UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JENNIFER LIVINGSTON, KIRSTEN BAIN, TAVI BURROUGHS, KENIA CHAVEZ, CHRISTINA VELASCO, KATHARINE LAZZARA, JESSICA MAPLES, SHANNON MARKEY, DONNA GRIFFIN, JAMIE SNEVELY, LISETTE VENEGAS, and MARY YOUNGREN,	)	
Plaintiffs,	)	No. 16 C 10156
v.	)	Judge Sara L. Ellis
CITY OF CHICAGO, a municipal corporation,	)	
Defendant.	)	

ORDER

On December 27, 2019, Magistrate Judge Young B. Kim granted in part and denied in part a motion to compel filed by Plaintiffs Jennifer Livingston, Kirsten Bain, Tavi Burroughs, Kenia Chavez, Christina Velasco, Katharine Lazzara, Jessica Maples, Shannon Markey, Donna Griffin, Jamie Snevely, Lisette Venegas, and Mary Youngren [255]. Plaintiffs moved to reverse Judge Kim's denial of their motion [276] and filed objections to this portion of Judge Kim's December 27 order [277]. The Court denies Plaintiffs' motion [276] and overrules their objections [277]. See Statement.

STATEMENT

Plaintiffs filed this lawsuit against Defendant City of Chicago (the "City"), alleging sex discrimination against female candidates for fire paramedic positions with the Chicago Fire Department ("CFD") in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. Plaintiffs allege that they are licensed and experienced female paramedics whom the City hired as fire paramedic candidates but then discharged and denied employment as fire paramedics based on sex discrimination. Specifically, Plaintiffs allege that they were discharged after they failed certain physical tests that the CFD administered at its Training Academy (the "Academy"). The CFD's use of these tests—in particular, two tests Plaintiffs refer to as the Lifting and Moving Sequence and the Step Test—is the focus of Plaintiffs' lawsuit against the City.

Some additional context about the CFD's hiring process for fire paramedics is necessary to understand the parties' arguments and Judge Kim's December 27 order. When the CFD determines that it has fire paramedic vacancies to fill, the City's Department of Human

Resources ("HR") "prepare[s] a job posting," "accept[s] applications for [fire] paramedic positions," and creates a list of applicants "who are appropriately credentialed." *Ernst v. City of Chicago*, No. 08 C 4370, 2018 WL 6725866, at *1 (N.D. Ill. Dec. 21, 2018). Next, HR "provides CFD with an eligibility list containing the names of those who are to be considered next in the hiring process." *Id.* (alteration omitted) (citation omitted) (internal quotation marks omitted). The CFD then invites a group of applicants "from the eligibility list to attend 'initial processing.'" *Id.* at *2 (citation omitted). From 2000 through 2014, fire paramedic applicants had to take a physical test at the processing stage that Plaintiffs refer to as the "PPT." *Id.*; Docs. 1 and 259, ¶¶ 17–18, 24.[1] In 2014, the CFD replaced the PPT with another physical test, which the parties refer to as the "PPAT" or "Avesta test." *Ernst*, 2018 WL 6725866, at *2; Docs. 1 and 259, ¶ 24. If the applicant fails the physical test at the processing stage, he or she cannot proceed "to the next step of the hiring process." *Ernst*, 2018 WL 6725866, at *2. But if the applicant passes the physical test (and satisfies all other processing requirements), the CFD gives the applicant a conditional job offer as a probationary fire paramedic, and the applicant may become a part of a training class at the Academy. *Id.* An applicant who attends the Academy is a fire paramedic *candidate* and an employee of the City. *See id.*; Docs. 1 and 259, ¶ 27 ("Each Plaintiff, after passing the PPAT and being certified as fit-for-duty by the CFD's medical officer, was hired by the CFD and matriculated to the CFD's Training Academy."). Accordingly, information collected and tests administered before an individual becomes a fire paramedic candidate (e.g., during the processing stage) are considered "pre-hire," and information collected and tests administered after the individual becomes a fire paramedic candidate (e.g., during his or her tenure at the Academy) are considered "post-hire." The PPT and PPAT are pre-hire tests; the Lifting and Moving Sequence and the Step Test are post-hire tests.

In November 2019, Plaintiffs moved to compel the City to produce two categories of pre-hire documents: (1) "hiring or eligibility lists with the demographics of" CFD fire paramedic applicants, and (2) "the City's processing lists with the demographics of applicants who completed processing and who did not complete processing, and the reasons the applicants were rejected." Doc. 233 at 1. Plaintiffs sought these documents from 1995 to the present. At the time, Plaintiffs' complaint only asserted disparate treatment and disparate impact claims under Title VII,[2] and Plaintiffs represented that their motion to compel was "about evidence of disparate treatment." Doc. 249 at 3; *see also id.* (assertion by Plaintiffs that resolution of their motion was not "controlled by an earlier ruling on document discovery [regarding] disparate impact claims").

On December 27, 2019, Judge Kim granted in part and denied in part Plaintiffs' motion to compel. Judge Kim found that pre-hire data was not relevant to Plaintiffs' "disparate treatment theory that unnamed Academy instructors implemented the step and lift tests to weed

[1] The Court assumes the truth of allegations in Plaintiffs' pleadings for purposes of this order only.

[2] Plaintiffs moved in July 2019 to amend their complaint to include claims for intentional sex discrimination under the Constitution's Equal Protection clause (by way of 42 U.S.C. § 1983) and the Illinois Civil Rights Act (the "ICRA"), but the Court had not yet ruled on this motion when Plaintiffs filed their motion to compel. After the Court granted in part Plaintiffs' motion to amend in January 2020, Plaintiffs filed an amended complaint that includes equal protection and ICRA claims.

women out after their hire because the pre-hire requirements failed to do so." Doc. 255 at 1. As Judge Kim explained further:

> If the theory is that the City designed and implemented the [Lifting and Moving Sequence and the Step Test] because too many women were entering the Academy, the data that is material here is the post-hire data, which the City has produced. In other words, under Plaintiffs' disparate treatment theory it matters not how many women applied to serve as a paramedic. What matters is whether Academy instructors believed that too many women were actually part of the Academy and whether they then implemented discriminatory tests to eliminate them.

Id. Judge Kim, however, found that post-hire gender data after the 2014–2015 time frame was relevant to whether the City designed the post-hire tests to "weed women out," and Judge Kim ordered the City to produce post-hire gender data for Academy classes after 2015. *Id.* Plaintiffs now object to the portion of Judge Kim's December 27 order denying their motion to compel.

Federal Rule of Civil Procedure 72(a) governs the Court's review of a magistrate judge's ruling on nondispositive matters, which ordinarily include discovery disputes. *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 943 (7th Cir. 1997); *Rodriguez v. City of Chicago*, 429 F. Supp. 3d 537, 540 (N.D. Ill. 2019); 12 Richard L. Marcus, *Federal Practice and Procedure* § 3068.2 (3d ed. Apr. 2020 update) ("[D]iscovery rulings should ordinarily be viewed as nondispositive."). Under Rule 72(a), the Court must "consider timely objections" to the magistrate judge's order "and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). An order is clearly erroneous "only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks*, 126 F.3d at 943. This generally means that "if there are two permissible views of the facts," then the magistrate judge's "choice between them cannot be clearly erroneous." *Webb v. CBS Broad., Inc.*, No. 08 C 6241, 2011 WL 842743, at *2 (N.D. Ill. Mar. 8, 2011); *see also Oleksy v. Gen. Elec. Co.*, No. 06 C 1245, 2013 WL 3944174, at *7 (N.D. Ill. July 31, 2013) ("When performing clear error review, the district court should not overturn a decision by the magistrate judge merely because the district judge would have independently come to a different conclusion from the one reached by the magistrate judge on the same set of facts."). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Rodriguez*, 429 F. Supp. 3d at 540 (citation omitted). In ruling on discovery matters, "magistrate judges 'enjoy extremely broad discretion[.]'" *Charvat v. Travel Servs.*, 110 F. Supp. 3d 894, 896 (N.D. Ill. 2015) (quoting *Jones v. City of Elkhart*, 737 F.3d 1107, 1115 (7th Cir. 2013)).

Plaintiffs contend that Judge Kim's December 27 order severely limits their "ability to prove their well-pled claims of a widespread pattern, practice, or custom of hiring discrimination against women in violation of Title VII and the Equal Protection Clause." Doc. 277 at 1–2. As an initial matter, Plaintiffs only argued before Judge Kim that the requested documents were "evidence of disparate treatment." Doc. 249 at 3. Plaintiffs did not argue that the documents were relevant to their disparate impact claim, *see id.*, nor did they contend that the documents were relevant to the equal protection claim that they sought to add to their complaint.

Furthermore, Plaintiffs contend that their equal protection claim is "materially indistinguishable" from their disparate treatment claim. Doc. 299 at 6–7; *see also* Doc. 163 at 2 (assertion by Plaintiffs that their equal protection and ICRA claims "functionally duplicate" their disparate treatment claim, "are based on the same facts[,] and will be established with the same evidence"). The Court therefore only reviews Judge Kim's ruling with respect to Plaintiffs' Title VII disparate treatment claim. *See United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000) ("[A]rguments not made before a magistrate judge are normally waived . . . [and] district courts should not consider arguments not raised initially before the magistrate judge[.]").

To prove a disparate treatment claim, a plaintiff must show that an employer took a job-related action that was "motivated by intentional discrimination against employees, based on protected employee statuses such as race or sex." *Ernst v. City of Chicago*, 837 F.3d 788, 794 (7th Cir. 2016). Judge Kim interpreted Plaintiffs' disparate treatment claim as being premised on the Academy instructors' implementation of the Lifting and Moving Sequence and the Step Test due to their belief that too many women were entering the Academy. Plaintiffs contend that Judge Kim's interpretation fails to acknowledge that they are pursuing a "pattern or practice" disparate treatment claim and "takes a myopic view of the Plaintiffs' claims, their burden of proof, and what evidence a jury should be permitted to consider." Doc. 277 at 7–8, 10.

The Court is not "left with the definite and firm conviction" that Judge Kim erroneously interpreted Plaintiffs' disparate treatment claim. *See Weeks*, 126 F.3d at 943. Judge Kim has worked with the parties since January 2017, including during 18 months of settlement negotiations. Given this familiarity with the parties and their claims, the Court is confident that Judge Kim knows the contours of Plaintiffs' disparate treatment claim and the evidence necessary to prove that claim. Moreover, based on its own review of the pleadings and relevant briefing, the Court does not see anything definitively showing that Judge Kim misinterpreted Plaintiffs' disparate treatment claim. Plaintiffs, who have brought individual claims and not a class action lawsuit, only allege that they were subject to discriminatory post-hire physical tests, so it was reasonable for Judge Kim to frame the relevant question as the motive of the individuals implementing those allegedly discriminatory tests, i.e., the Academy instructors. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) ("The inquiry regarding an individual's claim [of discrimination] is the reason for a particular employment decision[.]"); *Gilty v. Vill. of Oak Park*, 919 F.2d 1247, 1250, 1252 (7th Cir. 1990) (where the plaintiff filed an individual disparate treatment claim, the Court had to "look for evidence of intentional discrimination directed at" *the plaintiff*, and "evidence of a pattern or practice" was only "collateral to evidence of specific discrimination against the actual plaintiff" (internal citation omitted)).

Based on this reading of Plaintiffs' disparate treatment claim, Judge Kim's finding that the City did not have to produce the requested pre-hire information was not clearly or legally erroneous. Plaintiffs do not explain why the Academy instructors would care about the initial number of eligible applicants, the percentage of female applicants who passed the processing stage, or the reasons why certain female applicants did (or did not) pass the processing stage. Rather, the Academy instructors would presumably only care about the total number of women who matriculate to the Academy, which is shown by the post-hire data that the City has already produced. *See* Doc. 233 at 3 (assertion by Plaintiffs that they already have "demographics of

each Academy class . . . back to the 1990s"); Doc. 255 at 1. Indeed, Plaintiffs can use information regarding how many women enter the Academy each year to determine whether the number of female fire paramedic candidates has increased or decreased from year to year. If the number of female fire paramedic candidates attending the Academy shot up in 2014 and 2015 (the first two years the CFD used the PPAT) compared to prior years when the CFD used the PPT, that would support Plaintiffs' theory that the PPAT was not as effective as the PPT in failing women at the pre-hire processing stage, and that the Academy instructors had an incentive to implement post-hire tests to weed out women. True, such post-hire information alone does not permit Plaintiffs to measure the *passage rates* for female applicants taking the PPAT compared to the PPT. But Plaintiffs do not explain, and the Court does not see any reason, why Academy instructors would be concerned about passage rates, as opposed to the total number of women entering the Academy each year.

Plaintiffs contend that Judge Kim denied them access to what they characterize as "basic statistical information," arguing that "it is axiomatic that statistical analyses . . . constitute important evidence in discrimination cases." Doc. 277 at 3–4. As the Supreme Court has recognized, however, statistics "come in infinite variety," and "their usefulness depends on all of the surrounding facts and circumstances." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). The fact that historical hiring statistics and applicant pool data may often be relevant to proving a disparate treatment claim does not mean that such information is categorically relevant to *any* disparate treatment claim. Plaintiffs also contend that, "[i]n addition to and independent of its relevance as pattern or practice evidence," the pre-hire statistics they seek show that the City has engaged in pre-hire discrimination over time, which is "circumstantial evidence of the City's discriminatory intent in inventing and using the [Lifting and Moving Sequence and the Step Test] to fail Plaintiffs from training." Doc. 277 at 10–12. But because Plaintiffs did not clearly articulate this argument until their reply brief in support of their motion to compel, Judge Kim was under no obligation to consider it. *See O'Neal v. Reilly*, 961 F.3d 973, 974 (7th Cir. 2020) ("[D]istrict courts are entitled to treat an argument raised for the first time in a reply brief as waived."). In any event, Judge Kim was entitled to find that this basis for relevance was not sufficient to warrant discovery into the pre-hire data at issue. *Cf. Motorola Sols., Inc. v. Hytera Commc'ns Corp.*, 365 F. Supp. 3d 916, 924 (N.D. Ill. 2019) (noting that "[n]ot all relevant information is discoverable" and that "relevance alone does not translate into automatic discoverability under Federal Rule of Civil Procedure 26"); *see also Gilty*, 919 F.2d at 1252 & n.7 (evidence of a "pattern or practice" was only of collateral importance to the plaintiff's individual disparate treatment claim and finding that it was proper for the district court to deny discovery searching for more evidence of broad-based discrimination based on its limited relevance). Finally, Plaintiffs contend that they need the requested pre-hire information so that they can better convey their narrative of the case at trial. But Plaintiffs' belief that this information will enable them to tell the jury a more compelling story does not necessarily entitle them to the information. The fact remains that Plaintiffs' disparate treatment claim alleges that they were discriminated against by post-hire job-related actions. *See Hildreth v. Butler*, 960 F.3d 420, 424 n.1 (7th Cir. 2020) ("The scope of discovery is defined by the claims pursued and the defenses raised.").

In sum, Judge Kim did not commit clear or legal error in denying Plaintiffs' motion to compel. The Court denies Plaintiffs' motion and overrules their objections to Judge Kim's December 27 order.

Date: September 4, 2020 /s/ Sara L. Ellis