
ELSA GULINO, MAYLING RALPH, PETER WILDS, and NIA GREENE, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant.

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96 CIV. 8414

INTERIM RECOMMENDATION AND INTERIM REPORT

TO THE HONORABLE KIMBA M. WOOD, United States District Court Judge.

John S. Siffert, SPECIAL MASTER

This Interim Report and Recommendation is separated into an Interim Recommendation and an Interim Report in view of the comments I received from the parties in response to my draft Interim Report and Recommendation. The Interim Recommendation sets forth (1) the non-discriminatory reasons for denying or removing a teacher from a permanent teaching position that I recommend be struck at this time; and (2) the defenses that I believe Defendant should be allowed to interpose to Plaintiffs' allegations that adverse employment actions were illegally premised on their failure to the pass the LAST-1.

The Interim Report is submitted as a guide to the parties and the Court on the merit issues that remain to be decided (either by summary process or by hearing), including the burdens of proof and the applicable standards. It is my hope that submitting this Interim Recommendation and Interim Report will expedite future proceedings and perhaps accelerate meaningful settlement discussions.

I. Interim Recommendation

Plaintiffs, a class of African-American and Latino teachers employed by Defendant Board of Education of the City School District of the City of New York ("Defendant" or "BOE"), move pursuant to Federal Rule of Civil Procedure 12(f) to strike Defendant's affirmative defenses. For the reason's set forth below, I respectfully recommend that the motion be **GRANTED** in part and **DENIED** in part.

A. *Background*

The facts of this case are set forth fully in previous opinions by the District Court over the course of this litigation. *See, e.g.*, *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino I*), 201 F.R.D. 326 (S.D.N.Y. 2001) (Motley, *J.*); *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino V*), 907 F. Supp. 2d 492 (S.D.N.Y. 2012) (Wood, *J.*). I recite only those facts relevant to this Recommendation and Report.

On December 5, 2012, the District Court (Wood, *J.*) found that the Liberal Arts and Sciences Test (LAST-1) was not job-related and that the BOE violated Title VII by requiring teachers seeking a permanent teaching license to take and pass the LAST-1. *Gulino V*, 907 F. Supp. 2d 492. The Second Circuit affirmed the decision on interlocutory appeal, and the case proceeded to the relief phase.[1] The District Court appointed me Special Master to "render decisions regarding

[1] On August 29, 2013, while the interlocutory appeal was pending before the Second Circuit, the District Court certified a damages class pursuant to Federal Rule of Civil Procedure 23(b)(3) consisting of:

> All African-American and Latino individuals employed as New York City public school teachers by Defendant, on or after June 29, 1995, who failed to achieve a qualifying score on LAST-1 before the end of the 2001/2002 school year, and as a result either lost or were denied a permanent teaching position.

Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y. (*Gulino VI*), No. 96 Civ. 8414, 2013 WL 4647190, at *12 (S.D.N.Y. Aug. 29, 2013) (Wood, *J.*). On June 18, 2014, the District Court amended the class to include individuals employed as New York City public school teachers who failed the LAST-1 between June 1, 2002 and February 13, 2004. *See* Dkt. No. 447.

classwide damages and relief issues and preside over the process of individual claimant hearings and issue decisions following those hearings." Amended Order of Appointment, Dkt. No. 453, at 1 (July 3, 2014). My duties include issuing findings of fact and conclusions of law relating to "the non-discriminatory reasons for removing a class member from a permanent teaching appointment or denying a class member a permanent teaching appointment." *Id.* at 2.

After a series of initial conferences, it became essential that the parties focus their attention on the burdens of proof and the nature of what they will have to prove at the individual claim hearings. Defendant's Answer contained a Second Affirmative Defense that it "acted reasonably, lawfully, properly, and in good faith," Answer, Dkt. No. 25, at 11, but it was not clear what Defendant claimed constituted reasonable, lawful, proper and good faith conduct. Consequently, I asked Defendant initially to provide a list of legitimate, non-discriminatory reasons for removing a teacher from a permanent teaching position or denying a teacher a permanent teaching position. I asked that Defendant denominate this list as its proposed affirmative defenses.[2] My request was made at the same time that I was fulfilling my obligation to establish a Scheduling Plan, which was approved by the District Court on July 14, 2014. *See* Dkt. No. 461. The Scheduling Plan set forth deadlines for the remainder of discovery. It contemplated that, after claimants filed their claim forms, Defendant would have the opportunity to review claimants' individual teaching files and request third party discovery in order to assess whether any defenses applied to individual claimants.

[2] Plaintiffs urge that I treat the briefs as a motion by Defendant to amend its Answer and that I deny leave to amend the Answer under the applicable standard. *See* Fed. R. Civ. P. 15(a); *see also Pereira v. Cogan*, 54 Fed. R. Serv. 3d 627 (S.D.N.Y. 2002) (Sweet, *J.*). However, Defendant's letter setting forth these legitimate non-discriminatory reasons was not a motion to amend its Answer to add additional affirmative defenses. Rather, it was in response to my request for clarification and akin to a bill of particulars. In any event, the parties agree that all of the listed non-discriminatory reasons for taking adverse employment actions will be treated like affirmative defenses with Defendant bearing the burden of proof. S*ee* Part II.A, *infra*.

On June 27, 2014, Defendant provided a list of fourteen legitimate, non-discriminatory reasons. According to Defendant, a claimant is not entitled to recover if he or she was, or would have been, denied a permanent position for any of these reasons:

1) Background and on-going investigations issues, including prior criminal convictions, arrest record resulting in conviction once employed;
2) Prior poor work history from previous employer;
3) Prior dishonorable discharge from the military;[3]
4) Prior poor work history from a different school district;
5) Poor performers on the Core Battery;
6) Finding of child abuse or neglect in family court, corporal punishment;
7) Substantiated allegation of misconduct resulting from an investigation by either offices of the [BOE] or the City of New York;
8) Finding of conduct violating chancellor's regulations, finding of conduct by [the BOE's] office of Equal Opportunity of discrimination based on race, national origin, sexual orientation, other protected characteristic or improper harassment in the work place;
9) Failure to meet any of the requirements of the State Education Department in effect at that time including failure to pass the content specialty tests, assessment of teaching skills test, failure to take and pass the appropriate coursework and credits required . . .;
10) Failure to take and satisfactorily complete student teaching or the equivalent teaching experience requirements, State required workshops (child abuse, etc.);
11) Failure to possess United States citizenship . . ., or possess/maintain valid H1 Visa as required;
12) Failure to apply for a position, failure to obtain master's degree within required time;
13) Unsatisfactory performance and/or poor conduct while employed including corporal punishment, excessive absence and lateness, abandonment of position, insubordination, neglect of duty, incompetence in the classroom (unsatisfactory service), failure to maintain state certification while employed; and
14) Budget reductions in a school, resignation from employment with [BOE], retirement, being found guilty of charges under [N.Y. Educ. Law § 3020-a] and terminated, termination of employment while serving as a probationary teacher at [BOE], death, promotion/transfer out of a teaching position to non-teaching, supervisory or administrative position or unauthorized leave.

Defendant's Letter to Special Master, at 6-7 (June 27, 2014). Defendant's letter also included the defense that some individuals should have re-taken the LAST-1 more promptly than they did.

[3] Defendant withdrew this affirmative defense on August 11, 2014.

At conference, the parties disagreed about the viability of these defenses, the applicable burdens of proof, and the type of evidence required to prove the defenses. To clarify these issues, I issued a briefing timetable that supplemented the July 14, 2014 Scheduling Plan. As steps in the larger process, I requested that Defendant submit a brief regarding its good-faith evidentiary basis for asserting these defenses, and I set a deadline for Defendant to produce all evidence it had in its possession regarding its defenses. I also invited Plaintiffs to move to strike those defenses they believed failed as a matter of law.

Based upon the briefings for this motion, I recommend striking three of Defendant's defenses that fail as a matter of law. I recommend not striking the other defenses at this time and not treating the current motion as one for summary judgment at this time. I believe the better course is to await the filings by claimants of their claims and the review by Defendant of the individual claimant files. After the parties determine which claims present genuine issues of material fact regarding eligibility for relief, it will be ripe to consider disposition of the claims on the merits, either by summary proceedings or by hearing.

A. *Motion to Strike Standard*

The Federal Rules of Civil Procedure provide that, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(c). The court, acting on its own or on a motion by an opposing party, "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Motions to strike are generally disfavored, and the "standard to prevail on a motion to strike is demanding." *Tardif v. City of New York* , No. 13 Civ. 4056, — F.R.D. —, 2014 WL 2971004, at *1 (S.D.N.Y. July 2, 2014) (Wood, *J.*) (internal citation and quotation marks omitted). To

prevail on a motion to strike, the moving party must establish (1) that no question of fact exists which might allow the defense to succeed; (2) that no substantial question of law exists, the resolution of which could allow the defense to succeed; and (3) that the moving party would be prejudiced by the inclusion of the defense.[4] *Cognex Corp. v. Microscan Sys., Inc.* , 990 F. Supp. 2d 408, 418 (S.D.N.Y. 2013) (Rakoff, *J.*); *see also Estee Lauder, Inc. v. Fragrance Counter, Inc.*, 189 F.R.D. 269, 271–72 (S.D.N.Y. 1999) (Sweet, *J.*). When a defense is "insufficient as a matter of law, the defense should be stricken to eliminate the delay and unnecessary expense from litigating the invalid claim." *Estee Lauder* , 189 F.R.D. at 272 (internal citation and quotation marks omitted).

B. *Recommendation on Defenses to Strike*

a. Three Defenses Should Be Struck

I recommend that the following defenses be struck because they present no open question of law and because there are no set of facts on which they can succeed: (1) poor performance on the Core Battery; (2) failure to promptly re-take the LAST-1; and (3) budget restrictions at schools.

i. *Poor Performers on the Core Battery (Defense #5)*

Defendant contends that a claimant's poor performance on the Core Battery test, the use of which the District Court found did not violate Title VII, could be used as a legitimate non-discriminatory reason for not hiring a teacher. I recommend striking this affirmative defense.

[4] Courts in this Circuit have split on whether Rule 8(a)'s heightened pleading standard applies to affirmative defenses. *See Tardif*, 2014 WL 2971004, at *1–3 (summarizing split). If the heightened standard applies, then an affirmative defense should be dismissed pursuant to Rule 12(f) unless the party asserting the defense "alleges enough facts to state a claim for relief that is plausible on its face." *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008) (Chin, *J.*) (internal citation and quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). While the weight of recent authority is against applying the heightened standard, *see Tardif*, 2014 WL 2971004, at *2–3, it is not necessary to decide this issue to resolve this motion; my recommendation would be the same under either standard.

First, Defendant admits, and the record establishes, that the BOE phased out the Core Battery and replaced with it with the LAST-1. An individual who failed the Core Battery but subsequently took and passed the LAST-1 would have been eligible for a permanent teaching position. Because the Core Battery results were not used as a basis to deny permanent teaching positions to teachers who had taken the LAST-1, Defendant cannot now rely on these results as a legitimate non-discriminatory reason for demoting or not hiring class members. *See Robinson v. Metro-N. Commuter R.R.* , 267 F.3d 147, 162 (2d Cir. 2001) (holding that an employer must establish "that a legitimate non-discriminatory reason *existed* for the particular adverse action" (emphasis added)), *abrogated on other grounds by Wa l-Mart Stores, Inc. v. Dukes* , 131 S. Ct. 2541 (2011).

Second, to the extent Defendant's position is that the Core Battery results have predictive utility – *i.e.*, that some test-takers scored so poorly on the Core Battery that the Defendant can predict that they never would have passed a non-discriminatory test of the liberal arts and sciences — this argument also fails. As the Core Battery was phased out and the LAST-1 phased in, class members were denied the opportunity to re-take a non-discriminatory test. It is impossible to determine what would have happened had they been given this opportunity.[5] This uncertainty will not be cured by additional discovery.

ii. *Failure Promptly to Re-Take the LAST-1*

Defendant has asserted that some claimants could have avoided adverse employment actions by re-taking and passing the LAST-1 and that others who eventually passed the test

[5] The argument also fails because there is no basis in fact to believe that the results of a previous test would have been an accurate measure of the applicant's qualifications as of the time of the later adverse employment action. The Core Battery and LAST-1 are not general intelligence tests that have prospective validity. *Cf. Cohen v. W. Have n Bd. of Police Comm'r s*, 638 F.2d 496, 503 (2d Cir. 1980) (noting that while tests of general intelligence have retrospective validity, tests of physical agility do not). Rather, the "tests measure only what is learned in general college courses," *Gulino I*, 201 F.R.D. at 329, and an applicant who scored poorly on the Core battery could have raised his score by additional study.

should have re-taken it more promptly than they did.[6] Defendant does not clarify whether it considers the failure to promptly re-take the LAST-1 to be a legitimate, non-discriminatory reason for an adverse employment action or a failure to mitigate. Regardless, I believe the defense has no merit and recommend that it be struck.

First, Defendant's position has no legal support. Defendant has identified no authority for its proposition that a victim of illegal discrimination must re-submit himself or herself to the same discriminatory instrument to become eligible for monetary relief. The City of New York presented a similar argument in the *Vulcans* case, arguing that firefighters had to re-take another version of a discriminatory test to be eligible for relief. Judge Garaufis squarely rejected this argument:

> The court agrees with the United States that victims of a discriminatory exam do not need to subject themselves to an identically crafted and administered exam in order to perfect their rights to relief from the first exam. Using the terms of the duty to mitigate, such a rule would require victims to engage in unreasonable efforts to attempt to mitigate their damages, and using the terms of equity, such a rule would be inequitable.

United States v. City of New York , No. 01 Civ. 2067, 2012 WL 3637410, at *3 (E.D.N.Y. Aug. 22, 2012). I believe that requiring employees to persevere through a gauntlet of discriminatory tests in order to preserve their eligibility for backpay would frustrate Title VII's "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody* , 422 U.S. 405, 421 (1975).

Second, the District Court rejected this argument in the context of class certification, holding that teachers who failed the LAST-1 should not be excluded from the class "because

[6] Defendant also hypothesizes that other "individuals may have initially failed the LAST-1 but later passed the exam before any adverse employment action was taken." *Defendant's Letter to Special Master*, at 7 (June 27, 2014). However, individuals who re-took and passed the LAST-1 prior to suffering an adverse employment action are not members of the class. *See Gulino VI*, 2013 WL 4647190, at *12 (defining class).

they failed to retake the exam as quickly as they could have." *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino VI*), No. 96 Civ. 8414, 2013 WL 4647190, at *5 (S.D.N.Y. Aug. 29, 2013) (Wood, *J.*). Even if the District Court's finding is not binding here as law of the case, Defendant's argument is no more persuasive now than when it was mustered in opposition to class certification.

iii. *Budget Reductions in a School (Part of Defense #14)*

I believe that the District Court's previous findings in this case foreclose Defendant from asserting that budget restrictions at schools were legitimate non-discriminatory reasons for not hiring teachers. For this reason, I recommend striking this defense.

Although a lack of vacancies theoretically can be a legitimate non-discriminatory reason for not hiring a candidate, *see, e.g.*, *Cohen v. W. Haven Bd. of Police Comm'rs* , 638 F.2d 496, 502 (2d Cir. 1980), in this case the BOE faced a severe teacher shortage throughout the time period in question. The shortage forced the City to seek renewals on numerous teachers' temporary licenses, including temporary licenses of teachers who had failed the LAST-1, so that those teachers could remain in the classroom and teach a full course load, albeit it at a lower salary and with fewer benefits. *See Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino III*), No. 96 Civ. 8414, 2003 WL 25764041, at *8 (S.D.N.Y. Sept. 4, 2003) (Motley, *J.*). As part of this litigation, the District Court found "that, given the large number of vacancies for full-time teachers during the time period at issue, class members who failed LAST-1, but satisfied all other requirements, would have received a full teaching license and would have been hired as a full-time teacher." *Gulino VI*, 2013 WL 4647190, at *6; *see also* Gill Decl., Dkt. No. 330 (estimating annual teacher vacancies of 8,000 to 13,000). Given this previous finding, I conclude that the present argument is barred by the law of the case and recommend that the

defense be struck. *See Playboy Enters., Inc. v. Dumas* , 960 F. Supp. 710, 716 – 17 (S.D.N.Y. 1997) (Kaplan, *J.*) ("The doctrine of law of the case dictates that . . . unreversed factual findings and legal conclusions . . . in the same case should not be disturbed absent changed law, changed circumstances or clear error."). Even if a specific school had budget restrictions, the claimant would have been hired as a permanent teacher and placed somewhere in the school system.

b. The Remaining Defenses Should Not Be Struck

I recommend not striking the remaining affirmative defenses because I believe it is premature to do so at this time. Plaintiffs urge the striking of these defenses now, even though the identity of the claimants is unknown, the time for the filing of claims has not expired, and Defendant has not had an opportunity to review the claimants' files. At this stage, striking the defenses would require me to speculate that no facts could emerge that might enable Defendant to prevail on those defenses at least for some of the individual claimants.

Plaintiffs make the powerful point that the discovery produced to date establishes that the employment decisions based on misconduct are discretionary and therefore the Defendant cannot prevail on the proffered defenses absent objective proof that the non-discriminatory reasons were in fact the actual reason for the adverse employment action. Nonetheless, for the reasons described in the Interim Report, it is plausible that facts could emerge that would render the remaining defenses viable at least for some claimants.[7] For this reason, I recommend that

[7] Even if I were to construe plaintiffs' motion as a motion for summary judgment, I would recommend denial of the motion as premature. Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 842 F. Supp. 2d 682, 702 (S.D.N.Y. 2012) (Sweet, *J.*); *see also* Fed. R. Civ. P. 56(c). Summary judgment should not be granted, however, until after the nonmoving party has "had the opportunity to discover information that is essential to [its] opposition to the motion for summary judgment." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (internal citation and quotation marks omitted). As a review of the claimant files may reveal information that is essential to Defendant's opposition, this is not the "rarest of cases" where summary judgment should be granted against a party that has not been afforded a full opportunity to conduct discovery. *Id*.

discovery not be cut off at this juncture as to issues raised by these remaining defenses and that Defendant be permitted to assess whether a factual basis exists for persisting in each of the defenses.

II. Interim Report

The balance of this Interim Report is included to give the Court and the parties further guidance as to what I believe are the issues of fact to be tried, the burden of proof with respect to each issue, and what the proof must show in order for either party to prevail. This Interim Report is not intended to constitute a ruling on any legal issue nor should it be used as law of the case. I leave open the possibility that either party may persuade me that my current thinking is inadvisable. Nonetheless, the parties have briefed these issues, and I have given them extensive thought. In the interest of moving this case forward – and because the parties have indicated it would be helpful if the clients saw in writing my current view on these issues – I submit this portion of my Interim Report and Recommendation in the form of a Report and not a Recommendation that requires further action at this time.

A. *Disparate Impact Standards*

In disparate impact cases, such as this, where plaintiffs have established a Title VII violation, "each person seeking individual relief such as back pay . . . need only show that he or she suffered an adverse employment decision and therefore was a potential victim of the proved discrimination." *Chin v. Port Auth. of N.Y. & N.J.* , 685 F.3d 135, 151 (2d Cir. 2012) (internal quotation marks and citation omitted). Once the employee makes this showing, "the employer bears the burden of persuading the trier of fact that its decision was made for lawful reasons." *Id*. The employee is entitled to relief unless the employer "can establish by a preponderance of the

evidence that a legitimate non-discriminatory reason existed for the particular adverse action." *Robinson*, 267 F.3d at 162.

The employer can satisfy this burden by establishing that the employee was in fact subjected to the adverse employment action because of a legitimate non-discriminatory reason. *See Chin*, 685 F.3d at 151–52. The parties appear to agree that in the event that Defendant can establish by a preponderance of the evidence that an adverse employment action, in fact, was taken because of one of the surviving non-discriminatory reasons, in that case, Defendant will prevail on liability.

The parties do not agree about what should happen in the event that the evidence does not establish that the actual reason for the adverse employment action was one of the remaining defenses. Defendant urges that even if it cannot sustain its burden on the actual reason for the employment action, it may still prevail by establishing by a preponderance of the evidence that it would have taken the same adverse action even if the claimant had not failed the LAST-1.

Even if Defendant is correct that in some circumstances it will be able to prevail on liability absent proof that the adverse employment action was actually for non-discriminatory reasons, it is indisputable that Defendant faces a demanding standard. As the Second Circuit wrote, "[w]hen the defendant has attempted to prove the existence of a nondiscriminatory reason for the failure to hire but it remains uncertain whether the plaintiff would have been hired in the absence of the discriminatory practice, and the uncertainty flows from that practice, the issue should be resolved against the defendant, the party responsible for the lack of certainty." *Cohen*, 638 F.2d at 502; *accord Sanders v. Madison Square Garden, L.P.* , No. 06 Civ. 589, 2007 WL 2254698, at *11 (S.D.N.Y. Aug. 6, 2007) (Lynch, *J.*), *withdrawn in part on reconsideration by* 525 F. Supp. 2d 364 (S.D.N.Y. 2007). After a review of the case law and the parties' arguments,

I believe it could help guide the parties for me to report my current view on Defendant's burden and what it must show in order to prevail. In the event that Defendant cannot establish that the adverse employment action was, in fact, based on a lawful reason, it is my view – subject to being persuaded otherwise by further briefing by the parties – that Defendant will have to prove by a preponderance of the evidence: (1) that the underlying event or objective conditions occurred; (2) that it was inevitable that the BOE would have discovered the events and (3) that it was inevitable that the BOE would have taken an adverse employment action under those circumstances.[8] To satisfy the third prong, in most cases Defendant will likely have to establish objective criteria that the decision-maker would have used to reach the underlying employment decision. *See United States v. City of New York* , 847 F. Supp. 2d 395, 431–32 (E.D.N.Y. 2012) (Garaufis, *J.*). Absent these criteria, I believe that I would simply be substituting my judgments on how the claimants should have been treated by speculating about how the claimants would have been treated by the BOE. *See id.*; *cf. Stewart v. Gen. Motors Corp.* , 542 F.2d 445, 452 (7th Cir. 1976) ("Because [the employer] had no objective standards by which to measure whether a given employee deserved a promotion, deciding in individual cases whether a particular person would have been promoted but for racial discrimination would lead the district court into a quagmire of hypothetical judgments, in which any supposed accuracy in result would be purely imaginary." (internal citation and quotation marks omitted)).

[8] I recognize that *Cohen* and its progeny do not phrase the standard in terms of "inevitably," but in terms of resolving uncertainty against the defendant to the extent it is responsible for that uncertainty. Plaintiffs note in their briefing that the more common formulation in the case law is that the defendant must prove that an employment decision "without doubt" would have occurred as a result of a non-discriminatory hiring criteria. *See Plaintiffs' Supplemental Memorandum of Law in Support of Their Motion to Strike Defendant's Proposed Affirmative* Defenses, at 8-9 (Aug. 4, 2014). I adopt the "inevitably" formulation used by Judge Lynch in *Sanders v. Madison Square Garden*, 2007 WL 2254698, at *11. Even though he was writing in the specific context of after-acquired evidence, the formulation is applicable here. It is not clear to me, at the time of writing this Interim Report, whether it will make a difference in the outcome if I were to apply the "without doubt" standard instead of the "inevitably" formulation.

I am not suggesting that Defendant may not obtain discovery or offer evidence of facts that it was not aware of at the time of the adverse employment action. Defendant correctly notes that it may rely on such after-acquired evidence of employee wrong-doing in order to establish that the employee inevitably would have been terminated for that misconduct. *See McKennon v. Nashville B anner Publ'g Co.* , 513 U.S. 352, 362-63 (1995). However, such after-acquired evidence does not appear to be a defense to liability. Instead, the case law suggests that it simply limits the relief available to a claimant.[9] *See id.*

B. *The Nature of the Proof Required to Prevail on the Remaining Defenses*

Defendant's non-discriminatory reasons for taking adverse employment actions ("affirmative defenses") can be sub-divided into two broad categories: (1) Employee misconduct that could justify an adverse employment action (defenses #1, 2, 4, 6, 7, 8, 13 and part of 14); and (2) Additional certification requirements necessary for a permanent teaching position (defenses #9, 10, 11 and 12). The following part of this Interim Report details how I expect to apply the legal standards to these two categories based upon the briefing to date. Again, this is provided as a guide to assist the parties in assessing their discovery needs and the nature of proof that they will be required to adduce in order to prevail.

a. Employee Misconduct (Defenses #1, 2, 4, 6, 7, 8, 13, and parts of 14)

[9] An employer who seeks to rely on after-acquired evidence must establish that the employee's wrongdoing — which may include workplace misconduct, criminal misconduct, or misconduct that compromises the integrity of the employer's business — "was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon*, 513 U.S. at 362-63; *see also Sanders*, 2007 WL 2254698, at *11 (requiring employer to prove that employee "inevitably would have been terminated due to her alleged misconduct"). The case law suggests that if an employer establishes that an employee inevitably would have been terminated because of his or her wrongdoing, backpay should be awarded "*from the date of th e u nlawful d ischarge to th e da te the n ew in formation w as d iscovered*," unless "extraordinary equitable circumstances" require a different result. *McKennon*, 513 U.S. at 362 (emphasis added).

Defenses # 1, 2, 4, 6, 7, 8, 13 and part of 14[10] reflect categories of misconduct, including prior criminal convictions, a finding of child abuse or neglect in family court, insubordination, and incompetence in the classroom, that Defendant alleges could form a basis for denying an individual a permanent teaching position.

Defendant may prevail at individual hearings if it is able to prove that one of these non-discriminatory reasons in fact was the actual, non-pretextual basis for the adverse employment action.

Alternatively, to establish that claimants' misconduct inevitably would have led to the same adverse employment actions regardless of their LAST-1 scores, Defendant will likely need to articulate objective criteria that would have controlled the employment decisions absent the discriminatory policy.[11] This will require a fact-intensive inquiry, the outcome of which will depend both on the teacher's conduct and on the standards that were actually applied at the time.

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[10] Defense #14 consists of eight separate defenses: (1) budget reductions in a school; (2) resignation; (3) retirement; (4) being found guilty of charges under § 3020-a and terminated; (5) termination of employment while serving as a probationary teacher; (6) death; (7) promotion/transfer out of a teaching position to non-teaching, supervisory or administrative position; and (8) unauthorized leave. Of these, termination pursuant to § 3020-a, termination as a probationary teacher, and unauthorized leave fall within this category of employee misconduct. Resignation, retirement, death, and promotion/transfers are relevant to damages calculations, but do not render a claimant ineligible for relief. Finally, as discussed *supra*, a budget reduction in a school is not a valid basis for denying a teacher a permanent teaching position or removing a teacher from a permanent teaching position and is not relevant to any damages calculation.

[11] To date, Defendant has produced Chancellor's Regulations, collective bargaining agreements, and employee guides that outline the hiring and termination procedures. These do not necessarily establish, however, the circumstances under which a teacher inevitably would have been denied or removed from a permanent position. They do not indicate, for instance, what standards a BOE employee customarily considered to determine whether an infraction was of such severity that it necessarily would have rendered a teacher ineligible for a permanent teaching position.

Defendant also has submitted the Declarations of Theresa Europe, Deputy Counselor to the Chancellor for Case Assessment and Review, and Gary Barton, a former BOE administrator and current BOE consultant. The Europe Declaration provides data from the Administrative Trial Unit on § 3020-a cases, but it does not delineate misconduct cases by the type of misconduct. The Barton Declaration provides statistics from the BOE's human resources database. That declaration states that there were 79,033 teacher terminations, both voluntary and involuntary, during the relevant time period. The declaration also provides statistics for the total number of involuntary teacher terminations based on certain affirmative defenses. For instance, the declaration notes that 1,016 teachers were involuntarily terminated after receiving an unsatisfactory performance rating. However, the declaration does not indicate (1) how many total teachers met each affirmative defense criteria; or (2) how many

Although discovery is now closed as to evidence of policies, union contracts, employee guides or similar documents that Defendant already has in its possession,[12] Defendant will have the opportunity to review the claimants' files and request additional appropriate discovery from third parties based upon the contents of those files. Information gleaned from individual files conceivably may establish that an individual inevitably would have been subjected to an adverse employment action due to his or her misconduct. For instance, it is plausible that a claimant's file will indicate that the appropriate supervisor had concluded that the claimant should not be placed in a permanent teaching position and that this recommendation was not carried out only because the claimant's LAST-1 score rendered the situation moot.

Further discovery may reveal other means for Defendant to satisfy its burden and refute Plaintiffs' interpretation of the evidence produced to date. After the parties have had the opportunity to develop the record by examining the claimants' files, it will be possible to determine if there is any remaining uncertainty and whether that uncertainty should be resolved against Defendant. *See, e.g.*, *Cohen*, 638 F.2d at 502.

b. Additional Certification Requirements (Defenses #9, 10, 11, & 12)

At this stage of the proceedings, subject to further briefing, I do not believe that it would be sufficient for Defendant merely to establish that a claimant did not complete additional certification requirements, apply for a permanent position, or obtain proper work authorization. While an employer can defeat a Title VII claim by establishing that a claimant failed to meet non-discriminatory requirements in place at the time, *see id.* at 502-03, an applicant who is discriminated against early in an application process need not complete additional steps that are

termination proceedings were initiated for each affirmative defense criteria (including proceedings that did not result in termination). Without this additional context, it remains to be determined whether the provided statistics will be sufficient to satisfy Defendant's burden, even if they are admissible.

[12] At conference, Defendant stated it will not produce additional evidence of this type.

futile in light of the discrimination, *see Int'l Bhd. of Teamsters v. United States* , 431 U.S. 324, 367 (1977). Here, the claimants were not required to complete these additional requirements before taking the LAST-1. Rather, these requirements were additional steps in an ongoing application process that a claimant could have completed after passing the LAST-1. A claimant who would have otherwise completed the requirements and been hired may have decided to abandon the process as a result of failing the LAST-1.[13]

Nonetheless, in the Interim Recommendation I recommended that these defenses not be struck at this time in order to provide Defendant the opportunity to establish by a preponderance of the evidence that a claimant who did not fulfill these requirements would not have done so even if he or she had not been required to pass the LAST-1. For example, a claimant could admit that he or she never intended to complete the applicable certification requirements. To be clear, claimants need not speculate about what they might have done, and any residual uncertainty caused by the discriminatory policy will be resolved against Defendant; however, I decline to speculate at this time about how claimants will respond to this line of questioning.[14]

[13] Defendant asserts that the defenses can serve as automatic bars because the certification requirements have independent value apart from obtaining a permanent teaching license. According to Defendant, because a claimant might have pursued these requirements even if he or she was not seeking a permanent teaching position, the claimant would have made the same decision regardless of his or her score on the LAST-1. This argument is unpersuasive. Defendant is obviously correct that independent reasons may exist for pursing or not pursuing some of the requirements. However, the deciding factor to forgo the additional requirements may nonetheless have been the claimant's realization that, even if he or she completed the requirements, he or she would not be eligible for a permanent teaching position. My current thinking is that in order to succeed on this defense Defendant will have to establish by a preponderance of the admissible evidence that the failure to pass the LAST-1 did not cause a claimant to cease his or her efforts to complete the certification requirements.

[14] Of course, Defendant will have to have a good faith basis for pursuing such a line of questioning. *Cf. United States v. Concepcion*, 983 F.2d 369, 391 (2d Cir. 1992). Presumably, access to the claimants' files will inform Defendant whether to proceed with this defense.

Discovery may also reveal that some claimants attempted unsuccessfully to fulfill the requirements despite failing the LAST-1.[15] Such evidence may be relevant, if not persuasive, in determining whether the outcome would have been any different had the claimant passed the LAST-1. If Defendant can establish that, absent discrimination, a claimant inevitably would not have completed the certification requirements or applied for a position, then that claimant should not recover. *Cf. E.E.O.C. v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.* , 164 F.3d 89, 102 (2d Cir. 1998) (requiring district court to conduct fact-finding as to each claimant to determine whether the claimant would have completed apprenticeship program to become a full journey worker).

C. *Relevance of the Defenses to Remedy/ Damages*

Many of the proffered defenses may pertain to other aspects of the relief phase of the case. For example, the misconduct defenses may be relevant to eligibility of a particular claimant to priority hiring relief, even if the evidence of misconduct does not bar liability for backpay. Likewise, the amount of damages may be affected by when the misconduct occurred, when it inevitably would have been discovered, and when the inevitable employment decision would have been made. These issues will have to be sorted out after the claimants come forward, their files have been reviewed, and further appropriate discovery has been taken.

Additional issues with respect to damages and mitigation are currently under discussion with the parties. A goal is to see if the parties' respective experts can agree on existing statistical studies that can provide a rational methodology for determining potential offsets to lost health and welfare benefits that claimants otherwise would have received had they been employed in permanent teaching positions.

[15] Plaintiffs contend that a failed attempt to fulfill the additional requirements should not be a bar to recovery because, absent failing the LAST-1, the applicant might have tried multiple times to pass the requirements. This may be true, but it is a factual question that will need to be resolved through further discovery and at individual hearings.

III. Conclusion

For the foregoing reasons, I recommend that Plaintiffs' motion to strike Defendant's affirmative defenses be **GRANTED** with respect to poor performance on the Core Battery (defense #5); failure to re-take the LAST; and budget restrictions at schools (part of defense #14) and **DENIED** with respect to all other defenses.

IV. Objections

Pursuant to the Court's Amended Order of Appointment, the parties are hereby directed that if they have any objections to this Interim Recommendation and Interim Report, they must, within fourteen days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable Kimba M. Wood, United States District Judge, to the offices of the undersigned, and to any opposing parties. Any requests for an extension of time for filing objections must be directed to Judge Wood.

Dated: New York, New York
October 24, 2014

JOHN S. SIFFERT
Special Master