IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., ET AL,

Plaintiffs-Intervenors,

-against-

THE CITY OF NEW YORK, ET AL,

Defendants.

----------X

Case No. 07-CV-2067 (NGG)(RLM)

ECF Case

MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS-INTERVENORS' MOTION FOR SUMMARY JUDGMENT CONCERNING JOB-RELATEDNESS, BUSINESS NECESSITY AND ALTERNATIVES

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Plaintiffs-Intervenors submit this memorandum of law in further support of their motion for summary judgment and in reply to Defendants' memorandum of law concerning validity and alternatives.

Argument

I. DEFENDANTS' RESPONSES TO PLAINTIFFS-INTERVENORS' RULE 56.1 STATEMENT ARE INSUFFICIENT TO CREATE ANY GENUINE ISSUE OF MATERIAL FACT

Defendants responded to most of Plaintiffs-Intervenors' Rule 56.1 Statements by either denying "the materiality of the assertions" or denying "plaintiffs-intervenors' characterization" of the cited testimony. Neither of these responses is sufficient to defeat summary judgment. Denying the materiality of an assertion does not create a dispute of fact. Materiality is a question

for the Court. *Zelnick v. Fashion Inst. of Tech.*, 464 F.3d 217, 224 (2d Cir. 2006). Furthermore, disputing the *characterization* of a fact is not the same as disputing a *material fact*, since Defendants do not dispute the underlying testimony upon which Plaintiffs-Intervenors rely.

Defendants also "refer the Court" to the complete deposition transcripts of each City witness "for a true and complete recitation of its contents." As a matter of law, these responses are insufficient to show a dispute of material fact. Rule 56(e) imposes upon the non-movant a burden to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate '*specific facts* showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis added). Reference to an entire transcript is insufficient. A trial court is under no obligation to "perform an independent review of the record to find proof of a factual dispute," and where a local rule requires a party to set out specific facts in dispute, as is the case in the Eastern District, summary judgment may be granted on the basis of a party's failure to do so. *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 470-71 (2d Cir. 2002).

II. DEFENDANTS RAISE NO GENUINE ISSUE OF MATERIAL FACT THAT WOULD SATISFY THEIR BURDEN TO SHOW THAT THE CHALLENGED EXAMS WERE JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

Once adverse impact is shown, the burden shifts to Defendants to prove that Exams 7029 and 2043 are valid as used in selecting firefighters, i.e. that they are job related and consistent with business necessity. *Gulino v. New York State Bd. of Educ.*, 460 F.3d 361, 382 (2d Cir. 2006). Defendants have failed to meet that burden or to present any genuinely disputed fact that *could* prove the validity of the challenged exams.

The entire purpose of Dr. Bobko's and Dr. Schemmer's expert report on validity was to offer an opinion on the issue of validity. Yet, Defendants' experts never offered an opinion that the exams were valid in their expert report, produced in January 2008, and neither of them ever testified – over the course of four days of deposition – that they believed the exams to be valid or validly used. Nor did Defendants ever move to supplement their expert report pursuant to Rule 26(e). Even though validity was the *one* issue on which Defendants had the burden of producing expert opinion and factual proof, that burden was entirely unmet as of the close of discovery on October 31, 2008, and it was unmet on February 2, 2009 when Plaintiffs-Intervenors' motion papers were served.

Now, more than thirteen (13) months after Defendants produced their expert reports on validity, Dr. Schemmer has said *for the first time* that the examinations are valid in spite of their many shortcomings. Def. Ex. 5 at ¶3.[1] Setting aside its inadmissibility, Dr. Schemmer's Declaration is wholly insufficient to rebut Plaintiffs-Intervenors' claims.

A. THERE IS NO DISPUTED ISSUE OF FACT THAT COULD SHOW THAT THE CUTOFF SCORES AND RANK-ORDERING USED ON EXAMS 7029 AND 2043 TO SELECT FIREFIGHTERS WERE VALIDATED

There is no dispute about how the cutoff scores were set on Exams 7029 and 2043. For Exam 7029, the cutoff score was "based on the projected FDNY's hiring needs." Def. Mem. at 12. For Exam 2043, it was based on a local administrative guideline. Resp. to SOF ¶63. There

[1] As discussed more thoroughly in Plaintiffs-Intervenors' moving brief, Defendants may not, consistent with Rule 26 and federal case law, submit additional expert opinion or fact witness testimony at this very late stage in these proceedings. P-I Mem. at 23-24. The Declarations of Defendants' expert, F. Mark Schemmer and DCAS consultant Dr. Catherine Cline advance new and previously undisclosed opinions as to the examinations at issue here, and Plaintiffs-Intervenors have already served Defendants with a motion to strike this material. The fully-briefed motion shall be filed on or before Tuesday, March 17, 2009.

is also no dispute that candidates were selected for appointment in rank order based on their test scores. Resp. to U.S.A. SOF ¶40-42. The only question remaining for the Court is whether Defendants can meet their burden to establish that the use of the selected cutoff scores and rank ordering were permissible under Second Circuit authority. Thus, the issue is ideally suited for summary judgment.

The Court of Appeals in *Guardians Association v. Civil Service Commission of the City of New York*, 630 F.2d 79 (2d Cir. 1980) held that "use of rank-ordering requires a demonstration of such substantial test validity that it is reasonable to expect one- or two-point differences in scores to reflect differences in job performance." 630 F.2d at 100-101. Furthermore, where an exam has adverse impact, a defendant may not base its cutoff score on hiring needs unless the exam would be valid for rank-ordering. *Id.* at 105.

Defendants produced *no* expert opinion to justify the use of the cutoff scores or the rank-ordering on Exams 7029 and 2043. Dr. Bobko's and Dr. Schemmer's expert report did not even mention the validity of the rank ordering or the cutoff scores used on the challenged exams (App. S:173-175, Bobko-Schemmer at 26-29), and they gave no opinion that would establish the validity of the rank-ordering or the cutoff scores in their multi-day depositions. In fact, Dr. Bobko candidly and explicitly conceded that his and Dr. Schemmer's expert report was *not* sufficient to establish the validity of the cutoff scores or rank-ordering on either exam. SOF ¶¶58, 67.[2] Dr. Schemmer now seeks to revise his co-author's deposition testimony by saying

[2] Defendants claim that SOF ¶58 "does not contain an explicit statement of fact which can be admitted or denied, however to the extent [that it asserts] that Exams 7029 and 2043 are not job related and consistent with job necessity, defendants deny the assertion." This generalized response is insufficient to raise an issue of fact as to Dr. Bobko's testimony or its meaning. Similarly, Defendants deny ¶67 "due to the mischaracterization of the testimony" and direct the Court to the entire text of Dr. Bobko's deposition transcript. This, again, is insufficient to create

that Dr. Bobko was responding to "a trick question." Def. Ex. 2 at ¶8. Given that Dr. Bobko did not seek to clarify or amend this testimony on the notarized "errata" sheet he submitted (Def. Ex. 12, final page of exhibit) and has not filed an affidavit seeking to clarify his testimony now, it is evident that he stands behind his statement that the expert report does not "establish" (i.e., prove, show, etc.) validity.[3]

Even aside from Dr. Bobko's admission, neither expert ever opined that a one- or two-point difference in test score – or any difference for that matter – would be expected to predict a difference in job performance. App. S:173-175, Bobko-Schemmer at 26-29. In fact, Defendants did *nothing* to determine whether differences in candidates' scores corresponds in any way to their level of performance.[4] Thus, Defendants cannot possibly meet the specific test of validity that *Guardians* requires to support their scoring system.

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an issue of fact and does not satisfy a non-moving party's burden under Rule 56. *See* Point I above. Dr. Bobko's statements speak for themselves, and they plainly indicate that Defendants' expert report did not establish the job relatedness or business necessity of the cutoff scores or rank-ordering on Exams 7029 and 2043.

[3] Dr. Schemmer claims that the questions were "trick" questions because an expert report does not "establish" validity of an exam, but can only "comment on the issue of validity from the position of expertise." Def. Ex. 2 at ¶8. This ignores the plain meaning of the word "establish." Merriam-Webster's On-line Dictionary defines "establish" as "to put beyond doubt **:** prove" [as in] "established my innocence." *Available at* http://merriam-webster.com/dictionary/establish. Webster's Third New International Dictionary (1986) defines "establish" to mean "to prove or make acceptable beyond a reasonable doubt" and "to provide strong evidence for." Black's Law Dictionary defines "establish" as meaning "to put beyond doubt or dispute; prove; convince." If Dr. Bobko did not understand the use of the term "establish" when he was asked these questions, he was on notice to ask for clarification, which he did not do. Def. Ex. 15 at 8-9.

[4] The only evidence Defendants bring forth now is a *new* Declaration from consultant Dr. Catherine Cline, who states that "research...suggests that the higher the scores the greater the probability of success on the job." This general statement is insufficient to establish that one- or two-point differences in test scores would be expected to predict differences in job performance. Dr. Cline does not identify the "research" to which she is referring, and she gives no indication of how large the differences in score must be to affect expected performance. In any event, Dr. Cline's declaration is inadmissible for reasons discussed at footnote 1 above.

Guardians also requires that the impact of the error of measurement be held to acceptable limits, and Defendants bear the burden on this point. 630 F.2d at 106. Defendants' assertion that the measurement error inherent in any examination prevented them from using an appropriate scoring system is unavailing. It is undisputed that the error of measurement for the challenged exams corresponds to four (4) test questions and that variations in score due to chance can drop a candidate's score thousands of places on the hiring list. Resp. to SOF ¶69. Yet, Defendants make no argument, nor could one be supported, that they designed their scoring and selection system in a way that would limit the impact of the error of measurement, as *Guardians* requires.

Defendants also do not dispute that among those candidates who took both Written Exams 7029 and 2043, 54.8% of those who scored below 70 on Written Exam 2043 (i.e., failed) scored above 70 on Written Exam 7029; and of those who scored below 70 on Written Exam 7029, 75.9% scored 70 or above on Written Exam 2043. Resp. to SOF ¶72. Given that the exams are, as Defendants admit, "very similar" (Resp. to SOF ¶12), this high level of inconsistent performance is obviously not sufficient to meet Defendants' burden of showing a "substantial demonstration of reliability," which the Court of Appeals requires to justify the use of rank-ordering and cutoff scores based on hiring needs, *Guardians*, 630 F.2d at 101.[5]

Given the exams' adverse impact on black test-takers, Defendants' failure to validate the cutoff scores or rank-ordering system on Exams 7029 and 2043, alone requires a finding that the exams violate Title VII. *Guardians*, 630 F.2d at 106. Summary judgment on liability should be entered in favor of Plaintiffs-Intervenors.

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[5] Defendants assert, but do not support with any evidence, the proposition that test-takers' abilities may have changed between the time that Exams 7029 and 2043 were administered. Def. Mem. at 14-15; Def. Ex. 2 at ¶10, Def. Ex. 3 at ¶5. This speculative claim, on a point where Defendants bear the burden of proof, is insufficient to create a dispute of fact.

B. THERE IS NO SUFFICIENT EVIDENCE OF CONTENT VALIDITY FOR THE CHALLENGED EXAMS, AND SUMMARY JUDGMENT FOR PLAINTIFFS IS WARRANTED

Plaintiffs-Intervenors have catalogued many of the fatal flaws in the development and construction of the challenged exams. *See* P-I Mem. at 24-32. Although it is their burden to do so, Defendants failed to come forward with any specific evidence to rebut Plaintiffs-Intervenors' showing that the tests were so incompetently developed as to destroy their content validity.

1. Defendants fail to establish thoroughness and care in test development

As the Court of Appeals has held, "[c]ontent validity is determined by a set of operations, and one evaluates content validity by the thoroughness and care with which these operations have been conducted." *Guardians*, 630 F.2d at fn 14, citing *APA Standards*. While Defendants' expert report, and their experts' depositions, fail to state that the content validity standards were met, Dr. Schemmer now asserts (in his Declaration submitted two weeks ago) that while "in terms of documentation, procedures and the mechanics of development, the DCAS development of Exams 7029 and 2043 were far from ideal," the exams were very representative of entry level firefighter selection exams which used more rigorous methods and which were thoroughly documented." Def. Ex. 5 at ¶3. Dr. Schemmer does not specify *how* the challenged exams are "representative" of other firefighter exams, he does not identify which exams he is comparing the challenged exams to, and he does not indicate that any of those exams have been approved by any court. The "thoroughness and care" necessary to establish content validity cannot be demonstrated here, and Dr. Schemmer's conclusory (and inadmissible) statement that the exams are nevertheless valid is insufficient to avoid a finding of summary judgment in favor of Plaintiffs-Intervenors. *See, e.g., Geonaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995)(a non-moving party must come forward with more than unsupported

assertions); *Twin Labs., Inc. v. Weider Health & Fitness, Inc.*, 900 F.2d 566, 568 (2d Cir. 1990)("Conclusory allegations will not suffice to create a genuine issue").

2. The Landy report cannot support the validity of Exams 7029 and 2043

Defendants now claim, for the first time, that the validity of the challenged exams is based on a "draft" report authored by Dr. Frank Landy in 1992 (the "Landy report").[6] Defendants contend that because Dr. Landy is a well-respected I/O psychologist, his work is presumptively valid. Def. Mem. at 5; Def. Ex. 2 at ¶11. But the *Uniform Guidelines on Employee Selection Procedures,* 29 C.F.R. § 1607.9A, are clear that the general reputation of a test or its author can never be "accepted in lieu of evidence of validity."

Moreover, Defendants' assertion that Exams 7029 and 2043 were based on the Landy report is utterly belied by the testimony of the DCAS Examiners who developed those exams. Matthew Morrongiello, the Examiner for Exam 7029, was questioned in detail about the steps he took in developing Exam 7029 and never indicated that the Landy report was the basis for the development or scoring of Exam 7029. Asked if he had even read the Landy report at the time, his response was: "I believe I referred to it. I can't say for sure that I read in detail, though." Def. Ex. 22, Morrongiello Tr. at 440. Asked if he had used the Landy report as the basis for Exam 7029, Morrongiello said "[t]o a degree," explaining that he looked back at Landy's task list "just as a starting point" for the Exam 7029 task list. *Id.* at 478-479. Morrongiello could not identify any other way that the Landy report was used in the development or scoring of Exam 7029. *Id.*

The DCAS Examiner for Exam 2043, Alberto Johnston, also gave extensive and detailed

[6] The Landy report is hearsay and is inadmissible. By responding to the Landy report, Plaintiffs-Intervenors do not waive the right to challenge its admissibility at trial.

testimony but never said that he had relied upon the Landy report with respect to the development of that exam. Johnston considered the Morrongiello report to be a content validity study – something Morrongiello himself denied – and testified that the Morrongiello report was the only such study that he knew of related to Exam 2043. Def. Ex. 7, Johnston Tr. at 431.

Even Dr. Bobko, who co-authored Defendants' expert report on validity, testified that he was "not particularly intimately familiar with the Landy study" but that he had "skimmed it." Def. Ex. 15, Bobko Tr. 196-197. Just a cursory review of the Landy report confirms that it could not have been used as the basis for Exams 7029 and 2043 because it outlines a completely different type of job analysis, test construction process and scoring system than were used on the challenged exams:

a. *Entirely different job analysis process*: Landy did not conduct a standard job analysis for Exam 0084 because the firefighters' union refused to participate. Def. Ex. 5 at 1-2. As a substitute, Landy "transported" data from Washington, D.C. and used it to determine which abilities were necessary for New York City firefighters. *Id.* at 3. Dr. Bobko testified that he had "no opinion" as to the validity of Dr. Landy's transportability study, Def. Ex. 15, Bobko Tr. 31-32, so it could hardly have formed the basis for validating Exams 7029 or 2043.

b. *Entirely different test construction*: Among other differences: (1) the test plan for Exam 0084 is markedly different from the test plan for Exams 7029 and 2043, *see* Def. Ex. 5 at Table 9; Def. Ex. 4, last page of exhibit; (2) the questions on Exam 0084 were written by psychology graduate students and members of Dr. Landy's staff (Def. Ex. 5 at 24), whereas the questions on Exams 7029 and 2043 were written by firefighters and reviewed by DCAS

personnel (Resp. to SOF ¶¶123-125)[7]; and (3) Exam 0084 was pilot tested (Def. Ex. 5 at 25-26) while Exams 7029 and 2043 were not (App. EE, Exam 7029 Test Dev. Report). These differences are discussed in Plaintiffs-Intervenors' main brief at 28.

c. *Entirely different scoring methodology*: Exam 0084 used "corrective scoring" in which "the candidate could indicate his or her second and third choice of answer as well as the first choice" and then "received partial credit for choosing the correct answer on the second or third try." Def. Ex. 5 at 31-32. Corrective scoring was *not* used on either Written Exam 7029 or 2043. Resp. to SOF ¶11.

Moreover, the "draft" Landy report was never intended to establish the content validity of Exam 0084 or its scoring system. The report simply "describes the job analysis and written test development" for Exam 0084 (Def. Ex. 5 at 1) and highlights Dr. Landy's intention to conduct a criterion-related validity study to measure the validity of the exam. Def. Ex. 5 at 30. That criterion-related validity study was never completed. Incumbent firefighters took Exam 0084, but the City never compared their scores to any measure of their job performance (i.e., the "criterion"). *Id.* Thus, the predictive value of the test was never ascertained and the "draft" Landy report certainly cannot establish the validity of two later exams that were based on a different job analysis, a different test-construction process and a different scoring system.

3. Reading level

As the Court in *Guardians* points out, "the reading level of the test should not be pointlessly high." 630 F.2d at 99. Defendants bear the burden of showing that it is not. *Id.* Here, Defendants concede that no reading level analysis was done by them or by their experts,

[7] The Court of Appeals specifically cautioned against this practice, since employees are "amateurs in the art of test construction." *Guardians*, 630 F.2d at 96.

but they argue that it is not possible to analyze the reading level of multiple-choice exams. Resp. to SOF ¶128; Def. Ex. 2 at ¶17. This argument is wholly undermined by Defendants' reliance on the reputation of I/O psychologist Dr. Landy, whose report notes that the reading level of Written Exam 0084 (also a multiple-choice test) *was* analyzed by his firm. Def. Ex. 5 at 28. Clearly a reading level analysis was possible but was simply not done by Defendants, despite their burden to prove the exams' validity. In fact, Plaintiffs-Intervenors' expert Dr. Wiesen did analyze the reading level of Exams 7029 and 2043, and his report showed that the reading level was so high as to destroy the exams' validity. SOF ¶127. In the absence of competing evidence from Defendants, Dr. Weisen's findings regarding the excessively high reading level, and its consequences for test-takers, should be accepted as undisputed.

4. Flawed job analysis

Defendants have the burden of proving that a suitable job analysis was conducted. *Guardians*, 630 F.2d at 95. Defendants have not come forward with evidence that could be used to meet that burden. Plaintiffs-Intervenors, however, showed that the job analysis conducted for Exams 7029 and 2043 was fatally flawed because, among other things, it is not genuinely disputed that: (1) no non-cognitive abilities were rated, SOF ¶88, Resp. to SOF ¶88; (2) the abilities were not rated on a "Day 1" scale (to determine whether the ability is needed at the very start of the job), SOF ¶91, Resp. to SOF ¶91; and (3) members of the Linking Panel were confused about the meanings of the abilities they were rating, SOF ¶¶96-97, Resp. to SOF ¶¶96-97.[8]

[8] Defendants admit that no one explained to the Linking Panel members, or gave them examples of, the difference between "somewhat important," "important," and "critical" which were the ratings they employed in evaluating the importance of a particular ability in performing a given task. Resp. to SOF ¶95. Defendants speculate that over time a person's view of what is

5. Representativeness

Defendants have the burden to show that the challenged exams were representative of the content of the job. *Guardians*, 630. F.2d at 98. Here, there is no dispute that Exams 7029 and 2043 did not measure any non-cognitive knowledges, skills, abilities or characteristics ("KSACs"). App. M:84, 86, Adm. 29, 36. Defendants admit that Resistance to stress, Teamwork, Responsibility, Desire to Learn, Honesty, Cleanliness, Medical Interest, Achievement Orientation, Dependability and Conscientiousness are all non-cognitive KSACs which have been found to be important to the job of firefighter. Resp. to SOF ¶114-115. Defendants respond by claiming that *some* of the non-cognitive abilities named by Plaintiffs-Intervenors were not feasible to use in 1999 and 2002, but they do not say *which* non-cognitive KSACs were not feasible to use, *why* they were not feasible to use, or what the specific basis for such assertions would be. Def. Mem. at 10-11. In light of Defendants' *own witnesses*' admissions that many non-cognitive measures were in use years earlier – including in a paper and pencil format – and could have been used on the challenged exams (see Point III below), their conclusory and unsupported "feasibility" defense cannot create a disputed issue of fact.

III. DEFENDANTS FAILED TO SHOW MATERIAL DISPUTES OF FACT REGARDING ALTERNATIVE EMPLOYMENT PRACTICES

Defendants Memorandum of Law in Opposition fails to address whatsoever Plaintiffs-Intervenors' argument that even if the exams were validated – which they were not – summary judgment would be required in light of undisputed facts showing that Defendants had alternative

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important to the job may change, but they do not cite to testimony from any of the Linking Panel members to suggest that their views of what is important to the job *did* actually change in any way. Resp. to SOF ¶96. Rather, it is clear from their testimony that their ratings were inconsistent because they did not understand the meanings of many of the abilities they were asked to rate.

methods available to them for screening firefighter candidates. Those methods would have satisfied Defendants' administrative interests and reduced adverse impact against black candidates. Under *Gulino*, 460 F.3d at 382, judgment for plaintiffs is appropriate when defendant fails to adopt less discriminatory alternatives. *See also* 42 U.S.C. § 2000e-2(k)(1)(c).[9]

Exams 7029 and 2043 tested only for cognitive abilities. App. M:84, 86, Adm. 29, 36. Yet Plaintiffs-Intervenors show that there were a wide variety of important, non-cognitive abilities (described by Dr. Schemmer as "personality characteristics," App. AA:355-356, Schemmer Tr. 298-299) that: (1) were important to the firefighter job; (2) were testable in paper and pencil format at the time Exams 7029 and 2043 were administered (i.e., were available); (3) showed lesser differences in scores between black and white applicants or incumbents than purely cognitive ability tests; and (4) were not included in the abilities for which Defendants tested in either Exam 7029 or 2043. SOF ¶¶149-167. In fact, Defendants' experts conceded that measuring these non-cognitive abilities would add to the validity of an otherwise cognitive-only exam. Def. Ex. 8, Schemmer Tr. 298-302.

Defendants have responded by attempting to create the illusion of disputes of material fact, but they fail to demonstrate anything more than the illusion. This is another case where Defendants simply "refer the Court" to the complete deposition transcript of the City witnesses upon whom Plaintiffs-Intervenors rely "for a true and complete recitation of its contents." Resp. to SOF ¶¶152, 154, 156, 158, 162, 165 & 167. As discussed above, this is insufficient to create a genuine dispute of fact.

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[9] The 1991 Civil Rights Act expressly adopted the law on "alternative employment practices" as it existed on June 4, 1989, the day before the Supreme Court's decision in *Ward's Cove*. In the Second Circuit, *Guardians* was controlling authority on that date. *See Gulino,* 460 F.3d at 385 (holding that *Guardians* was "still the law in this Circuit" after the 1991 Civil Rights Act).

It is not necessary for the Court to look any further than Plaintiffs-Intervenors' designations of the deposition testimony of Defendants' own witnesses to find the evidence of material facts not in dispute. Those depositions show, *inter alia*, the following:[10]

- Defendants' expert Dr. Schemmer conceded that a number of non-cognitive abilities listed in a U.S. Civil Service Commission study (conducted in the 1970's) were important to the firefighter job, testable in paper and pencil format, but not included in Exams 7029 or 2043. Def. Ex. 8, 287-291.
- Dr. Schemmer made the same concessions with respect to other non-cognitive abilities included on the U.S. Department of Labor's O*Net list of abilities important to the job of firefighter (Def. Ex. 8, 299-302) and with respect to a group of assessments offered by Previsor, a company with which Dr. Bobko has an affiliation. Def. Ex. 8, 292-299.
- The City itself developed "situational judgment" test questions to screen for non-cognitive abilities relevant to the job of Custodian Engineer in December 2001-December 2002, at the time Exam 2043 was being developed. Resp. to SOF ¶¶153-154, Def. Mem. at 5 (acknowledging that Exam 2043 was developed in 2002, at the same time the City was developing the Custodian Engineer exam).
- Defendants do not dispute that Exam 6019, which tested for non-cognitive abilities important to the firefighter job and developed by the City itself, had less adverse impact than either Exam 7029 or 2043 and was at least as job-related and

[10] While there are other material statements of fact that Defendants do not dispute, those cited above are, standing alone, sufficient for entry of judgment for Plaintiffs-Intervenors on the "alternative employment practices" prong of the adverse impact claim.

consistent with business necessity. Resp. to SOF ¶¶149-151.

- Defendants do not dispute that cognitive ability tests – such as Exams 7029 and 2043 – generally result in lower test scores for black test takers (Resp. to SOF ¶157) and that exams that include non-cognitive abilities (such as the City's own firefighter Exam 6019) can have increased validity and reduced black-white score disparities. Resp. to SOF ¶¶149-150, 158, 165 & 167.[11]
- Dr. Schemmer conceded that tests or "assessments" of these non-cognitive abilities were available at the time of the administration of Exams 7029 and 2043. Def. Ex. 8, Schemmer Tr. at 291, 294, 296, 298, 302.
- Defendants do not dispute that such paper and pencil tests meet the City's administrative, scoring and security objectives. Resp. to SOF ¶151.

Nothing more need be shown for entry of judgment for Plaintiffs-Intervenors on the alternative employment practices prong of their disparate impact claim. *Guardians*, 630 F.2d at 100-106.

Conclusion

For all these reasons, as well as those contained in Plaintiffs-Intervenors' moving papers, we respectfully ask that the Court enter judgment on liability in favor of Plaintiffs-Intervenors on their disparate impact claims.

[11] While Defendants seek to dispute Plaintiff-Intervenors' characterization of Dr. Schemmer's testimony, the transcript unequivocally shows that he testified that "there are paper and pencil assessments" of non-cognitive abilities, that those tests are "valid assessment measures," that they "were available during the time frame" when Exams 7029 and 2043 were administered, and that the literature on "these sorts of KSAs," i.e., "personality characteristics" . . . "show lesser differences between black and white job applicants or incumbents." Def. Ex. 8, Schemmer Tr. 289-299.

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