

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

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

**ELECTRONICALLY
FILED**

THE CITY OF NEW YORK,

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

Defendant,

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**PROPOSED INTERVENORS-PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO INTERVENE AS OF RIGHT**

Proposed Plaintiffs-Intervenors, the Vulcan Society, Inc., Candido Nuñez, Roger Gregg and Marcus Haywood, respectfully submit this memorandum of law in support of their motion to intervene as of right in this action, pursuant to Fed. R. Civ. P 24(a) and to section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f), 42 U.S.C. §1981, 42 U.S.C. §1983, state and city law.

The exercise of supplemental jurisdiction over the additional state and city law causes of action raised in the proposed Intervenors' Complaint, as well as the claims against the Fire Department of the City of New York, New York City Department of Citywide Administrative Services, Mayor Michael Bloomberg and New York City Fire Commissioner Nicholas Scoppetta as Defendants in this action, are proper as they derive from the same operative facts that form the basis of this action.

A. INTERVENTION SHOULD BE GRANTED AS OF RIGHT WITH RESPECT TO TITLE VII CLAIMS

Rule 24 of the Federal Rules of Civil Procedures states, in relevant part, that “[u]pon timely application anyone shall be permitted to intervene in an action...when a statute of the United States confers an unconditional right to intervene.” Fed. R. Civ. R. 24(a)(1). As filers of the original Equal Employment Opportunity Commission charges that form the basis of this lawsuit, proposed Plaintiffs-Intervenors have the right to intervene in this action, pursuant to section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f). That section provides that “[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.” An aggrieved person is defined as a person who has filed a charge with the EEOC. See Spirit v. Teachers Ins. and Annuity Ass’n, 93 F.R.D. 627, 640-41 (S.D.N.Y. 1982), rev’d in part on other grounds, 691 F.2d 1054 (2d Cir. 1982 (“The Court’s view that the statutory language strongly indicates that Congress, in drafting the intervention provision contained in 42 U.S.C. § 2000e-f(f)(1), must have used the term ‘person aggrieved’ to refer to a person who filed a charge with the EEOC is fully supported by the legislative history of that section.”).

Most courts agree that this constitutes an “unconditional right to intervene” under Rule 24(a)(1) in a Title VII enforcement action against an employer. See, e.g., McClain v. Wagner Elec. Corp., 550 F.2d 1115, 1119 (8th Cir. 1977); EEOC v. Rekrem, Inc., 199 F.R.D. 526, 529 (S.D.N.Y. 2001); EEOC v. Die Fliedermaus, L.L.C., 77 F.Supp.2d 460, 460 (S.D.N.Y. 1999); EEOC v. Pacific Maritime Ass’n, 188 F.R.D. 379, 380 (D. Or. 1999); see also EEOC v. Waffle House, Inc., 534 U.S. 279, 291, 122 S. Ct. 754, 763, 151 L. Ed. 2d 755 (2002) (stating that an

individual may intervene in the EEOC enforcement action); General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326, 100 S. Ct. 1698, 1704, 64 L. Ed. 2d 319 (1980) (stating that an individual may intervene in the EEOC enforcement action).

It is undisputed that the Vulcan Society, Inc., as well as Nuñez, Gregg and Haywood filed charges with the EEOC and are persons aggrieved under 42 U.S.C. § 2000e-5(f)(1). Accordingly, proposed Plaintiffs-Intervenors have an unconditional right to intervene in this action with regard to their Title VII claims.

B. THE COURT SHOULD ALSO ALLOW INTERVENORS TO ADD THEIR CLAIMS UNDER 42 U.S.C. §§ 1981 & 1983 AND EXERCISE SUPPLEMENTAL JURISDICTION OVER STATE AND CITY LAW CLAIMS, AND SHOULD ALLOW CLAIMS AGAINST ADDITIONAL DEFENDANTS

The Court should permit Intervenors to add claims brought under 42 U.S.C. §§ 1981 and 1983, as well as the State and City law claims raised in proposed Plaintiffs-Intervenors' Complaint, as those claims "derive from the same operative facts that form the basis of this action." See EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 448 F.Supp.2d 458, 461 (EDNY 2006) (granting individual's motion to intervene in a Title VII action and add additional defendants and state and city law claims); see also EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 273 F.Supp.2d 260, 263 (same); EEOC v. Die Fliedermaus, 77 F.Supp.2d at 469-70 (consolidating Title VII and § 1981 claims in the same action).

In this case, all claims are founded on the same allegation presented in United States' Complaint - - to wit - - that the City and the named agencies and individuals (the "Defendants") have used testing procedures which discriminate against black applicants for firefighter positions in the New York City Fire Department. Factually, the Plaintiff-Intervenors' Complaint adds one additional allegations, to wit that the Defendants have knowingly and with reckless disregard al-

lowed this discrimination to persist over many years. The enumerated statutes provide particular relief for this disparate treatment and intentional discrimination.

Proposed Plaintiffs-Intervenors raise these additional claims in order to ensure that, inasmuch as Defendants may have violated more than one statute, the additional forms of relief provided under those laws will be available to Plaintiffs and members of their class.

As proposed Plaintiffs-Intervenors' original EEOC charges alleged discrimination by not only the City of New York but also proposed Defendants Fire Department of the City of New York, New York City Department of Citywide Administrative Services, Mayor Michael Bloomberg and New York City Fire Commissioner Nicholas Scoppetta, we respectfully ask that the Court permit the additional claims against the proposed Defendants, as they arise out of the same set of facts already at issue in this litigation, and do not threaten to complicate or delay the adjudication of this matter.

For all of the above reasons, proposed Plaintiffs-Intervenor should be permitted to intervene in this action, to include the 1981 and 1983 claims in their Complaint and the Court should exercise supplemental jurisdiction over their state and city law additional claims.

Dated: July 23, 2007
New York, New York

Respectfully submitted,

LEVY RATNER, P.C.

/s/ Richard A. Levy

By: Richard A. Levy (RL5154)
Attorneys for proposed
Plaintiffs-Intervenors
80 Eighth Avenue
New York, New York 10011
(212) 627-8100
(212) 627-8182 (fax)

Shayana Kadidal (SK1278)
CENTER FOR CONSTITUTIONAL
RIGHTS

Attorneys for Plaintiffs
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6438
(212) 614-6499 (fax)