

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GARY TINNEY)
660 North Colony Road)
Meriden, CT 06450)

and)

LINDA D. COHENS)
159 Clifton St)
New Haven CT 06513)

and)

BERNARD McNEIL)
36 Windsor Rd)
Hamden CT 06517)

and)

ANTHONY REESE)
62 Treat St, Apt 321)
West Haven CT 06516)

and)

CURTIS TOLSON)
122 Springside Ave)
New Haven CT 06515)

and)

MICHAEL NEAL)
61 Brownell Street)
New Haven CT 06511)

and)

ANTHONY WELLS)
47 Truman Street)
New Haven, CT 06519,)

Plaintiffs,)

CASE NO.:

)
vs.)
)
CITY OF NEW HAVEN)
200 Orange Street)
New Haven, CT 06510)
)
and)
)
INTERNATIONAL ASSOCIATION)
OF FIREFIGHTERS LOCAL 825)
350 Ferry Avenue)
New Haven, Connecticut 06511,)
)
Defendants.)

COMPLAINT

(Equal Protection – Race Discrimination, Fourteenth Amendment 42 U.S.C. § 1983; Due Process - Fifth Amendment, 42 U.S.C. § 1983; Race Discrimination, 42 U.S.C. § 1981; Race Discrimination/Disparate Treatment, 42 U.S.C. § 2000-e, et seq.; Race Discrimination/Disparate Impact, 42 U.S.C. § 2000-e, et seq.)

JURY DEMAND ENDORSED HEREON

PARTIES AND BACKGROUND

1. This is a case involving race discrimination in employment relating to promotional examination administered in December, 2003, by the City of New Haven for the ranks of Lieutenant and Captain in the New Haven Fire Department.
2. All Plaintiffs are firefighters in the City of New Haven who participated in and completed the promotional examination process for either the rank of Lieutenant or Captain.

3. Plaintiffs are the first New Haven firefighters to challenge in any litigation the validity of the actual promotional examinations in issue.
4. The City of New Haven is a municipality located in the State of Connecticut, which operates the New Haven Fire Department (the “City” or “New Haven”).
5. The City operates a fire department, known as the New Haven Fire Department (the “Fire Department”).
6. The Fire Department consists of approximately 350 uniformed members.
7. There is no requirement that a uniformed member of the Fire Department be a resident of the City.
8. The typical career of a uniformed member of the Fire Department lasts approximately 25 years.
9. The Fire Department is a paramilitary organization that has several ranks; Lieutenant is the first rank in progression and Captain is the next rank up the line of progression.
10. Promotions within the Fire Department are made approximately every 6-7 years.
11. Any given uniformed firefighter are eligible to participate in only 3-4 promotional cycles over the span of their career.
12. The New Haven Civil Service Board (“CSB”) is responsible for the preparation, administration and scoring of promotional examinations for the New Haven Fire Department.
13. Defendant International Association of Firefighters Local 825 is the collective bargaining agent for the uniformed personnel of the City of New Haven Fire Department (the “Union”).

14. Pursuant to an agreement between the Union and the City, promotional examinations for the Fire Department consist of a written component and a structured oral interview component; this agreement is not contained in the collective bargaining agreement.
15. The two components of the promotional examination are weighted at 60% for the written component and 40% for the structured oral interview component.
16. It is widely accepted within the professional literature of the industrial/organization psychologists and testing consultants that cognitively loaded examinations have an inherent adverse impact towards African-Americans and Hispanics.
17. The written component of the promotional examinations provided by the agreement between the Defendants is what is referred to as a “cognitively loaded” examination.
18. A cognitively loaded examination is an examination that emphasizes cognitive skills, such as reading comprehension, rather than skills and abilities necessary to perform the job of a firefighter line officer.
19. The written component of any given promotional examination has generally consisted of 100 or more multiple-choice questions and answers.
20. Promotional examinations in a multiple-choice format are basically recognition and memorization exercises.
21. The structured oral interview component of any given promotional examination cannot measure the abilities and skills necessary for any given candidate to perform at the rank for which they are being tested.

22. The structure of the promotional examinations or the weighting of the respective components of the promotional examinations as provided by the agreement between the Defendants was not defined by any study or analysis conducted by any industrial/organizational psychologist or testing consultant.
23. No job analysis was conducted in order to determine the appropriate structure or the weighting of the respective components of the promotional examinations as provided by the agreement.
24. There is no scientific basis for either the structure of the promotional examinations or the weighting of the components for the promotional examinations.
25. Promotional examinations using the format provided by the agreement between the Defendants cannot adequately measure a representative sample of the job domain for either the rank of Lieutenant or Captain in the New Haven Fire Department.
26. Promotional examinations developed and administered pursuant to the format provided by the agreement between the Defendants do not closely resemble the conditions and environment encountered by any firefighter on the job.
27. The promotional tests for the rank of Lieutenant and Captain for the New Haven Fire Department are not sufficiently valid under a content validation strategy or sufficiently reliable to justify rank ordering of candidates from the promotional examination part of the promotional process.
28. The agreement between the Defendants for the promotional examinations is not included in the collective bargaining agreement between the City and the Union.

29. This agreement relating to the structure and weighting of the Fire Department promotional examinations has been used as the basis for the design, development and administration of the promotional examinations for the Fire Department for at least the past 20 years.
30. The promotional examinations using the format provided by the agreement between the Defendants has had an adverse impact towards African-Americans and other minorities for the entire period of time that it has been in use.
31. Both Defendants are aware and have been aware that the promotional testing format pursuant to their agreement relating to promotional testing has had an ongoing and repeated adverse impact towards African-Americans and other minorities for the entire period of time that it has been in use.
32. The promotional examinations used by the Defendants pursuant to their agreement are not merit-based as they do not adequately measure the skills, abilities and knowledges necessary to perform the positions of either Lieutenant or Captain on the New Haven Fire Department.
33. After any given promotional examination is administered and scored, candidates are listed in rank order starting with the highest scoring candidate in descending order to the lowest scoring candidate.
34. The City uses a "Rule of Three" when making promotional decisions based upon promotional test results.
35. The Rule of Three used by the City requires that any given vacancy for a position in the New Haven Fire Department be filled with one of the three top unselected candidates from the applicable eligibility list.

36. Under the Rule of Three used by the City, it is possible that the top scoring candidates on any given promotional test would not be promoted during the life of the promotional eligibility list.

FACTUAL AVERMENTS

Lieutenant and Captain Promotional Tests

37. In late 2003, the City administered promotional examinations for the ranks of Lieutenant and Captain in the New Haven Fire Department.
38. The promotional examinations were developed, administered and scored by a third-party consultant.
39. The promotional examination for each rank was structured according to the agreement between the Union and the City.
40. In 2004, the City CSB voted not to certify the test results for each rank due to its concern that it would be sued by black firefighters if it used the test results in making promotional decisions.
41. There was no validation report for the Captain's promotional test that was prepared before the City decided not to certify the test results.
42. The validity of the promotional tests has never been subjected to any form of scrutiny or reviewed in any legal action before any court of law.
43. Defendant's CSB created eligibility lists for each rank with candidates rank-ordered from highest score to lowest score on the promotional examination part of the promotional process.
44. The City finally certified the test results for each rank in October, 2009.

45. Defendant City made the first promotions in straight rank order from the eligibility lists drawn from the promotional examinations on December 7, 2009, and made further promotions on December 10, 2009.

Disparate Impact

46. Under the Uniform Guidelines of Employee Selection (“UGES”), 29 C.F.R. 1607.04(D), a prima facie case of disparate impact arises if the selection rates for the group with the lower selection rate is less than 4/5s that of the group with the highest selection rate (the “4/5s Rule”).
47. Until all the selections had been made or identified, it was not possible to determine adverse impact based upon selection rates.
48. Plaintiffs are the first persons to compute in any litigation either the selection rates or impact ratios relating to the promotional process in issue.
49. Neither selection rates nor impact ratios based thereon could be computed until, at the earliest, the City either identified the persons to be promoted from the certified test result lists or made the promotions from the certified eligibility lists.

Captain

50. Plaintiff Gary Tinney is a firefighter for the New Haven Fire Department, serving at the rank of Lieutenant.
51. Plaintiff Tinney was qualified for and participated in the promotional examinations for the rank of Captain that were administered in November and December, 2003
52. Plaintiff Tinney completed the testing portion of the promotional process.

53. 41 total candidates completed the testing portion of the process: 25 whites, 8 blacks and 8 Hispanics.
54. Of those, 34 total candidates passed: 16 whites, 3 blacks and 3 Hispanics.
55. The promotional examination was never validated nor has a validation report ever been prepared.
56. On December 7, 2009, the City promoted 7 persons from the Captain's eligibility list: 6 whites, 1 Hispanic and 0 blacks.
57. On December 10, 2009, the City promoted another 2 persons from the Captain's eligibility list: 1 white, 1 Hispanic and 0 blacks.
58. The selection rate for white Captain promotional candidates is 35.7%, or 7 (promotional selections) ÷ 25 (white persons completing the promotional examination).
59. The selection rate for black candidates is 0.
60. The impact ratio is 0, which is far less than 80% in violation of the 4/5s Rule as provided in the UGES, 29 C.F.R. 1607.04(D).
61. Plaintiffs have established a prima facie case of race discrimination with regards to the Captain's promotional process.
62. The promotional tests are not valid and cannot be validated under any existing validation strategy as they do not sample the job domain for the rank of Captain on the New Haven Fire Department.
63. The promotional examinations do not determine which candidates are the most qualified to be promoted based upon merit.

64. There are alternative measures that are available that are more effective at selecting promotional candidates and that have less adverse impact than that observed in this promotional process.
65. The City has knowingly violated its charter and the laws of the United States in permitting outside influence into the civil service laws and examination requirements.
66. Despite this history of adverse impact and the fact that there are alternative measures that are routinely used in promotional examinations in fire service in other municipalities, Defendants have continued to discriminate by requiring and using a promotional process that they know has a discriminatory effect on minorities while simultaneously not promoting the most qualified candidates.
67. To the date of the filing of this complaint, the promotional examination's validity has never been fully or fairly litigated in any court.
68. To the date of the filing of this complaint, the promotional examinations' validity remains in question and, as such, facially impacts the rights of Plaintiffs.
69. The Plaintiffs were also harmed by Defendant City's discarding of the examinations without sufficient basis for doing so.
70. The actions by the City have resulted in irrevocable delays in the promotional process and cycles over the years of the litigation between the City and the original Plaintiffs, as well as unlawful denials of promotion to Plaintiffs and lost opportunity.
71. All acts of the City regarding the promotional process were pursuant to its policies, practices and procedures.

72. By virtue of Defendants various acts and omissions, Plaintiffs have suffered and continue to suffer loss of promotion and loss of wages and benefits associated therewith, entitling them to promotion and back pay, with benefits.
73. By virtue of Defendants various acts and omissions, Plaintiffs have suffered and continue to suffer damages in terms of emotional distress, humiliation, embarrassment and general loss of enjoyment of life, all entitling them to the award of compensatory damages.
74. Plaintiffs are entitled to the recovery of their reasonable attorneys fees, costs and expert witness fees incurred to prosecute this action.

Lieutenant

75. Plaintiffs Linda Cohen, Bernard McNeil, Anthony Reese, Curtis Tolson, David Tyson and Anthony Wells (“Plaintiff Candidates”), are firefighters for the New Haven Fire Department.
76. Plaintiff Candidates were qualified for and participated in the promotional examinations for the rank of Lieutenant that were administered in November and December, 2003
77. Plaintiff Candidates completed the testing part of the promotional process.
78. 77 total candidates completed the testing portion of the process: 43 whites, 19 blacks and 15 Hispanics.
79. Of those, 34 total candidates passed: 25 whites, 6 blacks and 3 Hispanics.
80. On December 7, 2009, the City promoted 16 persons from the Captain’s eligibility list: 8 whites and 0 blacks.

81. On December 10, 2009, the City promoted another 8 persons from the Lieutenant's eligibility list: 4 white, 1 Hispanic and 3 blacks.
82. The selection rate for white Lieutenant promotional candidates is 27.9%, or 12 (selections) ÷ 43 (persons completing the promotional examination process).
83. The selection rate for black candidates is 15.8%, or 3 (selections) ÷ 19 (persons completing the promotional examination process).
84. The impact ratio is 57.9%, or 15.8 ÷ 27.9, which is far less than 80% in violation of the 4/5s Rule as provided in the Uniform Guidelines of Employee Selection (UGES), 29 C.F.R. 1607.04(D).
85. Plaintiffs have established a prima facie case of race discrimination with regards to the Lieutenant's promotional process.
86. The promotional tests are not valid and cannot be validated as they do not sample the job domain for the rank of Lieutenant on the New Haven Fire Department.
87. The promotional examinations do not determine which candidates are the most qualified to be promoted based upon merit.
88. There are alternative measures that are available that are more effective at selecting promotional candidates and that have less adverse impact than that observed in these promotional examinations.
89. The City has knowingly violated its charter and the laws of the United States in permitting outside influence into the civil service laws and examination requirements.
90. Despite this history of adverse impact and the fact that there are alternative measures that are routinely used in promotional examinations in fire service in

other municipalities, the City has continued to discriminate by continuing to use a promotional process that it knows has a discriminatory effect on minorities while simultaneously not promoting the most qualified candidates.

91. To the date of the filing of this complaint, the promotional examination's validity has never been fully or fairly litigated in any court.
92. To the date of the filing of this complaint, the promotional examinations' validity remains in question and, as such, facially impacts the rights of Plaintiffs.
93. The Plaintiffs also have been harmed by the City's discarding of the examinations without sufficient basis for doing so.
94. The actions by the City have resulted in irrevocable delays in the promotional process and cycles over the years of the litigation between the City and the original Plaintiffs, as well as unlawful denials of promotion to Plaintiffs and lost opportunity.
95. All acts of the City were pursuant to its policies, practices and procedures.
96. By virtue of Defendants various acts and omissions, Plaintiffs have suffered and continue to suffer loss of promotion and loss of wages and benefits associated therewith, entitling them to promotion and back pay, with benefits.
97. By virtue of Defendants various acts and omissions, Plaintiffs have suffered and continue to suffer damages in terms of emotional distress, humiliation, embarrassment and general loss of enjoyment of life, all entitling them to the award of compensatory damages.
98. Plaintiffs are entitled to the recovery of their reasonable attorneys fees, costs and expert witness fees incurred to prosecute this action.

JURISDICTION

99. This Court has jurisdiction over Plaintiffs' federal claims pursuant to 42 U.S.C. 1988 and 28 U.S.C. 1331, federal question jurisdiction.
100. This Court has jurisdiction over Plaintiffs state law claims pursuant to 28 U.S.C. 1367, supplemental jurisdiction.
101. Plaintiffs have each filed charges of race discrimination, disparate impact and disparate treatment, with the EEOC, which are pending at the time of the filing of this complaint.
102. This Court has jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. 1367(c), supplemental jurisdiction.

COUNT I

42 U.S.C. 1983 – Equal Protection, Fourteenth Amendment

103. Plaintiffs incorporates by reference each of the allegations contained in paragraphs 1 through 97 of this complaint as if fully rewritten herein.
104. Defendants City of New Haven's various acts and omissions directed towards Plaintiffs constitute violation of 42 U.S.C. 1983, based upon the denial of equal protection of the law due to race in violation of the Fourteenth Amendment to the United States Constitution.

COUNT II

42 U.S.C. 1983 – Substantive Due Process, Fourteenth Amendment

105. Plaintiffs incorporate by reference each of the allegations contained in paragraphs 1 through 97 of this complaint as if fully rewritten herein.
106. Defendant City of New Haven's various acts and omissions directed towards Plaintiffs in using promotional examinations that its knows have a history of

discriminatory impact towards minorities and then making promotions from eligibility lists that Defendants know have an adverse impact on minorities, without establishing validity thereof and taking affirmative steps to preclude minority firefighters from challenging constitute violations of 42 U.S.C. 1983, based upon the denial of substantive due process due to race under the Fourteenth Amendment to the United States Constitution.

COUNT III

42 U.S.C. 1983 – Procedural Due Process, Fourteenth Amendment

107. Plaintiffs incorporate by reference each of the allegations contained in paragraphs 1 through 97 of this complaint as if fully rewritten herein.
108. Defendant City of New Haven's various acts and omissions directed towards Plaintiffs in using promotional examinations that its knows have a history of discriminatory impact towards minorities and then making promotions from eligibility lists that Defendants know have an adverse impact on minorities, without establishing validity thereof and taking affirmative steps to preclude minority firefighters from challenging constitute violations of 42 U.S.C. 1983, based upon the denial of procedural due process under the Fourteenth Amendment to the United States Constitution.

COUNT IV

U.S.C. 2000e-2, et seq. – Race Discrimination, Disparate Treatment

109. Plaintiffs incorporate by reference each of the allegations contained in paragraphs 1 through 97 of this complaint as if fully rewritten herein.
110. Plaintiffs could not maintain this action until Defendant City used the eligibility lists in question, which did not occur until December 7, 2009.

111. Defendants various acts and omissions directed towards Plaintiffs, including the requiring of the use of a promotional process that is known to have adverse impact towards African-Americans and other minorities, refusal to change that process while knowing that the promotional process continued over many years to have a demonstrated adverse impact on African-Americans and other minorities, while not adequately measuring the skills, knowledges and abilities necessary to perform the job of either Lieutenant or captain in the New Haven Fire Department, constitutes discrimination in employment on the basis of race, disparate treatment, in violation of 42 U.S.C. 2000e-2, et seq.
112. Plaintiffs have established a prima facie case of race discrimination with regards to the Lieutenant's and Captain's promotional processes.

COUNT V

42 U.S.C. 2000e-5, et seq. – Race Discrimination, Disparate Impact

113. Plaintiffs incorporate by reference each of the allegations contained in paragraphs 1 through 97 of this complaint as if fully rewritten herein.
114. Plaintiffs did not have standing to challenge the promotional process until such time as Defendant City used the eligibility lists in question, which did not occur until December 7, 2009.
115. Defendants various acts and omissions directed towards Plaintiffs constitutes discrimination in employment on the basis of race, disparate impact, in violation of 42 U.S.C. 2000e-5, et seq.

COUNT VI
Declaratory Judgment

116. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 97 of this complaint as if fully rewritten herein.
117. Plaintiffs are entitled to a declaratory judgment that the promotional examinations do not measure the attributes necessary to be an effective Lieutenant or Captain in the New Haven Fire Department, are not merit based and are therefore in violation of the Charter of the City of New Haven.

Wherefore, Plaintiffs pray this Court grant them judgment against the Defendant and seek the following relief:

- a) Declaratory judgment that the 2003 Fire Lieutenant and Captain promotion examinations do not adequately measure the attributes of being an officer in the New Haven Fire Department to warrant being used as part of the selection process for promotion;
- b) award of promotions to the respective ranks with in-grade seniority sought by each Plaintiff in the 2003 promotional process;
- c) award of back pay, including pension contributions, overtime, acting time compensation and any general increases awarded from date of in-grade seniority through present;
- e) general compensatory damages;
- f) reasonable attorneys fees incurred to prosecute this action;
- g) costs and expert witness fees and expenses;
- h) any other relief deemed necessary and just by the Court.

/s/ Dennis R. Thompson
Dennis R. Thompson
Ohio Reg. # 0030098
tmprnlaw@sbcglobal.net
Christy B. Bishop
Ohio Reg. # 0076100
bishopchristy@gmail.com
Thompson & Bishop
2719 Manchester Road
Akron, Ohio 44319
330-753-6874
330-753-7082 (facsimile)

/s/W. Martin Philpot, Jr.
W. Martyn Philpot, Jr.
CT 05747
Law Office of W. Martin Philpot, Jr.
LLC
409 Orange Street
New Haven, CT 06511
203-624-4666

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiffs demand a jury trial for each of their claims and causes of action to the extent permitted by law.

/s/ Dennis R. Thompson
Dennis R. Thompson