

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff, aintiff,

MEMORANDUM & ORDER

-and-

07-CV-2067 (NGG) (RLM)

THE VULCAN SOCIETY, INC., *for itself and on behalf of its members*, JAMEL NICHOLSON, and RUSEBELL WILSON, *individually and on behalf of a subclass of all other victims similarly situated seeking classwide injunctive relief*,

ROGER GREGG, MARCUS HAYWOOD, and KEVIN WALKER, *individually and on behalf of a subclass of all other non-hire victims similarly situated*; and

CANDIDO NUÑEZ and KEVIN SIMPKINS, *individually and on behalf of a subclass of all other delayed-hire victims similarly situated*,

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK,

Defendant.

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NICHOLAS G. GARAUFIS, United States District Judge.

This Order addresses whether eligible black claimants may seek compensatory damages under New York State Human Rights Law and New York City Human Rights Law for certain noneconomic losses due to the City’s disparate impact discrimination, as provided in the court’s Compensatory Damages Order.

I. BACKGROUND

In 2007 the United States brought suit against the City of New York (“City”), alleging that certain aspects of the City’s policies for selecting entry-level firefighters for the New York City Fire Department (“FDNY”) violated Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 20000e et seq. (“Title VII”). (Compl. (Dkt. 1).) Plaintiff-Intervenors intervened in the lawsuit, alleging similar claims of disparate impact and also alleging disparate treatment (raising both theories of liability under federal, state, and local law) on behalf of a class of black entry-level firefighter candidates. (Int. Compl. (Dkt. 48).)

On July 22, 2009, the court granted summary judgment to the United States and Plaintiff-Intervenors, concluding that the written examinations used by the FDNY to screen and rank applicants between 1999 and 2007 had discriminatory effects on certain minority applicants, and that New York City’s reliance on these examinations constituted employment discrimination in violation of Title VII (the “Disparate Impact Opinion”). (Disp. Impact Op (Dkt. 294).) The United States and Plaintiff-Intervenors moved for summary judgment under Title VII only (see United States Mem. in Supp. of Mot. for Disp. Impact Summ. J. (Dkt. 255); Pl.-Int. Mem. in Supp. of Mot. for Disp. Impact Summ. J. (Dkt. 262)), and thus the court ruled only on the City’s liability under Title VII (see Disp. Impact Op. at 1 (“Today, the court holds that New York City’s reliance on these examinations constitutes employment discrimination in violation of Title VII of the Civil Rights Act of 1964.”)).

On October 30, 2009, Plaintiff-Intervenors’ moved for summary judgment on their claims of intentional discrimination under Title VII, New York State Human Rights Law (“NYSHRL”), and New York City Human Rights Law (“NYCHRL”). (See Pl.-Int. Mem. in Supp. of Mot. for Disp. Treatment. Summ. J. at 5-8.) Plaintiff-Intervenors also moved for

summary judgment on their disparate impact claims under NYSHRL and NYCHRL. (Id. (“[B]ecause the Court has already found disparate impact liability against the City under Title VII in its Order of July 22, 2009, . . . the Court should grant summary judgment against the City on the City and State disparate impact claims.”).)

On January 13, 2010, the court granted summary judgment on Plaintiff-Intervenors’ disparate treatment claim, holding the City liable for engaging in a pattern or practice of intentional discrimination against black applicants for the job of firefighter, in violation of Title VII; 42 U.S.C. § 1981; the Equal Protection Clause of the Fourteenth Amendment; New York Executive Law §§ 290 and 296(1)(a) and New York City Administrative Code § 8-107(1)(a) (the “Disparate Treatment Opinion”). (Disp. Treatment Op. (Dkt. 385).) The court also granted, for the same reasons set forth in the Disparate Impact Opinion, Plaintiff-Intervenors’ motion for summary judgment on their disparate impact claims under NYSHRL and NYCHRL. (Id. at 69.)

On December 8, 2011, the court entered a Remedial Order ordering injunctive relief to remedy the City’s past discrimination. (See Remedial Order (Dkt. 765).) The City filed a timely appeal from the court’s judgment of liability for disparate treatment and from many aspects of the Remedial Order. (See Not. of Appeal (Dkt. 766); Am. Notice of Appeal (Dkt. 770).) During the pendency of the appeal, the court issued an order regarding the availability of compensatory damages for certain noneconomic harms that may be awarded to black victims of the City’s discrimination (“Compensatory Damages Order”). (See Comp. Damages Order (Dkt. 974).) The court then issued the Final Relief Order, setting forth eligibility criteria for individual claimants, providing for the award of compensatory damages in accordance with the court’s prior orders and providing a framework for the relief process. (See Final Relief Order (Dkt. 1012).) The City did not appeal from the Compensatory Damages Order or the Final Relief Order.

On May 14, 2013, the Second Circuit issued its decision on the City's appeal and vacated the court's grant of summary judgment for disparate treatment liability. See United States of America v. City of New York, No. 11-5113-CV, 2013 WL 1955782, at *23 (2d Cir. May 14, 2013) ("The grant of summary judgment to the Intervenors on their disparate treatment claim is vacated."). The Second Circuit remanded the disparate treatment claim for trial. Id. at 22. The Second Circuit was clear that "[m]otions for back-pay and damages remain pending in the District Court and are not the subject of this appeal." Id. at 5.

Pursuant to the Second Circuit's decision, Plaintiff-Intervenors interpret the Compensatory Damages Order in such a way that compensatory damages may still be awarded to eligible black claimants. (See Pl-Int. Ltr. re Comp. Damages (Dkt. 1122) at 1.) Plaintiff-Intervenors argue that regardless of the resolution of the disparate treatment claim, eligible black claimants currently are entitled to pursue compensatory damages under NYSHRL and NYCHRL for certain noneconomic losses based on the court's *disparate impact* finding. (Id.) Conversely, the City interprets the court's Compensatory Damages Order to award compensatory damages as a result of its finding of liability for *discriminatory treatment* only and argues that whether eligible black claimants are entitled to compensatory damages depends on the outcome of the discriminatory treatment claim at trial. (City Ltr. re Comp. Damages (Dkt. 1123).) The United States has not stated a position on the issue.

II. DISCUSSION

The court now clarifies that the Compensatory Damages Order awarded damages to eligible black claimants for certain noneconomic losses pursuant to Title VII, NYSHRL, and NYCHRL based both on the court's findings of disparate impact liability and on its finding of disparate treatment liability under the relevant laws.

The City argues that the court's Compensatory Damages Order refers only to the Disparate Treatment Opinion, and thus "awarded compensatory damages as a result of [the court's] finding of liability for discriminatory treatment only." (City Ltr. re Comp. Damages at 1.) However, as set forth above, the court's finding of liability for disparate impact under NYSHRL and NYCHRL was not in the earlier Disparate Impact Opinion, but in the Disparate Treatment Opinion.¹ (See Disp. Treatment Op. at 69.)

The City also points to certain language in the Compensatory Damages Order to argue that the court did not rule that damages flow from disparate impact under NYSHRL and NYCHRL.² However, although the court did not clearly distinguish between the damages authorized by disparate impact liability and those authorized by disparate treatment liability, the court made clear that damages for employment discrimination were authorized under Title VII, NYSHRL, and NYCHRL, and that damages under the latter two do not require a showing of intent to discriminate. (See Comp. Damages Op. at 15 ("Both the NYSHRL and the NYCHRL permit awards of compensatory damages to victims of discrimination. The New York Court of Appeals has recognized that such damages are authorized by New York law, and has noted that compensation under New York law, unlike under federal law, does not depend on a showing of intent to discriminate." (citations omitted)).) Therefore, the City's interpretation of the court's

¹ The Second Circuit vacated certain aspects of the Disparate Treatment Opinion—notably, the court's grant of summary judgment on the disparate treatment claim—but did not vacate the court's ruling on disparate impact under NYSHRL and NYCHRL. See United States of America v. City of New York, 2013 WL 1955782, at *23. Therefore, this portion of the Disparate Treatment Opinion remains the law of the case. Johnson v. Holder, 564 F.3d 95 (2d Cir. 2009) (citation omitted) ("[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case.").

² Specifically, the City points to the court's conclusion that "[t]he NYSHRL and NYCHRL will be interpreted similarly to federal statutes in terms of the kinds of compensatory damages that are available." (City Ltr. Re Comp. Damages at 2 (citing Comp. Damages Opinion at 16).) The context of this sentence, however, clearly shows that the court referred to the types of damages authorized by state and federal law, not the source of the court's authority to award such damages. In any case, this statement is not counter to the court's conclusion that damages stem from disparate impact under NYSHRL and NYCHRL.

order is incorrect. Eligible black claimants may seek damages under NYSHRL and NYCHRL for disparate impact discrimination as authorized by the Compensatory Damages Order. These damages may be awarded in the narrow categories of emotional distress, loss of enjoyment of life, inconvenience, and lost future earning capacity in the limited circumstances described by the Compensatory Damages Order. Eligible black claimants may also seek damages for forms of noneconomic harm that the court did not address in the Compensatory Damages Order but may be awarded such damages only if an award would be consistent with the Compensatory Damages Order and the court's finding of disparate impact liability under NYSHRL and NYCHRL.³

SO ORDERED.

Dated: Brooklyn, New York
June 3, 2013 United

NICHOLAS

/s/
G. GARAUFIS
States District Judge

³ Pursuant to the Second Circuit's decision, Plaintiff-Intervenors' disparate treatment claim will proceed to trial before another court. See United States of America v. City of New York, 2013 WL 1955782, at *23. Accordingly, whether eligible black claimants may be entitled to additional damages for disparate treatment, and the extent of such damages, are issues to be decided by the disparate treatment trial court.