

11-5113-cv

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VULCAN SOCIETY, MARCUS HAYWOOD, CANDIDO NUNEZ, ROGER GREGG,

Intervenor Plaintiffs-Appellees,

– v. –

CITY OF NEW YORK,

Defendant-Appellant,

NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY DEPARTMENT OF
CITYWIDE ADMINISTRATIVE SERVICES, MICHAEL BLOOMBERG, Mayor,
NEW YORK FIRE COMMISSIONER NICHOLAS SCOPPETTA, in their individual
and official capacities,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE MERIT MATTERS

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INTEREST OF AMICUS CURIAE¹

Merit Matters, Inc., founded in April of 2010, is a New York State Domestic Not-For Profit Corporation doing business as “Merit Matters.”

The organization was created out of concern for deteriorating standards for hiring and promoting within the FDNY. It serves as an advocacy group committed to ensuring equal employment opportunity to all and guaranteed results to no one. Merit Matters strenuously advocates that standards for hiring within the FDNY must be meaningful, elevated, equally applied, and blind to skin color, race, gender, ethnicity, sexual orientation or any other factor that is irrelevant to one’s merit and qualifications for hiring or promotion. Merit Matters emphatically rejects the “equal outcomes” approach to equal opportunity, and believes that Title VII lawsuits are often used as a vehicle through which legitimate, race-blind, employment examinations and race-neutral selection procedures are unfairly attacked by unqualified and unsuccessful job applicants who seek judicial invalidation of such procedures purely as a means to gain unfair preferences and advantages

¹ The Appellant, the City of New York, the respondent, The United States of America, as well as the Plaintiff-Intervenors, have consented to the filing of this brief. Pursuant to FRAP 29, Merit Matters states that no counsel for a party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

over others on the basis of their race or ethnicity. Merit Matters believes that race-based hiring and promotional selection procedures imposed as a remedy for racial statistical disparities in qualifications are not only unlawful in all circumstances but antithetical to the FDNY's mission.

Moreover, imposition of such measures on public safety and first responder agencies has a deleterious effect on morale, and undermines the respect and proper functioning essential to the department. In essence, Merit Matters advocates that written and physical examinations for the FDNY should ensure that the most qualified applicants are chosen and that entry tests are not designed to have as many applicants of a particular skin color or ethnicity pass. Merit Matters is motivated by the need to ensure the safety of firefighters by protecting them from unsafe personnel practices, and to maximize the FDNY's ability to respond most effectively to all manner of public catastrophes. Merit Matters advocates for the setting and maintaining of meaningful standards for the entry-level hiring of firefighters in New York City, and especially high standards for the selection of those who will be allowed to serve as commanding officers to lead firefighters into dangerous rescue operations. Anything less would severely jeopardize the health and safety of the 8 million residents, 50 million visitors and 11,000 firefighters in New York City.

Since its formation, Merit Matters has garnered widespread support from FDNY members and residents of New York City, all of whom share the same concerns and commitment to the principles of Merit Matters. In a show of support for Merit Matters' mission, over 8,000 individuals have signed an on-line petition labeling themselves as "concerned citizens" and active or retired "FDNY members". Additionally, twenty-nine FDNY fraternal and civic groups as well as athletic teams have officially endorsed Merit Matters and support its mission. These groups represent firefighters from diverse racial and ethnic backgrounds. It should be noted that the FDNY is the largest fire department in the nation and the second largest in the World. Although founded years after the current litigation commenced, Merit Matters is now the strongest unified voice in New York City advocating for a strictly merit-based hiring system within the FDNY.

In carrying out its mission, Merit Matters engages the public, members of the FDNY and the media in public dialogue about the issues of concern to the FDNY, including issues in this litigation. Toward that end, the organization's website contains a voluminous record of verified facts, statistics, data, articles, opinion pieces, and references on these issues and this litigation in particular. Merit Matters' executive board members appear regularly in media outlets, communicate with various officials and agencies

on these issues, and are pro-active in disseminating information that rebuts and counters what it believes is false and misleading information circulated and publicized by special interest groups that seek racial preferences in hiring.

The interest of Merit Matters in this case is simple. It stems from its commitment to equal opportunity to all and special treatment for none while maintaining meaningful standards in the profession

INTRODUCTION AND SUMMARY OF ARGUMENT

Merit Matters respectfully submits this Amicus Curiae brief in support of the City of New York, which challenges and seeks reversal of the District Court's summary judgment, and its finding that the City engaged in deliberate and intentional race discrimination against blacks and Hispanics in the hiring of entry-level firefighters.

The City presented a plethora of evidence that negated any inference or allegation that it engaged in intentional discrimination through hiring examinations. Indeed, the opposite is true as the evidence demonstrated that the City not only fully complied with all legal mandates and EEOC guidelines in developing the civil service examinations for the FDNY, but

also engaged in a long-standing pattern and practice of actively recruiting minority candidates for the FDNY. Numerous factual issues existed to warrant the denial of summary judgment.

The City also seeks vacatur of the injunction as it is both unnecessary and overreaching. The District Court found that the use of the multiple choice entry-level examinations violated Title VII. The relief granted, however, strays well beyond those examinations and thus exceeded the District Court's remedial authority. Additionally, the District Court demonstrated a degree of partiality, such that reversal of the injunction and reassignment of this case to another judge on remand is warranted.

ARGUMENT

I. THE FINDING OF INTENTIONAL DISCRIMINATION SHOULD BE REVERSED.

The District Court erred in finding that the City intentionally discriminated against blacks and Hispanics. The clear evidence demonstrates that the City, before administering the FDNY civil service examinations, conducted an appropriate job analyses, devised and administered legally valid and race-neutral examinations, undertook valiant

efforts to recruit minorities, and ultimately hired candidates on a completely color-blind basis. In the face of such evidence, the finding of intentional discrimination is simply shocking.

Since summary judgment takes away a party's right to present a case to the finder of fact, it is to be granted only in limited circumstances where no material issue of fact exists. *Nationwide Life Ins., Bankers Leasing Ass'n.*, 182 F.3d 157 (2nd Cir. 1999). Summary judgment in favor of the party who has the burden of proving the intent, or "discriminatory motive," is rarely granted and improper "when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

In *Guardians Association of New York City Police Dept., Inc. v. Civil Service Commission.*, 630 F.2d 79, (2d Cir. 1980), this Court determined that content validation was an appropriate method for assessing whether a civil-service examination has sufficient validity in order to be used to select applicants for a civil service job. In essence, a test that had a disparate impact, but underwent suitable job analysis, reasonable competence and was job-related, would be a legally permissible examination.

In interpreting the Equal Employment Opportunity Commission Uniform Guidelines on Employee Selection, the Court stated:

“The Guidelines describe various aspects of content validation, but do not neatly list ingredients of an adequate exam. From our study of the Guidelines, we distill five attributes of an exam with sufficient content validity to be used notwithstanding its disparate racial impact. The first two concern the quality of the test's development: (1) the test-makers must have conducted a suitable job analysis, and (2) they must have used reasonable competence in constructing the test itself. The next three attributes are more in the nature of standards that the test, as produced and used, must be shown to have met. The basic requirement, really the essence of content validation, is (3) that the content of the test must be related to the content of the job. In addition, (4) the content of the test must be representative of the content of the job. Finally, the test must be used with (5) a scoring system that usefully selects from among the applicants those who can better perform the job.” *Id.* at 95.

The record makes clear that there is not a scintilla of evidence to support a conclusion that the City purposefully and intentionally discriminated against blacks and Hispanics in entry-level recruiting and selection procedures for the FDNY; to the contrary, its procedures and examinations were race-neutral and race-blind. The District Court here erroneously bootstrapped entirely common and expected statistical disparities in outcomes into a finding of racism and intentional discrimination on the part of numerous city officials.

Exams #7029 (administered in 1999 and producing an eligibility list used through December 2004) and #2043 (administered in 2002 and producing an eligibility list used through January 2008), were designed by Dr. Frank Landry, a highly-regarded Industrial and Occupational Psychologist. (A95-96; 464-470; 484). In administering these two examinations, the City relied on Dr. Landry's validation study. (A464 and 484) He was also responsible for creating examination #0084 which was administered in 1994 (A464-470). In a further effort to ensure that the tests were valid, the City took the step of having firefighters meet with the expert to confirm that no duties and responsibilities of entry-level firefighting had changed. The City also assembled a panel of firefighters to evaluate, or "link," critical job tasks such as search and rescue, scene evaluation, ventilation, and salvage, with aptitude for such tasks the subject of the examinations. (A466-470; 482-492).

Additionally, in 2002, the City, on its own initiative, sought assistance from Columbia University to conduct a study of its FDNY diversity strategy, specifically addressing recruitment and hiring practices. (A1271-1274; 1304-1305; SPA 7). The result was four reports generated by academics and graduate students in the Masters in Public Administration degree program. (SPA 7).

Before the 1999 exam was administered, the City undertook extraordinary efforts to encourage minorities to join the ranks of the FDNY through numerous initiatives targeted exclusively at minorities. Merit Matters strongly believes that the City should not engage in recruitment efforts that exhaust resources in favor of one racial or ethnic group over another. However, the City's extraordinary efforts in this regard most assuredly dispel any notion that it engaged in intentional race discrimination and purposefully excluded minorities from equal employment opportunity.

By 1998, the Emergency Medical Service functions and personnel came under the auspices of the FDNY. Many of the EMS emergency technicians and paramedics were minorities. In an effort to increase diversity in its firefighter ranks, the City offered a "promotional" exam to those within the EMS that would afford any test-taker who obtained a passing grade the ability to be hired in advance of anyone who took the FDNY open competitive examination. (A639; 652; 747-749). The Vulcan Society was invited to join the Recruitment Advisory Committee in an effort to assist the City in recruiting African Americans for the FDNY. (A650; 700-701).

In further preparation for administering the 1999 test, numerous advertisements were printed in both English and Spanish in minority-

oriented newspapers and broadcast on television and radio stations. (A694). A \$2.7 Million advertising campaign targeted to minorities was implemented in 2002. (A694). FDNY recruiters were sent to schools and community groups that served a large minority population. (A694; A5154). The City designated twenty recruiters per day who were assigned specifically to conduct recruitment efforts in minority neighborhoods throughout New York City. (A 686-694). The City posted 700 recruitment posters *-per week-* around the City, and enlisted numerous black celebrities to record public service announcements. (A694).

It has been acknowledged that, “[T]argeted recruitment efforts also help to negate any inference that an employer deliberately discriminated on the basis of race.” *Washington v. Davis*, 426 U.S. 229, 246 (1976). In *Washington*, two African American males applied for positions in the Washington, D.C. police department, and sued after being rejected, asserting that the department was liable for intentional race discrimination by implementing a test that required verbal skills, but which was failed disproportionately by African Americans. In rejecting their claims, the Supreme Court held that a selection procedure’s racially disparate impact, without more, is not unconstitutional for lack of discriminatory intent. (“disproportionate impact is not irrelevant, but it is not the sole touchstone of

an invidious racial discrimination forbidden by the Constitution. ". *Id.* at 243).

Application of *Washington v. Davis* to the facts of this case clearly required judgment in the City's favor on the intentional discrimination claims. The extensive recruitment efforts undertaken by the City clearly negate any suggestion of an intent to exclude minorities from hire. If the City's efforts proved anything, it was the City's unyielding commitment to recruiting, hiring, and retaining minority firefighters. In the face of such a compelling, undisputed showing, the District Court instead bootstrapped unintentional statistical disparities into a finding of intentional race discrimination. The error is manifest and the judgment should be reversed outright.

Additionally, the exams themselves were non-discriminatory as they specifically tested job-related abilities. At issue were multiple choice tests consisting of 85 questions intended by the City to measure the following nine abilities: Written Comprehension, Written Expression, Memorization, Problem Sensitivity, Deductive Reasoning, Inductive Reasoning, Information Ordering, Spatial Orientation and Visualization. (A466-470; 482; 492) All of these tested abilities are pertinent and vital to the work of a firefighter.

Although testing job-related qualities, the examination questions were not extraordinarily challenging. In fact the answers are contained in either a picture provided or in a short sentence immediately above the question. To provide this Court an understanding of the types of questions posed to the candidates, a few examples are included.

From the 1999 exam #7029, question “6” provided the test-taker with a picture of a fire scene.² Smoke and flames were coming out of a store clearly marked as a “Deli”; a firefighter was spraying water into the same store. The question that followed asked, “Which store is the fire located in?” The answer choices were; (A) The bar, (B) The deli, (C) The pizza store, and (D) The video store. Question “15” from the same exam listed protective gear and the order in which it is to be put on. #5 is a pair of gloves, and #6 is a helmet. The question is: “You have just completed putting on your gloves, the next item you should put on is?” The answer choice was (D) Helmet.

Exam #2043 offered equally simplistic questions. Question “45” stated that while at the scene of a car fire on a street, a firefighter was told to inform the supervisor of any dangerous conditions at the scene. It asked which one of the following conditions would be considered the most dangerous to the firefighter at the scene of the car fire? The answer choices

² Official copies of exam #7029 and #2043 can be found at <http://documents.nytimes.com/new-york-city-firefighter-examinations>.

were: (A) The car is leaking gasoline; (B) The car has four flat tires; (C) Vehicle traffic has come to a complete stop at the scene; and, (D) The car's windshield is broken.

Being a firefighter and first responder requires sufficient intellect and basic proficiencies fundamental and vital to success at every level of the FDNY. A substantial amount more goes into fighting a fire than just spraying water on flames and hoping for the best. The nine abilities tested through these examinations are extremely important to most jobs, but are particularly important to firefighting.

Reading comprehension is an extremely important job-related skill. There are approximately fifteen volumes of FDNY operating procedures, consisting of thousands of pages of information. The Fire Academy requires enormous amounts of reading in order to learn and understand departmental operations. One cannot graduate the academy without demonstrating proficient reading comprehension. Once on the job, there are countless additional manuals and policies and procedures one must absorb in order to accumulate knowledge and to keep apprised of updates to procedures. Advancement within the department mandates proficiency in reading comprehension as well. Written expression, another trait tested on the

examinations, requires a firefighter to be able to convert into words that which they see in a building during inspections.

Firefighters are also required to issue written violations of building and safety codes. A driver of the fire truck must have memorized the streets and intersections of their sector, and those of the surrounding sectors, and must be able to quickly identify the quickest route to a particular address. A firefighter needs to memorize procedures pertinent to their assigned tasks at a fire and be able to carry out those procedures without referring to manuals or asking colleagues for instructions. Each member of the firehouse is assigned varying tasks based upon their shift assignment, and procedures will vary based upon the nature of the emergency. A firefighter must be prepared to adjust from carrying out the 'standard' procedures if, upon arrival at a scene, unexpected or changing circumstances require it. For example, the approach in battling a fire varies if the structure is an old law tenement, a new law tenement, a brick brownstone, a row frame home, a fire-proofed multiple dwelling, a high-rise multiple dwelling, a commercial unit or a hospital. Spatial orientation is another key requirement for firefighting. A firefighter on a rescue may be called upon to go into dark, smoke-filled rooms that contain uncontrollable fire raging all around. They can typically crawl thirty to fifty feet over furniture, bicycles, toys, dozens of

countless personal belongings ,and then suddenly have to retreat because part of the ceiling or floor collapsed in that room, with fire now burning all around them. Knowing if you made a left, then a right, followed by a long narrow hallway and then another right when crawling into the room may be what saves you. This mental assessment must take place with lightning speed and surgical accuracy while your supply of oxygen is rapidly diminishing. If the firefighter is not cognizant of how to operate the oxygen system or loses track of his location, it may require other firefighters to put themselves in danger to perform a rescue.

A firefighter usually only gets to look at a building for a few seconds before entering it to battle the blaze and search for victims. As short as that may be, it is critical that those precious seconds be used in a meaningful way to quickly assess the number of floors, where the fire escapes are, how many units exist per floor, and whether it is commercial or residential space on each such floor. Once the firefighter is inside, the supervisor outside needs to immediately know pertinent details about the fire, for example: where the victims were found in relation to the back stairwell other members are ascending. Before a window is broken or a roof is cut to vent the fire, a firefighter should have assessed the weather, ascertained directional changes in wind, and calculated how that impacts on his decisions and next moves.

Firefighters are called upon to conduct building inspections. The procedure for conducting such inspections of multi-use high-rise skyscrapers is laid out in dozens of pages in an FDNY manual. Performing inspections properly is critical to enforcement of building codes. When a fire alarm is sent to a firehouse, the firefighter on housewatch is responsible for receiving and interpreting information provided by the Critical Information Dispatch System. It appears on a small ticket and serves as a brief assessment of the conditions firefighters might face, such as structural features that are not readily apparent from outside the building. It is important that the firefighter on the housewatch first interpret the codes on the ticket and then competently relay that information. The firefighters must comprehend and retain what is being told to them in less than ideal circumstances because at the same time, there are sirens wailing and horns blasting.

Additionally, a firefighter could be called upon during any given shift to have to complete numerous forms pertaining to equipment, scheduling issues, or reports. During a fire, an assessment must be made to determine which walls and ceiling must be opened to search for the extension of the fire, securing evidence of possible arson for the Fire Marshal's investigation, and using codes every few seconds to communicate status and conditions of the fire to outside supervisors. Firefighters must employ sound reasoning

skills in ascertaining whether a fire on the top floor of an "H"-type multiple dwelling in the "A" wing could mean that the fire could extend via the cockloft in the throat to the "B" wing.

To put it mildly, a firefighting unit in action is operating at best in a state of organized chaos, and how many outcomes turn to tragedy can depend on the skill and knowledge of those who respond.

The City unquestionably bent over backwards to accommodate and recruit black and Hispanic applicants, to the near exclusion of whites. Against this record, the District Court concluded that the City intentionally discriminated against minorities and deliberately excluded them from opportunities based merely on how these demographic groups scored on the examinations. Indeed, the opposite is true as the evidence demonstrates that the City not only fully complied with all legal mandates and EEOC guidelines in developing the civil-service examinations for the FDNY, but also engaged in a long-standing pattern and practice of actively recruiting minority candidates for the FDNY.

II. THE REMEDIAL MEASURES IMPLEMENTED ARE OVER-REACHING AND PREMISED ON ERRONEOUS FINDINGS

Despite the summary judgment finding of intentional discrimination, the injunction must be vacated as it reaches components of the FDNY that were never at issue in the liability phase of this lawsuit. Despite the broad equitable powers conferred by Title VII, the District Court lacked authority to order the FDNY to change practices that have no nexus to the exams that formed the sole basis of the liability determination.

Where a court acts to correct civil rights violations, it must ensure that injunctive remedies correspond to the nature and the scope of the violation. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 577-78 (1983); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *EEOC v. HBE Corp.*, 135 F.3d 543, 557-58 (8th Cir. 1998); *Bridgeport Guardians*, 482 F.2d 1333, at 1340-41 (2nd Cir. 1973).

Here, the factual allegations were confined to the design and use of the City's written exams. Indeed, the Vulcans were granted leave to intervene only on the condition that they limit their allegations to the issues set forth by the Department of Justice, with the sole addition being their claim that the same facts constituted intentional discrimination. For that specific reason, the District Court refused to allow the Vulcans to amend their complaint to challenge other elements of the City's hiring practices,

including recruitment, character review and examination #6019. However, despite the District Courts limiting the liability phase to those two exams, years later it entered an injunction directly relating to practices well beyond the exams, including recruitment, character review and examination #6019!

Since the findings of liability were based solely upon the written examinations, the Court certainly had the authority to order the City to devise a lawful method of testing, and to limit interim hiring until a valid examination was crafted. Indeed, those are the only injunctive remedies sought by the Government. The District Court has presumed the liability findings bestow the power to interfere with practices which were neither alleged by the Vulcans nor found to be discriminatory.

The injunction is invasive judicial oversight of the FDNY for a minimum of ten years via a special monitor with no knowledge or experience in firefighting and disaster response. The District Court's judgment and injunction essentially require the City to lower standards and abandon efforts to achieve excellence. Merit-based hiring is being replaced with race-based or quota-based hiring. It would be a setback for blacks, Hispanics and whites alike to lower standards and to hire along racial lines. Distilled to its core, the challenged orders are but a judicial attempt to achieve racial balance in the FDNY, and that has no support in law. See

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 70, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

III. The Decisions Below Undermine Public And Firefighter Safety.

“For over 200 years, the New York City Fire Department has served the people of New York with uncommon bravery, skill, and determination. New York’s status as one of the world’s great cities is owed in no small part to the commitment and unflagging effort of its firefighters, who provide the city with a degree of security that is rarely acknowledged only because it is so rarely called into question. On September 11, 2001, the world witnessed the magnitude of that commitment, and nobody who was in the city on that day or in the years after will forget the heroism that was displayed by firefighters as the tragedy unfolded, or the role that the Fire Department played in rallying and sustaining the city during the aftermath.” The District Court below made these observations in its order of January 13, 2010. (Docket #385) But the District Court’s judgment and orders betray all of those statements.

Merit Matters believes it is important for the Court to understand the practical implications of the District Court’s errors.

Intentional race discrimination is repugnant. When such conduct is alleged against a municipality by individuals seeking preferential treatment, premised on erroneous and misleading evidence, it is worse than repugnant because it creates a toxic workplace and political atmosphere. In this case, unfounded allegations that the FDNY intentionally discriminates against blacks and Hispanics, work to jeopardize the health and safety of firefighters. No fire department or public safety agency should be forced to endure the corrosive impact of such divisive racial allegations absent clear proof that they are true. Such allegations were hardly proved in this case; rather, in order to impose the most severe and wide-ranging forms of remedial measures on the City and the FDNY, the District Court bootstrapped clearly unintended disparate impact into a finding of intentional discrimination, against a complete absence of evidence of discriminatory intent. The issues of equality, opportunity, and diversity are very important to Merit Matters. The organization seeks to include individuals from all minority groups to join the ranks of the FDNY. However, they must be selected according to their abilities and not by the lowering of standards or quotas.

The finding that the City intentionally discriminated against blacks and Hispanics affords the court, and the court appointed monitor, the ability

to take control of the FDNY with unfettered discretion on endless levels. This has already resulted in and will continue to result in special preference and treatment premised upon skin color and ethnicity, and consequently, a deterioration of morale in the FDNY. Among firefighters, the importance of camaraderie cannot be overstated; when lives are at stake, the trust, confidence and respect among firefighters has a direct impact on each individual firefighter's ability to remain calm and focused, and to persevere under the most difficult physical and emotional circumstances. That camaraderie is undermined when firefighters are made to feel like members of a certain race, rather than members of a unit, and when suspicions are aroused that a firefighter is less than highly qualified for the job but was imposed on the ranks by judicial order.

The need to maintain high-standards also cannot be disputed. When a firefighter is faced with a deadly situation, or a citizen of New York City is in a burning high-rise building, each should presume that only the most qualified and competent firefighter is by their side or coming to their rescue. The orders below will undoubtedly work to eliminate that fair presumption.

Firefighters who know that they are entering a profession in which they will be judged based on their abilities and their continuing acquisition of skills and knowledge, will find the job a worthy and rewarding one, worth

their investment of time and devotion. If, however, they are forced to contend with non-merit-related factors of skin color and race in the ranks of their department, their morale, trust, and performance is adversely affected.

The facts of this case provide a cautionary tale for the ill effects on those who hold the most dangerous job in the country of unfounded and unsupported charges that their employer is an intentional race discriminator, and their workplace a “bastion of white male privilege.” The District Court’s judgment, if left undisturbed, will have a destructive impact on the FDNY, not only because it requires the selection of new firefighters based on raw racial quotas, but because it is also premised on an unfounded, and ill-considered, condemnation of the City for non-existent discriminatory intentions, and an equally unfounded and unfair characterization of New York City firefighters as a group that owes its existence to white male privilege.

Most recently, as part of the remedial measure aimed at combating the alleged intentional discrimination, the District Court ordered door-to-door home visits of black applicants who failed to properly complete the upcoming test application. During these personal visits a Vulcan Society member would assist the candidate in completing the application, to be re-submitted four months past the deadline. (DE #783). Merit Matters is

troubled by the extension of such an undeniable privilege on the explicit basis of race, especially against the District Court's own racial rhetoric denouncing the FDNY as a bastion of white male privilege based on nothing but statistics. The fact that the District Court will deny the privilege of untimely submission of applications to candidates of another race raises troubling implications: it amounts to a judicial order for racially disparate treatment of applicants. Merit Matters believes firmly that a failure to properly complete and timely submit an application itself flags one's unfitness for the job. Notably, Merit Matters offered to conduct home visits to all candidates regardless of skin color. That offer was rejected.

The City was precluded from hiring candidates from test #6019 unless such hiring conformed to a quota. (DE #527). Since "quota" is an undesirable term, various judicial euphemisms have been employed: "proportional hiring," "applicant flow", "target," "goal" "timetable," and "hiring preference". (DE #527). The bottom line is that these proposals all call for the lowering of standards and dispensing with merit-based hiring in favor of outright racial balancing.

IV. THIS COURT SHOULD EXERCISE ITS ADMINISTRATIVE DISCRETION TO DIRECT A RANDOM REASSIGNMENT OF THIS CASE TO ANOTHER JUDGE.

The City has asked this Court to exercise its inherent authority to direct a reassignment of this case to another judge on remand. Amicus understands that such requests are not made lightly but sparingly, and believes the City's request in this case is well-founded and justified. Reassignment is necessary in order to preserve the appearance of neutrality and judicial detachment, and to foster public respect for, and deference to, court judgments as this case is of great interest and significance to New York City's firefighters and its residents, all whom deserve to be protected by the most educated, knowledgeable and qualified firefighters chosen on the basis of merit and not skin color, race or ethnicity.

Amicus agrees with and supports the City's positions respecting the errors it assigns to the District Court's findings of intentional and deliberate race discrimination, its claims of procedural unfairness, and its challenges to the injunction and remedial orders. Merit Matters does offer this Court the following additional arguments and considerations respecting the City's request for a reassignment of this case to another judge on remand.

Merit Matters has indeed been vocal in expressing its concerns over the District Court's rulings in this case. The challenged remedial orders,

including the District Court's longstanding refusal to allow the City to hire new firefighters through its own means, have had and will in the future have serious and direct consequences for firefighters, their working conditions, workplace morale, and most especially, their safety on the job. Thus, there is clear justification for such vocal expression from Merit Matters.

The leaders and members of Merit Matters have a particular interest in their freedom to express their thoughts and opinions regarding these important issues without fear or concern that the presiding judge is monitoring their speech. Equally important is Merit Matters' interest in ensuring that the presiding judge in this case refrains from casting aspersions on its leaders and members by voicing undue and injurious opinions that they are resistant to "integration" (and thus support segregation), lack appreciation for "civil rights" and "equal opportunity," and seek to maintain the FDNY as a "bastion of white male privilege." (SPA 16; 85-86). Given that it has issued numerous press releases and publicly expressed opinions critical of the District Court's procedures, liability determinations and remedial posture, Merit Matters rationally concluded that its leaders were the unnamed but unmistakable targets of the District Court's inquiries of Fire Commissioner Cassano regarding what actions he might be willing to take against "senior uniformed officials" who "were writing columns in the

newspaper” or “criticizing the process or the litigation here.” (Appellant Brief at 72, hereinafter AB; A3711). Over the City’s objection, the District Court, sua sponte, summoned Fire Commissioner Cassano as a witness.

The question of reassignment turns on “whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous,” “whether reassignment is advisable to preserve the appearance of justice,” and “whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (in banc); *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136, 147 (2d Cir. 2000) (ordering reassignment following eight years of litigation); *Scott v. Perkins*, 150 Fed. App’x 30, 34 (2d Cir. 2005) (reassigning 10-year-old civil case under *Robin*). Here, these factors favor reassignment.

This is particularly so given that there was no jury in this case, and in the end, as with any Title VII case, it is the District Court that decides issues of equitable relief, determines how long remedial orders shall remain in place, and possesses authority to hold parties in contempt for non-compliance with orders. Indeed, “[w]here the judge sits as the fact-finder,

reassignment is the preferable course, since it avoids any rub-off of earlier error.” *United States v. Robin*, 553 F.2d 8, at 10 (2d Cir. 1977).

Whether this Court affirms or not, this case must undergo further proceedings on remand.³ Given the District Court’s questioning of the City administration over its decision not to settle but to exercise its right to defend the action on its merits, any reversal or vacatur of the District Court’s judgment and orders would create a discomfoting remand environment.

Amicus agrees with the City that the record reveals a demonstrated need to eradicate an appearance - one the District Court has unquestionably fostered- that the District Court is partial. As an organization representing many FDNY officers and firefighters as well as private citizens, Merit Matters is especially concerned that the District Court appears to have focused on those who have voiced an opinion or published letters that criticize the Court or express disagreement with its rulings.

Trial judges should not concern themselves with or be moved by press and other media publications, or the extra-judicial statements of individuals whom the Court believes should stay mute because they work, at whatever

³ Apparently, and regrettably in amicus’s view, remand proceedings are a given since the City’s brief announced that it does not challenge certain earlier disparate impact findings made by the District Court. Presumably, therefore, there will be some form of remedial proceedings concerning those findings.

level, in the City administration or in the FDNY. The FDNY is the nation's largest fire department and the second largest in the world.

The City suggests the District Court here used its examination of Commissioner Cassano as a means to communicate the Court's frustration with a matter impertinent to legal questions before it: public criticism of the Court by private citizens who also serve as FDNY personnel.

Amicus also submits that an objective observer might also reasonably infer another purpose to the line of questioning: to chill such speech by intimating the Fire Commissioner might lawfully take action to stifle or punish the critics, and worse, that such consequences might also be imposed by the District Court through the exercise of its remedial powers, a reasonable inference given the Court's claimed need to foster a "positive compliance atmosphere about civil rights and full employment opportunity."

Aside from what the City aptly describes as the District Court's steering of its examination of Cassano in this new direction, there was the spectacle of a city fire commissioner pointing out to a federal judge perceived First Amendment issues associated with the Court's suggestion that some official action should be taken against FDNY officers who write columns in newspapers "criticizing the process or the litigation here." (AB 59; A3711-3712). Amicus agrees with the City that the District Court

appeared to have an untoward interest in how the Court is portrayed in the media. And the Court's choice of words respecting uniformed personnel indicate its failure to appreciate that passionately held disagreements and debate attend judicially ordered racial quotas in employment, and court-ordered denials of jobs to those who qualified for hire pursuant to race-neutral civil service tests and selection criteria. It is a zero sum game. One man's "civil rights" is another man's civil deprivation and one judge's vision of "equal opportunity" is another man's unlawful racial preferences. As demonstrated below, the District Court chose to demonize one side of that legitimate debate, and in so doing, created a problem of appearances, and instilled in Merit Matters a concern about its free speech rights.

In addition to the foregoing, the District Court employed what amicus considers being inflammatory rhetoric in denigrating those in the FDNY who, in the District Court's words, "criticized the process or the litigation here." Such critics, the Court declared, were "resistant to efforts to integrate" the department. The Court further characterized the critics as individuals who lack a positive attitude about "civil rights and full employment opportunity."

The message was subtle but plain enough: those who express disagreement with the District Court's procedural handling of the case, its

factual findings, or its remedial orders will be bench-cast as benighted bigots who prefer to maintain the FDNY as an institution which the District Court, in a previous instance of regrettable language,, maligned as a “bastion of white male privilege” that is a “shameful blight” on the City.⁴ (AB 74; SPA 16, 85-86). Since Merit Matters is in fact committed to civil rights and equal employment opportunity, it respectfully submits that the District Court’s comments were not only hurtful but injurious to the firefighters Merit Matters represents.

By casting opponents and critics, whether parties or not, as people opposed to “integration,” “equal opportunity” and “civil rights,” the District Court covertly but no less effectively likened its critics to 1960’s-era segregationists and racists. Whether this was the District Court’s intent is of no matter. What matters is the appearance created by these gratuitous judicial statements, none of which fairly relate to a legal question properly before and decidable by the Court. Moreover, the District Court’s resort to such unnecessary and provocative -yet easily avoidable - rhetoric, which the Court undoubtedly understood would be fodder for the media (and it was),

⁴ Amicus respectfully notes that such denigrations are especially ill-received among the ranks of the fire department that throughout its history has witnessed its members sacrifice their lives for people of all races and nationalities.

lends to the appearance of an image-conscious court engaging in a media counter-offensive designed to offset bad press.

The District Court's openly assigning blame on city officials for public criticism of the Court and bad press, together with its seeming criticism of the City for not settling this case -clearly suggest the litigation has degenerated into a personal feud between the district judge and the City's mayor.⁵ In these circumstances, it requires no stretch to conclude that the District Court can "reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous." *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (in banc).

The record reflects additional evidence that supports reassignment. At a conference on June 5, 2007, Judge Garaufis advised that his nephew had taken FDNY exam #6019. While on that day exam #6019 was not part of the lawsuit, shortly thereafter, it became apparent that it would play a significant role in this litigation. Upon information and belief, based upon a review of the score attained by the judge's nephew, his hiring from that list

⁵ This concern is buttressed by the District Court's decision to ignore the parties' submissions respecting the appointment of a special master in favor of appointing an individual well known for his "publicly acrimonious history with the Mayor, the Corporation Counsel, the FDNY, and the City itself." Appellants' Br. at 26; A1705-06.

was unlikely. Thus, the nephew is a direct beneficiary of the judicial decision to preclude the use of hiring in rank order from exam #6019 to fill vacancies, as such an effectual discarding of that tests list means another bite at the apple, with the opportunity of scoring higher on a future exam.

For all of the foregoing reasons, amicus submits that reassignment to a different judge on remand would be prudent.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of below and remand for any further necessary proceedings with an instruction that the case be randomly reassigned to a new judge.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order of December 23, 2011 because it contains 6,809 words excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

Dated: Queens, New York
January 24, 2012

_____/s_____
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