "manifest relationship to the employment in question;" bear "a demonstrable relationship to

27. For a further discussion of the conflicting standards among the federal circuits in measuring the business necessity defense, see *infra* notes 43-69 and accompanying text.

28. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (holding that when facially neutral employment test has disparate impact on protected class, it could violate Title VII even if no evidence exists to show that employer had discriminatory intent); Earl M. Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW. U. L. REV. 776, 778-79 (1983) (discussing how Court has been inconsistent since *Griggs* in its disparate impact jurisprudence).

29. *See, e.g.*, *Griggs*, 401 U.S. at 436 (concluding that employer has not justified employment practice with sufficient proof of practice's necessity to its business). *Griggs* involved a claim against the defendant, Duke Power Company, who required that applicants for work in its coal handling department have a high school diploma or satisfactory scores on both a standardized general intelligence test and an aptitude test. *See id.* at 427-28 (providing employer's policy). Such requirements excluded a disproportionate number of black workers as compared to whites. *See id.* at 430 (stating policy's impact). For instance, the high school diploma requirement would have excluded eighty-eight percent of the state's black residents, compared to sixty-six percent of its white residents, and the aptitude tests would have excluded ninety-four percent of the blacks, compared to forty-two percent of the whites. *See id.* at 430 n.6 (discussing policy's consequences). A unanimous Supreme Court held that such practices violated Title VII unless justified by the employer. *See id.* at 430 (providing Court's holding). To justify such a policy, the Court required the defendant to show that the discriminatory employment practice was a business necessity and job-related, which the employer was unable to do. *See id.* at 436 (explaining Court's holding); *see also* Hollar, *supra* note 23, at 779 (discussing facts and holding of *Griggs*). Hollar notes that before *Griggs*, it had been unclear whether courts under Title VII would treat a facially neutral employment practice that tended to disproportionately exclude women or minorities as unlawful. *See id.* at 778 (noting problems before *Griggs* decision). The Supreme Court, however, "answered that question" in *Griggs* by holding that such a practice indeed violates Title VII. *Id.*

successful performance of the jobs for which it was used;" and bear some "relationship to job-performance ability."[30]

The Court continued its indecisiveness in *Albemarle Paper Co. v. Moody*,[31] where it once again used different language to describe the employer's burden by stating that discriminatory employment tests must be "significantly correlated with important elements of work behavior which . . . are relevant to the . . . jobs for which candidates are being evaluated."[32] On the other hand, although the language in *Griggs* and *Albemarle* varied, both cases created a heavy burden for defendants to successfully assert business necessity, and they consistently focused on whether the pre-employment test was job related and whether it measured job performance.[33] Likewise, in *Dothard v. Rawlinson*,[34] the Court subsequently announced the standard for a successful business necessity defense, again using different language to articulate it, but also encompassing its prior themes: "a discriminatory employment practice must be shown to be *necessary to safe and efficient job performance* to survive a Title VII [disparate impact] challenge."[35]

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30. *Griggs*, 401 U.S. at 431-32, 436; *see also Lanning I*, 181 F.3d at 485 (stating how standard enunciated by Supreme Court in *Griggs* for business necessity defense was unclear and listing different language used by Court to attempt to enunciate standard); Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 321 (1998) (listing different language used by Court to define business necessity in disparate impact cases under Title VII and discussing how it has led lower courts to create different standards in order to analyze business justifications set forth by employers).

31. 422 U.S. 405 (1975).

32. *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (2003)). In *Albemarle*, an employer sought to use verbal exam and high school diploma requirements for making its hiring and promotion decisions, whereby white workers disproportionately outperformed racial minorities. *See id.* at 408-11 (stating facts). To meet its burden under the business necessity defense, the employer hired an industrial psychologist to complete validation studies showing that the tests were job related. *See id.* at 429-30 (discussing employer's actions). The employer showed that its tests had a significant statistical correlation with manager ratings in several groups of the jobs in question. *See id.* (providing employer's evidence to prove that its requirements were necessary). The Court rejected the studies, holding that the employer failed to show that its requirements were job-related. *See id.* at 434-36 (giving Court's holding); *see also* Hollar, *supra* note 23, at 779-80 (discussing how standard in *Albemarle* was strict and would "likely render most physical and written tests invalid"); Lye, *supra* note 30, at 324 (stating how Court "considerably strengthened the disparate impact plaintiff's hand" by adopting strict standard for business necessity defense).

33. *See* Lye, *supra* note 30, at 326 (concluding that Court had imposed "exacting demands" on defendant attempting to justify test as job-related).

34. 433 U.S. 321 (1977).

35. *Id.* at 331 n.14 (emphasis added). *Dothard* involved women who challenged the Alabama prison system's statutory height requirement of being at least five feet, two inches and a weight requirement of being at least 120 pounds for its prison guard positions. *See id.* at 323-24 (stating facts of case). Such requirements would exclude approximately thirty-three percent of all women between eighteen and seventy-nine years of age, but only one percent of all men between the same

Shortly after the composition of the Court changed in the late 1980s, however, it began to drift from its prior precedent by allowing employers more discretion in their employment practices.[36] In 1989, such endeavors culminated in *Wards Cove*, where the Court explicitly held for the first time that the employer bears only the burden of production, not persuasion, at the business necessity stage of disparate impact litigation.[37] Furthermore, it held that an employer only needs to show that its challenged practice "serves, in a significant way," its "legitimate employment goals," which is

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ages. *See id.* at 329 (discussing impact of employer's requirements). The State justified its pre-employment requirements because it believed that prison guards need to be strong. *See id.* (stating State's reason for its requirements). It, therefore, reasoned that taller, heavier people tended to be stronger. *See id.* at 331 (explaining State's justification). The State, nevertheless, failed to introduce any statistical evidence to prove its assertions. *See id.* (showing how State failed to properly prove its justification). Thus, the Court held that the State did not meet its burden under the business necessity defense. *See id.* (providing Court's holding). It concluded that if "strength" were actually a genuine "job-related quality," the State could easily validate a test that measured strength directly instead of through reliance on height and weight measurements. *See id.* at 332 (explaining Court's reasoning); *see also* Hollar, *supra* note 23, at 780 (discussing Court's holding and reasoning in *Dothard*); Lye, *supra* note 30, at 326-27 (explaining how *Dothard* clarified business necessity standard, but still left some unresolved issues).

36. *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 584-87 (1979) (making more lenient standard for employer). In *Beazer*, plaintiffs challenged the Transit Authority's blanket exclusion of any individual using or possessing methadone from all employment positions, which disproportionately implicated Hispanic and black people. *See id.* at 571 (stating facts). While the Court found that the plaintiffs failed on their prima facie case to prove disparate impact because their statistics did not encompass the relevant labor market, it commented in dicta on the business necessity defense. *See id.* at 584-85 (giving Court's comments in *Beazer*). The Court stated, in a footnote, that even if the plaintiffs had proved a disparate impact, the defendant would have shown business necessity by establishing that its practice significantly served its legitimate business goals of safety and efficiency. *See id.* at 587 n.31 (providing Court's dicta). Subsequently, in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988), the plurality similarly noted that employers could justify a pre-employment test by simply advancing a legitimate business reason for the practice in question. *See* Hollar, *supra* note 23, at 781 (discussing how Court upheld employment requirement in *Beazer*). Hollar interestingly noted that the Court did not assess whether the employer's rule was necessary for safe job performance, which was the standard articulated in *Dothard*. *See id.* (stating how Court possibly deviated from its holding in *Dothard*); *see also* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 836 (3d ed. 1998) (noting how Republican President Ronald Reagan appointed Antonin Scalia and Anthony M. Kennedy in 1986 and 1988, respectively, to Supreme Court to fill vacancies left by retiring Justices Lewis F. Powell and William J. Brennan); Lye, *supra* note 30, at 327-29, 331-32 (noting that Court took "a definitive step towards disparate impact's current state of erosion and confusion" through its opinions in *Beazer* and *Watson*); Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 405 (1989) (arguing how Court's decision in *Beazer* weakened *Griggs* standard).

37. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (changing burden for employer in Title VII disparate impact case from burden of persuasion to only burden of production to justify its employment practice).

substantially more deferential and pro-employer than the previous standards.[38] Consequently, though, the Court's dramatic shift in its Title VII jurisprudence did not go unnoticed.[39]

2. *Congressional Disapproval and the Enactment of the Civil Rights Act of 1991*

Even though the Court finally settled on precise language for the business necessity defense in *Wards Cove* and seemed to resolve the defense's previous issues, Congress grew increasingly concerned over the Court diminishing Title VII protections through its holdings.[40] Therefore, after exhaustive debates within Congress and with the Bush administration, Congress passed the 1991 Civil Rights Act, which effectively reversed the Court's decision in *Wards Cove* by once again placing a burden of persuasion—rather than merely a burden of production—on the defendant to

38. *Id.* The Court concluded that the "dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* The Court explained that lower courts, therefore, should engage in a "reasoned review" of the employer's justification for instituting the challenged practice. *Id.* Moreover, the Court emphasized that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.*; *see also* Lanning v. Southeastern Pa. Transp. Auth. (Lanning I), 181 F.3d 478, 487 (3d Cir. 1999) (discussing how Court adopted more liberal test for business necessity in *Wards Cove*); Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1405 (1990) (arguing that decisions of conservative Court in late 1980s on its Title VII jurisprudence are as outmoded as its decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Reginald Alleyne, *Smoking Guns Are Hard to Find*, L.A. TIMES, June 12, 1989, at 5 (noting how Supreme Court's "underlying dislike" for Title VII is reflected in its *Wards Cove* decision); Linda Greenhouse, *The Year the Court Turned to the Right*, N.Y. TIMES, July 7, 1989, at A1 (reporting that *Wards Cove* effectively overruled *Griggs* standard).

39. *See Lanning I*, 181 F.3d at 487 (noting that in response to Court's decision in *Wards Cove*, Congress enacted Civil Rights Act of 1991).

40. *See* Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 906-07 (1993) (hereinafter *The Civil Rights Act*) (discussing Congress's response to Court's decisions that substantially limited plaintiffs' ability to prevail in Title VII lawsuits); *see also* 136 CONG. REC. H6/95 (1990) (statement of Rep. Owens) (commenting on Court's decision in *Wards Cove*). Representative Owens remarked that:

> Years of steady progress lurched to a halt . . . . Here again in America, racism has been made socially acceptable . . . . And now thanks to Ronald Reagan's appointments to the Supreme Court, here again in America, racism in the workplace has been made legally tenable . . . . Years of consensus and consistent precedent were swept aside . . . . [W]hat the Court has said to employers in *Wards Cove* is that while you still can't commit blatant, obvious acts of discrimination against minorities and women, if you are sophisticated and discreet about it, we will look the other way. You cannot hang a "no blacks allowed" sign on your door, but if you're clever and come up with a standardized test or some other superficially neutral ruse that achieves exactly the same result, no one will stand in your way. You can be a bigot, in other words, so long as you are a kind and gentle one.

Id. (citations omitted).

prove business necessity and by codifying the business necessity defense to require that the challenged practice "be job related for the position in question and consistent with business necessity."[41] Furthermore, the Act permits courts to look only at a single memorandum as legislative history, which states that the terms "business necessity" and "job related" "are intended to reflect the concepts enunciated by the Supreme Court in [*Griggs*], and in [the Court's] decisions *prior* to [*Wards Cove*]."[42]

B. *How Other Circuits Have Evaluated the Defense*

Because the cases from *Griggs* to *Wards Cove* do not expound a readily articulable standard for business necessity, the lower courts have been unable to adopt a uniform standard to analyze the legitimacy of an employer's justification for a practice that has a disparate impact, leading mainly to three different standards employed outside the Third Circuit.[43]

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41. 42 U.S.C. § 2000e-2(k)(1)(A) (2003); *see also The Civil Rights Act*, *supra* note 40, at 896-906 (explaining political struggle to enact 1991 Civil Rights Act); James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L. & POL'Y REV. 133, 174 (1992) (stating that in order for 1991 Act to pass, proponents had to withdraw from notion of greatly expanding employees' civil rights). The Democrats in Congress primarily sought to overturn the Court's decision in *Wards Cove* and to codify the *Griggs* standard. *See id.* at 899-900 (stating one political party's view). Conversely, the Republicans, along with the Bush Administration, were concerned with drafting a bill that would make it too difficult for employers to prevail in disparate impact suits and, as a result, to use quotas in their hiring processes to avoid discrimination suits. *See id.* at 900 (noting Republican party's concerns). Hence, as a result of the controversy:

> [T]he Civil Rights Act of 1991 endured a two-year odyssey that involved twenty-two days of hearings, introduction of at least ten major alternative bills, dozens of versions of these bills, a veto, a failed veto override, scores of hours of debate on the floors of the House and the Senate, and hundreds of hours of meetings.

Id. at 900-01 (citations omitted). In the end, however, it was a compromised piece of legislation that spoke vaguely and handed the problem back to the courts. *See id.* at 902-03 (explaining how Act is product of compromise between two parties). At least minimally, though, it effectively overruled the holdings in *Wards Cove*, including its business necessity definition. *See id.* at 910 (discussing Act's impact). *But see* Carvin, *supra* note 3, at 1164 (arguing that *Wards Cove* remains good law even after 1991 Civil Rights Act); *see also* Grover, *supra* note 20, at 387 (stating how business necessity defense "secured a statutory foundation" in the 1991 Civil Rights Act). Grover also correctly notes that because the Court's decisions prior to *Wards Cove* are inconsistent, definitions for the terms "job-related" and "consistent with business necessity" have been difficult to ascertain. *See id.* at 393 (describing lower court's difficulties in interpreting Act).

42. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992) (emphasis added); *see* Hollar, *supra* note 23, at 783 (noting how all legislative history for Act is foreclosed from being used by courts except single memorandum).

43. *See* Hollar, *supra* note 23, at 785 (stating how Court's precedent is confusing with respect to terms "business necessity" and "job-related," resulting in lower courts struggling to create unified standard); Douglas W. Kmiec, *The 1991 Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma*, 68 NOTRE DAME L. REV. 911, 917 (1993) (noting how Congress has left "business necessity" defense undefined, which has thereby produced "unnecessary make-work for lawyers" and

First, the most lenient and widely used of the three tests is the "manifest relationship" test, which stems from the broad language used in *Griggs*.[44] Circuit courts using the test mandate that the employer prove merely "a manifest relationship" between its pre-employment demands and successful job performance to satisfy the Act's business necessity requirements.[45] Hence, if the employer demonstrates a legitimate business purpose and shows that the implemented test will further that purpose, the test will survive the challenge.[46] Next, other circuits have interpreted the Act's language to require the employer to prove that the challenged practice is "demonstrably necessary" to meet "an important business goal for Title VII purposes," which, when compared to the "manifest relationship" standard, requires a higher correlation between the employer's requirements and its goal of screening unqualified applicants.[47]

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increased burdensome litigation for employers and employees); Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1, 18 (1989) (discussing how Court gave conflicting signals as to meaning of "business necessity" in *Griggs*). Player observes that "[i]n the seventeen years between *Griggs* and the Court's decision in [*Wards Cove*], the Court failed to define with any precision what it meant by 'business necessity.'" *Id.* at 2.

44. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (stating that employers are required to show that pre-employment test has a "manifest relationship to the employment in question"); *see also* Hollar, *supra* note 23, at 785-86 (discussing how courts use manifest relationship test to analyze defense and how it is most lenient compared to other standards that courts have used); Lye, *supra* note 30, at 352-53 (listing manifest relationship test as one of tests that lower courts have used to interpret Act's language for business necessity).

45. *See* Hollar, *supra* note 23, at 785-86 (noting that courts use manifest relationship test, which is most lenient of lower courts' tests). Hollar contends that while the test is supported by broad language in Supreme Court precedent, it appears inconsistent with the Court's disposition of cases in the 1970s, when it announced very strict standards.

See id. at 787 (discussing potential inconsistency with Court's precedent and manifest relationship test); Lye, *supra* note 30, at 352-53 (listing standard as one used by lower courts to satisfy Act's language in analyzing whether test is "job-related" and "consistent with business necessity"); *see also* Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 585 (9th Cir. 2000) (using manifest relationship test to evaluate employer's business necessity defense in disparate impact claim); Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1315 n.10 (10th Cir. 1999) (using manifest relationship test when no safety concerns implicated); NAACP v. Town of East Haven, 70 F.3d 219, 225 (2d Cir. 1995) (mandating manifest relationship between employment practice and test); Zamlen v. City of Cleveland, 906 F.2d 209, 217 (6th Cir. 1990) (following standard that uses manifest relationship test in cases where nature of employment does not involve safety concerns); Davis v. City of Dallas, 777 F.2d 205, 211 (5th Cir. 1985) (applying manifest relationship standard); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (adopting manifest relationship standard); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 321-22 (N.D. Cal. 1992) (interpreting 1991 Act to require employer "to show that its selection criteria bear 'a manifest relationship to the employment in question'").

46. *See* Hollar, *supra* note 23, at 786 (explaining how employer can prove business necessity under manifest relationship test in disparate impact case).

47. *See* Bew v. City of Chicago, 252 F.3d 891, 894 (7th Cir. 2001) (outlining standard for business necessity defense, using demonstrably necessary standard);

Finally, the remaining circuits—relying on language in *Albemarle* and *Dothard*—have used the so-called "close-approximation-to-job-tasks" standard to analyze whether an employer's job-selection test is valid under the Act.[48] Under such a standard, if the physical test "closely approximates a task that the applicant would actually perform on the job," courts are likely to uphold it.[49] For instance, courts are more likely to uphold a police department's test that requires an applicant to scale a six-foot wall or run one and one-half miles in twelve minutes under this approach than if the test required doing a set of push-ups in a specified time because the former requirements are considered "critical duties" typically performed in the course of employment, whereas the latter task is not.[50] Courts that adopt the close approximation standard reason that if a test encompasses actual job tasks, it makes it highly consistent with business necessity and less likely that the test masks intentional discrimination or screens out qualified applicants.[51]

C. *The Third Circuit's Approach Toward Evaluating the Business Necessity Defense*

Given the aforementioned approaches toward analyzing the business necessity defense under the Act, in 1999 the Third Circuit in *Lanning I*[52] addressed the issue for the first time.[53] The Third Circuit in *Lanning I* not only declined to follow other circuits' approaches, but it announced the

Anderson v. Zubieta, 180 F.3d 329, 342 (D.C. Cir. 1999) (employing demonstrably necessary standard for disparate impact cases); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118-19 (11th Cir. 1993) (employing demonstrably necessary standard); Banks v. City of Albany, 953 F. Supp. 28, 35 (N.D.N.Y. 1997) (adopting demonstrably necessary standard); Donnelly v. R.I. Bd. of Governors, 929 F. Supp. 583, 594 (D.R.I. 1996) (using synonymous standard); *see also* Lye, *supra* note 30, at 350-51 (discussing *Fitzpatrick* and demonstrably necessary standard).

48. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1470-73 (8th Cir. 1996) (using standard to uphold employer's test); *see also* Hollar, *supra* note 23, at 789-91 (calling test "close-approximation-to-job-tasks" and discussing its substance and how courts analyze employers' pre-employment practices to see if they satisfy Act).

49. Hollar, *supra* note 23, at 789. Hollar notes that the close approximation standard focuses mostly on the test's form, while the manifest relationship test focuses mostly on the skill being tested. *See id.* (contrasting two tests).

50. *See id.* at 789-90 (illustrating application of close approximation test based on past cases). Hollar explains how the close approximation standard is closely tied to the Equal Employment Opportunity Commission's guidelines for validating employment tests. *See id.* at 790 (discussing how standard follows agency's guidelines). More specifically, the Commission's concept of "content validity" is satisfied "by data showing that the content of a selection procedure is representative of important aspects of performance on the job." *Id.*

51. *See id.* (discussing rationale for test and arguments supporting its use).

52. Lanning v. Southeastern Pa. Transp. Auth. (Lanning I), 181 F.3d 478 (3d Cir. 1999).

53. *See Lanning I*, 181 F.3d at 485 (stating that appeal focuses on proper standard for evaluating whether pre-employment test is "job-related for the position in question and consistent with business necessity" under Act). The business necessity issue was mainly the sole issue in *Lanning I* because the defendant conceded

strictest standard for analyzing the business necessity defense to date: an employer's job-selection test must "measure [only] the minimum qualifications necessary for the successful performance of the job in question."[54]

Consequently, under the Third Circuit's standard, several issues can arise when litigating whether an employer has met its burden under the business necessity defense.[55] For example, an employer must first show that the test's requirements correlate to successful job performance.[56] That is, the skills that the pre-employment test measures must be skills that employees actually use to execute their jobs, rather than skills that the employer merely perceives to be important for the job.[57] Thus, if an employer implements, for instance, a physical fitness exam, it cannot simply claim that the job is physically demanding and expect a court to uphold the exam, without more, if it has a disparate impact on a protected class.[58] Rather, the employer will have to show—usually by statistical evidence—that without the skill, the employee would compromise the effectiveness of the job in question.[59]

Similarly, another issue that litigants will have to address is whether the test effectively measures only the mere *minimal* qualifications or degree of the skill necessary for successful job performance.[60] Employers, for example, must prove that at least those minimally qualified will be able to pass their test.[61] They will also need to show that by merely passing the

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that its pre-employment test had a disparate impact on women. *See id.* (stating *Lanning I*'s narrow issue).

54. *Id.* at 490.

55. *See id.* at 491-94 (discussing reasons why SEPTA had not met its burden under newly announced standard, reflecting what defendants must show to prevail under standard).

56. *See id.* at 492 n.21 (discussing that one reason why court is skeptical of defendant's statistical studies is because "the absolute number of arrests . . . do[es] not necessarily correlate with successful job performance").

57. *See* Lanning v. Southeastern Pa. Transp. Auth. (Lanning II), 308 F.3d 286, 290 (3d Cir. 2002) (questioning whether defendant's study "overemphasizes" use of skill measured in actually performing job functions).

58. *See* Brooks, *supra* note 20, 6-7 (explaining employer's burden under business necessity defense). With respect to their job selection tests, employers must at least show "a significant relationship between the physical fitness requirement and the responsibilities of members of their department" to have a legitimate chance of proving business necessity in the Third Circuit. *Id.*

59. *See Lanning II*, 308 F.3d at 290 (highlighting lower court's assertion that inability to pass defendant's pre-employment test would compromise job's overall effectiveness).

60. *See id.* at 291 (noting that critical issue in case is what minimum qualifications were actually necessary to successfully perform job's functions); *see also* Joanna Grossman, *What Defines "Business Necessity" in the Discrimination Context?: A Federal Appellate Case Grapples with How Fast Transit Police Officers Must Run*, Nov. 19, 2002, *at* http://writ.news.findlaw.com/grossman/20021119.html (reporting that Third Circuit remanded case to trial court in *Lanning I* to determine if SEPTA's standard measured only minimum qualifications).

61. *See Lanning II*, 308 F.3d at 292 ("[T]o set an unnecessarily high cut-off score would contravene *Griggs*."). The Third Circuit noted that it would be illegal

test, the applicants are much "more likely"—than those failing it—to be able to satisfactorily execute the job's functions.[62] To determine such, courts will first closely scrutinize the test's cut-off score by looking at whether the employer legitimately set the cut-off based on sufficient evidence that that score measures only the minimum abilities for the job, rather than the employer arbitrarily setting the score.[63] For instance, when establishing an effective cut-off score, an employer cannot rely solely on its experts' subjective judgments,[64] nor can it simply reason that "the higher the performance, the better the applicant will be at the job," and so set the score unnecessarily high.[65] On the contrary, an employer will have to use a variety of experts, studies and statistics to establish a valid cut-off

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to require applicants to have to score so high on the pre-employment test that their predicted rate of success is one hundred percent. *See id.* (discussing tests that would violate federal law).

62. *Cf. id.* at 291-92 (holding that acceptable interpretation of "minimum qualifications necessary" is "likely to be able to do the job" and that, in effect, employers have right to demand chance of success that is better than twenty percent). *But see* Grossman, *supra* note 60, at 4-6 (interpreting phrase "minimum qualifications" more literally). Grossman appears to take a stricter view than the *Lanning II* court on how to determine if the pre-employment test truly measures the minimum. *See id.* (noting author's disapproval with Third Circuit's disposition in *Lanning II*). More specifically, her inquiry would be: "[C]ould someone with a lesser [score than the cut-off] successfully perform the tasks required of [the job]? If so, the fitness requirement would be invalid." *Id.* Apparently, Grossman takes the view that if one person who does not meet the test's requirements could still perform the job's tasks, the test is invalid. *See id.* (explaining author's assertion). Under the *Lanning II* interpretation, however, an employer can still prevail even if the plaintiff can prove that some applicants who fail could still perform the job's tasks effectively. *See Lanning II*, 308 F.3d at 291 (articulating Third Circuit's ruling). Hence, as long as the employer can show that "individuals who fail the test will be much less likely to successfully execute critical policing tasks," it can prevail. *Id.*

63. *See* Lanning v. Southeastern Pa. Transp. Auth. (Lanning I), 181 F.3d 478, 492 n.19 (3d Cir. 1999) ("Where . . . the cut-off score chosen has a discriminatory disparate impact, *Griggs* prohibits the establishment of . . . arbitrary barrier[s] to employment opportunities.").

64. *See id.* at 491-92 (holding employer's test invalid under Title VII because it relied on its experts' judgment alone to set its cut-off score).

65. *Id.* at 493 n.23 (stating that "more is better" theory—where employer sets high score because higher performers on test typically will perform better on job—results in unnecessarily high cut-off scores and will not be valid basis to set scores under Title VII). The Third Circuit notes that studies that actually prove "more is better" are not always irrelevant. *See id.* (providing Third Circuit's analysis). The court explains that for some positions where applicants' higher scores on a pre-employment exam correspond to better job performance, a cut-off score based on the "more is better" theory is justified. *See id.* (stating how some employers may legitimately use tests where higher scores indicate better candidates). The court, for example, notes that a typing exam for the position of a typist may be justified in setting a high cut-off score, given that the faster, more accurate typists are usually better on the job. *See id.* (stating court's example). Even so, however, the employer will still have to show evidence of such. *See id.* (discussing employer's burden). Nevertheless, the Third Circuit acknowledges that the "more is better" approach is accurate only in the "rarest of cases where the exam tests for qualities that fairly represent the totality of a job's responsibilities." *Id.* Thus, it contends

score and to prove that those who meet its score are, in a real sense, more likely to be able to do the job effectively.[66]

The final significant hurdle—and one that litigants may often overlook—is that when employers attempt to prove the aforementioned issues, they must do so using validated, relevant studies and evidence.[67] The plaintiffs and courts should and will undoubtedly scrutinize the defendant's evidence for deficiencies and unreliability.[68] Employers, however, can attempt to dispose of these arguments by showing that they used sound principles of statistical analysis, such as a representative sample, and that the studies' conclusions correlated closely to job performance, which would be shown by a high correlation coefficient for each study.[69]

IV. ANALYSIS OF *LANNING I* AND *LANNING II*

On October 15, 2002, the Third Circuit delivered its opinion in *Lanning II*.[70] In doing so, the Third Circuit not only reaffirmed the "minimum qualifications" standard set forth in *Lanning I* as the correct standard to evaluate an employer's justification for a job-selection test that has a disparate impact, but it also indicated how it expected the lower courts to apply the standard.[71]

A. *Facts*

To upgrade the quality and physical fitness level of its transit police force, the Southeastern Pennsylvania Transportation Authority ("SEPTA") hired an expert exercise physiologist to develop an appropriate physical

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that for complex jobs where "intelligence, judgment, and experience" play a critical role, hiring based on rank from a job-selection test would be erroneous. *Id.*

66. *See generally id.* at 491-93 (discussing that employer needs validated studies rather than just its experts' subjective opinions to prove business necessity).

67. *See id.* at 493 n.21 (cautioning district court to "take a critical look" at employer's studies on remand). The Third Circuit warned that the story that statistics "tell depends, not unlike beauty, upon the eye and ear of the beholder." *Id.* Furthermore, it stated that courts "must apply a critical and cautious ear to one dimensional statistical presentation." *Id.* (quoting Bryant v. Int'l Sch. Serv., Inc., 675 F.2d 562, 573 (3d Cir. 1982)).

68. *Cf. id.* at 493 n.21 (explaining how courts must critically look at employer's evidence of business justification).

69. *See* Lanning v. Southeastern Pa. Transp. Auth. (Lanning II), 308 F.3d 286, 290-91 (3d Cir. 2002) (discussing concerns over defendant's evidence to prove business necessity).

70. 308 F.3d 286 (3d Cir. 2002). For a further discussion of *Lanning II*, see *infra* notes 84-122 and accompanying text.

71. *See generally Lanning II*, 308 F.3d at 289 (quoting *Lanning I*, 181 F.3d at 491 n.16) ("We are accordingly confident that application of the business necessity standard to SEPTA is fully consistent with the Supreme Court's pre-*Wards Cove* jurisprudence as required by the Act."). The Third Circuit reviewed and affirmed the lower court's findings that SEPTA had met the requirements of the minimum qualifications standard for a successful business necessity defense. *See id.* at 289-93 (stating Third Circuit's holding).

fitness test for its police officers and applicants.[72] After conducting studies, SEPTA's expert recommended that SEPTA's goals could be met if officers had a 42.5 mL/kg/min aerobic capacity, which officers would have if they could run one and one-half miles in twelve minutes.[73] Therefore, SEPTA used its expert's recommendations as a basis for creating and instituting an applicant screening test.[74] Thus, if applicants could not run one and one-half miles in twelve minutes, SEPTA would disqualify them from consideration for employment as transit officers.[75] As a result of SEPTA administering the test to its applicants, the pass rate for women was 6.7%, compared to a 55.6% pass rate for men during the time period involved in the litigation.[76]

Because the test had a disparate impact on women, five female applicants who failed the test brought a Title VII class action suit challenging SEPTA's use of the screening test;[77] in response, SEPTA conceded to the test's discriminatory effect, yet it argued that the test was necessary to determine if the applicant could successfully perform the job's duties.[78] The district court, by using the "manifest relationship" test, entered judgment for SEPTA on all claims because SEPTA proved business necessity: its

72. *See Lanning I*, 181 F.3d at 481-82 (giving facts of case).

73. *See id.* at 482 (discussing SEPTA's basis for establishing its cut-off score to its applicant screening test). Dr. Paul Davis, SEPTA's expert, initially decided that an aerobic capacity of 50 mL/kg/min was essential to successfully perform the job. *See id.* at 482 n.3 (explaining expert's method for creating SEPTA test). Interestingly, after reflection, Dr. Davis thought that such a high standard would have "a draconian effect" on women applicants, so he concluded that the 42.5 mL/kg/min standard was more fitting for SEPTA's goals. *Id.*

74. *See id.* at 482 (explaining that SEPTA adopted its expert's judgments).

75. *See id.* (illustrating how SEPTA screened applicants).

76. *See id.* at 483 (noting pass rates for women and men in 1993 and 1996, which show discriminatory effect of SEPTA's pre-employment test on women).

77. *See id.* at 484 (stating origins of lawsuit). The five plaintiffs brought the suit on behalf of all the 1993 female applicants, 1996 female applicants and future female applicants for employment as SEPTA police officers who have been denied or will be denied employment because they cannot run one and one-half miles in twelve minutes or less. *See id.* (stating facts). Furthermore, the Department of Justice, under the Clinton Administration, also filed suit on behalf of the United States challenging SEPTA's test. *See id.* (naming parties to case). *But see* James C. Sharf, Lanning *Revisited: The Third Circuit Again Rejects Relative Merit*, Jan. 3, 2003, *at* http://www.siop.org/tip/Jan03/05sharf.htm (last visited Jan. 17, 2003) (reporting that one of Bush Administration's early moves was to withdraw government's participation in *Lanning I*). By the time of *Lanning II*, the government had withdrawn its lawsuit against SEPTA. *See id.* (explaining government's actions in case); *see also* Shannon P. Duffy, *3rd Circuit Decides SEPTA Fitness Legal for Applicants, McKee Dissents*, 227 LEGAL INTELLIGENCER 1 (2002) (reporting how Justice Department had internal battles because many lawyers wanted to keep case). Assistant Attorney General Ralph F. Boyd, Jr. decided to withdraw from the case, stating: "[w]e feel it is critical to public safety that police and firefighters be able to run, climb up and down stairs to rescue people quickly under the most trying of circumstances." *Id.*

78. *Cf. Lanning I*, 181 F.3d at 484 (explaining how SEPTA attempted to show at trial that statistically significant correlation exists between high aerobic capacity and arrests, arrest rates and commendations).

test—which measured aerobic capacity—had a "manifest relationship" to the critical duties of a SEPTA transit police officer.[79]

In *Lanning I*, however, the Third Circuit reversed and remanded the case, holding that the district court applied an incorrect legal standard to measure whether SEPTA proved business necessity under the 1991 Civil Rights Act.[80] Accordingly, the Third Circuit held that the standard most consistent with the Act and Supreme Court precedent prior to *Wards Cove*—as directed by Congress's interpretative memorandum—was that the employer must demonstrate that its pre-employment test and respective cut-off score measure only "the minimum qualifications necessary for successful performance of the job in question."[81] Furthermore, the court held that the standard takes public safety into consideration, for if a court finds that failing to meet an employer's cut-off score would jeopardize public safety, it would be indicative that the level was minimal for successful job performance.[82]

On remand, the district court held a five-day hearing and made additional findings of fact to its previous 162-page opinion from *Lanning I*, and it ultimately concluded that SEPTA had proven that its 42.5 mL/kg/min aerobic capacity test measures the minimum qualifications necessary for the successful performance of a transit police officer.[83] In *Lanning II*, which involved a different panel of judges from *Lanning I*, the Third Circuit affirmed the judgment for the defendants.[84] In doing so, the Third Circuit found that SEPTA had satisfied the "minimum qualifications" stan-

79. *See id.* at 484 (noting how district court found that SEPTA demonstrated manifest relationship existed between aerobic capacity and critical duties of SEPTA transit police officer).

80. *See id.* at 494 (remanding case to district court to apply correct legal standard of minimum qualifications to determine if defendant had proven business necessity).

81. *Id.* at 490 (citation omitted).

82. *See id.* at 490 n.16 (noting that public safety can be basis for determining if test measures minimum qualifications); *see also* Lanning v. Southeastern Pa. Transp. Auth. (Lanning II), 308 F.3d 286, 289 (3d Cir. 2002) (discussing how business necessity standard takes public safety into consideration). If employers can show that the inability of an applicant to meet the employer's pre-employment test would jeopardize public safety, the Third Circuit will consider it "relevant to determine if that level is necessary for the successful performance of the job." *Lanning I*, 181 F.3d at 490 n.16. Moreover, it will consider it relevant because an employee who poses a substantial risk to public safety could not be considered to be effectively performing that job's functions. *See id.* (explaining Third Circuit's emphasis on public safety when analyzing employer's burden in disparate impact case).

83. *See Lanning II*, 308 F.3d at 289 (discussing district court's findings upon remand). The district court found that any lesser standard than SEPTA's current test and cut-off score "would result in officers . . . who were a danger to themselves, other officers, and the public at large, [and] unable to effectively fight and deter crime." *Id.* (citation omitted); *see* Michael R. Triplett, *Third Circuit Finds No Disparate Impact in Transit Authority Fitness Requirements*, Oct. 18, 2002, *at* http://emlawcenter.bna.com/PIC/empic.nsf/(Index)/E720C4CF45F236DE85256C56005C5 (reporting on holding in *Lanning II*).

84. *See Lanning II*, 308 F.3d at 289-93 (giving disposition of case).

dard by proving that applicants who failed the test would be "much less likely" to effectively execute the job's critical tasks.[85]

B. *Legal Reasoning for Adopting a Strict Business Necessity Standard*

Once again, the Third Circuit announced an entirely new standard among the circuits to measure if the defendant had proven business necessity under the Act.[86] To establish the most effective standard, the court reasoned that because the Act instructed courts to interpret its business necessity language in conformity with *Griggs* and pre-*Wards Cove* cases, it first had to ascertain the Court's "mission" in those cases.[87] Thus, the Third Circuit determined that the Court's central theme in *Griggs*—and later in *Albemarle* and *Dothard*—was to eliminate *unnecessary* barriers to employment when a neutral practice had a discriminatory impact.[88] The Third Circuit also acknowledged both that the Supreme Court adopted strict standards in those cases to effectuate that mission and that the Act attempted to reinstate a more pro-plaintiff interpretation of Title VII, given that Congress enacted it as an immediate response to *Wards Cove*'s pro-employer standard.[89] The court concluded, therefore, that the strict "minimum qualifications" standard would most effectively encompass those considerations and eliminate an employer's use of excessive, and so unnecessary, requirements that have a disparate impact on protected groups and that operate as a barrier to employment opportunities.[90]

C. *Positive Aspects of the Third Circuit's Standard*

At the very least, the "minimum qualifications" standard meets the Act's objectives.[91] First, by requiring the employer to test only for minimum qualifications, the standard ensures that applicants in Title VII's protected classes are given a fair opportunity to obtain meaningful employment by not being unnecessarily excluded through arbitrary tests

85. *Id.* at 291. *But see* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 443-44 (5th ed. 2000) (suggesting that SEPTA's test may be job-related in sense that everyone who passes it will be fit for job, yet test may not be job-related in sense that those who fail test are not fit to be police officers).

86. *Cf.* Hollar, *supra* note 23, at 791-93 (listing Third Circuit's minimum qualifications standard to prove business necessity as strictest standard to date).

87. *See Lanning I*, 181 F.3d at 489 (concluding that only minimum qualifications standard is consistent with Court's holding in *Griggs*).

88. *See id.* (articulating Supreme Court precedent by stating that it requires that employers' applicant screening tests have cut-off levels that reflect only qualifications necessary to successful job performance).

89. *Cf. id.* at 487-88 (discussing how Act's intended standard of measuring business necessity should be close to one enunciated in *Griggs*).

90. *See id.* at 490 (concluding that minimum qualifications standard is most consistent with Act's intent).

91. *See* Hollar, *supra* note 23, at 787 (noting how Act attempted to conform to strict standards enunciated in *Griggs* and its progeny and to reinstate more pro-plaintiff standard).

and cut-off scores.[92] In effect, the standard combats an employer who may covertly discriminate with a facially neutral practice.[93] Second, the standard comports with the Act's language mandating that the challenged practice be "consistent with business necessity" and "job related."[94] Hence, an employer who uses a test that measures the bare "minimum" qualifications means that the qualifications are a necessity, and so, they must be "consistent with business necessity";[95] similarly, a test that measures the minimum skills necessary for "successful job performance"—as the Third Circuit's approach requires—by implication means that the skills must be "job related," otherwise they would not lead to successful job performance.[96] Lastly, the Third Circuit's standard is a strict legal standard, a standard undoubtedly closer to the pro-employee *Griggs* decision than the pro-employer *Wards Cove* decision, which was Congress's apparent intent.[97] In sum, the standard—unlike the other circuits' more leni-

92. *See* Grossman, *supra* note 60, at 3-4 (discussing how *Lanning I* designed strict legal standard to eliminate discriminatory hiring practices). Grossman further notes her distress over the fact that *Lanning II* was a retreat from the strict standard established in *Lanning I*. *See id.* (stating author's disapproval with *Lanning II*'s ruling). Thus, she argues that *Lanning II* misapplied the strict legal standard and effectively diminished its harshness and ability to eliminate discriminatory screening tests. *See id.* (explaining author's disapproval).

93. *See Lanning I*, 181 F.3d at 489-90 (explaining effectiveness of Third Circuit's minimum qualifications standard in measuring business necessity). The court explained that:

> The disparate impact theory of discrimination combats not intentional, obvious discriminatory policies, but a type of covert discrimination in which facially neutral practices are employed to exclude, unnecessarily and disparately, protected groups from employment opportunities. Inherent in the adoption of this theory of discrimination is the recognition that an employer's job requirements may incorporate societal standards based not upon necessity but rather upon historical, discriminatory biases. A business necessity standard that wholly defers to an employer's judgment as to what is desirable in an employee therefore is completely inadequate in combating covert discrimination based upon societal prejudices. Only a business necessity doctrine that examines discriminatory cut-off scores in light of the minimum qualifications that are necessary to perform the job in question successfully can address adequately this subtle form of discrimination.

Id.

94. *See id.* at 489 (noting that business necessity language in Act and EEOC guidelines support Third Circuit's standard); *see also* 29 C.F.R. § 1607.5(H) (2003) (stating that cut-off scores should be established "so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force").

95. *See Lanning I*, 181 F.3d at 489 (commenting on fact that if standard only required qualities measured by pre-employment tests to bear merely some relationship to job, it would make "business necessity" prong of Act's language virtually meaningless).

96. *Cf. id.* at 489-90 (detailing how standard embodies "job-related" prong of Act).

97. *See id.* at 489 (stating how minimum qualifications standard encompasses central themes of *Griggs* and its pre-*Wards Cove* progeny). For a more complete discussion of *Griggs*, *Wards Cove* and the relevant cases decided between the two, see *supra* notes 24-39 and accompanying text. The interpretative memorandum,

ent standards—does not give employers wide discretion to create irrational, discriminatory tests because it forces courts to closely scrutinize the employer's basis for enacting its job-selection criteria.[98]

D. *Conceptual Problems with the Third Circuit's Approach*

Several problems exist with the Third Circuit's "minimum qualifications" standard.[99] First, it arguably requires more than the Act mandates.[100] Specifically, the standard—by requiring the test to solely measure the absolute business necessities for effective job performance, or simply the bare minimum—disregards the Act's language that it only has to be "consistent" with business necessity.[101] In turn, such an unjustified, harsh standard may lead employers to enact quotas, which are prohibited and seemingly contrary to the Act's intent, to avoid litigation and scrutiny under this harsh standard;[102] or, alternatively, the "minimum qualifications" standard may force employers to constantly measure the statistical impact of each of their practices and conduct a utility analysis on any practice with a discriminatory impact, which could be expensive and prohibi-

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which Congress mandated that courts consider as the sole source of legislative history, states in pertinent part: "The terms 'business necessity' and 'job-related' are intended to reflect the concepts enunciated by the Supreme Court in [*Griggs*], and in other Supreme Court decisions prior to [*Wards Cove*]." 137 CONG. REC. 28,680 (1991) (providing interpretative memorandum to 1991 Civil Rights Act).

98. *See Lanning I*, 181 F.3d at 493 n.21 (encouraging district court on remand to take closer, critical look at employer's studies and evidence).

99. *See generally id.* at 502 (Weis, J., dissenting) (explaining difficulties presented by minimum qualifications standard).

100. *See* Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1032-33 (1993) (concluding that Act's language does not require employer to prove test is absolute necessity); *see also* Hollar, *supra* note 23, at 798 (arguing that minimum qualifications standard does not coincide with Act).

101. *See* Alito, *supra* note 100, at 1031-33 ("Congress did not require that the practice be compelled by business necessity."). Alito further argued that if Congress wanted to adopt an absolute necessity standard or a minimum qualifications standard, it would have used specific language that revealed such an intent. *See id.* (articulating author's arguments). Therefore, she continued, the fact that Congress did not do so shows that it did not intend to adopt such a strict standard. *See id.* (stating author's conclusion); Hollar, *supra* note 23, at 798 (stating that Third Circuit's standard writes out word "consistent" from statute because standard requires proof of business necessity, whereas statute only requires consistency with business necessity).

102. *See* Alito, *supra* note 100, at 1013 (noting how Act "in no way" requires employers to use quotas or make employment decisions based on statutorily protected characteristics). Alito discussed an employer's dilemma:

> While employers are statutorily barred from hiring anyone on the basis of [protected characteristics], these same employers are told in litigation that unless they can explain why their employees do not fit the desired statistical grid, their "unbalanced" workforce may be evidence of their intent to discriminate and proof of illegal disparate impact discrimination.

Id. at 1012.

tive.[103] Hence, given the standard's potential impact on employers, legal commentators question whether the Third Circuit's interpretation adequately achieves the Act's goal of preserving an employer's legitimate discretion.[104]

Another practical problem with the Third Circuit's standard is how to determine the "minimum qualifications" for a given job.[105] One commentator illustrated the complexity of the matter:

> If you were selecting a team to climb Mt. Everest with you, would you require all applicants to have two legs? Would you require them all to have reasonably good vision? Sure you would . . . . But, a one-legged guy has climbed Everest; so has a blind guy. So, what are the minimum requirements to climb that mountain?[106]

In other words, it may be extremely difficult, if not impossible, for employers to identify only the essential skills for a job, create a test limited to measuring those skills and successfully defend it in a disparate impact case in the Third Circuit.[107]

E. *Responding to Criticism: A Strict Rule with Application Softness?*

Litigants should be aware that although the "minimum qualifications" standard is a strict standard in theory, the Third Circuit perhaps indicated in *Lanning II*—which is the first and only case to which it applied the standard—that the "minimum qualifications" standard may not be as strict in practice.[108] *Lanning II* revealed several important considerations for litigants about an employer's practical burdens when proving business necessity in a Third Circuit disparate impact suit.[109]

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103. *See id.* at 1032-33 (discussing conceptual problems with requiring employer to prove absolute necessity of its employment practice, which Act does not require).

104. *See* Spiropoulos, *supra* note 15, at 1528 ("Courts must interpret Title VII in a manner that will both facilitate the removal of arbitrary barriers to equal employment opportunities and protect legitimate employer prerogatives.").

105. *See* Sharf, *supra* note 77, at 6-10 (reporting employment lawyers' concerns with minimum qualifications standard).

106. *Id.* (quoting employment lawyer, David Copus).

107. *See id.* (explaining problem with Third Circuit's minimum qualifications standard). David Copus comments that "[i]t does not make sense to say that any given set of qualifications is the minimum necessary to do a job. All we can ever say is that we are not going to take a chance on anyone below that level of qualifications." *Id.*

108. *See* Grossman, *supra* note 60, at 4-6 (arguing that Third Circuit did not correctly implement its own standard); Sharf, *supra* note 77, 6-10 (reporting comments by employment lawyers that *Lanning II* was subtle shift away from *Lanning I*'s principles).

109. *See* Sharf, *supra* note 77, at 7-9 (disclosing comments from Robert J. Malionek, employment lawyer, about *Lanning II*). Malionek notes that *Lanning II* made clear that the "'minimum qualifications' standard is not meant to demand a perfect cut-off score which separates out all those who can perform the job from all those who cannot." *Id.*

First, the Third Circuit gives significant weight to an employer's justification for its discriminatory practice, especially if it is to increase public safety.[110] Initially, the court in *Lanning I* suggested that lower courts should not readily accept an employer's justification for using a discriminatory practice at face value.[111] In *Lanning II*, however, the court not only loosely accepted SEPTA's public safety justification for its test, but also virtually relied on it as a basis for its entire opinion.[112]

Second, the court liberally defines the term "minimum qualifications."[113] Thus, an employer apparently does not have to accept all applicants that have some minute chance of successfully performing the job.[114] For instance, to prove that the test did not validly measure only the minimum qualifications, the plaintiffs in *Lanning I* showed that one applicant who had failed SEPTA's fitness test, yet was hired due to a clerical error, eventually became a highly decorated officer.[115] Notwithstanding such evidence, the court held that a test could still be justified even if it excluded candidates that had some chance of job success;[116] the court required only that the test differentiate between those who are "likely to be able to do

110. *See id.* (discussing deference Third Circuit gave to SEPTA in *Lanning II*).

111. *See id.* (interpreting *Lanning I* and its implications).

112. *See id.* (noting change in Third Circuit's apparent direction from *Lanning I* to *Lanning II* with respect to more readily accepting defendant's justification for using test that has disparate impact on protected Title VII class); *see also* Lanning v. Southeastern Pa. Transp. Auth. (Lanning II), 308 F.3d 286, 289, 292 (3d Cir. 2002) (listing employer's stated reason for using test and how it serves as underlying justification for court's holding). SEPTA stated that its goal was to upgrade the quality of its workforce and increase public safety. *See id.* at 289 (giving employer's reason for eventually implementing its pre-employment test). The court, after recognizing those goals, prefaced its opinion by stating that "[i]t is against this backdrop that we assess the sole issue we caused to be resolved on remand." *Id.* Later, it stated that even the "dissent [in *Lanning II*] concedes that SEPTA has the right to improve its workforce." *Id.* at 292.

113. *See* Grossman, *supra* note 60, at 4-5 (arguing that Third Circuit upheld SEPTA's pre-employment, physical fitness exam and it was "no minimum qualification").

114. *See Lanning II*, 308 F.3d at 292 (articulating that employer can reasonably demand that its applicants' chance of success be greater than twenty percent, showing that it can disqualify applicants who have some chance of success).

115. *See* Lanning v. Southeastern Pa. Transp. Auth. (Lanning I), 181 F.3d 478, 483-84 (3d Cir. 1999) (providing facts of case and noting how one officer who had failed, yet had been mistakenly hired, has been nominated repeatedly for awards, such as "Officer of the Year" and "Officer of the Quarter"). The Third Circuit found irrelevant the fact that some incumbent officers had also failed the physical fitness exam, yet still successfully performed the job and its functions well. *See id.* at 494 n.24 (agreeing with lower court). It should be noted that SEPTA initially disciplined those incumbent officers who had failed the test. *See id.* at 483 (discussing employer's initial actions). Due to protests from the employees' union, however, SEPTA refrained from disciplinary action and, alternatively, implemented an incentive program for those officers passing its fitness goals. *See id.* (stating SEPTA's reaction to union's demands).

116. *See Lanning II*, 308 F.3d at 292 ("It is perfectly reasonable, however, [for an employer] to demand a chance of success that is better than 5% to 20%.").

the job" and those who are not.[117] Accordingly, it upheld SEPTA's test, which indicated that those who passed the test had an on-the-job success rate of seventy to ninety percent compared to only a five to twenty percent success rate for those who failed the test.[118]

Finally, the Third Circuit does not require employers to meet a high evidentiary standard to support a business necessity defense.[119] After the *Lanning I* court directed the district court to take a close, "critical look" at the employer's validation studies, the court in *Lanning II* was satisfied with SEPTA providing merely "competent evidence" that its test meets the "minimum qualifications" standard.[120]

In sum, *Lanning II* clarified the Third Circuit's business necessity standard that had been set forth in *Lanning I*.[121] *Lanning II*, in effect, showed practitioners that an employer's burden of proving business necessity was not unreasonable and could feasibly be met with less precision and difficulty than previously expected.[122]

F. *The Third Circuit Should Consider Adopting a Less Stringent Standard*

Because the Third Circuit appeared to leniently apply a strict theoretical standard—which may even require more than the Act intended—the court should consider adopting a less stringent, equally permissible standard for measuring a business necessity defense so that the Third Circuit's law is both theoretically and practically consistent.[123] For instance, as discussed in Part II, many circuits use the more lenient "manifest relationship" standard, which requires the employer to show a "manifest relationship" between its pre-employment requirements and successful job

117. *Id.* at 291.

118. *See id.* (showing what classifies as permissible test under minimum qualifications standard).

119. *See* Sharf, *supra* note 77, at 7 (reporting comments from employment lawyer on how minimum qualifications standard is not "one of absolutes" as evidenced by *Lanning II*'s holdings).

120. *See id.* (stating court's decision in *Lanning II*); *see also Lanning II*, 308 F.3d at 288 (holding that SEPTA adequately provided evidence to prove test was business necessity).

121. *See* Sharf, *supra* note 77, at 7-9 (providing comments from employment lawyer, Robert J. Malionek). Malionek stated that "it is the clarification and application of [the *Lanning I* standard] to the facts in *Lanning II* that can be recognized as bringing about a subtle shift away from what could have been a draconian standard in practice." *Id.*

122. *See id.* (reporting comments from employment lawyer Keith Pyburn).

123. *See* Grossman, *supra* note 60, at 4-5 (discussing how *Lanning II* court misapplied minimum qualifications standard and negated Congress's intent). Grossman concluded after *Lanning II* that "[SEPTA's fitness test] is not really a minimum qualification for the job," which means the Third Circuit misapplied its own standard. *Id.*; *see also* Sharf, *supra* note 77, at 9-10 (noting how Third Circuit did not strictly apply its standard). Keith Pyburn states that the court in *Lanning II*, "while reiterating the language of the original holding, proceed[ed] to allow a 'reasonable' cut score [sic] based on the factual record of this case." *Id.*

performance to prove business necessity.[124] If the Third Circuit used the "manifest relationship" standard in *Lanning II*, it would have produced the same result as the "minimum qualifications" standard.[125] Accordingly, if the Third Circuit adopts the "manifest relationship" standard or a similar standard to evaluate a business necessity defense, litigants practicing in the Third Circuit will be able to confidently rely on *Lanning II* with respect to what the court expects an employer to show in order to meet its burden.[126] Otherwise, litigants can only cautiously rely on *Lanning II*, while also having to be prepared to meet the strictness of *Lanning I*'s evidentiary requirements.[127]

V. CONCLUSION

In all, if employers create a job-selection test, they should be prepared to meet a variety of legal issues if a disparate impact results, for even the most well-documented justifications may not suffice in the Third Circuit.[128] Practitioners must realize that although SEPTA prevailed in *Lanning II*, the Third Circuit has employed the strictest approach among the circuits in measuring the business necessity defense.[129] Furthermore, even if a defendant proves business necessity under the Act, the plaintiff can still prevail by showing a less discriminatory alternative that meets the employer's needs.[130] Therefore, litigants for employers in a disparate impact case must be able to satisfy the "minimum qualifications" standard to justify their clients' employment practices and, in the process, should re-

124. *See* Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 585 (9th Cir. 2000) (using manifest relationship test to evaluate employer's business necessity defense in disparate impact claim). For a further discussion of the manifest relationship test, see *supra* notes 43-46 and accompanying text.

125. *Cf.* Sharf, *supra* note 77, at 9-10 (reporting comments by Keith Pyburn that Third Circuit used almost "reasonableness" standard to adjudicate *Lanning II*).

126. For a further discussion of what an employer must show to successfully prove business necessity under *Lanning II*, see *supra* notes 105-20 and accompanying text.

127. For a further discussion of how *Lanning II* unexpectedly applied *Lanning I*'s principles, see *supra* notes 105-20 and accompanying text.

128. *See* Brooks, *supra* note 20, at 11-12 (cautioning practitioners about difficulty they may encounter in proving business necessity in Third Circuit); *see also Fitness Counts for Police Officers*, 13 PA. EMP. L. LETTER (Dec. 2002) ("[Employers] should always be careful in implementing any test . . . since such testing has inherent legal risks that need to be evaluated."). Employers who establish a job-selection test should determine its impact on protected classes, and if a disparate impact exists, they should implement it only if a business necessity for the test exists. *See id.* (giving advice to employers).

129. *See* Hollar, *supra* note 23, at 791 (describing high burden of minimum qualifications standard).

130. *See* Lanning v. Southeastern Pa. Transp. Auth. (Lanning I), 181 F.3d 478, 485 (3d Cir. 1999) (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)) (discussing burdens of proof in disparate impact cases); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2003) (stating burdens of proof in Title VII cases).

but the counterargument that a less discriminatory alternative exists.[131] They should, however, encourage the Third Circuit to adopt a standard that is more deferential to employers.[132] Plaintiffs, on the other hand, should argue to keep the current standard, but strive for a more literal application of it.[133]

Nevertheless, the Third Circuit has thus far failed to *reliably* articulate its expectations for an employer to justify an employment practice with a disparate impact through a business necessity defense.[134] In turn, current Third Circuit law allows a panel for a given set of facts—perhaps depending upon the particular whims of the judges—to harshly *or* leniently scrutinize an employer's business necessity defense in a disparate impact case.[135] Thus, until the Supreme Court clarifies the issue, or until the Third Circuit either adopts a more lenient standard or applies its current standard more literally, litigants must be prepared for both possibilities.[136]

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131. *Cf. Lanning I*, 181 F.3d at 485 (conveying what defendants need to show in Title VII disparate impact cases to prevail).

132. *See Lanning I*, 181 F.3d at 504 (Weis, J., dissenting) (arguing that Third Circuit should have used standard that gives more deference to employers).

133. *See* Grossman, *supra* note 60, at 4-6 (arguing that Third Circuit in *Lanning II* should have been harsher in its application of minimum qualifications standard).

134. *See* Sharf, *supra* note 77, at 9-10 (reporting comments by Keith Pyburn, employment lawyer). Pyburn notes that the majority in *Lanning II* only reiterated the language of the minimum qualifications standard, though it actually used a "reasonableness" standard to evaluate SEPTA's business necessity defense. *See id.* (discussing Third Circuit's analysis).

135. *See* Grossman, *supra* note 60, at 4 ("Although the panel paid lip service (as it had to) to the earlier panel's articulation of the legal standard, it did little to see that the standard has been implemented correctly by the lower court."); Sharf, *supra* note 77, at 7 (arguing that *Lanning II* was "subtle shift away" from *Lanning I*'s "draconian" standard).

136. *See* Sharf, *supra* note 77, at 9-10 (reporting comments by Keith Pyburn). Pyburn acknowledges that *Lanning II* continued—rather than clarified—the debate over the correct standard in the Third Circuit for measuring an employer's business necessity defense under the 1991 Civil Rights Act. *See id.* (discussing *Lanning II*'s implications).