

**THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JAMES M. FOSTER, MIKE J. SHARP,  
TIMOTHY CHRISTIAN, TARIQ JAMAL-  
FRANCIS, and DARRICK PAYTON, on  
Behalf of Themselves and All Others  
Similarly Situated,

Plaintiffs,

v.

THE CITY OF PITTSBURGH,

Defendant.

Case No. 2:12cv1207

District Judge David Stewart Cercone

CLASS ACTION

JURY TRIAL DEMANDED

**PRELIMINARY APPROVAL ORDER GRANTING  
MOTION FOR CERTIFICATION OF THIS ACTION AS A CLASS ACTION,  
PRELIMINARILY APPROVING THE CLASS SETTLEMENT, APPROVING  
THE METHOD FOR PROVIDING NOTICE TO THE CLASS AND APPROVING  
THE NOTICE TO THE CLASS, AND SETTING THE DATE FOR HEARING  
TO CONSIDER THE FAIRNESS OF THE CLASS SETTLEMENT**

1. Plaintiffs James M. Foster, Mike J. Sharp, Timothy Christian, Tariq Jamal-Francis, and Darrick Payton (“Class Representatives”)<sup>1</sup> filed this class action on August 23, 2012, challenging the Defendant City of Pittsburgh’s hiring process for entry-level police officers.

2. On behalf of a class of African-American job applicants (“Class”), Plaintiffs asserted, *inter alia*, disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964 (“Title VII”).

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<sup>1</sup> All defined terms shall have the same meaning as in the Parties’ Settlement Agreement, which appears on the Docket at Dkt. #--.

3. Plaintiffs alleged that the City's hiring process operated as a pattern or practice of systemic disparate treatment with respect to African-American applicants, and had an adverse impact on those applicants.

4. Plaintiffs further alleged that the City lacked any legitimate business justification for the challenged hiring practices, and that there were suitable alternative selection procedures that would have had a lesser adverse impact.

5. The Parties agreed to a mediation before David White, pursuant to which the Parties agreed to jointly retain an expert, Dr. Leaetta Hough, to review and submit a detailed report on the City's hiring process.

6. Following the submission of that report by Dr. Hough, the Parties engaged in extensive mediation efforts before Magistrate Judge Lisa Pupo Lenihan, while the City simultaneously provided voluminous documents for review by Plaintiffs' counsel regarding its hiring selection processes.

7. The mediation before Judge Lenihan resulted in the Settlement Agreement which is attached hereto as Exhibit 1.

8. Under the Settlement Agreement, the Parties have agreed that this action should be certified as a class action pursuant to Fed.R.Civ.P. 23(a), (b)(1), (b)(2) and (b)(3); the City is to pay monetary relief to the Class in the amount of \$985,000 and fees, costs and expenses of Plaintiffs' counsel as awarded by the Court up to \$600,000.

9. Under the Settlement Agreement the City has dedicated \$250,000 in its 2015 Operating Budget to fund additional expert review so as to reduce or eliminate the Alleged Discriminatory Practices and any Adverse Impact resulting therefrom.

10. Under the Settlement Agreement, the City has agreed to the entry of an injunction related to the City's police hiring process which
  - a. prevents it from using any Selection Device or Process that
    - (1) results in disparate treatment of African-Americans on the basis of race or color; or
    - (2) has an Adverse Impact on African-Americans on the basis of race or color, is not demonstrably job related for that position, nor justified by business necessity where an alternative Selection Device would have less of an Adverse Impact; or
    - (3) otherwise does not meet the requirements of Title VII.
  - b. prevents it from retaliating against or otherwise adversely affecting any person because he or she
    - (1) opposed the Alleged Discriminatory Practice;
    - (2) in any way participated or cooperated in the investigation or litigation of the Alleged Discriminatory Practices; or
    - (3) has benefited from this Settlement.
  - c. requires the City, within 24 months of the Execution Date, to complete implementation of a series of reforms and improvements to its Selection Process for the position of Entry-Level Police Officer that are designed to eliminate or reduce Alleged Discriminatory Practices, and to begin to implement and conduct validity studies for its Selection Devices.
  - d. requires the City to be guided by the Hough Report, the Hough Overview, and any other information agreed to by the Experts in working to identify and implement the changes to the City's Selection Process for Entry-Level Police Officers that are necessary to eliminate Alleged Discriminatory Practices and eliminate or reduce any resulting Adverse Impact. To that end the City shall perform the following:
    - (1) Within three months, update the job analysis, including but not limited to, incorporating integrity, dependability and cultural competence as job requirements ("Step 1");
    - (2) Within six months, develop a construct-oriented measurement plan for the entire Selection Process that ensures all knowledge, skills, abilities and other characteristics ("KSAO's") that are critical to the performance of an

Entry-Level Police Officer are included, and those that are unimportant are avoided (“Step 2”);

(3) Within one year, review all existing Selection Devices, individually and in combination, and the Selection Process as a whole, to identify possible causes of Adverse Impact on African-American applicants (“Step 3”);

(4) Within one year, alter current or develop new Selection Devices designed to remedy Adverse Impact on African-American applicants (“Step 4”);

(5) Within one year, revise the rating process, including but not limited to developing rating scales that specify standards and guidelines to ensure a structured, objective, and systematic evaluation that is reliable and valid, notably for the Oral Boards, background investigation and Chief’s Roundtable stages of the Selection Process, designed to remedy Adverse Impact on African-American applicants (“Step 5”);

(6) Within two years, conduct validity studies for all Selection Devices contained in the Selection Process (“Step 6”);

(7) Within one year, improve applicant preparation materials and classes (“Step 7”); and

(8) Within eighteen months, design and begin conducting continuous and ongoing validation and monitoring of the revised Selection System (“Step 8”).

## **I. PRELIMINARY CERTIFICATION OF THIS ACTION AS A CLASS ACTION**

11. Pursuant to the Parties’ Settlement Agreement, Plaintiffs have now moved for preliminary approval of this action as a class action under Fed.R.Civ.P. 23(a),(b)(1), (b)(2) and (b)(3).

12. Subject to notice, and the opportunity for class members to object, this Court hereby certifies this action as a class action for a Class defined as:

All African-Americans who (1) applied for the position of Entry-Level Police Officer with the City of Pittsburgh; (2) took a written police officer examination offered by the City in any year between and including 2008 and 2014; (3) did not decline a conditional offer of employment from the City; and (4) were not given a final

offer of employment as a police officer recruit with the City in that application process.

13. The Class is sufficiently numerous, insofar as the parties agree that the number of class members exceeds 350, which is more than sufficient to certify a class. See Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 594 (3d Cir. 2010), recognizing that “generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.”

14. Common questions of fact and law to which there are common answers exist because police hiring was highly centralized. Wal-Mart Stores, Inc. v. Dukes, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2541, 2551 (2011). The City operates its Bureau of Police under a hierarchical command structure. The City established and employed one single “employment process” with regard to persons seeking to be hired as entry level police officers. The process was composed of a series of steps or screens, the successful completion of which is required for an applicant to be hired as an entry level police officer. See Howe v. City of Akron, 723 F.3d 651 (6th Cir. 2013). Every person hired as a police officer during the Class period had to make it through all of the steps, including being approved for hiring after consideration by the Chief’s Round Table, which consisted of the Chief of the Bureau of Police and his highest level command staff.

15. Other common questions of fact and law to which there are common answers include:

- a. Whether the City has failed or refused to hire African-American applicants for the position of Police Officer Recruit on the same basis as Caucasian applicants;
- b. Whether the City’s Hiring Process has a disparate impact on African-Americans;
- c. Whether the City’s Hiring Process is justified as a valid basis for assessing police recruits;

- d. Whether there are alternative Hiring Processes which are equally as valid for assessing police recruits, but which have no or less of a disparate impact on African-Americans;
- e. Whether the City has adversely treated African-American applicants for the position of Police Officer Recruit during its Hiring Process;
- f. Whether the stark statistical imbalance of hiring Caucasian applicants over African-American applicants for Police Officer Recruits shows systemic disparate treatment of African-American applicants for Police Officer Recruit positions;
- g. Whether the City has employed subjective factors, including nepotism, and favoritism towards current officers' friends and family during its Hiring Process in a manner which discriminates against African-American applicants;
- h. Whether the City has failed to employ valid standards during the Chief's Roundtable, resulting in discrimination against African-American candidates;
- i. Whether members of the oral examination panels considered subjective factors in scoring applicants in a manner which discriminated against African-Americans;
- j. Whether the City's use of background checks has an adverse impact on African-American applicants or involves disparate treatment;
- k. Whether the Chief's Roundtable lacked objective criteria in selecting candidates in a manner which discriminated against African-Americans;
- l. Whether psychological screening has a disparate impact on African-American applicants or involves disparate treatment;
- m. Whether injunctive relief is suitable to abate the conduct at issue in this Complaint.

16. Representative Plaintiffs are all African-American and members of the proposed Class they seek to represent. They all applied for positions as entry-level police officers and did not receive such positions during their respective application processes. After certain changes were made in the City's Hiring Practices during the interim relief under this Settlement, Representative Plaintiff Francis was offered a position as an entry-level police officer.

17. Rule 23(a)(3) is satisfied because Representative Plaintiffs' claims, and the legal theories underlying those claims, are typical of the claims of the class because all were subject to the same top-down hiring process, and claim to have been subject to the same disparate treatment and disparate impact as a result of their race and/or color, giving rise to the employment claims herein. In addition, Plaintiffs' claims and underlying legal theories are typical because they arise from the same practices and course of conduct that gives rise to the claims of Class members, and Representative Plaintiffs proceed on the same legal theories as the Class. In particular, Representative Plaintiffs' claims, and the legal theories underlying those claims, are typical of the claims of the class as all are subject to the same hiring process, and all class members were subject to disparate treatment and disparate impact as a result of their race and/or color, giving rise to the employment claims herein. Every one of the Plaintiffs was affected by the City's ranking process whereby African-Americans received lower ranks than Caucasians after the combination and weighting of their scores on the written and oral tests.

18. The adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." Beck v. Maximus, Inc., 457 F.3d 291, 296 (3d Cir. 2006). Rule 23(a)(4) is satisfied with respect to Representative Plaintiffs because they will fairly and adequately represent the class members. Representative Plaintiffs have no relationship with the City except as Plaintiffs and they have no conflict of interest in maintaining a class action.

19. Representative Plaintiffs are represented by counsel who have vigorously represented the interests of the class to date, and will continue to do so. Plaintiffs' counsel have many years of experience in civil rights, employment law, and class action law suits. They have advanced the costs and expenses associated with this case contingent on the outcome.

20. Also with respect to counsel, the requirements of Rule 23(g) are satisfied. Rule 23(g) requires a court to appoint class counsel when it certifies a class. Class counsel must “fairly and adequately represent the interests of the class.” Fed.R.Civ.P. 23(g)(1)(D). To evaluate counsel, a court must consider: (i) work done in identifying or investigating claims; (ii) experience handling class actions and claims of the type asserted; (iii) knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class. Fed.R.Civ.P. 23(g)(1)(A). Here, Plaintiffs’ counsel have performed substantial work in investigating and identifying potential claims in this action, filing this litigation and expending substantial time and resources towards the joint expert process and mediation before Judge Lenihan.

21. The Court is familiar with Plaintiffs’ counsel considerable experience handling class actions, complex litigation, employment litigation, and the types of claims asserted in this action. Plaintiffs’ counsel have extensive knowledge of the applicable law; and Plaintiffs’ counsel have sufficient resources, and the intention to commit those resources, to representing the class. Plaintiffs’ counsel will adequately and fairly represent the class. Thus, this Court appoints Witold J. Walczak and Sara J. Rose, of the American Civil Liberties Union of Pennsylvania, and Edward J. Feinstein, Ellen M. Doyle, Pamina Ewing, and Feinstein Doyle Payne & Kravec, LLC, as Class Counsel.

22. Class certification is appropriate pursuant to Rule 23(b)(2) because the City has acted, or has refused to act, on grounds generally applicable to the class, whereby all applicants were subject to a top-down multi-step process which Plaintiffs claimed had a disparate impact on African-Americans, thereby making appropriate final injunctive relief and/or corresponding declarative relief with respect to the class.



23. Plaintiffs' claims for class-wide monetary relief for all Class Members is properly certified under Rule 23(b)(3) because questions of law and fact common to the Class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this case, particularly insofar as there were more African-American applicants for entry-level police officer positions than there were positions that they would have obtained in the absence of race discrimination. The City's police hiring process was carried out exclusively within this District. Plaintiffs are unaware of any other litigation which has been filed here or anywhere else by any members of the Class related to race and/or color discrimination in the selection of police officers. The class is relatively small and the decision-making was controlled at the highest level of the Bureau of Police.

## II. PRELIMINARY APPROVAL OF CLASS SETTLEMENT

24. This Court hereby preliminarily approves the Parties' Settlement Agreement, subject to notice to the Class and a Fairness Hearing for the reasons set forth in this Order. The Court employs a two-step process for preliminarily approving a class settlement, whereby first, the court considers preliminarily whether any obvious problems exists with the settlement, determines whether the class should be certified for settlement purposes and evaluates the parties' proposed plan for notifying class members. If the court finds that preliminary approval is warranted, the case proceeds to a fairness hearing where the concerns of class members, who have received notice of the proposed settlement, are received and considered by the court before making a determination of whether final approval should be granted. See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 777-78 (3d Cir. 1995); and Harlan v. Transworld Systems, Inc., 302 F.R.D. 319, 324-327 (E.D. Pa. 2014).

25. The Court concludes that the settlement in this case meets the requirements for preliminary approval. The Court is aware that there were extensive arms'-length negotiations supervised by Magistrate Judge Lenihan which resulted in the Settlement Agreement negotiated in this class action. The Parties jointly retained an expert to review the City's police hiring processes and part of the injunctive relief agreed to under the Settlement is directly related to the recommendations of the joint expert, Leaetta Hough. While there was no formal discovery in the case, the City produced to Plaintiffs the files of all successful candidates for the police officer positions and the files of all African-Americans who made it to the background investigation stage of the hiring process. In the course of her work as joint expert, Dr. Hough reviewed numerous documents about the City's police hiring practice and interviewed many players in the process, including the new police chief, members of his command staff, the City employees involved in the investigation of candidates, concerned community members and others in order to formulate her recommendations. Class Counsel also were provided documents regarding the City's selection process, worked with the individual plaintiffs, knowledgeable community members and confidential informants regarding issues related to the selection process, communicated with other experts on a non-paid basis through the auspices of the ACLU in order to develop both the monetary terms and injunctive relief under the Settlement Agreement.

26. Civil rights class actions often involve a war of the parties' competing experts. Because the outcomes are uncertain, "the probable cost, in both time and money, of continued litigation" weighs in favor of resolution. See Erie Cnty. Retirees Ass'n, v. Cnty. of Erie, Pennsylvania, 192 F.Supp.2d 369, 373 (W.D.Pa.2002) (citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)).

27. The risks of proceeding with the litigation, including with respect to obtaining class status, favor preliminary approval of the settlement. See In re Cendant Corp. Litig., 264 F.3d 201, 237–39 (3d Cir. 2001).

28. The Settlement Agreement provides for \$885,000, payable in two installments, to be available for monetary relief to the Class.

29. The Settlement Agreement provides for the City to use \$250,000 during 2015 for expert review of the significant and detailed injunctive relief to be provided under the settlement, and allows for additional expenditures as needed in the future.

30. Review of these material terms of the Settlement Agreement have persuaded the Court that preliminary approval of the settlement is proper, that a fairness hearing should be held and that the Class Notice should be sent out so that Class members may react to the terms of the settlement.

### **III. APPROVAL OF METHOD FOR DISSEMINATING NOTICE TO CLASS AND FORM OF CLASS NOTICE**

31. The Parties have proposed and the Court agrees that within ten (10) days of the entry of this order, individual notice shall be sent by the City, via first-class mail, to each class member at his or her last known address as shown in the City's files, and that returned notices shall be re-mailed where an internet search identifies more recent addresses for class members whose notices were returned. Class Counsel shall, within ten (10) days of the date of this Order, post copies of the Class Notice approved by the Court, along with the Settlement papers filed with the Court, on their respective websites at [www.aclupa.org](http://www.aclupa.org) and [www.fdpklaw.com](http://www.fdpklaw.com).

32. The Court approves the form of the Class Notice, submitted by the Parties as Ex. 6 to the Settlement Agreement. The Court finds the Class Notice is written in understandable language, adequately describes for class members the essential terms of the settlement, notifies

the class members of the information needed for them to make decisions about the settlement, including how to object or opt-out of the settlement, and satisfies the requirements of Fed.R.Civ.P. 23(c)(2) and Due Process.

**IV. FINAL CERTIFICATION OF THE PROPOSED  
RULE 23 SETTLEMENT CLASS**

33. The Court sets the following timetable for actions to be taken pursuant to this

Order:

Event	Time for Compliance
Deadline for mailing of Class Notice, and posting of Class Notice and settlement papers on Class Counsel's websites	10 calendar days after entry of preliminary approval order or <u>July 23, 2015</u>
Deadline for filing memorandum in support of final approval of settlement, and application for attorneys' fees, reimbursement of costs and expenses, and case contribution awards to named Plaintiffs	30 calendar days before fairness hearing or <u>October 16, 2015</u>
Deadline for filing exclusions from Class; or objections, appearance of counsel regarding objections, and notice of intention to appear at fairness hearing	14 calendar days before fairness hearing or <u>November 2, 2015</u>
Fairness hearing	At least 75 days after the mailing of class notice and 90 days after mailing of notice required by Class Action Fairness Act or <u>Monday, November 16, 2015, at 1:00 PM, Courtroom 7A, US Courthouse, Pittsburgh, PA</u>

It is SO ORDERED this 13th day of July, 2015.

s/ DAVID STEWART CERCONI

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David Stewart Cercone  
United States District Judge

cc: Counsel of Record  
(via CM/ECF Electronic Mail)