

NO. NNH-CV-11-6025382-S

BRUCE R. BONNER, SHAFIQ	:	SUPERIOR COURT
ABDUSSBAUR, CRAIG S. ALSTON,	:	
MALCOLM DAVIS, JR., MILT	:	
JACKSON, ALBERT McFADDEN, JR.,	:	
SAMSON REED, MITCHELL	:	
STRICKLAND, RAHQUE J. TENNANT	:	J. D. OF NEW HAVEN
and TIMOTHY P. WILSON	:	
	:	
VS.	:	
	:	
CITY OF NEW HAVEN	:	NOVEMBER 5, 2012

MOTION FOR TEMPORARY INJUNCTION

The plaintiffs respectfully move that this court issue an immediate temporary injunction restraining the defendant from making any promotions to the rank of Sergeant in its Police Department until this case has been adjudicated. In support of this motion, the plaintiffs represent as follows:

1. As more fully set forth in the Complaint herein, the plaintiffs are New Haven police officers who were denied promotion to the rank of Sergeant because of their race. Specifically, the defendant terminated the promotion list after only one year, contrary to unvarying past practice, expressly because the New Haven Civil Service Commission believed that Hispanics were

ARGUMENT REQUESTED

TESTIMONY REQUIRED

underrepresented on that list.

2. A new examination for promotion to Sergeant in the New Haven Police Department was given recently. This examination differed from the previous examination in the following respect:

- A. In the earlier examination, on which the plaintiffs scored high, a passing score on the written portion of the examination was a prerequisite to being granted admission to the oral examination.
- B. In the most recent examination, every applicant was given both a written and an oral examination. The written exam is given only 35% weight and the oral exam is given 65% weight. This methodology permits manipulation of the test results to achieve the ethnicity-based results which the defendant is seeking, regardless of merit.

3. The plaintiffs have learned that the results of this test will be announced within the coming days and that it is the intention of the defendant immediately to make promotions from that list in order to preclude the plaintiffs from gaining promotion if they are successful in this litigation.

4. If the defendant is permitted to carry out its plan, the plaintiffs will suffer irreparable injury.

THE PLAINTIFFS

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Their Attorney

ORDER

The foregoing motion having been heard, it is hereby ORDERED:

THE COURT

_____, J.

CERTIFICATION OF SERVICE

On the date above stated, a copy hereof was sent to Nuzzo & Roberts LLC,
P. O. Box 747, Cheshire, CT 06410; 203-250-3131; recep@nuzzo-roberts.com.

_____/s/_____(#067962)
JOHN R. WILLIAMS

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BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

This case represents the latest chapter in the attempts of the City of New Haven to make race and ethnicity a basis for advancement within its public safety sector without any evidence of business necessity. Ricci v. DeStefano, 557 U.S. 557 (2009). In this case, a racially neutral promotional examination was terminated one year early solely because members of the defendant's Civil Service Commission disliked the fact that Hispanics did not score as well as African-Americans and other non-Hispanics on the promotional exam. The pleadings are closed and this case has a trial date of October 22, 2013.

The defendant recently administered a new test for promotion to the positions being sought by the plaintiffs. That test differed significantly from the earlier test in one important respect: whereas the first test was based primarily

on a written examination, with an oral examination being given only to candidates who met a minimum successful score on the written test, the new test gives every candidate both a written and an oral exam, and the written exam is given only 35% weight while the oral exam is given 65% weight. This procedure permits manipulation of test results to produce the sort of ethnic "balance" being sought by the defendant.

The plaintiffs have learned that the results of this test will be released within a few days and have been informed that the defendant intends to make immediate promotions from this new list for the purpose of defeating this litigation by filling prior to trial the very positions being sought by the plaintiffs.

In Ward v. Thomas, 895 F. Supp. 401 (D. Conn. 1995), the federal district court in Connecticut delineated the standards governing the issuance of temporary injunctive relief:

The court may grant a motion for temporary restraining order if the moving party demonstrates a risk of irreparable harm and either a) a likelihood of success on the merits or b) the existence of sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships decidedly favoring the party requesting the relief. Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

As to the requirement of irreparable harm, the movant must show that the harm is "actual and imminent" not "remote or speculative." State of New York v. Nuclear Regulatory Commission, 550 F.2d 745, 755 (2nd Cir. 1977)

895 F. Supp. at 403.¹ Cf., Almontaser v. New York City Dept. of Education, 519 F.3d 505 (2nd Cir. 2008); TCPIP Holding Co., Inc. v. Haar Communications, Inc., 244 F.3d 88 (2nd Cir. 2001); Warner-Lambert Co. v. Northside Development Corp., 86 F.3d 3 (2nd Cir. 1996); Velez v. McGuire, 992 F. Supp. 125 (D. Conn. 1998); Ward v. Thomas v. Shalala, 895 F. Supp. 406 (D. Conn. 1995). The plaintiff must show that the harm in question cannot be remedied by an award of monetary damages. Velez v. McGuire, supra.² "The Second Circuit has held that the alleged violation of a constitutional right triggers a finding of irreparable injury. Jolly v. Coughlin, 76 F.3d 468, 482 (2nd Cir. 1996). Because violations of constitutional rights are presumed irreparable, Elrod v. Burns, 427 U.S. 347, 373

¹

The court went on to note: "Given the presentation of constitutional and other statutory challenges to defendant's actions, serious questions of law are presented by plaintiffs, and the balance of hardships between plaintiffs' economic survival and defendant's administrative inconvenience and increased work clearly tips in plaintiffs' favor, thus satisfying the alternative requirements for injunctive relief. See RAM v. Blum, 533 F. Supp. 933, 940 (S.D.N.Y. 1982)." 895 F. Supp. at 405, fn. 6.

²

"Where '(1) the injunction sought will alter, rather than maintain, the status quo...or (2) the injunction sought will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits,' the moving party must demonstrate both irreparable harm and a clear or substantial likelihood of success on the merits." Koppell v. New York State Board of Elections, 153 F.3d 95, 95-96 (2nd Cir. 1998), quoting Jolly v. Coughlin, 76 F.3d 468, 473 (2nd Cir. 1996) and Tom Doherty Assocs. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2nd Cir. 1995).

(1976), 'the very nature of [the] allegations' satisfies the requirement that [the plaintiff] show irreparable injury." State of Connecticut Dept. of Environmental Protection . Occupational Safety and Health Administration, 138 F. Sup. 2d 285, 291 (D. Conn. 2001), quoting Bery v. City of New York, 97 F.3d 689, 694 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). Cf. Kamerling v. Massanari, 295 F.3d 206, 214-15 (2nd Cir. 2002).

"[T]he granting of a preliminary injunction is not a decision on the merits of the plaintiff's suit. It is merely a decision that the suit has enough merit -- which need not be great merit -- to justify an order that will freeze the situation, in the plaintiff's favor, for such time as it may take to determine whether the suit is, or is not, meritorious.

"Specifically, the court asked to grant such relief discounts (that is, multiplies) the harm to the plaintiff if it is withheld by the probability that in the end the plaintiff will prevail in the suit, and compares that discounted harm to the discounted harm to the defendant from granting the relief to the plaintiff....If the plaintiff has a very high probability of prevailing, the discount factor will be small, and if he can then show that he will be seriously and irreparably harmed unless he obtains preliminary relief, the injunction will probably be granted. But even a plaintiff who does not have a very high probability of ultimately prevailing will be entitled to preliminary relief if he faces very great irreparable harm and the

defendant very little (unless third parties would be hurt)." Ayres v. City of Chicago, 125 F.3d 1010, 1013 (7th Cir. 1997) (Posner, C.J.).

In this case, the only relief being sought by the plaintiffs on their present motion is the maintenance of the *status quo* until the merits of their claim can be adjudicated. They will suffer irreparable harm if the temporary injunction is not issued and the defendant will suffer no change in its circumstances if it is issued. Accordingly, a temporary injunction should issue forthwith.

THE PLAINTIFFS

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Their Attorney

CERTIFICATION OF SERVICE

On the date above stated, a copy hereof was mailed to Nuzzo & Roberts LLC, P. O. Box 747, Cheshire, CT 06410; 203-250-3131; recep@nuzzo-roberts.com.

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JOHN R. WILLIAMS

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AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

STATE OF CONNECTICUT)	
)	SS: New Haven
COUNTY OF NEW HAVEN)	

BRUCE R. BONNER, having been duly sworn, states:

1. I am one of the plaintiffs in this lawsuit.
2. I am an officer in the New Haven Police Department.
3. I am an African-American.
4. Had the last promotion list to the rank of Sergeant in the New Haven Police Department been maintained for two years, as had been the unvarying past practice, I would have been promoted to the rank of Sergeant by now.
5. The last examination, on which I scored high enough to assure that I would have been a Sergeant by this time, required that every applicant pass a written examination before being allowed to take an oral examination.

6. I took a new examination for promotion to the Sergeant position earlier this year. That examination differed from the previous exam because every applicant took both a written examination and an oral examination and the written examination was given only 35% weight and the oral examination was given 65% weight in reaching a total score. Thus, it is possible to pass the exam without passing the written portion.

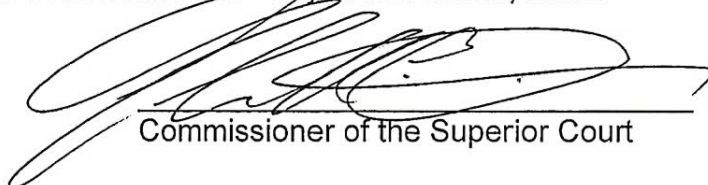
7. Assistant Police Chief Casanova stated a few days ago that the results of this most recent examination will be posted within the next few days and that it is the intention of the City of New Haven to make promotions to Sergeant off that list "very quickly" and that if any of us attempts to enjoin such promotions the City intends to claim that there is an "emergency" requiring immediate promotions.

8. If the Sergeant positions are filled in this manner, I will lose the opportunity to be a Sergeant and will suffer permanent and irreparable injury to my law enforcement career.



BRUCE R. BONNER

Subscribed and sworn to before me this 5th day of November, 2012.



Commissioner of the Superior Court

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P. O. Box 747, Cheshire, CT 06410; 203-250-3131; recep@nuzzo-roberts.com.

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JOHN R. WILLIAMS