IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

PLAINTIFF,

AND THE VULCAN SOCIETY, INC., ET AL.,

PLAINTIFFS-INTERVENORS,

V.

CITY OF NEW YORK, ET AL.,

DEFENDANTS.

CIV. ACTION NO. 07-CV-2067 (NGG)(RLM)

SERVED MARCH 9, 2009

PLAINTIFF UNITED STATES' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

The United States respectfully submits this memorandum in reply to the Memorandum of Law in Opposition to Plaintiff's and Plaintiff-Intervenors' Motions for Summary Judgment Concerning the Prima Facie Case of Disparate Impact (cited herein as "City's D.I. Mem."), served by defendant City of New York (the "City") on the United States on February 23, 2009. In its brief, the City does not deny that each of the four practices challenged by the United States has resulted in statistically significant disparities between both black and white and Hispanic and white candidates for the firefighter position in the City's Fire Department (the "FDNY"). Nor does the City deny that each of these disparities is practically significant. Indeed, the City – though still reluctant to clearly concede what it should have conceded long ago – does not even argue that the Court should deny the United States' motion for partial summary judgment with respect to some of the challenged practices.

With respect to the other challenged practices, the City argues that the 80% "rule of thumb" is theoretically preferable to the tests of statistical significance routinely used for decades by the courts. The City's argument is contrary to the clear precedent in this Circuit. As the Second Circuit has held, "[I]n cases involving large samples, 'if the difference between the expected value (from a random selection) and the observed number is greater than two or three standard deviations,' a prima facie case is established." Guardians Ass'n of the New York City Police Dept. v. Civil Serv. Comm'n of the City of New York, 630 F.2d 79, 86 (2d Cir. 1980) (quoting Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977)), cert. denied, 452 U.S. 940 (1981).

II. ARGUMENT

A. The City Admits that the 80% Rule Cannot Be Used to Determine Whether Rank-Order Processing and Selection from the Exam 7029 and 2043 Eligibility Lists Has Resulted in a Disparate Impact.

As the Court is aware, the United States alleges that four employment practices used by the City have resulted in a disparate impact upon black and Hispanic candidates for the entry-level firefighter position in the FDNY.[1] The City's 80% Rule argument does not even apply to two of the four practices challenged by the United States in this case. Specifically, according to the City's own experts, the 80% Rule cannot be used to determine whether rank-order processing and selection resulted in a disparate impact. Statement of Undisputed Facts Pursuant to Rule 56.1 ("Pl. Facts"), ¶ 67; Defendants' Response to Plaintiff's Statement of Facts Pursuant to Local Rule 56.1 ("Def. Resp. to Pl. Facts"), ¶ 67. Thus, the City cannot argue with respect to either blacks or Hispanics that the 80% Rule somehow trumps the United States' showing of statistical and practical significance for the practices of: (1) rank-order processing and selection from the Exam 7029 eligibility list; or (2) rank-order processing and selection from the Exam 2043 eligibility list. There is, therefore, no dispute that the City's rank-order processing and selection from the Exam 7029 and 2043 eligibility lists resulted in disparate impact upon both blacks and Hispanics.

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[1] Specifically, the four challenged practices are the City's: (1) pass/fail use of Written Exam 7029 with a cutoff score of 84.705; (2) pass/fail use of Written Exam 2043 with a cutoff score of 70; (3) rank-order processing/selection of candidates from the Exam 7029 eligibility list based on a combination of their scores on the written examination and physical performance test ("PPT"); and (4) rank-order processing/selection of candidates from the Exam 2043 eligibility list based on a combination of their scores on the written examination and PPT.

B. The City Admits that Its Pass/Fail Use of Written Exam 7029 Had a Disparate Impact Upon Black Candidates.

Moreover, the City admits that its pass/fail use of Written Exam 7029 fails the 80% Rule with respect to blacks. See Pl. Facts, ¶¶ 59, 89; Def. Resp. to Pl. Facts, ¶¶ 59, 89. The white pass rate was 89.92%, while the black pass rate was 60.26%. Pl. Facts, ¶ 83; Def. Resp. to Pl. Facts, ¶ 83. Thus, as shown in Table 1 of Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment, served on February 2, 2009 ("Pl. Mem."), the ratio of the pass rate of black candidates to the pass rate of white candidates was only 67%. Pl. Mem., p. 11 Table 1; Pl. Facts, ¶ 89; Def. Resp. to Pl. Facts, ¶ 89. Therefore, there is no dispute that the City's pass/fail use of Written Exam 7029 with a cutoff score of 84.705 resulted in a disparate impact upon black candidates.

C. The City's Argument that the 80% Rule Trumps the Undisputed Evidence that the Remaining Practices Resulted in Statistically and Practically Significant Disparities Is Contrary to Established Law.

Accordingly, the only questions to which the City's 80% Rule argument even applies are whether: (1) the City's pass/fail use of Written Exam 7029 (which the City admits had a disparate impact upon blacks) had a disparate impact upon Hispanics; (2) whether the City's pass/fail use of Written Exam 2043 had a disparate impact upon Hispanics; and (3) whether the City's pass/fail use of Written Exam 2043 had a disparate impact upon blacks. See City's D.I. Mem., p. 7 ("Applying the 80% Rule . . . shows that there is no adverse impact on either blacks or Hispanics with regard to the written component of Exam 2043 and no adverse impact on Hispanics for the written component of Exam 7029.")[2]

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[2] The City also makes a reference to Hispanics, the ranking of candidates and "the written component of Exam 2043." Def. Mem., p. 7. It is undisputed, however, that the City did

1. The City has identified no legal authority supporting its argument.

The City admits that the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 ("Uniform Guidelines"), which gave rise to the 80% Rule, themselves indicate that it is no more than a "rule of thumb." Pl. Facts, ¶ 61; Def. Resp. to Pl. Facts, ¶ 61. Indeed, as the United States previously pointed out, the report of the City's own experts quotes the portion of the Uniform Guidelines that states that failing the 80% Rule is not a prerequisite for a finding of disparate impact. See Pl. Mem., p. 21. The report also states that the 80% Rule "is not intended as a legal definition" of disparate impact, again quoting the Uniform Guidelines. Exhibit 1 to Declaration of William S.J. Fraenkel Submitted in Opposition to Plaintiff's and Plaintiff-Intervenors' Motions for Summary Judgment (dated February 23, 2009), p. 8.

The City nevertheless argues that, because one of the co-authors of the City's expert report, F. Mark Schemmer,[3] prefers the 80% Rule to the tests of statistical significance ("standard deviation analyses") routinely used by the courts for decades, this Court should hold that the 80%

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not rank candidates on the basis of their Written Exam 2043 scores alone. Pl. Facts, ¶¶ 30, 31; Def. Resp. to Pl. Facts, ¶¶ 30, 31. The City ranked candidates based on a combination of their scores on Written Exam 2043 and the PPT (the City's physical performance test). To the extent that the City refers to the results of Dr. Siskin's "effective cutoff score" analysis, that analysis was not intended to and does not take into account the effect of the City's rank-order processing and selection practice in terms of delayed hiring of black and Hispanic candidates. The results of Dr. Siskin's delay analysis with respect to Exam 2043 are shown in Table 4(a) of the United States' February 2, 2009 memorandum. The City does not argue that Table 4(a) is not sufficient to establish a prima facie case with respect to both blacks and Hispanics. Indeed, any attempt by the City to do so would be wholly inconsistent with the fact that the City does not argue that Table 3, reporting the results of the parallel delay analysis for Exam 7029, fails to establish that rank-order processing/selection from the Exam 7029 eligibility list resulted in a disparate impact upon both blacks and Hispanics. See City's D.I. Mem., p. 7.

[3] The City did not submit a declaration from its other expert, Dr. Philip Bobko, who is Dr. Schemmer's co-author.

rule of thumb negates the undisputed statistically and practically significant disparities at issue in this case. As the United States has explained previously, the City's argument is based on a fundamental misunderstanding of Title VII law. See Pl. Mem., pp. 18-20. Whatever a theoretician like Dr. Schemmer may believe about what the law should be, his and the City's arguments are contrary to established law and must be rejected by this Court.[4]

None of the caselaw cited in the City's brief supports its position in this case. Indeed, far from supporting the City's argument that the 80% Rule provides a better measure of disparate impact than tests of statistical significance, the very footnote in Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 996 n.3 (1988), cited by the City states, "This enforcement standard [the 80% Rule] has been criticized on technical grounds . . . and it has not provided more than a rule of thumb for the courts." Id. (citations omitted). Similarly, the City cites Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999). Smith is an age discrimination case in which the Second Circuit stated, "[A] disparate impact might well be actionable if older workers were retained at 88.79% of the rate for younger workers," id. at 369 (emphasis added), hardly a ringing endorsement of

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[4] Dr. Schemmer's theoretical preference for the 80% Rule is based primarily on the same issues of "sample size" and "parity" already addressed by the United States in its February 2, 2009 brief. Because the City simply restates its/Dr. Schemmer's arguments and does not attempt to rebut the authority and evidence relied upon by the United States, the United States does not address in detail in this memorandum the City's sample size and parity arguments. However, it must be pointed out that the City's argument that "[t]he problem is that the larger the group we are examining, the more candidates who sit for the exam, the greater our likelihood that some of them will not do as well as others," is completely inapposite. City's D.I. Mem., p.5. To use the City's "bad apple" analogy, if there are large numbers of apples in the barrel (i.e., candidates taking an examination), it is likely that some will be "bad apples" (i.e., fail the examination). But the larger the number of candidates taking the examination, the more likely it is that differences due to chance will "average out" and the pass rate of blacks and whites will be roughly the same. Simply having larger numbers would not result in a higher percentage of blacks than whites being labeled "bad apples."

the 80% Rule. To be sure, the Second Circuit did hold that the plaintiffs in Smith had not established a prima facie case, but it did so because their expert relied on "the wrong population for their statistical analyses," not because of the 80% Rule. Id. at 370.

The City also cites Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 225-26 (2d Cir. 1984). In Bushey, the court found, based on the 80% Rule, that disparate impact had been established, but it did not discuss tests of statistical significance. It certainly did not hold that the 80% rule trumps a showing of statistical significance. The United States' position is not that a plaintiff can never use the 80% Rule to establish a prima facie case; it is that a defendant cannot use the 80% Rule to negate one in the face of undisputed statistically and practically significant disparities. Similarly, Ottaviani v. State Univ. of New York at New Paltz, 875 F.2d 365, 371 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990), also cited by the City, is a case in which the Second Circuit stated that the plaintiff's statistical significance tests did not establish a prima facie case. But the court did not rely on – or even mention – the 80% Rule because Ottaviani was not a disparate impact case. See Ottaviani v. State University of New York at New Paltz, 679 F. Supp. 288, 297 (S.D.N.Y. 1988) ("In order to prove such a claim of disparate treatment, plaintiff must prove discriminatory intent."), aff'd, 875 F.2d 365 (2d Cir. 1990), cert. denied, 493 U.S. 1021 (1990). Instead, the court discussed the weakness of the plaintiff's statistical evidence, noting that nine of the disparities presented by the plaintiff class were equivalent to less than two units of standard deviation and that there were no significant disparities in some years. Ottaviani, 875 F.2d at 372. Moreover, the court found that whether the plaintiff had established a prima facie case was not "pivotal" because "the defendants were able to successfully undermine the plaintiffs' case by attacking the validity of the plaintiffs'

statistical evidence, and by introducing statistical evidence of their own . . . ." Id. at 373-74. This case does not involve disparities below or barely at the threshold of statistical significance. The City does not dispute that each of the relevant disparities was equivalent to between 10.46 and 21.84 units of standard deviation. Pl. Facts, ¶¶ 77, 94, 102, 110; Def. Resp. to Pl. Facts, ¶¶ 77, 94, 102, 110. Nor has the City attacked Dr. Siskin's statistical calculations or introduced any statistical evidence of its own. Id.

Finally, the City cites Waisome v. Port Authority of New York & New Jersey, 948 F.2d 1370, 1376 (2d Cir. 1991). Waisome is the only case cited by the City in which the court at least discussed the 80% Rule and found that a prima facie case had not been established (with respect to one challenged practice). However, what the City does not mention is the weakness of the statistical showing in that case. In Waisome, the difference in pass rates was equivalent to less than three (2.68) units of standard deviation. Id. at 1375. Moreover, the court found in Waisome that if only two more blacks had passed the examination at issue the statistical significance would have disappeared. Id. ("[T]he results would not have been statistically important had two more black candidates passed the written test. It was on this basis [the district judge] decided that [the disparity was not] sufficiently substantial to state a Title VII violation.") Thus, the City has been unable to find a single case in which a court has held that the 80% Rule negated a strong, undisputed showing of both statistical and practical significance. The Court must reject the City's argument because it has no foundation in the law.

2. This case is not about "hypotheticals" and "unknowns;" it is about real black and Hispanic candidates being denied an opportunity to become FDNY firefighters.

The City attempts to obscure what is clear in the law with a confused argument that, in

relying on tests of statistical significance, the courts have improperly focused on a "hypothetical population" or tried to predict an "unknown." Def. Mem., pp. 1, 2. The City is mistaken. This case is not about unknowns. The City admits that black and Hispanic candidates passed Written Exams 7029 and 2043 at a lower rate than white candidates. Nor is this case about hypotheticals. It is about real people who applied to become firefighters and were screened out of the selection process by the City's use of the employment practices at issue. The undisputed results of Dr. Siskin's standard deviation analyses were not presented by the United States to predict what will happen or to hypothesize about what did happen. What happened is that actual black and Hispanic candidates failed the written examinations used by the City more often than whites.

As the Second Circuit has explained, the function of statistical significance tests in disparate impact cases like this is to allow the Court to determine how likely it is that normally-occurring random chance caused these known differences in the pass rates. Put simply, if a standard deviation analysis indicated that a difference in pass rates was likely due to chance, then based on the analysis the Court could not conclude that the challenged practice caused the disparity. It would be too likely that the disparity would have occurred regardless of what employment practice the City used. As the City and its experts agree, the 80% Rule cannot fill this function for the Court, because it does not tell the Court how likely it is that a difference in pass rates was due to chance. Pl. Facts, ¶ 60; Def. Resp. to Pl. Facts, ¶ 60.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in the United States' February 2, 2009 Memorandum of Law in Support of Motion for Partial Summary Judgment, the Court should find that each of the four practices challenged by the United States has resulted in a disparate

impact upon black and Hispanic candidates for the entry-level firefighter position in the FDNY. The United States respectfully requests that the Court enter summary judgment against the City with respect to the United States' prima facie case of disparate impact.

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Respectfully submitted,

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