

Civil Action Number: 07 CV 2067 (NGG)(RLM)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

VULCAN SOCIETY, INC., for itself and on behalf of its
members; MARCUS HAYWOOD, CANDIDO NUNEZ,
and ROGER GREGG, individually and on behalf of a
class of all others similarly situated,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK; 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, in their individual and
official capacities,

Defendant.

**DEFENDANTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR PARTIAL MOTION TO
DISMISS THE INTERVENER PLAINTIFFS
COMPLAINT**

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PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum of law in support of their motion to dismiss the greater part of Plaintiff-Interveners claims as time-barred. The Vulcan Society, Inc., Candido Nunez, Roger Gregg, and Marcus Haywood (collectively, the “Interveners”) bring this action pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 1981, 42 U.S.C. § 1983, New York Executive Law §§ 290 and 296, and New York City Administrative Code §§ 8-101 (“State and City Human Rights Laws”).

Plaintiff-Interveners allege that the open competitive examination process by which applicants for entry-level firefighter positions are screened and selected has an adverse impact upon black applicants. Plaintiff-Interveners also allege that the process is used by defendants to intentionally discriminate against black applicants. However, all of the Vulcan Society’s claims relating to Exam 7029 as barred by the applicable limitations periods for Title VII and must be dismissed. In addition, the Vulcan Society’s claims under 42 U.S.C. §§ 1981, 1983, and State and City Human Rights laws relating to both exam 7029 and Exam 2043 are also time-barred and must be dismissed.¹ Similarly, the claims of the individual interveners Nunez, Gregg and Haywood’s (the “individual interveners”) under Title VII, §§ 1981 and 1983 and State and City Human Rights Law claims relating to Exam 2043 as barred by the applicable limitations periods.

¹ Defendants are not challenging the timeliness of the Vulcan Society’s Title VII claims relating to Exam 2043.

STATEMENT OF FACTS²

On February 27, 1999, defendant, City of New York, administered the written portion of open competitive Examination 7029 for the position of Firefighter. See Intervener Complaint, annexed to the Declaration of Kami Z. Barker (“Barker Decl.”), dated April 25, 2008, as Exhibit “A” at ¶ “37.” Candidates were mailed notices advising them of their scores on this portion of Exam 7029 on August 3, 1999. See Master Record of Examination for Exam 7029, annexed to Barker Decl. as Exhibit “B” at 4571 Eligible List Information (“result cards for MC Test Mailed 8-3-99”). Over two years later, on August 9, 2002, Plaintiff-Intervener the Vulcan Society (“Vulcans”) filed charges with the Equal Employment Opportunity Commission (“EEOC”) concerning the City’s open competitive examination process, specifically firefighter Examination 7029. See Vulcan EEOC charge, dated August 9, 2002, annexed to Barker Decl. as Exhibit “C.”

The Vulcans’ charge alleged, *inter alia*, that the Fire Department of the City of New York (“FDNY”) engaged in “discriminatory policies and practices against Blacks and African Americans on the basis of race and/or color in its recruitment and hiring processes,

² The Statement of Facts is derived from the Intervener Complaint, and the underlying EEOC charges and determinations. The facts and exhibits concerning the dates upon which plaintiff-intervenors received notice of the results of the written examinations are derived from exchanged discovery. Such materials can be considered on a motion to dismiss. Goldstein v. Pataki, 516 F.3d 50, 53, n.1; (2d Cir. 2008) (on a motion to dismiss, a court “may consider the “documents plaintiffs had either in [their] possession or had knowledge of and upon which they relied in bringing suit.” Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) cert. denied, 503 U.S. 960, 112 S. Ct. 1561, 118 L. Ed. 2d 208 (1992)); (district court could consider documents of which the plaintiff had notice and which were integral to their claim in ruling on motion to dismiss even though those documents were not incorporated into the complaint by reference); Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993) explaining that the main problem of looking to documents outside the complaint -- lack of notice to plaintiff -- is dissipated “where plaintiff has actual notice . . . and has relied upon these documents in framing the complaint”

including examinations, scoring, ranking, selection of classes off of the list, selection for participation in Firefighter school, and selection for appointment to the Department” in violation of Title VII.” See Vulcan EEOC charge, Exhibit “C,” at 5.

On December 14, 2002, the City administered the written portion of open competitive Examination 2043 for the position of Firefighter. See Intervener Complaint, Exhibit “A,” at ¶ “37.” Candidates were mailed notices advising them of their scores on this portion of Exam 2043 by March 27, 2003. See Individuals’ EEOC Charge, dated January 22, 2005, Exhibit “C,” at 9, FN18; see also Master Record of Examination for Exam 2043, annexed to Barker Decl. as Exhibit “D” at 4569: Comments (“mailed [Notice of Results] on March 27, 2003”); Gregg Response to Interrogatories, Exhibit “E” at “Response #9;” Nunez Response to Interrogatories, Exhibit “F” at “Response #9.”

On February 22, 2005, the Individual Interveners filed charges of discrimination with the EEOC related to Exam 2043.³ See Individuals’ EEOC Charge, Exhibit “G.” Each of the Individual Interveners alleged having taken, on December 14, 2002, the written portion of open competitive Examination 2043 for firefighter. See id. at 9-10. The Individual Interveners contended they were discriminated against by defendants, both intentionally, and by impact, through the administration of Examination 2043. See id. at 11-12.

On May 21, 2007, the United States Department of Justice (“DOJ”) initiated this action. Thereafter, on July 17, 2007, Interveners wrote this Court requesting to intervene as of right under 42 U.S.C. §2000e-5(f) and provided a proposed Intervener Complaint. A copy of Plaintiff-Interveners’ July 17, 2007 letter is annexed to Barker Decl. as Exhibit “H.” Thus, the

earliest that the Interveners sought to assert their claims in this Court was July 17, 2007. On September 5, 2007, this Court granted Interveners' application but the Interveners failed to file their complaint until September 25, 2007. See Intervener Complaint, Exhibit "A."

ARGUMENT

CERTAIN OF INTERVENERS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION

A timely filing of a charge of discrimination with the EEOC is a prerequisite for any action under Title VII. 42 U.S.C. § 2000e-5(f)(1). A plaintiff has 300 days from when a discriminatory act occurs to file a claim with the EEOC. 42 U.S.C. § 2000e-5(e)(1); AMTRAK v. Morgan, 536 U.S. 101, 109, 122 S.Ct. 2061 (2002). The EEOC charging period is triggered when the discrete unlawful practice takes place. Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S. Ct. 2162, 2166 (2006).

For claims arising under 42 U.S.C. §1983 the limitations period is three years. Bonner v. Gyccione, 178 F.3d 581 (2d Cir. 1999). Similarly, for claims under the New York State and City Human Rights laws the limitations period is also three years. See N.Y. Exec. Law §296; N.Y. C.P.L.R. §214(2); N.Y.C. Admin. Code §8-502(d); Kassner v. 2d Avenue Delicatessen, Inc., 496 F.3d 229, 238 (2d Cir. 2006). The statute of limitations for claims under 42 U.S.C. §1981 is four years. Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369 (2004).

³ The EEOC deemed the Vulcans' August 9, 2002 charge as concerning the 2043 Examination. In fact, the investigation of the August 9, 2002 charge by the EEOC concerned only Examination 2043.

A. The Vulcans' Claims Relating to Examination 7029

1. The Vulcans' Title VII Claims are Time Barred

The time to file a charge with the EEOC runs from the time the discriminatory act occurred, not from the date when the effects of the practice are felt. Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S. Ct. 2162, 2165 (2006).⁴ (citing National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 114 (2002)). Here, the administration of the 7029 written examination on February 27, 1999 was a discrete act by defendants. Ledbetter, 127 S. Ct. at 2165. The effects of the administration of this examination, such as the generation of the rank-order list and appointments off the list, cannot serve to extend plaintiffs' time to file with the EEOC. Accordingly, the time by which the Vulcans should have filed an EEOC charge expired on May 29, 2000, 300 days from the date in which the candidates received their scores. Yet, the Vulcans did not file a charge with the EEOC until August 9, 2002. Thus, the Vulcans are time-barred from asserting Title VII violations related to Exam 7029 and those claims must be dismissed.

The Supreme Court's recent decision in Ledbetter, demonstrates that the Vulcans' claims are untimely. In that case, plaintiff Ledbetter contended that over a 19 year period she received discriminatory evaluations which affected her level of compensation. 127 S. Ct. at 2165. Shortly before retiring, Ledbetter filed a charge of discrimination with the EEOC alleging that the discriminatory evaluations resulted in her earning substantially less than her male comparators. See id. The defendant contended that her complaint was untimely, having been

⁴ Although the Second Circuit seemed to endorse the application of a "continuing violation" theory in the context of an eligibility list based on a allegedly discriminatory civil service test in Guardians Ass'n v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980), the Supreme Court's decision in Ledbetter overrules the theory of continuing violation in this context.

made more than 180 days after even the last of the allegedly discriminatory evaluations. See id. at 2166. In contrast, Ledbetter claimed that each paycheck constituted a violation, thereby triggering a new charge filing period. See id. at 2169. The High Court rejected Ledbetter's theory. See id.

The Supreme Court held that Ledbetter's claims were untimely because the continuing effects (smaller paychecks) of prior discriminatory practices (poorer evaluations) do not give rise to timely violations of Title VII. Id. at 2169. The Court reasoned that "such effects in themselves have 'no present legal consequences.'" See id. (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)). So too in the instant matter are the Vulcans' claims untimely. The continuing effects of the administration of the examination, e.g., the generation of the rank-order list and appointments off the list, do not extend the time to file an EEOC charge beyond 300 days from the administration of the 7029. Thus, the Vulcans' claims concerning Examination 7029 must be dismissed.

2. The Vulcans' 42 U.S.C. §§ 1983 and 1981 Claims are Time Barred

The Vulcans' claims under 42 U.S.C. §§ 1981 and 1983 claims related to Examination 7029 must be dismissed as untimely. The three year statute of limitations for the Vulcans' § 1983 claims related to Examination 7029 expired on August 3, 2002. Bonner, 178 F.3d 581. The four year statute of limitations for the Vulcans' § 1981 claims related to Examination 7029 expired on August 3, 2003. Jones, 541 U.S. 369. The Vulcans did not seek leave of the Court to file these claims until July 17, 2007 and did not file their complaint until September 25, 2007. Thus, the earliest date the Vulcans' asserted their §§ 1981 and 1983 claims related to Examination 7029 was well over four years after the statute of limitations expired. Therefore, these claims must be dismissed.

3. The Vulcans' Claims Under State and City Human Rights Laws are Time-Barred

Claims under New York State and New York City Human Rights Laws must be brought within three years of the allegedly discriminatory acts. See N.Y. Exec. Law §296; N.Y. C.P.L.R. §214(2); N.Y.C. Admin. Code §8-502(d); Kassner, 496 F.3d at 238. The discrete discriminatory act of which the Vulcans complain, that is the administration of Examination 7029, occurred well over three years prior to July 17, 2007. Therefore, these claims are barred by the applicable statutes of limitations.

B. Claims Relating to Examination 2043

1. The Individual-Interveners' Title VII Claims are Time Barred

The discrete discriminatory act of which the Individual-Interveners complain is the written portion of Examination 2043, which was administered on December 14, 2002. As the individual-interveners received notice of their written test results no later than March 27, 2003, the time by which the Individuals had to timely file an EEOC charge expired on January 21, 2004. However, the Individuals did not file a charge with the EEOC until February 22, 2005. Thus, the Individuals are time-barred from asserting Title VII violations related to Exam 2043. Ledbetter, 127 S. Ct. at 2165.

The Individual-Interveners also claim that the rank-ordering of candidates based on scores and the appointment of candidates in rank order intentionally discriminates and has a discriminatory impact on them. See Intervener Complaint, Exhibit "A" at ¶ "33" and ¶¶ "52" – "55." However, the rank-ordering of candidates based on scores and the appointment of candidates in rank order are effects of the administration of the examination, which under Ledbetter, do not trigger nor extend the filing period. Accordingly, the Individuals-Interveners should have challenged this examination within 300 days of March 27, 2003, the date they

received the results of the written examination. As the Individuals-Interveners failed to do so, the Title VII claims related to this examination must be dismissed.

The Individual Interveners' claims pertaining to recruitment for Examination 2043 and the decision to administer Examination 2043 are also time-barred. These allegations accrued no later than December 14, 2002, when the test was administered. The Individual-Interveners did not file their charges of discrimination with the EEOC until February 22, 2005, long after 300 days elapsed. Accordingly, these claims are time-barred.

2. All of Plaintiff-Interveners' Claims Under 42 U.S.C. §§ 1983 and 1981 are Time Barred

All Plaintiff-Interveners' claims brought under 42 U.S.C. §§ 1981 and 1983 relating to Examination 2043 must be dismissed as untimely. The written portion of Examination 2043 was administered on December 14, 2002, and the candidates received their scores on March 27, 2003. Therefore, the statute of limitations for the Plaintiff-Interveners' § 1983 claims related to Examination 2043 expired on March 27, 2006. Bonner, 178 F.3d 581. Thus the statute of limitations for the Plaintiff-Interveners' § 1981 claims related to Examination 2043 expired on March 27, 2007. Jones, 541 U.S. 369. However, Plaintiff-Interveners' did not seek leave of the Court to file these claims until July 17, 2007 and did not file their complaint until September 25, 2007. Thus, the earliest date Plaintiff-Interveners asserted their §§ 1981 and 1983 claims related to Examination 2043 was well after the statute of limitations expired. Therefore, these claims must be dismissed.

3. All of Plaintiff-Interveners' Claims Under State and City Human Rights Laws

Claims under New York State and New York City Human Rights Laws must be brought within three years of the allegedly discriminatory acts. See N.Y. Exec. Law §296; N.Y. C.P.L.R. §214(2); N.Y.C. Admin. Code §8-502(d); Kassner, 496 F.3d at 238. The alleged

discriminatory act about which the Plaintiff-Interveners complain is the administration of Examination 2043 on December 14, 2002. The candidates received their scores on March 27, 2003, well over three years prior to July 17, 2007. Therefore, these claims are barred by the applicable statutes of limitations.

CONCLUSION

For the foregoing reasons, defendants respectfully request that all claims in the Plaintiffs-Interveners' complaint be dismissed, except Intervener Vulcan Society's Title VII claims relating to Exam 2043, and that the Court grant defendant such other and further relief as the Court deems just and proper.

Dated: New York, New York
 April 25, 2008

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