

*In the Matter of Melanie Kemery, Fire Fighter (M9999M), Various Jurisdictions*  
CSC Docket No. 2012-2033  
**(Civil Service Commission, decided October 3, 2012)**

Melanie Kemery, represented by John Pilles, Jr., Esq., appeals the physical performance portion of the examination for Fire Fighter (M9999M) on the basis that it discriminates against women.

The examination had a closing date of March 31, 2010, and consisted of a written cognitive portion, a written teamwork portion and a physical performance portion. The appellant took the PPT on April 19, 2011 which consisted of three parts, the obstacle course, the darkened maze crawl, and the ladder climb, and each portion had a passing point. The ladder climb and the darkened maze were pass/fail, *i.e.*, candidates who performed the exercise faster than the passing time passed that portion of the exam, and those who performed the exercise slower than the passing time failed. The obstacle course ranked the candidates, that is, those candidates who performed faster than the passing time (315 seconds) passed that portion of the exam, and their score was used in the calculation of their final exam score. The passing time for the PPT was 5 minutes, 15 seconds (315 seconds), and the appellant completed the course in 6 minutes, 34.44 seconds (394.44 seconds).

Prior to starting the obstacle course, all candidates were required to submit a Medical Clearance form which indicated that the candidate's physician determined that it was safe for the candidate to participate in strenuous physical activity on the test date. Candidates were informed that this portion of the test involved strenuous physical activities which require strength, endurance and speed. A 44-page Conditioning Manual was made available to all candidates that explained the various parts of the PPT, including the obstacle course. This manual stated that the PPT "is designed to assess a candidate's capacity to accomplish the tasks ordinarily performed by a firefighter while on the job. This is done by requiring candidates to perform a series of events that simulate firefighting activities which depend on the physical abilities required to perform the firefighter's job. These activities include cardiovascular fitness, muscle strength, muscular endurance and flexibility." The obstacle course event consisted of activities involving walking, lifting, and dragging and carrying various objects specific distances. Candidates wore 40-pound weighted vests which approximate the weight of the clothing, equipment and breathing apparatus that a firefighter normally wears while doing those types of activities. At no time was any candidate allowed to run the course. They could walk as fast as they liked, but running resulted in returning the candidate to the beginning. If they did it twice, they were disqualified. Running was determined to be occurring when the thrust of the driving leg was of sufficient force to propel the leading foot off the ground simultaneously. Candidates were instructed to walk briskly or as fast as possible. They were also not allowed to drop

the equipment, let the halyard slip through the hands on the ladder fly hoist, lower the simulated ladder box in an uncontrolled manner, or skip any steps of the staircase on the high-rise pack carry.

The obstacle course involved placing a 2½ inch supply line hose weighing 55 pounds over the shoulder and dragging it 75 feet. The candidate then unscrews a hydrant cap from one hydrant outlet, and screws it on another hydrant outlet until it is hand-tight. Fifty feet away, the candidate must then lift a 30 pound K-12 saw from a box, carry it 37.5 feet, and return it to its box. Moving 55 feet away from the box, the candidate must raise a 42 pound weight, simulating a ladder fly hoist. Then, after picking up a 50 pound simulated high-rise pack, the candidate proceeds to ascend and then descend a 6-step staircase six times. He or she returns the high-rise pack to its original location and then drags a 1¾ inch attack line weighing 50 pounds 62.5 feet, then back. Twenty feet from there, the candidate must then carry a 40 pound fire extinguisher 50 feet, and replace it in its original spot. The candidate then proceeds to the 165 pound mannequin to drag it 36 feet, walking backward. Then the candidate carries a simulated debris box weighing 50 pounds 37.5 feet away and then returns it, before continuing ten feet to the finish line.

On appeal, Ms. Kemery explains that she is a volunteer firefighter and is a female weighing 100 pounds and standing 5 feet tall. She contends that the examination is discriminatory, disparately impacting female candidates and giving preference to male candidates. She states that females are generally shorter and lighter than males, and shorter persons have shorter running strides. As such, she argues that the passing time of five minutes, fifteen seconds discriminates against women. In a supplement to her appeal, she states that this portion of the examination is invalid, as there is no correlation between the examination and the job and that it serves only to eliminate job applicants of a protected class. She requests documentation of the success ratio of male and female applicants on the PPT.

## CONCLUSION

The appellant argues that female candidates were disparately impacted as they are generally shorter and lighter than males, and shorter persons have shorter running strides. At the outset, a selection process must be implemented which does not have adverse impact on the employment opportunities of members of a race, color, religion, sex or national origin. A selection instrument which disproportionately screens certain members out is unlawfully discriminatory unless the selection process or its components have been validated, or the user otherwise justifies them in accord with Federal law. Thus, the adverse impact in this case relates to the appellant's gender, which is a protected class, not on her stature or height, which is not a protected class.

The merits of the appeal of examination validity require a discussion of the background of this examination. In October 1977, the United States Department of Justice (DOJ) filed a federal lawsuit against the Department of Civil Service<sup>1</sup> (CSD) and twelve New Jersey cities (“consent decree cities”) under 42 U.S.C. §§2000e *et seq.* (“Title VII”). In this action, the United States Attorney General alleged that the State and the consent decree cities were engaged in a pattern and practice of unlawful employment discrimination against black and Hispanic persons with respect to hiring and promotion in the fire departments of the defendant consent decree cities. On May 30, 1980, the DOJ, CSD, and the consent decree cities entered into a consent decree, which was approved by the federal court. Under the consent decree, CSD was required to develop a new test for firefighters. The decree stated:

The Civil Service examination selection process components are to consist of a written examination used solely on a qualifying basis and a job-related physical performance examination and/or such other job-related and nondiscriminatory selection device as the Chief Examiner may choose in his discretion to use as a ranking device in conformity with the New Jersey Civil Service Law, *N.J.S.A. 11:1-1 et seq.*, and the Civil Service rules and regulations promulgated thereunder.....

The decree permitted DOJ to object at any point in the selection process, and the federal court retained jurisdiction over all matters covered by the decree and to hear all disputes. The consent decree directed CSD to complete a validity study for a new test, and to provide the DOJ with a copy of the study, together with all data relating to test performance, job analysis and adverse impact. In addition, the decree provided for DOJ review of the racial breakdown of the examination applicants; the racial breakdown and item analysis of the test results; and the racial breakdown of any resulting firefighter eligibility list. The decree also required that the State conduct a thorough job analysis in a manner consistent with the *Uniform Guidelines of Employee Selection Procedures*, 28 C.F.R. 50.14 (“Uniform Guidelines”) and other professionally accepted standards. At this point, it is noted that these guidelines define adverse impact as “a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5 or eighty percent) of the rate for the group with the highest rate. ...” (section 4.d). The “four fifths rule” establishes a numerical basis for drawing an initial inference for adverse impact.

In 1989, the DOJ applied to the Court to compel the State to use new selection procedures for the entry-level firefighter examination in the consent decree cities because blacks had scored lower than whites on the physical performance test administered in 1989. In 1990, the parties entered into a

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<sup>1</sup> Now the Civil Service Commission (Commission).

supplemental consent decree concerning the testing of firefighters. The supplemental consent decree required the Department of Personnel<sup>2</sup> (DOP) to use procedures to test and certify candidates “which do not have an adverse impact on blacks and Hispanics or which have been shown to be job-related in accordance with professional testing standards and federal law.” Supp. Decree at ¶5. This decree required the Department to conduct a new job analysis for the position of firefighter, and to modify and/or redesign the physical performance test or any other component of the selection procedure. (¶6). The decree stated that in conducting this job analysis, the Department must “adhere to the requirements of professional testing standards, federal law, and the terms of the 1980 consent decree and this supplemental order.” (¶8). In addition, the Department could reappraise the written test and the relative weights to be accorded to the written and physical tests, and otherwise modify the entry level selection device, in light of the results of the job analysis.

The decree provided for DOJ review of the job analysis and every other stage of test development. The supplemental consent decree required the DOJ to make its expert consultants available to the State and mandated that the DOJ and State attempt to resolve any disputes over perceived deficiencies in the test development. (¶12). It also provided that in the event of a dispute, the DOJ or the State “may apply to the Court for resolution by expedited motion or summary proceeding.” (¶13).

Pursuant to the requirements of the supplemental consent decree, the Department developed a new Fire Fighter test. To ensure that a high quality examination was developed, DOP committed more than 21,000 hours of staff time to the design and development of the firefighter examination, at a cost exceeding \$3 million. The development process began in 1990 when the Department initiated a job analysis of the entry-level firefighter position, which was completed in October 1995 after five years of extensive research. DOP set forth its research, data and conclusions in a Fire Fighter job analysis study. The DOP, with input from Dr. Joyce Hogan, an expert consultant for the DOJ, examined the firefighter job and collected data describing the basic tasks, duties and responsibilities, as well as the knowledge, skills and abilities necessary for successful job performance. In collecting this data, which included all factors of the job, such as behaviors, tasks and knowledge that are critical for successful job performance, the Department reviewed current literature and available job analysis studies, observed incumbent firefighters and conducted job analysis panels with the incumbents and their supervisors. In November 1992, after review by the DOJ, DOP administered an initial Job Analysis Questionnaire (“JAQ”), which was distributed to approximately 900 incumbent firefighters from 56 paid fire departments. From December 1993 through February 1994, based on lower than anticipated responses on the initial

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<sup>2</sup> Now the Civil Service Commission (Commission).

JAQ, a revised JAQ was administered to a sample size of approximately 500 firefighters in 18 jurisdictions, including the 12 consent decree cities. Gender could not be considered in the job analysis as there was only one female in the population that responded to the questionnaire and received a job evaluation by a supervisor.

According to *N.J.A.C. 4A:4-2.2*, the Commission has the authority to determine the most appropriate selection instrument to use in assessing candidates in a given competitive title. In the subject title, a decision was made to select individuals for appointment by using the testing format derived from the job analysis. Three distinct areas of abilities were identified in the job analysis as equally important to performing the job of a Fire Fighter: cognitive, physical performance and a third area, which was neither cognitive nor physical in nature, referred to as situational judgment by the Commission.

The Commission was assisted in validation efforts for the PPT portion of the examination by nationally known expert Dr. Deborah Gebhardt of Human Performance Systems, Beltsville, Maryland, who has substantial experience in the design of physical performance tests for firefighters in a number of jurisdictions. Dr. Gebhardt conducted a concurrent validity study to assess physical performance. She used two samples for the study, and the second sample consisted of 21 women Fire Fighters from outside of the State of New Jersey, and four female Fire Fighters in New Jersey. Although 33 women in total had been recruited, some were eliminated as they did not return materials, had a conflict with testing dates, reported injuries or illnesses which precluded them from participating, were called out to fires, were unable to reschedule, or simply did not show up. Dr. Gebhardt reported that in all tests men (n=199) performed better than the women (n=25). However, the women's mean scores expressed as a percentage of the men's mean scores for the final mean time showed that men out-performed women by 13.8%. She statistically examined several cutoff scores on the pass/fail rates of the total sample by gender and ethnicity, and the passing point was set to reflect a minimally acceptable performance. The passing point of 315 seconds (rounded up) reflects an expected mean job performance of 10% (rounded up), *i.e.*, 90% of the sample passed the test with this time.<sup>3</sup> Examined by gender, at 315 seconds, men passed at a rate of 90.4% and women passed at a rate of 76%. At this level (10%), the women's passing rate was greater than 80% of the men's passing rate, thus satisfying the four-fifths rule. The examinations used to test these areas were approved by the DOJ, which provided input on various issues including the setting of the passing points.

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<sup>3</sup> It is noted that one standard deviation from the mean was 304.34 seconds, over 10 seconds faster than the passing point.

The test plan for the PPT was developed and the passing points for each portion of the PPT were set to measure the critical physical abilities needed by an entry-level Fire Fighter. These passing points were set in accordance with the Uniform Guidelines and other generally accepted psychometric standards. For the obstacle course portion of the PPT, a wide variety of physical fitness, work samples, and physical ability measures were studied, and the job analysis relied on work sample measures and ability assessments for the resultant test plan. The physical abilities to be tested were determined to be those listed above, cardiovascular fitness, muscle strength, muscular endurance and flexibility, as research indicated that these physical abilities are related to job performance for physically demanding jobs. A work-oriented physical ability test was developed and approved by the DOJ. Incumbent Fire Fighters took the PPT<sup>4</sup> and their test performances were evaluated by a panel of Subject Matter Experts (SMEs), persons who are proficient in the field of firefighting. The cutoff points for all three portions of the PPT were set in accordance with normal expectations of proficiency in the work force, *i.e.*, they were set with minimum expectations for successful versus unsuccessful job performance. The SMEs evaluated actual performances of incumbent Fire Fighters and determined the point below which the candidate would not be successful on the job. For the obstacle course, the passing point was set at 5 minutes and 15 seconds. The appellant exceeded this time by 1 minute, 19.44 seconds, and thereby failed the examination.

As noted above, the examination was not a sprinting race or limited solely to cardiovascular fitness, but included all the physical ability measures needed for successful job performance. Candidates were required to perform walking, heavy lifting, and dragging and carrying various objects specific distances. No running was allowed, and as noted above, if any candidate was found to be running, they were restarted. If they did it again, they were disqualified. The appellant has not provided persuasive arguments that this portion of the examination was invalid, had a disparate impact on females, that this portion of the test does not demonstrate a reasonable measure of job performance, or that this portion is otherwise unlawful and developed to eliminate job applicants of a protected class.

## ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>4</sup> It is noted that these incumbents received no training on how to take this examination prior to their performances.