IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF DELAWARE, THE DELAWARE DEPARTMENT OF PUBLIC SAFETY, and THE DELAWARE DIVISION OF STATE POLICE, Defendants.	)	Civil Action No. 01-020-KAJ

MEMORANDUM OPINION

Patricia C. Hannigan, Esquire, United States Attorney's Office, Wilmington, Delaware, Michael T. Kirkpatrick, Esquire and Benjamin J. Blustein, Esquire, United States Department of Justice, Washington, D.C.; counsel for plaintiff, United States of America

Rosemary K. Killian, Esquire, Department of Justice, Wilmington, Delaware, David H. Williams, Esquire, Morris, James, Hitchens & Williams LLP, Wilmington, Delaware, and Robert J. Malionek, Esquire, Latham & Watkins, Los Angeles, California; counsel for defendants, The State of Delaware, The Delaware Department of Public Safety, and The Delaware Division of State Police

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Wilmington, Delaware
May 20, 2003

JORDAN, District Judge

I. INTRODUCTION

This employment discrimination case was filed by the United States following a nearly four year investigation by the U.S. Department of Justice into the hiring practices of the Delaware State Police. (*See* Docket Item ["D.I."] 1 at ¶ 12; D.I. 4 at ¶ 13.) The United States charges that the State of Delaware, the State's Department of Public Safety, and the Division of State Police ("DSP") within that department (collectively, the "Defendants") have unlawfully used written examinations as part of the hiring process for the entry-level law enforcement position of DSP Trooper. (*Id*. at ¶¶ 8, 10.) More specifically, the accusation is that those examinations "have disproportionately excluded African Americans from employment but have not been shown to be job-related and consistent with business necessity... ." (*Id.* at ¶ 10.)

The United States has made a motion for partial summary judgment (the "Motion"), contending that it has established a *prima facie* case of unlawful discrimination under Title VII of the Civil Rights Act of 1964. (D.I. 233.) The United States claims that "undisputed facts establish that African American test takers passed the exam at issue at a significantly lower rate than white test takers." (*Id*.) The Court agrees that the United States has established a *prima facie* case that the Defendants' reliance upon the exam has had a disparate impact upon African Americans, and, therefore, for the reasons set forth herein, the Motion is granted.

II. BACKGROUND

From 1981 through October of 1998, the DSP used a written test known as the "Alert" examination as part of the hiring process for DSP Troopers. (D.I. 242 at ¶ 2.)[1] The Alert test measures reading comprehension and writing ability.[2] (*Id*.) According to the Defendants, the Alert test "was the first step or hurdle in the multi-component process used by the Delaware State Police to identify and hire qualified applicants for the entry-level State Trooper position." (*Id*.) Because the Alert test "operated as a hurdle, ... only applicants who passed [the test] proceeded in the process." (*Id*. at ¶ 8.)

Allegedly because of resource constraints, the DSP generally chose not to conduct a full background check on test takers. (*See id*. at ¶¶ 3-4.) Instead, they relied on the simple screening that could be accomplished with a written application and limited checks of computer data bases. (*See id.*; D.I. 240 at 7.) They then relied on the Alert test as a means to narrow the field of applicants. (*See* D.I. 242 at ¶ 2.) After administering the test, the Defendants invested further resources in the investigations necessary to determine whether those remaining in the applicant field met the other minimum standards for hiring. (*See id.* at ¶¶ 2-8.) Because the DSP approached hiring in this way, some unknown proportion of the test takers actually turned out to be lacking

[1]Docket Item 242 is the Affidavit of John A. Dillman, III, a Director of Human Resources for the DSP, which affidvait was filed on behalf of the Defendants in their opposition to the Motion.

[2]There are seven alternate forms of the Alert test. (Defendants' response to Request for Admission No. 5, reproduced at D.I. 235, Tab 1.) The DSP utilized several of those varieties over the years. (*See* D.I. 120 at ¶ 1.m and Exhibit 1.)

certain qualifications and were ineligible for employment, regardless of their performance on the test. (*See id*. at ¶ 4.)[3]

The recruiting classes at issue in this case are designated as classes 61 through 69. (D.I. 234 at 3; D.I. 240 at 7.) The parties have stipulated to basic facts regarding the racial composition of the test pool and the pass/fail status of individual test takers for each of those classes.[4] In aggregate, of the African Americans who took the Alert test over the period covered by recruit classes 61 through 69, 54.3% passed, while, over the same period, 84.8% of white test takers passed. (*See* D.I. 234 at 8 n. 7.) The parties hotly dispute the practical significance of that disparity (*see* D.I. 259 at 24-27),[5] but the Defendants have conceded that the difference is statistically significant (*see id.* at 27). The data are summarized in the following table.

[3]In addition to residency requirements, the minimum qualifications included (1) a high school diploma or GED and at least 60 semester or 90 quarter credit hours from an accredited college or university; (2) age of at least 21 years by the date of graduation from the police training academy; (3) U.S. citizenship; (4) a current, valid driver's license, with no conviction for driving under the influence within the prior five years and no suspension or revocation within the prior three years; (5) no use of any illegal drug within two years of application, and no use of any hallucinogenic drug at any time; and (6) no felony convictions and no criminal activity that would constitute a felony under the law of the state in which the conduct occurred. (See Defendants' response to Requests for Admission Nos. 108 and 109, reproduced at D.I. 235, Tab 3.)

[4]The parties' stipulation is in the form of a compilation of information regarding individual test takers for the classes in question. (*See* D.I. 120 and Exhibit 1 thereto.) While the Defendants have not stipulated to accuracy of the summary table provided by the United States in its brief, neither have they contested those portions of the table reproduced here.

[5]D.I. 259 is the transcript of the February 6, 2003 oral argument on the Motion.

DSP Recruit Class No.	Number of Test Takers		Percent Passed		Difference in Pass Rates in Units of Std. Deviation	Ratio of Pass Rates AA/White
	AA	White	AA	White		
61	41	236	51.2%	86.4%	5.11	59.3
62	68	388	61.8%	87.6%	5.16	70.5
63	39	228	56.4%	83.3%	3.63	67.7
64	49	408	42.9%	81.6%	5.95	52.6
65	30	209	70.0%	90.4%	2.87	77.4
66	38	289	47.4%	85.1%	5.33	55.7
67/68	39	313	33.3%	83.1%	6.82	40.1
69[6]	28	55	39.3%	81.8%	6.82	48.0
69[7]	44	154	52.3%	91.6%	5.87	57.1

III. DISCUSSION

A. Summary Judgment Standard

According to Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Facts are "material" if their existence could alter the outcome in a case. *Horowitz v. Federal Kemper Life Assur. Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995).

[6]Tested before May 30, 1998.

[7]Tested on or after May 30, 1998.

Hence, materiality must be determined in light of the applicable law: "[o]nly disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if there is evidence from which a rational person could conclude that the person opposing summary judgment is correct. *See id.*

It is the moving party's initial responsibility "to show that there is an absence of evidence to support the nonmoving party's case[,]" or, in this instance, defense. *See Peters Township School District v. Hartford Accident & Indemnity Co.,* 833 F.2d 32, 34 (3d Cir. 1987). The party opposing summary judgment cannot prevail "merely by making allegations; rather, the party opposing the motion must go beyond its pleadings and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial." *In re Ikon Office Solutions, Inc.,* 277 F.3d 658, 666 (3d Cir. 2002).

B. Disparate Impact Analysis

The Third Circuit has instructed that, "[u]nder Title VII's disparate impact theory of liability, plaintiffs establish a prima facie case of disparate impact by demonstrating that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern." *Lanning v. Southeastern Pennsylvania Transp. Authority (SEPTA)*, 181 F.3d 478, 485 (3d Cir. 1999) (citing *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977)). The agreed upon facts in this case are compelling proof of the disparate impact the Alert test has had on African American applicants for DSP Trooper positions. Over a

period of several years the administration of that examination has consistently had the effect of disqualifying African Americans at higher rates than whites. And while variations on the old theme of "lies, damned lies, and statistics" are often played to question mathematical evidence, there is no dispute in this case that the disparity is statistically significant. (*See* D.I. 259 at 27.) That, of course, does not mean there is no dispute about the statistics. In their effort to avoid the conclusion that the United States has made out a *prima facie* case of an unlawful hiring practice, the Defendants have attacked the premise that pass rates among the test takers are the appropriate focus of the Court's attention.

According to the Defendants, there are three basic reasons why the Court ought not attend simply to the demonstrated disparities stemming from the Alert test. First, the Defendants contend that a *prima facie* case cannot be based on an employment practice that has been discontinued. ((*See* D.I. 240 at 15-16.) Second, they claim that the effects of the Alert test, as described by the United States, cannot be the basis of liability because not all test takers were qualified applicants and therefore the pool of test takers is not a proper basis on which to measure the impact of the test on African Americans. (*See id.* at 16-21.) Finally, the Defendants assert that they have expert testimony that contradicts the conclusion that the Alert examination had an adverse affect upon African Americans and that there is therefore a material issue of fact that cannot be decided on summary judgment. (*See id.* at 22-24.) None of those arguments is well-founded.

i. Past Practices

Placing peculiar emphasis on the tense of the words in the relevant statute, the Defendants assert that, because the burden of establishing a *prima facie* case requires proof that "a respondent *uses* a particular employment practice that *causes* a disparate impact on the basis of race[,]" 42 U.S.C. § 2000e-2(k)(1)(A) (Defendants' emphasis), there can be no liability when, as in this case, the challenged practice is no longer in use. (*Id.* at 15.) That is an untenable interpretation, lacking any precedent or the benefit of logic. As the United States has pointed out, the Defendants have not cited a single decision to support their argument, despite the deep reservoir of available case law on Title VII. The reason is apparent. The effect of such a reading would be to create an instantaneous statute of limitations, to be triggered at the sole discretion of the employer whose practice is questioned: simply stop the challenged practice, and you are immune from suit. That result is obviously not contemplated by the statute and is at odds with the remedies available for past discrimination. *See, e.g.,* 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent *has* intentionally *engaged* in *or is* intentionally *engaging* in an unlawful employment practice ... ," the court may impose affirmative injunctive relief, which may include reinstatement and hiring of employees with back pay; emphasis added).

Authority in this Circuit suggests that there is no statute of limitations for cases brought by the Attorney General to remedy patterns and practices of employment discrimination. *See Lanning v. Southeastern Pennsylvania Transp. Authority*, 176 F.R.D. 132, 144 (E.D. Pa. 1997). Moreover, the Defendants' position is akin to the

discredited "voluntary cessation" argument for mootness. "[A]s a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case ... ." *Id.* at 142 (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)).

The fact that the Defendants discontinued use of the Alert test after the United States began to investigate their employment practices does not deprive the United States of the opportunity to seek redress for those affected over the years by the Defendants' use of that test, should it finally be determined that the use was unlawful.

ii. Actual Test Pool vs. Hypothetical Test Pool

On better footing, the Defendants assert that "[i]t is a bedrock principle of Title VII that an employment practice causes an adverse impact only if it deprives *qualified* employment applicants ... of the employment opportunity at issue." (D.I. 240 at 16; emphasis in original). From that premise, the Defendants argue that the statistically significant disparities produced by the Alert test are not properly at issue since not everyone who was permitted to take the test was a qualified applicant. (*Id.* at 16-21.) The DSP receives "hundreds of applications for each of the few positions in each recruit class," and it does not first screen out those applicants who lack the other qualifications to be a Trooper.[8] (*Id.* at 16.) Hence, the argument runs, because rigorous background checks were not conducted before the examination and because experience showed

[8]The Defendants do not contend that they entirely failed to screen test takers. Rather, their assertion is that only a rudimentary background check, based on the applicants' answers on the application form and a limited records check, was conducted prior to the administration of the test. (*See* D.I 240 at 7.)

that some test passers turned out to be otherwise unqualified, no proper conclusion can be drawn about disparate impact on qualified applicants, since the pool of test takers included non-qualified applicants. (*Id.* at 17.) According to the Defendants, the employment practice that should be focused on is the entirety of the hiring process, not the first hurdle that they erected. (*See* D.I. 240 at 20 ("The United States seeks to hold Defendants responsible for 'discriminating' against any black applicant who failed ALERT, merely because he or she is in a class of black applicants, and whether or not the applicant was qualified for employment.").)

While plausible, this argument has at its core a fundamental flaw. It depends upon a definition of "qualified applicant" that ignores the Defendants' actual practices. With no more than the assertion that some unknown number of test takers ultimately proved to have less than all qualifications for the job,[9] the Defendants demand that the Court ignore the actual results of the actual employment practice that they actually chose to use when deciding, year after year, who was qualified to sit for the examination. The Defendants would thus have the Court turn a blind eye to the real world, in contravention of Title VII's focus on the "particular employment practice" at issue. 42 U.S.C. § 2000e-2(k)(1)(A).

The particular employment practice in which the Defendants engaged in this case involved limited pre-screening of applicants and the administration of an

[9]The Defendants make the further assumption that African Americans must have been more likely than whites to have applied while lacking minimum qualifications. If one assumes that the number of "non-qualified" test takers, whatever that number is, is proportionately distributed among applicants, including African Americans and white applicants, then the existence of "non-qualified" test takers in the pool should have no impact on the statistical conclusions about disparate impact.

examination. That was, as the Defendants themselves have characterized it, the first of a series of hurdles that were used to narrow the field of applicants. (*See* D.I. 242 at ¶ 2.) While, at the end of the process, one must have met a series of qualifications to become a Trooper, the very first step involved the pre-screening of a written application and some limited background checks to determine who qualified to sit for the examination. The "qualified to sit" phase of the multi-hurdle process may not have perfectly matched the ultimate set of "qualified to serve" standards that the Defendants, through more rigorous background checks, ultimately imposed on each class of applicants. That, however, does not defeat the reality that year-in and year-out the Defendants employed a *de facto* "qualified to sit" standard that resulted in a pool of applicants who took the Alert test and thus produced the actual, historical data that is now presented to the Court. To conclude that the Defendants' own choices about how to screen the applicant pool are not pertinent would be contrary both to the statutory language of Title VII and the teachings of the Supreme Court in disparate impact cases.

As noted, the language of Title VII, as amended, focuses directly upon the use of "a particular employment practice that causes disparate impact on the basis of race[.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i). The question is not how the employer might have approached the hiring process; the question is what did the employer actually do. When historical data is available to answer that question, it is all to the good, because, while "there is no requirement ... that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants[,]" *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977), "[a]ctual applicant flow figures are the preferred method by which to measure an employer's hiring practice and performance."

Anderson v. Douglas & Lomanson Co., Inc., 26 F.3d 1277, 1287 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995); *cf. Green v. USX Corp.*, 896 F.2d 801, 804-05 (3d Cir.), *cert. denied*, 498 U.S. 814 (1990) ("plaintiffs' use of applicant flow data was an appropriate means of demonstrating the disparate impact of USX's hiring practices ... .").

Indeed, the defense theory presented in this case is reminiscent of the one emphatically rejected by the Supreme Court in *Connecticut v. Teal*, 457 U.S. 440 (1982). The Court in *Teal* was presented with a "bottom line" theory as a defense in a Title VII disparate impact case: "[u]nder that theory, ... an employer's acts of racial discrimination in promotions – effected by an examination having disparate impact – would not render the employer liable ... if the 'bottom-line' result of the promotional process was an appropriate racial balance." *Id.* at 442. In other words, the defendants urged, as the Defendants do in this case, that it was the process, not the examination within the process, that was relevant to the question of disparate impact. Because certain adjustments were made in the promotion process that resulted in promoting African Americans at a favorable rate, the defendants argued that `the law should not attend to the disparate impact imposed by the examination component of the process. *See id.* 444-45. At the district court level, the defendants were successful, the court ruling that the "bottom line" percentages were what counted. *Id.* at 445. The court of appeals, however, reversed, stating that "where 'an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process,' that barrier

must be shown to be job related." *Id.* at 445 (quoting 645 F.2d 133, 138 (2d Cir. 1981)). The Supreme Court affirmed that ruling by the court of appeals. *Id.* Reflecting on the landmark holding in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), the Court repeated that "Title VII prohibits procedures or testing mechanisms that operate as built-in headwinds for minority groups." 457 U.S. at 448-49 (quoting *Griggs*, 401 U.S. at 432; internal quotations omitted).

Strictly speaking, the Defendants in the case at bar are not claiming that they did anything to overcome the statistically demonstrable disparate impact of the Alert test on the test taking pool, so they cannot be said to be seeking shelter in favorable "bottom line" statistics. They are, however, resorting to the plainly rejected theory that the law should ignore a significant hiring hurdle in favor of some more global view of the selection process. That they couch their argument in the language of "qualified applicants" vs. "unqualified applicants" in the test pool does not alter the conclusion compelled by *Teal* and the cases cited therein. The Alert test has in fact acted as a "built-in headwind" for African Americans.

iii. Differing Expert Opinions

The Defendants' last line of argument is that even if the historical data is the proper focus of the Court's attention, a factual dispute remains because the Defendants have obtained an expert report that employs a statistical analysis contradicting the disparate impact shown by the calculations of the United States' expert. (*See* D.I. 240 at 22-24.) The argument relies heavily on precedent that notes there is no set "mathematical standard" for determining disparate impact. (*Id.* at 23, citing *Watson v.*

Fort Worth Bank & Trust Co., 487 U.S. 977, 995 n.3 (1988).) But the law's recognition that "statistics come in infinite variety and ... their usefulness depends on all surrounding facts and circumstances[,]" *Watson*, 487 U.S. at 995 n.3 (internal quotes omitted), does not mean that there is no such thing as a clear case of disparate impact. On the contrary, "[t]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Dothard*, 433 U.S. at 329.

The United States has met that burden. The Defendants have not challenged, and could not with any credibility challenge, the basic math employed by the United States' expert. As set forth in the table above, *supra* at 5, the evidence is overwhelming that the impact of the Alert test was to disproportionately take African Americans out of the pool of applicants for Trooper positions. The Defendants themselves have had to admit that the disparities demonstrated are statistically significant. (D.I. 259 at 27.) They want to argue about the practical significance by utilizing different analytical techniques on the agreed-upon statistics. It is enough for the Court, however, that the historical data in fact demonstrates a statistically significant disparity in the impact of the Alert test on African American applicants.

That such a disparity exists warrants the granting of the United States' Motion. It does not, of course, say anything at all about the motive of the Defendants in using the Alert test as a screening tool. Motive is not at issue in a disparate impact case, and the Court does not intend to imply by its decision today that anything other than a good faith effort to train well-qualified individuals lay behind the Defendants' use of that test.

Nor should this Opinion be seen as a statement that the Defendants will, following a trial on the remaining issues in the case, be held liable for violating Title VII. Today's decision disposes only of one part of the proof that would be required at trial. Whether reliance on the Alert test was a lawful employment practice is a decision that can only be made after the Defendants are afforded the opportunity to demonstrate that the test measured "the minimum qualifications necessary for successful performance of the job in question[.]" *Lanning*, 181 F.3d at 287.

An appropriate Order will follow.

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ORDER

The Court having heard argument on the United States' Motion for Partial Summary Judgment (D.I. 233; the "Motion") and having considered the parties' briefing in support and in opposition to the Motion, as well as the pleadings and record in this matter, and finding that no genuine issue of material fact exists with respect to the subject of the Motion,

IT IS HEREBY ORDERED that, for the reasons set forth in the Court's Opinion of today's date in this matter, the Motion is GRANTED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

DATE: May 20, 2003
Wilmington, Delaware