



U.S. Department of Justice

Civil Rights Division

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DJ 170-76-405

Employment Litigation Section - PHB
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Washington, DC 20530
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Via Electronic Mail

Karen Kennard
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SEP 26 2013

Re: Authorized Suit against the City of Austin, pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, as amended, with respect to the City's hiring of entry-level firefighters

Dear Ms. Kennard:

This letter is to inform you of the results of our investigation to determine whether the City of Austin (the "City"), through its Fire Department, is engaged in a pattern or practice of discrimination against African Americans and Hispanics with respect to the hiring of fire cadets, the City's entry-level firefighter position. We appreciate your cooperation during our investigation.

We share the City's objective to select the best qualified applicants to serve in its Fire Department. We undertook this investigation to evaluate whether the City's selection procedures disproportionately screened out any group of applicants on a protected basis and, if so, whether the City could demonstrate that those procedures in fact enabled it to distinguish between qualified and unqualified candidates. Based on the information gathered during our investigation, we have determined that, through those selection procedures, the City is engaged in a pattern or practice of discrimination against African Americans and Hispanics with respect to the hiring of fire cadets, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). Title VII prohibits not only intentional discrimination, but also employment actions that are "fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). A selection device may, of course, be used lawfully by an employer where the test measures an applicant's ability to perform the job at issue. However, where a device operates as an "artificial, arbitrary, and unnecessary barrier[]" to the employment of protected groups and is not job related and consistent with business necessity, Title VII prohibits its use. *Id.* at 431.

We understand that the City may be interested in participating in settlement negotiations with the goal of resolving this matter without contested litigation. Please be assured that, if the parties reach a negotiated resolution, the United States will work within the parameters of any such resolution to assist the City in meeting its immediate and future hiring needs while

complying with Title VII. We believe that the parties can reach an agreement that is consistent with our mutual goal of ensuring that the City has a valid, nondiscriminatory means of identifying qualified applicants for firefighter jobs. Please be advised that we may contact representatives from the Austin Firefighters' Association in the course of any settlement discussions with the City.

As you know, the City uses a multi-step selection process, and we have examined multiple hiring cycles in the course of our investigation. The following is a summary of our conclusions, and we can provide additional detail during the course of future conversations with the parties. The 2012 entry-level firefighter selection process used three selection devices: (1) the National Firefighter Selection Inventory (NFSI), a written examination intended to test both cognitive and non-cognitive abilities; (2) the Integrity Inventory (I2), a written test designed to measure counterproductive workplace behaviors and integrity-related personality factors, and (3) a Structured Oral Interview (SOI).

In 2012, the City set a cutoff score of 70 on the NFSI. The City permitted the top 1,500 highest scoring NFSI takers who passed the I2 to proceed to the SOI. Applicants who either scored lower than 70 or were not among the top 1,500 scorers who also passed the I2 were eliminated from the selection process (pass/fail use). We have concluded that the manner in which the City used the NFSI as a pass/fail device to screen applicants has caused adverse impact upon African-American and Hispanic applicants. For example, the disparity between white and African American NFSI pass rates was statistically significant, as was the disparity between white and Hispanic pass rates. Absent these differences, we would expect a substantially higher number of African Americans and Hispanics to have moved on to the next steps of the process.

Additionally, applicants who were permitted to proceed to the SOI and passed that step were placed on an initial eligibility list in descending rank order based on a "total score" calculated by the City. The total score was calculated by determining a composite score for each applicant based on the applicant's NFSI and SOI scores, and adding military points where applicable. We have concluded that the City's rank order practice of processing and selecting applicants on the basis of their total score, which is based in part on an applicant's NFSI score (rank order practice), has caused an adverse impact on African-American and Hispanic applicants. For example, both groups were statistically significantly less likely than whites, based on their ranks, to be reached for processing or to be ultimately hired.

An employer, of course, is not prohibited from using those selection procedures that cause adverse impact if it can demonstrate that the procedures validly predict an applicant's ability to perform the job. Where, however, an employer cannot make this showing, it has unnecessarily limited its applicant pool without gaining the ability to distinguish between qualified and unqualified candidates. Here, the information presented to us has not demonstrated that either the City's pass/fail use of the NFSI or the rank order practice described above meets the necessary standards. Under Title VII, the City has failed to demonstrate that its use of the NFSI is "job related" for the fire cadet position and "consistent with business necessity."

In 2013, the City used a different set of selection devices to screen fire cadet applicants. The selection devices included a written test called the National Entry-Level Firefighter

Examination (NELF), administered to more than 2,000 applicants in May 2013. The City invited all fire cadet applicants who took the NELF to participate in the next step of the selection process, which was the administration of a Structured Oral Interview (SOI 2). The City proposed combining NELF and SOI 2 scores (with military points) to arrive at a total score. The City planned to place applicants on an initial eligibility list in descending rank order based on total scores, and to process applicants through the remaining steps in the hiring process in descending rank order (rank order practice). Our preliminary analysis indicates that the City's proposed rank order practice will cause adverse impact on African Americans and Hispanics. Our preliminary analysis is that the information presented to us has not demonstrated that the City's proposed rank order practice is job related for the fire cadet position and consistent with business necessity. Therefore, we have serious concerns that, if implemented, the City's 2013 hiring process will violate Title VII.

On those bases, we have concluded that the City, through its Fire Department, is engaged in a pattern or practice of discrimination against African Americans and Hispanics on the basis of their race and/or national origin with respect to fire cadet hiring, in violation of Title VII. Title VII provides that when a local government employer has engaged in a pattern or practice of discrimination in violation of the Act, the Attorney General may apply to the appropriate court for an order that will ensure compliance with Title VII and remedy the effects of past discrimination. This duty has been delegated to the Assistant Attorney General in the Department's Civil Rights Division, who has authorized the filing of suit against the City of Austin. The United States will file its complaint no later than October 26, 2013.

We invite the City to discuss with us entering into a consent decree incorporating the measures we believe must be taken in order to comply with Title VII. The measures include the following:

1. The City must adopt and implement employment practices with respect to the screening and selection of applicants for fire cadet jobs that comply with Title VII. This includes the proposed 2013 process, which must be modified to comply with Title VII.
2. The City must provide make-whole relief to African-American and Hispanic applicants who were harmed by the City's use of the NFSI and rank order practice.

Deputy Chief Meredith Burrell and Senior Trial Attorney Shayna Bloom have been assigned to represent the United States in this matter. Ms. Bloom is available to discuss the

contents of this letter with you at your earliest convenience and to explore with your office whether the City is interested in discussing entering into a consent decree embodying the elements of the relief set forth above.

Sincerely,

Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division

By:



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