

RECEIVED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

2009 MAR 25 P 1:19

CLERK US DISTRICT COURT
NORFOLK, VIRGINIA

 UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF PORTSMOUTH, VIRGINIA,)
)
 Defendant.)
)

Civil Action No. 2:09CV133

COMPLAINT

Plaintiff United States of America alleges:

1. This action is brought on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended ("Title VII").
2. This Court has jurisdiction of this action under 42 U.S.C. § 2000e-6(b), 28 U.S.C. §§ 1331, 1343 and 1345.
3. Defendant City of Portsmouth, Virginia ("Portsmouth" or the "City"), is a municipal government and/or political subdivision created pursuant to the laws of the Commonwealth of Virginia.
4. Portsmouth is a person within the meaning of 42 U.S.C. § 2000e(a), and an employer within the meaning of 42 U.S.C. § 2000e(b).
5. Portsmouth maintains a Fire Department, and employs firefighters who, among other things, are responsible for protecting individuals and property in the City.
6. The civilian labor force of Portsmouth is approximately 45.5% African American.

7. As of October 7, 2008, Portsmouth employed approximately 226 firefighters across all ranks, of whom approximately 12.4% were African American.

8. Portsmouth is responsible for establishing the terms, conditions and other practices that bear upon the selection and employment of the City's firefighters.

9. Portsmouth has maintained and continues to maintain selection procedures by which applicants for appointment to the rank of firefighter are screened and selected.

10. As part of its selection process for firefighter, Portsmouth has administered and continues to administer to applicants the National Firefighter Selection Test ("NFST"), a written examination developed and sold by Stanard and Associates, Inc. ("Stanard").

11. Since at least 2004, Portsmouth has set the passing score for the NFST at 70%. Only applicants who pass the NFST with an overall average score of 70% or above are allowed to continue in the selection process for firefighter.

12. Applicants who pass the NFST and a physical agility test ("PAT") are interviewed by a panel and scored based on their interviews. Applicants' NFST and interview scores are then forwarded to Stanard, which places applicants into bands based on a combination of their NFST and interview scores. Stanard then provides the bands to the City's Human Resources ("HR") Department.

13. To fill firefighter positions, the City's Fire Department requests bands from the City's HR Department. Applicants within bands are treated as functionally equivalent to one another. Once a band is called, polygraph examinations and background checks are conducted for applicants within the band. Applicants are interviewed by the Chief of the Portsmouth Fire Department, and offers of appointment are extended to those applicants within the band who

have not been disqualified by the City's Civil Service Commission after the completion of the background checks.

14. Since 2004, the City has administered to firefighter applicants the NFST four times - in 2004, 2006, 2007, and 2008.

15. Between 2004 and the present, the pass rate of whites on the NFST was 85.9%, while the pass rate of African Americans was 42.4%. Although African Americans constituted approximately 29% of all applicants who took the NFST during this period, they constituted only approximately 17.9% of the applicants who passed the NFST.

16. This difference between the pass rates of African American and white applicants on the NFST is statistically significant. Moreover, between 2004 and the present, if African-American applicants had passed the NFST at the same rate as white applicants, 86 additional African American applicants would have remained under consideration in the selection process for firefighter.

17. Portsmouth's use of the NFST to screen and select firefighter applicants between 2004 and the present has resulted in disparate impact upon African Americans.

18. Portsmouth's use of the NFST between 2004 and the present is not job related for the position in question and consistent with business necessity, and does not otherwise meet the requirements of Section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k).

19. Portsmouth has pursued and continues to pursue policies and practices that discriminate against African Americans and that deprive or tend to deprive African Americans of employment opportunities because of their race, in violation of Section 707 of Title VII, 42 U.S.C. § 2000e-6. Portsmouth has implemented these policies and practices, among other ways,

through:

- a. its use of the NFST in the screening and selection of applicants for appointment to firefighter that results in disparate impact upon African Americans, is not job related for the position in question and consistent with business necessity, and does not otherwise meet the requirements of Section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k); and
- b. its failure or refusal to take appropriate action to correct the present effects of its discriminatory policies and practices.

20. The policies and practices of Portsmouth described in Paragraphs 10 through 19 constitute a pattern or practice of resistance to the full enjoyment by African Americans of their right to equal employment opportunities without discrimination based on race, in violation of Section 707 of Title VII, 42 U.S.C. § 2000e-6. This pattern or practice is of such a nature and is intended to deny the full exercise of the rights secured by Title VII. Unless restrained by order of this Court, the City will continue to pursue policies and practices that are the same as or similar to those alleged in this Complaint.

21. All conditions precedent to the filing of suit have been performed or have occurred.

WHEREFORE, the United States prays for an order enjoining Portsmouth, its officers, agents, employees, successors and all persons in active concert or participation with them, from engaging in discriminatory employment practices against African Americans on the basis of race in violation of Title VII, and specifically from:

- a. the use of a written examination in the screening and selection of applicants for


appointment to firefighter that results in disparate impact upon African Americans, is not job related for the position in question and consistent with business necessity, and does not otherwise meet the requirements of Section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k);

- b. failing or refusing to provide make-whole relief to individual African Americans who have suffered loss and/or will suffer loss as a result of the City's use of the NFST;
- c. failing or refusing to take appropriate action to correct the present effects of its discriminatory use of the NFST; and
- d. failing or refusing to take other appropriate non-discriminatory measures to overcome the effects of its discriminatory use of the NFST.

Plaintiff United States prays for such additional relief as justice may require, together with its costs and disbursements in this action.

Respectfully submitted,

LORETTA KING
Acting Assistant Attorney General
Civil Rights Division

By: 
John M. Gadzichowski (WI Bar No. 1014294)
Chief
Attorney for United States of America
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room 4906
Washington, D.C. 20530
Telephone: (202) 514-3831
Facsimile: (202) 514-1005
John.M.Gadzichowski@usdoj.gov

By: Jodi Danis
Jodi B. Danis (DC Bar No. 453493)
Deputy Chief
Attorney for United States of America
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room 4906
Washington, D.C. 20530
Telephone: (202) 307-5768
Facsimile: (202) 514-1005
Jodi.Danis@usdoj.gov

By: Meredith L Burrell
Meredith L. Burrell (MD Bar - No Bar No. Issued)
Senior Trial Attorney
Attorney for United States of America
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room 4906
Washington, D.C. 20530
Telephone: (202) 305-9053
Facsimile: (202) 514-1005
Meredith.Burrell@usdoj.gov

DANA J. BOENTE
Acting United States Attorney
for the Eastern District of Virginia

By: Susan L Watt
Susan L. Watt (VA Bar No. 17733)
Supervisory Assistant United States Attorney
Attorney for United States of America
United States Attorney's Office
8000 World Trade Center
101 West Main Street
Norfolk, Virginia 23510-1671
Telephone: (757) 441-6331
Facsimile: (757) 441-6689
Susan.Watt@usdoj.gov