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

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., ET AL,

Plaintiffs-Intervenors,

-against-

THE CITY OF NEW YORK, ET AL,

Defendants.

----------X

Case No. 07-CV-2067 (NGG)(RLM)

ECF Case

MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S AND PLAINTIFFS-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT CONCERNING THE PRIMA FACIE CASE OF DISPARATE IMPACT

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012-2399
(212) 614-6438
(212) 614-6499 (fax)

LEVY RATNER, P.C.
80 Eighth Avenue, 8th Floor
New York, NY 10011
(212) 627-8100
(212) 627-8182 (fax)

SCOTT + SCOTT, LLP
29 West 57th Street
New York, NY 10019
(212) 223-6444
(212) 223-6334 (fax)

Attorneys for Plaintiffs-Intervenors

On the brief:
Richard A. Levy
Darius Charney

Date of Service: March 9, 2009

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Plaintiffs-Intervenors submit this memorandum of law in further support of their motion for summary judgment and in reply to Defendants' memorandum of law concerning the prima facie case of disparate impact.

Argument

DEFENDANTS HAVE FAILED TO CREATE A DISPUTED ISSUE OF MATERIAL FACT REGARDING THE ADVERSE IMPACT OF THE CHALLENGED EXAMS

Defendants do not dispute that the statistical significance test accepted by *Guardians Association v. Civil Service Commission of the City of New York*, 630 F.2d 79, 86 (2d Cir. 1980) shows at least two (2) to three (3) units of standard deviation in the pass rates and eligibility list rankings of black and white firefighter candidates on Exams 7029 and 2043. (SOF ¶¶30-31, 35-

36; Resp. to SOF ¶¶ 30-31, 35-36).[1] It is also undisputed that the shortfall calculations presented by Plaintiffs-Intervenors – which show that large numbers of black applicants were excluded as a result of Exams 7029 and 2043 – were accurately calculated. (SOF ¶¶38-39; Resp. to SOF ¶¶38-39; Def. Ex. 1 (Bobko-Schemmer Rept.) at 21-22; Def. Ex. 15 (Bobko Dep.) at 139, 142, 143, 145, 151-152; Seeley Decl., Ex. Q (Schemmer Dep.) at 119-121).

The only question before the Court, which the Parties have agreed is ripe for resolution on summary judgment, is whether in this case adverse impact should be assessed using statistical significance – as accepted by the Second Circuit Court of Appeals in *Guardians*, 630 F.2d at 86, and *EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110, 119 (2d Cir. 1998) – or using the so-called 80% "rule of thumb" described by the *Uniform Guidelines on Employee Selection Procedures* ("*Uniform Guidelines*"), 29 C.F.R. § 1607.4(D).

A. THE 80% ANALYSIS IS NOT APPROPRIATE AS A MATTER OF SETTLED LAW

The 80% guideline, as set out in *Uniform Guidelines*, was not intended for use in cases involving large sample sizes, where statistical significance testing is a more reliable measurement of adverse impact. *See Uniform Guidelines Q's & A's*, 44 Fed.Reg. 11996, 11999 (March 2, 1979) at #20, 22, *available at* www.eeoc.gov/policy/docs/

[1] Plaintiffs-Intervenors' Local Rule 56.1 Statement is referred to here as "SOF" and Defendants' Response is "Resp. to SOF." Defendant's Response to the United States' Local Rule 56.1 Statement is referred to as "Resp. to U.S.A SOF." The exhibits annexed to the Declaration or Richard A. Levy are referred to by their Appendix tab and page, while the exhibits annexed to the Declaration of William Fraenkel are referred to as "Def. Ex. __." Plaintiff-Intervenors' moving brief in support of the motion is "P-I Mem." Defendants' brief in opposition to the prima facie case is "Def. Mem."

qanda_clarify_procedures.html.[2] *Uniform Guidelines Q & A* #24, cited (misleadingly) by Defendants in support of the use of the 80% standard, specifically refers to cases involving small sample sizes. 44 Fed.Reg. at 11999. Defendants' own expert Dr. Bobko has acknowledged that, where the sample size is large, statistical significance testing is better than the 80% standard at controlling for "false negatives," i.e., incorrect findings of no adverse impact. App. T:191-194, Bobko Tr. at 61-62, 65-66.

As discussed in Plaintiffs-Intervenors' opening brief (P-I Mem. at 12-14), the Second Circuit and other federal courts have consistently relied on statistical significance testing rather than the 80% standard to find adverse impact in cases, like this one, that involve large sample sizes, statistically significant between-group disparities, and substantial shortfall figures. *See, e.g., EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 100 (2d Cir. 1998) (large sample size included all electrician apprenticeship applicants in New York State over a four-year period, and the likelihood of statistical white-black disparity occurring by chance was 1 in 10,000); *Groves v.*

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[2] *Uniform Guidelines Q & A* #22 provides:

> Where large numbers of selections are made, relatively small differences in selection rates may nevertheless constitute adverse impact if they are both statistically and practically significant. . . For that reason, if there is a small difference in selection rates (one rate is more than 80% of the other), *but large numbers of selections are involved*, it would be appropriate to calculate the statistical significance of the difference in selection rates. (emphasis added).

Similarly, *Uniform Guidelines Q & A* #20, emphasizes that the 80% standard "is not intended to be controlling in all circumstances," and notes, by way of example, that federal "enforcement agencies would consider disqualification [of job applicants] based on an arrest record alone as having an adverse impact" on Hispanic job applicants where "nationwide statistics" showed a statistically significant Hispanic-white disparity in rates of disqualification based on arrest records even if using arrest records yielded a Hispanic job selection rate that was more than 80% of the selection rate for whites.

Alabama State Bd. of Educ., 776 F.Supp. 1518, 1528 (M.D. Ala. 1991)(large sample size consisted of all black and white applicants for public school teaching positions in state of Alabama over a seven-year period, and a statistical white-black disparity of 10.7 standard deviations); *Bew v. City of Chicago*, 979 F.Supp. 693 (N.D. Ill. 1993)(sample size of 4,071 and statistical white-minority disparity exceeding 5 units of standard deviation); *Delgado v. Ashcroft*, No. 99-2311, 2003 U.S. Dist. LEXIS 26471, *8, 24 (D.D.C. May 29, 2003) (statistical disparity of 5 units of standard deviation and hiring shortfall of 45 Hispanic applicants). Here, Exam 7029 had more than 14,000 test-takers, and Exam 2043 had more than 15,000 test-takers. (SOF ¶¶27, 32; Resp. to SOF ¶¶27, 32).

The cases cited by Defendant, where the 80% rule was used, are clearly distinguishable because much smaller samples were analyzed. The two cases Defendants cite in which the court relied on the 80% rule rather than statistical significance testing to assess the adverse impact of a civil service exam are inapposite. Def. Mem. at 3. *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370 (2d Cir. 1991), involved a much smaller sample size than the instant case (only 617 applicants took the challenged exam), and statistical significance that was of a "limited magnitude," as demonstrated by an exam-passing shortfall of only two (2) black candidates. *Id.* at 1372, 1376. *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1983), involved a sample of only 275 test takers, and no standard deviation analysis was ever performed. *Id.* at 222, 225-26.[3]

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[3] Even where there is a small sample size, the Second Circuit has relied on statistical significance testing rather than the 80% standard to find adverse impact where the statistical disparity between white and black job applicants was clearly significant. *See Bridgeport Guardians, Inc. v. Bridgeport*, 933 F.2d 1140, 1147 (2d Cir. 1991)(likelihood of white-black disparity occurring by chance was only 1 in 10,000).

B. EVEN UNDER THE 80% APPROACH SUGGESTED BY DEFENDANTS, BLACK APPLICANTS STILL SUFFERED AN ADVERSE IMPACT

It is undisputed that black applicants were adversely impacted by the use of Written Exam 7029 as a pass-fail screening device, even applying the 80% analysis. App. M:80, Adm. 13. Further, it is undisputed that the proportion of black firefighter candidates on the Exam 2043 eligibility list who were ranked lower than the last candidate appointed from that list (i.e., were effectively cut off from final hiring consideration) was less than 80% of the proportion of white candidates who ranked lower than the last candidate appointed from the list. App M:81-82, Adm. 16-17; App. O:136; App. R:162. Accordingly, there is no genuine dispute that Exams 7029 and 2043 had an adverse impact on black firefighter applicants, even under Defendants' proffered standard.

C. THE INADMISSIBLE SCHEMMER AFFIDAVIT

Dr. Schemmer, in a Declaration improperly submitted long after the close of discovery, contends that there are three problems with using statistical significance testing and shortfall methodologies in the present case: (1) the methodologies are based on inferential statistics, which he claims is ill-suited for cases where the race and number of all exam takers are known; (2) large sample sizes distort the results of statistical significance testing; and (3) the methodology assumes "perfect parity" between racial groups as the "null hypothesis," which he argues does not reflect the real world. Def. Mem. at 4-7; Def. Ex. 2 at ¶¶19-31.

The cases cited above, and the *Uniform Guidelines Q's & A's*, clearly show that it is not only acceptable but preferable to use statistical significance and shortfall analyses to measure adverse impact where there is a large sample sizes and where the relevant data on all the job applicants affected by the challenged employment practice is known. *See, e.g., Uniform*

Guidelines Q's & A's, 44 Fed.Reg. 11996, 11999 at #20, 22; *Bridgeport Guardians,* 933 F.2d at 1143-44, 1147-48; *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d at 117-18; *Delgado*, 2003 U.S. Dist. LEXIS 26471, *8, 24.

Moreover, as Dr. Schemmer himself has conceded, the statistical significance and shortfall methodologies that federal courts typically use to measure adverse impact in Title VII cases always assume perfect parity between the relevant demographic groups. Seeley Decl., Ex. Q at 185; *see also*, *Bridgeport Guardians*, 933 F.2d at 1147-48; *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d at 117-20; *Delgado*, 2003 U.S. Dist. LEXIS 26471, *8-11, 24. This is obviously appropriate. The first prong of the impact analysis only determines if there is a meaningful difference in test outcomes by race. The second prong, which analyzes if the test was valid, takes into account any individual or group differences that might *actually affect performance*. If validity is established, perforce, the differences in test outcomes (i.e., non-parity in ability) are appropriate to consider in the selection process because they are sufficiently related to differences in predicted job performance.

In sum, Defendants have failed to establish a disputed issue of material fact or law concerning Plaintiffs-Intervenors' prima facie case. Plaintiffs-Intervenors are therefore entitled to summary judgment on the first prong of their disparate impact claims.

Conclusion

For all these reasons, as well as those contained in Plaintiffs-Intervenors' moving papers, we respectfully ask that the Court enter judgment on liability in favor of Plaintiffs-Intervenors on the first prong of their disparate impact claims.

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LEVY RATNER, P.C.

By: Richard A. Levy
Dana Lossia
Robert H. Stroup
80 Eighth Avenue
New York, NY 10011
(212) 627-8100
(212) 627-8182 (fax)
rlevy@lrbpc.com
dlossia@lrbpc.com
rstroup@lrbpc.com

CENTER FOR CONSTITUTIONAL RIGHTS
Darius Charney
Anjana Samant
666 Broadway, 7th Floor
New York, NY 10012-2399
(212) 614-6438
(212) 614-6499 (fax)
dcharney@ccrjustice.org
asamant@ccrjustice.org

SCOTT + SCOTT, LLP
Judy Scolnick
Amanda Lawrence
29 West 57th Street
New York, NY 10019
(212) 223-6444
(212) 223-6334 (fax)
jscolnick@scott-scott.com
alawrence@scott-scott.com

Attorneys for Plaintiffs-Intervenors