

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK JOHNSON, FRANCO S. CALZOLAI,  
and MICHAEL R. BRYANT,

No. C 09-05503 JSW

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN  
FRANCISCO, THE CIVIL SERVICE  
COMMISSION OF SAN FRANCISCO, and  
THE SAN FRANCISCO FIRE  
DEPARTMENT,

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Defendants.

\_\_\_\_\_ /

Now before the Court is the motion for summary judgment filed by the City and County of San Francisco ("the City"). The Court finds this matter suitable for disposition without oral argument. *See* N.D. Cal. Civ. L.R. 7-1(b). Accordingly, the hearing set for February 19, 2016 is VACATED. Having carefully reviewed the parties' papers and considered their arguments and the relevant authority, and good cause appearing, the Court hereby DENIES the City's motion for summary judgment.<sup>1</sup>

\_\_\_\_\_

<sup>1</sup> The Court DENIES Plaintiffs' motion to strike the late-filed Exhibit C to the declaration of Jonathan Rolnick as the delay was inadvertent error and caused no prejudice. The Court GRANTS Plaintiffs' administrative motion to file under seal. The Court GRANTS Plaintiffs' motion for leave to file written responses to Defendants' evidentiary objections made on reply.

**BACKGROUND**

1  
2 Plaintiffs Mark Johnson, Franco S. Calzolari, and Michael R. Bryant (“Plaintiffs”) filed  
3 suit claiming their rights under the United States Constitution and state law were violated when  
4 they were denied promotions to Battalion Chief in the San Francisco Fire Department due to  
5 their performance on a Civil Service examination for the position (“the H-40 examination”).  
6 Plaintiffs claim the administration of the H-40 examination resulted in disparate impact against  
7 African Americans.

8 This Court granted summary judgment in favor of the City by order dated March 29,  
9 2012. On appeal, the Ninth Circuit Court of Appeals affirmed that order in part and reversed in  
10 part. The Ninth Circuit reversed and remanded for further consideration of Plaintiff’s claims for  
11 disparate impact discrimination in violation of 42 U.S.C. section 1981, Title VII of the Civil  
12 Rights Act of 1964 (“Title VII”), and the California Fair Employment and Housing Act  
13 (“FEHA”). (Memorandum of U.S. Court of Appeals, Docket No. 138 (“Memo”), at 4-5, citing  
14 remaining claims 1, 3, and 4.)

15 The Court shall address specific, additional facts as necessary in the remainder of this  
16 order.

**ANALYSIS**

17  
18 **A. Legal Standard Applicable to Motion for Summary Judgment.**

19 A principal purpose of the summary judgment procedure is to identify and dispose of  
20 factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).  
21 Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and  
22 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to  
23 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R.  
24 Civ. P. 56(c). “In considering a motion for summary judgment, the court may not weigh the  
25 evidence or make credibility determinations, and is required to draw all inferences in a light  
26 most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.  
27 1997).  
28

1 The party moving for summary judgment bears the initial burden of identifying those  
2 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine  
3 issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is “genuine” only if there is  
4 sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v.*  
5 *Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is “material” if it may affect the  
6 outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the  
7 ultimate burden of persuasion at trial, that party must produce evidence which either negates an  
8 essential element of the non-moving party’s claims or that party must show that the non-moving  
9 party does not have enough evidence of an essential element to carry its ultimate burden of  
10 persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.  
11 2000). Once the moving party meets its initial burden, the non-moving party must go beyond  
12 the pleadings and, by its own evidence, “set forth specific facts showing that there is a genuine  
13 issue for trial.” Fed. R. Civ. P. 56(e).

14 In order to make this showing, the non-moving party must “identify with reasonable  
15 particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275,  
16 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact  
17 must take care adequately to point a court to the evidence precluding summary judgment  
18 because a court is “not required to comb the record to find some reason to deny a motion for  
19 summary judgment.” *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th  
20 Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418  
21 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary  
22 judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

23 **B. Purposeful Discrimination Claim is Dismissed.**

24 The parties agree and the Ninth Circuit already ruled that there is insufficient evidence  
25 to create a triable issue of fact as to the intent element of Plaintiffs’ original claim for  
26 purposeful discrimination under 42 U.S.C. section 1981. (See Memo at 5-6 (citing *Vasquez v.*  
27 *County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003).) Accordingly, the City’s motion for  
28 summary judgment is GRANTED as to this claim.

1     **C.     Questions of Fact Remain on Disparate Impact Claims.**

2             On remand, the Ninth Circuit tasked this Court to make a determination, among other  
3 things, “whether a statistically significant disparity resulted from the eligibility criteria  
4 challenged by Plaintiffs.” (See Memo at 5 (citing *Contrares v. City of Los Angeles*, 656 F.2d  
5 1267, 1272-74 (9th Cir. 1981)).)

6             A claim for disparate impact discrimination challenges “employment practices that are  
7 facially neutral in their treatment of different groups but that in fact fall more harshly on one  
8 group than another and cannot be justified by business necessity.” *Int’l Brotherhood of*  
9 *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); see also *Guz v. Bechtel National,*  
10 *Inc.*, 24 Cal. 4th 317, 354 (2000) (finding that California courts will look to pertinent federal  
11 precedent when applying state discrimination statutes). In order to establish a prima facie claim  
12 of disparate impact discrimination, a plaintiff must identify the employment practice  
13 challenged, show disparate impact on a protected group, and prove causation with respect to  
14 each challenged practice. See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-58  
15 (1989). The distinctly factual issue of demonstrating that any particular employment practice  
16 impacts a protected class in a significant manner depends on statistical disparities and  
17 competing explanations for those disparities. “The statistical analysis must show a disparity  
18 that is ‘sufficiently substantial’ as to ‘raise such an inference of causation.’” *Paige v.*  
19 *California*, 291 F.3d 1141, 1145 (9th Cir. 2002) (citing *Watson v. Fort Worth Bank & Trust*,  
20 487 U.S. 977, 994 (1988)).

21             At this procedural posture, the Court cannot find that the analyses performed by both of  
22 the parties’ experts resolves the claims as a matter of law. The timing, scope, and methodology  
23 of the respective parties’ experts create factual matters which remain the subject of reasonable  
24 and significant dispute. See *Int’l Brotherhood*, 431 U.S. at 33-40 (holding that the probative  
25 value of statistics must be examined in light of the totality of the circumstances). The Court  
26 cannot grant summary judgment on this record. See *Chuang v. U.C. Davis*, 225 F.3d 1115, 1124  
27 (9th Cir. 2000) (“As a general matter, the plaintiff in an employment discrimination action need  
28 produce very little evidence in order to overcome an employer’s motion for summary judgment.

1 This is ‘because the ultimate question is one that can only be resolved through a searching  
2 inquiry – one that is most appropriately conducted by a fact finder, upon a full record.’”); *see also*  
3 *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) (“In evaluating motions for  
4 summary judgment in the context of employment discrimination, we have emphasized the  
5 importance of zealously guarding an employee’s right to a full trial, since discrimination claims  
6 are frequently difficult to prove without a full airing of the evidence and an opportunity to  
7 evaluate the credibility of the witnesses.”).

8 Further, and also precluding summary judgment, the Court finds that the record is replete  
9 with disputed facts regarding whether the H-40 examination was a valid and job-related selection  
10 process. Although Defendants may justify a challenged selection device as a business necessity  
11 by showing that it is significantly job-related, this process of validation is primarily a question of  
12 fact. *See, e.g., Ass’n of Mexican-American Educators v. California*, 231 F.3d 572, 584-85 (9th  
13 Cir. 2000) (“The question whether a test has been validated is primarily a factual question, which  
14 depends on underlying factual determinations regarding the content and reliability of the  
15 validation studies that a defendant utilized.”). On the current record, the Court finds there are  
16 disputed issues of fact regarding the validation of the H-40 examination process.

17 Upon careful review of the record and the experts’ reports, the Court finds that there  
18 remain questions of fact regarding the claims which preclude the Court from granting the  
19 remainder of Defendants’ motion. Accordingly, it is DENIED.

20 **CONCLUSION**

21 For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART  
22 Defendants’ motion for summary judgment. The Court shall conduct a further case management  
23 conference on April 1, 2016 at 11:00 a.m. The parties shall submit a joint case management  
24 statement by no later than March 25, 2016.

25 **IT IS SO ORDERED.**

26 Dated: February 8, 2016

27   
28 \_\_\_\_\_  
JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE

