11-5113-cv(L), 12-0491-cv(CON)

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-Cross-Appellants,

– v. –

MICHAEL BLOOMBERG, Mayor, New York Fire Commissioner NICHOLAS SCOPPETTA, in their individual and official capacities, CITY OF NEW YORK,

Defendants-Appellants-Cross-Appellees,

NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, NEW YORK CITY FIRE DEPARTMENT,

Defendants.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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INTRODUCTION

The district court erroneously concluded that Mayor Bloomberg and Fire Commissioner Scoppetta could not be held individually liable for intentional discrimination unless they were on notice of the evidentiary burden-shifting analysis under which § 1981 and § 1983 cases are decided. In this Court, the Appellants-Cross-Appellees' ("Defendants'") brief on qualified immunity makes no attempt to defend the district court's legal analysis. Indeed, Defendants explicitly agree with the Intervenors that immunity does not apply if public officials violate Constitutional or statutory rights "of which a reasonable person would have known." (Appellant-Cross-Appellees' Response and Reply Brief for the City of New York and Defendants Bloomberg and Scoppetta, Doc. 169, hereinafter "City Resp. Br.," at 56.)

The Mayor and Commissioner do not deny – as they could not plausibly – that the right to be considered for public employment on a nondiscriminatory basis is Constitutionally and statutorily protected. In fact, they concede in their response brief that they *were* aware that the tests at issue in this case had an adverse impact on minority applicants for employment in the FDNY. (City Resp. Br. 59.) Given that any reasonable public official would have known of Intervenors' clearly-established right to be free from racially discriminatory hiring, these concessions should effectively end the case for immunity.

Grasping for a supportive theory, Defendants propose a startling non sequitur – that the Mayor and the Commissioner, though aware that the use of Exams 7029 and 2043 was likely unlawfully harming minorities, nonetheless decided that correcting the violation would require the City to stop hiring firefighters and would frustrate the personnel needs of the Fire Department. Yet there is no record evidence to support the contention that abiding by federal, state and city law would have obstructed necessary firefighter hiring. The immediate demand placed on the Commissioner and Mayor by the City's Equal Employment Practices Commission was simply that they investigate the adverse impact and the job relatedness of the 1999 exam, which was used for hiring up through 2004. Undertaking such an investigation was expressly required by the City EEO Policy, which the City's Equal Employment Practices Commission ("EEPC") was attempting to enforce. Had they completed an investigation into adverse impact and validity, the Mayor and Commissioner could have directed the development of an alternative, unbiased and job-related exam instead of proceeding with Exam 2043, an unfortunate replica of the unlawful 1999 test. This would have avoided future discrimination while lawfully and timely meeting all of the FDNY's hiring needs.

The need for an adverse impact and validation study was even more glaring in light of the fact that both the Mayor and Commissioner were alerted to the

severe underrepresentation of blacks among FDNY firefighters as soon as they assumed office, if not before, and both were informed that questions had been raised about the fairness of the FDNY's entrance exams. In fact, Defendants' position – that the FDNY would have had to stop hiring if the Mayor and Commissioner had followed the EEO Policy – is a tacit concession that the Mayor and Commissioner *knew* that had they performed the mandated investigation, the tests being used to hire firefighters would not have passed Constitutional and statutory muster; i.e., that the exams' results could not be lawfully used. This awareness of the ongoing deprivation of the Constitutional rights of minority firefighter applicants not only defeats any claim for federal qualified immunity, it also precludes a finding by this Court that Defendants are entitled to judgment as a matter of law on Intervenors' claims of intentional discrimination.

With respect to state law immunity, Defendants' attempt to transform the mandatory requirements of the City Charter and the City EEO Policy into discretionary judgments, informed by hiring practicalities, is unavailing. The EEO Policy language is clear. Agency heads must:

> [E]xamine all devices used to select candidates for employment to determine whether these devices adversely impact any particular racial, ethnic, disability, or gender group. To the extent that adverse impact is discovered, agency heads <u>will</u> determine whether the

> device is job-related. If the device is not job-related the agency will discontinue using that device. (A865.)[1]

There is no discretionary language here as regards the Commissioner's obligations. And, the Mayor is assigned "ultimate responsibility for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed *and enforced*." (A867) (emphasis added.)

The claim that following the law would have sidetracked hiring – a claim that is unsupported by evidence – is no defense to a deliberate disregard of explicit EEO Policy requirements. *See Haddock v. City of New York*, 75 N.Y.2d 478, 485 (N.Y. 1990) ("Indeed, the very basis for the value judgment supporting immunity and denying individual recovery for injury becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion.") In fact, Defendants agree that immunity is not appropriate "where a municipal actor violates an internal rule or policy that mandates a specific action in a certain situation." (City Resp. Br. 67.) The EEO Policy at issue here was perfectly clear, as were the Mayor's and Commissioner's violations of the mandated action. Thus, state law immunity is not available.

[1] Citations to the record on appeal are designated as "A___," except that citations to the district court's disparate impact and disparate treatment orders are designated as "DI-A___" and "DT-A___," respectively.

ARGUMENT

I. DEFENDANTS BLOOMBERG AND SCOPPETTA ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE FEDERAL CLAIMS BASED UPON EITHER THE DEFENSE OF QUALIFIED IMMUNITY OR THE MERITS OF THE CLAIMS

A. The Defendants Neither Support the District Court's Rationale for Granting Summary Judgment on Qualified Immunity nor Dispute the Fact that the Long-Standing Constitutional Prohibition Against Discrimination in Public Employment Would Be Known to Any Reasonable Public Official, Including the Mayor and Fire Commissioner

1. Defendants Effectively Concede that the District Court's Analysis on Qualified Immunity Was Incorrect

Defendants Bloomberg and Scoppetta appear to concede that the district court's analysis on federal qualified immunity was erroneous and that Intervenors have demonstrated that dismissal on that basis was reversible error. Plainly, the district court erred in requiring Intervenors to show that a public official needed to be on notice of the shifting evidentiary burdens arising in claims brought under 42 U.S.C. §§ 1981 & 1983 and the Fourteenth Amendment in order to counter a claim for immunity. Notably, the Defendants make no attempt to defend the district court's faulty analysis. (DT-A1434-35.) Further, as Intervenors have shown, even if that were the test, Intervenors would have satisfied it. (Brief for Plaintiffs-Appellees-Cross-Appellants, Doc. 133, hereinafter "Intervenors Br.," at 153-54.)

2. Nor Do Defendants Dispute that, Under the Correct Analysis, the Long-Established Constitutional Right to Be Free from Race Discrimination in Hiring Would Have Been Known to a Reasonably Competent Public Official in 2002 and Thereafter

Defendants do not dispute that courts have long recognized that the Constitution – and the Civil Rights Act of 1866 – prohibit race discrimination in public employment, including discrimination in the use of hiring exams, and that a reasonably competent public official would have known of those constitutional and statutory rights. Under applicable Supreme Court precedent, these are the only questions involved in a qualified immunity defense, *i.e.*, whether defendants are charged with violating a Constitutional or statutory right of which a reasonably competent official would have been aware under the circumstances. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."); *see also Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (noting that qualified immunity defense is distinct from and not dependent upon the separate issue of intent that is an element of equal protection claims).

3. Because the District Court Did Not Reach the Factual Issue of Intent to Discriminate, this Court Should Reverse and Remand for the District Court to Consider That Issue in the First Instance

The district court granted summary judgment solely upon consideration of the elements of a qualified immunity defense, without reaching the underlying substantive claims of intent to discriminate under 42 U.S.C. §§1981 & 1983 and the Fourteenth Amendment. (DT-A1434, n.32) ("Here, the court declines to consider whether the Intervenors have made out an equal protection or §1981 violation against the Mayor or Commissioner, as the individual defendants' entitlement to qualified immunity is wholly dispositive of these claims.") Because the district court did not reach the primarily factual issue of intent,[2] this Court need not evaluate the evidence of discriminatory intent, de novo, as Defendants suggest. Rather, the Court should reverse and remand to the district court for its application of the standards for proof of intent to the voluminous factual record in the first instance. *See Prats v. Port Auth. of New York & New Jersey*, 350 F.3d 58, 59 (2d Cir. 2003) (remanding to the district court to decide in first instance liability issue not previously decided by the district court); *see also Brocklesby Transport v. Eastern States Escort Servs.*, 904 F.2d 131, 133-34 (2d Cir.1990) (ordering remand of liability issue that "turns in part on factual questions not addressed by the

[2] The Supreme Court noted the intensely factual character of the intent issue in *Crawford-El*, 523 U.S. at 589.

district court" for district court to make initial determination); *Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC*, 356 F. App'x 452, 454 (2d Cir. 2009) ("Because the question of mootness is, at least in part, factual, dependent as it is on the terms and circumstances of the settlement, we think it best to leave the question of mootness for the district court to decide in the first instance.")

B. Even if this Court Reaches the Question of Whether Bloomberg and Scoppetta Are Entitled to Summary Judgment Dismissing Intervenors' Claims of Intentional Discrimination, Defendants Are Not Entitled to Judgment as a Matter of Law

If this Court reaches the issue of intent and considers the record evidence de novo, it will find that the individual Defendants have failed to demonstrate that no reasonable trier-of-fact could conclude that they engaged in intentional discrimination. Defendants Bloomberg and Scoppetta do not address the record evidence in support of Intervenors' claims.[3] Instead, they rely upon arguments either without support in the record or upon testimony that a trier-of-fact could reasonably conclude is pretextual, thereby further foreclosing summary judgment in their favor.

[3] The district court, while not reaching the issue, did acknowledge that "[t]he Intervenors have submitted copious evidence from which a reasonable fact-finder could infer that the Mayor and Commissioner harbored an intent to discriminate against black applicants – evidence which, under a Title VII framework, might well establish a prima facie case of intentional discrimination as a matter of law – but no evidence that directly and unmistakably proves that fact." (DT-A1435.)

1. A Trier-of-Fact Could Readily Find that Scoppetta's and Bloomberg's Turning of a Blind Eye to the Racial Disparities Caused by the Exams, and Their Failure to Comply with the City's EEO Policy and the EEPC's Entreaties, Support an Inference of an Intent to Discriminate

Defendants argue that Intervenors failed to provide sufficient evidence that would permit any trier-of-fact to conclude that the individual Defendants "themselves acted on account of a constitutionally protected characteristic," and that "knowledge of discriminatory effect is insufficient to make out a claim of intentional discrimination," citing *Ashcroft v. Iqbal*,__U.S.__, 129 S. Ct. 1937 (2009) (City Resp. Br. 58-59). Because the Defendants' motion to dismiss was filed only after completion of all discovery, *Iqbal*'s focus upon the adequacy of the Complaint under Fed. R. Civ. P. 8 is inapplicable. Instead, the usual Rule 56 standards apply: drawing all inferences and viewing the evidentiary record in favor of Intervenors, have the Defendants shown there are no material factual issues in dispute and that they are entitled to judgment as a matter of law. *See, e.g., Clough v. City of New Haven*, 29 F. App'x 756, 759 (2d Cir. 2002). The answer to that question is plainly no.

A review of the record demonstrates that the Intervenors have presented substantial circumstantial evidence of intent – much more than the discriminatory effects of Exam 7029 alone – upon which a trier-of-fact could find against Mayor Bloomberg and Commissioner Scoppetta. The Supreme Court held in *Village of*

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977), that a plaintiff can prove intent circumstantially by relying upon a variety of factors, including, *inter alia*, (i) a pattern of disparate treatment of the protected class, (ii) the historical background of the decision-making, (iii) the specific sequence of events leading up to the challenged decision, as well as (iv) procedural or substantive departures from the employer's practices.

The Intervenors briefed these issues in the district court (Dkt. # 342 at 19-20; Dkt. # 343 at 36-53; Dkt. # 376 at 12-15). Defendants' claim that there is no evidentiary basis to infer discriminatory intent is strongly contradicted by the facts recounted below and under the *Arlington Heights* criteria, Defendants cannot demonstrate the absence of an evidentiary basis to infer their discriminatory intent.

(a) Scoppetta and Bloomberg Were Both Aware in Early 2002 of the Racially-Exclusionary Nature of the Exams Being Used and That Questions Existed Regarding Their Validity

Neither Mayor Bloomberg nor Commissioner Scoppetta contends that he lacked knowledge of FDNY's racially lopsided hiring when he took office in 2002.[4] In their brief in this Court, Defendants openly concede that they "knew of the Exams' disparate impact." (City Resp. Br. 59.) The racial problem in FDNY hiring came to Scoppetta's attention when he attended town hall meetings as part

[4] Neither of the Defendants submitted an affidavit in support of their motion to dismiss or in opposition to Plaintiffs-Intervenors' motion for summary judgment under §§ 1981 and 1983.

of the Giuliani administration from 1996-2001. (A814 at 124; A1360 at 124; A1078.) Then, just a month after he joined the FDNY, his Assistant Commissioner, Sherry Kavaler, informed him in writing that "questions have been raised about [the] fairness/bias" of the FDNY's firefighter exam. (A814 at 125; A1361 at 125; A990.) By September 2002, he was telling New York newspapers that "the Fire Department is 93% white and male – there's something seriously wrong with that picture." (A815 at 127; A1361 at 127; A1113.)

Similarly, Mayor Bloomberg took office in January 2002 and was aware of the lack of racial diversity in the FDNY early in his administration through personal observation and professional dealings with the Department. (A815 at 129; A1361 at 129.) He realized it "was very heavily weighted towards White males" (*Id.*; A899) and spoke to Commissioner Scoppetta about the diversity problem. (A815 at 130; A1361 at 130.) As early as April 2002 he met with Vulcan Society President Paul Washington about, *inter alia*, "the legality of the entry level firefighter examinations and other selection procedures" (A815-16 at 131-34; A1361-62 at 131-34; A897-99; A947; A984-85; A997-98) and [the Vulcan Society's] belief that the exams "are a poor indicator of one's ability to do the job." (A816 at 133; A1362 at 133.)

(b) A Trier-of-Fact Could Find that Bloomberg's and Scoppetta's Stated Reasons for Their Non-Compliance Are Pretextual

Despite Mayor Bloomberg's and Commissioner Scoppetta's undisputed knowledge of significant questions regarding the lawfulness of the exams, and their duties under the City Charter and City EEO Policy, they did nothing to comply with the EEO Policy or the entreaties of the EEPC that they comply. A court may find discriminatory intent, in part, upon a finding that a defendant's proffered reasons for his or her actions (or inactions) are pretextual. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

Mayor Bloomberg testified, in a sworn response to an interrogatory, that after discussions with the Fire Commissioner and the DCAS Commissioner regarding "disparities in pass rates," it "seemed best to spend public resources to move forward with new exams and new recruitment strategies rather than spending scarce public money to examine the results of the past exams." (Dkt. # 345-3, at Exh. JJ, p. 75.)

Yet this statement provides no justification for Scoppetta's and Bloomberg's failure to direct development of a new unbiased and validated exam as early as 2002 or thereafter prior to 2006, much less their failure to require an assessment of the adverse impact and validity of biased exams they were using to hire firefighters through 2008. Construction of Exam 2043 did not begin until February 2002

(A990), and it was, by design, simply a new version of the racially biased Exam 7029, based upon the same test construction model as the earlier exam. (DI-A464; DI-A472, n.24.) Despite Bloomberg's professed concern to "move forward," he did nothing to investigate the discriminatory nature of Exam 7029 and, therefore, did nothing to change the nature of the exam being developed in 2002, as required by the EEO policy and Federal and local law. Absent investigation of Exam 7029's adverse impact and validity, the 2002 exam was a costly new exercise in violating minority applicants' rights, and in no way a "move forward." And, there were alternatives available to the Mayor and Fire Commissioner that would have improved the City's exams.[5] The City's own independent expert acknowledged that alternatives to cognitive-only ability exams were available prior to 2002 that would have measured other important skills related to the firefighter job and would likely have reduced adverse impact. (Dkt. # 267-8, Schemmer Dep. Tr., at 289-99.) In fact, valid alternative criteria were available at least as far back as 1977

[5] For example, the rank-ordered use of both Exams 7029 and 2043 was highly discriminatory. (DI Order, at 20-22). If the Defendants had conducted the required studies of the exams, such would have been apparent and reasonable alternatives considered. If the City had decided to select amongst qualified candidates without use of rank order, the disparate impact of the exams would have been significantly reduced. Or, as suggested by Judge Garaufis, the City could have chosen a number of other alternative uses of the exam to remedy the discrimination, once the EEO-Policy-mandated studies of the exams provided a strong basis in evidence to believe that a disparate-impact violation would otherwise result. *Ricci v. DeStefano*, __U.S.__, 129 S. Ct. 2658, 2677 (2009). (Doc # 527, at 13-14)

when the U.S. Civil Service Commission addressed the issue of firefighter hiring. (Dkt. # 261 at ¶¶159-61; Dkt. # 265 at ¶¶159-61.)

Even after the use of Exam 2043 resulted in observable adverse impact against black applicants, the Commissioner and Mayor did not investigate its lawfulness. Thus, the lists generated from the biased exams continued in use through 2008 (DI-A439), ensuring the continued exclusion of minorities from the workforce. Predictably, black incumbents remained at the 3% level – virtually unchanged from the start of the Bloomberg administration. It was only after a probable cause finding by the EEOC on the Vulcan Society's charges and on the eve of threatened litigation by the Justice Department that Bloomberg and Scoppetta chose to direct the development of a new (though poorly designed and still discriminatory) exam in 2006. (Dkt. # 435.) Had Bloomberg and Scoppetta been committed to "moving forward" by putting public resources into developing a new exam, they had the opportunity to do so in 2002, or in the years immediately thereafter. Based on these facts, a trier-of-fact could find that the Mayor's proffered reason for failing to comply with EEO Policy and local and federal law is pretextual.

Nor does Mayor Bloomberg's other stated reason for not investigating and correcting the discriminatory use of the written exams make sense. He told the EEPC that "the Fire Department has undertaken a wide-ranging recruitment

campaign to attract women and minorities to its ranks, including various methods in which to recruit and retain candidates of color." (A1018.) Yet he himself acknowledged that recruitment did nothing to solve the problem of an exam's unfair exclusion of blacks. (A819 at 149; A1364 at 149; A908 at Tr. 81:9-19.) As the district court observed, "[i]f more blacks were taking the exam as a result of the City's recruitment efforts, then more blacks were being illegally harmed." (DT-A1409.) [6]

(c) Defendants' Argument that Bloomberg and Scoppetta Were Called Upon to "Suspend All Hiring and Undertake a Validity Study" Is Contrary to the Record Evidence

Defendants also argue that Intervenors have "implicitly conceded" that "since all statistical evidence of disproportionately white hiring is traceable to events occurring before the Mayor and Fire Commissioner took office, the sole allegation that personally implicates them is their failure, despite receiving reports of their disproportionate effect on black applicants, to suspend all hiring from pre-existing eligibility lists and undertake a validity study of the Exams." (City Resp. Br. 59.)

Intervenors have made no such concession, and Defendants' assertion grossly distorts the circumstances confronting the Mayor and Commissioner. There

[6] The purported recruitment effort was a sham; the number of minority test takers for the 2002 exam fell sharply from the number on the 1999 exam. (DI-A439; DI-A443; DI-A445.)

is no record evidence supporting the assertion that they needed to suspend all hiring in order to undertake a validity study. Quite to the contrary, neither the express language of the EEO Policy, nor the EEPC's interpretation of the Policy in 2002-03, called upon Mayor Bloomberg or Commissioner Scoppetta to suspend all hiring while a validity study was conducted. Instead, the EEO Policy called for an analysis of adverse impact and validity, and only upon a finding of adverse impact *and* lack of validity would the agency discontinue use of a selection device. Further, there is no testimony from either Bloomberg or Scoppetta – even in the form of affidavit testimony in support of the City's summary judgment motion – that they believed that compliance with the EEO Policy would leave the City without the ability to hire firefighters during the conduct of a validity study.

Defendants further argue that "City decision-makers could not stop using the eligibility lists unless they suspended hiring while better tests were designed, administered, and scored." (City Resp. Br. 60). There is no record support for this argument either. The City routinely developed new exams during the continued use of prior eligibility lists, which terminate under City Personnel Rules upon establishment of a new list. *See* Personnel Rules and Regulations of the City of New York, 55 RCNY 12 - Appendix A, Rule 4.6.6 (b) ("Unless otherwise provided, an eligible list which has been in existence for one year or more shall terminate upon the establishment of an appropriate subsequent like list for the

same title.") But, assuming the required investigation disclosed - - as it would have - - that use of Exam 7029 violated the law, a new and valid exam could have been prepared and used. It took the City no longer to construct the new exam in 2006 (Exam 6019) than it did to construct the backwards-looking and unlawful Exam 2043 in 2002. The City developed Exam 2043 between February and December 2002 (A990; DI-A439), and Exam 6019 between April 2006 and January 2007 (Dkt. ## 435, 436; A1756.) The city continued to use Exam 2043 while it developed Exam 6019 and for at least a year *after* Exam 6019 was administered. (DI-A439.) Defendants have attributed to Intervenors a concession, to wit, that hiring would be impossible if Defendants followed the law. This concession was never made. Moreover, there is no evidentiary support in the record that abiding by the law would have crippled the City's ability to hire. This argument provides no basis for entry of summary judgment for the individual defendants on the issue of intent. The fact is, had the Mayor and Fire Commissioner heeded the City's EEO Policy and the requests of the EEPC, they could have had a valid test in place in late 2002 when the discriminatory, non-job related Exam 2043 was administered.[7]

[7] The Defendants also incorrectly assert that the construction of Exam 2043 was well underway by the time they took office (City Resp. Br. 58.) or that its development "took place, in whole or in large part" under the previous administration (City Resp. Br. 71, n.21) The record evidence shows otherwise. Test development had just begun in February, 2002, and Scoppetta's FDNY was

Far more evidence supports Intervenors' claims of unlawful discriminatory intent than Bloomberg and Scoppetta choose to acknowledge on this appeal. Intervenors rely upon much more than "a knowledge of discriminatory effect." (City Resp. Br. 60). They have demonstrated a strong circumstantial case based, *inter alia*, upon the *Arlington Heights* factors referenced above. For example, they have shown that the individual Defendants violated the City's own EEO Policy and ignored the repeated efforts of the EEPC to bring them into compliance. As a direct consequence of their willful decision, despite glaring evidence that the written exams excluded blacks from the firefighter job, Defendants continue to allow discriminatory hiring from the 7029 and 2043 rank-order lists through 2008. Had the Mayor or Commissioner undertaken the required studies and followed the EEO Policy, the discriminatory effects of the written exams would have been confirmed, and alternate uses of the exams – or a new, valid exam – would have been required and developed. Intervenors have further demonstrated that there were alternatives to the continued use of the discriminatory exams. Defendants did not have to accept a discriminatory outcome. (Dkt. # 267-8, Schemmer Dep. Tr., at 289-99.) Their indifference to the known record of discriminatory exclusion of black applicants from the firefighter job is actionable under the very authority cited by the City, as was their affirmative interference with the EEPC's efforst to force

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working jointly with DCAS on testing issues respecting the use of 2043 and the related physical exam. (A990.)

compliance with the law. *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 145 (2d Cir. 1999) (recognizing that "deliberate indifference to discrimination can be shown from a defendant's actions or inaction in light of known circumstances.")

(d) There Is No Record Evidence that 9/11 Figured in Bloomberg's or Scoppetta's Decision-Making Regarding Compliance with the EEO Policy or Development of Exams

Defendants also argue that the "factual context facing the individual defendants is also significant" since the personnel crisis resulting from the events of 9/11 precluded bringing "hiring to a standstill." (City Resp. Br. 61.) Yet, neither Bloomberg nor Scoppetta ever testified in this case that considerations of 9/11 precluded them from directing construction of a new exam, the study of Exam 7029's adverse impact and validity, or the investigation of alternate, less discriminatory uses of Exam 7029. Summary judgment, of course, may not be granted on the basis of an assertion made in counsel's brief, rather than by admissible evidence. *See Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 207 (1981) ("An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.") Nor does counsel's argument asking the Court to take judicial notice of the number of firefighters retiring between 2001 and 2006 constitute a legitimate, non-discriminatory reason for failure to act in 2002 or

2003.[8] As noted above, neither the EEPC nor the EEO Policy required an immediate halt to hiring or the immediate discontinuance of all uses of an exam that City decision-makers decided to replace.

In short, the Defendants' argument that they have shown entitlement to summary judgment is without merit.[9] Defendants rely upon facts and arguments not supported by the record and, therefore, there is no basis under Rule 56 to grant them summary judgment on the basis of these arguments.[10]

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[8] Similarly, Defendants' reliance upon the very-belated use of an "expert psychometrician" to develop Exam 6019 starting in 2006 (City Resp. Br. 71, n.21) is not a defense to Defendants' refusal four years earlier to comply with the City's EEO Policy and federal, state and city law. If anything, it shows that the Defendants could have done the same in 2002.

[9] The Defendants argue that the use of the EMT promotional exam is significant evidence favoring the individual Defendants, without acknowledging that it, too, was implemented in response to litigation threatened by the United States and that the United States would likely have viewed its discontinuance by Bloomberg and Scoppetta with disfavor. *Matter of Gallagher v. City of New York*, 307 A.D.2d 76, 78 (N.Y. App. Div. 2003).

[10] The Defendants' citation to *Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 112 (2d Cir. 1980) for their argument that no no inference of discrimination can be drawn in Intervenors' favor (City Resp. Br. 60) is misplaced. The Police Department in *Guardians* "made extensive efforts to understand and apply the [EEOC] Guidelines." *Id*. This stands in marked contrast to this case, where the Mayor and Commissioner blocked efforts to investigate whether the *Guardians* standards were being followed.

II. AS TO THE STATE IMMUNITY CLAIM, DEFENDANTS FAIL TO SHOW THAT *HADDOCK V. CITY OF NEW YORK* IS NOT CONTROLLING

A. Scoppetta and Bloomberg Failed to Take the Steps Explicitly Mandated by the EEO Policy to Evaluate Hiring Practices for Adverse Impact and Job-Relatedness, Thereby Insuring Continued Racial Discrimination in Hiring

Although Bloomberg and Scoppetta provide a lengthy discussion of State immunity law, the core of Intervenors' State law claim on appeal is that the district court misapplied the New York Court of Appeals decision in *Haddock v. City of New York*, 75 N.Y.2d 478 (1990) (Intervenors Br. 154-58.) Significantly, Defendants concede that State law discretionary immunity does not attach "where the municipal actor violates an internal rule or policy that mandates a specific action in a certain situation." (City Resp. Br. 67.) Instead, Defendants argue that the EEO Policy could not be interpreted as explicitly written, because the Fire Commissioner could not "hire new firefighters without using the eligibility list" and "hiring without using an eligibility list was not a legally available option." (*Id.* at 68.)

The Defendants' argument is nonsensical. It was possible for Commissioner Scoppetta to comply with the State Constitution and Civil Service Law given the plain meaning of the City's EEO Policy. The EEO Policy does not require the agency head (in this case, Commissioner Scoppetta) to hire personnel without

using an eligibility list. It does call for discontinuing the use of a selection procedure, such as a written exam, if *found* to have an adverse impact and to lack validity. (A865.) Nothing in the EEO Policy dictates an immediate discontinuance of the exam's use such that public safety would be at risk or to otherwise require hiring without an eligibility list.

Neither Commissioner Scoppetta nor Mayor Bloomberg presented affidavit testimony nor asserted in the district court that they failed to follow the EEO Policy because to do so would have violated the Civil Service Law or the State Constitution. They did not assert in the Court below that application of the EEO rule would require immediate suspension of an existing eligibility list. Nor, for that matter, did DCAS Commissioner Hirst, when confronted with the EEPC's entreaties to Commissioner Scoppetta that he conduct an adverse impact and validity study, suggest that doing so was inconsistent with either the State Constitution or Civil Service Law or require immediate suspension of an eligibility list. (A1116-18.) Bloomberg and Scoppetta simply decided *not to comply* with the City's EEO Policy, and under *Haddock* such decision-making precludes immunity. *Haddock v City of New York*, 75 N.Y.2d 478, 485 (1990) ("Indeed, the very basis for the value judgment supporting immunity and denying individual recovery for injury becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion.")

B. Bloomberg and Scoppetta Played a Significant Role in Establishing Qualifications for the Firefighter Job, Further Demonstrating Their Obligation to Ensure Nondiscrimination in Hiring

The City Charter provision giving DCAS authority to "determine the requisite knowledge, skill and ability required for a given civil service position" does not relieve an agency head of his/her responsibility to comply with the terms of the EEO Policy. DCAS itself issued the Policy requiring agency heads to investigate their selection procedures pursuant to *N.Y.C. Charter 814* (12). Again, when confronted with evidence of the EEPC's insistence that the FDNY conduct the adverse impact study of the firefighter exam, DCAS Commissioner Hirst did not deny that the FDNY was obligated to do so under the EEO Policy, but rather simply – and damningly – mused that she herself had not examined her own agency's practices for adverse impact. (A1119.)

Moreover, contrary to Defendants' arguments, the record evidence shows that Commissioner Scoppetta and Mayor Bloomberg have had substantial roles in setting "the requisite knowledge, skill and ability required" for the firefighter position. For example, the decision in 2006 to change the minimum qualifications for the firefighter job from 30 college credits to 6-months of prior work experience involved both the Mayor and the Commissioner Scoppetta. (A1083.) Similarly, with regard to past City practice, the evidence shows that Scoppetta's predecessor, not DCAS, set the cutoff score for Exam 7029. (A1232-33; A964-69.) The use of

84.75 as the passing score, rather than the usual DCAS passing score of 70, highly exacerbated the racial impact of the exam and, ultimately, the City could not show that use of that cutoff score met this Court's *Guardians* standards for predicting future job performance. These undisputed facts further undermine the Defendants' contention that setting selection standards was exclusively a DCAS matter and that Commissioner Scoppetta was, therefore, powerless to direct a study of them.

Tellingly, Defendants' argument about the restricted role of Commissioner Scoppetta under the EEO Policy also fails to mention the City Charter's assignment to Commissioner Scoppetta of the duty to ensure "that such agency does not discriminate against employees or applicants for employment as prohibited by federal, state and local law." *N.Y.C. Charter 815* (19). Plainly, both his failure to comply with the EEO Policy and his selection of candidates from a discriminatory eligibility list is contrary to that duty.

Because Mayor Bloomberg ratified the Commissioner's failure to follow the EEO Policy, he too acted in contravention of the Policy, which assigned to the Mayor "ultimate responsibility for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed *and enforced*." (A867.) Bloomberg disregarded this explicit obligation when he rejected the EEPC's specific request that Exam 7029 be analyzed for adverse impact and validity. Under the terms of the EEO Policy, study of hiring practices was not left to the

discretion of agency heads or the Mayor – the Policy required such studies in the circumstances presented here, and both Mayor Bloomberg and Commissioner Scoppetta refused to follow the mandates of the Policy.

Defendants' arguments do not weaken, much less undermine, *Haddock's* applicability to the facts of this case. Because both Mayor Bloomberg and Commissioner Scoppetta failed to adhere to the City's own EEO Policy, even in the face of clear and repeated instructions from the EEPC, *Haddock* precludes application of discretionary immunity under State and City law.

CONCLUSION

On the basis of the foregoing, Plaintiffs-Intervenors-Appellees-Cross-Appellants respectfully ask this Court to reverse the district court's grant of summary judgment on both federal and state immunity grounds and remand the issue of the Mayor's and Commissioner's liability for discrimination under federal, state and city laws to the district court for consideration on the merits.

Dated: May 31, 2012
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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of February 22, 2012 because it contains 5,877 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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AFFIDAVIT OF CM/ECF SERVICE

I, Glenda Plair, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On May 31, 2012

deponent served the within: **Reply Brief for Plaintiffs-Appellees-Cross-Appellants**

upon:

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Sworn to before me on May 31, 2012

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