

No. 01-1040

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

CATHERINE NATSU LANNING, *et al.*,
Appellants,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY,**
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(CIVIL ACTION NOS. 97-0593 AND 97-1161)

**BRIEF OF *AMICI CURIAE* WOMEN IN FEDERAL LAW
ENFORCEMENT, NATIONAL CENTER FOR WOMEN &
POLICING, PENNSYLVANIA NOW, INC., FEMINIST MAJORITY
FOUNDATION, WOMEN'S LAW PROJECT, ACLU WOMEN'S
RIGHTS PROJECT, ACLU PENNSYLVANIA, NATIONAL
PARTNERSHIP FOR WOMEN & FAMILIES, AND NATIONAL
WOMEN'S LAW CENTER, IN SUPPORT OF APPELLANTS AND
IN FAVOR OF REVERSAL**

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STATEMENTS OF INTEREST

Women in Federal Law Enforcement (WIFLE) is an outgrowth of an interagency committee formed by the Department of the Treasury and the Department of Justice in 1982. In June 1999, WIFLE, Inc. was established. WIFLE works to achieve gender equity throughout the law enforcement profession, resulting in better service to the public, by recruiting, retaining and promoting women in the law enforcement profession, enhancing the image of law enforcement, and promoting the value of collaboration and cooperative leadership. WIFLE is the sole organized voice representing thousands of women in all types of federal law enforcement including the Federal Bureau of Investigation, Border Patrol, Secret Service, and Customs.

The **National Center for Women & Policing (NCWP)**, a division of the Feminist Majority Foundation, promotes increasing the number of women at all ranks of law enforcement to improve police response to violence against women, reduce police brutality and excessive force, and strengthen community policing reforms. The NCWP is the largest organization of women at the command levels of law enforcement in the United States.

Pennsylvania NOW, Inc. is a non-profit, social change, membership organization founded in 1972. Pennsylvania NOW is affiliated with the National Organization for Women based in Washington, DC. Through grassroots

organizing efforts, Pennsylvania NOW's twenty-seven chapters with over 9,000 members work to eliminate all forms of discrimination against women, including discrimination based on race, economic status, age, sexual orientation, religious affiliation, ethnic origin, and/or disability.

The **Feminist Majority Foundation**, a non-profit organization, was founded in 1987 with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality and women's rights.

The **Women's Law Project (WLP)** is a non-profit public interest law firm located in Philadelphia, Pennsylvania dedicated to advancing the legal and economic status of women and their families. Since its founding in 1974, the WLP has worked to abolish sex discrimination in our laws and institutions through litigation, public policy advocacy, and individual counseling. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination and elimination of gender discrimination in the workplace.

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 300,000 members dedicated to preserving the United States Constitution's Bill of Rights. The **ACLU Women's Rights Project (ACLU WRP)**, founded in 1971 by Justice Ruth Bader Ginsburg, has been a leader in the

efforts to eliminate the barriers to women's full equality in American society.

Included in the docket of the ACLU WRP are cases that seek to ensure women's access to and advancement in non-traditional jobs, such as policing. Solidifying the important protections embodied in Title VII of the Civil Rights Act of 1964 (Title VII) is a priority for the ACLU WRP.

The **ACLU of Pennsylvania** is a statewide affiliate of the American Civil Liberties Union. Both the ACLU and its affiliates have long been concerned with Title VII in general, and problems of discrimination within police departments specifically. For these reasons, the issues presented in this case are a matter of significant interest to the ACLU of Pennsylvania and its members.

The **National Partnership for Women & Families**, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The **National Women's Law Center** (The Center) is a nonprofit legal advocacy organization dedicated since 1972 to the advancement and protection of

women's rights and the corresponding elimination of sex discrimination from all facets of American life. The Center focuses on major policy areas of importance to women and their families, including employment, education, family economic security, reproductive rights and health -- with special attention to the needs of low-income women. The Center has participated as counsel, provided assistance, or participated as *amicus curiae* in range of cases that aim to secure the equal treatment of women under the law.

ARGUMENT

I. INTRODUCTION

This Court's decision in *Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478 (3d Cir. 1999), *cert. denied*, 120 S.Ct. 970 (2000), is a critical victory for women police officers, women who wish to be police officers, working women, and the public. By requiring employers to defend their hiring standards as the minimum necessary for successful job performance, this Court opened doors for women and fulfilled the promises of Title VII of the Civil Rights Act. The district court's subsequent opinion, however, once again accepted that an employer can set its hiring standards as it wants, without relating those standards to successful job performance. Therefore, *Amici* urge this Court to reverse the lower court and find that SEPTA has failed to meet its burden to show that the cutoff score for the 1.5 mile run it requires of applicants is job-related and consistent with business necessity.

Rigid and arbitrary physical requirements do not improve the quality of the workforce; they simply make it overwhelmingly male. As this brief will discuss, if SEPTA and other police departments are allowed to use a standard that limits the number of women police officers, public safety may actually decrease. SEPTA's cutoff of 12 minutes for a 1.5 mile run does not increase the safety of either the public or other police officers.

II. WOMEN HAVE PROVEN THEMSELVES TO BE SUCCESSFUL POLICE OFFICERS AND INCREASE THE EFFECTIVENESS OF LAW ENFORCEMENT AGENCIES.

SEPTA has litigated this case for over four years. During that time, it has been demonstrated that many other police departments, including those servicing transit agencies, do not use a 1.5 mile/12 minute standard. Yet, SEPTA refused to change its cutoff score and, instead, spent untold amounts of money defending it. The district court, in turn, refused to order SEPTA to change its cutoff score, stating that to do so would dilute standards. Given the fact that this standard is one which the overwhelming majority of women will not meet, *see Lanning*, 181 F.3d at 481 n.5 (one study showed that 47% of men between the ages of 20-29 can pass this standard compared to 12% of women in the same age category), essentially the district court and SEPTA seem to agree: policing is not women's work. History and experience prove the contrary.

In 1972, women were only 2% of law enforcement officers -- their numbers kept low by discriminatory standards such as the now discredited height requirement. National Center for Women & Policing, *Equality Denied, The Status of Women in Policing: 2000* at 5 at <http://www.feminist.org/police>. Although non job-related discriminatory hiring standards continue to depress the number of women in law enforcement, as these standards have been replaced with job-related requirements, the number of women in law enforcement has gradually increased.

In 2000, women represented 13% of state, local and municipal law enforcement officers, including 10.3% of the supervisors, and 7.3% of top command positions. *Id.* at 6.¹ Among municipal police departments, women were 14.5% of the officers. *Id.* at 5. In contrast, it is estimated that 6% of SEPTA's officers are female. Findings of Fact in *Lanning v. SEPTA*, Nos. 97-0593 & 97-1161, at 208 (E.D. Pa. June 25, 1998) [hereinafter FOF].

In the mid 1970's, when women first entered law enforcement in larger numbers, numerous researchers undertook extensive studies to examine how they performed versus their male counterparts. What they found was that women are as capable as men of being police officers. See Susan Erlich Martin & Nancy J. Jurik, *Doing Justice, Doing Gender: Women in Law and Criminal Justice Occupations* 55 (1996) (collecting studies). International studies have reached the same conclusion. See Joseph Balkin, *Why Policemen Don't Like Policewomen*, 16 J. Police Sci. & Admin. 29-38 (1988).

Research from the 1980's found that there is no meaningful difference between male and female officers in activities on patrol, see John R. Snortum & John C. Byers, *Patrol Activities of Male and Female Officers as a Function of*

¹ These figures are based on 282 responses to a survey of 349 state, county and municipal law enforcement agencies with 100 or more sworn officers. *Id.* at 4 n.7.

Work Experience, 6 *Police Studies* 63-72 (1983), commitment to law enforcement, see Louis W. Fry & Sue Greenfeld, *An Examination of Attitudinal Differences Between Policewomen and Policemen*, 65 *J. Applied Psych.* 123-26 (1980), and response to violent confrontations. See Sean A. Grennan, *Findings on the Role of Officer Gender in Violent Encounters With Citizens*, 15 *J. Police Sci. & Admin.* 78-85 (1987).

A number of studies also show that female officers use a less authoritarian style of policing that relies less on physical force, although they obtain similar results. See *id.* Furthermore, research documents that female officers are exceedingly less likely to be involved in employing excessive force, thereby *increasing* the safety of the public and increasing the effectiveness of the police agency. See Independent Commission on the Los Angeles Police Department, *Report of the Independent Commission on the Los Angeles Police Department* 83-84 (1991); Katherine Spillar et al., *Gender Differences in the Cost of Police Brutality and Misconduct: A Content Analysis of LAPD Civil Liability Cases: 1990-1999*, at <http://www.feminist.org/police> (analyzing payment by city in police-related excessive force lawsuits and finding that men outnumbered women on the force in the ratio of 4:1 but accounted for payouts in excessive force lawsuits at the ratio of 23:1).

One of the reasons that women do well in policing is that they perform well in what is truly important on the job. For example, one study showed that skills such as integrity, self-control, dependability and situational reasoning are more important than physical ability in policing. *See Texas Commission on Law Enforcement Officer Standards and Education, Survey on the Activities of Texas Law Enforcement Agencies 1999*, at 7-8 (2000), available at <http://tcleose.state.us/surveytest/AGENCY~.PDF>. On a scale of one (lowest) to five (highest), survey respondents (808 police officers statewide) ranked the importance of various skills and abilities. The ratings were as follows: integrity-4.76; self-control-4.58; dependability-4.51; situational reasoning-4.37; initiative-4.12; interpersonal skills-4.12; reading-3.97; writing-3.94; appearance-3.63; physical abilities-3.62. Physical abilities was the lowest of the 10. *Id.*

Interpersonal skills are especially critical for community policing, which emphasizes communication and cooperation with citizens as well as informal problem-solving. One author has argued:

[p]olice officers who patrol transit systems also should practice the proactive intervention strategies characterized by the community policing approach. To help them do so, police managers might find it best to focus efforts away from radio dispatch and dramatic enforcement missions, such as drug arrests, in favor of providing the kind of high-profile crime prevention presence that has a true impact on ridership.

Kurt R. Nelson, *Policing Mass Transit: Serving a Unique Community*, Law Enforcement Bulletin, January 1997, available at <http://www.fbi.gov/publications/leb/1997/jan971.htm>.

Studies show that women excel at the interpersonal aspects of law enforcement and community policing. See, e.g., Susan Strum & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L.R. 953, n.134 (1996) (describing informal study of housing police officers, where women, who could not rely on their physical strength to intimidate, developed mentoring relationship with young men and kept housing projects safer because they did not approach the young men in confrontational way). In one study, police training instructors indicated that female officers have an advantage over their male peers in several areas, including empathy towards others and interacting in a non-confrontational manner. Diane L. Pike, *Women in Police Academy Training: Some Aspects of Organizational Response*, in *The Changing Roles of Women in the Criminal Justice System: Offenders, Victims and Professionals* 250-70 (Imogene L. Moyer ed., 1985). Female officers are reportedly less cynical in their views of citizens, see Alissa Pollitz Wordon, *The Attitudes of Women and Men in Policing: Testing Conventional and Contemporary Wisdom*, 31 *Criminology* 203-36 (1993), and more supportive of the principles of community policing than their male

colleagues. *See Stanard & Assocs., Inc., An Investigation of Police Officer Morale* 17 (1997).

Every day in growing numbers, women serve as police officers and perform well. In fact, the individuals involved in this case prove that point. The lead plaintiff in this case, Catherine Lanning, who failed SEPTA's entry-level run requirement, is a police officer with the University of Pennsylvania, has received commendations for her heroic performance, and responds to back-up calls from SEPTA officers. FOF, *supra*, at 155. One of the few women hired by SEPTA, Officer Tracy Thomas, who was hired even though she failed the 12 minute run, *see* FOF, *supra*, at 203,

has gone on to become a decorated officer who has repeatedly been nominated for awards such as Officer of the Year and Officer of the Quarter. In fact, SEPTA has commended Officer Thomas for her outstanding performance as a police officer. Moreover, Officer Thomas serves as one of SEPTA's two defensive tactics instructors.

FOF, *supra*, at 261.

III. THE TWELVE-MINUTE CUTOFF SCORE DOES NOT ENSURE JOB PERFORMANCE OF SEPTA OFFICERS OR THE SAFETY OF THE PUBLIC OR OFFICERS.

As this Court stated, "a discriminatory cutoff score must be shown to measure the minimum qualifications necessary to perform successfully the job in question." *Lanning*, 181 F.3d at 493. The record of this case clearly establishes that SEPTA completely failed to fulfill its burden to satisfy this showing. SEPTA

did not produce any evidence that any other police department uses as strict a standard as running 1.5 miles in 12 minutes. In fact, SEPTA itself does not consistently apply this standard, thus refuting its argument that such a standard is required for public safety purposes.

The Philadelphia Police Department, which performs back-up for SEPTA officers, does not require the 12 minutes/1.5 mile standard. XIV J.A. at 2464. Nor does the New York State Transit Police require this standard. VI J.A. at A-1469. The Pennsylvania Municipal Police Officer's Education and Training Commission, the body charged with certifying and overseeing the training of police officers in Pennsylvania, also does not require it. IX J.A. at 844. Incredibly, SEPTA requires more from its entry-level applicants than branches of the United States Military recommend for their *incumbents*. See Gordon Strong, *Descriptive Comparisons of United States Military Physical Fitness Programs*, 2 Sport J. (1999), available at <http://www.thesportjournal.org> (Army: males ages 22-26 must run 2 miles in 16.36 minutes; Navy: males ages 20-29 must run 1.5 miles in 13.45 minutes; Marines: males ages 17-26 must run 3 miles in 28 minutes).

SEPTA's own actions show that this standard is not necessary for successful policing. SEPTA requires its incumbents to take a physical test that includes the 12 minute/1.5 mile run standard. SEPTA has promoted, given special recognition to, and given satisfactory performance appraisals to incumbent officers

who have failed its physical test. FOF, *supra*, at 256-58. SEPTA has never disciplined, terminated or removed any officer for failing to perform the physical requirements of the job. *Id.* at 259. As the district court stated, “SEPTA has never taken *any* steps to determine whether the incumbent officers who have failed the physical test have adversely affected SEPTA’s ability to carry out its mission.” *Id.* at 252 (emphasis supplied). In fact, as this Court noted, officers with aerobic capacity that SEPTA deems too low for its applicants averaged the same number of arrests as officers with the aerobic capacity that SEPTA deems required. *Lanning*, 181 F.3d. at 490 n.15 (officers with aerobic capacity of less than 37 mL/kg/min had an average arrest of 13.6; officers with at least 48 mL/kg/min had an average of 13.9).

Even assuming, *arguendo*, that SEPTA could prove that the aerobic capacity it selected was required for the job, it did not show why this standard had to be applied as an entry-level cutoff *before* entrance into the academy. After hire, the vast majority of police applicants, including SEPTA’s, are sent to a police academy in which physical training is typically a daily activity. In recognition of this fact, some agencies have one standard for applicants and another for academy graduates, thereby allowing candidates to train up to the academy graduation standard. *See, e.g.*, New York State Troopers, at <http://www.troopers.state.ny.us/RecTprs/RecPAT/PATindex.html> (requiring that applicants meet the 50th

percentile (age and gender normed) for fitness for entrance into the academy and the 70th percentile for graduation).

SEPTA's claim and the district court's determination that safety requires SEPTA's standard is also refuted by research in this area which shows that decreasing crime on transit systems is a function of controlling environmental factors (i.e., lighting, entry, and hours of operation) and police presence. The Federal Transit Administration's *Transit Security Handbook* lists multiple ways to increase transit security; none of them includes increasing the aerobic capacity of officers. Federal Transit Administration, *Transit Security Handbook* 46-57, 83-88 (1998), available at <http://transit-safety.volpe.dot.gov/Publications/Security/TransitSecurityHandbook.pdf> [hereinafter *Handbook*]. According to the *Handbook*:

Research indicates that a well-patrolled system, which effectively solves passenger problems, prevents crime (rather than responds only after incidents occur), and maintains order, enhances passenger perceptions of security and may increase ridership. Based on this research, which is an outgrowth of the experiences of the fourteen new RFGS [Rail Fixed Guideway Systems²] constructed since 1970, most RFGS now commit the majority of personnel resources to uniformed deployment programs, emphasizing visibility over apprehension.

Id. at 84.

² The system that SEPTA patrols is a Rail Fixed Guideway System. *See Handbook, supra*, at 13.

An example in the *Handbook* is instructive. In 1993, due to a series of unusual bus crimes, the New York City Police Department, in coordination with the Surface Unit of the New York City Transit Police Department, assigned 28 officers to patrol certain New York City bus lines for the years 1994 to 1996. Police officers did this by either riding the bus for one stop or by boarding the bus at a stop and getting off before the bus departed. On the test bus lines, the number of incidents reported declined considerably. Total incidents fell from 63 in 1994, to 42 in 1995, and again in 1996 to 19, a total decline of 70 percent. *Id.* at 88-89. A Department of Justice study regarding the low rate of crime on the Washington D.C. Metro System (in 1994, 1.4 Part I crimes per 1 million riders) attributed this decline of incidents to the physical structure of the Metro and the vigilance of the transit police -- not their aerobic capacity. Nancy G. La Vigne, National Institute of Justice, *Visibility and Vigilance: Metro's Situational Approach to Preventing Subway Crime* (1997), available at <http://www.ncjrs.org>. According to a Federal Bureau of Investigation Publication, “[b]y far, the most important element of this effort [to reduce transit crime] is high-profile police patrol.” Nelson, *supra*.

Apparently, SEPTA’s expert agrees that presence is a tool to reduce crime in transit systems. *Lanning*, 181 F.3d at 491 n.18 (quoting Dr. Paul Davis’ original report as saying “[t]ransit police officers are more likely to have incidents come to

them, as opposed to responding to the scene of an event. By mission, the presence of the officer is that of a deterrent, maintaining maximum visibility”).

Finally, the district court excused SEPTA’s lack of evidence, claiming that an employer had to be free to improve the quality of its officers. Conclusions of Law on Remand, *Lanning v. SEPTA*, Nos. 97-0593 & 97-1161, at 20, 33 (E.D. Pa. Dec. 7, 2000). As this Court noted in its opinion, this “more is better” rationale, taken to its logical conclusion would allow any employer to pick one physical trait, typically more applicable to men than women, however arbitrary and however small a part of the job it entailed, and elevate it until no women would be hired. *Lanning*, 181 F.3d at 493. This Court’s opinion and Title VII of the Civil Rights Act do not permit SEPTA to implement or the district court to approve such a standard.

CONCLUSION

The standard selected and maintained by SEPTA and endorsed by the district court ignores the reality of law enforcement and the facts of this case. For those reasons, the lower court's decision should be reversed.

Respectfully submitted,

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Dated: October 9, 2001

CERTIFICATE OF BAR MEMBERSHIP

I, Terry L. Fromson, hereby certify that I am admitted to practice before the
United States Court of Appeals for the Third Circuit.

Terry L. Fromson

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

I, Terry L. Fromson, hereby certify that the foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 29(d) in that it contains 3374 words.

Terry L. Fromson

CERTIFICATE OF SERVICE

I, Terry L. Fromson, hereby certify that on this 9th day of October, 2001, I caused two true and correct copies of the foregoing Brief of *Amici Curiae* to be served by U.S. first-class mail on:

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