

## MD: BALTIMORE FD – IMPARTIAL INVESTIGATION OF CHEATING ON PROMOTION EXAM – CLAIM OF RACIAL DISCRIMINATION BY 5 WHO WERE INVESTIGATED WAS PROPERLY DISMISSED

On April 25, 2013, in Jenkins v. Baltimore City Fire Department, the U.S. Court of Appeals for the 4<sup>th</sup> Circuit held in an unpublished opinion(3 to 0), 519 Fed. Appx. 192, that lawsuit by five African-American firefighters was properly dismissed.

<http://docs.justia.com/cases/federal/appellate-courts/ca4/12-1582/12-1582-2013-04-25.pdf>

“We have carefully reviewed the parties’ briefs and the joint appendices and find no legal or factual basis to reverse the district court’s conclusion that, while Plaintiffs established a prima facie case of disparate promotion, see *Page v. Bolger*, 645 F.2d 227, 229-30 (4th Cir. 1981), they did not prove that the City’s proffered reason for the adverse employment action was pretextual.”

The U.S. District Court had dismissed the lawsuit, based on a detailed recommendation by U.S. Magistrate. 862 F. Supp. 2d 427 (D. Md. 2012); <https://www.casetext.com/case/jenkins-v-baltimore-city-fire-dept/>

“Plaintiffs, five current or former African American Baltimore City Fire Department employees, filed a Title VII employment suit alleging race discrimination against the Baltimore City Fire Department (‘BCFD’) and the Mayor and City Council of Baltimore (‘City’). Presently before the Court is defendants’ motion for summary judgment. (ECF No. 47). For the reasons set forth below, the Court GRANTS defendants’ motion.”

### Cheating on exam – statistical review

“With respect to the captain exam, Dr. Bruno concluded that examinees 13 and 50 cheated on the test, presumably with at least one having advance knowledge of the test answers. (*Id.*). They achieved scores of 102 and 103 respectively, and, of the 7 incorrect answers they shared, their answers matched in 6 cases. (*Id.*). Their scores were ‘far above most other examinees and are extremely high given their average scores on all previous tests taken.’ (*Id.*). Further, the pair had identical scores of 49 out of the total possible score of 103 on a 2005 exam. (*Id.*). The covering OIG report identified examinees 13 and 50 as Stafford and Williams, respectively. (ECF No. 56, Ex. B, Def. 3322).

Ultimately, the OIG concluded in an executive summary to the report that plaintiffs somehow obtained and shared a copy of the actual 2001 promotional test (to which other test-takers did not have access) in violation of testing protocols. (ECF No. 65–1, 4). Some

of the 2001 questions were repeated on the 2007 exam. ( *Id.* ). The executive summary noted that “[w]hen questioned as to how [plaintiffs] came by the 2001 exam, their responses were deceptive and indirect.” ( *Id.* ). Last, the executive summary concluded that the test was improperly monitored (e.g., a monitor slept on duty during the exam, and failed to regulate test-takers' access to bathrooms), compromising the security of the entire examination. (ECF No. 65–1, 5).

Newly appointed Fire Chief James Clack reversed discipline

“Chief Clack felt that the OIG report was an insufficient basis for plaintiffs' discipline, and dismissed most of the cheating charges against them. \*\*\* Thus, all discipline against plaintiffs was eventually reversed and plaintiffs were compensated accordingly.”

Lawsuit properly dismissed – Local 964 posted allegations, not the City

“Plaintiffs appear to argue that the initial accusations against them (e.g., the rumors and postings on Local 964's website) were racist. ( *E.g.*, ECF No. 56, 21).

However, this argument fails to raise material issues of fact for at least two reasons. First, and most importantly, the initial suspicion and accusations of cheating ( *e.g.*, the rumors and postings) all of which predate any evidence of an investigation by defendant were initiated by the *firefighters* —not by defendant. (ECF No. 47–5, 4). Second, while the accusations (particularly the postings from the union website) were offensive, there is no evidence that they were racist. The postings contained no racial slurs and did not identify the alleged cheaters by name or race. ( *See* ECF No. 47–10).”

City properly launched investigation

“The record is undisputed that the then Mayor of Baltimore, Sheila Dixon, an African American, ordered the investigation of the cheating allegations regarding the 2007 promotional exams, freezing the list pending the completion of the investigation. While it is undisputed that Chief Goodwin had questions about the integrity of the exam results, it is also undisputed that within days of the release of the exam results both firefighter unions strongly called for an investigation “to protect the integrity of the system.” *See supra*.

It is also undisputed that a colorblind statistical analysis of all test results substantiated cheating on the exam by four of the five plaintiffs and other aspects of the investigation substantiated improprieties as to the fifth plaintiff and the others.”

**Legal Lesson Learned: The integrity of the promotion process is critical; bring in independent investigator.**