
ELSA GULINO, MAYLING RALPH, PETER WILDS, and NIA GREENE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant.

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96 CIV. 8414

TO THE HONORABLE KIMBA M. WOOD, United States District Court Judge.

John S. Siffert, SPECIAL MASTER

Plaintiffs previously moved pursuant to Federal Rules of Civil Procedure 15(c)(1)(C) and 23(c)(1)(C) to amend the class certification to expand the class (1) to cover the discriminatory effects of the LAST-2 examination; and (2) to include paraprofessionals as well as teachers as plaintiffs in the class. On June 9, 2016, I submitted an Interim Report & Recommendation to the Court recommending that Plaintiffs' motion (1) be granted with respect to expanding the class, without objection on the part of the Defendant, to include teachers employed by the Defendant who lost or were denied a permanent teaching position as a result of failing the LAST-2; and (2) be denied with respect to expanding the class to include paraprofessionals who failed the LAST-1 or LAST-2. *See Interim Report & Recommendation*, Dkt. No. 776 (June 9, 2016).

Subsequent to my submission of the Interim Report & Recommendation, Plaintiffs produced new evidence suggesting that some paraprofessionals' claims may be timely. The

parties agree with my suggestion that I request that the Court withdraw the previous Interim Report & Recommendation and substitute it with the attached proposed Interim Report & Recommendation.

I originally recommended that the class not be expanded to include paraprofessionals because I determined that their statute of limitations had run and that it would be futile to amend the complaint to add them as plaintiffs. Specifically, the evidence adduced by Defendant indicated that neither the LAST-1 nor the LAST-2 was used as a basis for employment decisions after April 30, 2014. *See id.* at 8–11. According to Defendant, teaching applicants after that date were required to take and pass the ALST—an exam the Court found to be non-discriminatory. After I submitted the Interim Report and Recommendation, however, Plaintiffs presented newly discovered evidence indicating that the LAST-2 continued to be administered until at least January 2016. If the Defendant continued to make employment decisions on the basis of those recent LAST-2 results, then it is possible that some paraprofessionals' claims may be timely, in which case it might not be futile for Plaintiffs to amend the complaint.

The parties agree that this issue will require additional discovery and possibly additional briefing, and they consent to withdrawing the Interim Report & Recommendation insofar as it relates to amending the class to include paraprofessionals. The new evidence does not affect the first portion of the Interim Report & Recommendation—that the class definition should be amended to include teachers who lost or were denied a permanent teaching position because of failing the LAST-2.

Accordingly, I recommend that the Court approve the attached proposed Substituted Interim Report & Recommendation that recommends that that portion of Plaintiffs' motion be granted.

Dated: New York, New York
July 15, 2016

JOHN S. SIFFERT
Special Master

ELSA GULINO, MAYLING RALPH, PETER WILDS, and NIA GREENE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant.

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96 CIV. 8414

[PROPOSED] SUBSTITUTED INTERIM REPORT AND RECOMMENDATION

TO THE HONORABLE KIMBA M. WOOD, United States District Court Judge.

John S. Siffert, SPECIAL MASTER

Plaintiffs move pursuant to Federal Rule of Civil Procedure 23(c)(1)(C) to amend the class certification to expand the class to cover those African-American and Latino individuals employed as New York City public school teachers who lost or were denied a permanent teaching appointment because of their failure to pass the LAST-2. Defendant does not object. I recommend that the motion to expand the class be **GRANTED**.

I. FACTS

The facts of this case are set forth fully in previous opinions by the District Court over the course of this litigation. *See, e.g.*, *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino I*), 201 F.R.D. 326 (S.D.N.Y. 2001) (Motley, J.); *Gulino v. Bd. of Educ. of the City*

Sch. Dist. of the City of N.Y. (*Gulino V*), 907 F. Supp. 2d 492 (S.D.N.Y. 2012) (Wood, J.). I recite only those facts relevant to this Interim Report and Recommendation.

On April 23, 1996, the named plaintiffs in this case filed complaints with the Equal Employment Opportunity Commission ("EEOC") alleging that the defendant Board of Education of the City School District of New York ("BOE" or "Defendant") discriminated against them on account of their race by requiring them to pass discriminatory tests as a condition of maintaining their permanent teaching positions. On or about October 11, 1996, the United States Attorney General issued Plaintiffs a right-to-sue letter. Compl. ¶ 20. Plaintiffs subsequently filed this class action on November 8, 1996.

The Complaint alleged that two tests, the NTE and the LAST-1, adversely affected African-American and Latino teachers in violation of Title VII. As a result of failing these tests, African-American and Latino teachers lost or were denied licenses, were demoted to substitute status, and suffered significant reductions in compensation and pension and seniority rights. *Id.* ¶¶ 8, 14. Plaintiffs brought the action on behalf of themselves and all those similarly situated, including "those African American and Latino teachers who have been or will be deemed unqualified for licensure based on the NTE or the [LAST-1]." *Id.* ¶ 64.

Plaintiffs originally moved to certify a class on February 26, 2001. The Court granted motion and certified a class consisting of:

> All African-American and Latino individuals employed as New York public school teachers by Defendants, on or after June 29, 1995, who failed to achieve a qualifying score on either the NTE or the [LAST-1], and as a result either lost or were denied a permanent teaching position.

Gulino I, 201 F.R.D. at 330–31.

Following an "epic bench trial that lasted more than eight weeks and filled over 3,600 pages of trial transcript," the Court found that the tests had an "adverse impact on African-

American and Latino teachers," but ruled for Defendant on liability because it found that the NTE was properly validated and the LAST-1 was job-related. *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino III*), No. 96 Civ. 8414, 2003 WL 25764041 (S.D.N.Y. Sept. 4, 2003) (Motley, J.). On appeal, the Second Circuit vacated and remanded with instructions that the district court apply the five-part test it set forth in *Guardians* to determine if the LAST-1 was properly validated. *Gulino v. Bd. of Educ.* (*Gulino IV*), 460 F.3d 361, 385-88 (2d Cir. 2006) (citing *Guardians Ass'n of N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980)).

On remand, the Court found that the BOE violated Title VII because the LAST-1 was never properly validated and not job-related. *Gulino V*, 907 F. Supp. 2d 492 (Wood, J.). The Court also decertified the class in light of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Gulino V*, 907 F. Supp. 2d at 497-98.

Plaintiffs subsequently moved to re-certify a remedy phase class under Rule 23(b)(3) that would be consistent with *Wal-Mart*. The Court certified a class on August 29, 2013. On June 17, 2014, the Court amended the class to its current form to cover all iterations of the LAST-1.[1] The class currently consists of:

> All African-American and Latino individuals employed as New York City public school teachers by Defendant, on or after June 29, 1995, who failed to achieve a qualifying score on an administration of the LAST-1 given on or before February 13, 2004, and as a result either lost or were denied a permanent teaching position.

See Order Granting Mot. to Amend, Dkt. No. 447, at 8 (June 17, 2014). The Court also exercised its broad remedial authority to require that subsequent exams complied with Title VII. *See*

[1] The Court limited the class initially to those teachers who had failed the LAST-1 before the end of the 2001/2002 school year because the statistical evidence presented at the bench trial before Judge Motley only covered versions of the test administered up to that date. After additional briefing established that later versions of the LAST-1 had similar disparate impacts on African American and Latino teachers, the Court modified the class to include teachers who failed the LAST-1 on or before February 13, 2004, the last date the LAST-1 was offered. *See Order*, Dkt. No. 447 (June 17, 2014).

Opinion & Order, Dkt. No. 608, at 7 (June 5, 2015) (citing *Guardians*, 630 F.2d at 109). On June 5, 2015, the Court, relying in part on an analysis from the court-appointed neutral expert Dr. Outtz, found that the LAST-2, like its predecessor, violated Tile VII. *Id.*

II. PRESENT MOTION

Plaintiffs request that the Court amend the class definition to include:

> All African American and Latino individuals employed as New York City public school teachers by Defendant, on or after June 29, 1995, who failed to achieve a qualifying score on any administration of the LAST, and as a result either lost or were denied a permanent teaching appointment.

This definition expands the class to cover individuals who lost or were denied a permanent teaching appointment because they failed to achieve a qualifying score on the LAST-2, which was offered after February 13, 2004.

Defendant does not oppose Plaintiffs' request to expand the class definition to include teachers that failed the LAST-2. The parties agree that the requirements of Federal Rule of Civil Procedure 23(c)(1)(C) are met here. The Court's June 2015 opinion that Defendant's use of the LAST-2 violates Title VII qualifies as a changed circumstance justifying amending the class. *See In re J.P. Morgan Chase Cash Balance Litig.*, 255 F.R.D. 130, 133 (S.D.N.Y. 2009) ("[T]here must be some development or change in circumstances to merit revisiting a class certification decision."). Defendant does not dispute that the class as modified to include African-American and Latino teachers who failed the LAST-2 satisfies the requirements of Rule 23(a) and Rule 23(b)(3). Accordingly, I recommend that the motion be granted.

III. CONCLUSION

For the foregoing reasons, I recommend that Plaintiffs' motion to expand the class to include teachers employed by the Defendant who lost or were denied a permanent teaching position as a result of failing the LAST-2 be **GRANTED**.

IV. OBJECTIONS

Pursuant to the Court's Amended Order of Appointment, the parties are hereby directed that if they have any objections to this Interim Report and Recommendation, they must, within fourteen days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable Kimba M. Wood, United States District Judge, to the offices of the undersigned, and to any opposing parties. Any requests for an extension of time for filing objections must be directed to Judge Wood.

Dated: New York, New York
July 15, 2016

JOHN S. SIFFERT
Special Master