Civil Action No. 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,

Defendants

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CLAIMS OF INTENTIONAL DISCRIMINATION

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Defendants respectfully submit this memorandum of law in support of their motion to dismiss Plaintiffs-Intervenors' complaint on grounds that it fails, under Ashcroft v. Iqbal, ____ U.S. ____, 129 S. Ct. 1937 (2009), to state a claim upon which relief may be granted. Defendants also submit this memorandum of law in support of their motion for summary judgment on the claims brought against Mayor Michael Bloomberg and New York City Fire Commissioner Nicholas Scoppetta, in their individual capacities. Summary Judgment for Mayor Bloomberg and Commissioner Scoppetta is warranted on grounds that the Mayor and Fire Commissioner are entitled to immunity from suit under Federal and State law. Dismissal of the Title VII claims against Mayor Bloomberg and Commissioner Scoppetta in their individual capacities is also sought, as individuals are not subject to liability under Title VII. Defendants further seek dismissal of all claims against the New York City Fire Department and the Department of Citywide Administrative Services, as neither is a suable entity.

POINT I

PLAINTIFFS-INTERVENORS' COMPLAINT FAILS TO STATE A CLAIM FOR INTENTIONAL DISCRIMINATION

Plaintiffs-Intervenors' complaint alleges that Mayor Bloomberg has:

> known of the discriminatory practices in hiring that have adversely affected black applicants for employment in the FDNY and condoned, ratified and authorized such conduct, notwithstanding numerous reports from City civil rights agencies investigating the matter which have demanded reforms in the hiring process.

See Plaintiffs-Intervenors' Complaint at ¶ 28[1], a copy of which is annexed to the Declaration of William S.J. Fraenkel as Exhibit 1. Concerning Commissioner Scoppetta, Plaintiffs-Intervenors

[1] Plaintiffs-Intervenors make this allegation only "[u]pon information and belief..."

make a similar allegation asserting that he "knew or should have known of the discriminatory practices and wrongful acts of the Defendants described in th[e] Complaint, and condoned, ratified and/or authorized such conduct and recklessly disregarded the resulting unlawful consequences." See Plaintiffs-Intervenors' Complaint at ¶ 29.

The only other allegations in the Complaint concerning intentional discrimination appear in paragraphs 33 and 51. In paragraph 33 of Plaintiffs-Intervenors' Complaint it is alleged that:

> [d]espite the numerous EEPC recommendations and reports of the New York City Council urging the City to take action to end the disparate impact of its examination processes on black applicants and potential applicants, and the EEOC's probable cause finding on Plaintiffs-Intervenors' complaints, the City and the FDNY have repeatedly failed and refused to remedy this obviously discriminatory situation. Defendants have thus intentionally – or with reckless disregard – perpetuated a racially discriminatory hiring system.

Then in paragraph 51, Plaintiffs-Intervenors conclude that:

> [b]ecause defendants have been long-aware of the discriminatory impact on blacks of their examination processes, their continued reliance on and perpetuation of these racially discriminatory hiring processes constitute intentional discrimination ....

Even if the allegations in Plaintiff-Intervenors' Complaint were true, and below it will be demonstrated that the allegations do not comport with the evidence, these allegations fail to state a claim of intentional discrimination and must be dismissed.

In Ashcroft v. Iqbal, ____ U.S. ____, 129 S. Ct. 1937, 1949 (2009), the Supreme Court clarified pleading standards for civil complaints. The Court explained that the pleading standard demands more than "an unadorned, the defendant unlawfully harmed me accusation."

The High Court emphasized that pleadings "offering only labels and conclusions or a formulaic recitation of the elements of a cause of action will not do, nor will naked assertions devoid of further factual enhancement." (internal quotation marks omitted.) Id.

The Iqbal court went on to state that the allegations that defendants "knew of, condoned, and willfully and maliciously agreed to subject" the plaintiff to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest", and allegations that the defendant, the former United States Attorney General Ashcroft, was the "principal architect" of this policy, and that defendant FBI Director Mueller was "instrumental" in adopting and executing it, amounted to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim. The Court held that the assertions were conclusory allegations and not entitled to the assumption of truth. Iqbal, ____ U.S. at ____, 129 S. Ct. at 1951. The Supreme Court further explained that for a complaint to be viable, it must plead factual content plausibly showing that the defendants took actions volative of the plaintiff's rights. Id.

The Iqbal case is particularly relevant because, as here, it involved intentional discrimination claims. Referring to "extant precedent," particularly Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 99 S. Ct. 2282 (1979)[2], the Court explained that the "intent" element of an intentional discrimination claim embodies more than simply an intent to take an action that violates rights. The "intent" element also requires more than an intent to act despite knowing that the action's consequences that could affect someone's rights. Rather, the "intent"

[2] In Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296 (1979), the Court held that: "'[d]iscriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" (citation and footnote omitted.)

element of an intentional discrimination claim "involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." Iqbal, ____ U.S. at ____, 129 S. Ct. 1948. The High Court went on to declare that:

> [i]t follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason **but for the purpose of discriminating on account of race,** religion, or national origin....In a *§ 1983* suit or a Bivens action -- where masters do not answer for the torts of their servants -- the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. **In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose Bivens liability** on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

Iqbal, ____ U.S. at ____, 129 S. Ct. at 1948-9(citations and brackets omitted)(emphasis added).

The Iqbal decision is thoroughly consistent with prior decisions of this Circuit. In Collier v. Barnhart, 473 F.3d 444, 449 (2d Cir. 2007), the Second Circuit held that "the requirement of purposeful discrimination means that equal protection is not violated unless the challenged provision was enacted not in spite of its adverse effect on the identifiable group but rather because it would have that effect.")(brackets, citations, and internal quotation marks omitted.) The Circuit has also held that, standing alone, the fact that a particular action has a foreseeable adverse impact is insufficient to establish discriminatory intent. Soberal-Perez v. Heckler, 717 F.2d 36, 41-42 (2d Cir. 1983), cert. denied, 466 U.S. 929, 104 S. Ct. 1713 (1984).

Another Second Circuit case of note is Clyburn v. Shields, 33 Fed. Appx. 552, (2d Cir. 2002). In Clyburn, plaintiffs alleged that a law school intentionally used the LSAT for the purpose of discriminating against African-American law school applicants. However, the Circuit found that the complaint failed to set forth facts substantiating such a theory. In reviewing the complaint the Court of Appeals stated that, at best, the plaintiffs were alleging that defendants had knowledge that the LSAT disparately impacted black candidates and yet defendants continued to use it as an admissions criterion. The Circuit then concluded that even if the complaint could be read to allege that defendants used the LSAT "because of" its adverse effect on African-American applicants, "this bare allegation, without any facts alleged in support, is insufficient to state a claim for intentional discrimination." Clyburn, 33 Fed. Appx. at 556. In the instant matter no facts exist in the Complaint, or in the record, to support the allegation that the defendants used the firefighter hiring process "because of" its adverse effect. Consequently, Plaintiffs-Intervenors' Complaint must be dismissed.

The Supreme Court holdings in Feeney and Iqbal, as well as their progeny, stand in conflict to the assertion Plaintiffs-Intervenors make in paragraph 51 of their Complaint that "[b]ecause defendants have been long-aware of the discriminatory impact on blacks of their examination processes, their continued reliance on and perpetuation of these racially discriminatory hiring processes constitute intentional discrimination." Plaintiffs-Intervenors' "formulaic recitation of the elements of a cause of action" found in paragraph 51 of complaint is insufficient to make out a claim of intentional discrimination. Moreover, the allegations of paragraphs 28 and 29 of Plaintiffs-Intervenors complaint, that the Mayor and Fire Commissioner knew or should have known that City's firefighter hiring practices adversely affected black applicants, and "condoned, ratified and authorized such conduct", parallels the deficient

assertions of the Iqbal complaint. Just as the Iqbal complaint was dismissed against the Attorney General and FBI Director, the claims against the Mayor and Fire Commissioner in the instant matter equally warrant dismissal.

Plaintiffs-Intervenors' Complaint is devoid of any allegation that the City, and particularly Mayor and Fire Commissioner, used the pre-existing firefighter selection process, including Examination 2043, in order to discriminate against black applicants, in contrast to using it despite discriminatory impact on black applicants. Indeed, Plaintiffs-Intervenors' Complaint is lacking any factual allegation that would support an assertion that any defendant, including Mayor Bloomberg and Commissioner Scoppetta, acted at any time for the purpose of discriminating on account of race. Even, the allegations of paragraph 33 of Plaintiffs-Intervenors' Complaint are devoid of such facts.[3]

The most generous reading of paragraph 33 is that defendants had knowledge of the disparate impact on black applicants caused by the examination processes but "failed and refused to remedy this obviously discriminatory situation." Plaintiffs-Intervenors describe the race neutral examination processes as "intentionally... perpetuat[ing] a racially discriminatory hiring system...." However, the "intent" element of an intentional discrimination claim "involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group" Iqbal, ____ U.S. at ____, 129 S. Ct. 1948. As such, Plaintiffs-Intervenors have not plead a cognizable intentional discrimination claim. Plaintiffs-Intervenors have not plead any factual matter that would plausibly suggest that defendants continued or adopted, and then implemented, the hiring practices at issue for the purpose of discriminating on account of race. Consequently, under Feeney, Iqbal and their

[3] Below defendants demonstrate that the assertions of paragraph 33 are misrepresentations if not blatant falsehoods.

progeny, Plaintiffs-Intervenors' intentional discrimination claims must be dismissed for failure to state a claim.

Plaintiffs-Intervenors should not be afforded the opportunity to replead because there is, even now after the close of discovery, no evidence that defendants used the results of Examination 2043 for the purpose of discriminating against blacks. Intentional discrimination claims require proof that the defendants used Examination 2043 because they wanted to disadvantage black applicants. Actions that disadvantaged blacks, but were not done to disadvantaged blacks, are insufficient for an intentional discrimination claim. Indeed, the evidence in this case shows that defendants' actions were objectively reasonable. Therefore, as set forth below, even if Plaintiffs-Intervenors could state a claim, the individual defendants, Mayor Bloomberg and Commissioner Scoppetta, are entitled to immunity from suit.

POINT II

UNDER FEDERAL AND STATE LAW MAYOR BLOOMBERG AND COMMISSIONER SCOPPETTA ARE ENTITLED TO IMMUNITY FROM SUIT AND CLAIMS AGAINST THEM MUST BE DISMISSED

On January 1, 2002, Michael Bloomberg became the Mayor of the City of New York and he immediately appointed Nicholas Scoppetta as Commissioner of the Fire Department of City of New York ("FDNY"). These two individuals were charged with the task of continuing to rebuild the FDNY after the loss of 343 firefighters on September 11, 2001, and the resulting psychological and physical toll on the survivors. Part of the rebuilding effort included hiring new firefighters.

Under the New York State Constitution, Article V, § 6, appointments and promotions in the New York civil service, including appointment to the position of entry level

firefighter, must be made according to merit and fitness. Merit and fitness is to be ascertained, as far as practicable, by examinations. Civil Service Law § 50(1) charges the Commissioner of Department of Citywide Administrative Services ("DCAS")[4] with prescribing the appropriate civil service examination. See also Montero v. Lum, 68 N.Y.2d 253, 258 (1986). And see New York City Charter Section 814.[5]

In furtherance of the New York state constitutional and statutory mandate, DCAS began, during the Giuliani administration, the process of developing a new examination for entry level firefighter.[6] In the fullness of time, Examination 2043 was developed and ultimately administered in December 2002, during the Bloomberg administration. From the results of Exam 2043 an eligible list was established. From that eligible list were new firefighters hired. Plaintiffs-Intervenors assert that by using these pre-existing hiring procedures, and Exam 2043, Mayor Bloomberg and Commissioner Scoppetta engaged in intentional discrimination. Plaintiffs-Intervenors' purported basis for this assertion is that Mayor Bloomberg and Commissioner Scoppetta knew or should have known that using these methods would result in a disparate impact on black applicants. However, even if the Mayor and Fire Commissioner knew the selection process would have a disparate impact, it was nonetheless objectively reasonable for them to believe established rights would not be violated by continuing use the selection

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[4] The DCAS Commissioner performs all of the functions of a "municipal civil service commission," or "municipal commission" as those terms are used in the New York State Civil Service Law. See City of New York v. Civ. Serv. Comm., 6 N.Y.3d 855, 858 (2006).

[5] Charter section 814(2) explicitly vests the DCAS commissioner with power and duty "[t]o make studies in regard to the grading and classifying of positions in the civil service, establish criteria and guidelines for allocating positions to an existing class of positions, and grade and establish classes of positions..." Section 814(3) vests the DCAS Commissioner with the power to schedule and conduct civil service examinations.

[6] See e.g., Plaintiff's Deposition exhibit number 98, annexed to the Fraenkel Declaration as Exhibit 2.

process.

Earlier this year the United States Supreme Court stated:

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity balances two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Groh v. Ramirez, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting) (citing Butz v. Economou, 438 U.S. 478, 507, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) (noting that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")).
>
> Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (emphasis deleted). Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery." Anderson v. Creighton, 483 U.S. 635, 640, n. 2, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam).

Pearson v. Callahan, ____ U.S. _____, _____, 129 S. Ct. 808, 815 (2009). Thus, as a general

rule, public officers are entitled to qualified immunity if: (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights. Kerman v. City of New York, 374 F.3d 93, 108 (2d Cir. 2004).

New York state law offers a similar, if not stronger, defense. New York's highest Court has consistently explained that an official's discretionary acts may not be a basis of liability even if the actions were negligent or malicious. McLean v. City of New York, 12 N.Y.3d 194, 202, 878 N.Y.S.2d 238 (2009). See also, Haddock v. New York, 75 N.Y.2d 478, 84, 554 N.Y.S.2d 439, 443 (1990)("Governmental immunity under the decisional law of this State does not attach to every act, but when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant generally is not answerable in damages for the injurious consequences of that action.")

As demonstrated above, as a matter of law, it was not intentional discrimination for the Mayor and Fire Commissioner to continue using the City's long established firefighter selection process to hire individuals who passed Examination 2043 in 2002. There is no evidence that the Mayor or Fire Commissioner acted with a purpose to disadvantage black applicants, rather than acting with knowledge that black applicants could be disadvantaged. Iqbal, ____ U.S. at ____, 129 S. Ct. at 1949. However, even if Plaintiffs-Intervenors could state a claim for intentional discrimination, the Mayor and Fire Commissioner would be entitled to immunity as it was objectively reasonable for them to believe their acts did not violate law.

Even if an employment selection device has a disparate impact, it may still be used if it is related to the position in question and consistent with business necessity. See 42 U.S.C. § 2000e-2(k)(1)(A)(i); Gulino v.New York State Education Department, 460 F.3d 361,

382 (2d Cir. 2006), as amended, cert denied, Bd. of Educ. v. Gulino, ___ U.S. ____, 128 S. Ct. 2986 (2008). Until this Court's decision in July 2009, there had never been a finding that Examination 2043 was not job related and consistent with business necessity.

The Equal Employment Practices Commission ("EEPC") report, to which Plaintiffs-Intervenors frequently cite and use to allege that the Mayor and Fire Commissioner intentionally discriminated, never finds or suggests that Exam 2043 is not related to the job of firefighter and consistent with business necessity. This EEPC report was forwarded to Mayor Bloomberg on April 8, 2003. A copy of this report is annexed to the Fraenkel Declaration as Exhibit 3 and was Plaintiffs-Intervenors' deposition Exhibit number 48.

First, we must, as Plaintiffs-Intervenors do, leave aside the fact that the EEPC report does not focus on Examination 2043. The EEPC report reviews Examination 7029. Examination 7029 was administered in 1999 under Mayor Giuliani and Commissioner Von Essen, not under Mayor Bloomberg and Commissioner Scoppetta.

Second, the EEPC report never asserts that the examination is improper. Rather, the report recommends that with regard to the written examination and the college credit requirement, an adverse impact study be conducted. The EEPC report further recommends that if adverse impact is found, then a validation study should be conducted. The City Council frequently parroted these recommendations but also never declared the test to be invalid.[7] Plaintiffs-Intervenors have not, and cannot, produce any evidence that the EEPC or the New York City Council ever declared Examination 2043 to be invalid. Thus, Plaintiffs-Intervenors cannot legitimately suggest that the Mayor and Fire Commissioner knew or should have known

[7] Defendants neither suggest nor concede that any such declaration by the EEPC or the City Council would have any legal weight.

based on EEPC and City Council reports that Examination 2043 would not pass muster.[8]

Plaintiffs-Intervenors also refer in paragraph 33 of their Complaint, to the Equal Employment Opportunity Commission's ("EEOC") probable cause finding. The EEOC's probable cause finding was issued on June 24, 2004.[9] A copy of this report is annexed to the Fraenkel Declaration as Exhibit 4. It found impact and also concluded that the City's Development Report did not include the necessary elements of a validation study as those elements are set forth in the EEOC's guidelines. Consequently, the EEOC concluded that test was not "validated according to professional standards." However, as the defendants argued as late as their opposition to the summary judgment motions in this case, there is a distinction between a test being not properly validated and a test being invalid. In fact, the Department of Justice conducted an investigation for nearly three more years before ultimately deciding to challenge the validity of the exam in this action. By that time the City had already begun the process for developing a new examination, 6019, which was administered in January 2008.

Moreover, as matter of law, it was reasonable for Mayor Bloomberg and Commissioner Scoppetta to believe that the examination was a valid job related test. Under both Federal and State law there is a presumption that public officers, such as DCAS' test developers, "act conscientiously and in good faith in the discharge of their duties." Karawia v. United States Dep't of Labor, 2009 U.S. Dist. LEXIS 38832 at *39 (S.D.N.Y. May 6, 2009), citing, Libertatia Assocs., Inc. v. United States, 46 Fed. Cl. 702, 706 (2000). Also see Clemmons v. West, 206 F.3d 1401, 1403-04 (Fed. Cir. 2000)("Government officials are presumed to carry out their duties in good faith and proof to the contrary must be almost irrefragable to overcome that

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[8] Thus, the assertions of paragraph 33 are misrepresentation if not blatant falsehoods.

[9] Unlike the EEPC, the EEOC looked at Examination 2043.

presumption.") (citing Sanders v. United States Postal Serv., 801 F.2d 1328, 1331 (Fed. Cir. 1986)); Szpunar-Lojasiewicz v. IRS, 876 F. Supp. 465, 469 (W.D.N.Y. 1994)(official acts of public officers, in the absence of clear evidence to the contrary, are deemed properly discharged.)(citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S. Ct. 1 (1926)); Driscoll v. Troy Housing Authority, 6 N.Y.2d 513, 518, 190 N.Y.S.2d 663, 666 (1959)(presumption that public officials act honestly and in accordance with law); Coutant v. Poughkeepsie, 69 A.D.2d 506, 510, 419 N.Y.S.2d 148, 150 (2d Dep't 1979)(there is a presumption that public officers have performed the duties imposed upon them by law); Peck Slip Assoc., L.L.C. v. City Council of City of New York, 6 Misc. 3d 510, 789 N.Y.S.2d 806, (Sup. Ct. N.Y. Co,. 2004) aff'd., 26 A.D.3d 209, 809 N.Y.S.2d 56 (1st Dep't), appeal denied, 7 N.Y.3d 703, 819 N.Y.S.2d 870 (2006)(plaintiff did not meet the heavy burden of overcoming the presumption that public officers have performed the duties imposed upon them by law.)

As explained above, New York State and New York City Law vest the DCAS Commissioner and not the Fire Commissioner with the power and authority to develop civil service examinations. Under the New York City Charter, section 815, an agency commissioner, such as Commissioner Scoppetta, is not authorized to develop civil service examination, but only to assist DCAS in analyzing civil service positions. The development of an examination, such as for firefighter, is solely the responsibility of DCAS. As Commissioner Scoppetta explained in his deposition:

> Q. Well, I asked you earlier why given the questions even raised on this agenda as early as January of '02 about possible bias in the written test, why you did not ask that either your department or DCAS do an adverse impact study to see if that were the case?
>
> A. Because the historical data of tests in the past told me that if you can increase the pool of

> whatever the test is, I didn't look at the test, I have no access to the test, nor would I have the expertise to determine it and without having an expert hired to do this, that is DCAS's purview, I looked at the historical data, I saw that roughly every ethnic group passed the test in the same percentage as took it. So if 10 percent of the candidates were minorities, were Latinos, blacks, they tended to get on the list -- they will show up about 10 percent of the passing grade. That is half the problem. The other half is that the grade should be high enough that they're going to get reached. And that told me we should increase the pool of minorities who actually apply and take the test, and we should tutor everyone as we must, offer the tutoring to everyone who wants it, but focus heavily in communities that we were targeting so that they would be placed high enough on the list that they are likely to get hired. That is precisely what happened when we adopted that strategy and changed the message to demonstrate to applicants that we were targeting the benefits of this job, and that turned out to be a message that resonated with the communities we were seeking as opposed to what we thought might resonate, the "heroes wanted" campaign, of the first test. The first test in my time. The proof is in the pudding, look at the makeup of that list. Don't laugh, it is true, look at the list. I'm not laughing at your questions. I don't think you should be laughing at my answers.

See the excerpt of the deposition of Commissioner Nicholas Scoppetta, August 21, 2008 at 83:15 to 85:12, annexed to the Fraenkel Declaration as Exhibit 6.

The Fire Commissioner and Mayor could legally presume that the DCAS examinations were job related and consistent with business necessity. At no time prior to this Court's July decision[10] was "almost irrefragable" evidence presented to either Mayor or Fire

[10] Other than the DOJ's complaint in this action, the evidence reflects only one suggestion that the examination was not valid. That suggestion is attributed to the former president of the Vulcan Society. In a New York Times article from July 1, 1999, Mr. Washington is attributed with the assertion that the examination used to select candidates "was not really a job-related test." This article was shown to the Mayor during his deposition as Plaintiffs-Intervenors'

Commissioner demonstrating that Examination 2043 was unrelated to the job. The EEPC never made such a finding and the EEOC only found in June of 2004 that DCAS' validation process did not meet the EEOC's validation guidelines. The EEOC's determination did not marshal irrefragable proof that the test was not job related. However, the Mayor did more than rely on a legal presumption. The Mayor made his own inquiries. The Mayor explained his actions at his deposition held on August 26th:

> A. I can tell you that after I became Mayor, when we looked at the lack of diversity in the Fire Department and I inquired as to whether or not we were picking from a large enough sample so that we can assure ourselves that we are getting the best, and the brightest and the most talented and brave, and all of the characteristics we were looking for, we certainly looked at the pool of applicants, the input to the test.
>
> Q. Did you look at the test? Do you know if anyone looked at the test to see whether it was slanted, as you put it, in the outcome that Blacks and Latinos were doing much worse on the test?
>
> A. My understanding, after asking my experts, namely, the management of the Fire Department, in addition to various firefighters, probies, Lieutenants, Chiefs Captains, whatever, as to whether or not they thought the test was biased or designed to give a, whether intentionally or not, to give a specific result other than to get the best and the brightest.

Exhibit 100. The Mayor explained that because back in the year 1999, he was not in government he probably would not have read the article at that time. See the deposition of Mayor Bloomberg at 19:4-7. It should also be noted that the examination on which Mr. Washington was commenting was administered well before Michael Bloomberg took office as mayor. Further, at the time of the exam Mr. Washington was a Fire Lieutenant and therefore could not have sat for the examination and could not know its contents. Lastly, the Eligible List based on that examination was not established until November 15, 2000, sixteen and a half months after Mr. Washington made his assertion. At the point Mr. Washington spoke to the New York Times he could not have known how black candidates had fared on the examination.

> And every time I asked, the answer always was the test, according to them was, not biased. But I never saw the test, so I have to rely on them.

See the deposition of Mayor Bloomberg at 61:24 to 63:3 annexed to the Fraenkel declaration as Exhibit 5. The Mayor testified that, to the best of his knowledge, nobody ever alleged that the test was biased. See the deposition of Mayor Bloomberg at 64:14-15. When specifically asked if he knew if anyone had alleged the exam was biased, the Mayor reiterated the inquiries he made:

> Q. So a moment ago you testified that no one told you that the test was biased, but there did come a time when you knew that someone was alleging that the test was biased?
>
> MR. LEMONEDES: Objection to form.
>
> A. There are people alleging things every day, counsel.
>
> Q. But you already knew that there was big problem in the Fire Department diversity? I mean, there was a context.
>
> A. There was certainly a big problem that I was aware about in the Fire Department, which, to the best of my knowledge, was because we did not have a diverse group of people taking the test, applying to take the test.
>
> Q. And did you consider the possibility that the test itself might have been a barrier to employment in the Fire Department?
>
> A. Yes. And I believe I asked, I testified that I asked everybody from the Commissioner on down, and I had nobody tell me that they thought the test was biased, other than if the Vulcan Society sued us and alleged it, I guess they did. And if Paul said it in a meeting, I guess he did. I have no recollection of a specific conversation.

See the deposition of Mayor Bloomberg at 75:23 to 77:2.[11] Plaintiffs-Intervenors counsel later asked if the Mayor thought the examination was job related. The Mayor replied and explained his basis for believing the that the examination DCAS designed was related to the job of firefighter:

> Q. What does it mean to be job-related in your understanding?
>
> A. That they measure the skills required to do the job.
>
> Q. And your basis for believing that these challenged tests were job-related is? The source of that is whom or what?
>
> A. The Fire Commissioner all the way down.
>
> Q. So you are referring to the same people who you spoke to about whether or not the test is biased, the Fire Commissioner, the Chief?
>
> A That's correct.
>
> Q. The firefighters and the probies?
>
> A. That's correct.
>
> Q. And that was your basis for determining that the test was job-related?

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[11] See also, Deposition of Mayor Bloomberg at 81:9-25:

> **Q.** If the test is biased, as has now been found, for example, by the federal court, if it's biased, and whether or not you agree with the court's decision, if it's biased, how does it help to expand your recruitment and then give a biased test?
> **A.** If it were biased, I don't know that it does. But I have no knowledge that the test was biased, and certainly, and back before this judge's decision, everybody I asked said that they did not believe it was.
> **Q.** And the people you asked were the people you previously described?
> **A.** They were a mixture of ethnicities of people in the Fire Department from the Commissioner all the way down to the probies who had just taken the test.

A. That's correct.

See the deposition of Mayor Bloomberg at 123:25-124:18. Finally, Plaintiffs-Intervenors' counsel asked the Mayor why, after the EEPC report and EEOC charge and later findings, did the Mayor "not respond to the issue of a bad test?" The Mayor explained:

> A. I fundamentally disagree with you. I have no knowledge that the test was bad. The experts I talked to said the test was not bad. And I believed then and believe now that the problem was simply that we had not made the communities that we were outreaching to knowledgeable about the attractiveness of this job.

See the deposition of Mayor Bloomberg at 111: 2-11.

Although, owing to the presumption at law that DCAS would properly fulfill its statutory duty to administer an appropriate civil service examination for the position of firefighter, it would have been reasonable for the Mayor and Fire Commissioner to presume that Examination 2043 and the selection process for picking firefighters was valid, the Mayor did more. The Mayor also inquired of people in the firefighting field, from the highest ranking uniformed member of the FDNY, the Chief of Department, to firefighters who had only recently taken the test. The Mayor was assured that the test was not biased and was related to the job.

Under the circumstances delineated above, particularly the need to replenish the FDNY's firefighting ranks in the aftermath of September 11th, and the absence of any definitive evidence that the examination was not job related, the Mayor and Fire Commissioner are entitled to immunity from suit. Although others may assert that the Mayor's and Fire Commissioner's judgment was mistaken, their judgment was not unreasonable. As the Supreme Court recently reaffirmed, the doctrine of qualified immunity covers mistakes in judgment, whether the mistake is one of fact or one of law. Pearson, ____ U.S. at _____, 129 S. Ct. at 815. Therefore, the

Federal claims against the Mayor and Fire Commissioner must be dismissed. Similarly, all state and local claims against the Mayor and Fire Commissioner must also be dismissed under the stronger New York State Governmental immunity provisions. New York state's Governmental immunity doctrine dictates that an official's discretionary acts, such as not electing to halt the firefighter selection process, may not be a basis of liability even if the actions were negligent or malicious. McLean, 12 N.Y.3d at 202, 878 N.Y.S.2d at 238.

POINT III

TITLE VII CLAIMS AGAINST THE MAYOR AND FIRE COMMISSIONER, IN THEIR INDIVIDUAL CAPACITIES, AS WELL AS ALL CLAIMS AGAINST THE FDNY & DCAS MUST BE DISMISSED

As individuals are not subject to liability under Title VII, those claims against Mayor Bloomberg and Commissioner Scoppetta must be dismissed. See Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004).

As neither the FDNY nor DCAS are suable entities, the claims against those agencies must be dismissed. See Warheit v. City of New York, 2006 U.S. Dist. LEXIS 58167 at *40 (S.D.N.Y. Aug. 15, 2006), aff'd., 271 Fed. Appx. 123 (2d Cir. 2008).[12]

[12] In Warheit v. City of New York, 2006 U.S. Dist. LEXIS 58167 at *40 (S.D.N.Y. Aug. 15, 2006), aff'd., 271 Fed. Appx. 123 (2d Cir. 2008), it was noted that a governmental entity may not be sued in its individual capacity absent express consent from the state and that the New York City Charter § 396, expressly mandates that "actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency." The Court concluded that claims against the FDNY must be dismissed.

CONCLUSION

For the foregoing reasons defendants respectfully pray for this Court to enter an order dismissing Plaintiffs-Intervenors' intentional discrimination claims, granting Mayor Bloomberg and Commissioner Scoppetta immunity from suit, dismissing all Title VII claims against Mayor Bloomberg and Commissioner Scoppetta, dismissing all claims against the FDNY and DCAS and the granting defendants all other relief this Court deems necessary and proper.

Dated: New York, New York
September 17, 2009

Respectfully Submitted,

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William S.J. Fraenkel,
Of Counsel.

Civil Action No. 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,

Defendants

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CLAIMS OF INTENTIONAL DISCRIMINATION

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Due and timely service is hereby admitted.

New York, N.Y. ..... *, 200...*

..... *Esq.*

Attorney for .....