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MEMORANDUM

To: Victor Bolden, Esq., City of New Haven Corporation Counsel
From: Steven D. Ecker, Esq.
Date: November 14, 2011
Re: Legal Considerations Regarding Residency Requirement For Applicants Seeking Employment as New Haven Firefighters

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Introduction

This memorandum contains a preliminary analysis of the principal legal issues that should be assessed in connection with the City's consideration of the use of a "residency requirement" for applicants seeking employment as New Haven firefighters. I emphasize three points at the outset.

First, this analysis is preliminary in nature. This qualification is necessary mostly because I have had only limited time to study the various legal issues raised here. That having been said, however, it will become clear in what follows that the legal analysis provides a very reliable basis for the purpose of guiding the City's leadership with respect to answering certain fundamental questions – most importantly, whether the City is exposed to the possibility of a non-frivolous lawsuit if it were to adopt a residency requirement for firefighter applicants.

Second, the term "residency requirement" can obviously mean different things in different contexts. My understanding is that the City of New Haven is not considering a post-hiring (or even hiring) residency requirement, i.e., a requirement that a firefighter reside in New Haven as a condition of employment. Indeed, such a requirement would be impermissible under Connecticut General Statutes § 7-460(b) (municipality may not require any employee, whose position is subject to a collective bargaining agreement, to reside in that municipality as a condition of employment).[1] Nor is there any "durational" component to the contemplated rule (i.e., a requirement that the applicant reside in New Haven for a period of time prior to hiring). Rather, the requirement under consideration, as I understand it, would apply only to applicants for the firefighter position, and would require residency in New Haven as of the date of that

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[1] I assume for purposes of this analysis that a residency requirement applied only to the application process would not violate General Statute § 7-460(b). The Connecticut State Board of Labor Relations has ruled that the statutory prohibition is not violated by a municipality's residency requirement applicable to job applicants only. See In the Matter of the City of Hartford, Case # MPP-19,281, Decision # 3716 (August 5, 1999) (dismissing complaint challenging, on statutory grounds, municipality's residency requirement for individuals applying for position of principal accountant and administrative assistant).

application. Unless otherwise indicated, references in this memorandum to the "residency requirement" under consideration in New Haven refers to this "applicant" requirement.

Third, the following analysis focuses on a 100% residency requirement. A different approach (for example, a 50% New Haven, 50% non-New Haven rule) obviously might change the legal conclusion significantly. Although this memorandum focuses on a 100% requirement, I address the 50/50 requirement briefly in Part IV below.

Summary of Conclusions

The bottom line is not subject to serious doubt: use of a 100% residency requirement for firefighters would expose the City to a non-frivolous employment discrimination claim alleging disparate impact under Title VII. By "non-frivolous" I do not mean that the claim would ultimately prevail, but only that it would likely expose the City to protracted litigation under existing law. Without additional information and extensive further analysis (both factual and legal), it would be impossible to predict the likely outcome of such a case. The only prediction I can make with confidence at this point is that, if the City were to adopt a 100% residency requirement for job applicants, it would be exposed under existing law to a legally cognizable Title VII lawsuit by a non-resident plaintiff claiming that the policy has a disparate impact on non-minority applicants in the relevant labor market.

I. RESIDENCY REQUIREMENTS UNDER TITLE VII

A. The Established Viability of a Disparate Impact Claim in This Context

There has been a significant amount of litigation over the past fifteen years regarding the legality of municipal residency requirements under Title VII. The current state of the law is that a viable disparate impact[2] claim exists if the plaintiff is able to establish that the residency requirement causes a statistically significant exclusionary effect on applicants based on their membership in a protected group. As in all disparate impact cases, no evidence of discriminatory intent is necessary – a residency requirement can violate Title VII even though its purpose has nothing whatsoever to do with race. Statistics ultimately determine the outcome of disparate impact cases; a disparate impact exists when the residency requirement results in a statistically significant disparity between the percentage of the protected class in the relevant labor pool and the percentage eligible to be hired under the challenged practice.

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[2] This memorandum addresses only a disparate impact claim, because my understanding is that the City's consideration of a residency requirement is not motivated by any purposes involving race. Obviously, any race-conscious policies are analyzed under a different legal framework. See, e.g., Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

Perhaps the most efficient way to introduce the law in this area is to quote from a 2006 EEOC statement on the subject:

> Title VII is violated by recruiting persons only from largely homogeneous sources if the recruitment practice has a racial purpose, or if it has a significant racial impact and cannot be justified as job related and consistent with business necessity. For example, Title VII might be violated if a municipal employer with an overwhelmingly White population and workforce abuts a major city with an overwhelmingly Black population, but the municipality only hires it own residents and refuses to advertise its jobs in newspapers that circulate in the abutting major city.

EEOC Directive 915.004 at p. 15- (Issued April 19, 2006).

The EEOC bases the foregoing overview on three cases, one from the Sixth Circuit and two from the Third Circuit, which the Directive summarizes as follows:

> Compare United States v. City of Warren, MI, 138 F.3d 1083, 1094 (6th Cir. 1998) (on similar facts, holding Department of Justice established that municipality's recruiting practices had a disparate impact on Black potential job applicants in violation of Title VII: "Warren's limitation of its applicant pool to residents of the overwhelmingly white city, combined with its refusal to publicize jobs outside the racially homogenous county, produced a de facto barrier between employment opportunities and members of a protected class. A plaintiff need not identify a sign reading 'No Blacks Need Apply' before invoking Title VII."), and NAACP v. Town of Harrison, NJ, 940 F.2d 792, 799-805 (3d Cir. 1991) (affirming lower court's finding that requirement that town employees become residents within one year of hire had unlawful disparate impact on Blacks; town's population was 0.2 percent Black and town had never hired a Black person, though the metropolitan area was home to over 214,000 Blacks, and Blacks made up 22 percent of town's private sector workforce), with NAACP v. City of Bayonne, NJ, 134 F.2d 113, 123-25 (3d Cir. 1998) (upholding finding that the plaintiff did not prove that residency requirement caused disparate impact – statistical evidence was not strong, and city showed that its four-year moratorium on the residency requirement did not raise the number of Black employees).

Id. at p.15-24 n.86.

For reasons unknown to me, most of the Title VII litigation over residency requirements has been in the Third Circuit. The Town of Harrison and City of Bayonne cases are cited in the EEOC analysis above. Two additional cases on the subject have been decided within the Third

Circuit in the past eighteen months. In Meditz v. City of Newark, 658 F.3d 364 (3d Cir. 2011), the plaintiff had alleged that the city's residency requirement for non-uniformed employees violated Title VII because it had a disparate impact on white non-hispanics in the relevant labor market in the surrounding area. The district court granted summary judgment in favor of the city on the ground that the City of Newark was sufficiently large and diverse that the city itself constituted the relevant labor market. The Third Circuit reversed. It held that the district court had failed to determine the proper parameters of the relevant labor market based on considerations such as commuting patterns and transportation flow, and locations from which private employers draw their workforce. Id. at 373.[3] It also criticized the district court's "subjective" analysis of the statistical evidence regarding the disparities between the racial composition of the relevant city employee pools and relevant labor market, and instructed the district judge on remand to use the required standard-deviation statistical analysis. Id. at 374 n.17. Meditz, decided in September of this year, plainly demonstrates the current viability of a disparate impact claim brought by a non-resident white plaintiff challenging the residency requirements of a municipality with a larger population of minorities than the surrounding areas.

A September 2010 district court decision from New Jersey teaches a similar lesson from a different perspective. In NAACP v. North Hudson Regional Fire & Rescue, 742 F.2d 501 (D.N.J. 2010), Judge Dickinson Debevoise granted a permanent injunction prohibiting the defendant, a consolidated municipal fire department, from hiring off a list of candidates compiled under a policy requiring that the employees reside in one of the five towns within the "North Hudson" district ("member towns"). Plaintiffs prevailed by demonstrating that the residency requirement had a significant statistical impact on the number of African-Americans eligible for employment. Through its expert witness, plaintiffs used a number of different parameters to compare the racial composition of the member towns to that of the surrounding communities within a 30-minute commuting distance. Id. at 512-14.[4] The defendant had an expert of its own, of course, and the district court engaged in a lengthy examination of the competing analyses offered in the "battle of the experts." See id. at 512-21. The district court ultimately concluded that the plaintiffs had established a Title VII violation. North Hudson, like Meditz, counsels extreme caution.

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[3] The Court observed that the record "evidence suggests that the relevant labor market is not limited to the City of Newark." Id. at 373 n.16.

[4] The member towns had a low African-American population (3.4%) while the proportion of African-Americans increased in the surrounding population bands (5.8% within a five-mile radius; 15.8% within a ten-mile radius). Id. at 513.

B. The Business Necessity Defense Under Title VII

A job requirement that causes an otherwise impermissible disparate impact may nonetheless be defended under Title VII if the employer is able to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k). Note, first of all, that this "business necessity" defense requires much more than a showing that it is "good for the City" for economic reasons, or for other legitimate public policy reasons (higher employment, lower crime rates, fostering pride in the community, etc.) to employ City residents. The "business necessity" must be tied specifically to the job performance at issue – it must be necessary that a fireman, to do his job properly, live in New Haven. In the North Hudson case discussed above, for example, the municipality argued that the residency requirement was justified by business necessity because it (1) improves the firefighters' effectiveness and responsiveness by increasing the likelihood that they are familiar with the local buildings and streets, and also the speed with which they can respond to an emergency; and (2) increases the number of Spanish-speaking firefighters, which improves their ability to communicate effectively with Spanish-speaking residents. 742 F. Supp. 2d at 522. These and other business-necessity arguments were rejected by the district court. Id. at 522-25.

It does not appear that the business necessity defense would substantially change the calculus in assessing the viability of a potential Title VII lawsuit here.

C. Other Title VII Cases/Research Regarding Residency Requirements

Although my research to date has not been exhaustive, I have found no reason to think that the foregoing Title VII residency-requirement cases are in any way anomalous or unrepresentative. Second Circuit law on this particular issue (Title VII as applied specifically to residency requirements) appears from my preliminary research to be meager to non-existent. Again, from my preliminary review of Second Circuit Title VII law, I see no reason to think our Circuit's analysis would depart significantly from the cases in the Third Circuit.

If additional Title VII research were to be done on the issue, it should focus on making certain that there is nothing different in the Second Circuit (or elsewhere) that would change the analysis used in the Third Circuit.

II. CONSTITUTIONAL CHALLENGES TO RESIDENCY REQUIREMENTS BASED ON THE RIGHT TO INTRASTATE TRAVEL

I was surprised to learn that courts have given serious attention, in the employment context, to challenges to residency requirements based on a constitutional right to intrastate travel. See generally Note, Freedom of Movement at a Standstill? Toward the Establishment of a Fundamentral Right to Intrastate Travel, 90 B.U. L. Rev. 2461, 2487-89 (2010) (discussing

constitutional attacks on employment residency requirements based on intrastate right to travel). In other words, a resident of (for example) Middletown might argue that a residency requirement imposed by New Haven violates his or her constitutional right to intrastate travel. This type of legal claim is not of any significant concern in connection with the residency requirement being considered in New Haven, in my view, because the sole focus of the requirement under consideration is the candidate's residency at the time of the application for employment.

To summarize briefly, it appears that residency restrictions are constitutionally problematic only when they impose "durational" (as opposed to "continuing") residency requirements.[5] See McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) (holding that a residency requirement requiring municipal firemen to reside in that City during the time they are employed there does not violate the constitution); Carofano v. City of Bridgeport, 196 Conn. 623, 638-43 (1985) (same under state constitution). The New Haven rule under consideration contemplates neither a durational nor a continuing requirement. I see no significant issue on this particular point.

III. RESIDENCY REQUIREMENTS IN THE HARTFORD FIRE DEPARTMENT

From what I have been able to learn, it appears that the City of Hartford provides no useful precedent or guidance with respect to a residency requirement for firefighters.

Hartford's residency requirement for firefighter applicants was challenged in a federal lawsuit captioned Boileau v. City of Hartford, Civil No. 3:98-cv-01473 (AWT). The legal challenge to the residency requirement in Bolieau was not based on Title VII, or any claim of race discrimination, but rather on the constitutional right to travel. (See Part II above). The district court decision only concluded that Hartford's residency requirement did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Certainly, there was no consideration of any of the Title VII issues addressed in this memo above. As a result, this decision does not mean that a challenge to a 100% residency requirement in New Haven would survive a legal challenge brought under Title VII.

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[5] "Durational" requirements mandate that the job candidate, to be eligible for the position, must have resided in the location for a prescribed period of time. "Continuing" requirements mandate that the person reside in the location as a condition of employment. See, e.g., Carofano v. City of Bridgeport, 196 Conn. 623, 638-39 (1985) (explaining distinction).

IV. A FIFTY/FIFTY RESIDENCY POLICY FOR USE IN CAPPING THE NUMBER OF APPLICATIONS.

I have not had sufficient time to analyze the legal implications of a "50/50" residency requirement. It should not be automatically assumed that use of a 50/50 policy would trigger the same degree of concern that the 100% requirement would clearly raise. First, my understanding of the 50/50 policy under consideration is that it would be used as a means to "cap" the number of applicants considered for the firefighter position in light of the large number of applications received for a very small number of openings. For example, if a limit of 800 applications were imposed for any particular posting, then a 50/50 policy would require the City to limit the applicant pool to the first 400 resident applicants and the first 400 non-resident applicants. This approach is very different from a 100% policy, because every non-resident still has an opportunity to be part of the applicant pool – they just need to get their application in fast enough. (With a 100% requirement, the non-resident is categorically excluded, and has no opportunity at all.) Although this distinction does not eliminate the possibility of a legal claim brought by the 401st non-resident applicant, the City's position should be significantly stronger in this context because the opportunity is equally open to anyone, and the candidate's residency status is not used as a job qualification but a simple means for controlling application numbers.

Second, the controlling issue for disparate impact purposes will be the statistical analysis, and my sense is that the statistical analysis in connection with a 50/50 application policy would be complex. Under the 50/50 policy, it seems to me that it would be difficult for a plaintiff to show that the challenged policy has any significant effect on the racial composition of the persons who ultimately make the eligibility list.

At this point, beyond these thoughts, I cannot provide any opinion about whether the 50/50 policy would expose the City to a viable Title VII claim based on disparate impact.