UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, JOHN BRENNAN, JAMES G. AHEARN, KURT BRUNKHORST, SCOTT SPRING, ERNEST TRICOMI, and DENNIS MORTENSON Plaintiffs/Intervenors, v. NEW YORK CITY BOARD OF EDUCATION; CITY OF NEW YORK; WILLIAM J. DIAMOND, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES (in his official capacity); NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, Defendants.	)	CIVIL ACTION NO. 96-0374 (FB) (RL) **SECOND AMENDED COMPLAINT IN INTERVENTION**

Plaintiffs/intervenors John Brennan, James G. Ahearn, Kurt Brunkhorst, Scott Spring, Ernest Tricomi, and Dennis Mortenson, by way of Complaint in Intervention, allege as follows:

JURISDICTION

1. This is an action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1331 and 1343(3).

ALLEGATIONS OF FACT

1. Plaintiffs/intervenors John Brennan, James G. Ahearn, and Kurt Brunkhorst are permanently employed as Custodian Engineers, Assignment Level 2, by defendant New York City Board of Education.

2. Plaintiffs/intervenors Scott Spring, Ernest Tricomi, and Dennis Mortenson are permanently employed as Custodian Engineers, Assignment Level 1, by defendant New York City Board of Education.

3. Each of plaintiffs/intervenors is a Caucasian male.

4. The New York City school system operated by defendants contains many positions for Custodian Engineers, with compensation depending upon the size of the schools to which a particular Custodian Engineers is assigned. Assignment to schools is competitive and determined significantly by the seniority dates of the applicants for the position.

5. The Complaint filed by plaintiff United States of America ("United States") was based on Section 707 of Title VII,

42 U.S.C. § 2000e-6, which authorizes the Attorney General to bring an action whenever she believes that any person or group of persons is engaged in a pattern or practice of discriminatory behavior in violation of the rights guaranteed by Title VII, 42 U.S.C. § 2000e-2, where "the pattern or practice is of such nature and is *intended* to deny the full exercise of th[ose] rights."

6. The United States has not pursued any theories of intentional discrimination in this litigation.

7. Instead, the United States has relied on two different disparate impact theories (*i.e.*, theories that required no showing of discriminatory intent). First, it claimed that three different civil service exams for the positions of Custodian and Custodian Engineer (now referred to as Custodian Engineer Level 1 and Custodian Engineer Level 2) had a disparate impact against blacks and Hispanics (the "testing claims"). Second, it claimed that the defendants' recruiting practices had a disparate impact against blacks, Hispanics, women, and Asians (the "recruiting claim").

8. The United States did not attempt to show that the examinations challenged in the testing claims had any disparate impact against women or Asians.

9. The Answer filed by plaintiffs/intervenors' employer, defendant New York City Board of Education, among others, denies all allegations of wrongful discrimination.

10. This Court has made no finding that defendants have violated Title VII.

11. On or about February 11, 1999, the United States and defendants entered into a certain Settlement Agreement, which, subject to Court approval, would resolve all allegations of wrongful discrimination alleged in the Complaint filed by the United States.

12. The Settlement Agreement provides that defendants shall award to a class of persons referred to as Offerees positions as permanent Custodians or Custodian Engineers, with retroactive seniority dates. Only black, Hispanic, Asian and female persons are Offerees or are eligible to be "Offerees."

13. Many of the Offerees did not take any of the challenged examinations. Other Offerees have taken an exam, but the Settlement Agreement would give them retroactive seniority from a date earlier than the date upon which they took the exam.

14. None of the Offerees were the victims of any discriminatory recruiting practices. Each of them applied for and obtained a job.

15. The Settlement Agreement does not merely restore the Offerees to positions or seniority they would have held but for alleged discrimination.

16. If the Settlement Agreement were approved, at least some of the retroactive seniority dates to be awarded to the Offerees give the Offerees more seniority than that enjoyed by plaintiffs/intervenors.

17. The Settlement Agreement does not require defendants to award back pay or money damages to any persons. The sole burden and expense of the Settlement Agreement, if approved by the Court and implemented by the parties, would be borne by plaintiffs/intervenors and persons similarly situated.

18. In addition to filing this Complaint, plaintiffs/intervenors Brennan, Brunkhorst, Ahearn, Tricomi, and Mortenson filed written objections to the Settlement Agreement.

COUNT ONE: VIOLATION
EQUAL PROTECTION AND CIVIL RIGHTS

19. Plaintiffs/intervenors repeat and reallege each of the allegations in paragraphs 1-19 as if fully set forth herein.

20. The retroactive grants of seniority in the Settlement Agreement are based in part on an individual's race, ethnicity, or sex, and constitute illegal race and sex discrimination in

violation of Title VII, the Equal Protection Clause, and 42 U.S.C. §§ 1981, 1983, and 1985(3).

21. Defendants have no compelling government interest to justify the use of race. Even if they had such an interest, the proposed retroactive grant of seniority in the Settlement Agreement is not narrowly tailored to meet that interest.

22. Defendants have no important government interest to justify the use of sex as a classification. Even if they had such an interest, the proposed retroactive grant of seniority is not substantially related to the achievement of that interest.

23. The proposed Settlement Agreement would constitute illegal employment discrimination against plaintiffs/intervenors on account of their race and sex, in violation of 42 U.S.C. § 2000e-2; would deprive plaintiffs/intervenors of equal protection of the laws and enjoyment of their civil rights as citizens of the United States, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983; would deprive plaintiffs/intervenors of their right to contract without racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983; and would constitute a conspiracy to deprive plaintiffs/intervenors of their civil rights under 42 U.S.C. § 1985(3).

COUNT TWO: BREACH OF CONTRACT

24. Plaintiffs/intervenors repeat and reallege each of the allegations in paragraphs 1-24 as if fully set forth herein.

25. Custodian Engineers compete for assignments to particular schools pursuant to a "rating and transfer plan" set forth in a collective bargaining agreement ("CBA") between the New York City Board of Education and Local 891, International Union of Operating Engineers. Those with more seniority have a significant advantage in this competition. Under the CBA, seniority is determined by actual length of service in a given position.

26. Each of the plaintiffs/intervenors has an employment contract with the New York City Board of Education and is a third-party beneficiary of the CBA. The rules and provisions of the CBA are part of the contractual relationship between plaintiffs/intervenors and the defendants.

27. Plaintiffs/intervenors have not consented to the proposed Settlement Agreement or the retroactive grants of seniority it contains.

28. The retroactive grants of seniority have not been proven necessary to remedy a violation of Title VII after a trial.

29. The defendants have breached their contractual obligations to plaintiffs/intervenors by granting seniority to the Offerees based on their race and/or sex, and thus denying plaintiffs/intervenors the greater relative seniority to which they are contractually entitled by reason of their actual service, which is longer than the actual service of the Offerees.

30. Plaintiffs/intervenors have no adequate remedy at law.

COUNT THREE: FAILURE TO SUPPORT A CLAIM FOR PATTERN OR PRACTICE DISCRIMINATION

31. Plaintiffs/intervenors repeat and reallege each of the allegations in paragraphs 1-31 as if fully set forth herein.

32. Under Section 707 of Title VII, 42 U.S.C. § 2000e-6, the United States can bring a Title VII lawsuit only on the basis of a "pattern or practice" of discriminatory behavior that violates Title VII rights, and only where "the pattern or practice is of such nature and is *intended* to deny the full exercise of th[ose] rights."

33. The United States has failed to pursue any theories of intentional discrimination in this litigation.

34. Thus, the United States has failed to submit any evidence in support of a pattern or practice of Title VII violations that would permit it to obtain relief under Section

707.

35. Accordingly, there is no legal basis for this Court to enter the proposed Settlement Agreement as a consent decree.

WHEREFORE plaintiffs/intervenors demand judgment rejecting the "Settlement Agreement"; enjoining plaintiff and defendants from providing race-based or sex-based retroactive grants of seniority or any other impermissibly discriminatory remedy; and awarding plaintiffs/intervenors their attorneys' fees, pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k).

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