UNITED STATES DISTRICT COURT
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.

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

ECF Case

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

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
Dana Lossia
Robert H. Stroup
Darius Charney

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Intervenors submit this memorandum of law in support of their motion for summary judgment. This Title VII case challenges the unlawful adverse impact upon black applicants of the cognitive only written exams used by the City of New York to screen and rank applicants for entry-level firefighter positions. The challenged exams – Exams 7029 and 2043 – were first given in 1999 and 2002 respectively.

By way of background, there has been, for decades, a dramatic disproportion between the three (3%) percent of black firefighters in the FDNY and the roughly twenty-seven (27%) percent black population of New York City. The challenged cognitive exams (and similar predecessor exams) have been a major factor in excluding black citizens from firefighter positions in the City of New York. The City's own witnesses have verified that the FDNY has the worst record of diversity of any New York City agency, and when compared to other fire departments in major U.S. cities.

Experts in the field of industrial/organizational psychology and test development have long known that cognitive abilities, above a threshold level, are not, by and large, the abilities of greatest importance in the performance of a firefighter's job. And they have long known that tests of those abilities have the greatest adverse impact on minorities. *Non-cognitive* attributes, such as teamwork, integrity, resilience, tolerance for stress and adaptability, are generally as good as or better than most cognitive abilities in predicting firefighter performance and have less adverse impact, and valid measures of such attributes have been available for decades.

This case can easily be decided on summary judgment because Defendants' experts and employees have either conceded or simply failed to contest every material fact relevant to such a decision. The legal principles governing this challenge to Defendants' selection procedures are well-established. A plaintiff's initial burden is to demonstrate, usually through statistical evidence, a significant enough adverse impact upon minority applicants to establish a *prima facie* case of discrimination. *Gulino v. New York State Bd. of Educ.*, 460 F.3d 361, 382 (2d Cir. 2006). The burden then shifts to the defendant to show that the challenged exam is "validated," i.e., that it is "job related" and consistent with "business necessity." Id. If the defendant succeeds, a plaintiff may still prevail by demonstrating that available alternative measures would have been equally valid but with less adverse impact. Id.

ADVERSE IMPACT:

Plaintiffs-Intervenors' statistical proof that Written Exams 7029 and 2043 had an adverse impact on black applicants is conceded. The City admits that, using generally accepted analyses, the statistical disparity between blacks and whites, in terms of both pass rates and ranking, is greater than three (3) units of standard deviations on both Exams 7029 and 2043. As this is the standard accepted by this Circuit, Plaintiffs-Intervenors' *prima facie* case is established.

VALIDITY:

To meet their burden of proving that the challenged exams were "job related" and consistent with "business necessity," Defendants submitted a three (3) page report that glaringly omitted any opinion that the tests were valid or could be validated as used. This was not an oversight. Defendants' expert, Dr. Philip Bobko, candidly admitted at deposition that his expert report did *not* establish the validity of Defendants' use of Exams 7029 and 2043 as pass/fail screening devices, with cutoff scores of 84.705 and 70.000, respectively, or for ranking candidates. Thus, it is not possible for Defendants to carry their burden of proving "job relatedness" and "business necessity."

The expert report submitted by Plaintiffs-Intervenors, and the three (3) expert reports submitted by the United States, show that Exams 7029 and 2043 were fatally flawed in their construction and use because, *inter alia*, (a) the pas/fail cutoff scores and the rank-ordering of candidates were not shown to predict performance; (b) the written tests did not measure the most important abilities and attributes needed by firefighters; (c) the test construction did not meet professional standards; and (d) the reading level of the exams was too high, obscuring the abilities purportedly being measured. Defendants did not respond to these expert findings. Since they cannot introduce new evidence now (three months after fact and expert discovery has closed), there is simply no disputed fact or opinion which would deter summary judgment.

AVAILABLE ALTERNATIVES:

Even if Defendants had made some showing of validity, summary judgment would still be required since, at the time the challenged exams were given, in 1999 and 2002, there were *numerous* alternatives available, which would have had equal or greater validity and less adverse impact on black candidates. The availability of alternative (non-cognitive) measures to predict

firefighter performance was made widely known by the U.S. Civil Service Commission in the late 1970s, and such measures have been used ever since. They include tests for such attributes as responsibility, desire to learn, teamwork, getting along with people, and many others. Significantly for this motion, it is *Defendants'* own employees, experts and documents that confirm that these alternative measures were available years before Exams 7029 and 2043 were administered.

In fact, after this litigation began, Defendants administered Exam 6019 which tested for a host of non-cognitive personal attributes using "situational judgment exercises" in a written, multiple choice exam. Defendants' witnesses conceded that Exam 6019 had equal or greater validity than the challenged exams and less adverse impact on black applicants *and* that the non-cognitive attributes it measured could have been tested on written exams in 1999 and 2002.

In short, there are no material facts in dispute and the challenged exams violated Title VII as a matter of well-settled law. We respectfully refer the Court to the Rule 56.1 Statement of Undisputed Facts for a full recitation of the material facts in this case.

I. RULE 56 STANDARDS

Plaintiffs-Intervenors meet the Rule 56 requirements for the grant of summary judgment. The moving party has the initial burden of showing that the requisites of Rule 56(c) are met. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once a moving party meets its Rule 56(c) burden, the non-movant "may not rely merely on allegations or denials in its own pleading," Rule 56(e), but must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986); *see also SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith*

Radio Corp., 475 U.S. 574, 586 (1986)(internal quotations omitted). It cannot resist summary judgment through "mere speculation or conjecture as to the true nature of the facts," *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995)(citations omitted), or through affidavits amounting to "self-serving conclusions." *BellSouth Telecomm. v. W.R. Grace*, 77 F.3d 603, 615 (2d Cir. 1996).

When the motion for summary judgment involves issues upon which the non-movant carries the burden of proof at trial, the moving party meets its Rule 56 burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Nothing more is required of the moving party in such circumstances:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. 317-318.

This principle applies when expert opinion is necessary to establish an element of the non-movant's case. Summary judgment against that party is appropriate when the expert fails to provide either the necessary opinion or the underlying facts upon which that opinion is based. *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1335 (10th Cir. 2004)(in case involving assertion that Zoloft caused suicide of teenager, summary judgment granted to defendants as plaintiffs had failed to file timely supplemental report, and when report was excluded on *Daubert* grounds, plaintiffs were without scientific evidence of causation—an element on which they bore the burden of proof); *Firefighter's Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 904 (8th Cir. 2000) (affirming grant of summary judgment where non-moving party failed to

comply with filing deadline for expert report and therefore lacked basis to challenge defendant's expert testimony on job-relatedness of fire battalion chief exam); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991)(summary judgment affirmed where non-moving party's expert failed to offer testimony on whether placement of crane cover was unsafe or substandard, an opinion critical to the non-movant's case); *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 476 F.Supp.2d 1143, 1155 (N.D. Cal. 2007)(summary judgment granted where non-moving party failed to obtain underlying evidence that would permit expert to calculate royalty damages—a necessary element of the non-movant's case); *New Mexico v. General Elec. Co.*, 322 F.Supp.2d 1237, 1256 (D.N.M. 2004)(in public nuisance case arising from hazardous chemical contamination of groundwater, summary judgment entered for defendant in light of plaintiff's expert's failure to testify to the existence of a contaminant plume).

II. THERE IS NO GENUINE ISSUE AS TO ADVERSE IMPACT, AND PLAINTIFFS-INTERVENORS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

To make out a *prima facie* case of disparate impact under Title VII, a plaintiff must "identify[] the specific employment practice that is challenged" and then "offer statistical evidence of a kind and degree sufficient to show that the practice in questions has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 994 (1987); *see also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001)(same). The statistical disparities "must be sufficiently substantial to raise an inference of causation." *Smith v. Xerox Co.*, 196 F.3d 358, 365 (2d Cir. 1999) (citing *Watson*, 487 U.S. at 994-995); *see also Robinson,* 267 F.3d at 160 (same).

The Second Circuit recognizes standard deviation analysis as the primary statistical methodology for proving adverse impact under Title VII. *See Guardians Ass'n v. Civil Serv.*

Comm'n of New York, 630 F.2d 79, 86 (2d Cir. 1980) (citing *Castaneda v. Partida*, 430 U.S. 482, at 496 n.17 (1977); *Smith v. Xerox Corp.*, 196 F.3d at 366. Under this approach, in cases involving large sample sizes,[1] a plaintiff can make out a *prima facie* case of disparate impact by showing, through the application of appropriate statistical measures to the test scores of different demographic groups, that "the difference between the expected value (from a random selection) and the observed number is greater than two or three standard deviations." *Guardians*, 630 F.2d at 86, quoting *Castaneda*, 430 U.S. at 496, n.17.

In this case, Plaintiffs-Intervenors have challenged four (4) specific employment practices: Defendants' use of written Exams 7029 and 2043 as pass-fail screening devices and in the rank-order processing of candidates. (Intervenors' Compl., Dkt. 48 at ¶¶ 52-55). In all four cases, the statistical significance of the disparity between white and black firefighter candidates has been established by Plaintiffs-Intervenors' and Plaintiff's experts, and has been admitted by Defendants or their experts. Plaintiff's expert's calculations of "practical significance" – the actual impact of the challenged exams on applicants – have not been disputed.

A. THE DISPARITIES IN THE PASS RATES AND ELIGIBILITY LIST RANKINGS OF BLACK AND WHITE CANDIDATES ON WRITTEN EXAMS 7029 AND 2043 ARE STATISTICALLY SIGNIFICANT

1. Disparity in Pass Rates on Exam 7029

Plaintiff's and Plaintiffs-Intervenors' experts found, and Defendants themselves admit, that the disparity in the pass rates of white and black candidates on Written Exam 7029 exceeded three (3) units of standard deviation.[2] (App. O:115,121-122, 132, Siskin I at 3, 21-22, Table 1;

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[1] Exam 7029 had 12,915 white and 1,749 black applicants (totaling 14,664), and Exam 2043 had 13,878 white and 1,393 black applicants (totaling 15,271). (Plaintiffs-Intervenors' Rule 56.1 Statement of Facts, hereinafter referred to as "SOF" at ¶¶ 27, 32).

[2] Plaintiffs-Intervenors' and Plaintiff's experts actually calculated the disparity to be more than thirty-three (33) units of standard deviation. (App O: 121, 132; App R:155). This figure and all

App. R:154-155, Wiesen I at 18-19; App. M:74, Adm. 1).[3] Given the large sample sizes of 12,915 white and 1,749 black test takers (SOF ¶27), this is clearly a statistically significant disparity under the standard set forth in *Guardians*, 630 F.2d at 86 (if the difference "is *greater than two or three* standard deviations, a prima facie case is established")(emphasis added)(citation omitted).

2. Disparity in Pass Rates on Exam 2043

Like Exam 7029, the sample sizes involved in Exam 2043 – 13,878 white candidates and 1,393 black candidates – were quite large. (SOF ¶32). Plaintiffs-Intervenors' and Plaintiff's experts found, and Defendants themselves admit, that the disparity in the pass rates of black and white candidates exceeded three (3) units of standard deviation. (App. M:75, Adm. 3; App. O:117, 126, 135, Siskin I at 5, 26, Table 5; App. R:158-159, Wiesen I at 42-43).[4]

3. Disparity in Eligibility List Rankings of Black and White Candidates on Exam 7029

Defendants admit that, as a group, black candidates who passed Exam 7029 were ranked lower on the Exam 7029 eligibility list than were white candidates. (App. M:76, 78, Adm. 5, 9). Plaintiffs-Intervenors' and Plaintiff's experts calculated, and Defendants themselves admit, that

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of the standard deviation figures set forth in footnotes 4-7 equate to a less than 1 in 10,000 probability that the disparities between white and black candidates in passing and ranking occurred by chance. (App O:121-122, 124, 126, 128-130).

[3] Citations to the Appendix refer to the lettered exhibit tab where the document may be found as well as the Appendix page number, at the upper right-hand corner of each page. For example, the first page of the Appendix is "App. A:1" and the final page is "App. RR:590". Deposition transcripts are referred to by their location in the Appendix, the name of the witness as well as the transcript page, e.g., "App. T:231, Bobko Tr. 319." Defendants responses and objections to Plaintiff's and Plaintiffs-Intervenors' requests for admission are referred to by location in the Appendix and admission number, e.g., "App. M:74, Adm. 1." Likewise, Defendants' responses and objections to Plaintiff's and Plaintiffs-Intervenors' interrogatories are referred to by location in the Appendix and the interrogatory number, e.g., "App. N:107, Interrog. 30."

[4] Plaintiffs-Intervenors' and Plaintiff's experts actually calculated the disparity to be more than twenty-one (21) units of standard deviation. (App O:126; App R:159).

the disparity between the average rank of white candidates and the average rank of black candidates on the eligibility list for Exam 7029 exceeded three (3) units of standard deviation. (App. M:76-79, Adm. 5, 6, 9, 10; App. O:124, Siskin I at 24; App. R: 156, Wiesen I at 27).[5] Again, because this disparity involves large samples, it is clearly statistically significant. *See Guardians*, 630 F.3d at 86.

4. Disparity in Eligibility List Rankings of Black and White Candidates on Exam 2043

Plaintiff's and Plaintiffs-Intervenors' found, and Defendants' experts admit, that as a group black candidates who passed Exam 2043 were ranked lower on the eligibility list for Exam 2043 than were white candidates, and that the disparity between the average rank of white candidates and the average rank of black candidates on the eligibility list for Exam 2043 was at least 2.99 units of standard deviation. (App. O:128-129, Siskin I at 31-32; App. R:160-161, Wiesen I at 51-52; App. S:170-171, Bobko-Schemmer at 17-18).[6] In addition, Plaintiff's and Defendants' experts both concluded that the disparity between the proportion of black and white candidates on the Exam 2043 eligibility list ranked at or above the last person appointed from that list exceeded three (3) units of standard deviation. (App. O:129-130, Siskin I at 32-33; App. S:170, Bobko-Schemmer at 17).[7] Again, given the large sample size, these standard deviation calculations are statistically significant. *See Guardians*, 630 F.3d at 86.

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[5] Plaintiffs-Intervenors' and Plaintiff's experts actually calculated the disparity to be more than six (6) units of standard deviation. (App O:124; App R:156).

[6] Plaintiff's and Plaintiffs-Intervenors' experts actually calculated the disparity to be more than nine (9) units of standard deviation. (App O:128-29; App. R:160-61).

[7] Plaintiff's expert actually calculated the disparity to be more than nine (9) units of standard deviation. (App O:129-130).

B. DEFENDANTS' SAMPLE-SIZE ARGUMENT DOES NOT ELIMINATE ADVERSE IMPACT

Defendants' experts make the bizarre argument that the very high levels of disparity found by Plaintiffs-Intervenors' and Plaintiff's experts are artificially inflated because the sample sizes were too big. (App. S:168-169, 177-179, Bobko-Schemmer at 14-15, Appendix A) Defendants' argument is peculiar because it is *small* rather than large sample sizes which the Second Circuit has held to undermine the reliability of statistical significance testing. *See, e.g., Waisome*, 948 F.2d at 1379; *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1372 (2d Cir. 1989). Furthermore, the Court in *Guardians* applied the two-to-three standard deviation analysis to an applicant pool of 36,797 – much larger than the applicant pool involved with Exams 7029 and 2043. 630 F.2d at 85. Nevertheless, Plaintiff's expert calculated, and Defendants' experts concede, that even if the sample sizes were reduced by 90%, the disparities between black and white candidates' pass rates and eligibility list rankings on Exams 7029 and 2043 would *still* exceed two (2) or three (3) units of standard deviation. (App. O:122, 124, 126-127, Siskin I at 22, 24, 26-27, App. S:170-172, Bobko-Schemmer at 17-19).

C. THE DISPARITIES IN THE PASS RATES AND ELIGIBILITY LIST RANKINGS OF BLACK AND WHITE CANDIDATES ON BOTH EXAMS ALSO HAD PRACTICAL SIGNIFICANCE

1. Practical Significance of the Disparities in Pass Rates

Plaintiffs-Intervenors' and Plaintiff's experts both calculated that the passing shortfalls for black candidates on Written Exams 7029 and 2043 – that is, the number of additional black candidates who would have passed had the black pass rate been equal to the white pass rate – were at least 457 for Exam 7029 and 150 for Exam 2043. (App. O:122, 127, Siskin I at 22, 27; App.R:155, 159, Wiesen I at 19, 43). Defendants' experts did not contest Plaintiff's expert's calculations under this methodology (App. T:197-200, Bobko Tr. 139, 142-143, 145), and this

and similar shortfall methodologies have been recognized by federal courts as legitimate measures of practical significance in Title VII disparate impact cases. *See, e.g., Delgado v. Ashcroft*, No. 99-2311, 2003 U.S. Dist. LEXIS 26471, *24 (D.D.C. May 29, 2003); *Waisome*, 948 F.2d at 1376-77. Shortfalls of 457 and 150 passers are substantial numbers, the former being greater than the total number of black firefighters currently employed by the FDNY and the latter roughly equal to half the size of a typical class of new firefighter hires in the FDNY's fire academy. These passing shortfalls are "hardly *de minimis*" and are large enough to establish practical significance. *Delgado*, 2003 U.S. Dist. LEXIS 26471 at *24 (shortfall of 45 Hispanics established practical significance).

2. Practical Significance of the Disparities in Eligibility List Rankings

Plaintiff's expert Dr. Siskin used similar methodologies to calculate the practical significance of the disparities between black and white candidates' rankings on the eligibility lists for Exams 7029 and 2043. First, hypothesizing what the hiring dates for black candidates would have been had their average ranking distribution (and thus appointment date distribution) on the Exam 7029 eligibility list been the same as the average ranking and appointment date distribution for white candidates, Dr. Siskin calculated that 68 black candidates from the Exam 7029 eligibility list had suffered delays in their appointments to the FDNY.[8] (App. O:116, 125, 133-134, Siskin I at 4, 25, Tables 3A, 3B). For Exam 2043, Dr. Siskin calculated that approximately 30 to 40 additional black candidates would have been appointed if the proportion of black test passers ranked above the last person appointed had been equal to the proportion of

[8] Because the FDNY hired enough firefighters to exhaust the entire Exam 7029 eligibility, test passers' low rankings delayed their appointments (often by several years), but did not prevent them. However, this particular analysis does not take into account the additional 457 black test-takers who would have been placed on the Exam 7029 eligibility list, and thus eligible for hire, but for the use of a cutoff score of 84.705 on Written Exam 7029.

white test passers ranked above the last person appointed off of that list. (App. O:129-130, 136, Siskin I at 32-33, Table 11).[9]

Finally, Dr. Siskin calculated that 44 black candidates on the Exam 2043 eligibility list were *delayed* in their appointment to the FDNY because of the disparities in the average eligibility list rankings of black and white candidates. (App. O:130-131, 138, Siskin I at 33-34, Table 12B). Plaintiff-Intervenor Candido Nuñez was one of these delayed hires. Nuñez sat for Written Exam 2043 in December 2002 but was not appointed for more than five (5) years, in the last class from that list in January 2008. (App. I:47; App. TT:599-600, Nuñez Tr. 58-59).

Again, Defendants' experts did not contest any of Dr. Siskin's calculations based on these methodologies, (App. T:197-204, Bobko Tr. 139, 142-143, 153-156), and all three shortfall numbers are clearly more than "*de minimis*." Accordingly, as a matter of law, the disparities in the rankings of black and white candidates on Exams 7029 and 2043 had practical significance.

D. THE "80 % GUIDELINE" DOES NOT DEFEAT PLAINTIFFS-INTERVENORS' PRIMA FACIE CASE

Unable to refute Plaintiffs-Intervenors' and Plaintiff's overwhelming evidence of statistical and practical significance, Defendants' experts argue that some of the disparities in the pass rates and eligibility list rankings of black and white candidates on Exams 7029 and 2043 do not satisfy the so-called "80%" or "Four-fifths rule" for establishing adverse impact under Title VII. (App. S:164-167, Bobko-Schemmer at 8-11). However, application of the rule to the present case is of no help to Defendants.

Under the 80% test, which is set forth in the United States Equal Employment Opportunity Commission's *Uniform Guidelines on Employee Selection Procedures* ("*Uniform Guidelines*"), 29 C.F.R. § 1607.4 (1978), "[a] selection rate for any race, sex, or ethnic groups

[9] Again, this shortfall figure does not include the shortfall caused by the cutoff score.

which is less than four-fifths (4/5) (or eighty percent) of the rate of the group with the highest rate will generally be regarded [] as evidence of adverse impact." 29 C.F.R. §1607.4D.[10] Applying this guideline to the black and white pass rates on Written Exam 7029 supports a finding of adverse impact. Defendants admit that the ratio of the pass rate of black candidates to the pass rate of white candidates was less than 80%. (App. M:80, Adm. 13).

Similarly, application of the 80% guideline to the black-white disparity in eligibility list ranking for Exam 2043 supports a finding of adverse impact because, as Defendants admit, the proportion of black candidates on the Exam 2043 eligibility list who ranked at or above the last person appointed from that list was less than 80% of the proportion of white candidates on the eligibility list who ranked at or above the last person appointed. (App. M:81-82, Adm. 16-17).

As for the disparity between the average eligibility list rankings of black and white firefighter candidates on Exam 7029, neither Plaintiff's, Plaintiffs-Intervenors' nor Defendants' experts determined whether or not the disparity was within the 80% guideline.

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[10] Notably, the 80% approach itself is nothing more than a non-binding "rule of thumb for the courts." *Watson*, 487 U.S. at 995 n.3; *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 118 (2d Cir. 1998)(same); *see also Guardians*, 630 F.2d at 91 (discussing non-binding nature of the *Uniform Guidelines*). More importantly, as both Defendants' expert Dr. Bobko and the EEOC have acknowledged, the 80% guideline is a *less* reliable indicator of adverse impact than statistical significance testing in cases, like this one, involving large sample sizes. (App. T:191-194, Bobko Tr. 61-62, 65-66; *Uniform Guidelines Q's & A's*, 44 Fed. Reg. 11996, 11999 (March 2, 1979) at 20, 22, available at www.eeoc.gov/policy/qanda_clarify_procedures.html). As the *Uniform Guidelines* note, between-group selection rate differences that may not satisfy the 80% guideline's definition of adverse impact "may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms," 29 C.F.R. § 1607.4D, a situation which the EEOC acknowledges is most likely to occur in cases involving large sample sizes. *See Uniform Guidelines Q's & A's*, 44 Fed. Reg. 11996, 11999 at 20, 22. The Second Circuit has found a *prima facie* case of adverse impact without even considering evidence related to the 80% test where standard deviation analysis showed clear statistical significance. *See, e.g., Bridgeport Guardians v. Bridgeport*, 933 F.2d 1140, 1146-47 (2d Cir. 1991); *Joint Apprenticeship Comm.*, 186 F.3d at 118-120.

Defendants will likely note that, on Written Exam 2043, the black pass rate was 88% of the white pass rate. However, the disparity between black and white pass rates amounted to an astounding twenty-one (21) units of standard deviation, and Defendants and their experts admit that, even after reducing the sample sizes by 90%, the disparity *still* exceeded three (3) units of standard deviation. (App. M:75, Adm. 3; App. O:117, 126, 135, Siskin I at 5, 26, Table 5; App. R:158-159, Wiesen I at 42-43; App. S:171, Bobko-Schemmer at 18). In other words, there is a statistically significant showing of adverse impact.

The decision in *Delgado v. Ashcroft* is particularly instructive here. As in the case at bar, the *Delgado* plaintiffs established that the use of the challenged employment practice resulted in a disparity between Hispanics and whites that was both statistically significant, as measured by the number of standard deviations, and practically significant, as measured by a hiring shortfall of 45 Hispanics over a five-year period when the challenged practice was used. 2003 U.S. Dist. LEXIS 26471 at *8-11. The district court found that plaintiffs had established a *prima facie* case of adverse impact even though the selection rate for Hispanic applicants was 88% of the selection rate for whites. Id. at *24-26. Here, given the strong evidence of statistical significance, an even more substantial passing shortfall of 150 black candidates, and an identical 88% black-to-white pass rate ratio, Written Exam 2043 clearly had an adverse impact as well. *See also Graves v. Alabama State Bd. of Educ.*, 776 F.Supp. 1518, 1528 (M.D. Ala. 1991) (finding adverse impact where disparity between black and white test takers had "overwhelming statistical significance" although "the result of analysis under the four-fifths rule [wa]s at most a borderline figure").

E. DEFENDANTS' EXPERT'S ADMISSIONS AND FAILURES TO OPINE ARE DISPOSITIVE

In addition to the admitted and undisputed facts described above, Defendant's expert Dr. Philip Bobko explicitly admitted at deposition that both the use of Written Exam 7029 as a pass/fail screening device with a cut-off score of 84.705 and the rank-order processing of firefighter candidates from the Exam 7029 eligibility list had an adverse impact on black firefighter candidates. (App. T:185, 189, Bobko Tr. 52, 56). Dr. Bobko's admission eliminates any disputed issue of fact as to the adverse impact of Exam 7029.

When asked for his opinion as to the adverse impact on black candidates of the use of Written Exam 2043 as a pass/fail screening device and for rank order processing of candidates, Dr. Bobko *refused* to offer one. (App. T:187-188, 190, Bobko Tr. 54-55, 57). Given Plaintiffs-Intervenors' and Plaintiff's experts' unequivocal and factually supported opinions that these employment practices had an adverse impact on black candidates (App. O:118, Siskin I at 10; App. R:159, 161, Wiesen I at 43, 52), Dr. Bobko's failure to offer an opposing opinion eliminates any dispute of fact as to the first prong of Plaintiffs-Intervenors' disparate impact claims.[11]

III. THERE IS NO GENUINE ISSUE OF FACT AS TO JOB-RELATEDNESS AND BUSINESS NECESSITY, AND PLAINTIFFS-INTERVENORS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

In light of this showing of adverse impact, the burden shifts to Defendants to prove that the two challenged examinations are job related and consistent with business necessity. *Gulino*, 460 F.3d 361, 382 (2d Cir. 2006); *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 100

[11] The reason Dr. Bobko gave for not opining on these issues, that he needed "additional clarification" on the meaning of the term "adverse impact" (App. T:187-188, 190, Bobko Tr. 54-55, 57) was strange considering that, only a few minutes earlier, he was able to offer an opinion as to the adverse impact of using Exam 7029 as a pass/fail screening device without seeking any additional clarification. (App. T:185, Bobko Tr. 52).

(2d Cir. 2000)("Congress has required a Title VII defendant to justify not only the legitimacy of the ends, but also the necessity of the means"), citing *Lanning v. SEPTA*, 181 F.3d 478, 488 (3d Cir. 1999); *Nash v. Consol. City of Jacksonville*, 895 F. Supp. 1536, 1545 (M.D.Fla. 1995) ("The Civil Rights Act of 1991... restored pre-Wards Cove law in which, *inter alia*, ... 'business necessity' really means 'necessity.'"), aff'd, 85 F.3d 643 (11th Cir. 1996).

Under *Guardians*, an employment test with adverse impact violates the second prong of Title VII if *either* the content of the exam is not validated *or* the uses to which it is put have not been validated. 630 F.2d at 87. Regarding the police officer exam at issue in *Guardians,* the court held that "even if the construction of the exam passes muster, *the way in which it was used* to distinguish among candidates . . . defeats any claim of validity for a testing process that produces disparate racial results." 630 F.2d at 99-100 (emphasis added). There, "the City *used* the results of the exam to compile a rank-ordering of all the applicants, and then selected a passing score sufficient to generate the required number of potential trainees." 630 F.2d at 100 (emphasis added). The Court flatly rejected those uses of the exam because the City had failed to show that the uses were related to job performance. 630 F.2d at 105-106 ("Primarily on the basis of [the challenged exam's] improper use of rank-ordering, and of the cutoff score, we affirm the conclusion of the District Court that the exam as used was invalid") .

Defendants here *used* the exams in the same ways struck down by *Guardians*: (1) to set pass/fail cutoff scores (84.705 on Exam 7029 and 70.000 on Exam 2043) that eliminated all candidates who scored below those marks, and (2) to rank-order the remaining candidates based on their exam scores for the purpose of hiring. Defendants have failed to present any evidence to support the validity of either of these uses. Therefore, Defendants cannot meet their burden to show that the exams are lawful under Title VII.

A. EXAMS 7029 AND 2043 ARE NOT VALID BECAUSE THE CUTOFF SCORES FOR PASSING WERE NOT VALIDATED

The Second Circuit in *Guardians* held that "when an exam produces disparate racial results, a cutoff score requires adequate justification," 630 F.2d at 106, "so that, for any given cutoff . . . those who passed would likely perform the job better than those who failed." 630 F.2d at 105. Here, Defendants made no attempt to present evidence justifying the cutoff scores used on Exams 7029 and 2043. Defendants' expert Dr. Bobko conceded this:

> Q. In the parts of your report where you talk about job relatedness and business necessity, you didn't discuss the pass/fail cutoff scores the City used on written exam 7029 and 2043, correct?
>
> A. [Bobko:] Correct.

(App. T:231, Bobko Tr. 319).

When asked directly whether his and Dr. Schemmer's report established the validity of the cutoff scores used, Dr. Bobko admitted that it did not:

> Q. Is what's in this report, the Bobko, Schemmer report, sufficient to establish that the City's use of exam 7029 as a pass/fail screening device with a cutoff point of 84.705 is consistent with job relatedness and business necessity?
>
> A. [Dr. Bobko:] No.
>
> Q. Is it your opinion it is sufficient to establish that the City's use of written exam 2043 as a pass/fail screening device with a cutoff score of 70 is job related and consistent with business necessity?
>
> A. [Dr. Bobko:] No.

(App. T:205-206, Bobko Tr. 179–180).

The law is clear that where a defendant fails to demonstrate that a one- or two-point difference in scores reflects a meaningful difference in performance, and where the exam has an adverse impact, the defendant cannot set a cutoff score solely on the basis of the expected