

**Charge of Discrimination**  
**Equal Employment Opportunity Commission**  
New York District Office

**Charging parties:**

[REDACTED]  
Bronx NY 10462  
[REDACTED]

[REDACTED]  
Bronx NY 10452  
[REDACTED]

**Marcus Haywood**  
[REDACTED]

Brooklyn NY 11208  
[REDACTED]

*on behalf of themselves and all others similarly situated.*

**Respondents:**

**New York City Fire Department (“FDNY”)**  
9 MetroTech Center  
Brooklyn NY 11201

**The City of New York**  
**Michael R. Bloomberg, Mayor**  
City Hall  
New York NY 10007

**NYC Department of Citywide Administrative Services**  
(“DCAS”)  
One Centre Street, 17th Floor South  
New York NY 10007

**INTRODUCTION**

The charging parties are individual African-American applicants for the position of firefighter with the New York City Fire Department (hereinafter “Fire Department,” “Department” or “FDNY”). Charging parties took the written examination required of applicants for this position and obtained passing scores. They also passed the physical examination and have been informed of their positions on the list from which individuals are appointed to the position of firefighter. However, their positions are low enough that they are unlikely to be hired within the four-year expected lifetime of this list, and (with the exception of Mr. Haywood) will be too old to qualify for appointment during the next list cycle.

Charging parties allege that Respondents employ policies and practices that are discriminatory in their impact upon African-American potential and actual applicants on the basis of race and/or color, as compared with white potential and actual applicants, and that Respondents engage in intentional discriminatory acts, policies and practices against African-Americans on the basis of race and/or color in its recruitment and hiring processes, including examinations, scoring, ranking, requirements for appointment, selection of classes off of the list, selection for participation in the probationary firefighter school, and selection for appointment to the Fire Department, in violation of Title VII of the Civil Rights Act of 1964, as amended, the New York State Human Rights Law,<sup>1</sup> and the New York City Human Rights Law.<sup>2</sup> (No proceedings have been commenced before any state or local agency.) They bring this charge of discrimination on behalf of themselves and the class of all others similarly situated.

## I. GENERAL ALLEGATIONS AGAINST THE FIRE DEPARTMENT

### Background and History

Extensive background information concerning the instant charge is contained in the charge brought by the Vulcan Society (the fraternal organization of African-American firefighters) on August 9, 2002 (EEOC charge no. 160 2002-01828 (investigator: Electra Yourke)), and that charge, the supplements thereto, and their attachments are appended to this charge as Exhibit A.

The New York City Fire Department is a department of the City of New York charged with protecting the lives and property of the people of New York City through fire prevention and suppression, education, medical services and other related emergency and non-emergency activities. The Fire Department employs approximately 11,400 fire officers and firefighters, as well as many civilian employees. The Department of Citywide Administrative Services (DCAS) carries out certain administrative tasks for the City government, and has a role in administering civil service and licensing exams for the Fire Department. The Fire Department and DCAS are under the control and supervision of the Mayor of the City of New York.<sup>3</sup>

Approximately 2.9% of the Department's firefighters are African-American. Every professional fire department in every major city in America is more diverse than New York's. Over 50% of Los Angeles' firefighters are minorities and 40% of Boston's. The departments are 31% African-American in Baltimore and 23% African-American in Chicago. The New York City Fire Department's 2.9% figure is easily the worst in the nation among major cities with professional fire departments.

A lawsuit in the early 1970s challenging previous testing requirements resulted in a court order that mandated that one minority be hired for every three non-minorities hired.<sup>4</sup> This order

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<sup>1</sup> N.Y. Exec. Law § 296.

<sup>2</sup> 8 Admin. Code of the City of New York § 8-107.17.

<sup>3</sup> See [http://www.nyc.gov/html/om/pdf/org\\_chart\\_citywide.pdf](http://www.nyc.gov/html/om/pdf/org_chart_citywide.pdf) (city government and administration organizational chart). The official abbreviation of the department was changed from N.Y.F.D. to F.D.N.Y. with the Tweed Charter of 1870, passing all control over the department from Albany to the City.

<sup>4</sup> See *Vulcan Soc. Of N.Y. City Fire Dept., Inc. v. Civil Service Com'n*, 490 F.2d 387, 391 (2d Cir. 1973) (Friendly, J.), aff'd 360 F. Supp. 1265 (S.D.N.Y. 1973), 353 F. Supp. 1092 (S.D.N.Y. 1973).

was in effect from 1973 through 1977. However, the number of African-Americans in the Department has actually decreased, in both absolute and percentage terms, since shortly after the termination of the hiring preference system resulting from that litigation.

## Hiring practices

The Department hires firefighters off a list on which applicants are ranked based on a combination of their scores on a written test and a physical test. The major barrier to entry for most African-American aspirants has been the written examination, an exam which has a disparate impact on African-American applicants not justified by job-relatedness or business necessity. This exam is composed not by outside testing professionals but rather by DCAS with the assistance of panels of firefighters, and is intended for use only by the New York City Fire Department. The written examination has never been validated (that is, studied to establish a relationship with job skills or business necessity) by the Department or any other government agency.

Applicants enter the process by registering for the written examination. After taking the test, those applicants who achieve a passing adjusted score (the figure that constitutes a passing score has varied over the years and appears to be set arbitrarily) are invited to take a physical agility test. Those who pass both the written and physical tests have their scores combined and adjusted based on factors such as New York City residence (which adds five points to one's score). The candidates are then placed on the appointment list in a rank order based on their final combined score. Applicants are called off the list in rank order by list number and, after meeting several other requirements (citizenship, residence in New York City or one of several surrounding counties, being at least 21 years old, 30 college credits (or, as a substitute, two years of military service), possession of a driver's license, passing a medical exam and background investigation) are appointed to the FDNY and enrolled in the probationary school ("Fire Academy"). Graduates of the Academy (which has a negligible attrition rate) become probationary firefighters, and, after a year of successful service, lose their probationary status and become firefighters.

These requirements for appointment, or ones like them, have been applied for many years and have caused the large disparity seen between the percentage of African-Americans in the qualified labor pool within New York City, approximately 25.5%, and the actual percentage of African-American firefighters within the New York City Fire Department, which is 2.98%. The requirements that cause the disparity include the use of an unvalidated written exam, substandard minority recruitment practices, and the extremely lengthy overall application process.

## Written Examination

The written exam requirement of the Fire Department causes a tremendous disparate impact on minority applicants for the position of firefighter, particularly African-Americans, as the EEOC confirmed and formally determined during its investigation of the Vulcan Society charge. The EEOC's conclusion was unsurprising, as the federal courts that considered the issue in the 1973 litigation came to the same conclusion, and the majority of the test appears to be little

changed from the test that was ruled illegal in 1973.<sup>5</sup> The impact of the test is evidenced by the general banding information divided by race:

**Table 1: Percentage of each scoring band comprised of given racial group<sup>6</sup>**  
Open Competitive Exam no. 2043 (administered on December 14, 2002)

	Caucasian (13,805)	African-American (1,376)
Failed test	38.4	20.2
Score between 70-74	54.9	20.9
Score between 75-79	63.0	17.4
Score between 80-84	67.2	14.6
Score between 85-89	75.4	9.0
Score between 90-94	80.4	5.5
Score between 95-100	86.7	2.6

Thus, the highest band—those with scores of 95 and higher, most of whom can expect to be hired during a four-year list cycle—is only 2.6% African-American, closely paralleling the 2.9% of African-Americans in the Department as a whole. African-Americans fail at five times the rate of Caucasians (14.4% against 2.7%), and Caucasians are more than three times as likely to score in the 95-and-up scoring range which all but assures hiring during a four-year list cycle (34.2% of all Caucasian test takers (4,719 of 13,805) scored 95 or above, while only 10.3% (142 of 1,376) of African-Americans test takers did).

The results of this written examination, the subsequent physical agility testing, and various bonus adjustments (for New York City residency, for example) are combined into a final score which is used to rank candidates on the list used to determine the order of individual appointments to the Fire Academy, from which candidates graduate to the rank of probationary firefighter. The list reflects the disparate impact created by the written examination results. On information and belief, the first probationary firefighter class drawing members from the new list contained no African-Americans from the new list;<sup>7</sup> the second probationary firefighter class

<sup>5</sup> The test at issue in the 1973 federal court litigation included a substantial number of current events questions, comprising 20% of the total number of questions. The district court based its finding on the lack of job-relatedness of this portion of the test. However, as the Court of Appeals noted, the district court also found no indication that the remainder of the test had been shown to be job-related, and in the absence of a prior “professional job analysis” to show a “demonstrable relationship to successful performance of the job[]” (quoting *Griggs*), the defendants had failed to prove the job-relatedness of even that part of the test outside of the current events section. 490 F.2d at 394.

During the course of the investigation of the Vulcan Society charge, respondents disclosed no clear evidence showing any major test redesign in the intervening years since 1977.

<sup>6</sup> Note that the above banding data, initially provided to EEOC by the Fire Department in the investigation of the Vulcan Society’s charge, mistakenly excluded all (fractional decimal) scores falling between 74 and 75, 79 and 80, 84 and 85, etc. such that the data exclude these narrow bands of scores falling between the bands described in Table 1. Eventually, respondents to that charge provided corrected, complete banding data to the EEOC. The full banding data has not been released by EEOC or respondents, however, so Charging Parties lack access to these revised, complete statistics. Nonetheless, the above data show a consistent pattern whereby African-Americans comprise a smaller percentage of each successively higher scoring range, and clearly support the notion that the use of the written examination discriminates against African-Americans.

<sup>7</sup> That class contained approximately 10 African-Americans, but all of them were drawn from the previous list, based on the 1999 exam.

drawing members from the new list, scheduled to graduate in February 2005, contains 160 individuals, of whom two (2) are African-American.

The EEOC determined that the written examination had a disparate impact on black applicants. Determination of June 24, 2004, at 4. After review of the alleged test validation report submitted by Respondents, the EEOC determined the following:

No claim is made by the author of this report that it is a complete validation study. No validation strategy is mentioned.... The content of the items is not described, so no claim for content validity could be made using only the material in this report. This document cannot be considered a complete validation report and the documentation provided by the Respondent does not satisfy the requirements of the Uniform Guidelines on Employee Selection Procedures.

Based upon the above, the Commission finds that Black test-takers were discriminated against when the City, relying on a pre-employment test that Blacks disproportionately failed and that was not validated according to professional standards, excluded them from further consideration because they failed the test.

Determination of June 24, 2004, at 5. The same reasoning supports the conclusion that ordering the hiring of applicants by scores based on the results of the written test is discriminatory.

The Commission concluded that “there is reason to believe that violations have occurred,” *id.*, and invited the parties to conciliate the matter. However, Respondents refused to negotiate and the matter was referred to the Department of Justice for consideration on August 16, 2004. As of the date of this charge, the Justice Department is still considering whether to sue on its own behalf or simply issue a Right to Sue letter to the Vulcan Society.

## **Recruitment**

Additional causes of disparity within the Fire Department are the poor recruitment strategies used to attract African-Americans initially (especially given the low percentages of African-Americans already in the department) and to encourage African-Americans to start their preparation for the challenges posed by the hiring process, the Department’s failure to distribute assistance in preparing for these challenges fairly, and ineffective strategies to ensure African-American applicant retention through the lengthy application process.

The Fire Department’s Recruitment Programs have been deficient in that:

- There are insufficient resources allocated for recruitment in terms of budget, staff, and incentives. (Respondents’ position statement in response to the Vulcan Society charge—*see* Determination at 4—asserts that they spent \$120,000 in overtime pay, out of a \$1,130,000,000 budget, on minority recruitment. That equates to 0.01% of the total budget of the Department.)

- Advertising is mainly in the media and by mail, instead of individualized, face-to-face recruitment targeted at African-American neighborhoods. Former Commissioner of the Department Thomas Von Essen freely acknowledged before the City Council that such media advertising is generally ineffective, and personal, face-to-face recruiting was responsible for much of the diversity that does exist within the Department.<sup>8</sup>
- Preparation courses for the written and physical exams are primarily held in areas that are difficult to travel to from neighborhoods inhabited by large numbers of minorities.

Inadequate recruiting efforts mean that many minorities are not recruited until a short time before the written test is given; these candidates then have little time to prepare adequately for the written exam.

The inadequacy of the Department's recruitment and minority applicant retention practices is evidenced by the statistics documenting the percentage of African-Americans among all candidates who sat for the December 2002 written exam. 23,932 individuals registered for the exam, of which 2,159, or 9.02%, were African-American. Of the 17,803 candidates who sat for Exam No. 2043, only 1,376 or 7.7% were African-American, so a substantial attrition occurs for African-Americans between registration and administration of the test, with 14.4% of African-Americans candidates lost during that period.<sup>9</sup> (Of the 16,823 who passed the exam, only 1,178 or 7.0% were African-American, and, as the banding data shows, the true impact of the test is greater since a much-higher-than-passing score is required to be hired during the lifetime of an ordinary list.) By comparison, the 2000 Census data indicates that of the New York City population between ages 16 and 29, 25.5% was African-American.

There is a sharp dropout rate for minority candidates in each step of the hiring process, and attrition is highest when minority candidates are waiting to be hired off the list.<sup>10</sup> Many candidates are only able to maintain interest during the four or five year hiring process due to family support—because they have an uncle, father, or some other close relative who guides them through the process.<sup>11</sup> Due to the historically low number of minorities in the Fire Department, members of these groups are less likely to benefit from a mentor of this nature.

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<sup>8</sup> See Commissioner Thomas Von Essen, *Testimony before City Council Committee on Fire and Criminal Justice Services* (Sep. 28, 1999) at 4-5 (“many of the minority firefighters who now serve throughout the Department came from Firefighting families or were introduced to the job by a minority recruiter who spent time with them. Unless you see first hand that this profession has tremendous rewards and you see how members balance the risks with the rewards, it isn’t easy to grasp why you would want such a physical demanding, dangerous job. ... You can’t just put an ad on TV or a sign on the subway and convince people it’s ok to run into fire. It takes personal hands on mentoring and dialogue.”)

<sup>9</sup> EEOC Determination at 4.

<sup>10</sup> Committee on Fire & Criminal Justice Services, *Oversight: FDNY Female and Minority Recruitment* (<http://webdocs.nycouncil.info/attachments/60231.htm>), Appx. B § 5.1 (“According to the FDNY, there is approximately a 50% fall off rate for candidates in each step of the hiring process, and attrition is highest when women and minority candidates are waiting to be hired off the list.”).

<sup>11</sup> *Id.*

As a general matter, Respondents have failed to take affirmative steps to overcome the negative impression of the Fire Department among African-Americans. The Charging Parties believe that the Department currently relies on word of mouth recruiting as its *de facto* official recruitment strategy, and that this has the effect of perpetuating the current racial composition of the department, which itself is a consequence of past discrimination.

The Supreme Court has noted that an employer can convey the message that minorities are unwelcome by “consistent discriminatory treatment of actual applicants, by the manner in which [the employer] publicizes vacancies, [its] recruitment techniques, [its] responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of [the] work force from which [it] has discriminatorily excluded members of minority groups. When a person’s desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is...a victim of discrimination.” *Teamsters v. United States*, 431 U.S. 324, 365-66 (1977).

## **Other requirements**

Several other prerequisites have a disparate impact on African-American applicants. The Department requires that all eligibles complete 30 hours of college credit before they can be hired off of the list. The credits need not be in any particular area of study.<sup>12</sup> Although an eligible may earn these credits while he or she is waiting to be appointed, the additional burdens and costs of going to college, and having to work while attending college have a disproportionate impact on African-American candidates. The FDNY requires all new appointees to attend the probationary firefighter school (“Fire Academy”), a 13-week job training program containing many specialty courses to train firefighters on relevant topics.<sup>13</sup> The fact that the Department offers ample on the job training and specialty courses and that the required 30 college credits need not be in any particular subject are ample evidence that the college credit requirement is not job related.

Prior to appointment, applicants are encouraged to have completed, at their own expense, a first responder’s emergency medical treatment course. If they have not done so, the Department will make training available during the yearlong probationary period, but the candidate will still have to bear the cost of the training. This training was once provided in the Fire Academy, at the Department’s expense, and the cost of the training has discouraged African-Americans from entering the applicant pool. The EEPIC has acknowledged that this current requirement might disproportionately screen out minority candidates and cannot be justified by business necessity.<sup>14</sup>

The FDNY requires eligibles to obtain a driver’s license before being appointed. Many minority eligibles are raised in poor urban areas and have had neither the necessity nor economic ability to purchase a car, and thus have never obtained a driver’s license. Although an eligible

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<sup>12</sup> [http://www.nyc.gov/html/fdny/html/community/firefighter\\_faq.shtml#collcredit](http://www.nyc.gov/html/fdny/html/community/firefighter_faq.shtml#collcredit) (indicating that courses in “fire science” and “cooking” are equally acceptable). Two years of military service may also substitute for the requisite college credits, raising further questions as to what characteristic the Department seeks to select for by utilizing this alternative requirement.

<sup>13</sup> [http://www.nyc.gov/html/fdny/html/units/fire\\_academy/fa\\_proby.shtml](http://www.nyc.gov/html/fdny/html/units/fire_academy/fa_proby.shtml)

<sup>14</sup> Letter from EEPIC to FDNY regarding EEPIC Audit of FDNY Recruitment Program (May 25, 2000) at 7.

may get a driver's license while waiting to be appointed, the additional costs of driving lessons, lack of access to a car, and the expense of actually getting a driver's license<sup>15</sup> create an additional barrier to employment for African-American eligibles.

Additionally, this requirement is extraneous given that most firefighters are not required to drive on the job. In order to drive FDNY emergency vehicles, firefighters must complete an 80 hour course at the FDNY chauffeurs' school.<sup>16</sup> A comparatively small number of firefighters receive this certification.<sup>17</sup> Ultimately the driver's license requirement is not job related and disproportionately screens out African-American eligibles.

The Department awards a five point residence bonus (added to the final score) to New York City residents. The manner in which the Department conducts checks to ensure that applicants claiming the residence bonus are bona fide city residents has an unlawful disparate impact on African-Americans. Residence checks are conducted in such a manner that apartment dwellers, who tend to move often and are disproportionately African-American, are disproportionately audited and removed from eligibility for the residence credit if they have moved and are audited before informing the Department of their new address.

Finally, the background check process appears to routinely reject candidates who have been arrested without charge. Such arrests—often occurring in cases of “mistaken identity”—are an unfortunate and unavoidable fact of life for many young male African-American residents of the City, and often appear to lead to rejections even where legitimate explanations exist for individual arrests or the pattern of arrests.

## II. INDIVIDUAL ALLEGATIONS OF THE CHARGING PARTIES

Mr. [REDACTED] is a 28-year old African-American and Latino man. He was born in Honduras, emigrated to the United States in 1998 and has lived in New York City since that time. He was naturalized as a United States citizen on [REDACTED], 2004. He is married with a small child and currently works in [REDACTED].

Mr. [REDACTED], who is fluent in English but speaks Spanish at home, first learned about the exam from ads placed by the Department on Spanish language television. He was initially reluctant to apply due to his knowledge of the history and reputation of the Department in regard to African-American hiring. However, he learned via the internet of test preparation classes offered by the Vulcan Society, and attended these classes as part of his preparation for the written exam, which lasted for approximately 5-6 months. His scores on practice tests improved during this time. He also attended approximately 3-4 classes with the FDNY held at 9 Metrotech Center on Saturdays, and used a test prep book he purchased at Barnes and Noble.

<sup>15</sup> The cost for a first time driver's license is \$50. <http://www.nysdmv.com/licefee.htm>

<sup>16</sup> Requirements obtained from [http://www.ci.nyc.ny.us/html/fdny/html/community/firefighter\\_requirements.shtml](http://www.ci.nyc.ny.us/html/fdny/html/community/firefighter_requirements.shtml)

<sup>17</sup> EEOC Determination page 4.

Mr. [REDACTED] registered and sat for the December 2002 open competitive written examination, receiving a passing raw score of 81.176<sup>18</sup> and an adjusted score on the examination of 83.529.<sup>19</sup> He subsequently took the physical agility test, scoring a perfect 100. His combined written examination and agility test scores, with an added 5 point New York City residency bonus, gave him an adjusted overall score of 94.199. Mr. [REDACTED] is currently on the list of eligibles at list number 50[REDACTED].

Mr. [REDACTED] has earned over 30 college credits from Bronx Community College. He has a drivers' license.

Mr. [REDACTED] has not taken the required certified first responders course. He called the FDNY recruitment center phone line and was told that it was not recommended that he take the training course because his list position was too low to anticipate being hired.

[REDACTED]  
Mr. [REDACTED] is a 29-year old African-American man. He is a United States citizen by birth and was raised and currently lives in the Bronx. He is a graduate of William Howard Taft High School in the Bronx. He is single, with no children, and currently works at [REDACTED]

Mr. [REDACTED] registered and sat for the December 2002 open competitive written examination, receiving a passing raw score, and his adjusted score on the examination was 78.823. (He attended the Vulcan Society's written test preparation classes given Thursdays in Harlem, which he found to be extremely helpful, as his scores on practice exams improved as the sessions progressed.) He subsequently took the physical agility test, scoring a perfect 100. His combined written examination and agility test scores, with an added 5 point New York City residency bonus, gave him an adjusted overall score of 91.107. Mr. [REDACTED] is currently on the list of eligibles at list number 60[REDACTED].

Mr. [REDACTED] attended Kingsboro Community College where he earned approximately 60 credits in physical therapy.

Mr. [REDACTED] does not have driver's license and does not own a car. Like many minority eligibles, Mr. [REDACTED] was raised in a less affluent urban area (the Bronx) and never found it necessary to obtain a driver's license or purchase a car.

Mr. [REDACTED] took a First Responder's course as part of his physical trainer curriculum, however, the course was not certified. The FDNY requires that candidates take and pass a Certified First Responder with Defibrillation (CFR-D) course at their own expense before the end of their probationary periods (and in fact "prefers that new probationary firefighters have the CFR-D upon appointment").<sup>20</sup>

<sup>18</sup> Mr. [REDACTED] received notice of his passing raw score in a notice postmarked Mar. 27, 2003.

<sup>19</sup> Mr. [REDACTED] raw score on the written examination was 81.176.

<sup>20</sup> [http://www.nyc.gov/html/fdny/html/community/firefighter\\_faq.shtml#cfrd](http://www.nyc.gov/html/fdny/html/community/firefighter_faq.shtml#cfrd)

## **Marcus Haywood**

Mr. Haywood is a 23-year old African-American man. He is a United States citizen by birth and was born, raised and currently lives in Brooklyn. He is a graduate of Paul Robeson High School. He is married with four children, and currently works part time for UPS while attending school full time at TCI (Technical Career Institute) where he is studying electronic engineering.

Mr. Haywood learned about the firefighter exam when he was approached by a member of the Vulcan Society in Prospect Park, from whom he received an application form. He did not become aware of the possibility of applying to the Department from any advertisements or outreach by the Department, and had no encounters with any non-Vulcan Society face to face recruiters before signing up for the written exam.

Mr. Haywood received his registration form shortly before taking the written test, and therefore did not have time to engage in any organized preparation courses for the written test. He was not aware that the Fire Department offered any test preparation courses prior to taking the written test. He prepared by going to a library and looking over several books about the exam.

He did train in a systematic way for the physical test, via programs offered by the FDNY at Randall's Island, which he learned of through mailings sent by the Department. One such program was apparently co-sponsored by the Vulcan Society, largely attended by African-Americans, and featured lectures about the history of African-Americans in the Department.

Mr. Haywood registered and sat for the December 2002 open competitive written examination, receiving an adjusted score on the examination of 70.588. He subsequently took the physical agility test, scoring a perfect 100. His combined written examination and agility test scores, with an added 5 point New York City residency bonus, gave him an adjusted overall score of 85.713. Mr. Haywood is currently on the list of eligibles at list number 6990.

Mr. Haywood has earned, to date, 27 college credits from Kingsboro Community College, and is enrolled in 16 credits worth of courses this semester at TCI.

Mr. Haywood does not have driver's license and does not own a car. Mr. Haywood's family does not own a car. He does have a learner's permit and is taking driving lessons.

Mr. Haywood has not taken the required certified first responders course.

## **Timeliness**

The Charging Parties all received notice of their placements on the list shortly after May 5, 2004, when the current Firefighter List (List No. 2043) was established. On information and belief, the FDNY commenced selecting individuals from this list for appointment to the Fire Academy on or around the middle of May of 2004, and intends to use and is using the list to make future selections for such appointments. In any event, it is clearly established in this Circuit

that each discriminatory hiring from a list assembled with the use of invalid or discriminatory employment practices (including the written examination here) constitutes a new violation.<sup>21</sup>

## **Injury**

The Charging Parties have been injured in that others have been or will be appointed to the Fire Academy and the position of firefighter in preference to the Charging Parties because of the use of the discriminatory hiring practices described above. Given their position on the current list, the Charging Parties are unlikely to ever be appointed before this list expires,<sup>22</sup> and if they are appointed, they will have waited much longer than can be justified, due to the discriminatory practices described above.

Charging Parties will suffer economic injury as a result of these discriminatory hiring practices. They have also suffered psychological injuries as a result of this discrimination, and, if they are hired, will be deprived of a working environment free from discrimination and of the associational benefits of diversity in the workforce once hired.

## **Class allegations**

On information and belief, a class of similarly situated potential and actual applicants exists who have suffered injury from Respondents' discriminatory policies and practices. The class includes, without limitation, all African-Americans and other minorities whose hiring has been or will be delayed because of the use of the written examination or the other factors listed herein. This class includes, without limitation, individuals who have passed the written examination but have not scored highly enough to be reasonably expected to be hired within the expected four-year life of the current list, individuals who have failed the written examination, and those who have been discouraged from applying. Failure to adequately recruit and hire African-Americans and other minorities creates an environment in the Department that stigmatizes and thereby aggrieves all members of the class, even those who are hired. No purpose would be served by requiring the members of this class to file individual charges.

## **CONCLUSION**

The Charging Parties ask the EEOC to determine that Respondents employ policies and practices that are discriminatory in their impact upon African-American potential and actual applicants on the basis of race and/or color, as compared with white potential and actual

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<sup>21</sup> See *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 249 (2d Cir. 1980) ("the results of the tests were in effect being 'used to discriminate' ... each time a member of the plaintiff class was denied a chance to fill a vacancy"), *aff'd in part*, 463 U.S. 582 (1983), *cert. denied in part*, 463 U.S. 1228 (1983); *see also Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001) (per curiam) (In *Guardians*, "[w]e concluded that a new violation accrued each time the list was used to make an employment determination, even though the order of the list had been determined at an earlier date."); *Association against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 273 (2d Cir. 1981).

<sup>22</sup> While the Department claims to have exhausted the entire preceding list (open competitive list no. 7029), the duration of that list was extended due to special circumstances resulting from the terrorist acts of September 11, 2001, and the number of firefighters hired during the time that list was in use was increased due to the need to replace the terrible losses the Department suffered on that day.

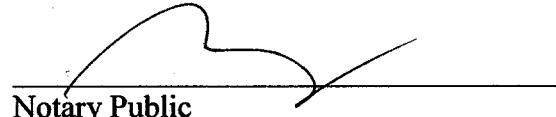
applicants, and that Respondents engage in intentional discriminatory acts, policies and practices against African-Americans on the basis of race and/or color in its recruitment and hiring processes, in violation of law.

The Department of Justice is currently considering whether to bring suit against the FDNY based on the results of the EEOC investigation into the Vulcan Society's charge of August 2002. The charge and determination were forwarded to the Justice Department in August 2004. The Justice Department has informed Respondents that it is conducting a formal investigation into issues raised by the Vulcan Society charge and other issues beyond the scope of that charge, including discrimination against Latino candidates. Charging parties request that, to the extent possible, the EEOC expedite its investigation so that any lawsuit brought by the Charging Parties may move forward in coordination with litigation based on the Vulcan Society charge.

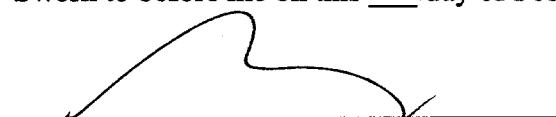
The undersigned Charging Parties affirm that to the best of their knowledge, the foregoing is true.

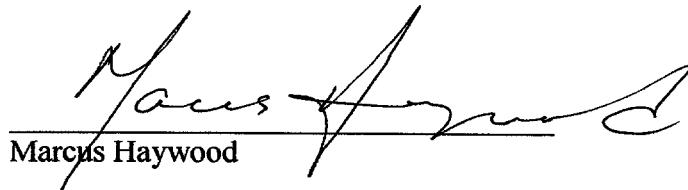

Sworn to before me on this 22 day of February 2005

  
Notary Public  


Sworn to before me on this 22 day of February 2005

  
Notary Public

NANCY CHANG  
Notary Public, State of New York  
No. 02CH4687840  
Qualified in New York County  
Commission Expires Oct. 31, 2005



Marcus Haywood

Sworn to before me on this 23 day of February \_\_, 2005



Barbara J. Olszansky  
Notary Public

BARBARA J. OLSHANSKY  
Notary Public, State of New York  
No. 02OL5063740  
Qualified in New York County  
Commission Expires July 29, 2007