

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,

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

-against-

ECF Case

THE CITY OF NEW YORK, ET AL.,

Defendants.

-----X

RULE 56.1 STATEMENT OF UNDISPUTED FACTS

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

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RULE 56.1 STATEMENT OF UNDISPUTED FACTS

INTRODUCTION

This statement of uncontested facts is submitted in support of Plaintiffs-Intervenors' motion for summary judgment. This case – and this motion for summary judgment – involves a claim that entry-level firefighter Examinations No. 7029 and 2043, initially administered in 1999 and 2002, discriminate against black applicants. Following some background information (¶¶1-7) and an overview of the administration of the challenged exams (¶¶8-25), the uncontested material facts are grouped to correspond to the three (3) prong test under Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e, *et seq.*, for proving discrimination in the screening and selection of job applicants. They are as follows:

- I. Those establishing that the written portion Defendants' Exams 7029 and 2043 had an adverse impact on black applicants (¶¶26-52).
- II. Those showing that Defendants have not and cannot establish that the exams were job related and consistent with business necessity (i.e., validated) (¶¶53-146).
- III. Those showing that there were alternative selection devices available to Defendants when written Exams 7029 and 2043 were used that had equal or greater validity and less adverse impact on black applicants (¶¶147-167).

BACKGROUND OF THE CASE

HISTORY

1. Plaintiff-Intervenor the Vulcan Society acted as plaintiff in a similar action against the FDNY in the 1970s, in which Judge Weinfeld of the Southern District found that the FDNY's written entry-level firefighter examination had a racially discriminatory impact and was not sufficiently job related to withstand attack under 42 U.S.C. § 1983. That decision was affirmed by the Second Circuit Court of Appeals in 1973, which also upheld the District Court's injunction requiring the City to hire one (1) minority candidate for every three (3) white candidates. *See Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Com.*, 490 F.2d 387 (2d Cir. 1973). In the early 1970s, New York City's firefighting force was made up of five percent (5%) minority firefighters. *Id.* at 398. After the expiration of the Court's injunction in 1977, however, the hiring of black firefighters plummeted to the point that, as of March 31, 2005 (the most recent date for which such data was produced), black firefighters made up only three percent (3%) of the force. (App. A:1, Demographics of FDNY firefighters).¹ Meanwhile New York City is made up of 26.6% black residents according to the most recent U.S. census data. (App. B:2, U.S. Census data).

2. Hiring rates from the two exams given just *prior* to those challenged here were consistently low. The total number of black hires from Exam 7022 (given in 1988) was 29 out of

¹ 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. TT:600". 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."

2,256 (a black hiring rate of less than 1.3%). (App. C:3, appointments from Exams 7022 and 0084 by race). The next exam, Exam 0084 (given in 1992) resulted in 56 black hires out of 2,692 total hires (a black hiring rate of 2%). *Id.*

THE EQUAL EMPLOYMENT PRACTICES COMMISSION'S AUDITS

3. The New York City Equal Employment Practices Commission (“EEPC”), a non-mayoral City agency that monitors enforcement of the City’s Equal Employment Opportunity Policy, began an audit of firefighter Exam 7029 in the fall of 1999. According to the EEPC’s research at that time, which was provided to the FDNY, employment rates of black firefighters were much lower in New York City than in any other major city in America. (App. D:4). As of 1999, the percentage of black firefighters in Chicago was 20%; in Houston was 17%; in Los Angeles was 14%; in Philadelphia was 26%; and in San Diego was 8%. *Id.* The EEPC’s Executive Director, Abraham May, testified that the FDNY had – and still has – the worst minority under-representation of any New York City agency he has seen. (App. E:5-8, May Tr. 49-51). The EEPC recommended that the FDNY conduct an adverse impact study on the written portion of Exam 7029. The FDNY, and ultimately Mayor Bloomberg, refused to do so. (App. F:9-16, EEPC Report and Mayor’s response).

EEOC CHARGES AND COMPLAINT

4. On August 9, 2002, the Vulcan Society filed a charge with the United States Equal Employment Opportunities Commission (“EEOC”) alleging that firefighter Exam 7029 had an adverse impact against black applicants and also alleging intentional discrimination. (App. G:17-23, EEOC Charge by Vulcan Society). In the EEOC’s Determination of the charge, it concluded that an analysis of test scores on Written Exam 7029 “indicate a high degree of adverse impact against African-American applicants, and all the differences in percentages

between blacks and whites are highly statistically significant.” (App. H:27, EEOC Determination). The EEOC also found that the exam was not validated (i.e., had not been shown to predict job performance). *Id.*

5. On February 24, 2005, three additional charges of discrimination were filed by Roger Gregg, Marcus Haywood and Candido Nuñez, black men who were denied appointment after taking, and passing, Exam 2043. (App. I:30-51, EEOC Charges by Gregg, Haywood and Nuñez). The EEOC’s Determinations of their charges found that Exam 2043, like Exam 7029, had adverse impact on black applicants and was not validated. (App. J, EEOC Determinations).

6. The City refused to engage in conciliation at the EEOC (App. K:62, City letter to EEOC), and the charges filed by the Vulcan Society, Gregg, Haywood and Nuñez were all referred to the United States Department of Justice, leading to the initiation of this lawsuit. The United States’ filed its Complaint in this matter on May 21, 2007. (Dkt. 1). On September 5, 2007, the Court granted Plaintiffs-Intervenors leave to intervene not only with respect to the issues raised in the United States’ Complaint but also with respect to their additional claims of disparate impact and disparate treatment against the City, the FDNY, the Department of Citywide Administrative Services (“DCAS”), Fire Commissioner Nicholas Scoppetta and Mayor Michael Bloomberg. (Dkt 47). Plaintiffs-Intervenors’ Complaint, filed September 25, 2007, alleges, *inter alia*, discrimination in selection procedures in violation of Title VII, as well as 42 U.S.C. § 1981, 42 U.S.C. § 1983, the New York State Human Rights Law, New York Executive Law §§ 290 and 296, and New York City Administrative Code §§ 8-101, *et seq.* (Dkt. 48).

7. Essentially, the Complaint charges Defendants with using firefighter selection procedures that have a statistically significant adverse impact against black applicants, that are not job related or consistent with business necessary, and for which lawful alternatives were

available. The Complaint also alleges that Defendants maintained these procedures despite specific knowledge of their adverse impact on blacks and with reckless disregard as to their unlawfulness under Title VII and other applicable laws.

OVERVIEW OF THE ADMINISTRATION OF EXAMS 7029 AND 2043

8. Prior to the administration of a civil service examination, the City issues a Notice of Examination (“NOE”), setting forth the requirements for the position and other details about how to apply to take the test. (App. L:63-73, NOEs for Exams 7029, 2043 and 6019).

9. Those interested in taking Exam 7029 or 2043 were required to return a completed application and application fee to DCAS, unless the fee was waived as set forth by City regulations. (App. M:90, Adm. 48-50). Applicants were then sent admission cards. (App. M:91, Adm. 51-52).

10. Exams 7029 and 2043 each had two components: a written, multiple choice test and a physical performance test (“PPT”). (App. L:64, 69). The written and physical components of each test were intended to be worth 50% of a candidate’s overall score. (App. L:64, 69). As discussed in paragraphs 75-78 below, due to flaws in Defendants’ method of computation, the combined score did not accurately reflect a 50-50 weighting of the written test and the PPT.

11. The written portion of both Exam 7029 and Exam 2043 consisted of a paper and pencil test with 85 multiple choice questions. (App. M:85-87, Adm. 31, 38). Each candidate’s score on Written Exam 7029 and Written Exam 2043 was the percentage of the 85 questions on the examination that the candidate answered correctly. (App. M:92, Adm. 58).

12. Written Exams 7029 and 2043 were based on the same job analysis and test plan (App. CC:393, Adm. 11; App. KK:537-543, Johnston Tr. 19, 23-28), and Defendants’ expert Dr. Philip Bobko testified that he considered them to be “very similar,” based both upon his own

review as well as a representation by Defendants. (App. T:225-227, Bobko Tr. 296-298).

13. Nevertheless, the passing score on Written Exam 7029 was 84.705 (App. M:94, Adm. 65), while the passing score on Written Exam 2043 was 70.000. (App. N:109, Interrog. 36).

14. The City did not allow candidates who scored below 84.705 on Written Exam 7029 or below 70.000 on Written Exam 2043 to take the PPT. (App. M:95, Adm. 68-69).

15. The written portion of Exam 7029 was first given to applicants on February 26, 1999. (App. N:109, Interrog. 36). Written Exam 7029 was subsequently administered to additional groups of applicants as late as December 2002. (App. M:91-92, Adm. 55). Candidates were hired from the Exam 7029 eligibility list at least until December 2004. (Answer, Dkt. 8 at ¶10; App. O:119, Siskin I at 12).²

16. The written portion of Exam 2043 was first given to applicants on December 14, 2002. (App. M:92, Adm. 56). The City continued to give Written Exam 2043 to other groups of applicants at least until March 2007. (App. M:92, Adm. 57). Candidates were hired from the Exam 2043 eligibility list at least until August 5, 2007. (App. O:137, Siskin I at Table 12A; App. P:148, Dep. of Thomas Patitucci, DCAS Asst. Commissioner for Examinations (designee),

² Dr. Bernard R. Siskin, Ph.D. was retained as an expert by the United States in this action. Dr. Siskin's November 2007 expert report on adverse impact is referred to here as "Siskin I at ___," and his July 2008 expert report on job relatedness and business necessity is referred to as "Siskin II at ___." The United States' additional experts are David P. Jones, Ph.D. and Leaetta M. Hough, Ph.D., whose July 2008 expert report on job relatedness and business necessity is referred to as "Jones-Hough at ___," and Irwin L. Goldstein, Ph.D., whose July 2008 expert report on content validity is referred to as "Goldstein at ___." Joel P. Wiesen, PhD. was retained as an expert by Plaintiffs-Intervenors. Dr. Wiesen's January 2008 expert report on adverse impact is referred to here as "Wiesen I at ___," and his August 2008 expert report on job relatedness and business necessity is referred to as "Wiesen II at ___." Drs. Philip Bobko and F. Mark Schemmer were retained as expert witnesses in this action by Defendants. Their January 2008 expert report is referred to here as "Bobko-Schemmer at ___".

October 9, 2007, Tr. 218:4-9).

17. Before inviting candidates who passed Written Exam 7029 or 2043 to take the PPT, the City sent them each a Notice of Result, informing them of their scores on the written test and whether they had passed. (App. M:92-93, Adm. 59-60).

18. After Notices of Result were sent, there was an appeals period during which a candidate could challenge the accuracy of his/her score on the written examination. (App. M:93-94, Adm. 61-63). If a candidate's written test score was corrected as a result of an appeal, the candidate would be sent a new Notice of Result, reflecting the corrected written test score. (App. M:94, Adm. 64).

19. Each candidate who passed Written Exam 7029 or 2043 was sent a packet with instructions regarding the PPT. (App. N:109, Interrog. 36). The City used the same PPT for both Exam 7029 and Exam 2043. (App. M:88-89, Adm. 40, 43). The PPT consisted of eight (8) physical tasks or "events." (App. M:88, Adm. 41). A candidate had to pass any six (6) of the eight (8) events in order to pass the PPT. (App. M:89, Adm. 44). A candidate's score on the PPT was the percentage of the PPT events he or she passed. (App. M:89, Adm. 45). There were only three (3) possible passing scores on the PPT. Those who passed all eight (8) events scored 100%; those who passed seven (7) out of the eight (8) events scored 87.5%; those who passed six (6) out of the eight (8) events scored 75%. (App. M:89, Adm. 46). Candidates who failed more than two (2) events were not permitted to continue the PPT and were given a score of 62.5%. (App. M:90, Adm. 47).

20. Candidates' scores on the Written Exam and the PPT were combined to arrive at a "transformed score" and certain additional points were then added for Veterans Credit, Residency Credit and/or Legacy Credit to arrive at the "Adjusted Final Average score." (App.

M:97-98, Adm. 86, 96).

21. Candidates who passed both the written and PPT components of Exam 7029 or 2043 were sent an updated Notice of Result informing them of their Adjusted Final Average and their rank on the eligibility list, but not informing them of their likelihood of being reached for appointment. (App. I:47-48, 50-51).

22. The Exam 7029 eligibility list was established on November 15, 2000. (App. N:32, Interrog. 36). The Exam 2043 eligibility list was established on May 5, 2004. (App. M:95-96, Adm. 71).

23. Based on the number of firefighters needed to fill the FDNY's next academy class, DCAS would "certify" a group of candidates from the eligibility list, beginning with the highest ranked candidate on the list. (App. Q:150-151, Dep. of Stephen Dobrowsky, Deputy Asst. Commissioner for Civil Service Administration, Tr. 59-60; App. M:99-101, Adm. 105, 110-111).

24. These "certified" candidates were then investigated by the FDNY's Candidate Investigation Division ("CID") for potential hire. The CID determined whether the candidates on a "certification list" met the requirements for appointment listed on the NOE, including checking criminal background, education or military service, employment references, Certified First Responder with Defibrillation ("CFR-D") certification, English-speaking ability, citizenship, age, proof of identification and driving record. (App. M:98, Adm. 98; App. N:111, Interrog. 36).

25. The City appointed candidates in descending rank order (starting with list number "1") from among those on the certification list who had completed the investigation process, had been determined to be qualified at the time a new academy class was appointed, and accepted an

offer of employment. (App. M:101, Adm. 112). If a candidate's list number was not reached by the time of the last appointment to a given academy class, the candidate would not be appointed at that time, even if s/he had completed all steps in the selection process and been found qualified. (App. M:101, Adm. 113).

I. DEFENDANTS' ADMISSIONS, AS WELL AS UNCONTESTED FACTS AND UNCONTESTED EXPERT OPINIONS, ESTABLISH THAT THE CHALLENGED EXAMS, AS USED, HAD AN ADVERSE IMPACT AGAINST BLACK APPLICANTS

A. The Disparities In Passing Rates and Eligibility List Rankings of White And Black Candidates on Exams 7029 and 2043 Were Statistically Significant

26. In the fields of statistics, test development, and other social sciences, it is generally accepted that a disparity in outcomes between two subgroups is "statistically significant" if there is a five percent (5%) or lower likelihood that such disparity could have occurred by chance. (App. O:120, Siskin I at 15; App. 152, Wiesen I at 12; App. S:167, Bobko-Schemmer at 11). This "5% likelihood" threshold corresponds to roughly 1.96 units of standard deviation, while 2.56 units of standard deviation correspond to a one percent (1%) likelihood that a disparity is due to chance. *Id.* Thus, social scientists and the federal courts generally consider disparities of at least two (2) or three (3) standard deviations to be statistically significant. *Id.*³

Exam 7029

27. Approximately 12,915 white candidates and 1,749 black candidates took the written portion of Exam 7029. (App. O:132, Siskin I at Table 1; App. R:154, Wiesen I at 18).

³ *See also Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977).

28. Of the white candidates who took the written portion of Exam 7029, 89.9% passed, while only 60.3% of black candidates who took the written portion of Exam 7029 passed. (App. O:132, Siskin I at Table 1; App. R:154, Wiesen I at 18).

29. Defendants' experts did not contest, in either their report or at deposition, the figures or calculations presented in paragraphs 27 and 28 above.

30. Plaintiffs-Intervenors' and Plaintiff's experts showed – and Defendants admit – that the disparity between the pass rate of black and white candidates on the written portion of Exam 7029 exceeded three (3) units of standard deviation. (App. M:74, Adm. 1; App. S:170-171, Bobko-Schemmer at 17-18; *see also* App. O:115, 121-122, 132, Siskin I at 3, 21-22, Table 1; App. R:154-155, Wiesen I at 18-19).⁴

31. Defendants also admit that as a group, black candidates who passed both the written and physical portions of Exam 7029 were ranked lower on the eligibility list for Exam 7029 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 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

Exam 2043

32. Approximately 13,878 white candidates and 1,393 black candidates took the written portion of Exam 2043. (App. O:135, Siskin I at Table 5; App. R:158, Wiesen I at 42).

⁴ Plaintiff's and Plaintiffs-Intervenors' experts actually calculated the disparity to be more than thirty-three (33) units of standard deviation. (App. O:121, 132, Siskin I at 21, Table 1; App. R:155, Wiesen I at 19). This means that the odds are much less than 1 in 10,000 that the disparity would occur by chance. (App. R:155, Wiesen I at 19).

⁵ Plaintiff's and Plaintiffs-Intervenors' experts actually calculated the disparity to be more than six (6) units of standard deviation. (App. O:124, Siskin I at 24; App. R:156, Wiesen I at 27).

33. Of the white candidates who took the written portion of Exam 20439, 7.2% passed, while only 85.4% of black candidates who took the written portion of Exam 2043 passed. (App. O:135, Siskin I at Table 5; App R:158, Wiesen I at 42).

34. Defendants' experts did not contest, in either their report or at deposition, the figures or calculations presented in paragraphs 32 and 33 above.

35. Plaintiffs-Intervenors' and Plaintiff's experts proved – and Defendants admit – that the disparity between the pass rates of white and black candidates on the written portion of Exam 2043 exceeded three (3) units of standard deviation. (App. M:75, Adm. 3; App. S:170-171, Bobko-Schemmer at 17-18; *see also* App. O:117, 126, 135, Siskin I at 5, 26, Table 5; App. R:158-159, Wiesen I at 42-43).⁶

36. Plaintiff's, Plaintiffs-Intervenors' and Defendants' experts all concluded that, as a group, black candidates who passed both the written and physical portions of Exam 2043 were ranked lower on the eligibility list for Exam 2043 (i.e., had higher list numbers) 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 exceeded 2.9 units of standard deviation. (App. 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).⁷

37. Plaintiff's and Defendants' experts both concluded that the disparity in the proportions of black and white candidates on the Exam 2043 eligibility list ranked at or above the

⁶ Plaintiff's and Plaintiffs-Intervenors' experts actually calculated the disparity to be more than twenty-one (21) units of standard deviation. (App. O:126, Siskin I at 26; App. R:159, Wiesen I at 43).

⁷ Plaintiff's and Plaintiffs-Intervenors' experts actually calculated the disparity to be more than nine (9) units of standard deviation. (App. O:128-129, Siskin I at 31-32; App. R:160, Wiesen I at 51).

rank of 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).⁸

B. The Disparities In Passing Rates and Eligibility List Rankings of White And Black Candidates on Exams 7029 and 2043 Also Had Practical Significance

38. Defendants' use of the written portion of Exam 7029 as a pass/fail screening device with a cutoff score of 84.705 also resulted in a shortfall of about 457 black test passers. In other words, approximately 457 additional black candidates who took the written portion of Exam 7029 would have passed if black candidates had passed the exam at the same rate as white candidates. (App. O:122, Siskin I at 22; App.R:155, Wiesen I at 19; App. T:197-200, Bobko Tr. 139, 142-143, 145).

39. Defendants' use of the written portion of Exam 2043 as a pass/fail screening device with a cutoff score of 70.000 resulted in a shortfall of about 150 black test passers. In other words, approximately 150 additional black candidates who took the written portion of Exam 2043 would have passed if black candidates passed the exam at the same rate as white candidates. (App. O:127, Siskin I at 27; App. R:159, Wiesen I at 43; App. T:197-200, Bobko Tr. 139, 142-143, 145).

40. As a result of Defendants' rank-order processing and selection of firefighter candidates from the eligibility list for Exam 7029, approximately 68 black candidates who passed both the written and physical portions of Exam 7029 were delayed in being hired as firefighters. (App. O:116, 125, 133-134, Siskin I at 4, 25, Tables 3A and 3B; App. T:201-204, Bobko Tr. 153-156). These 68 firefighters lost approximately 20 years of combined employment, or about 3 ½ months of wages, benefits and seniority each. (App. O:116, Siskin I at 4).

⁸ Plaintiff's expert actually calculated the disparity to be more than nine (9) units of standard deviation. (App. O:129-130, Siskin I at 32-33).

41. Defendants' rank-order processing and selection of firefighter candidates from the eligibility list for Exam 2043 resulted in a hiring shortfall of approximately 30 to 40 black candidates. In other words, approximately 30 to 40 additional black candidates from the 2043 eligibility list would have been hired as firefighters if the proportion of black candidates on the eligibility list ranked at or above the rank of the last person appointed from that list was the same as the proportion of white candidates on the eligibility list ranked at or above the rank of the last person appointed from that list. (App. O:129-130, 136, Siskin I at 32-33, Table 11; App. T:197-200, Bobko Tr. 139, 142-143, 145).

42. As a result of Defendants' rank-order processing and selection of firefighter candidates from the eligibility list for Exam 2043, approximately 44 black candidates who passed both the written and physical portions of Exam 2043 were delayed in being hired as firefighters. (App. O:130-131, 138, Siskin I at 33-34, Table 12B; App. T:201-204, Bobko Tr. 153-156). For example, Candido Nuñez, a Plaintiff-Intervenor in this matter, was ranked number 5,003 on the Exam 2043 eligibility list (App. I:47) and was only reached for hire in the very last class hired from that list in January 2008, more than five (5) years after he took Written Exam 2043 in December 2002. (App. TT:599-600, Nuñez Tr. 58-59).

C. Defendants' "Sample Size" Argument Does Not Eliminate Adverse Impact

43. Defendants' experts contend that the very high level of statistical significance of the disparities between the pass rates and eligibility list rankings of black and white candidates on each of the challenged exams (see footnotes 4-8 supra) was artificially inflated by the large sample sizes, i.e., the large numbers of white and black applicants for each of the two exams. (App. S:168-169, 177-179, Bobko-Schemmer at 14-15, Appendix A).

44. However, Defendants' experts conceded that even if the sizes of the relevant samples were reduced by ninety percent (90%), the following would nonetheless be true:

a. the disparity between the pass rates of white and black firefighter candidates on the written portion of Exam 7029 would still exceed three (3) units of standard deviation. (App. O:122, Siskin I at 22; App. S:171, Bobko-Schemmer at 18);

b. the disparity between the pass rates of white and black candidates on the written portion of Exam 2043 would still exceed three (3) units of standard deviation. (App. O:126-127, Siskin I at 26-27; App. S:170-171, Bobko-Schemmer at 17-18);

c. the disparity between the average rank of white candidates and the average rank of black candidates on the eligibility list for Exam 7029 would still exceed two (2) units of standard deviation. (App. S:170-171, Bobko-Schemmer at 17-18);

d. the disparity between the average rank of white candidates and the average rank of black candidates on the eligibility list for Exam 2043 would still exceed 2.9 units of standard deviation. (App. S:170, 172, Bobko-Schemmer at 17, 19); and

e. the disparity between the proportions of black and white candidates on the Exam 2043 eligibility list ranked at or above the rank of the last person appointed from that list would still exceed three (3) units of standard deviation. (App. S:171, Bobko-Schemmer at 18).

D. Defendants' Application of The "80 Percent Rule" Does Not Eliminate Adverse Impact

45. Defendants' expert report places great emphasis on the fact that some of the disparities between the pass rates and eligibility list rankings of the relevant demographic subgroups of applicants on the two challenged exams did not violate the so-called "80%" or "four-fifths" rule of thumb for assessing adverse impact. (App. S:164-167, Bobko-Schemmer at 8-11). Under

this rule of thumb, a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) or 80% of the rate for the group with the highest rate “will generally be regarded” as evidence of adverse impact. See *Uniform Guidelines on Employee Selection Procedures* (“*Uniform Guidelines*”) 29 C.F.R. § 1607.4D.

46. However, Defendants’ expert Dr. Bobko has acknowledged both in his academic writing and during his deposition that when dealing with large samples, statistical significance testing is a superior method for controlling for “false negatives,” i.e., incorrect findings of no adverse impact, than is the 80% rule. (App. T:191-194, Bobko Tr. 61-62, 65-66).⁹

47. More importantly, Defendants’ use of Exams 7029 and 2043 in the New York City firefighter hiring process did in fact violate the 80% Rule, and they admit that much, as follows:

a. The ratio of the pass rate of black candidates to the pass rate of white candidates on the written portion of Exam 7029 was less than 80%. (App. M:80, Adm. 13);

b. The proportion of black candidates on the eligibility list for Exam 2043 ranked at or above the rank of the last person appointed from that list was less than 80% of the proportion of white candidates on the eligibility list for Exam 2043 who ranked at or above the rank of the last person appointed from that list. (App. M:81-82, Adm. 16-17; App. O:136, Siskin I at Table 11; App. R:162, Wiesen I at 53).

⁹ In addition, both the Second Circuit Court and the federal agencies in charge of enforcing Title VII have concluded that even in cases where an employment test does not fail the “80% Rule,” its adverse impact can still be established if the disparities in outcomes between the relevant sub-groups are statistically and practically significant. See *Uniform Guidelines*, 29 C.F.R. §1607.4D; *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999).

E. Defendants' Expert's Admissions on the Adverse Impact of Exam 7029

48. Defendants' expert Dr. Bobko, admitted during his deposition that Defendants' use of the written portion of Exam 7029 as a pass/fail screening device had an adverse impact on black firefighter candidates. (App. T:185, Bobko Tr. 52).

49. Dr. Bobko also admitted during his deposition that Defendants' rank-order processing and selection of candidates from the eligibility list for Exam 7029 had an adverse impact on black firefighter candidates. (App. T:189, Bobko Tr. 56).

50. While both Plaintiff's and Plaintiffs-Intervenors' experts concluded that Defendants' use of the written portion of Exam 2043 as a pass/fail screening device had an adverse impact on black firefighter candidates (App. O:118, Siskin I at 10; App. R:159, Wiesen I at 43), Defendants' expert Dr. Bobko declined to offer any opinion on this question. (App. T:187-188, Bobko Tr. 54-55).¹⁰

51. While both Plaintiff's and Plaintiffs-Intervenors' experts concluded that Defendants' rank-order processing and selection of candidates from the eligibility list for Exam 2043 had an adverse impact on black firefighter candidates (App. O:118, Siskin I at 10; App. R:161, Wiesen I at 52), Dr. Bobko declined to offer any opinion on this question. (App. T:190, Bobko Tr. 57)¹¹.

¹⁰ When asked at deposition for his opinion on this question, Dr. Bobko refused to answer, stating that he needed "additional clarification" on the definition of "adverse impact." (App. T:187-188, Bobko Tr. 54-55). However, when asked only a few moments earlier whether, in his opinion, Defendants use of the written portion of Exam 7029 as a pass/fail screening device had an adverse impact on black candidates, Dr. Bobko answered "yes" without seeking any additional clarification on the meaning of "adverse impact." (App. T:185, Bobko Tr. 52).

¹¹ Again, when asked for his opinion on this question, Dr. Bobko refused to answer and stated that he needed clarification on the definition of adverse impact. (App. T:190, Bobko Tr. 57).

52. Nowhere in Defendants' experts' report do Drs. Bobko or Schemmer *deny* that the use of Exams 7029 and 2043 as pass/fail screening devices and in rank ordering candidates with passing scores had an adverse impact on black candidates.

II. UNCONTESTED FACTS AND UNCONTESTED EXPERT OPINIONS ESTABLISH THAT EXAMS 7029 AND 2043 WERE NOT JOB RELATED OR CONSISTENT WITH BUSINESS NECESSITY

A. The Use Of Exams 7029 and 2043 Was Not Validated

53. The validity of an examination is determined not only by its content but also by the way it is used to screen and rank exam takers. (App. U:270, Jones-Hough at 53). If the ranking of applicants on an eligibility list, or the passing score of an examination, is not valid, the examination itself cannot be valid. *Guardians Ass'n. v. Civil Serv. Comm.*, 630 F.2d 79 (2d Cir. 1980).

54. Defendants' expert Dr. Schemmer testified that "validity is as much a function of the process and application of the test as is the test itself, that certainly validity can be affected by an improper application or inference as validity doesn't follow the test around." (App. AA:344, Schemmer Tr. 244).

i. The Pass Marks (Cutoff Scores) For Exams 7029 and 2043 Were Never Validated

55. Where an employer has not demonstrated that a one- or two-point difference in scores on an exam reflects a meaningful difference in performance on the job, and where there is adverse impact in passing the exam, the employer cannot lawfully set a cutoff score solely on the basis of the expected number of applicants needed to fill vacancies. *Guardians*, 633 F.2d at 105.

56. Defendants' expert Dr. Schemmer concedes that the passing score of an exam may defeat the exam's job relatedness:

Q. Do you agree with this statement, no matter how valid the exam, it is the cutoff score that ultimately determines whether a person passes or fails. A cutoff score unrelated to job performance may well lead to the rejection of applicants who are fully capable of performing the job.

A. [Dr. Schemmer:] As stated, I would agree with that.

(App. AA:344, Schemmer Tr. 244).

57. Defendants' expert report makes no attempt to justify the pass/fail cutoff scores used on Written Exam 7029 or 2043:

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).

58. Dr. Bobko acknowledged this in his testimony regarding his and Dr. Schemmer's expert report:

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).

59. Nor do Defendants contend that the cutoff scores used on Written Exam 7029 and

Written Exam 2043 measure the minimum level of the tested skills, abilities or other characteristics necessary for successful performance of the job of entry-level firefighter in the FDNY. (App. N:107, Interrog. 30).

60. Carol Wachter, DCAS's Assistant Commissioner for Examinations at the time that Exam 7029 was developed, testified that no validity studies were conducted with respect to the pass mark for Written Exam 7029. (App. W:299, Wachter Tr. 85). The pass mark was set based on the number of entry-level firefighter job openings anticipated by the FDNY. (App. W:297-298, 303-304, Wachter Tr. 74-75, 181-82). Wachter also testified that it would have been possible to use a lower pass mark for Written Exam 7029 and still select only qualified candidates. (App. W:301-302, Wachter Tr. 179-180). In fact, she agreed that a pass mark of 84.705 was in excess of the minimum competency level necessary for the job. (App. W:300, Wachter Tr. 86).

61. Thomas Patitucci also testified that the Written Exam 7029 cutoff score was not based on data gathered from the job analysis but rather was based on the number of candidates that the FDNY wished to have pass the written test and be called to the physical. (App. P:144-146, Patitucci (designee) Tr. 91-93). Patitucci characterized the pass mark for Written Exam 7029 as "unrealistically high," and he objected to the fact that the FDNY rather than DCAS was setting the pass mark for the exam. (App. P:141-143, Patitucci Tr. 42-44).

62. The Examiner for Exam 7029 also never conducted an analysis of whether the cutoff score of 84.705 used on Written Exam 7029 corresponds to the level of the tested abilities necessary to perform the firefighter job successfully, nor did he do any analysis of whether a score of 70 on written Exam 2043 corresponds to the minimum level of the tested abilities necessary to perform the firefighter job successfully. (App. X:309-310, Morrongiello Tr. 96-97).

63. The cut-off score for Exam 2043 was not set based on the level of competence necessary for the job, or based on the FDNY's hiring needs, but rather pursuant to DCAS Personnel Rule and Regulation 4.4.9, which sets 70% as a default passing score unless the Notice of Exam of the DCAS Commissioner provide otherwise. (App. N:105-106, Interrog. 16; App. P:140, Patitucci Tr. 20).

64. Dr. Bobko testified that it was represented to him that Exams 7029 and 2043 were "very similar in their content," and his "review of those exams seemed to confirm that they were very similar." (App. T:225-227, Bobko Tr. 296-298). Nevertheless, the pass mark on Exam 7029 was 84.705, while the pass mark on Exam 2043 was 70. (App. M:94, Adm. 65; App. N:109, Interrog. 36). Defendants cannot show – and have not attempted to show – job relatedness and business necessity in the setting of these cutoff scores.

65. Dr. Siskin highlights one of the problematic effects of Defendants' inconsistent use of cutoff scores. If a hypothetical Applicant "A" scored 84.705 on Written Exam 7029 and 75 on the PPT, she would have a transformed score of 70.000, under the methodology for calculating transformed scores set forth in the "Firefighter Exam No. 7029 Explanation of Test Scores." (App. Y:328-329; App. V:283, Siskin II at 15). If a hypothetical Applicant "B" scored 83.529 on Written Exam 7029 and 100 on the PPT, she would have a transformed score of 83.652. *Id.* Applicant B would have a higher transformed score than Applicant A and should be placed higher on the eligibility list. The problem is that Applicant B's score on the written test would have disqualified her from taking the PPT (App. M:95, Adm. 68), even though the majority of applicants who took the PPT scored 100 (App. Z:341, Wiesen II at 82). Thus, under the City's use of Exam 7029, Applicant A (with a transformed score of 70.000) would be placed on the Exam 7029 eligibility list, but Applicant B (with a transformed score of 83.652) would

