U.S. Department of Justice

Civil Rights Division

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DJ 170-51-358

Employment Litigation Section - PHB
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March 5, 2009

Honorable Nicholas G. Garaufis
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States, et al. v. City of New York, et al., 07-CV-2067 (NGG) (RLM)

Dear Judge Garaufis:

The United States respectfully requests leave to file a memorandum setting forth the United States' position concerning issues that are already being briefed by the other parties in this action. The memorandum would explain the reasons that the United States wishes to join plaintiffs-intervenors' motion for summary judgment against defendant City of New York (the "City") with respect to the issues of job relatedness and business necessity. The memorandum – which would not be accompanied by any other documents – would rely on materials already submitted by plaintiffs-intervenors and the City to explain why, under controlling law, there are no genuine issues with regard to any material facts as to these issues.[1] The United States is prepared to file the memorandum on March 9, 2009, when plaintiffs-intervenors' reply brief is due. If the Court grants the plaintiffs-intervenors' motion, as well as the United States' motion for partial summary judgment with respect to disparate impact, which will be fully briefed on March 9, 2009, there will be no need for the trial as to liability that is scheduled for April 13, 2009. Oral argument on the motions is scheduled for March 19, 2009 at 2:30 p.m.

As the Court is aware, the United States alleges that the City has violated Title VII of the

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[1] Some of the materials submitted by the City, including the declarations of Catherine Cline and F. Mark Schemmer and a report authored by Frank Landy (Exhibits 2, 3 and 5 to the declaration of the City's counsel), are not admissible. For example, Dr. Cline's declaration offers opinions regarding the job relatedness of Written Exams 7029 and 2043. Dr. Cline's opinions are not admissible under Fed. R. Evid. 702 because the City did not timely disclose Dr. Cline as an expert witness. Nor are Dr. Cline's opinions, which purport to be based on her "scientific, technical, or other specialized knowledge," admissible under Fed. R. Evid. 701. Thus, if the Court were to deny plaintiffs-intervenors' motion for summary judgment, the United States will file a motion in limine prior to trial requesting that the Court exclude certain testimony and documents. Nonetheless, even considering all of the materials relied upon by the City (admissible or not), the City has not raised any genuine issues of material fact.

Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e et seq., by using four employment practices that have resulted in a disparate impact upon black and Hispanic candidates for the entry-level firefighter position in the FDNY and have not been shown to be job related and consistent with business necessity. The plaintiffs-intervenors make the same allegations with respect to black candidates only. In a Title VII disparate impact case such as this, the plaintiff bears the burden of proving a prima facie case – i.e., that the challenged practices resulted in a disparate impact upon members of the protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The burden then shifts to the employer to prove that the practices are "job related for the position in question and consistent with business necessity." Id.

On February 2, 2009, the United States served on the City a motion for partial summary judgment with respect to the prima facie case – i.e., the issue of disparate impact. On the same date, plaintiffs-intervenors served their motion for summary judgment with respect to, inter alia, job relatedness and business necessity as well as disparate impact. The United States did not move for summary judgment on job relatedness and business necessity, because, during discovery, the City had not clearly set forth the legal and factual bases for the City's position on these issues. As the United States has stated previously, at that time the United States believed that, while the City had not produced sufficient evidence to prevail at the liability phase trial scheduled to begin on April 13, it arguably could raise material issues of fact.

The City served its papers in opposition to the plaintiffs-intervenors' motion on February 23, 2009. These papers make clear that the City has not, and cannot, raise any genuine issue of material fact with respect to job relatedness and business necessity. The arguments raised by the City are deficient as a matter of law, for two reasons. First, the City implicitly – and incorrectly – contends that the United States and plaintiffs-intervenors bear the burden of proof on these issues. In fact, as stated above, it is the City that bears the burden of proof with respect to job relatedness and business necessity. Second, under established law in this Circuit, the City clearly has failed to come forward with evidence – or even factual allegations – sufficient to sustain its burden of proof on these issues. See Guardians Ass'n of the New York City Police Dept. v. Civil Serv. Comm'n of the City of New York, 630 F.2d 79 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); Gulino v. New York State Educ. Dept., 460 F.3d 361, 386 (2d Cir. 2006) (Guardians remains controlling in cases such as this), cert. denied, 128 S. Ct. 2986 (2008). Thus, even when all of the evidence is considered in the light most favorable to the City, any factual disputes are not material, and there is no need for a trial as to liability. Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 224 (2d Cir. 2006) (material fact is one that, under governing law, would affect the outcome of the lawsuit).

Moreover, regardless of whether the Court grants the United States leave to join plaintiffs-intervenors in seeking summary judgment with respect to job relatedness/business necessity, the Court should allow the United States an opportunity to respond to aspects of the City's February 23 memorandum that directly implicate the United States' interests at trial. The City's incorrect legal position concerning the burden of proof and the type of evidence needed to establish job relatedness and business necessity are relevant to trial as well as summary

judgment. If the Court were to deny the motion for summary judgment, the same burden of proof and evidentiary requirements would apply at trial.

Furthermore, the City has misrepresented the substance of the deposition testimony of the United States' experts. One such misrepresentation concerns the undisputed fact that the City set the cutoff score for Written Exam 7029 at 84.705 solely because of the City's anticipated hiring needs, and not because of any evidence that the candidates who scored below 84.705 did not have the abilities necessary to perform successfully as firefighters. In this regard, the City contends that Dr. David P. Jones, one of the United States' expert witnesses, testified that setting a cutoff score based on hiring needs is job related and consistent with business necessity. Def. Mem at 11. In fact, however, Dr. Jones testified that setting a cutoff score based on hiring needs would not be job related. According to Dr. Jones, "To say we need to have X number of people available is not [a] statement of job-relatedness at all," and "when qualifying standards are set and, in particular, when those standards have an adverse impact . . . I think there needs to be a f[ar] sounder rationale for them than 'business need.'" Exh. 13 to Declaration of William S.J. Fraenkel, 80:24-82:9. The United States should be allowed an opportunity to protect the record – particularly with respect to its own expert witnesses – by responding to the City's brief.

The United States therefore requests that the Court allow it to file a memorandum of no more than twenty pages addressing these issues and explaining why the United States now joins plaintiffs-intervenors in seeking summary judgment with respect to job relatedness and business necessity. Of course, the United States would not oppose a request by the City for leave to file a reply to the United States' memorandum. Thank you for Your Honor's consideration of this request.

Respectfully submitted,

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cc: All counsel of record (via ECF)