

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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GULINO, ET AL.,

Plaintiffs,

96 CV 08414 (KMW)  
ORDER

-against-

BOARD OF EDUCATION, ET AL.,

Defendants.  
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WOOD, U.S.D.J.:

In an order dated October 22, 2009, the Court ordered the parties in the above-captioned action to submit a joint-status letter informing the Court of what issues needed to be decided in the action on remand, and what additional briefing or proceedings the parties believed were necessary for the Court to make a determination on those issues. On November 9, 2009, the parties submitted a letter in which they took differing positions on what additional proceedings are required.

For the reasons stated below, the Court holds that the Defendants will not be permitted to introduce additional evidence on remand related to the version of the Liberal Arts and Sciences Exam ("LAST") that was first used on February 14, 2004. The Court also establishes a schedule for briefing the issues before the Court on remand.

I. Background

In 1996, Plaintiffs, representing a class of African-American and Latino teachers in the New York City public school system, brought this action against the New York State Department of Education ("SED") and the New York City Board of Education ("BOE"). Plaintiffs claimed that Defendants discriminated against them through the use of two

standardized teacher certification tests, the National Teachers Examination Core Battery (“CBE”) and the Liberal Arts and Sciences Test (“LAST”). Plaintiffs claimed that the tests had a disparate impact on African American and Latino test-takers, and thus were discriminatory in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.*

In 2002, the case went to trial before Judge Constance Baker Motley. Judge Motley held that Plaintiffs had made out a prima facie case of disparate impact, but that Defendants had shown that the Tests were job-related, a defense to Plaintiffs’ showing of disparate impact. Accordingly, Judge Motley entered judgment in favor of Defendants.

Plaintiffs appealed to the Second Circuit Judge Motley’s ruling that the LAST was job-related. In a 2006 opinion, the Second Circuit found that Judge Motley had applied the wrong standard to determine whether the LAST was job-related. According to the Circuit, Judge Motley should have applied the test for job-relatedness laid out in Guardians Association v. Civil Service Commission of New York, 630 F.2d 79 (2d Cir. 1980) (“Guardians”), which requires the Defendants to prove that the LAST was properly validated.<sup>1</sup> Under Guardians, an employment test that is properly validated is job-related. The Circuit vacated Judge Motley’s decision with respect to the LAST, and remanded the case to the District Court for further proceedings in accordance with the Circuit’s opinion. The Circuit also found that the SED was not an employer within the meaning of Title VII, and ordered all claims against the SED dismissed.

On remand, the case was reassigned to Judge Sydney H. Stein. In February 2009, the case was transferred from Judge Stein to the undersigned.

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<sup>1</sup> Guardians lays out a five-part test that courts can use to determine whether an employment test was properly validated and thus is job-related: (1) The test-makers must have conducted a suitable job analysis; (2) they must have used reasonable competence in constructing the test itself; (3) the content of the test must be related to the content of the job; (4) the content of the test must be representative of the content of the job; and (5) there must be a scoring system that usefully selects from among the applications those who can better perform the job. Guardians, 630 F.2d at 95.

II. Additional Proceedings on Remand

In their November 9, 2009 letter to the Court, the parties took differing positions on what additional proceedings and briefing are required on remand.

Defendants argue that on remand the Court should permit Defendants to introduce new evidence related to the redevelopment and revalidation of the LAST that took place from 2000-2004. Defendants submit the Declaration of Jeanne W. Clayton (the "Clayton Declaration"), a director of National Evaluation Systems, Inc. ("NES"), the company that helped the SED redevelop and revalidate the LAST. According to the Clayton Declaration, from 2000-2004, the SED conducted a thorough redevelopment and revalidation of the LAST, which resulted in a revised version of the test (the "New LAST"). The New LAST was first used for teacher certification on February 14, 2004. The Clayton Declaration indicates that there is significant documentation available regarding the revalidation process used for the New LAST.

Plaintiffs, who brought this action in 1996, were required to pass the version of the LAST used prior to February 14, 2004 (the "Old LAST"). Defendants claim that the Old LAST and the New LAST are sufficiently similar, such that evidence related to the revalidation process is relevant to the issue of whether the Old LAST was properly validated.

Plaintiffs object to including evidence related to the New LAST. Plaintiffs contend that evidence about the revalidation process is irrelevant to the question before the Court on remand: Whether the Old LAST, which is the test Plaintiffs were required to pass in order to obtain teaching certificates, is job-related.

The Court agrees with Plaintiffs. Plaintiffs brought this action on the basis of the Old LAST. The Clayton Declaration states that from 2000-2004 "the LAST [underwent] an extensive redevelopment process similar in scope and process to the initial development process

[for the Old LAST],” in order to comply with new teacher certification regulations that went into affect in February 2004. (Clayton Decl. ¶ 13.) This process included: (1) developing a revised framework and revised objectives for the LAST “that comprehensively defined the content to be included on the [New LAST]” (Clayton Decl. ¶ 16); (2) reviewing all the test questions from the Old LAST, and determining whether each question should be maintained, revised, or deleted; and (3) revising old test questions and creating new questions to replace those that had been deleted. (Clayton Decl. ¶¶ 34-50.) This description of the redevelopment and revalidation process indicates that the New LAST is different from the Old LAST. Moreover, evidence that the SED took certain steps to validate the New LAST does not prove that the SED took the same steps to validate the Old LAST. Thus evidence related to the revalidation process for the New LAST is not relevant to whether the Old LAST was properly validated, which is the issue before the Court. Accordingly, the Court will not permit the parties to introduce evidence related to the revalidation process on remand.

### III. Schedule of Briefing and Proceedings on Remand

Based on the Second Circuit’s opinion and the parties’ November 9 letter, the Court has identified two issues that must be decided on remand:

1. Whether the Old LAST is job-related under the Guardians standard; and
2. If the Old LAST was job-related, whether it was misused by the BOE for “in service” teachers.

Plaintiffs also claim that the Court must decide whether the CBE was misused for in-service teachers. The Circuit, however, did not state clearly that this issue remains open on remand. The footnote Plaintiffs refer to in their letter states only that the District Court can address the issue of the LAST’s misuse on remand if necessary. See Gulino, 460 F.3d at 370

fn.9. The Circuit's opinion does not address whether the CBE was misused. It is not clear, therefore, that the issue of the CBE's alleged misuse remains open.

Neither party has requested to introduce new evidence on the validation process for the Old LAST or on the issue of misuse. It is unclear whether the parties believe that the Court can decide the issues based on the trial record. The Court notes, however, that it did not preside over the original trial, and thus cannot make credibility determinations with respect to witnesses who testified at trial. To the extent that such determinations are necessary to decide the issues, the Court may need to hold evidentiary hearings to gather new testamentary evidence.

At this stage, the Court would like the parties to brief the following issues: (1) whether the Old LAST is job-related under the Guardians standard; (2) whether the Old LAST was misused for in-service teachers; (3) whether the issue of the CBE's misuse remains open on remand and, if so, whether the CBE was misused for in-service teachers; and (4) whether the Court can base its decision on testimony from trial, or whether it is necessary for the Court to hold evidentiary hearings in order to hear witnesses' testimony and assess credibility. Along with their briefing, the parties should provide the Court with copies of all relevant evidence from the trial proceedings.

The parties shall comply with the following briefing schedule: Plaintiffs shall submit a memorandum with points of law and fact on the issues identified above, by no later than February 17, 2010. Defendants shall submit a response by no later than April 21, 2010. Together, the parties shall submit one set of all relevant evidence from the trial proceedings by no later than April 21, 2010; the parties shall submit the evidence in paper form and on computer disks in PDF form. The Court then will decide whether evidentiary hearings are necessary.




In an order dated September 17, 2009, the Court granted the SED amicus status but stated that it would determine the precise scope and manner of the SED's participation at a later date. The Court permits the SED to submit an amicus memorandum by no later than April 21, 2010, addressing whether the Old LAST is job-related under the Guardians standard. The SED shall furnish to the Court a copy of any relevant evidence that it relies upon from the trial proceedings.

IV. Conclusion

For the reasons stated above, the Court will not permit the parties to submit new evidence on remand related to the validation process for the New LAST. The Court orders the parties to comply with the briefing scheduled set forth in this Order. The Court orders the Clerk of the Court to designate this action an ECF case.

SO ORDERED.

DATED: New York, New York  
December 8, 2009

  
KIMBA M. WOOD  
United States District Judge