

For Immediate Release

**U.S. COURT OF APPEALS FINDS DISTRICT COURT WRONG
ON INTENTIONAL DISCRIMINATION CHARGE
IN FDNY HIRING PRACTICES CASE**

***RULING SETS ASIDE MOST OF THE INTRUSIVE REMEDIAL MEASURES DIRECTED BY THE DISTRICT COURT;
CITY CONTINUES ITS OWN SUCCESSFUL EFFORTS TO CREATE A MORE DIVERSE DEPARTMENT,
WITH LATEST CLASS BEING THE MOST DIVERSE IN THE FDNY'S HISTORY***

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New York, N.Y., May 14, 2013 -- The Second Circuit Court of Appeals overturned a finding of intentional discrimination against New York City today and struck down most of the remedial changes to Fire Department's practices imposed by Judge Nicholas Garaufis of Brooklyn's Federal District Court for the Eastern District of New York.

Moreover, the Second Circuit granted the City's request that the case be assigned to a different judge for trial of the intentional discrimination claim by the Vulcan Society. The Court found that Judge Nicholas Garaufis "made an unwarranted venture into fact-finding at a preliminary stage" and branded the City's evidence as "incredible" without hearing any witnesses. "... [A]n objective observer would have a reasonable basis to question the judge's impartiality in assessing that evidence at trial," wrote Second Circuit Judge Jon O. Newman on behalf of the Court's majority.

"This is a major victory for the City. We are extremely pleased that the Second Circuit recognized significant problems in the manner in which the District Court handled the case," said Corporation Counsel Michael A. Cardozo. "This lawsuit was filed to address a relatively narrow issue involving two now expired exams, conducted in 1999 and 2002, but was inappropriately used as a vehicle by the court to justify judicial intrusion into virtually every aspect of FDNY hiring. The City champions the goal of a more diverse Fire Department, and has undertaken multi-million-dollar campaigns to further that goal. Now that we are no longer hampered by many of the onerous remedial requirements, we now have a greater ability and freedom to continue our effective diversity efforts."

"Through our extensive recruitment efforts in the past decade, the Department has continued to meet our long-standing goal of attracting an increased number of people of color and women to take the Firefighter exam - including the record-setting number who took the most recent exam in 2012," said Fire Commissioner Salvatore J. Cassano. "We eagerly anticipate hiring another class of new firefighters and further increasing the diversity within our ranks."

Fire Commissioner Cassano noted that the latest class of 280 EMTs and paramedics being promoted this Friday is the "most diverse class of probationary firefighters in Fire Department history," with 40 percent of them being minorities and women.

Case History

The lawsuit -- *U.S.A. et al vs. The City of New York, et al.* -- as first brought in 2007 by the U.S. Justice Department (DOJ) as a challenge to two written FDNY examinations from 1999 and 2002. DOJ's original

lawsuit alleged only that the two exams resulted in a disparate impact on Blacks and Hispanics applying to be firefighters. Months after DOJ's complaint was filed, the Vulcan Society, an organization of Black firefighters, intervened in the case and broadened the claims to include intentional discrimination.

In July 2009, Judge Garaufis ruled that the two challenged exams and the rank-ordering of results disproportionately impacted black and Hispanic applicants, and that the City had not satisfied its burden of demonstrating that they were "job-related" and "consistent with business necessity." The Court later appointed the honorable Mary Jo White as Special Master to oversee the City's development of a new exam. Judge Garaufis approved the use of the exam developed under Special Master White's supervision in October 2012.

The City also sought dismissal of the Vulcan Society's intentional discrimination claims, and the Vulcan Society cross-moved for summary judgment. In opposition, the City presented evidence that it did not intentionally discriminate, including evidence that its written exams were designed with attention to the federal government's Uniform Guidelines on Employee Selection Procedures. The City also submitted substantial evidence of its own aggressive efforts to promote diverse hiring. However, in January 2010, Judge Garaufis of the District Court ruled that a trial was not necessary, and found that the City had engaged in intentional discrimination as a matter of law.

After a remedial hearing, the District Court issued its final relief order in three phases over the fall and winter of 2011, ordering broad relief measures, including the appointment of a Court Monitor to oversee the City's development of future exams and to restructure and oversee the FDNY's hiring structure for the next 10 years or more -- at an estimated \$2 million cost to taxpayers.

In January 2012, the City filed an appeal in the Second Circuit Court of Appeals seeking to reverse the finding of intentional discrimination and reassign the case to a different Brooklyn federal court judge for trial. The City argued that reassignment to a different judge was essential to preserve public confidence in a fair outcome. Oral arguments in the appeal took place in June 2012.

While the case was in litigation, the City engaged in an unprecedented and expansive recruitment campaign to attract the most diverse group of applicants in the Department's history. FDNY staff held over 6,000 recruitment events throughout the city and attracted interest from more than 140,000, 60,000 of whom signed up for the exam.

The 2012 fire exam, which was taken by more than 41,000 candidates – including a record-breaking 19,260 minorities (a 130-percent increase over the previous exam administered in 2007) – in March and April, was developed by PSI, a leading test development company with extensive experience designing tests for government agencies, in consultation with experts representing the Vulcan Society and the Department of Justice. The exam results have indicated that among the ranks of candidates likely to be considered for appointment, there is no adverse impact against any group, and the development process demonstrates that the test is job-related.

Legal Team

The City's core legal team includes Georgia Pestana, Executive Assistant Corporation Counsel for Employment and Policy Litigation; Deborah Brenner, Senior Counsel in the Appeals Division; Kathleen Comfrey, Senior Counsel in the Labor & Employment Law Division; William Fraenkel, Senior Counsel in the Labor & Employment Law Division; Patricia Miller, Deputy Chief of Special Federal Litigation, and Alan Krams, former Senior Counsel in the Appeals Division. Also providing key input were General Counsel Daniel Shacknai of the FDNY and Paul Zidlicky of Sidley Austin.

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