07 CV 2067 (NGG)(RLM)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

VULCAN SOCIETY, INC., et al.,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK; et al.,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-INTERVENORS' MOTION FOR CLASS CERTIFICATION

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York

Attorney for Defendant
Room 2-316
100 Church Street
New York, N.Y. 10007-2601

Of Counsel: Kami Z. Barker
Telephone: (212) 788-1202

NYCLIS No. 2007-017441

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Cases **Pages**

Cases **Pages**

Statutes

Other Authorities

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum of law in opposition to Plaintiffs-Intervenors' motion for class certification. The proposed class definition is overbroad and unnecessary due to the presence of the United States Department of Justice. The Department of Justice, the governmental entity charged with enforcing Title VII of the Civil Rights Act of1991, commenced this action in May 2007. The United States, on behalf of all injured individuals, alleges that defendants' written examinations 7029 and 2043 for the position of entry-level firefighter had a disparate impact on black and Hispanic applicants. The relief sought by the United States would accrue to the benefit of all those the Plaintiffs-Intervenors seek to represent. Thus, the proposed class certification is not only unnecessary, but a hindrance to the efficient resolution to the matter. The United States is well suited both in resources and ability to secure equitable and injunctive relief for the proposed class members.

The are numerous additional reasons why class certification is inappropriate. At the outset, Plaintiffs-Intervenors' proposed class definition is overbroad. No evidence has been presented in support of the elements of the proposed class definition. This alone requires denial of the motion. Finally, none of the Plaintiff-Intervenors are adequate class representatives. Thus, class certification must be denied.

STATEMENT OF FACTS

Article V, § 6 of the New York State Constitution provides that:

> Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, . . . [provisions regarding veterans' credits omitted]

The New York Constitution therefore mandates that civil service appointments and promotions are to be made following examinations and those examinations are to be competitive.

The City of New York ("City") hires firefighters pursuant to the New York State Constitution and the New York Civil Service Law.[1] To achieve the requirement of determining merit and fitness, the New York City Department of Citywide Administrative Services ("DCAS") designs and implements the civil service examinations for civil service positions, including firefighter.

Beginning in 2002, the United States Equal Employment Opportunity Commission ("EEOC") conducted an investigation of a charge brought by the Vulcan Society concerning the New York City Fire Department's ("FDNY") recruitment and hiring practices for the position of entry-level firefighter. Based upon its investigation, the EEOC concluded that there was probably cause to believe that written examination 2043, administered in 2002, had disparate impact on black and Hispanic applicants. As a result, the EEOC referred the matter to the United States Department of Justice ("DOJ") for further action. After an additional

[1] The New York Civil Service Law ("CSL") was enacted to implement the Constitutional provision. Meenagh v Dewey, 286 N.Y. 292 (1941).

investigation, the DOJ commenced the instant lawsuit, alleging that written examinations 7029, administered in 1999, and 2043, administered in 2002, for the position of entry-level firefighter had a disparate impact on black and Hispanic applicants. The United States seeks equitable relief, including, *inter alia*, a Court order prohibiting the use of alleged discriminatory screening and selection devices and to "make whole" those injured by the alleged discriminatory practices. See United States Complaint at 11-12.

The Vulcan Society ("Vulcans")[2] intervened in this action, pursuant to 42 USC § 2000e-5(f)(i) and were permitted to assert additional claims under 42 U.S.C. §§ 1981 and 1983, and State and City Human Rights Laws. Additionally, three individual plaintiffs, who took examination 2043, Roger Gregg, Marcus Haywood and Candido Nuñez, a current FDNY firefighter, sought to intervene in this action. Plaintiff-Intervenors ("Intervenors") allege that written examinations 7029 and 2043 and the requirements that appointees possess thirty college credits, a driver's license and a first responder with defibrillation ("CFR-D") certificate have a disparate impact on black applicants. The Intervenors also allege that in using these screening and selection devices, the FDNY intentionally discriminates against black applicants. The Intervenors seek the same equitable and injunctive relief as the United States, in addition to punitive damages against individually named defendants Mayor Bloomberg and Commissioner Scoppetta.[3]

The Intervenors now move for class certification as the vehicle by which to obtain the relief sought for an entire class of individuals. However, the United States, by virtue of

---

[2] The Vulcan Society, while not a collective bargaining organization, is a fraternal organization of black firefighters.

[3] Plaintiff-Intervenors seek punitive damages against these individuals, despite the fact that they took office in January 2002, years after the design of Examinations 7029 and 2043.

commencing this action, represents the very class of individuals plaintiffs wish to represent. Indeed, the United States represents the interest of black and Hispanic applicants, while the Intervenors allege claims on behalf of black applicants only. The United States government seeks and has the power to obtain equitable and injunctive relief, including back pay, for all the putative class members. The United State's position thereby renders class certification unnecessary. Furthermore, plaintiffs cannot identify an adequate class representative.

ARGUMENT

POINT I

THE CLASS DEFINITION IS OVERBROAD AND THUS INSUFFICIENT TO PERMIT CLASS CERTIFICATION.

It is well settled that "[t]he definition of the class is of primary importance, since it 'enables courts to accurately determine whether the proposed class satisfie[s] the other requirements of Rule 23.'" Wright v. Giuliani, 2000 U.S. Dist. LEXIS 8322, *29 (S.D.N.Y. June 14, 2000) (quoting 5 James Wm. Moore, Moore's Federal Practice 23.21[3] (1999)) annexed hereto as Appendix 1, aff'd on other grounds, 230 F.3d 543 (2d Cir. 2000). The Second Circuit has cautioned that a court should not certify an overly broad class, because "'[a]n overbroad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process.'" Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1337-38 (2d Cir. 1992) (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126-27 (5th Cir. 1969)), vacated as moot sub nom. Sale v. Haitian Ctrs. Counsel, Inc., 509 U.S. 918 (1993).

Indeed, a plaintiff's failure to provide a sufficiently narrow class definition can prevent certification of the class because it is impossible to determine whether the other requirements of Rule 23(a) have been met. Wright, supra, *30("because the proposed class is over-broad, it is not possible to carefully assess the adequacy of the proposed class representatives and the typicality of their claims...").

The Intervenors propose an overbroad class definition. Intervenors define their proposed class as:

> All black New York City firefighters or applicants for entry-level firefighter positions who have been discriminated against by Defendants' screening and

> selection devices and procedures used as part of open competitive examinations 7029, 2043, 6019, as well as those black applicants who will be discriminated against if such devices and procedures are not modified by Order of this Court.

This definition is patently overbroad. Thus, class certification must be denied.

A. The Class Definition Must Be Limited to Examination 2043

Examination 7029 must be eliminated from the class definition because the Intervenors did not timely file an EEOC charge of discrimination.[4] Class certification requires a class representative who has timely filed an EEOC charge of discrimination.Griffin v. Dugger, 823 F.2d 1476, 1492 (11th Circ. 1987), cert. denied 486 U.S. 1005 (1988). Neitherthe Vulcans nor any of the individually named Intervenors timely filed an EEOC charge of discrimination regarding Examination 7029. Thus, inclusion of examination 7029 in the class definition is improper.

Examination 6019 must be eliminated from the class definition, as it is not at issue in this matter. Issues that have not been raised by representative parties in their administrative complaints may not be raised in a class action claim. Butts v. City of New York Dept's of Hous. Preservation and Dev., 990 F.2d 1397, 1401 (2d Cir. 1993); see also Eastland v. Tennessee Valley Authority, 553 F.2d 364, 372 (5th Cir. 1977), cert. denied, 434 U.S. 985, 98 S. Ct. 611 (1977). Plaintiff-Intervenors have never filed an EEOC charge of discrimination related to 6019. Further, Plaintiff-Intervenors' complaint does not make allegations related to examination 6019. The Court, therefore, has no jurisdiction over this claim.

---

[4] Defendants have moved to dismiss all of Plaintiff-Intervenors' claims related to Examination 7029 as time-barred. For a complete discussion of this point, defendants respectfully refer this Court to their motion to dismiss.

By letter to the Court, dated June 13, 2007, counsel for plaintiff United States, notified the Court that the fact that Your Honor's nephew had taken examination 6019 did not require the Court's recusal. The United States assured the Court that recusal was unnecessary because it "does not allege the City's use of 6019 violations Title VII...Because the Complaint does not ask the Court to rule on the legality of the City's use of Exam 6019, the interests of Your Honor's nephew will not be affected by a liability judgment in this case." See Docket Item #6.

In support of their motion to intervene, the Intervenors represented to this Court that a "single set of operative facts underlies the claims raised by the United States and the proposed Plaintiff-Intervenors." See Proposed Plaintiffs-Intervenors' Reply Memorandum of Law in Further Support of Their Motion to Intervene, dated August 17, 2003, Docket Item # 39, pp. 1-6. Significantly, in granting intervention, this Court rejected defendants' contention that the Vulcan Society and the three individuals were seeking to bring a more expansive action. The Court found, based on counsels' representations, that the Intervenors' claims, including those asserting disparate treatment, arose from the same operative facts pled by the United States. Such operative facts do not allege Title VII violations related to Examination 6019. Nonetheless, the Intervenors now seek to expand the allegations and operative facts by including examination 6019 in their proposed class definition. Thus, inclusion of examination 6019 in the class definition is improper.

B. The Class Definition Must Be Limited to Specific Screening and Selection Devices and Procedures

The class definition is overbroad because it includes all screening and selection devices. In a disparate impact case, plaintiffs must identify the specific employment practice that is being challenged. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

Further, the only issues that may be raised in a class action claim are those that were raised by representative parties in their administrative complaints, together with those that may reasonably be expected to arise from the administrative investigation of their claims. Butts, 990 F.2d at 1401; see also Eastland, 553 F.2d at 372. The Intervenors' EEOC charges allege discrimination with regard to specific screening and selection devices and procedures. Specifically, the Intervenors complain of the written examination and the first responder certificate, thirty college credit and drivers' license requirements.[5] Thus, the Court does not have jurisdiction over any additional claims. Accordingly, the class definition can only include applicants who took written examination 2043 and those required to possess a first responder certificate, thirty college credits and a drivers' license as part of the selection process.

The class definition can not include those screening and selection devices which the Intervenors cannot support. An allegation that discrimination has occurred neither determines whether a class action may be maintained nor defines the class that may be certified. General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 157 (1982).

> There is a wide gap between (a) an individual's claim [of discrimination] and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

[5] Plaintiff-Intervenors do not complain in their EEOC charges or in their Complaint of discrimination by the Personnel Review Board ("PRB") in the appointment process. Accordingly, this issue cannot be properly included in the class definition.

Id. A class representative must, therefore, show the validity of his individual claim, as well as provide evidence to demonstrate that the his claim will be typical of the class claims. Id. at 157-158; 2370-2371; see also FRCP 23(a)(3).

The college credit requirement cannot be included in the class definition because Plaintiff-Intervenors cannot demonstrate its disparate impact. That is, the Intervenors cannot demonstrate that this requirement is an issue typical of the class. First, the Intervenors admit that the college credit requirement is not an absolute requirement. See Wiesen Report annexed to Wiesen Aff. as Exhibit "A" at 60, FN 1. Additionally, the Intervenors' proposed class representative, Gregg, has earned twice the required college credits.[6] See Gregg Aff. at ¶ "3." This alone proves the claim is atypical.

Further, the Intervenors' proposed evidentiary support of this requirement's disparate impact is insufficient and unreliable. The Intervenors' expert, Wiesen, most notably does not sample the applicant pool. Instead, Wiesen uses "comparison information" from the 2000 Census Bureau statistics. See Wiesen Report annexed to Wiesen Aff. as Exhibit "A" at 60-61. This "comparison information" is inapplicable for several reasons. First, the "comparison information" reports years of college, rather than college credits.[7] Second, the "comparison information" only samples men, when women, too, apply to be firefighters. Third, the census sample only includes male residents in the five boroughs of New York City and six adjacent counties. However, individuals from across the country apply to be firefighters. Finally, the "comparison information" samples individuals between the ages of 18 to 34 years of age, when the age limit for firefighter applicants is 29. Thus, this sample is demonstrably unrepresentative

[6] Nuñez is a current FDNY firefighter, and has, thus, fulfilled this requirement.

[7] Wiesen only assumes that one year of college is equivalent to thirty college credits.

of the class. Accordingly, the college credit screening device cannot be encompassed within the class definition.

Additionally, the class definition cannot properly include the first responder with defibrillation ("CFR-D") certificate and drivers' license requirements because the Intervenors cannot prove their disparate impact or typicality. Indeed, the Intervenors provide no evidence to support their allegation that these requirements create a disparate impact on black applicants. Gregg alleges that the CFR-D and drivers' license requirements are expensive. See Gregg Aff. at ¶ "12." However, the Intervenors provide no evidence to demonstrate that these claims are typical of the class.[8] Moreover, the Intervenors' expert report is entirely silent on these requirements. Thus, without more, the Intervenors fail to sufficiently demonstrate typicality of these claims. Accordingly, the class definition cannot include the CFR-D and drivers' license requirements as discriminatory screening devices.

C. The Class Definition Must Be Limited To Qualified Applicants

The Intervenors' inclusion of all black applicants in their proposed class definition is overbroad. The phrase "all black applicants" encompasses unqualified applicants. However, an unqualified applicant suffers no injury as a result of an allegedly discriminatory practice. See Falcon, 457 U.S. at 156. Such unqualified applicants cannot, therefore, represent a class of persons who did allegedly suffer injury. Id.

An entry-level firefighter must fulfill several requirements before appointment to the position. The written examination and the aforementioned requirements are but a few of the many qualifications an applicant must satisfy. Applicants must, *inter alia*, pass a physical test, meet rigid age and medical fitness requirements, as well as pass a drug screening test and

[8] Nuñez is currently a FDNY firefighter, and, thus, has fulfilled these requirements.

background check. A black applicant who is either too old, medically unfit, a convicted felon, a controlled substance abuser, or otherwise unqualified suffers no injury from the alleged discriminatory practice at issue. A qualified applicant, therefore, is one who fulfills all the prerequisites of entry-level firefighter that this Court finds not to be discriminatory in nature. Thus, the class definition must be limited to qualified applicants for the position of entry-level firefighter.

D. The Class Definition Must Be Limited to Those Applicants Who Have Been Rejected

The Intervenors include in their class definition "all those black applicants who will be discriminated against if such devices and procedures are not modified by Order of this Court." Through the inclusion of future applicants, the Intervenors seek to obtain monetary damages for "those potential black applicants who have been deterred from applying for appointment..." See Plaintiff-Intervenors Complaint at 19, ¶ "5." However, this class definition is overbroad, speculative and improperly includes uninjured individuals. Additionally, the Intervenors cannot fulfill the Rule 23(a) requirements for this sub-class. Thus, the class definition must be limited to those applicants who have already been rejected for the entry-level FDNY firefighter position.

In Title VII failure to hire actions, "only those who have been rejected from a job have been legally aggrieved..." Vulcan Society, 82 F.R.D 379, 400 (S.D.N.Y. 1979) (certification denied to sub-class of those who were discouraged from applying for the job as a firefighter as a result of discriminatory hiring policies including written examinations and recruitment practices). There is

> ...no basis for including in the class the as yet unknown person who may be employed by the defendant, or denied employment, or deterred from seeking employment in the future. Any declaratory

> or injunctive relief that may be entered will redound to the benefit of these persons in any event, but certainly no monetary relief can be awarded to them for discrimination not yet inflicted.

Williams v. Wallace Silversmiths, Inc., 75 F.R.D. 633, 636 (D.Conn. 1976), app'l dismissed 566 F.2d 364 (2d Cir. 1977).

In this case, the rank order lists for examinations 7029 and 2043 have expired, and the FDNY no longer makes appointments off either list. Accordingly, only those qualified applicants who have not been appointedto the position of firefighter may be legally aggrieved.[9]

Further, the Intervenors do not even attempt to identify the number of individuals that will be injured in the future. "The size of the class and the impracticability of joinder must be positively shown and not speculative." Faraci v. Regal Cruise Line, Inc., 1994 U.S. Dist. LEXIS 14817, 4 (S.D.N.Y 1994) (quotations omitted). As the Intervenors have failed to positively demonstrate the numerosity of this sub-class, certification must be denied.

Finally, even if such a claim could be maintained, the Intervenors cannot identify an adequate representative. There is no plaintiff or proposed class representative who alleges that he would apply for the position but for the allegedly discriminatory practices of the FDNY. Similarly, no plaintiff alleges that he was discouraged from applying for the job of firefighter as a result of the allegedly discriminatory screening and selection devices of the FDNY. Accordingly, class certification to include future applicants must be denied.

For the foregoing reasons, the Intervenors' proposed class definition is overbroad, and class certification must, therefore, be denied. However, assuming, *arguendo*, this Court

[9] Moreover, those applicants who never reached the top of the list for appointment were never subjected to the medical examination, drug test or background check. Therefore, these rejected applicants could not have suffered adverse impact as a result of these factors.

determines that class certification is appropriate, defendants propose that the class be certified as two sub-classes, narrowly defined as:

> All black New York City firefighters, appointed from Civil Service List 2043, who were discriminated against as a result of the adverse impact of the written examination 2043.

> All qualified black applicants who took examination 2043, but were not appointed due to the adverse impact of the written examination 2043 or rank-order listing of Civil Service List 2043.

POINT II

CLASS CERTIFICATION IS UNNECESSARY BECAUSE THE CLASS IS REPRESENTED BY THE UNITED STATES GOVERNMENT.

A. Class Certification Is Unnecessary to Achieve Injunctive and Equitable Relief

The class action device was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Falcon, 457 U.S. at 155 (quoting Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979)). Specifically, class actions are appropriate when they "save[] resources for both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." Id.

Here, the United States has commenced the instant action on behalf of the proposed class members. The United States seeks the very equitable relief for which the Intervenors request class certification to achieve. Indeed, the United States seeks equitable relief, including, *inter alia*, a Court order prohibiting the use of the alleged discriminatory screening and selection devices and to "make whole" those injured by the alleged discriminatory practices. See United States Complaint at 11-12. The Intervenors admit that equitable relief, including back pay, predominates over their claims for monetary relief. See Plaintiff-Intervenors' Memorandum of Law at 27 ("Regardless of monetary relief, the Intervenors ... seek injunctive relief..."). Therefore, class certification is unnecessary to achieve the predominating equitable and injunctive relief.

Moreover, the class does not need greater representation than the United States. The United States is well suited both in resources and ability to secure equitable and injunctive relief for the proposed class members. The United States has, no doubt, demonstrated adequacy of class representation through its vigorous litigation. Further, the Intervenors' proposed

representatives suffer inadequacies, as discussed below, that the United States does not. Most significantly, the United States' purpose is to vindicate a congressional policy by seeking to enjoin practices proscribed by Title VII. Therefore, the United States does not have any conflicting interests with the class, as the Intervenors' proposed representatives may well have. Thus, class certification would be a waste of judicial and party resources and fails to achieve the economic purposes of Rule 23. Therefore, class certification must be denied.

B. Class Certification Is Improper When Monetary Claims Predominate Over Equitable and Injunctive Relief

It has been established that the class need not be certified to achieve injunctive and equitable relief. Accordingly, the Intervenors' only remaining purpose for class certification is to achieve monetary damages for the class. However, class certification is improper in cases where the appropriate final relief relates exclusively or predominately to money damages. Parker v. Time Warner Entertainment Co., 331 F.3d 13, 18 (2d Cir. 2003) (citing Fed. R. Civ. P. 23(b)(2), advisory committee note (1966)). Therefore, class certification must be denied.

Under Rule 23(b)(2) plaintiffs must show that the injunctive relief they seek predominates over the damages sought.[10] The Second Circuit has held that

> before allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary

[10] In addition to the injunctive and equitable relief, which includes back pay, Plaintiff-Intervenors also seek compensatory and punitive damages. Although punitive damages are not available against the City, Plaintiff-Intervenors are suing Mayor Bloomberg and Commissioner Scopetta in their individual capacitiesand seek punitive damages against them, despite the fact that they took office in 2002, after the design of Examinations 7029 and 2043.

> and appropriate were the plaintiffs to succeed on the merits. Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.

Robinson v. Metro-North Commuter Railroad, 267 F.3d 147, (2d Cir. 2001), cert. denied, 535 U.S. 951(2002)(citation omitted). Entitlement to non-incidental damages does not preclude a Rule 23(b)(2) class but it does indicate that the class may lack the cohesion and unity necessary for certification under this Rule. Id. at 165-66. The absent class members, all of whom would be bound by the determination should a Rule 23(b)(2) class be certified, would not be sufficiently protected in such circumstances. Id.

Monetary damages require significant individualized proof and cannot be common to all class members. The very nature of compensatory damages necessitates inquiry into the "subjective differences of each plaintiff's circumstances." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413-414 (5th Cir. 1998).[11] Class certification is, therefore, improper when issues of monetary damages predominate over those issues common to the class. Id. at 408. Therefore, the court may only allow

> certification if it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," Allison, 151 F.3d at 430 (Dennis, J., dissenting), and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.

[11] The Second Circuit in Robinson rejects the holding in Allison that the mere presence of compensatory or punitive damages renders a class incapable of certification. However, Robinson nonetheless maintains that class certification is not available in cases solely for monetary damages and holds that issues of equitable relief must predominate to warrant class certification.

Robinson, 267 F.3d at 164.

Here, the Intervenors do not need class certification to obtain injunctive and equitable relief, including back pay, for proposed class members. In the presence of the United States as the class representative, the only purpose for seeking class certification is to obtain compensatory and punitive damages for the class. Such emotional and intangible injuries are subjective and completely individualized. The Intervenors, therefore, cannot fulfill the Rule 23(a)(2) and (3) requirements of commonality and typicality or demonstrate that, under Rule 23(b)(2), their claims for equitable relief predominate. Accordingly, class certification must be denied.

POINT III

THE INTERVENORS FAIL TO SATISFY THE RULE 23(a)(4) REQUIREMENT FOR CLASS CERTIFICATION.

To qualify for certification, a proposed class must meet the four requirements of Rule 23(a) as well as at least one of the requirements of Rule 23(b). Federal Rule 23(a) establishes four prerequisites to a class action: (1) the numerosity requirement, which states that the class must be so numerous that joinder of all members would be impractical; (2) the commonality requirement, which requires that there are questions of law or fact common to all members of the class; (3) the typicality requirement, which mandates that the claims or defenses of the named plaintiffs be typical of the claims or defenses of the class; and (4) the representative requirement, which states that the named plaintiffs and their counsel will fairly and adequately protect the interests of the unnamed members of the class. Fed. R. Civ. P. 23(a). "To be eligible for class certification, plaintiffs must first show that the proposed class satisfies all four requirements of Rule 23(a)." Marisol A. v. Giuliani, 929 F. Supp. 662, 689 (S.D.N.Y. 1996), aff'd., 126 F.3d 372 (2d Cir. 1997). The burden of satisfying these requirements is on the plaintiffs. Id.

In this case, as noted in Point I, above, the Intervenors propose an overbroad class definition. However, even if the Intervenors' proposed class definition is limited to exclude those elements discussed in Point I, the Intervenors fail to satisfy the Rule 23(a)(4) requirement. Specifically, the Intervenors have failed to identify a class representative that will fairly and adequately protect the interests of the unnamed members of the class.

The Second Circuit has held that the "adequacy of representation" requirement of Rule 23(a) is a two pronged inquiry:

> adequacy of representation is measured by two standards. First, class counsel must be "qualified, experienced and generally able" to conduct the litigation. Second, the class members must not have interests that are "antagonistic" to one another.

In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992)(citation omitted). The two pronged analysis is virtually compelled by the requirements of the Due Process Clause of the Constitution. See Marisol A., 126 F.3d at 378 (citing Falcon, 457 U.S. at 157 n. 13.). Here, plaintiffs fail the second prong of the Rule 23(a)(4) requirement, which focuses on plaintiffs themselves.

A. The Vulcan Society Cannot Adequately Represent the Class

A class action, under *Rule 23,* must be brought by a member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33 (1962). A class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members. East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977). Further, a plaintiff who is seeking to act as class representative must have individual standing to assert the class' claims. Ramos v. Patrician Equities Corp., 765 F. Supp. 1196, 1199 (SDNY 1991); Vulcan Society, 82 F.R.D. at 398-99.

An "association's right to sue in its own behalf does not confer upon it representative status." Vulcan Society, 82 F.R.D. at 399.

> 'Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought.'

Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004) (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975). An association does not have standing to pursue money damages on behalf of its members. See id. In Warth, the Supreme Court held that an organization lacked standing to recover damages on behalf of its members when there were individualized damages.

Warth, 422 U.S. at 515-516. Warth held that:

> If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Id. at 515.

In Vulcan Society, several black firefighters and the Vulcan Society brought a Title VII action against various Westchester County municipalities, alleging, *inter alia*, discrimination with respect to written examinations, requirements for appointment and recruitment practices. Vulcan Society, 82 F.R.D at 385. The Court held that the Vulcan Society had standing to maintain the action, on the basis of the society's interest in achieving equal employment opportunities for blacks in fire departments. Id. at 391. The Court, however, denied the Vulcan's request to serve as the class representative, holding that:

> the direct interests of the [Vulcan Society] for which protection is sought and to which injury is alleged are different and distinct from the interest of the class which certification is sought.... the Vulcan Society would not be an adequate representative. Its own interests which it here seeks to protect are its right of association and to obtain dues from potential members. This interest is substantially different from the interest of one who would like a position as a firefighter and has been discouraged from seeking such. Further, it has not been established that an association can be a representative plaintiff. 'Although members of the class may be members of the association or other organization, it is itself not a member of the class and would therefore normally be barred as a class plaintiff unless perhaps its raison d'etre is to represent the class. See Norwalk Core v. Norwalk

Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968)."

Id. at 399 and FN 32.

The Vulcan Society, in this case, is in no different position than the Vulcan Society in the cited action. Accordingly, the Vulcan Society is not an adequate class representative. It need be further noted that the Vulcan's Society is the only plaintiff that filed a timely EEOC charge of discrimination related to this action.[12] Accordingly, only the Vulcans have standing to represent the class. However, as discussed above, the Vulcans cannot adequately represent the class, as they possess differing interests than the class. Therefore, the Intervenors have not proposed an adequate class representative and class certification must be denied.

B. The Individual Plaintiff-Intervenors Cannot Adequately Represent the Class

To determine if a class will be adequately represented by an individually named plaintiff, the Court must engage in a case specific assessment. In re Lilco Sec. Litigation, 111 F.R.D. 663, 672 (E.D.N.Y 1986). In making this determination, the Court must consider several factors. These factors include: (1) "the representative's understanding and involvement in the lawsuit," (2) "the willingness to pursue the litigation," and (3) "any conflict between the representative and the class." Parker v. Time Warner Entertainment Co., 239 F.R.D. 318, 330 (E.D.N.Y. 2007) (internal citations omitted).

Courts have refused class certification when plaintiffs failed to exhibit knowledge about the facts of the lawsuit. See, e.g., In re Lloyds American Trust Fund Litigation, 1998 U.S.

[12] The EEOC deemed the Vulcans' August 9, 2002 charge as concerning the 2043 Examination. The Vulcans, therefore, timely filed an EEOC charge related only to examination 2043.

Dist. LEXIS 1199, *33 (S.D.N.Y. 1998); Darvin v. International Harvester, 610 F. Supp. 255, 257 (S.D.N.Y. 1985) (credibility lacking where plaintiff refused to answer questions at deposition and showed unfamiliarity with suit); Weisman v. Darneille, 78 F.R.D. 669, 671 (S.D.N.Y. 1978) (familiarity with suit and credibility lacking, which exposed plaintiff to unique defenses). Moreover, a class is entitled to "an adequate representative, one who will check the otherwise unfettered discretion of counsel in prosecuting the suit." Id. at 671.

Here, none of the individually named Plaintiff-Intervenors can serve as class representatives because they have no standing. Class certification requires a class representative who has timely filed an EEOC charge of discrimination. Griffin, 823 F.2d at 1492. As argued in defendants' motion to dismiss, none of the individual Plaintiffs-Intervenors filed a timely EEOC charge of discrimination regarding examination 2043. Indeed, the Intervenors cannot identify a single individual who filed a timely EEOC charge of discrimination for either exam at issue. Accordingly, without a class representative, class certification must be denied.

Assuming, *arguendo*, this Court finds the individual the Intervenors' EEOC charge timely, the individuals are inadequate class representatives. Marcus Haywood is a grossly inadequate representative. Haywood has had no involvement in this action and has failed to show any willingness to pursue the litigation whatsoever. This lack of involvement is emphatically demonstrated by Haywood's failure to participate in discovery. Specifically, to date, Haywood has failed to respond to defendants' first set of interrogatories and request for the production of documents, served February 20, 2008.[13] Further, Haywood, has not submitted an affidavit in support of the instant motion for class certification. In the absence of an affidavit,

[13] Due to Haywood's failure to respond to defendants' requests, Haywood's claims must be dismissed, pursuant to Rule 41(b), for failure to prosecute.

the Intervenors are incapable of proving Haywood's qualification for the position of firefighter[14], knowledge of the facts of this case or his intention to pursue the class' interests. It is apparent that Haywood is either disinterested in his claims or purposefully noncompliant. Either way, Haywood is an inadequate class representative.

Candido Nuñez is also an inadequate class representative. Nuñez has expressed no desire to represent the class. This is likely due to his current employment by the FDNY as a firefighter. Having obtained the position of firefighter, he does not share the predominating interest of the class members – that is, the equitable relief of appointment. Additionally, having fulfilled all the requirements for the position of entry-level firefighter, Nuñez cannot allege injury from these requirements. Finally, Nuñez submits no affidavit in support of the instant motion. In the absence of an affidavit, Nuñez fails to prove his knowledge of the facts of this case, his intent to pursue the class' interests or his dedication to check the class' counsel's discretion. Thus, Nuñez cannot adequately represent the class.

Finally, Roger Gregg, too, is an inadequate class representative. Gregg is the only individually named plaintiff who has expressed a desire to represent the class. However, Gregg cannot prove that he was qualified for the position.[15] Assuming Gregg could fulfill all other requirements, Gregg does not and cannot demonstrate that he was medically qualified for the position before the 2043 list expired.[16] An unqualified applicant suffers no injury as a result of

---

[14] Haywood provides no proof that he, *inter alia,* is an American citizen, has a high school diploma or has not been convicted of any crimes.

[15] In Vulcan Society, 82 F.R.D at 401, FN 33, plaintiff, Moyer, was prohibited from serving as class representative for his inability to swim and plaintiff, McQuay, was prohibited from serving as class representative for not having a high school diploma.

[16] Indeed, Gregg has not seen a health care provider in the last ten years.

an allegedly discriminatory practice. See Falcon, 457 U.S. at 156. Such unqualified applicants cannot, therefore, represent a class of persons who did allegedly suffer injury. Id. Thus, Gregg cannot represent the class.

The entire class will not be adequately represented by any of these the Intervenors. There is certainly no showing that adequate class representatives are unavailable. Therefore, class certification should be denied.

CONCLUSION

WHEREFORE, defendant respectfully requests that the Intervenors' motion for certification of a class be denied in its entirety, and that defendant be granted costs, fees, and disbursements together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 23, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for the Defendant
100 Church Street, Room 2-316
New York, New York 10007-2601
(212) 788-1202
kbarker@law.nyc.gov

By: _____
Kami Z. Barker
Assistant Corporation Counsel