

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., MARCUS  
HAYWOOD, CANDIDO NUÑEZ,  
ROGER GREGG,

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK, FIRE  
DEPARTMENT OF THE CITY OF NEW  
YORK, NEW YORK CITY DEPARTMENT  
OF CITYWIDE ADMINISTRATIVE  
SERVICES, and MAYOR MICHAEL  
BLOOMBERG and NEW YORK CITY FIRE  
COMMISSIONER NICHOLAS SCOPPETTA,  
in their individual and official capacities,

Defendants.

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NICHOLAS G. GARAUFIS, United States District Judge.

From 1999 to 2007, the New York City Fire Department used written examinations with discriminatory effects and little relationship to the job of a firefighter to select more than 5,300 candidates for admission to the New York City Fire Academy. These examinations unfairly excluded hundreds of qualified people of color from the opportunity to serve as New York City firefighters. Today, the court holds that New York City's reliance on these examinations constitutes employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

## I. INTRODUCTION

In recent years, black and Hispanic residents of New York City (the “City”) have come to comprise a substantial portion of the City’s population, but their representation in the New York City Fire Department (“FDNY”) has remained extraordinarily low.<sup>1</sup> In 2002, the New York City Department of City Planning identified 25% of the City’s residents as black and 27% of its residents as Hispanic.<sup>2</sup> At the same time, however, only 2.6% of its firefighters were black and 3.7% of its firefighters were Hispanic.<sup>3</sup> When this litigation commenced in 2007, the percentages of black and Hispanic firefighters had increased to just 3.4% and 6.7%, respectively.<sup>4</sup> In other words, on a force of 8,998 firefighters, there were just 303 black firefighters and 605 Hispanic firefighters. These numbers stand in stark contrast to some of the nation’s other large cities, such as Los Angeles, Chicago, Philadelphia, and Houston, where minority firefighters have been represented in significantly higher percentages.<sup>5</sup>

In this case, Plaintiff United States of America (the “Federal Government”) as well as the Vulcan Society, Inc., Marcus Haywood, Candido Nuñez and Roger Gregg (the “Intervenors”), have sued to enforce the right of black and Hispanic candidates to be treated fairly in the

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<sup>1</sup> The parties use the terms “black” and “Hispanic” in their submissions, and the court adopts the parties’ terminology.

<sup>2</sup> See Declaration of Sharon Seeley dated January 21, 2009 (Docket Entry # 253) app. B (citing statistics from the New York City Department of City Planning).

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* app. C.

<sup>5</sup> See Declaration of Richard A. Levy dated February 2, 2009 (Docket Entry # 264) Ex. D (showing percentages of minority firefighter representation in 1999 in New York City as 2.9% African-American and 2.8% Hispanic, in Los Angeles as 14.0% African-American and 30.0% Hispanic, in Chicago as 20.4% African-American and 8.6% Hispanic, in Houston as 17.1% African-American and 13.9% Hispanic, and in Philadelphia as 26.3% African-American and 3.2% Hispanic). The 2000 Census figures for those cities show that Los Angeles had 11.2% black residents and 46.5% Hispanic or Latino residents, Chicago had 36.8% black residents and 26.0% Hispanic or Latino residents, Houston had 25.3% black residents and 37.4% Hispanic or Latino residents, and Philadelphia had 43.2% black residents and 8.5% Hispanic or Latino residents. See U.S. Census Bureau, State & County QuickFacts, available at <http://quickfacts.census.gov/qfd/index.html> (last visited on July 21, 2009).

application process for positions in the FDNY. Specifically, the Federal Government and the Intervenor (“Plaintiffs”)<sup>6</sup> challenge the City’s reliance on two written examinations that are used to appoint entry-level firefighters to classes at the New York City Fire Academy (“Academy”). These examinations—Written Examination 7029 and Written Examination 2043—were administered from 1999 to 2007, and the City has appointed more than 5,300 entry-level firefighters based upon their results. Although Plaintiffs identify approximately 3,100 of the examination candidates as black and approximately 4,200 of the examination candidates as Hispanic, the City has appointed just 184 black firefighters and 461 Hispanic firefighters from the challenged examinations. (See Section III.A, *infra*.)

Plaintiffs assert that the City’s reliance on Exams 7029 and 2043 in selecting entry-level firefighters has had a disparate impact on black and Hispanic candidates in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (“Title VII”). The Intervenor also claim, under a disparate treatment theory, that the City, two city agencies, the Mayor and the Fire Commissioner “have long been aware of the discriminatory impact on blacks of their examination process,” and that their “continued reliance on and perpetuation of these racially discriminatory hiring processes constitute intentional race discrimination . . . .” (Intervenor’s Compl. (Docket Entry # 48) ¶ 51.)

To remedy these claimed violations, Plaintiffs seek various forms of injunctive and monetary relief. The Federal Government seeks to enjoin the City from engaging in discriminatory practices “against blacks on the basis of race and against Hispanics on the basis of

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<sup>6</sup> The Intervenor present claims relating only to black firefighters, while the Federal Government brings claims relating to both black and Hispanic firefighters. Although their Motions are separate, the fundamental issues in each are the same. The court will, therefore, generally refer to both parties as “Plaintiff” throughout, distinguishing between the Federal Government and the Intervenor as needed.

national origin,” and seeks a specific injunction against the practices challenged in this case. (See Compl. (Docket Entry # 1) ¶ 38.) It also asks the court to order the City to take “appropriate action to correct the present effects of its discriminatory policies and practices” and to enjoin it from failing to “make whole” those harmed by the City’s policies and practices. (Id.) The Intervenors seek similar, but broader relief, including an injunction requiring the City to “appoint entry-level firefighters from among qualified black applicants in sufficient numbers to offset the historic pattern and practice of discrimination against blacks in testing and appointment to that position.” (Int. Compl., Prayer For Relief ¶ 3(d).) The Intervenors seek to require the City to “recruit black candidates and implement and improve long-range recruitment programs” and to “provide . . . future test scores, appointment criteria, eligibility lists, appointment data, and all other information necessary to conduct an adverse impact and job-relatedness analysis of the examination and selection process.” (Id. ¶¶ 3(e), (f).) The Intervenors also seek damages and other fees. (Id. ¶¶ 4-9.)

This is not the first time the City has been brought to federal court to defend its entry-level firefighter examinations against charges of discrimination. In the early 1970s, Judge Weinfeld in the Southern District of New York found that the City’s written and physical examinations for entry-level firefighters violated the Equal Protection Clause of the Constitution because of their discriminatory impact on black and Hispanic applicants. See Vulcan Soc’y of New York City Fire Dep’t, Inc. v. Civil Serv. Comm’n, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973), affirmed in relevant part by 490 F.2d 387 (2d Cir. 1973). Following Judge Weinfeld’s decision in Vulcan Society, the City contracted with a private consulting firm to construct valid written and physical examinations; these contracts were cancelled three years later, however,

apparently on account of a budget crisis. See Berkman v. City of New York, 536 F. Supp. 177, 184 (E.D.N.Y. 1982).<sup>7</sup> At the time of Vulcan Society, Judge Weinfeld noted the “overwhelming disparity between minority representation in the [FDNY] (5%) and in the general population of New York City within the age group eligible for appointment (32%).” Vulcan Soc’y, 360 F. Supp. at 1269. In the three decades that have followed, these minority groups have come to represent an even greater share of the City’s population. Despite these changes, the overwhelmingly monochromatic composition of the FDNY has stubbornly persisted.<sup>8</sup>

This court has already issued several decisions in the case. I have bifurcated the liability and relief phases (see Docket Entry # 47), permitted intervention by the Intervenors (see id.), denied the Intervenors’ motion to amend the Intervenors’ Complaint (see Docket Entry # 182), declined to dismiss the Intervenors’ Complaint on timeliness grounds (see Docket Entry # 231), and certified a class consisting of black applicants for the position of entry-level firefighter (see Docket Entry # 281).

Now before the court are Motions for Summary Judgment by the Federal Government and the Intervenors. (Docket Entries ## 251, 260.) The Federal Government and the Intervenors have moved for summary judgment on the prima facie case of disparate impact, and the Federal

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<sup>7</sup> In Berkman, female candidates for the job of entry-level firefighter challenged the physical examination component of a prior FDNY test. See Berkman, 536 F. Supp. at 205-16.

<sup>8</sup> By contrast, it has been reported that the composition of the New York City Police Department (“NYPD”) has undergone significant diversification since the 1970s. In 1978, the NYPD was made up of 8.9% black officers and 3.8% Hispanic officers. See Guardians Ass’n of New York City Police Dep’t, Inc. v. Civil Serv. Comm’n, 484 F. Supp. 785, 793 (S.D.N.Y. 1980). According to a New York Times article published in June 2009, the NYPD reported its rank-and-file officers as 18% black and 28.7% Hispanic. See Al Baker, “Police Commissioner Plans to Put More Minority Officers in Top Posts,” N.Y. Times A20 (June 26, 2009), available at <http://www.nytimes.com/2009/06/26/nyregion/26nypd.html> (last visited on July 21, 2009). On July 15, 2009, the NYPD announced that it had sworn in its most diverse Police Academy class ever, including 14.7% black recruits and 33.3% Hispanic recruits. See New York City Police Dep’t, Press Release # 024, dated July 15, 2009, available at [http://www.nyc.gov/html/nypd/html/pr/pr\\_2009\\_024.shtml](http://www.nyc.gov/html/nypd/html/pr/pr_2009_024.shtml) (last visited on July 21, 2009).

Government has joined the Intervenor's Motion for Summary Judgment on the City's business necessity defense.<sup>9</sup> (See Docket Entries ## 251, 260, 263.)

Upon consideration of the parties' submissions and oral argument, the court concludes that Plaintiffs have established a prima facie case that the City's use of the two written examinations has resulted in a disparate impact upon black and Hispanic applicants for the position of entry-level firefighter. The court also concludes that the City has failed to present sufficient evidence supporting a business justification for its employment practices. I therefore grant Plaintiffs' Motions for Summary Judgment in their entirety.

In essence, my ruling is premised upon two basic conclusions. First, Plaintiffs have shown that there is no triable issue of fact as to whether the City's use of Written Exams 7029 and 2043 has resulted in a statistically and practically significant adverse impact on black and Hispanic firefighter applicants. Black and Hispanic applicants disproportionately failed the

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<sup>9</sup> In support of its Motion, the Federal Government has submitted a Statement of Undisputed Facts Pursuant to Rule 56.1 (Docket Entry # 252) ("USA 56.1"), a Declaration of Sharon A. Seeley (Docket Entry # 253) ("Seeley Decl."), an Affidavit of Bernard R. Siskin, Ph.D. (Docket Entry # 254) ("Siskin Aff."), including a copy of his November 2007 expert report at Exhibit A ("Siskin Report"), a Memorandum of Law (Docket Entry # 255) ("USA Mem."), and a Reply Memorandum (Docket Entry # 258) ("USA Reply"). In response, the City has submitted an opposing Memorandum of Law on the prima facie case (Docket Entry # 256) ("Def. PF Mem.") and a Response to the Federal Government's Rule 56.1 Statement (Docket Entry # 257) ("Def. USA 56.1").

In support of their Motion, the Intervenor's have submitted a Rule 56.1 Statement of Undisputed Facts (Docket Entry # 261) ("Int. 56.1"), a Memorandum of Law (Docket Entry # 262) ("Int. Mem."), a Declaration of Richard A. Levy (Docket Entry # 264) ("Levy Decl."), a Reply Memorandum on the prima facie case (Docket Entry # 268) ("Int. PF Reply") and a Reply Memorandum on job-relatedness and business necessity (Docket Entry # 269) ("Int. BN Reply"). Included in the Levy Declaration are excerpts from the expert report of Dr. Wiesen (Levy Decl. Exs. R, Z ("Wiesen Report").) A full version of the Wiesen Report appears as Docket Entry # 123. In response, the City has submitted an opposing Memorandum of Law relating to the prima facie case ("Def. PF Mem."), an opposing Memorandum of Law relating to job-relatedness and business necessity (Docket Entry # 266) ("Def. BN Mem."), a Response to Intervenor's Rule 56.1 Statement (Docket Entry # 265) ("Def. Int. 56.1"), and a Declaration of William S.J. Fraenkel (Docket Entry # 267) ("Fraenkel Decl."). Included in the Fraenkel Declaration is the expert report of Dr. Schemmer and Dr. Bobko. (Fraenkel Decl. Ex. 1 ("Bobko-Schemmer Report").) The Federal Government has submitted a memorandum joining the Intervenor's on job-relatedness and business necessity (Docket Entry # 263 ("USA BN Mem."), and the City has filed a response (Docket Entry # 272 ("Def. USA Resp.")).

The Intervenor's have also moved to strike two declarations submitted by the City with their summary judgment papers. (See Docket Entries ## 273, 274, 276, 277.) The court addresses this Motion in Section IV.B below.

written examinations, and those who passed were placed disproportionately lower down than white candidates on the hierarchical hiring lists resulting from their scores. Second, although the City has had the opportunity to justify this adverse impact by showing that it used the written examinations to test for the relevant skills and abilities of entry-level firefighters, the City has failed to raise a triable issue on this defense. Under Second Circuit precedent, the evidence presented by the City is insufficient as a matter of law to justify its reliance on the challenged examinations.

Before proceeding to the legal analysis, I offer a brief word about the Supreme Court's recent decision in Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009). I reference Ricci not because the Supreme Court's ruling controls the outcome in this case; to the contrary, I mention Ricci precisely to point out that it does not. In Ricci, the City of New Haven had set aside the results of a promotional examination, and the Supreme Court confronted the narrow issue of whether New Haven could defend a violation of Title VII's disparate treatment provision by asserting that its challenged employment action was an attempt to comply with Title VII's disparate impact provision. The Court held that such a defense is only available when "the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." Id. at 2664. In contrast, this case presents the entirely separate question of whether Plaintiffs have shown that the City's use of Exams 7029 and 2043 has actually had a disparate impact upon black and Hispanic applicants for positions as entry-level firefighters. Ricci did not confront that issue.

The Ricci Court concluded that New Haven would not likely have been liable under a disparate impact theory. See id. at 2681. In doing so, the Court relied on the various steps that

New Haven took to validate its civil service examination. Id. at 2678-79. It is noteworthy, however, that in this case New York City has taken significantly fewer steps than New Haven took in validating its examination. The relevant teaching of Ricci, in this regard, is that the process of designing employment examinations is complex, requiring consultation with experts and careful consideration of accepted testing standards. As discussed below, these requirements are reflected in federal regulations and existing Second Circuit precedent. This legal authority sets forth a simple principle: municipalities must take adequate measures to ensure that their civil service examinations reliably test the relevant knowledge, skills and abilities that will determine which applicants will best perform their specific public duties.

In rendering this decision, I am aware that the use of multiple-choice examinations is typically intended to apply objective standards to employment decisions. Similarly, I recognize that it is natural to assume that the best performers on an employment test must be the best people for the job. But, the significance of these principles is undermined when an examination is not fair. As Congress recognized in enacting Title VII, when an employment test is not adequately related to the job for which it tests—and when the test adversely affects minority groups—we may not fall back on the notion that better test takers make better employees. The City asks the court to do just that. Regrettably, though, the City did not take sufficient measures to ensure that better performers on its examinations would actually be better firefighters. Accordingly, the court grants the Motions for Summary Judgment and finds that Plaintiffs have established disparate impact liability.

## II. SUMMARY JUDGMENT STANDARD

“Summary judgment is appropriate when the pleadings and admissible evidence proffered to the district court show that there is ‘no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .’” Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 309 (2d Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). “Material facts are those which ‘might affect the outcome of the suit under the governing law,’ and a dispute is ‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Coppola v. Bear Stearns & Co., 499 F.3d 144, 148 (2d Cir. 2007) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Factual disputes that are irrelevant or immaterial to the disposition of a case cannot preclude a grant of summary judgment. See Loria v. Gorman, 306 F.3d 1271, 1282-83 (2d Cir. 2002).

In considering a motion for summary judgment, the court construes the facts “in the light most favorable to the nonmoving party,” and draws “all reasonable inferences in its favor.” SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 137 (2d Cir. 2009). “[T]he moving party bears the burden of demonstrating the absence of a genuine issue of material fact.” Baisch v. Gallina, 346 F.3d 366, 371-72 (2d Cir. 2003) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). In response, the nonmoving party “‘must do more than simply show that there is some metaphysical doubt as to the material facts . . . .’” Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

