UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 1:02CV00923(JR)
	)	
TOM RIDGE, SECRETARY,	)	
DEPARTMENT OF HOMELAND	)	
SECURITY,	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFFS' PATTERN OR PRACTICE CLAIMS

Defendant Tom Ridge, Secretary for the Department of Homeland Security, hereby moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on all of plaintiffs' pattern or practice claims. In support, the Court is respectfully referred to Defendant's Statement of Material Facts as to Which There Is No Genuine issue, Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, and the Exhibits attached hereto.

Respectfully submitted,

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Date: August 30, 2004

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' PATTERN OR PRACTICE CLAIMS

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INTRODUCTION

In this putative class action, plaintiffs are Hispanic special agents who were formerly employed by the United States Customs Service ("Customs").[1] Plaintiffs allege that Customs engaged in systemic discrimination against Hispanics agents in promotions, transfers, awards, training, work assignments, discipline and retaliation in violation of Title VII, 42 U.S.C. § 2000e-16, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a. To make a prima facie showing of a pattern or practice of discrimination, plaintiffs must demonstrate a statistically significant disparity in the treatment of Hispanic agents at Customs as compared to whites. However, Customs data demonstrate that Customs treated Hispanic agents at least as well as, if not better than, white agents. Accordingly, summary judgment for defendant Tom Ridge, Secretary of the Department of Homeland Security ("DHS"), should be entered.

Each of plaintiffs' pattern or practice claims is unsupported by statistical evidence. Plaintiffs allege that, because of a "good old boy network" at Customs, Hispanic agents were not promoted to supervisory positions at the same rate as white agents. See Complaint at ¶ 14. Yet Customs promotion data show that Hispanic special agents were being promoted to supervisory positions at a rate slightly higher, not lower, than whites.

---

[1] The former United States Customs Service was a bureau within the Department of Treasury. See Franklin Jones Decl. ("Jones Decl.") (attached to Defendant's Opposition to Plaintiffs' Motion for Rule 16 Conference ("Def's Opp. To Plfs' Mot. for Rule 16 Conf.") [#65] as Ex. 1) at ¶ 3. In March 2003, pursuant to the Homeland Security Act of 2002, P.L. No. 107-296, and the President's Reorganization Plan Modification of January 2003, the employees within the United States Customs Service were transferred from the Department of the Treasury to either Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP"), bureaus within the Department of Homeland Security. Id. ICE is comprised primarily of former Immigration and Naturalization Service ("INS") agents and former United States Customs Service criminal investigators, and contains the vast majority of the former Customs 1811 special agents relevant to this action. Id.

In their transfer claim, plaintiffs assert that, unlike similarly situated white special agents, Hispanics were assigned to posts along the Southwest border or in Puerto Rico and not allowed to transfer to more "desirable" posts, and that this hindered their promotion opportunities. See Complaint at ¶ 27. Yet statistics reveal that special agents assigned to the Southwest border or Puerto Rico were more, not less, likely to get promoted than agents not assigned to those areas. Moreover, statistics show that Hispanic agents assigned to the Southwest border or Puerto Rico were more likely to be promoted than similarly situated white special agents assigned to those same areas.

In their transfer claim, plaintiffs further allege that Hispanics were not granted lateral transfers to desirable, career enhancing foreign attaché posts, especially those in Europe. Id. Yet statistics show that Hispanics were proportionately represented in foreign posts, including those in Europe.

Plaintiffs claim that Hispanic special agents at Customs received fewer awards than similarly situated white special agents. See Complaint at ¶ 50. Yet statistics show that Hispanic criminal investigators at Customs received a proportionately greater number of awards than whites, and those awards, on average, had a higher monetary value than the awards white agents received.

Plaintiffs also assert that, unlike white criminal investigators, Hispanic criminal investigators at Customs were denied training that was necessary for their career development. Id. at ¶ 63. Yet Customs training statistics show that Hispanic special agents received statistically significantly more training than white agents.

Plaintiffs assert that Hispanics received a disproportionate amount of allegedly

"undesirable" and "devalued" work assignments such as undercover work and wiretap monitoring, and that this type of work hindered their opportunities for promotion. See Complaint at ¶ 34. Yet a statistical analysis of the data demonstrates that undercover work helped agents get promoted. Hispanic agents who performed some undercover work were promoted faster than agents who did not, and the same as whites who did a similar amount of undercover work. Additionally, Customs data show that there were only 48 wiretaps conducted at Customs from 1993 through 1999 in cases that Hispanic agents worked on, and in only two of those cases could Hispanic agents have been solely responsible for monitoring and transcribing intercepted conversations. Moreover, beginning in 2000, Customs paid outside contractors to monitor wiretaps and perform the necessary language translation as a matter of policy, and contractors were hired in some cases prior to 2000. Finally, these work assignments do not rise to the level of an adverse action and thus, are not actionable under Title VII.

The only claim where defendant's expert found any statistically significant disparity potentially adverse to Hispanic special agents was with regard to discipline – specifically, suspensions without pay. Statistics show that, while no Hispanic criminal investigator was demoted involuntarily at Customs and only two Hispanics were discharged for misconduct as opposed to twelve white special agents during a ten-year period of time, Hispanics were statistically more likely than whites to be suspended for disciplinary reasons. Yet, put into context, only 42 Hispanic criminal investigators were suspended at Customs during the entire ten-year period at issue in this case out of the 495 putative class members, falling far short of the necessary showing of a pattern or practice of discriminatory discipline. Moreover, each of those suspensions involved a unique set of facts, different types of misconduct, and different offices,

factors that do not support a pattern or practice claim of discrimination. In addition, to establish a pattern or practice of discriminatory discipline, plaintiffs must demonstrate that Hispanics were receiving harsher suspensions than whites for like or similar offenses – a showing that plaintiffs cannot make.

Finally, plaintiffs' claim of retaliation is not appropriate for a class pattern or practice claim. Retaliation claims are so individualized that they cannot meet the pattern or practice standard or survive class certification analysis under Rule 23 of the Federal Rules of Civil Procedure.

For these reasons, and for the reasons set forth below, defendant is entitled to summary judgment on all of plaintiffs' pattern or practice claims.

BACKGROUND

A. Procedural Background

On March 23, 1995, Miguel Contreras filed an administrative class complaint with the Equal Employment Opportunity Commission (EEOC) "on behalf of himself and all similarly situated past, present, and future Hispanic special agents at [the Customs Service]." Admin. Class Compl. at 2 (attached as Ex. 18 to the Declaration of Mariam Harvey, attached to Def. Mot. Summ. Judg. [#22]). In the administrative class complaint, Mr. Contreras defined the class as "Hispanic GS-1811 Special Agents (Criminal Investigator) Grade 12-15, who are currently employed by USCS's Office of Investigation [sic] and Internal Affairs." Id. On October 22, 1999, after a series of appeals through the EEOC, the case was remanded to the agency for class processing. On June 22, 2000, the EEOC issued an order defining the class as: "All Special Agents (Criminal Investigators), job series 1811, grades 12 through 15, of Hispanic national

origin, employed in the Office of Investigations and Office of Internal Affairs of the United States Customs Service." See Mem. Op. at 5-6 [#70]. After administrative class certification, the parties conducted extensive discovery. See Declaration of John P. Helm ("Helm Decl.") (attached as Ex. 1 to Def. Mem. Opp. to Pl. Mot. Compel [#38]). Defendant produced to plaintiffs numerous witnesses and thousands of pages of documents relevant to plaintiffs' claims.

After completion of discovery, the administrative judge scheduled a merits hearing for June 10, 2002. On May 10, 2002, the day Mr. Contreras was required to file his statistical expert's report with the EEOC, Mr. Contreras withdrew from the administrative process by filing the instant action. See Helm Decl. ¶ 7. As this Court noted in its February 26, 2004 Memorandum Opinion, plaintiffs' district court complaint included additional claims of discrimination and significantly broadened the definition of the class from that alleged by plaintiffs at the administrative stage. See Mem. Op. at 6 n.2 [#70].[2]

In 2003, this Court allowed plaintiffs to take depositions under Rule 30(b)(6) of the Federal Rules of Civil Procedure to identify the agency's documents and databases relevant to plaintiffs' claims, and plaintiffs took eleven depositions. See Def. Mem. Opp. to Pl. Mot. to Compel [#38] (attaching deposition transcripts). On March 20, 2003, defendant moved for summary judgment on the ground that plaintiffs failed to exhaust their administrative remedies. See Def.'s Mot. Summ. Judg. [#22]. On February 26, 2004, the Court entered an order granting

[2] Because the named plaintiff Miguel Contreras only exhausted claims on behalf of Hispanic special agents who were GS-12 through GS-15, the class in this case must be restricted to those defined class members. Accordingly, the arguments set forth in this memorandum and the analysis of defendant's expert, Dr. Bernard Siskin, are limited to the putative class as defined in the administrative class complaint, "Hispanic GS-1811 Special Agents (Criminal Investigator) Grade 12-15, who are currently employed by USCS's Office of Investigation [sic] and Internal Affairs." Admin. Class Compl. at 2.

in part and denying in part defendant's motion. See Mem. Op. at 19 [#70]. The Court granted summary judgment to the defendant on plaintiffs' claims relating to hostile work environment and foreign language awards after concluding that those claims were not properly exhausted. Id. The Court denied summary judgment to defendant on plaintiffs' remaining seven claims, including promotions, transfers, work assignments, training, discipline, awards and bonuses, and retaliation. Id. On May 21, 2004, the Court denied plaintiffs' Motion for Reconsideration of the Court's order granting summary judgment to defendant on the hostile work environment and foreign language award claims. See Mem. Op. [# 77].

B. Customs Organizational Structure

On March 9, 2003, Customs GS-1811 Criminal Investigators were officially transferred to Immigration and Customs Enforcement ("ICE"), a bureau within the Department of Homeland Security ("DHS"). See supra, n.1. Before the transfer, Customs was part of the Department of the Treasury and the special agent GS-1811 workforce was located in three main offices: Office of Investigations, Office of Internal Affairs, and Office of International Affairs.

1. Office of Investigations

The mission of the Office of Investigations ("OI") at Customs was to investigate fraud, money laundering, child pornography, and the smuggling of arms, narcotics, and other prohibited or regulated items. See Declaration of John J. Seraphin ("Seraphin Decl.") at ¶ 4 (attached as Ex. 10 to Def.'s Mot. Summ. Judg. [#22]) (reattached hereto as Exhibit 1). OI had approximately 3,244 special agent criminal investigators. Id. at ¶ 5. OI, headed by an Assistant Commissioner, was divided into different regional offices throughout the country. Id. at ¶ 9. As of March 9, 2003, OI had twenty (20) Special Agent in Charge (SAIC) offices responsible for the

administration and management of all enforcement activities within the geographic boundaries of the office. Id. There were approximately 99 subordinate field offices called Resident Agent in Charge (RAIC) that reported directly to the SAIC. Id. at ¶ 9. In addition, fourteen (14) Resident Agent offices (RAs) reported directly to the RAIC. Id.

2. Office of Internal Affairs

The Office of Internal Affairs ("IA") investigated alleged criminal and serious misconduct of Customs employees. See Seraphin Decl. at ¶ 6. IA had approximately 180 special agents. Id. These agents conducted investigations and reported the results to Customs management to take appropriate action. In addition to conducting IA investigations, IA agents consulted with trained agency fact-finders who were assigned to conduct inquiries (referred to as "administrative inquiries" or "management inquiries") where the alleged misconduct did not rise to the level of seriousness requiring a formal IA investigation. See Declaration of Chris W. Pignone ("Pignone Decl.") at ¶¶ 33, 34 (attached hereto as Exhibit 2). In this capacity, IA agents reviewed reports of the fact-finders, provided guidance to fact-finders and administratively tracked inquiries being conducted by Customs management fact-finders. Id.

IA, headed by an Assistant Commissioner, was divided into four (4) regional SAIC offices, and had an additional presence in twenty-one (21) RAIC offices. See Seraphin Decl. at ¶ 11. Throughout the years, Customs agents often rotated between OI and IA, and on April 19, 1999, the former Commissioner Raymond Kelly implemented a formal rotation policy requiring the rotation of agents between divisions. See Declaration of Charles E. Royer ("Royer Decl.") at ¶ 8 (attached hereto as Exhibit 3). As a general rule, the minimum tour of duty with IA was three years. Id.

3. Office of International Affairs

The Office of International Affairs (INA) had approximately 97 special agent criminal investigators who conducted collateral investigations to support the domestic offices, referred certain investigations to domestic offices, served as liaison to the local law enforcement officials or foreign counterparts to accomplish Customs mission and responsibilities, and assisted the international trade community and general public on Customs issues. See Seraphin Decl. at ¶ 8. Customs also had attachés at United States embassies. These attachés were responsible for the overall planning, organization, administration and coordination of all Customs activities throughout the foreign area of jurisdiction. See Royer Decl. at ¶ 35.

C. Customs Databases

Customs maintained several databases to record and track its various employment actions of its workforce. Set forth below is a description of the databases upon which defendant's statistical expert relied for his analysis.

1. PERHIS database

The primary database Customs used to record and track personnel actions was PERHIS, a personnel history database maintained by the United States Department of Agriculture. See Declaration of Tanya E. Bennett ("Bennett Decl.") at ¶ 15 (attached hereto as Exhibit 4). PERHIS was used to record every employee's employment history, including all promotions, cash and time-off awards, within-grade increases, duty station reassignments (transfers), suspensions, terminations, demotions, and pay increases. Id. PERHIS contained data reaching back to 1992. Id.

2. Race and National Origin Data

Customs obtained race and national origin ("RNO") data from every employee through a self-identification process. See Bennett Decl. at ¶ 4. The data were entered into the PERHIS database. Id. at ¶ 2. All Customs employees were requested to self-identify their RNO either on Standard Form 181 or OPM Form 1468. Id. at ¶ 4. In addition, Customs routinely informed its employees of how their RNO data was classified and gave them an opportunity to verify or change their RNO designation. Id. at ¶ 6. From 1998 to 2003, Customs formally reminded its employees five separate times to verify their RNO designation and to request that the RNO designation be corrected if necessary. Id. at ¶¶ 10-14.

Customs collected RNO from its employees in compliance with the EEOC regulation issued on April 10, 1992, requiring every agency to collect RNO data through a voluntary self-identification process. See 29 CFR § 1614.601 (1992); Bennett Decl. at ¶ 7. If an employee refused to indicate his or her RNO, both Customs policy and the EEOC regulation required Customs to identify the employee's RNO through visual perception. Id. at ¶ 8; 29 C.F.R. § 1614.601(b).

3. TECS database

The Treasury Enforcement Communications System ("TECS") was a law enforcement computer system administered by Customs. See Depo. Transcript of Ellen Mulvenna, 6:3-6 (attached as Exh. 10 to Def's Opp. to Pl. Mot. Compel [#38]). TECS was a mainframe system consisting of many separate databases and has data from 1987. Id. at 11:17-12:3. TECS included, among other things, a case management system for both OI and IA to track all of Customs law enforcement investigations, a border-crossing database, an internal case

management system, a disciplinary action tracking system, and an intelligence reporting database. Id. at 6:3-12.

Furthermore, TECS contained a management information reporting system which included statistical reports on case management, hours reported by Customs agents in both OI and IA, reports on seizures, and reports on how many persons Customs processed at airports or at land borders in any given day, month or year. Id at 13:9-13. Agents were required to enter the hours they worked on a particular case into TECS and to designate whether the hours were non-undercover or undercover. See Supplemental Declaration of Paul M. Kilcoyne ("Suppl. Kilcoyne Decl.") at ¶ 17 (attached hereto as Exhibit 5). TECS further included an e-mail subsystem through which Customs agents could receive or send messages. See Depo. Transcript of Ellen Mulvenna, 6:15-16.

4. TRAEN database

The Training Records and Enrollment Network ("TRAEN") database tracked every training course that each Customs employee attended. See Declaration of Lynne M. Smith ("Smith Decl.") at ¶ 13 (attached hereto as Exhibit 6). Each field office had a TRAEN registrar to enter training data into the database, and the Customs Academy entered its own training data into the TRAEN database. Id. All training that took place at the Academy was input into TRAEN from the database's inception. Id. The TRAEN database contains training information dating back to 1990. Id. Entry of training courses into TRAEN became mandatory in 2000 and Customs encouraged TRAEN registrars to retroactively enter attendance data from training prior to 2000 into the database to ensure its completeness. Id. at ¶¶ 13, 14. Additionally, because Customs had given guidance to TRAEN registrars prior to 2000 concerning how to enter training

into TRAEN, personnel in some field offices may have entered employees' non-Academy training into TRAEN prior to 2000. Id. TRAEN registrars received a manual describing how to enter data into TRAEN and were trained on TRAEN entry. Id.

5. VAACS database

The Vacancy Announcement Application Control System ("VAACS") was used by Customs to create vacancy announcements for competitive promotions, to track applications, and to input applicants' names and social security numbers. See Depo. Transcript of Barbara Zakrison at 13:14-19 (attached as Ex.11 to Def's Opp. to Pl. Mot. Compel [#38]). VAACS also contained the certifications and selections for some, but not all, of the vacancies announced. Id. at 16:17-20. The VAACS database goes back to 1985. See Depo. Transcript of Susan Zaner at 38:2 (attached as Ex. 8 to Def's Opp. to Pl. Mot. Compel [#38]).

6. Vetting data

As discussed infra, in 1999, the delegation of selection authority for promotions and transfers was raised to a higher level of management at Customs. See Declaration of Diane S. Shepherd ("Shepherd Decl.") at ¶ 3 (attached hereto as Exhibit 7). Thus, the decision to promote agents was made at headquarters where many of the selecting officials had little or no personal knowledge of a candidate other than what was in his or her written application. Id. at ¶ 4. Accordingly, in 1999, Customs needed a formalized type of reference check to ensure that the selections made were in the best interest of the agency. Id. This formalized reference check, known as "vetting," was a process whereby the employment history of all candidates for promotion, transfers, and awards would be reviewed for past disciplinary problems or past or pending IA investigations. Id at ¶ 5.

Vetting involved a three-step process. See id. at ¶ 6. First, the vetting office would check with IA or the Office of Inspector General ("IG") to determine if the candidate for selection was the subject of any former or pending investigation. Id. Second, the vetting office would contact the Office of Labor and Employee Relations to determine if the individual had been subject to any past disciplinary action. Id. Finally, the vetting office would do a manual check of the individual's Official Personnel File ("OPF") to determine the awards and promotion history of that individual. Id.

If no derogatory information was found, the vetting office would "clear" the individual for selection. See id. at ¶ 7. If, on the other hand, the individual had a closed investigation or prior disciplinary problems, the vetting office would forward the relevant information to the Office of the Assistant Commissioner or Deputy Assistant Commissioner for a determination of whether the information was sufficiently serious to warrant not allowing the individual's selection to go forward. Id. If the individual was the subject of an open investigation, the Assistant Commissioner of IA would provide an oral executive briefing to the Assistant Commissioner of the division making the selection who would then determine whether the derogatory information was sufficiently serious to warrant not allowing the individual's selection to go forward. Id. at ¶ 8.

All candidates selected for promotions for positions at GS-12 and above, with the exception of persons applying for the Senior Executive Service ("SES") positions, were subject to vetting before the promotion was finalized. See Shepherd Decl. at ¶ 9. In addition, all persons selected for reassignment or transfer, persons selected to receive awards or bonuses, persons selected to be EEO counselors or persons selected to serve on the agency's disciplinary review

board were subject to vetting. Id. at ¶ 10.

ARGUMENT

I. STANDARDS FOR SUMMARY JUDGMENT MOTIONS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The initial burden is on the moving party to point out the absence of any genuine issue of material fact. See id. at 323. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). The substantive law identifies which facts are "material": "[f]actual disputes that are irrelevant or unnecessary will not be counted." Id. at 248. Furthermore, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp., 477 U.S. at 323. In order for a dispute about a material fact to be "genuine," a party must show that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Once the initial burden of the moving party is satisfied, the burden shifts to the responding party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Id. at 250.

II. STANDARDS FOR PROVING DISPARATE IMPACT AND DISPARATE TREATMENT PATTERN OR PRACTICE CLAIMS

Plaintiffs here have brought both disparate treatment and disparate impact pattern and practice claims under Title VII, 42 U.S.C. § 2000e-16, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Thus, to prevail in this putative class action, not only do plaintiffs have to satisfy the standards for disparate treatment and disparate impact claims, they must also establish that the alleged discrimination is a systemwide problem.

A. Disparate Treatment and Disparate Impact Claims

There are two types of Title VII cases: disparate treatment cases and disparate impact cases. See Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In a disparate treatment claim, a plaintiff must prove that an employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . ." Id.; see also Segar v. Smith, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984). Disparate impact, on the other hand, involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 335 n.15; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) (plurality opinion). In either type of Title VII case, the plaintiff must initially establish a prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

To establish a prima facie case of disparate treatment, a plaintiff must adduce evidence that "give[s] rise to an inference of unlawful discrimination." Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In other words, plaintiffs must offer sufficient evidence

to create an inference that defendant's challenged decisions were racially motivated. See Teamsters, 431 U.S. at 358. If a plaintiff proves a prima facie case, the employer may rebut it "simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision." Watson, 487 U.S. at 986. The plaintiff must then prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. See Burdine, 450 U.S. at 252-53. "On the disparate treatment claim the 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Segar, 738 F.2d at 1267 (quoting Burdine, 450 U.S. at 253).

To prove a prima facie case of disparate impact, a plaintiff must show that the challenged practice or procedure, although facially neutral, has a discriminatory effect on a protected group. Dothard, 433 U.S. at 329. In other words, a plaintiff must identify particular employment practices, demonstrate that those employment practices cause an adverse impact on the protected group, and show that the disparities are "sufficiently substantial" to raise an inference of causation. Watson, 487 U.S. at 994-95. Proof of a discriminatory motive is not required under a disparate impact theory. See Teamsters, 431 U.S. at 335 n.15; Segar, 738 U.S. at 1266.

In a disparate impact case, the plaintiff bears the burden of persuasion as to the existence of a disparity caused by an employment practice. See Segar, 738 F.2d at 1267. However, if the plaintiff makes this showing, the employer can rebut the prima facie case by demonstrating that a disparity does not exist or by proffering an explanation for why that disparity is not evidence of discrimination. Id. at 1267-68. Statistics are usually the principal focus of a prima facie case of disparate impact. Watson, 487 U.S. at 987 ("evidence in these 'disparate impact' cases usually

focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities"); Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) (in a disparate impact case, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants.") (quotations omitted).

In sum, under both the disparate treatment and disparate impact theories, plaintiffs must first make a prima facie showing of discrimination. Courts "have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated." St. Mary's Honor Soc'y v. Hicks, 509 U.S. 502, 514 (1993) (emphasis in original).

B. Pattern or Practice Claims

Plaintiffs have an added burden. Not only do plaintiffs have to satisfy the standards for both disparate impact and disparate treatment, they must also establish that the alleged discrimination is a systemwide problem. To establish a prima facie case for a pattern or practice claim, plaintiffs must show that there was systemic discrimination, and "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [They must] establish by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure -- the regular rather than the unusual practice." Teamsters, 431 U.S. at 336. Plaintiffs thus must prove a pattern or practice of discriminatory action and cannot rely on particular employment decisions to establish a pattern or practice:

> Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination; rather it must be established by a preponderance

> of the evidence that "racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." . . . The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while "at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking."

Cooper v. Fed. Reserve Bank, 467 U.S. 867, 875-76 (1984) (quoting Teamsters, 431 U.S. at 336, 360 n.46). Because a class action plaintiff must show a "systemwide pattern or practice" of discriminatory actions, Teamsters, 431 U.S. at 336, "it is equally clear that a class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved." Cooper, 467 U.S. at 877-78.

"Both pattern or practice disparate treatment claims and disparate impact claims are attacks on the systematic results of employment practices." Segar, 738 F.2d at 1267. To make a prima facie showing of disparate treatment in a pattern or practice case, the plaintiff class will typically try to present "evidence – often in statistical form – of a disparity in the position of members of the plaintiff class and comparably qualified whites." Id. (emphasis in original). Similarly, in a disparate impact pattern or practice case, "the plaintiff class must present evidence that the practices have a disproportionately adverse effect on the plaintiffs." Id.[3] "Consequently, the proof of each claim will involve a showing of disparity between the minority and majority

[3] "Disparate impact will apply in the pattern or practice case only after plaintiffs have made a sufficient initial showing of disparity between groups that appear to be comparably qualified, and after it has been decided that the employer's explanation rebuts the disparate treatment claim." Segar, 738 F.2d at 1272 n.19.

groups in an employer's workforce." Id.

C. Statistical Disparities Must Be Significant

To support a prima facie pattern or practice case of discrimination, plaintiffs must make a showing of a statistically significant disparity between Hispanic special agents and other special agents. See Watson, 487 U.S. at 995 ("statistical disparities must be sufficiently substantial that they raise an inference of causation"). Statistical disparities can have three causes: (1) the disparity can have a legitimate and nondiscriminatory cause; (2) the disparity can be a product of unlawful discrimination; or (3) the disparity may be the product of chance. See Palmer v. Shultz, 815 F.2d 84, 90-91 (D.C. Cir. 1987). To measure the likelihood that the statistical disparities are the result of discrimination rather than chance, plaintiffs must calculate standard deviation figures for the results of their statistical analysis. The Supreme Court has stated that "[a]s a general rule . . . [for large samples] . . . if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that [the disparity] was random would be suspect . . . ." Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977); see also Palmer, 815 F.2d at 92 ("A disparity measuring two standard deviations (to be more precise, 1.96 standard deviations) corresponds to a 5% probability of randomness under a two-tailed test.").

For a valid statistical analysis, the employees included in the sample must be those eligible for selection rather than a larger universe of employees who do not meet the minimum standards. Id. at 90. "A plaintiff's statistical evidence must therefore focus on eliminating this nondiscriminatory explanation by showing disparities in treatment between individuals with comparable qualifications for the positions at issue." Segar, 738 F.2d at 1274 (citations omitted).

The Supreme Court has cautioned that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures [quotas or preferential treatment]. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." Watson, 487 U.S. at 992. As a result, the Supreme Court has held that plaintiffs not only must show that there are statistical disparities to establish a prima facie case, but they must "begin by identifying the specific employment practice that is challenged." Id. at 994. "[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." Id.

While anecdotal evidence can serve to bolster statistical evidence of discrimination, anecdotal evidence alone is insufficient to show a pattern or practice of discrimination, unless the anecdotal evidence includes a statistically significant number of aggrieved employees. See O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992) ("'[w]hile anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination' . . . . Anecdotal evidence is most useful as a supplement to strong statistical evidence. . . .") (quoting Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir.1991)); Wagner v. Taylor, 836 F.2d 578, 592 (D.C. Cir. 1987); Gonzalez v. Brady, 136 F.R.D. 329, 332 (D.D.C. 1991) ("[T]he Court cannot assume that because these eleven plaintiffs allegedly have had [discriminatory] experiences, 1,452 fellow Hispanic employees have as well. Thus, the Court must examine the statistical evidence

plaintiffs provide.").[4]

III. PLAINTIFFS CANNOT MAKE A PRIMA FACIE SHOWING OF EITHER DISPARATE IMPACT OR DISPARATE TREATMENT ON ANY OF THEIR PATTERN OR PRACTICE CLAIMS

There is insufficient evidence to support a prima facie case of either disparate impact or disparate treatment in this case. Accordingly, this Court should grant defendant's motion for summary judgment on all of plaintiffs' pattern or practice claims. See Lopez v. Laborers Int'l Union, 987 F.2d 1210 (5th Cir. 1993) (upholding the dismissal by summary judgment of plaintiffs' disparate treatment and disparate impact claims because plaintiffs' statistical evidence was insufficient to prove a prima facie case).

A. Defendant Is Entitled To Summary Judgment On Plaintiffs' Pattern Or Practice Promotion Claim

In their Complaint, plaintiffs assert that Customs "selection systems promote Agents based upon who they know instead of their ability, which has an adverse impact upon Hispanic Special Agents." Complaint at ¶ 14. Specifically, plaintiffs allege that Customs "selection processes" for supervisory positions "and the current Merit Promotion Plan, adopted July 1, 1986, for management positions in the Customs Service are excessively subjective, have a disparate impact on Hispanic Special Agents and, plaintiffs are informed and believer [sic] and

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[4] See also Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 280 n.21 (4th Cir. 1980) ("The individual treatment experienced by these plaintiffs was not sufficient, standing alone and independent of relevant statistical data, to justify an inference of a facility-based pattern or practice."); Stambaugh v. Kan. Dep't of Corrections, 151 F.R.D. 664, 675-76 (D. Kan. 1993) ("The anecdotal evidence here does not come from a statistically significant number of aggrieved persons in the putative class."); Ross v. Nikko Sec. Co. Int'l, 133 F.R.D. 96, 97 (S.D.N.Y. 1990) (anecdotal evidence was insufficient because "[t]he testimonial proof must identify a statistically significant number of aggrieved persons in the putative class in relation to the size of the relevant work force").

thereon allege, are neither job-related nor required for business necessity." Id.

Plaintiffs' pattern or practice promotion claim suffers several fatal flaws. First, plaintiffs cannot show any promotion policy or practice at Customs that was either excessively subjective or discriminatory on its face. Second and most importantly, plaintiffs cannot show that a statistically significant disparity exists favoring white agents over Hispanic agents in terms of promotions that would support a disparate impact pattern or practice claim. In fact, statistical evidence shows the converse is true, i.e., Hispanic agents were not adversely affected by Customs promotion practices.

1. Customs Promotion Policies, Procedures and Practices Are Governed by Predominately Objective Criteria

a. Competitive Promotions for GS-12 through GS-15 Criminal Investigators

Until July 2001, the career ladder for a Customs special agent, GS-1811, was GS-5 through GS-12. See Supplemental Declaration of Susan B. Zaner ("Suppl. Zaner Decl.") at ¶ 4 (attached hereto as Exhibit 8). Individuals hired to be GS-1811 special agents below grade 12 could advance to grade 12 through a series of automatic promotions within a designated time frame. Id. Once an agent reached the "journeyman level" of grade 12, any further promotions were made through a competitive merit-based selection process. Id.[5]

Competitive promotions were governed by merit promotion principles set forth in Customs Merit Promotion Plan ("MPP"). See Suppl. Zaner Decl. at ¶ 6. The purpose of the

[5] In July 2001, the journeyman level for a Customs GS-1811 special agent was raised to the GS-13 level. See Suppl. Zaner Decl. at ¶ 5. Raising the journeyman level allowed individuals hired as special agents below the GS-13 level to progress to GS-13 without competition. Id.

MPP was to ensure that employees received fair consideration for advancement opportunities for which they were eligible and that vacant positions were filled by the best qualified candidates. Id. The MPP covered all Customs positions that were part of the competitive service, except for positions in the Senior Executive Service. Id.

Customs MPP became effective on July 1, 1986. See Suppl. Zaner Decl. at ¶ 6. Under the plan, candidates for competitive promotions would submit a written application. Id. at ¶ 7. An evaluation panel, using a crediting plan, rated each applicant on the significant job-related knowledge, skills, and abilities critical for successful performance in the position to be filled. Id. at ¶ 8. The knowledge, skills and abilities that were critical for successful performance were called primary criteria. Id. Those that were important for a successful candidate to possess were called secondary criteria. Id. The crediting plan for any position contained different rating levels for each criterion listed on the vacancy announcement. Id. The panel would assign numerical ratings based on these criteria to distinguish between candidates. Id. The ten highest scoring candidates were then referred as best-qualified to the selecting official in order of ranking. Id.

Until approximately December 1998, the selecting official for positions within OI and IA was the SAIC whose office had the vacancy. See Suppl. Zaner Decl. at ¶ 9, Att. A. After 1998, the authority for making selections was raised to the level of the Assistant Commissioner. Id., Att. A.

In 1991, Customs implemented an automated system to replace the written application process for competitive promotions for GS-1811-13 and 14 positions. Id. at ¶ 11. The automated system was called the Customs Automated Merit Promotion System ("CAMPS"). Id. Applicants applying through CAMPS submitted an application package consisting of a specially

designed application booklet that was optically read. Id. at ¶ 12. Applicants did not submit written work experience narratives; rather they provided answers to questions contained in the optically scanned application booklet. Id. at ¶ 13. The CAMPS application questions pertained to work activities, supervisory appraisal, annual performance appraisal, and awards. Id. at ¶ 14. In addition, applicants could request consideration for job openings at multiple geographic locations. Id.

Under CAMPS, the panel process was eliminated. See Suppl. Zaner Decl. at ¶ 15. All application packages were rated and ranked through the automated system; separate selection registers were prepared for each geographic area; and the system automatically generated letters to applicants at various stages of the application process. Id.

The use of CAMPS was discontinued in 1993. Id. at ¶ 16. From 1993 to 1996, Customs reverted to its previous written application process. Id. Subsequently, in April 1996, Customs began using the Office of Personnel Management's ("OPM") Microcomputer Assisted Rating System ("MARS") to fill GS-1811-13 and 14 positions in OI. See Suppl. Zaner Decl. at ¶ 17. This system was also referred to as the "Telephone Application Processing System" ("TAPS"). Id. The MARS process required applicants to fax a one-page application to OPM and respond telephonically to a series of questions. Id. at ¶ 18. The applicant's responses to the questions were processed electronically by OPM. Id. No additional information was factored into the applicant's score. Id. In addition, the panel process was eliminated. Id. Instead, applications were rated and ranked by the MARS system, and separate selection registers were prepared for geographic areas when requested by OI management. See Suppl. Zaner Decl. at ¶ 18. Only two vacancy announcements were issued under TAPS. Id. at ¶ 17.

From September 1997 through October 2000, Customs used the Customs Automated Application Processing System (CAAPS). Id. at ¶ 19. Under CAAPS, applicants responded to standard questions on a standard form and faxed a four-page application to OPM. Id. at ¶ 20. The candidate's application was processed electronically, and responses to questions were scored by OPM. Id. There were six vacancy announcements issued under CAAPS. Id. at ¶ 19.

On November 20, 2000, and then again on March 25, 2002, Customs processed competitive promotions for GS-14 Criminal Investigator positions through the SA-14, an examination process specially designed and pre-tested within Customs to objectively and fairly measure a GS-13 special agent's potential to perform as a supervisor or in non-supervisory positions at the GS-14 level. Id. at ¶ 22. The SA-14 test only applied to promotions to a GS-14 position within OI, IA, the Office of Training and Development and the Office of International Affairs. Id. at ¶ 24. In addition, applicants completed a very short, scanned application designed to determine basic eligibility. Id. at ¶ 24. They took a three-part Leadership Skills Written Test Battery and a Structured Interview Examination. Id. The SA-14 test was only administered twice at Customs. Id.

b. SES Appointments

A different set of procedures existed for filling positions with the Senior Executive Service ("SES"). Candidates for vacant SES positions at Customs had to submit an application form that addressed, in written narrative, the mandatory Executive Core Qualifications ("ECQ") and technical qualifications required for the SES position being filled. See Declaration of Michele L. Burton ("Burton Decl.") at ¶ 3 (attached hereto as Exhibit 9). The five ECQs included leading change, leading people, results driven, business acumen, and building

coalitions/communication. Id. A screening panel, composed of SES members at Customs, evaluated the candidates and recommended whether applicants be rated as "Qualified" or "Highly Qualified" for each core and technical qualifications. Id. at ¶ 4. All candidates were referred to the Executive Resources Board ("ERB") at Customs for final evaluation. Id.

The ERB, composed of the Deputy Commissioner of Customs and all Assistant Commissioners, made the final determination as to whether the candidates were "Qualified," "Highly Qualified" or "Best Qualified" and provided written recommendations to the Commissioner concerning the "Best Qualified" group. See Burton Decl. at ¶ 5. The Commissioner was the selecting official for all SES positions, except for the positions of Deputy Commissioner and Assistant Commissioner, IA. Id. at ¶ 7.

Once a competing candidate was selected for promotion to the SES, his or her ECQs had to be approved by OPM's Qualifications Review Board ("QRB"). Id. at ¶ 9. The QRB provided an independent peer review of applications for initial career appointments to the SES. Id. The candidate's application and supplemental qualifications statement for the core qualifications were forwarded to a QRB panel of SES members from the Federal Government who had to certify the candidate's qualifications. Id.

The QRB reviewed each application and decided if the candidate's experience met the ECQ requirements. See Burton Decl. at ¶ 10. The QRB did not rate, rank, or compare the candidate's qualifications against those of other candidates. Id. Rather, the QRB judged the overall scope, quality, and depth of a candidate's executive qualifications within the context of the five ECQs. Id. If the QRB did not certify the selection, the application was remanded to the agency and the applicant had one opportunity to amend deficiencies in the application package.

Id. Once the QRB certified the selection, the candidate's appointment to the SES position was processed. Id.

As shown above, the processes that Customs used for selecting individuals for competitive promotions were not excessively subjective, but rather, were based on specific qualification standards that were applied equally to all applicants. Plaintiffs have not identified any aspect of the promotion practices described above that was either discriminatory on its face or had an adverse impact on the promotion of Hispanic agents.

2. Hispanic Special Agents Were More, Not Less, Likely To Be Promoted At Customs Than White Special Agents

Customs data demonstrate that the procedures Customs used for competitive promotions were not discriminatory. Defendant's statistical expert, Dr. Bernard Siskin, analyzed Customs data to determine whether Hispanic special agents were more or less likely than white special agents to receive promotions at Customs.[6] See Declaration of Dr. Bernard R. Siskin ("Siskin

[6] Dr. Siskin's analysis was restricted to the years from 1993, two years before the plaintiffs' filed their administrative class complaint, to March 2003, the month in which Customs was disbanded and its special agents transferred to ICE, a bureau within the newly-formed Department of Homeland Security. See supra, n.1. As defendant noted in his Memorandum in Support of Defendant's Motion for Entry of A Discovery Scheduling Order, the GS-1811 special agents currently employed by ICE include former employees from several different agencies, including, but not limited to, the former U.S. Customs Service, the Immigration and Naturalization Service ("INS"), and the Federal Air Marshals Service. See Def's Mem. in Support of Entry of Disc. Scheduling Ord. at 14 [# 74]. The named plaintiffs in this case could not, therefore, demonstrate commonality and typicality with non-Customs special agents who had never been employed by Customs. Moreover, because the former Customs special agents are now part of a new agency that has new management, new policies, new missions, and new types of assignments, no additional claims of discrimination relating to actions taken by Customs could have accrued against the defendant Department of Homeland Security after the date of the transfer. To hold otherwise would mean that neither the Department of Homeland Security nor ICE would have the opportunity to independently resolve through the administrative process challenges to their – as opposed to Customs – policies and practices.

Decl.") at ¶ 21 (attached hereto as Exhibit 10). Using multiple pools, logistic regression and survival analyses, Dr. Siskin concluded that Hispanics were more, not less, likely to be promoted than white agents under any of those analyses. Id. at pgs. 2-3, Section II.

Using a multiple pools analysis, Dr. Siskin compared the promotion rates of Hispanics and whites who were similarly situated, i.e., in the same grade, division (IA or OI), and region of the country. Id. at ¶ 18. Using that method, Dr. Siskin was able to arrive at a statistical estimate of the impact that being Hispanic at Customs had on promotions, what Dr. Siskin refers to as the "Hispanic effect." Id. Comparing the number of Hispanic agents who would have been expected to have been promoted under a national-origin-neutral selection process with the number of Hispanic employees who actually were selected, Dr. Siskin concluded that "Hispanic agents are more likely than white agents in the same grade to be promoted." See Siskin Decl. at pg. 2, Section II, ¶¶ 21- 24, 29, Table 2 (showing an overall statistical significance of 4.04 units of standard deviation in favor of Hispanics). Table 2 of Dr. Siskin's declaration reflects that for all the grades from grades 12 to 15, Hispanics were more likely than white agents to be promoted and that, for promotions from grade 12 to grade 13, that likelihood was statistically significant (3.81 units of standard deviation). Id., Table 2.

Similarly, when Dr. Siskin controlled for both grade and year, he found that Hispanics were more likely than whites to be promoted in almost every year from 1993 to 2003, and that in years 1994, 1997, and 1998, Hispanics were favored over whites in promotions to a statistically significant degree. Id. at ¶ 30, Table 3. Even when Dr. Siskin controlled for the division (IA or OI) in which special agents worked, Hispanics remained more likely than whites to be promoted in both divisions, and to a statistically significant degree in OI. Id. at ¶ 34, Tables 8 and 8a.

Dr. Siskin, using a logistic regression analysis, also found that an agent's assignment to a duty station in Puerto Rico or the Southwest border increased the agent's chance of being promoted, whether white or Hispanic. See Siskin Decl. at ¶ 47, Table 14. Conversely, assignment to a duty station in the United States but not on the Southwest border had the most negative impact on an agent's chance of being promoted. Id. Dr. Siskin also found that Hispanic agents made up forty-five point eight percent (45.8%) of Customs agents stationed on the Southwest border and one hundred percent (100%) of the agents in Puerto Rico. Id. at ¶ 56, Table 25. Thus, Hispanic agents were disproportionately represented in locations where an agent was more likely to be promoted, accounting for some, but not all of the advantage that Hispanic agents had over whites in promotions.

Using a multiple pools analysis in which the region to which an agent was stationed was added to the definition of the pool, Dr. Siskin found that the Hispanic surplus in promotions dropped from 53.4 to 24.9. Id. at ¶ 36, Table 2 and Table 9. Thus, Dr. Siskin concluded that "the surplus in promotions Hispanics enjoy is partially due to Hispanics being more likely to be working in regions from which promotions are more likely to occur and partially because Hispanics working in the same region at the same grade as whites are significantly more likely than whites to be promoted." Siskin Decl. at ¶ 36. In sum, while the advantage that Hispanics had over whites in promotions was, in part, due to their being disproportionately located along the Southwest border and Puerto Rico, statistics demonstrate that Hispanic agents were still favored over whites.

Dr. Siskin also used a survival analysis to determine whether the time that an agent spent in his current grade level (i.e., time-in-grade) increased his likelihood of promotion and whether

Hispanics had to spend more or less time-in-grade than whites to be promoted. Id. at ¶ 40, Table 11. Dr. Siskin calculated the median time that it took for both white and Hispanic agents to be promoted based on the totality of the information available. Id. He found that "one-half of the Hispanics who enter Grade 12 will be promoted to Grade 13 within 2.26 years," whereas "one-half of the white agents who enter Grade 12 will be promoted to Grade 13 within 3.31 years." Id. In short, Hispanics who entered Grade 12 since 1993 tended to reach Grade 13 more quickly than whites.

Finally, Dr. Siskin used the bidding information contained in the VAACS database to compare the rate of promotions for Hispanics and whites. See Siskin Decl. at ¶¶ 48-50, Tables 15-21. As Dr. Siskin noted, Customs generally filled vacant positions through a competitive bidding process and maintained computerized information about the applicants for the vacancy, including who was minimally and best-qualified for the position and who was selected. Id. at ¶ 48. Using that data, Dr. Siskin found that Hispanic agents who bid for an opening for a promotion were consistently more likely than white bidders to be selected. Id. at ¶ 53, Tables 19, 20 and 21.

Dr. Siskin's report provides overwhelming evidence that, contrary to plaintiffs' allegations, Customs did not discriminate against Hispanic agents in promotions. To the contrary, Hispanics were more likely to be promoted than similarly situated white agents. Thus, entry of summary judgment for defendant on plaintiffs' pattern or practice promotion claim is warranted.

B. Customs Did Not Discriminate Against Hispanic Special Agents in Transfers and Office Assignments

In their Complaint, plaintiffs allege that the "Customs Service maintains procedures for making decisions regarding transfers, assignments and other career-enhancing opportunities that are excessively subjective." See Complaint at ¶ 27. Plaintiffs allege that, as a result of those procedures, "Hispanic Special Agents receive fewer and less desirable assignments" and "are more likely to be assigned to offices along the Southwest border and Puerto Rico than similarly situated white Non-Hispanic Agents." Id. Plaintiffs also assert that "Hispanic Agents have difficulty obtaining foreign attaché positions, especially those in Europe which are considered the most career-enhancing." Id. Finally, plaintiffs allege that Hispanic agents "are more likely to be assigned to small offices and therefore are less likely to receive the diverse work experience necessary for promotion." Id.

As explained below, plaintiffs' pattern or practice transfer claim cannot survive summary judgment. First, lateral transfers are not adverse employments actions that are actionable under Title VII. Second, plaintiffs have failed to identify a particular Customs policy or procedure that they allege is discriminatory or has an adverse impact on Hispanics in terms of "career enhancing" transfers. Finally, and most importantly, plaintiffs cannot meet their burden of showing that a statistically significant number of Hispanic special agents were either denied "desirable" transfer posts or assigned to "undesirable" offices than white special agents. Rather, statistics show that Hispanics were treated as, if not more, favorably than whites in receiving transfers that would help them obtain promotions.

1. Lateral Transfers Are Not Actionable Employment Decisions Under Title VII

A federal employee must allege some adverse or negative employment action in order to bring a claim under Title VII. The Supreme Court has said that, to be subject to Title VII, a personnel action must be a "tangible employment action," that is, "a significant change in the employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

Many of the allegedly discriminatory acts challenged in this case (i.e., transfers, training, work assignments, internal affairs investigations) are simply not actionable under Title VII because they do not rise to the level of "adverse employment actions," as that term has been described by the Court of Appeals in Brown v. Brody, 199 F.3d 446, 455 (D.C. Cir. 1999) ("Under 42 U.S.C. § 2000e-16(c), a federal employee must be 'aggrieved' in order to bring an action . . . ."). In this Circuit, lateral transfers generally do not constitute adverse employment actions under Title VII. Id. at 457 ("[A] plaintiff who is made to undertake or who is denied a lateral transfer – that is, one in which she suffers no diminution in pay or benefits – does not suffer an actionable injury unless there are some other materially adverse consequences . . . . "). The rule in this Circuit is that "[m]inor changes in opportunities or work-related duties do not constitute actionable injuries unless a decrease in salary or work-hour changes accompanies them." Stewart v. Ashcroft, 211 F. Supp. 2d 166, 173 (D.D.C. 2002) (citing Stewart v. Evans, 275 F.3d 1126, 1135 (D.C. Cir. 2002)), aff'd 352 F.3d 422 (D.C. Cir. 2003).

Plaintiffs here have alleged no diminution in pay or benefits which would demonstrate

that their alleged inability to obtain lateral transfers to "desirable" posts has caused them material harm. Instead, plaintiffs specifically tie the alleged denial of lateral reassignments to their alleged failure to obtain promotions. However, Hispanic special agents at Customs were more, not less, likely to be promoted. See Siskin Decl. at pgs. 2-3, Section II. Moreover, agents assigned to the Southwest border or Puerto Rico were more likely to be promoted. In short, plaintiffs' pattern or practice transfer claim cannot be sustained as a matter of law under Title VII.

2. Customs Had Numerous Policies That Allowed Agents Opportunities For Lateral Transfers, And Those Policies Fairly Balanced The Needs Of The Agency With The Needs Of All Of Its Agents

The Supreme Court has cautioned that, to establish a prima facie case of disparate impact, not only must plaintiffs show that there are statistically significant disparities, they must "begin by identifying the specific employment practice that is challenged." Watson, 487 U.S. at 994. "[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." Id.

Putting aside for the moment the fact that plaintiffs here cannot show any statistical disparity adversely impacting Hispanics in transfers, plaintiffs also have not identified the particular employment practices that they believe are responsible for the purported adverse impact. See Complaint at ¶ 27. The crux of plaintiffs' transfer claim as expressed by plaintiffs' counsel at the January 12, 2004, hearing on defendant's Motion for Summary Judgment is that, because of their Spanish language skills, Hispanic agents "have a hard time getting off the border and a hard time getting lateral transfers and competing for promotion." Excerpt from Transcript of Motions Hearing, January 12, 2004, pg. 25 (attached hereto as Exhibit 11). Yet, nine years

after filing their administrative complaint and two years after filing their Complaint in this Court, plaintiffs have yet to identify any particular transfer policy or practice that allegedly has a disparate impact on Hispanics.

a. Border Rotation Opportunities

The transfer policy that is most pertinent to plaintiffs' allegation that Hispanics agents at Customs had "a hard time getting off the border" is a policy that plaintiffs fail to mention in their Complaint: Customs border rotation initiative ("Rotation Policy"). In 2000, Customs implemented a policy that allowed agents who had been assigned for a certain number of years to designated locations along the Southwest border, Puerto Rico, Guam or the Virgin Islands to volunteer for, and receive, a lateral transfer to another office. See Royer Decl. at ¶ 10. In addition to offering transfers from those offices in Puerto Rico, Guam and the Virgin Islands, the Rotation Policy allowed transfers from designated Southwest border locations in Arizona (Ajo, Douglas, Nogales and Yuma); in California (Calexico); in New Mexico (Deming and Las Cruces); and in Texas (Brownsville, Del Rio, Eagle Pass, El Paso, Falcon Dam, Laredo, McAllen and Presidio). Id. In 2002 and 2003, Customs added Sells, Arizona, Alpine, Texas and San Ysidro, California to the list of Southwest border locations included in the Rotation Policy. Id. at ¶ 11.

Under the Rotation Policy, agents who applied for a rotation from the designated locations were asked to identify in order of priority three (3) SAIC office locations to which they wished to transfer. Id. Once management had determined the new assignments for all applicants, each interested employee was notified of the new transfer location and asked to accept or decline the transfer offer. See Royer Decl. at ¶ 14.

The Rotation Policy was designed to allow agents with the longest continuous tenure at the designated locations to transfer to another office. See Royer Decl. at ¶ 11. The policy defined agents with "continuous tenure" as those agents who had completed a minimum of three (3) continuous years in OI, without a break, at one or a combination of more than one of the designated locations. Id. However, because the number of agents that Customs could transfer under the Rotation Policy was dictated by funding availability, id. at ¶ 22, not all of those agents who had completed three continuous years at one of the designated locations were able to transfer. Id. at ¶ 21. Thus, Customs transferred all of the eligible agents that it could with its available funding, giving priority to those agents with the longest continuous tenure at the designated locations. Id.

Because Customs could not offer funded transfers from the designated border locations to all applicants due to funding constraints, Customs also offered all eligible 1811's an opportunity to submit self-funded lateral reassignment requests from the Southwest border. See Royer Decl. at ¶ 22. An agent was eligible for a self-funded transfer if he had three (3) or more years of continuous service in one or more Southwest border locations. Id. Self-funded transfers were based on the availability of vacancies in the office to which an agent wanted to transfer and the needs of the Service to maintain an effective Southwest border workforce. Id. Clearly, Customs Rotation Policy allowed agents, Hispanic and otherwise, to transfer off the border if they so chose. Hence, Customs had a national-origin-neutral transfer policy and plaintiffs' allegation that Hispanics had "a hard time getting off the border" is contravened by the actual facts of record.

b. Other Transfer Opportunities

In addition to the transfers offered through the Rotation Policy, an agent at Customs could have received a lateral transfer through six other means: (1) an agent could have requested a self-funded transfer from his supervisors; (2) an agent could have bid for a lateral transfer based upon a vacancy announcement issued for a competitive promotion; (3) an agent could have responded to an agency-wide TECS message announcing a particular lateral transfer opportunity; (4) an agent could have received a directed reassignment paid for by the agency; (5) an agent could have requested a hardship transfer; or (6) an agent could have applied for a foreign attaché position. See Royer Decl. at ¶ 25. Plaintiffs have not alleged any of these methods of requesting and receiving a transfer adversely impacted Hispanic agents at Customs.

3. Plaintiffs Cannot Demonstrate That A Statistically Significant Number of Hispanics Special Agents Were Denied Lateral Transfers That Were Career-Enhancing As Compared to Whites

The crux of plaintiffs' transfer claim is that Hispanic agents at Customs were not allowed to transfer from positions on the Southwest border and in Puerto Rico because of their Spanish speaking ability and, as a result, Hispanics were not given promotion opportunities. See Complaint at ¶ 27; see also Excerpt from Transcript of Motions Hearing, January 12, 2004, pg. 25 (Plfs' Counsel's statements). However, defendant's statistical expert, Dr. Bernard Siskin, concluded that Hispanic agents were more, not less, likely to be promoted than white agents. See Siskin Decl. at pg. 2-3, Section II.

Moreover, as noted earlier, Dr. Siskin analyzed whether a Customs agent's assignment to the Southwest border had an adverse impact on the agent's likelihood of being promoted. By comparing all similarly situated agents (white and Hispanic) who differed only as to the locations

to which they were assigned, Dr. Siskin measured whether being assigned to designated Southwest border locations or to offices in Puerto Rico had an adverse impact on an agent's likelihood of being promoted. Id. at ¶ 20 n.6 and ¶ 47, Table 14. Dr. Siskin concluded that those agents who were assigned to locations along the Southwest border or in Puerto Rico were statistically more likely to be promoted than agents who were assigned to other positions within the United States. Id. at ¶ 47, Table 14. The difference between the promotion rates of agents assigned to locations along the Southwest border and Puerto Rico and the promotion rates of agents assigned to other locations within the United States was measured at 2.98 units of standard deviation for the Southwest border and 3.03 units of standard deviation for Puerto Rico, both of which are considered statistically significant. Id., Table 14. Even taking into consideration the effect that being assigned to the Southwest border or Puerto Rico had on an agent's likelihood of promotion, Dr. Siskin concluded that Hispanic agents assigned to those Southwest border/Puerto Rico locations were still more likely to be promoted than white agents in those same locations. Id. at ¶ 36, Table 9.

In other words, because Hispanics were statistically more likely to work in the Southwest border and Puerto Rico offices, they had an advantage over white agents in terms of promotions, because agents assigned to the Southwest border or Puerto Rico were more, not less, likely to be promoted than an agent in a non-Southwest border location in the United States. See Siskin Decl. at ¶ 56, Table 25 (as of 2003, 45.8% of the Hispanic agents at Customs had worked in offices in Puerto Rico or along the Southwest border). Moreover, even when comparing the promotion rates of white and Hispanic agents who were assigned to border offices, Hispanics were found to have a slight advantage over whites in promotions. Id. On this statistical evidence

alone, defendant is entitled to summary judgment on plaintiffs' claim that Hispanics are disadvantaged by being assigned to duty stations along the border.

Moreover, plaintiffs have not accounted for the fact that the representation of Hispanic agents along the Southwest border and Puerto Rico may be the result of individual preference. Customs OI implemented a Rotation Policy in 2000 that allowed agents stationed along the Southwest border and Puerto Rico to transfer to other locations. See Royer Decl. at ¶ 9. Thus, if Hispanic agents remained on the Southwest border and Puerto Rico after 2000, it was largely at their choice. In addition, the high percentage of Customs Hispanic agents who were assigned to Southwest border locations is easily explained by the disproportionate number of Hispanics who live in those areas. According to the Statistical Abstract of the United States: 2003, as of 2000, the Hispanic population in the United States totaled 35,306,000. See Statistical Abstract of the United States: 2003, Table 22 (123d ed., U.S. Census Bureau) (2003) (attached hereto as Exhibit 12). Of the total Hispanic population, well over half (18,933,000) lived in only three states, California, Texas and Arizona, all states along the Southwest border. Id. Thus, the percentage of Customs Hispanic agents on the Southwest border (45.8%) was proportionate to, if not lower than, the percentage of the Hispanic population as a whole in that area (over 50%). Id.; see also Siskin Decl. at ¶ 56, Table 25.

Customs data are equally fatal to plaintiffs' allegation that Hispanic agents had difficulty obtaining foreign attaché positions, "especially those in Europe which are considered the most career enhancing." Complaint at ¶ 27. Using a logistic regression analysis, Dr. Siskin found that, for the period between 1993 and 2003, Hispanic agents at Customs were more likely than whites to be assigned to European duty stations, although not to a statistically significant degree. See

Siskin Decl. at ¶ 46, Table 13.

In sum, plaintiffs' pattern or practice transfer claim is unsupported by the facts. Contrary to plaintiffs' allegations, Hispanic agents did not have a "hard time getting off the border," nor were they denied promotions. Rather, they stayed on the border by preference and were benefitted in promotions as a result. Moreover, Hispanics working on the Southwest border or Puerto Rico even had an advantage over white agents who worked in those same areas; the data show that, whether assigned to those locations or not, Hispanic agents were more likely than whites to be promoted. Finally, Hispanic agents were proportionately represented in foreign attaché positions in Europe. Accordingly, defendant is entitled to summary judgment on plaintiffs' pattern or practice transfer claim.

C. Customs Did Not Discriminate Against Hispanic Agents In Awards

Plaintiffs' claim that Customs engaged in a pattern or practice of discriminating against them in awards cannot survive summary judgment. Plaintiffs contend that Customs awards policies had an adverse impact on Hispanic agents and, as a result, Hispanic agents received fewer awards than white agents and the awards Hispanic agents did receive were of lesser amounts than those similarly situated white agents received. See Complaint at ¶ 50. However, as a statistical analysis of cash and time-off awards received by white and Hispanic agent reveals, Hispanics received slightly more awards than whites. Additionally, the awards Hispanic agents received carried a higher monetary value than awards given to whites. Therefore, the facts show that there was no pattern or practice of discriminating against Hispanic agents in awards.

1. Customs Awards Policies Were Based on Exceptional Performance

Throughout the time period relevant to this lawsuit, Customs policies on awards were

designed to reward truly exceptional performance that was "clearly above and beyond what is normally expected." Shepherd Decl. at ¶ 12; Att. A. Prior to 1996, most awards were tied directly to employees' summary performance rating in their performance appraisal. Id. at ¶ 13, Att. B. For instance, employees who received a summary rating of Level 5 – for "Outstanding" performance, two levels above "Fully Successful" performance – would automatically be rewarded a general pay increase and a performance award of at least two percent of their base pay. Id. Aside from awards based on performance ratings, Customs also gave cash awards for "suggestions, inventions, superior accomplishments and unique or special acts or services" that went above and beyond normal job responsibilities and performance requirements, to employees who were "highly exceptional and unusually outstanding." Id. at ¶ 18. Supervisors were required to prepare written justifications of these cash awards. Id. at ¶ 19. Decisions about awards were to be made objectively and without regard to national origin and other factors not having to do with merit. Id. at ¶ 12. Beginning in 1994, supervisors could give time-off awards instead of cash awards. See Shepherd Decl., Att. C. Like cash awards, time-off awards were reserved for truly special accomplishments. Id.

In 1996, Customs changed its performance evaluation process and the policies and procedures respecting distribution of awards. See Shepherd Decl. at ¶ 15. Under the new system, awards were no longer tied to performance ratings. Id.; Att. D, E & F. This change was designed to give supervisors more control over the management of awards and to increase employee morale. Id. at ¶ 16.

Headquarters determined how much money each SAIC could spend on awards, generally ranging between one-half and one percent of salary and expenses for that office. See, e.g.,

Shepherd Dec., Att. E at 3; Declaration of Loraine E. Brown ("Brown Decl.") at ¶ 5 (attached hereto as Exhibit 13). Supervisors could give three types of awards: cash awards, time off awards, and honorary recognition awards. See Shepherd Decl. at ¶ 17; Att. A & F. Supervisors were instructed to attempt to ascertain which type of awards employees preferred. Id. at ¶ 17. Cash awards included Special Act Awards, which generally corresponded with an agent's work on a specific case, and Performance Awards, which were rewards for sustained superior performance. See Shepherd Decl.; Att. F; Declaration of Joseph Webber ("Webber Decl.") at ¶ 5 (attached hereto as Exhibit 14). Honorary awards included traditional items, such as certificates and paperweights, and non-traditional items, such as movie tickets. See Shepherd Decl. at ¶ 17; Att. G. Honorary awards were also given on a national level by the Commissioner of Customs. Id., Att. J.

In 1998, Customs began giving foreign language awards to agents who were proficient in and made substantial use of a foreign language in the performance of their duties. See Suppl. Kilcoyne Decl., Att. B, C & D. Agents were tested in the language in which they claimed proficiency and, depending on their test score and the amount of time spent using the foreign language, received a cash award up to five percent of their basic pay. Id. Foreign language awards were distributed at the headquarters level and did not come out of the awards budget for each SAIC. Id., Att. B, C, D at § 6.4.9

Quality Step Increases ("QSIs") (also referred to as Quality Salary Increases) were eliminated under the new system after fiscal year 1996, although they were reinstated in 1999. See Shepherd Decl., Att. H. A QSI is an increase in an employee's rate of basic pay from one step of a grade to the next. Id. QSIs were rarely given and were reserved for achievements that

were "exceptional and clearly above and beyond what is normally expected of employees." Id. (emphasis in original); see also Brown Decl. at ¶ 9. Because a QSI is a change in salary, it had to be approved by an Assistant Commissioner. See Shepherd Decl., Att. I. To receive a QSI, an agent had to (1) receive a "successful" rating on his performance appraisal; and (2) demonstrate performance significantly above expected, as determined by five criteria: (a) displaying outstanding performance to meet organizational goals or improve the efficiency, effectiveness, and economy of the Government; (b) excelling in all critical performance areas as documented by specific examples; (c) sustaining a high level of performance over the previous year; (d) exhibiting timeliness of performance; and (e) being in the position and grade for at least a year. Id. Supervisors were instructed not to recommend a QSI to reward an agent for simply doing his or her job or for short-term accomplishments. Id.

2. In Implementing Awards Policies, Supervisors Attempted to Ensure Fairness Among All Employees

Customs award policies were designed to promote "fairness and consistency." Shepherd Decl., Att. H. Supervisors in the field offices made efforts to ensure that this goal was met. One common method of ensuring consistency was for SAICs to review group supervisors' nominations of the agents they supervised for awards and to require group supervisors to justify, in writing, why each nominee should receive an award. See Brown Decl. at ¶ 6; Webber Decl. at ¶ 6; Declaration of Miguel Unzueta ("Unzueta Decl.") at ¶ 6 (attached hereto as Exhibit 15). This extra level of review allowed the SAIC to ensure that similar extraordinary acts and high levels of performance were awarded similarly by different group supervisors.

Some SAICs also sought to maintain consistency by using awards committees made up of

supervisors and agents, some of whom represented the RAIC offices within the SAIC, and some of whom were Hispanic. See Brown Decl. at ¶ 7; Webber Decl. at ¶ 7; Unzueta Decl. at ¶ 7. Awards committees reviewed supervisors' nominations of agents and justifications as to why those agents should receive awards in a certain amount and forwarded recommendations for awards to the SAIC. See Brown Decl. at ¶ 7; Webber Decl. at ¶ 8. Such committees ensured that agents with similar accomplishments were equally rewarded. Id. The use of such committees promoted consistency and fairness in awards. See Brown Decl. at ¶ 7; Webber Decl. at ¶ 9.

Because supervisors attempted to distribute money equitably among all high-performing agents, whether an agent received an award depended upon when he received his most recent award. See Brown Decl. at ¶ 8. However, while SAICs and awards committees attempted to reward agents fairly and evenhandedly, whether a particular agent received an award in a given year often depended on circumstances beyond the agent's and the SAIC's control, such as whether an important case came into the office when the agent was on call as the "duty agent." See Brown Decl. at ¶ 8.

3. OPM Concluded Customs Awards Program Was Based on Performance and Was Well-Liked by Employees

In an independent oversight review of Customs in November 2000, OPM's Office of Merit Systems Oversight and Effectiveness found that employees were positive about Customs award program and felt that it recognized performance. See OPM Oversight Review (attached hereto as Exhibit 16). The report of the oversight review described the various awards available to employees and the procedures by which supervisors determined who received awards, including the committee process and the requirement that awards be justified in writing described

above. Id. at 20. OPM found that both supervisors and nonsupervisory employees were positive about the awards program, and "most believed that the awards program recognized outstanding performance." Id. Additionally, OPM found the award actions it reviewed to be both "well-justified and processed in accordance with agency procedures." Id.

4. Hispanic Agents Received More Awards Than White Agents from 1993 to 2003

The statistical data confirm that Customs neutral award policies have not had a disparate impact on Hispanic agents. Cash and time-off awards are personnel actions recorded in the PERHIS database. See Bennett Decl. at ¶ 15; Siskin Decl. at ¶ 59. A statistical analysis of awards received by white and Hispanic GS-1811 special agents between 1993 and 2003, controlling for the year and agents' grade, reveals that Hispanic agents received statistically significantly more overall awards than white agents during that time. See Siskin Decl. at ¶¶ 61-62; Tables 28-29. Hispanic agents received considerably more foreign language awards than white agents. Id. When foreign language awards are not considered, Hispanic agents were equally likely to receive awards as whites. Id. Hispanic agents received slightly more QSIs than white agents, but the difference is not statistically significant. Id. at Table 29. As Dr. Siskin concluded, "the data clearly indicate that national origin is not a factor affecting the likelihood of receiving an award (excluding foreign language awards). Id. at ¶ 63 (emphasis in original).

5. Hispanic Agents Received More Lucrative Awards than White Agents from 1993 to 2003

In addition to receiving more total awards than white agents and an equal number of awards other than foreign language awards, Hispanic agents received statistically significantly more dollars in award money than white agents. Id. at ¶ 63; Table 30. This disparity holds true

in both foreign language awards and other cash awards. Id. Hispanic and white agents receiving time-off awards received, on average, the same amount of time off. Id. at ¶ 63; Table 31. Accordingly, Customs awards policies did not disadvantage Hispanic agents at all but, to the contrary, benefitted them substantially.

D. Customs Did Not Deny Training Opportunities to Hispanic Agents

The facts show that Customs did not engage in a pattern or practice of denying training opportunities to Hispanic agents. Plaintiffs contend Customs training policies had an adverse impact on Hispanic agents and, as a result, Hispanic agents received fewer training opportunities than white agents, and the training opportunities Hispanic agents did receive were less career-enhancing than those similarly situated white agents received.[7] See Complaint at ¶ 63. However, under Customs training policies, agents attended training in accordance with the agency's needs and budgetary restrictions. Customs training data demonstrate that Hispanic agents actually received more training opportunities than similarly situated white agents. Accordingly, plaintiffs' training claim cannot survive summary judgment.[8]

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[7] Plaintiffs also contend they were denied opportunities to attend annual conferences sponsored by the Customs National Hispanic Agents Association ("CNHAA"). However, according to Customs policy, advocacy group conferences such as the CNHAA were not considered official training and were not funded by the National Training Fund. See Declaration of James E. Riggs ("Riggs Decl.") at ¶ 12, Att. B, C & D (attached hereto as Exhibit 17). While any agent could attend these conferences, whether a particular SAIC office provided funding for agents' attendance depended upon whether the SAIC office had adequate funds and staff resources to send them and whether the agent had already attended a professional association conference that year. Id. at ¶ 12. When they could, SAICs attempted to send at least some agents to conferences such as the CNHAA. See Webber Decl. at ¶ 15; Brown Decl. at ¶ 15.

[8] Additionally, plaintiffs' training claim does not rise to the level of an adverse action actionable under Title VII. See, supra, Part III.B.1.

1. Customs Offered Training Opportunities That Corresponded to the Agency's Needs and Budget

Customs provided training to agents based on a determination of the agency's needs as a whole and individual field offices' needs in particular. See Smith Decl. at ¶ 4. Training at Customs was not designed to get agents promoted, but to help them perform their jobs better. See Declaration of Francis Gary White ("White Decl.") at ¶ 5 (attached hereto as Exhibit 18). The skills that agents learned during training might lead to better job performance and, thus, promotion. Attendance at training, however, could not ensure promotion, because training instructors could not guarantee that agents would be able to put the skills into practice. Id. In this way, while certain courses were more popular than others, no particular training course was considered prestigious or career-enhancing. See Brown Decl. at ¶ 13; Riggs Decl. at ¶ 11.

The majority of off-site training agents attended was at the Customs Academy in Glynco, Georgia ("Academy"). See White Decl. at ¶ 8. Agents working within OI and IA received different training opportunities, consistent with the different skills agents within those two offices needed. In general, the Academy offered fewer training classes for IA agents than for OI agents. See Declaration of Richard D. Ogden ("Ogden Decl.") at ¶ 4 (attached hereto as Exhibit 19). The IA Training Division at the Academy was responsible for scheduling basic, advanced and specialized IA training classes and coordinating with IA field offices throughout the country to determine which agents would attend. See Decl. of Bonnie W. Browning ("Browning Decl.") at ¶¶ 1-2 (attached hereto as Exhibit 20). From the mid-1990s to early 2000, IA training funds were limited, and the IA Training Division's funding was dominated by the Basic Agent Training Program for agents entering IA for the first time. Id. at ¶ 3. During this time, the amount of

advanced and specialized training courses for IA agents was limited, and the courses that the Academy did offer focused on needs unique to conducting internal investigations. Id. IA agents were selected to attend these courses by their field offices. Id. at ¶ 4. No selection was required for Basic Agent Training, because this course was mandatory. Id.

The Academy offered more training courses for OI agents than IA agents, in accordance with the particular skills that OI agents working on specific types of cases needed. The only mandatory Academy training course all OI agents were required to complete successfully was Basic Agent Training. See White Decl. at ¶ 6; Att. A. The Academy sent notice of advanced training courses to SAICs and Field Training Program Managers ("FTPMs") at the SAIC offices, which were responsible for nominating agents to attend. See Ogden Decl. at ¶ 6; White Decl. at ¶ 4. When the Academy received nominations from the SAIC offices, it chose among them, attempting to evenly distribute spots among SAIC offices. See Ogden Decl. at ¶ 9. The Academy also gave priority to nominees based on the needs of the agency; in other words, whether the advanced training would teach skills relevant to the kind of work a particular agent was currently doing (e.g., narcotics smuggling or asset forfeiture). Id. at ¶ 7; White Decl. at ¶ 7. For Undercover Operatives School, the Covert Operations Division at Customs Headquarters selected attendees from nominations provided by SAIC offices. See Ogden Decl. at ¶ 10; Suppl. Kilcoyne Decl. at ¶ 13.

The amount of training agents could receive was limited by the amount of money in Customs National Training Fund, which funded Academy training for agents. See Smith Decl. at ¶ 6. Between approximately 1993 and 1996, there was a shortage of funding in the National Training Fund, and the Academy had to deliver training in the field at SAIC offices. See Ogden

Decl. at ¶¶ 12-13. Because training funds were limited, these field training courses focused on the major investigative priorities of Customs. Id. In 1997 or 1998, training in the field ended, and courses at the Academy continued as before. Id. at ¶ 14.

Customs created the Office of Training and Development ("OTD") at headquarters in 1999, which coordinated the training of Customs special agents. See Smith Decl. at ¶¶ 3, 7. The creation of OTD allowed Customs to centralize the determination of training needs at the headquarters level in order to improve the quality and consistency of training. Id. at ¶ 7; Att. B. When OTD was first established, it assembled task forces to develop standard curriculum frameworks that described what types of training Customs employees needed to be able to perform their jobs. Id. at ¶ 8. Each fiscal year beginning in 2000, OTD assembled a National Training Plan ("NTP") "to ensure that Customs employees receive the training essential to performing their jobs with the competence, professionalism, and honor that are the hallmarks of" Customs. Id. at ¶ 9; Att. D. The NTP identified Customs training priorities and requirements and included all classes offered by the Customs Academy and private vendors within a given year. Id. at ¶ 10. Each year, to develop the NTP, OTD contacted each headquarters office (e.g., the Office of Investigations), which in turn contacted its field offices, to solicit requests for training. Id. at ¶ 11. Upon receiving the requests, OTD worked with training providers in an attempt to meet the training needs of each office. Id.

In sum, selection of Customs employees to attend training was based on fulfilling the needs of the agency and helping agents develop the skills needed to perform their jobs effectively. See Smith Decl. at ¶ 12; Att. E. Attending training was not considered an award, and it could not ensure promotion. See White Decl. at ¶¶ 5, 7. Factors not related to the

documented need for training, including national origin, were not relevant to selection. See Smith Decl. at ¶ 12; Att. E.

2. Customs Supervisors Selected Agents to Attend Training Based on the Needs of the Field Offices

Personnel within the SAIC offices nominated agents to attend training based on the office's needs and, for private vendor training, the office's budget. The National Training Fund only paid for expenses related to Academy training, and individual SAIC offices had to pay to send their agents to training offered by private vendors. See White Decl. at ¶ 9, 10.

Each SAIC office had an FTPM, a GS-1811 special agent who was responsible for informing agents about upcoming training opportunities and coordinating the SAIC's nominations. See Ogden Decl. at ¶ 6. When the Academy announced a course, the FTPM in each SAIC notified agents throughout the region overseen by the SAIC about it and received requests to attend. See Riggs Decl. at ¶ 6. Agents who wanted to take advantage of a training opportunity sought approval to attend from their Group Supervisor and, upon receiving approval, contacted the FTPM to express their interest in attending. Id. at ¶ 7. The FTPM compiled a list of interested agents and helped the Assistant SAIC rank the agents in accordance with the SAIC's needs, then forwarded the list to the Academy. Id. at ¶ 8; Webber Decl. at ¶ 13.

Whether an agent's request for training was granted depended on a number of factors related to the needs of the SAIC: when the agent had last attended training; whether the training was relevant to the agent's area of work and current group assignment (e.g., narcotics smuggling or money laundering); and, for vendor-provided courses, the SAIC's budget. See Riggs Decl. at ¶ 8. SAICs attempted to ensure fairness in allocating training resources, as many agents wanted

to attend as much training as possible. See Brown Decl. at ¶ 11.

3. Hispanic Agents Received Equal Training Opportunities to White Agents from 1993 to 2003

According to a statistical analysis of the TRAEN database, the database that tracked training at Customs, Hispanic agents benefitted substantially from Customs training policies. Hispanic agents at grades GS-12 and GS-13 received disproportionately more training than white agents in those grades. See Siskin Decl. at ¶ 66; Table 33. The difference was statistically significant. Id. At grades GS-14 and GS-15, Hispanic agents received training opportunities equal to white agents. Id. These conclusions hold true for both training offered at the Customs Academy and non-Academy training. Id.

E. Customs Did Not Discriminate Against Hispanic Agents in Work Assignments

As discussed below, Customs work assignment policies did not discriminate against Hispanic agents, nor did Customs carry out a pattern or practice of discriminating against Hispanic agents in assignments. In their complaint, plaintiffs allege Customs method of assigning cases discriminated against Hispanic agents. Specifically, plaintiffs contend they were assigned "fewer high profile cases" and "cases that are not career-enhancing." Complaint at ¶ 34. Additionally, they contend they were disproportionately assigned "undercover work and other Spanish-language related duties," including wiretap monitoring. Id.

Summary judgment should be entered against plaintiffs for the following reasons. First, Customs method of assigning agents to cases did not take national origin into account. Second, to the extent Hispanic agents worked undercover, they did so voluntarily, not because of a pattern or practice of discrimination. Third, under Customs policy, all wiretaps have been monitored and

transcribed by outside contractors, not Hispanic agents, since 2000. Before 2000, Hispanic agents could have been solely responsible for monitoring or transcribing wiretaps in only two cases, which does not rise to the level of a pattern or practice. Finally, as a matter of law, plaintiffs' challenge to their work assignments is not an actionable claim under Title VII, and the Court should therefore grant judgment to defendant on the pattern or practice assignments claim.

1. Customs Assignment Method Was Based on the Needs of the Field Office and Was Neutral to National Origin

Customs assigned cases to agents in a manner that was based not on national origin but the needs of the agency. The process by which agents received assignments varied among field offices. In most field offices, agents rotated as the "duty agent," which meant they were on call for a certain amount of time and handled whatever cases came into the office. See Declaration of James Geddes ("Geddes Decl.") at ¶¶ 7-8 (attached hereto as Exhibit 21). Duty agents were responsible for following-up on the leads and referrals they received during their duty agent shift. Id. at ¶¶ 10-11. Especially in small- to medium-sized field offices, most of an agent's work was derived from cases developed while serving as duty agent or alternative duty agent. Id. at ¶ 9.

In large SAIC offices such as Houston and Los Angeles, agents were assigned to a subject matter group such as fraud or narcotics smuggling when they entered the SAIC, based on the needs of the office and any skills and prior experience of the agent. See Webber Decl. at ¶ 17; Brown Decl. at ¶ 16. In smaller offices, including some offices on the southwest border, agents were encouraged to develop their own cases and conduct their own investigations based on information they collected from confidential informants, their own observations and information from their supervisors. See Geddes Decl. at ¶ 12. In general, regardless of what type of cases

agents handled, agents who acted independently and actively pursued leads and developed relationships with informants and agents from other law enforcement agencies would get important cases through these connections. See Webber Decl. at ¶ 18.

2. Customs Did Not Discriminate Against Hispanic Agents in Undercover Assignments

a. Hispanic Agents Were Not Unfairly Required to Perform Undercover Work, Because Undercover Work Was Strictly Voluntary

The facts show that Customs did not engage in a pattern or practice of requiring Hispanic agents to perform undercover assignments. Under Customs policy, all undercover work was voluntary. See Suppl. Kilcoyne Decl. at ¶ 7; Unzueta Decl. at ¶ 5. Agents were told repeatedly that undercover work was voluntary, both by instructors at the Academy during Undercover Operatives Training and by supervisors in field offices. See Suppl. Kilcoyne Decl. at ¶ 7; Declaration of D.G. ("D.G. Decl.") at ¶ 11 (attached hereto as Exhibit 22) (filed under seal) ("I have always understood that working undercover is voluntary. I have never felt coerced to work undercover."). When agents completed undercover training, they signed a form saying they understood that undercover work was voluntary and noted whether they wanted to do undercover work. See Suppl. Kilcoyne Decl. at ¶ 8; Att. A (form signed by plaintiff Miguel Contreras acknowledging undercover work was voluntary). Academy instructors informed agents that even though they were certified to do undercover work after attending the training, they did not ever have to do it. See D.G. Decl. at ¶ 11. Additionally, an agent could choose to stop working undercover if he no longer wanted to work undercover or wanted to take time off from undercover work. See Brown Decl. at ¶¶ 17-18; D.G. Decl. at ¶ 12.

Supervisors did not want any agent to work undercover who did not want to, because the agent could compromise the safety of himself or his colleagues. See Suppl. Kilcoyne Decl. at ¶ 9; Webber Decl. at ¶ 19; Unzueta Decl. at ¶ 5. Each field office had an agent who was an undercover liaison coordinator and, in this role, was available for undercover agents to talk to about their assignments or any pressures they felt in their personal lives. See Suppl. Kilcoyne Decl. at ¶ 10. In conclusion, even if plaintiffs' allegation that Hispanic agents did more undercover work were true, this disparity was not a result of discrimination by Customs but of personal choices by individual agents.

b. Customs Did Not Prevent Hispanic Agents From Being Promoted By Assigning Them Undercover Work

Plaintiffs contend Customs "devalues" undercover work in terms of awards and promotions. Complaint at ¶ 34. The statistical data show that doing some undercover work did not adversely affect an agent's likelihood of promotion. In fact, many agents received awards for their undercover work and were promoted precisely because, not despite, the fact that they were successful at undercover work. See Unzueta Decl. at ¶ 4. While agents who logged more than ten percent of their total working hours as undercover hours appeared not to reach the GS-14 level, those agents generally did not seek promotions to a GS-14 position. See Siskin Decl. at ¶ 73. Given that undercover work was voluntary and agents who worked a lot of undercover hours did not apply for supervisory positions, Hispanic agents were not disadvantaged by Customs undercover policies.

Undercover work was an important investigative tool that was vital to the performance of Customs mission. See Suppl. Kilcoyne Decl. at ¶ 15. Given the importance of undercover work

to the agency, Customs chose only the most skilled agents to be certified as undercover operatives. Id. at ¶ 11. Being certified as an undercover operative and working undercover increased agents' chances of being promoted through Customs promotion system. See Zaner Decl. at ¶ 20; Suppl. Kilcoyne Decl. at ¶ 12.

Moreover, the statistical evidence demonstrates that agents who logged undercover hours for less than ten percent of their total time working were more likely to be promoted than agents who did not work undercover. See Siskin Decl. at ¶ 71, Table 37. While logging over ten percent of total hours as undercover work had a negative impact on agents' likelihood of reaching higher grade levels, only 41 agents out of more than 3,000 total GS-1811 agents at Customs logged more than ten percent of his total hours to undercover work, and the seemingly negative impact may be due to the small number of agents. Id. at ¶¶ 9, 71, Tables 1, 35. Further, as the TECS and VAACS data show, no Hispanic agent who logged more than ten percent of their total hours to undercover work and was not promoted to grade GS-14 ever even applied for a GS-14 promotion. Id. at ¶ 73. In other words, agents who worked undercover frequently chose to do so rather than to apply for a promotion to a supervisory position. Plaintiffs simply cannot support their claim that Customs policies or practices relating to undercover work kept Hispanic agents from being promoted.

3. Customs Did Not Discriminate Against Hispanic Agents In Wiretap Assignments

Since approximately the year 2000, Customs had a policy whereby field offices were encouraged to hire contractors to monitor wires and transcribe (and, if necessary, translate) intercepted conversations into English. See Suppl. Kilcoyne Decl. at ¶ 23. Even before this

policy became official, many field offices used contractors to monitor the wires; in addition, Customs had very few wiretap cases prior to 2000. See, e.g., Webber Decl. at ¶ 20; Suppl. Kilcoyne Decl. at ¶ 23.

With the use of contractors came an increased amount of wiretaps and encouragement from Headquarters to do more wiretaps. See Suppl. Kilcoyne Decl. at ¶ 27. Customs used substantially more wiretaps after 2001. Id. at ¶ 27; Brown Decl. at ¶ 21. Between 1993 and the end of 1999, Hispanic agents logged hours to only 48 cases where field offices sought approval from headquarters to use a wiretap. See Suppl. Kilcoyne Decl. at ¶ 28. Of those 48 cases, in 18 cases, the wiretap was monitored and transcribed by contractors, not agents. Id. In three of those cases the wiretap was monitored and transcribed by officers from other federal, state or local law enforcement agencies. Id. In ten cases, no wiretap was ever employed. Id. In four cases, the intercepted conversations were not in Spanish.[9] Id. In eleven cases, Customs agents monitored the wire along with contractors or other officers, but contractors were responsible for a majority of the translation. Id. Thus, in only two cases could Hispanic agents have possibly been solely responsible for monitoring and transcribing the wire. Id. And in one of those cases, the wire was only operational for 24 hours. Id. This small number of cases belies plaintiffs' allegation that Customs had a standard operating procedure of assigning Hispanics to wiretap cases.

Additionally, the facts do not support plaintiffs' allegation that working on wiretap cases hindered their opportunities to receive promotions and awards. Generally, wiretap cases were considered good assignments because they were larger and more significant cases. See Brown

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[9] Only Spanish-speaking wires are relevant to plaintiffs' wiretap claim, because wiretap monitoring was one of the "Spanish-language related duties" they allege they were disproportionately assigned. Complaint at ¶ 34.

Decl. at ¶ 19. Thus, agents assigned to cases involving wiretaps were likely to be recognized in awards or promotions. Id. at ¶ 19; Suppl. Kilcoyne Decl. at ¶ 25. Wiretaps were complicated and involved expensive technology and the participation of many agents. See Suppl. Kilcoyne Decl. at ¶ 26. In general, given the amount of agent resources used to run a wiretap, agents were only used to monitor and transcribe a wire when contracting companies that were court-certified to do that work did not yet exist. Id. at ¶ 24; Webber Decl. at ¶ 20. Given the minute number of cases in which Hispanic agents might have been involved in monitoring and transcribing wiretaps and the lack of factual support for plaintiffs' contention that wiretap monitoring prevented promotions and awards, the facts do not support plaintiffs' claim that Customs engaged in a pattern or practice of discriminating against Hispanic agents in wiretap assignments.

4. As a Matter of Law, Hispanic Agents' Assignments Do Not Rise to the Level of an Adverse Action Actionable Under Title VII

To state a claim under Title VII, plaintiffs must identify an adverse action that Hispanic agents suffered. Plaintiffs allege in their Complaint that they were assigned "less desirable" cases and "cases that are not career-enhancing." Complaint at ¶ 34. However, the statistical data demonstrate that Hispanic agents, in general, were promoted faster than white agents, and agents who worked some undercover were promoted faster than agents who did no undercover work. Because Hispanic agents' work assignment claim does not rise to the level of a "legally cognizable adverse action" and their assignments did not affect their promotions, plaintiffs' assignments claim fails as a matter of law. Brown, 199 F.3d at 453.

Without an ultimate effect on an agent's ability to be promoted, an assignment a particular agent receives is not in and of itself an adverse action. Plaintiffs' subjective perception of

whether or not a particular assignment is "less desirable" does not render the assignment an adverse employment action. Complaint at ¶ 34; Forkkio v. Powell, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002) ("[p]urely subjective injuries . . . are not adverse employment actions"); Brown, 199 F.3d at 457 ("Mere idiosyncracies of personal preference are not sufficient to state an injury.").

First, the discrete assignments that particular agents received did not significantly alter their job responsibilities. A plaintiff can maintain a Title VII claim by showing that a "tangible employment action" such as failure to promote or "reassignment with significantly different responsibilities" was taken for a forbidden reason. Ellerth, 524 U.S. at 753; see also Brown, 199 F.3d at 456 (quoting Ellerth). Plaintiffs' assignment claim does not meet this standard. The undercover work and other "undesirable" assignments plaintiffs complain of were an inherent part of the criminal investigator position, in which role all agents performed surveillance and did not always identify themselves as Customs agents. See Kilcoyne Decl. at ¶¶ 15, 24. Wiretap monitoring was no more tedious than other types of surveillance or other case work required of agents. Id. at ¶ 24. "Mere inconveniences and alteration of job responsibilities will not rise to the level of adverse action." Stewart v. Evans, 275 F.3d at 1135 (quoting Childers v. Slater, 44 F. Supp. 2d 8, 19 (D.D.C. 1999)); see also Freedman v. MCI Telecomm. Corp., 255 F.3d 840, 848 (D.C. Cir. 2001).

Second, the assignments did not "tangibly change" the working conditions of plaintiffs' employment to the level of constituting "a material employment disadvantage." Stewart v. Evans, 275 F.3d at 1134 (an "'employment decision does not rise to the level of an actionable adverse action . . . unless there is a tangible change in the duties or working conditions

constituting a material employment disadvantage'") (quoting Walker v. WMATA, 102 F. Supp. 2d 24, 29 (D.D.C. 2000), and citing Ellerth). Outside of their allegation that undercover work is "dangerous," see Complaint at ¶ 34, the plaintiffs have not alleged that the actual working conditions of their assignments constituted a material employment disadvantage.[10] And to the extent that undercover work did involve some degree of personal danger, the agents volunteered to take that risk. As discussed above, agents were repeatedly reminded that undercover assignments were voluntary, and thus the Customs Service cannot be said to have imposed the risk on agents.[11] Additionally, agents received appropriate credit towards promotion for doing undercover work.[12]

Finally, the assignments plaintiffs challenge did not hamper their ability to succeed at Customs. See Freedman, 255 F.3d at 848 (suggesting that a temporary assignment could create

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[10] In Perez v. FBI, 707 F. Supp. 891 (W.D. Tex. 1988), aff'd, 956 F.2d 265 (5th Cir. 1992), the district court found that Hispanic FBI agents' wiretap duties constituted "disparate treatment in the conditions of their employment" only because of the specific working conditions of the wiretaps: (1) the shifts often lasted 12 hours; (2) the assignments lasted 30-90 days; (3) the assignment were involuntary; (4) agents were taken off their active cases and not reassigned upon return; and (5) the agents were absent from home office and family. Id. at 909. Plaintiffs have not made any similar allegations as to the working conditions of the very few wiretaps they performed. See Complaint at ¶¶ 34-43.

[11] This case thus differs from Segar v. Civiletti, 508 F. Supp. 690, 713 (D.D.C. 1981), aff'd sub nom Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), where the court found the DEA had assigned undercover work to black agents more frequently than to white agents.

[12] Again, in this respect, Segar and Perez are distinguishable from the instant case. See Segar, 508 F. Supp. at 713 ("Disproportionate assignment to undercover work adversely affects Black agents in that it exposes them to greater dangers and hardship [and] precludes obtaining the 'breadth of experience' that is a critical consideration for promotion to supervisory positions."); Perez, 707 F. Supp. at 912 ("Though Title VII may not prohibit the [FBI] from assigning Hispanic Special Agents to undercover work in disproportionate numbers, Title VII does prohibit the [FBI] from failing to credit adequately the contribution of the undercover agent to the mission of the [FBI] in terms of promotions and benefits.").

liability if it has an objectively harmful effect on "future employment opportunities"); see also Brown, 199 F.3d at 457. Wiretap cases were high-profile and, thus, likely to lead to recognition. See Brown Decl. at ¶ 19; Suppl. Kilcoyne Decl. at ¶ 25. Additionally, doing some undercover work actually increased an agent's chance of being promoted. See Siskin Decl. at ¶ 71, Table 37. While logging more than ten percent of total hours to undercover corresponded with staying in a non-supervisory position, Hispanic agents with high undercover hours did not apply for any supervisory positions. Id. at ¶¶ 71, 73. Accordingly, because plaintiffs' assignment claim does not involve an adverse action actionable under Title VII, it fails as a matter of law.

F. Plaintiffs Cannot Demonstrate A Pattern Or Practice Of Discriminatory Discipline At Customs

In their Complaint, plaintiffs assert that Customs used disciplinary procedures that were “excessively subjective and, as a result, [had] an adverse impact on Hispanic Special Agents.” Complaint at ¶ 44. In particular, plaintiffs assert that Hispanics were disciplined “more frequently and more harshly than similarly situated white Special Agents.” Id. As an example of this alleged discriminatory discipline, plaintiff Miguel Contreras asserted that he was “subject to numerous Internal Affairs investigations.” Id. at ¶ 46.

As set forth fully below, plaintiffs’ pattern or practice discipline claim fails as a matter of law. First, investigations of misconduct that do not result in any disciplinary action being taken are not adverse employment actions that are cognizable under Title VII. Second, Customs policies and practices were centralized starting in 1996 to allow for an objective and consistent disciplinary process. Plaintiffs cannot identify any aspect of these policies that was inherently discriminatory toward Hispanics. Third, although Hispanics were more likely than whites to be

suspended for the period between 1993 and 2003, no statistically significant disparity existed between the suspensions of white agents and those of Hispanic agents prior to 1999, when Customs implemented a centralized, objective process for both investigating employee misconduct and proposing disciplinary actions. Moreover, the fact that Dr. Siskin found only 42 Hispanics out of 495 total were suspended during a ten-year period does not demonstrate a pattern or practice of discriminatory discipline. Finally, plaintiffs cannot show that Hispanics were disciplined more harshly than white agents for like or similar offenses, a requirement for a claim of discriminatory discipline. For all these reasons, defendant is entitled to summary judgment on plaintiffs' discipline claim.

1. Investigations Of Employee Misconduct That Do Not Result In Disciplinary Action Are Not Actionable Adverse Employment Practices

In the Complaint, plaintiff Miguel Contreras cites "investigations" of employee misconduct as evidence that Customs engaged in a pattern or practice of discriminatory discipline. Complaint at ¶¶ 46, 48. However, as a matter of law, an investigation that does not lead to disciplinary action is not an actionable adverse employment action. See, e.g., Brown, 199 F.3d at 456-57; Mack v. Strauss, 134 F. Supp. 2d 103, 114 (D.D.C. 2001), aff'd, 2001 WL 1286263 (D.C. Cir. Sept. 28, 2001); Roney v. Ashcroft, Civ. Action No. 01-0544, at 5 n.1 (Mem. Op. Aug. 6, 2002) (Robertson, J.). This Court has held that when no adverse action is taken based upon an investigation of employee misconduct, there is "no objectively tangible harm." Moore v. Summers, 113 F. Supp. 2d 5, 23 (D.D.C. 2000) ("It is undisputed that no disciplinary action has been taken against Special Agent Moore [a plaintiff] as a result of the investigation. Consequently, there was no adverse action."). Thus, investigations that did not result in

disciplinary action do not rise to the level of an actionable adverse employment practice and cannot form the basis of plaintiffs' pattern or practice discipline claim.

2. Customs Policies and Procedures Were Designed To Ensure Consistency And Neutrality In The Disciplinary Process

a. Centralized Allegation Intake and Review Process

Customs received allegations of misconduct from internal and external sources. See Pignone Decl. at ¶ 29. Allegations could be received through an IA hotline number, the Customs Customer Satisfaction Unit, mail, e-mail, referrals from the IG or referrals from IA field offices. Id. Until 1999, all allegations of employee misconduct, whether they came from the public, other federal agencies, or within the agency, were investigated by the IA field office in the particular region in which alleged misconduct arose. Id. at ¶¶ 11, 28. In 1999, Customs made a major change by centralizing the intake system for investigations of misconduct. Id. at ¶ 27. Thus, after 1999, all allegations, regardless of the source, were forwarded to the Intake Group, a centralized intake office located at headquarters, for processing and assignment. Id. at ¶ 29.

An allegation was classified into one of four classes. See Pignone Decl. at ¶ 31. Class 1 involved allegations of criminal misconduct. Id. Examples of Class 1 allegations included allegations such as bribery, smuggling or perjury. Id. Class 2 involved serious non-criminal misconduct such as misuse of a government vehicle, inappropriate release of TECS investigative information, or sexual harassment. Id. Class 1 allegations, as well as a majority of Class 2 allegations, were referred to IA for investigation. Id.

Class 3 allegations involved management issues such as insubordination, unprofessional behavior to the public, failure to follow policies or mismanagement. See Pignone Decl. at ¶ 31.

Class 3 allegations were referred to Customs management for inquiry or action. Id. Class 4 allegations were considered minor or frivolous allegations and were generally closed without action or investigation. Id. A permanent record was created, however, for future reference. Id. Class 4 allegations might concern, for example, lost or missing credentials. Id.

Employees within the Intake Group conducted an initial analysis of an allegation to determine its appropriate classification. See Pignone Decl. at ¶ 32. The Intake Group then determined whether the allegation should be referred to management for action or to IA for investigation, or closed with no action taken. Id. Allegations of misconduct on the part of OI employees at grade of GS-15 or higher or IA employees were investigated by the IG. Id. at ¶ 30.

b. Customs Management Inquiries

Less serious allegations of employee misconduct were referred by IA to Customs management for examination and appropriate action. See Pignone Decl. at ¶ 33. Management had the option of taking immediate action or assigning a fact finder to conduct an inquiry into the allegation. Id. These inquiries by Customs management were known as management inquiries. Id. at ¶ 34.

On February 25, 1999, Customs established a formalized program for management inquiries. Id. This program provided training and written guidelines for a group of fact finders responsible for addressing allegations of misconduct not subject to an investigation by IA. Id. In addition, the IA provided guidance and oversight to a fact finder. See Pignone Decl. at ¶ 34. When a fact finding inquiry was concluded, the inquiry report was reviewed and approved by IA to ensure the inquiry was complete and thorough. Id.

c. Discipline Process

Following one of the inquiry procedures described above, agents faced two major categories of discipline. Id. at ¶ 4. The first category was discipline for less serious misconduct. Id. For such misconduct, employees received discipline that ranged from an oral admonishment to a letter of reprimand to a suspension from duty and pay of fourteen-days or less. Id. Less serious misconduct included, for example, attendance problems, discourteous behavior, failure to follow instructions or the policies and procedures of the agency, and negligence while on duty. See Pignone Decl. at ¶ 4. The second category of discipline was an adverse action for serious misconduct. Id. at ¶ 5. An adverse action could include suspensions from duty and pay for more than 14 days, reductions in pay and/or grade, and removal. Id. Examples of serious misconduct would include association with drug traffickers, inappropriate association with confidential informants, unauthorized use of a government vehicle, sexual harassment or misuse of TECS. Id.

For both types of discipline, Customs followed a formal process to discipline an employee. See Pignone Decl. at ¶ 6. First, a proposing official issued a proposal letter to the employee informing him or her of the proposed discipline and outlining the specific facts and charges against the employee. Id. Second, the employee had the right to respond both orally and in writing to the charges and proposed discipline, setting out any mitigating circumstances. Id. Finally, the deciding official, i.e., someone other than the proposing official, determined whether or not the charges against the employee could be sustained, and if so, selected the specific penalty to impose. Id.

The deciding official took into account certain factors, known as the "Douglas Factors,"

when selecting an appropriate penalty. Id. at ¶ 7. The Douglas Factors include, among other things: the nature and seriousness of the offense; the employee's job level and type of employment; the existence of any past disciplinary record; whether or not the offense would have an effect on the employee's ability to perform at a satisfactory level; the consistency of the penalty with those imposed upon other employees for the same or similar offenses; the consistency of the penalty with the applicable agency table of penalties; the impact of the offense on the reputation of the agency; and the potential for the employee's rehabilitation. See Pignone Decl. at ¶ 7. The deciding official could either sustain the original proposed action, reduce the penalty or impose no penalty. Id. at ¶ 8. The deciding official could not increase the penalty from the original proposed action. Id.

d. Customs Disciplinary Review Boards

From 1982 until January 1996, supervisors in the individual local field offices had the responsibility for proposing and deciding disciplinary actions. Id. at ¶ 10. In January 1996, the disciplinary process changed significantly for both IA and OI. See Pignone Decl. at ¶ 13. Both divisions established independent Disciplinary Review Boards ("DRBs") to issue proposals for adverse actions.[13] Id. The primary function of the DRBs was to promote fairness and consistency in addressing cases of alleged employee misconduct. Id. at ¶ 19. The DRBs for both OI and IA consisted of a panel of three members from that organization as well as an employee

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[13] In May 1999, the Commissioner of Customs, Raymond Kelly, established a service-wide Disciplinary Review Board for all employees, including Customs Inspectors and non-law enforcement personnel. See Pignone Decl. at ¶ 21. That service-wide DRB had similar procedures as the preceding DRBs within IA and OI. Id. However, as compared to the IA/OI DRBs, the panel members of the service-wide DRB were composed of a mix of managers and supervisors from the various divisions within Customs (i.e., IA, OI and Field Operations with authority over Customs Inspectors). Id. at ¶ 22.

relations specialist from the Office of Labor and Employee Relations. Id. at ¶¶ 14, 15. The panel members were selected from approximately 50 senior managers and supervisors from the field and from headquarters. See Pignone Decl. at ¶ 14.

The DRBs reviewed the investigative reports produced by IA or the IG. Id. at ¶ 15. After reviewing a case, the panel would determine whether or not to propose an adverse action. Id. If the DRB determined that the offense charged merited less discipline, the DRB would normally remand the case to local management for consideration of a lesser penalty. See Pignone Decl. at ¶ 16. If the DRB determined that the offense charged merited an adverse action (something greater than a 14-day suspension), a member of the DRB panel would serve as the proposing official and would issue a letter to the employee outlining the proposed discipline. Id.

The SAIC from the particular region to which the employee was assigned was delegated the authority to be the deciding official on the proposed discipline for OI employees. Id. at ¶ 18. Decisions on proposed actions issued by the IA DRB were made by the Assistant Commissioner. Id.

In sum, through a series of policy changes, by 1999, Customs implemented procedures that constituted a centralized system for investigating allegations of employee misconduct as well as a centralized system for proposing discipline that promoted consistency in the imposition of discipline. This system was neither excessively subjective or nor inherently discriminatory.

3. Plaintiffs Cannot Show That The Disciplinary Measures Imposed On Hispanic Agents Were More Severe Than Those Enforced Against Whites For Like Or Similar Offenses

For a protected class of individuals to make out a prima facie case of discriminatory discipline under Title VII, "they must prove that employees outside of their protected group were

not punished in a similar fashion." See Batson v. Powell, 912 F. Supp. 565, 573 (D.D.C. 1996), aff'd, 203 F.3d 51 (D.C. Cir. 1999); see also Plummer v. Bolger, 559 F. Supp. 324, 329 (D.D.C. 1983), aff'd, 721 F.2d 1424 (D.C. Cir. 1983). Moreover, the protected group must show that its members received harsher discipline than others outside the protected group for like or similar offenses. In other words, the comparison must be between individuals similarly situated. See Wilmington v. J.I. Case Co., 793 F.2d 909, 915 (8th Cir. 1986) (plaintiffs must show that the discipline enforced against the protected group was more severe than that imposed on those comparably situated but outside the protected group); see also Moore v. Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985) (same). Plaintiffs here cannot meet this standard.

Although defendant's expert, Dr. Siskin, found that Hispanics were more likely than whites to be suspended at Customs from 1993 to 2003, he determined that only 42 Hispanic agents were suspended during the entire period out of 495 Hispanic agents, a number that is hardly indicative of a pattern or practice of discriminatory discipline. See Siskin Decl. at ¶ 9 and ¶ 76, Table 39. Put into context with Dr. Siskin's other findings that Hispanics were treated more, not less, favorably to whites in terms of promotions, awards, and training, it is highly unlikely that the explanation for Hispanics' disproportionate suspensions is discrimination. Moreover, the fact that Dr. Siskin did not find that Hispanics were more likely than whites to be terminated or demoted for disciplinary reasons supports the conclusion that discrimination is not the reason for the statistical disparity in suspensions. Id. at ¶ 75, Table 38.

Two other factors show that there was no pattern or practice of discriminatory discipline at Customs. First, when Dr. Siskin compared the rate of suspensions of white and Hispanic agents broken out by year, he found that, from 1993 to 1999, no statistically significant disparity

existed between Hispanics and whites. Id. at ¶ 79, Table 42A. Thus, the number of Hispanic suspensions was only statistically significant after the year 1999, when, as described above, Customs implemented major changes to its system of investigating employee misconduct and imposing discipline to make it more consistent and objective. Id. at ¶ 79, Table 42B.

As noted earlier, those changes included a centralized allegation intake system that precluded subjective determinations by supervisors in the field as to which allegations of misconduct were to be investigated. See Pignone Decl. at ¶¶ 28, 29. The system for proposing discipline also changed significantly in that a centralized disciplinary review board made proposals for disciplinary actions for all Customs employees. Id. at ¶ 21. Furthermore, the deciding officials were guided by objective criteria in making their proposals. Id. at ¶ 7. Plaintiffs cannot validly argue that this new centralized discipline system was responsible for the increased numbers of Hispanic suspensions. Indeed, for a number of suspensions imposed after 1999, other putative class members served as either the proposing or deciding officials. See Declaration of Mari Yonkers ("Yonkers Decl.") at ¶ 8 (indicating that Hispanic agent served as deciding official) (attached as Exhibit 23) (filed under seal); Unzueta Decl. at ¶¶ 2, 8-14.

Second, as Dr. Siskin noted in his report, the Customs data do not reflect the behavior that led to the suspensions of the 42 putative class members. Nor does the data show that Hispanics received harsher suspensions than whites for same or similar offenses, something that plaintiffs have the burden to show to make out a prima facie case of discriminatory discipline.

As Mari Yonkers, the Director of Labor and Employee Relations at Customs, explains in her declaration, no two cases of discipline are alike. See Yonkers Decl. at ¶ 23; see also Unzueta Decl. at ¶ 11. The suspensions of Hispanic agents from 1993 to 2003 were imposed for offenses

that ranged from criminal conduct to unauthorized use of government resources to negligent performance of duties. See Yonkers Decl. at ¶ 5. For example, out of the 42 Hispanic agents suspended during this period, one was suspended after he was arrested on criminal charges in 2000. Id. at ¶ 6. That employee later entered a guilty plea on two counts of bribery and conspiracy to traffic in counterfeit goods. Id.

Another Hispanic agent was suspended in 2001 after an investigation revealed that the employee had conducted an unauthorized investigation of her brother-in-law using Customs resources, staff and information. See Yonkers Decl. at ¶ 7. The DRB's proposal to suspend the agent for sixty days for abuse of authority and unauthorized use of law enforcement resources was sustained by the deciding official, Roberto Fernandez (the SAIC in Puerto Rico and a putative class member), after the employee admitted to the conduct charged. Id.

Ms. Yonkers also describes the suspension of an Hispanic agent who was charged in 2001 with failure to follow established policies and procedures in the detention of a suspect. Id. at ¶ 8. The suspect escaped after the Hispanic agent left the suspect alone in a room without restraints. Id. The agent received a proposed fourteen-day suspension. See Yonkers Decl. at ¶ 8. However, the deciding official, the SAIC in Seattle, mitigated the proposed suspension to a two-day suspension due to the agent's clean disciplinary record and because the agent took responsibility for his actions. Id. As Ms. Yonkers noted, these individual cases reflect that the suspensions at issue here each involved a unique set of facts, different charges, different offices, differing levels of egregiousness, and different mitigating or aggravating factors. Id. at ¶ 5. In other words, the cases do not reflect a standard operating procedure.

For all of these reasons, defendant is entitled to summary judgment on plaintiffs' pattern

or practice discipline claim.

G. Retaliation Claims Are Too Individualized and Thus Inappropriate To Be Pattern or Practice or Class Claims

Plaintiffs cannot demonstrate that Customs had a pattern or practice of retaliating against Hispanic agents. Lacking statistical support for their pattern or practice retaliation claim, plaintiffs apparently hope to utilize anecdotal evidence to establish a pattern or practice of retaliation, an endeavor that must fail due to the highly individualized nature of retaliation claims and the unsuitability of such claims for pattern or practice and class treatment. Relying solely on a patchwork of unconnected, isolated occurrences, plaintiffs cannot sustain a claim that a uniform "standard operating procedure" of retaliation on the part of Customs existed.

Plaintiffs bringing pattern or practice claims and class claims face a similar burden: in both, plaintiffs must show that discrimination or retaliation was the employer's "regular rather than usual practice" and was "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." Teamsters, 431 U.S. at 336. In a pattern or practice case, plaintiffs must show the defendant engaged in "a pattern of discriminatory decisionmaking" and that discrimination was the defendant's "standard operating procedure." Id. at 360 n.46, 336. Similarly, in order to meet the commonality and typicality requirements of Federal Rule 23(a) for class certification, a plaintiff must make a "specific presentation identifying the questions of law and fact that were common to the claims of [the plaintiff] and the members of the class he sought to represent." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 158 (1982). In pattern or practice cases as in class action cases, "there is a wide gap" between an individual's claim of discrimination and retaliation and "the existence of a class of persons who have suffered the same injury as that

individual." Falcon, 457 U.S. at 157; see also Cooper, 467 U.S. at 876. Due to the nature of the claims, both pattern or practice and class claims cannot succeed without statistical evidence. See O'Donnell Constr. Co., 963 F.2d at 427; Wagner, 836 F.2d at 592.

Absent statistical support, retaliation claims are inappropriate for class or pattern or practice treatment. A claim of retaliatory treatment based upon anecdotal evidence, due to the inherently unique factual circumstances surrounding it, "is clearly not a class issue." See Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 496, 511 (E.D. Ark. 1980); see also Francis v. Am. Tel. & Tel. Co., 55 F.R.D. 202, 208 (D.D.C. 1972) ("Discrimination in retaliation for filing a complaint with the EEOC unlike racial discrimination is not by its very nature class discrimination."). The unique experiences of an individual – absent proof that the experience is part of a larger orchestrated pattern or practice of the defendant – simply cannot be applied to the class as a whole. "Because retaliation manifests itself in many ways and often turns on facts particular to each case . . . to establish a prima facie case, the retaliation must have been pursuant to a general practice of the defendant." Hartman v. Wick, 600 F. Supp. 361, 368 (D.D.C. 1984) (rejecting class claim of retaliation where the evidence introduced indicated the reprisals "took various forms and came from various officials").

A prima facie case of retaliation under Title VII requires that a plaintiff demonstrate that: (1) he engaged in protected activity, (2) he was subjected to adverse action by the employer, and (3) there existed a causal link between the adverse action and the protected activity. See Jones v. Wash. Metro. Area Transit Auth., 205 F.3d 428, 433 (D.C. Cir. 2000). However, when anecdotal evidence "focus[es] on individual actions rather than show[ing] an overarching policy" of discriminatory conduct, a common pattern of discrimination cannot be established. Reid v.

Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 675-76 (N.D. Ga. 2001) (denying class certification on retaliation claims).

Because discrete claims of retaliation are fact-sensitive and require individualized proof, even when idiosyncratic experiences are uncovered, the absence of commonality and typicality preclude the conduct from being assumed to exist on a class-wide basis. Id. at 676. Mere conclusory assertions that isolated instances of retaliation are systematic or routine and consequently can apply class-wide will not survive commonality scrutiny at certification. Elkins v. American Showa, Inc., 219 F.R.D. 414, 418 (S.D. Ohio 2002).[14] Similarly, assertions that individual retaliatory experiences are typical as to the class so long as the class claims "rest on the 'same legal theory'" as the individual claim "would vitiate the requirement of typicality." Marquis v. Tecumseh Prods. Co., 206 F.R.D. 132, 161 (E.D. Mich. 2002). Any anecdotal retaliation claim uncovered by the plaintiffs, no matter its merits as a stand-alone individual action, will not overcome the hurdles of commonality and typicality and will fail as applied to the class. If anything, "preoccupation with particular retaliatory wrongs allegedly done to one may well make such person an inadequate representative of the class." Strong, 87 F.R.D. at 511 (quoting Williams v. Boorstin, 451 F. Supp. 1117, 1124 (D.D.C. 1978), rev'd on other grounds, 663 F.2d 109 (D.C. Cir. 1980)). For the same reasons that courts have found retaliation inappropriate for class treatment, plaintiffs' retaliation claim cannot proceed as a pattern or

[14]The Elkins court explained why class retaliation claims are not conducive to class-wide adjudication: "Each plaintiff must individually prove the four elements of a retaliation claim. The Defendant is entitled to establish as to each plaintiff a legitimate reason for any adverse action taken against that plaintiff, and each plaintiff must then have the opportunity to establish that the reason offered is pretextual." Id. at 425.

practice claim. Accordingly, defendant is entitled to summary judgment on plaintiffs' pattern or practice retaliation claim.

CONCLUSION

For the reasons set forth above, defendant respectfully requests that the Court grant summary judgment to defendant on all of plaintiffs' pattern and practice claims.

Respectfully submitted,

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Date: August 30, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al.,)	
)	
Plaintiffs)	
)	
v.)	Case No. 1:02CV00923(JR)
)	
TOM RIDGE, SECRETARY,)	
DEPARTMENT OF HOMELAND)	
SECURITY,)	
Defendant.)	
)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE ARE NO GENUINE ISSUES

Pursuant to Local Civil Rule 7.1(h), Defendant Tom Ridge, Secretary of the Department of Homeland Security, hereby submits this statement of material facts as to which there are no genuine issues:

BACKGROUND

1. On March 23, 1995, Miguel Contreras filed an administrative class complaint with the Equal Employment Opportunity Commission (EEOC) "on behalf of himself and all similarly situated past, present, and future Hispanic special agents at [the Customs Service]." Admin. Class Compl. at 2 (attached as Ex. 18 to the Declaration of Mariam Harvey, attached to Def. Mot. Summ. Judg. [#22]).

2. In the administrative class complaint, Mr. Contreras defined the class as "Hispanic GS-1811 Special Agents (Criminal Investigator) Grade 12-15, who are currently employed by USCS's Office of Investigation [sic] and Internal Affairs." Id.

3. The former United States Customs Service was a bureau within the Department of Treasury. See Franklin Jones Decl. ("Jones Decl.") at ¶ 3 (attached to Defendant's

Opposition to Plaintiffs' Motion for Rule 16 Conference ("Def's Opp. To Plfs' Mot. for Rule 16 Conf.") [#65] as Ex. 1).

4. In March 2003, pursuant to the Homeland Security Act of 2002, P.L. No. 107-296, and the President's Reorganization Plan Modification of January 2003, the employees within the United States Customs Service were transferred from the Department of the Treasury to either Immigration and Customs Enforcement ("ICE") or Customs and Border Protection ("CBP"), bureaus within the Department of Homeland Security. Id.

5. ICE is comprised primarily of former Immigration and Naturalization Service ("INS") agents and former United States Customs Service criminal investigators, and contains the vast majority of the former Customs 1811 special agents relevant to this action. Id.

DATABASES

6. The primary database Customs used to record and track personnel actions was PERHIS, a database with data reaching back to 1992 that recorded every employee's employment history, including all promotions, monetary and time-off awards, within-grade increases, duty station reassignments (transfers), suspensions, terminations, demotions, and pay increases. See Declaration of Tanya E. Bennett ("Bennett Decl.") at ¶ 15 (attached hereto as Exhibit 4).

7. Customs obtained race and national origin ("RNO") data from every employee through a self-identification process. Id. at ¶ 4.

8. The RNO data were entered into the PERHIS database. Id. at ¶ 2.

9. All Customs' employees were requested to self-identify their RNO either on Standard Form 181 or OPM Form 1468. Id. at ¶ 4.

10. Customs routinely informed its employees of how their RNO data was classified and gave them an opportunity to verify or change their RNO designation. Id. at ¶ 6.

11. From 1998 to 2003, Customs formally reminded its employees five separate times to verify their RNO designation and to request that the RNO designation be corrected if necessary. Id. at ¶¶ 10-14.

12. If an employee refused to indicate his or her RNO, Customs policy required Customs to identify the employee's RNO through visual perception. See Bennett Decl. at ¶ 8.

13. The Treasury Enforcement Communications System ("TECS") was a law enforcement computer system administered by Customs. See Depo. Transcript of Ellen Mulvenna, 6:3-6 (attached as Exh. 10 to Def's Opp. to Pl. Mot. Compel [#38]).

14. TECS was a mainframe system consisting of many separate databases and has data from 1987. Id. at 11:17-12:3.

15. TECS contained a management information reporting system, which included hours reported by Customs agents in both the Office of Investigations ("OI") and the Office of Internal Affairs ("IA"). Id. at 13:9-13.

16. Agents were required to enter the hours they worked on a particular case into TECS and to designate whether the hours were undercover or non-undercover.

See Supplemental Declaration of Paul M. Kilcoyne ("Suppl. Kilcoyne Decl.") at ¶ 17 (attached hereto as Exhibit 5).

17. The Training Records and Enrollment Network ("TRAEN") database tracked every training course that each employee attended at Customs. See Declaration of Lynne M. Smith ("Smith Decl.") at ¶ 13 (attached hereto as Exhibit 6).

18. The TRAEN database contains training information dating back to 1990. Id.

19. The Vacancy Announcement Application Control System ("VAACS") was used by Customs to create vacancy announcements for competitive promotions, to track applications, and to input applicants' names and social security numbers. See Depo. Transcript of Barbara Zakrison at 13:14-19 (attached as Ex.11 to Def's Opp. to Pl. Mot. Compel [#38]).

20. The VAACS database goes back to 1985. See Depo. Transcript of Susan Zaner at 38:2 (attached as Ex. 8 to Def's Opp. to Pl. Mot. Compel [#38]).

PROMOTIONS

21. Until July 2001, the career ladder for a Customs' special agent, GS-1811, was GS-5 through GS-12. See Supplemental Declaration of Susan B. Zaner ("Suppl. Zaner Decl.") at ¶ 4 (attached hereto as Exhibit 8).

22. Individuals hired to be GS-1811 criminal investigators below grade 12 could advance to grade 12 through a series of automatic promotions within a designated time frame. Id.

23. Once an agent reached the "journeyman level" of grade 12, any further promotions were made through a competitive merit-based selection process. Id.

24. In July 2001, the journeyman level for a Customs GS-1811 special agent was raised to the GS-13 level. Id. at ¶ 5.

25. All competitive promotions except for promotions to the Senior Executive Service were governed by merit promotion principles set forth in Customs' Merit Promotion Plan ("MPP"), which became effective on July 1, 1986. Id. at ¶ 6.

26. Under the plan, candidates for competitive promotions submitted written applications. Id. at ¶ 7.

27. An evaluation panel, using a crediting plan, rated each applicant on the significant job-related knowledge, skills, and abilities critical for successful performance in the position to be filled. Id. at ¶ 8.

28. The panel would assign candidates numerical ratings based on the criteria in the crediting plan. Id.

29. The ten highest scoring candidates were then referred as best-qualified to the selecting official in order of ranking. Id. at ¶ 8.

30. Until approximately December 1998, the selecting official within OI was the Special Agent in Charge ("SAIC") whose office had the vacancy. Id. at ¶ 9.

31. After 1998, the authority for making selections was raised to the level of the Assistant Commissioner for all Customs offices including OI and IA. Id.; Att. A.

32. In 1991, Customs implemented an automated system called the Customs Automated Merit Promotion System ("CAMPS") to replace the written application process for competitive promotions for GS-1811-13 and 14 positions. Id. at ¶ 11.

33. Applicants applying through CAMPS responded to questions contained in a specially designed application booklet that was optically read. Id. at ¶¶ 12, 13.

34. The CAMPS application questions pertained to work activities, supervisory appraisal, annual performance appraisal, and awards. Id. at ¶ 14.

35. Applicants could request consideration for job openings at multiple geographic locations. Id.

36. Under CAMPS, all application packages were rated and ranked through the automated system instead of through a panel process; separate selection registers were prepared for each geographic area; and the system automatically generated letters to applicants at various stages of the application process. Id. at ¶ 15.

37. The use of CAMPS was discontinued in 1993. Id. at ¶ 16.

38. From 1993 to 1996, Customs reverted to its previous written application process. Id.

39. In April 1996, Customs began using the Office of Personnel Management's ("OPM") Microcomputer Assisted Rating System ("MARS"), also referred to as the "Telephone Application Processing System" ("TAPS"), to fill GS-1811-13 and 14 positions in OI. Id. at ¶ 17.

40. The MARS process required applicants to fax a one-page application to OPM and respond telephonically to a series of questions. Id. at ¶ 18.

41. The applicant’s responses to the questions were processed electronically by OPM, and no additional information was factored into the applicant’s score. Id.

42. Under MARS, the panel process was eliminated, and applications were rated and

ranked by the MARS system with separate selection registers prepared for geographic areas when requested by OI management. Id.

43. Only two vacancy announcements were issued under TAPS. Id. at ¶ 17.

44. From September 1997 through October 2000, Customs used the Customs Automated Application Processing System (CAAPS). Id. at ¶ 19.

45. Under CAAPS, applicants responded to standard questions on a standard form and faxed a four-page application to OPM. Id. at ¶ 20.

46. The candidate's application was processed electronically, and responses to questions were scored by OPM. Id.

47. There were six vacancy announcements issued under CAAPS. Id. at ¶ 19.

48. On November 20, 2000, and then again on March 25, 2002, Customs processed competitive promotions for GS-14 Criminal Investigator positions through the SA-14 test, an examination process specially designed and pre-tested within Customs to measure a GS-13 special agent's potential to perform as a supervisor or in non-supervisory positions at the GS-14 level. Id. at ¶¶ 22.

49. The SA-14 test, which was only administered twice at Customs, applied to promotions to a GS-14 position within OI, IA, the Office of Training and Development and the Office of International Affairs. Id. at ¶ 24.

50. Under the SA-14 test, applicants completed a very short, scanned application designed to determine basic eligibility and took a three-part Leadership Skills Written Test Battery and a Structured Interview Examination. Id. at ¶ 24.

51. Candidates for vacant SES positions at Customs had to submit an application

form that addressed, in written narrative, the mandatory Executive Core Qualifications ("ECQ") and technical qualifications required for the SES position being filled. See Declaration of Michele L. Burton ("Burton Decl.") at ¶ 3 (attached hereto as Exhibit 9).

52. The five ECQs included leading change, leading people, results driven, business acumen, and building coalitions/communication. Id.

53. A screening panel, composed of SES members at Customs, evaluated the candidates and recommended whether applicants be rated as “Qualified” or “Highly Qualified” for each of the core and technical qualifications. Id. at ¶ 4.

54. All candidates were referred to the Executive Resources Board ("ERB") at Customs for final evaluation. Id.

55. The ERB, composed of the Deputy Commissioner of Customs and all Assistant Commissioners, made the final determination as to whether the candidates were “Qualified,” “Highly Qualified” or “Best Qualified” and provided written recommendations to the Commissioner concerning the “Best Qualified” group. Id. at ¶ 5.

56. The Commissioner was the selecting official for all SES positions, except for the positions of Deputy Commissioner and Assistant Commissioner, Internal Affairs. Id. at ¶ 7.

57. Once a competing candidate was selected for promotion to the SES, the candidate’s application and supplemental qualifications statement for the core qualifications were forwarded to OPM's Qualifications Review Board ("QRB"), a

panel of SES members from the Federal Government who had to certify the candidate's qualifications. Id. at ¶ 9.

58. The QRB did not rate, rank, or compare the candidate's qualifications against those of other candidates but instead reviewed each application and decided if the candidate's experience met the ECQ requirements. Id. at ¶ 10.

59. If the QRB did not certify the selection, the application was remanded to the agency and the applicant had one opportunity to amend deficiencies in the application package. Id.

60. Once the QRB certified the selection, the candidate's appointment to the SES position was processed. Id.

61. Overall, Hispanic agents were more likely than white agents in the same grade to be promoted via competitive selection or via career ladder progression. See Declaration of Bernard R. Siskin ("Siskin Decl.") at ¶¶ 29-13, Tables 2-6 (attached hereto as Exhibit 10).

62. Hispanic agents in the same division, region and with the same time-in-grade were more likely than white agents to be promoted. Id. at ¶¶ 32-29, 44-47, Tables 7-10, 12-14.

63. Hispanic agents bidding for a promotion were more likely than white agents bidding for a promotion to be selected. Id. at ¶¶ 51-53, Tables 15-21.

64. Hispanic agents bidding for a transfer were more likely than white agents bidding for a transfer to be selected. Id. at ¶ 54, Tables 22-24.

65. Hispanic agents were more likely to have a duty location on the Southwest

Border, in Puerto Rico or in other non-European locations than in other United States location. Id. at ¶ 56, Table 25.

66. The worst region to be assigned to in terms of an agent's chances of being promoted was in the U.S. at a location other than the Southwest Border or Puerto Rico. Id. at ¶ 47, Table 14.

TRANSFERS

67. In 2000, Customs OI implemented a Rotation Policy that allowed agents who had been assigned for a certain number of years to designated locations along the Southwest border, Puerto Rico, Guam or the Virgin Islands to volunteer for, and receive, a lateral transfer to another office. See Declaration of Charles E. Royer ("Royer Decl.") at ¶ 10 (attached hereto as Exhibit 3).

68. In addition to offering transfers from those offices in Puerto Rico, Guam and the Virgin Islands, the Rotation Policy allowed transfers from the following designated Southwest border locations: in Arizona (Ajo, Douglas, Nogales and Yuma); in California (Calexico); in New Mexico (Deming and Las Cruces); and in Texas (Brownsville, Del Rio, Eagle Pass, El Paso, Falcon Dam, Laredo, McAllen and Presidio). Id.

69. In 2003, Customs added Sells, Arizona, Alpine, Texas and San Ysidro, California to the list of Southwest border locations included in the Rotation Policy. Id. at ¶ 11.

70. Under the Rotation Policy, agents who applied for a rotation from the designated locations were asked to identify in order of priority three (3) SAIC office locations

to which they wished to transfer. Id.

71. Once management had determined the new assignments for all applicants, each interested employee was notified of the new transfer location and asked to accept or decline the transfer offer. Id. at ¶ 14.

72. Under the Rotation Policy, agents with the longest continuous tenure at the designated locations could transfer to another office. Id. at ¶ 11.

73. The policy defined agents with "continuous tenure" as those agents who had completed a minimum of three (3) continuous years in OI, without a break, at one or a combination of more than one of the designated locations. Id.

74. Customs transferred all of the eligible agents that it could with its available funding, giving priority to those agents with the longest continuous tenure at the designated locations. Id. at ¶ 21.

75. Because Customs could not offer funded transfers from the designated border locations to all applicants due to funding constraints, Customs also offered all eligible 1811's an opportunity to submit requests for a self-funded lateral reassignment from the Southwest border. Id. at ¶ 22.

76. An agent was eligible for a self-funded transfer if he had three (3) or more years of continuous service in one or more Southwest border locations. Id.

77. Self-funded transfers were based on the availability of vacancies in the office to which an agent wanted to transfer and the needs of the Service to maintain an effective Southwest border workforce. Id.

78. In addition to the transfers offered through the Rotation Policy, an agent at

Customs could have received a lateral transfer through six other means: (1) an agent could have requested a self-funded transfer from his supervisors; (2) an agent could have bid for a lateral transfer based upon a vacancy announcement issued for a competitive promotion; (3) an agent could have responded to an agency-wide TECS message announcing a particular lateral transfer opportunity; (4) an agent could have received a directed reassignment paid for by the agency; (5) an agent could have requested a hardship transfer; or (6) an agent could have applied for a foreign attaché position. Id. at ¶ 25.

79. As of 2000, the Hispanic population in the United States totaled 35,306,000. See Statistical Abstract of the United States: 2003, Table No. 22 (123d ed., U.S. Census Bureau) (2003) (attached hereto as Exhibit 12).

80. Of the total Hispanic population, well over half (18,933,000) lived in only three states, California, Texas and Arizona, all states along the Southwest border. Id.

81. The percentage of Customs Hispanic agents on the Southwest border (45.8%) was proportionate to, if not lower than, the percentage of the Hispanic population as a whole in that area (over 50%). Id.; Siskin Decl. at Table 25.

82. Hispanic agents were more likely than similarly situated white agents to be promoted to a European location. Id. at ¶ 58, Table 13, 15 & 26-27.

83. Hispanic representation at European duty stations was proportionate to Hispanic representation overall at Customs. Id. at ¶ 58, Tables 26-27.

84. Hispanic agents who bid for a European vacancy were more likely than white agents who bid to be designated best-qualified and more likely to be selected. Id.

at ¶ 58, Table 15.

AWARDS

85. Customs' policies on awards were designed to reward truly exceptional performance that was "clearly above and beyond what is normally expected." Declaration of Diane S. Shepherd ("Shepherd Decl.") at ¶ 12; Att. A (attached hereto as Exhibit 7).

86. Prior to 1996, most awards were tied directly to employees' summary performance rating in their performance appraisal. See Shepherd Decl., Att. B.

87. Aside from awards based on performance ratings, Customs also gave cash awards for "suggestions, inventions, superior accomplishments and unique or special acts or services" that went above and beyond normal job responsibilities and performance requirements, to employees who were "highly exceptional and unusually outstanding." See Shepherd Decl., Att. B at 18.

88. Supervisors were required to prepare written justifications of these cash awards. Id. at 19.

89. Beginning in 1994, supervisors could give time-off awards instead of cash awards, which, like cash awards, were reserved for truly special accomplishments. See Shepherd Decl., Att. C.

90. In 1996, Customs changed its performance evaluation process and the policies and procedures respecting distribution of awards so that awards were no longer tied to performance ratings. See Shepherd Decl. at ¶ 15; Att. D, E & F.

91. Headquarters determined how much money each SAIC could spend on awards,

generally ranging between one-half and one percent of salary and expenses for that office. See, e.g., Shepherd Dec., Att. E at 3; Declaration of Loraine E. Brown ("Brown Decl.") at ¶ 5 (attached hereto as Exhibit 13).

92. Supervisors could give three types of awards: cash awards, time off awards, and honorary recognition awards. See Shepherd Decl. at ¶ 17; Att. A & F.

93. Cash awards included Special Act Awards, which generally corresponded with an agent's work on a specific case, and Performance Awards, which were rewards for sustained superior performance. See Shepherd Decl.; Att. F; Declaration of Joseph Webber ("Webber Decl.") at ¶ 5 (attached hereto as Exhibit 14).

94. In 1998, Customs began giving foreign language awards to agents who were proficient in and made substantial use of a foreign language in the performance of their duties. See Suppl. Kilcoyne Decl., Att. B, C & D.

95. Foreign language awards were distributed at the headquarters level and did not come out of the awards budget for each SAIC. Id.

96. Quality Step Increases ("QSIs") (also referred to as Quality Salary Increases) were eliminated under the new system after fiscal year 1996, although they were reinstated in 1999. See Shepherd Decl., Att. H.

97. QSIs were reserved for achievements that were "exceptional and clearly above and beyond what is normally expected of employees." Id. (emphasis in original); see also Brown Decl. at ¶ 9.

98. Because a QSI is a change in salary, it had to be approved by an Assistant Commissioner. See Shepherd Decl., Att. I.

99. To receive a QSI, an agent had to (1) receive a "successful" rating on his performance appraisal; and (2) demonstrate performance significantly above expected, as determined by five criteria: (a) displaying outstanding performance to meet organizational goals or improve the efficiency, effectiveness, and economy of the Government; (b) excelling in all critical performance areas as documented by specific examples; (c) sustaining a high level of performance over the previous year; (d) exhibiting timeliness of performance; and (e) being in the position and grade for at least a year. Id.

100. According to Customs' award policies, the policies were designed to promote "fairness and consistency." Shepherd Decl., Att. H.

101. Many SAICs reviewed group supervisors' nominations of the agents they supervised for awards and required group supervisors to justify, in writing, why each nominee should receive an award. See Brown Decl. at ¶ 6; Webber Decl. at ¶ 6; Declaration of Miguel Unzueta ("Unzueta Decl.") at ¶ 6 (attached hereto as Exhibit 15).

102. Some SAICs used awards committees, which reviewed supervisors' nominations of agents and justifications as to why those agents should receive awards in a certain amount and forwarded recommendations for awards to the SAIC. See Brown Decl. at ¶ 7; Webber Decl. at ¶¶ 7-8; Unzueta Decl. at ¶ 7.

103. In an independent oversight review of Customs in November 2000, the OPM Office of Merit Systems Oversight and Effectiveness, found that employees were positive about Customs' awards program and felt that it recognized performance.

See OPM Oversight Review at 20 (attached hereto as Exhibit 16).

104. OPM found that both supervisors and nonsupervisory employees were positive about the awards program, and "most believed that the awards program recognized outstanding performance." Id.

105. OPM found the award actions it reviewed to be both "well-justified and processed in accordance with agency procedures." Id.

106. Cash and time-off awards are personnel actions recorded in the PERHIS database. See Bennett Decl. at ¶ 14; Siskin Decl. at ¶ 59.

107. Customs data indicate that national origin is not a factor affecting the likelihood of receiving an award (excluding foreign language awards). Siskin Decl. at ¶ 63.

108. Hispanic agents were not disadvantaged with regard to being given awards as compared to white agents. See Siskin Decl. at ¶¶ 61-62; Tables 28-29.

109. A statistical analysis of awards received by white and Hispanic GS-1811 special agents between 1993 and 2003, controlling for the year and agents' grade, reveals that Hispanic agents received statistically significantly more overall awards than white agents during that time. See Siskin Decl. at ¶¶ 61-62; Tables 28-29.

110. Hispanic agents were more likely than white agents to receive an award, a cash award, a time-off award and/or a quality step increase. Id. at ¶ 62; Tables 28-29.

111. Excluding foreign language awards, Hispanic agents and white agents in the same grade were statistically equally likely to receive an cash or time-off award or quality step increase. Id. at ¶ 62; Tables 28-29.

112. Hispanic agents received slightly more QSIs than white agents, but the difference

is not statistically significant. Id. at Table 29.

113. Hispanic agents received statistically significantly more dollars in award money than white agents. Id. at ¶ 63; Table 30.

114. Hispanic and white agents receiving time-off awards received, on average, the same amount of time off. Id. at ¶ 63; Table 31.

TRAINING

115. The IA Training Division at the Customs Academy scheduled basic, advanced and specialized IA training classes and coordinated with IA field offices throughout the country to determine which agents would attend. See Decl. of Bonnie W. Browning ("Browning Decl.") at ¶¶ 1-2 (attached hereto as Exhibit 20).

116. From the mid-1990s to early 2000, IA training funds were limited, and the IA Training Division's funding was primarily devoted to the mandatory Basic Agent Training Program for agents entering IA for the first time. Id. at ¶¶ 3-4.

117. IA agents were selected to attend advanced and specialized training courses by their field offices. Id. at ¶ 4.

118. The only mandatory Academy training course all OI agents were required to complete successfully was Basic Agent Training. See Declaration of Francis Gary White ("White Decl.") at ¶ 6; Att. A (attached hereto as Exhibit 18).

119. The Academy sent notice of advanced OI training courses to SAICs and Field Training Program Managers ("FTPMs") at the SAIC offices, which were responsible for nominating agents to attend. See Declaration of Richard D. Ogden

("Ogden Decl.") at ¶ 6 (attached hereto as Exhibit 19); White Decl. at ¶ 4.

120. The Academy gave priority to nominees based on the needs of the agency; in other words, whether the advanced training would teach skills relevant to the kind of work a particular agent was currently doing. See Ogden Decl. at ¶ 7; White Decl. at ¶ 7.

121. For Undercover Operatives School, the Covert Operations Division at Customs Headquarters selected attendees from nominations provided by SAIC offices. See Ogden Decl. at ¶ 10; Suppl. Kilcoyne Decl. at ¶ 13.

122. The amount of training agents could receive was limited by the amount of money in Customs' National Training Fund, which funded Academy training for agents. See Smith Decl. at ¶ 6.

123. Advocacy group conferences such as the Customs National Hispanic Agents Association ("CNHAA") were not considered official training and were not funded by the National Training Fund. See Riggs Decl. at ¶ 12; Att. B, C & D.

124. Customs created the Office of Training and Development ("OTD") at headquarters in 1999, which coordinated the training of Customs employees, including special agents. See Smith Decl. at ¶ 3.

125. Each fiscal year beginning in 2000, OTD assembled a National Training Plan ("NTP") "to ensure that Customs employees receive the training essential to performing their jobs with the competence, professionalism, and honor that are the hallmarks of" Customs. Id. at ¶ 9; Att. D.

126. The NTP identified Customs' training priorities and requirements and included all

classes offered by the Customs Academy and private vendors within a given year. Id. at ¶ 10.

127. Each year, to develop the NTP, OTD contacted each headquarters office (e.g., the Office of Investigations), which in turn contacted its field offices, to solicit requests for training. Id. at ¶ 11.

128. Selection of Customs employees to attend training was based on fulfilling the needs of the agency and helping agents develop the skills needed to perform their jobs effectively. See Smith Decl. at ¶ 12; Att. E.

129. According to Customs policy, factors not related to the documented need for training, including national origin, were not relevant to selection. See Smith Decl. at ¶ 12; Att. E.

130. The National Training Fund only paid for expenses related to Academy training, and individual SAIC offices had to pay to send their agents to training offered by private vendors. See White Decl. at ¶¶ 9-10.

131. Each SAIC office had an FTPM, a GS-1811 special agent who was responsible for informing agents about upcoming training opportunities and coordinating the SAIC's nominations. See Ogden Decl. at ¶ 6.

132. When the Academy announced a course, the FTPM in each SAIC notified agents throughout the region overseen by the SAIC about it and received requests to attend. See Declaration of James E. Riggs, Jr. ("Riggs Decl.") at ¶ 6 (attached hereto as Exhibit 17).

133. Agents who wanted to take advantage of a training opportunity sought approval to

attend from their Group Supervisor and, upon receiving approval, contacted the FTPM to express their interest in attending. Id. at ¶ 7.

134. The FTPM compiled a list of interested agents and helped the Assistant SAIC rank the agents in accordance with the SAIC's needs, then forwarded the list to the Academy. Id. at ¶ 8; Webber Decl. at ¶ 13.

135. Hispanic agents at grades GS-12 and GS-13 received statistically significantly more training than white agents in those grades. See Siskin Decl. at ¶ 66; Table 33.

136. At grades GS-14 and GS-15, Hispanic agents received training equal to white agents. Id.

WORK ASSIGNMENTS

137. Under Customs policy, all undercover work was voluntary. See Suppl. Kilcoyne Decl. at ¶ 7; Unzueta Decl. at ¶ 5.

138. Agents were told that undercover work was voluntary by instructors at the Academy during Undercover Operatives Training and/or by supervisors in field offices. See Suppl. Kilcoyne Decl. at ¶ 7; Declaration of D.G. ("D.G. Decl."). at ¶ 11 (attached hereto as Exhibit 22) (filed under seal).

139. Upon completing undercover training, plaintiff Miguel Contreras signed a form saying he understood that undercover work was voluntary and noted that he wanted to do undercover work. See Suppl. Kilcoyne Decl. at ¶ 8; Att. A.

140. Being certified as an undercover operative and working undercover increased agents' chances of being promoted through Customs' promotion system. See

Zaner Decl. at ¶ 20; Suppl. Kilcoyne Decl. at ¶ 12.

141. Agents who logged undercover hours for less than ten percent of their total time working were more likely to be promoted than agents who did not work undercover. See Siskin Decl. at ¶ 71, Table 37.

142. While logging over ten percent of total hours as undercover work had a negative impact on agents' likelihood of reaching higher grade levels, only 41 agents out of more than 3,000 total GS-1811 agents at Customs from 1993 to 2003 logged more than ten percent of their total hours to undercover work, and the seemingly negative impact may be due to the small number of agents. Id. at ¶¶ 9, 71, Tables 1, 35.

143. Agents reporting working more than ten percent of their hours undercover generally did not seek promotions. Id. at ¶ 73.

144. Based on the TECS and VAACS data, no Hispanic agent who logged more than ten percent of his total hours to undercover work and was not promoted to grade GS-14 ever even applied for a GS-14 promotion. Id. at ¶ 73.

145. Since approximately the year 2000, Customs had a policy whereby field offices were encouraged to hire contractors to monitor wires and transcribe (and, if necessary, translate) intercepted conversations into English. See Suppl. Kilcoyne Decl. at ¶ 23.

146. Even before this policy became official, many field offices used contractors to monitor the wires. See, e.g., Webber Decl. at ¶ 20; Suppl. Kilcoyne Decl. at ¶ 23.

147. Customs had very few wiretap cases before 2001 and used substantially more wiretaps after 2001. See Suppl. Kilcoyne Decl. at ¶ 27; Brown Decl. at ¶ 21.

148. Between 1993 and the end of 1999, Hispanic agents logged hours to only 48 cases where approval was sought from Headquarters to use a wiretap. See Suppl. Kilcoyne Decl. at ¶ 28.

149. Of those 48 cases, in 18 cases, the wiretap was monitored and transcribed by contractors; in three cases, the wiretap was monitored and transcribed by officers from other federal, state or local law enforcement agencies; in ten cases, no wiretap was ever employed; in four cases, the intercepted conversations were not in Spanish; in eleven cases, Customs agents monitored the wire along with contractors or other officers, but contractors were responsible for a majority of the translation; and in only two cases could Hispanic agents have possibly been solely responsible for monitoring and transcribing the wire, and in one of those two cases, the wire was only operational for 24 hours. Id.

DISCIPLINE

150. Allegations of employee misconduct could be received through an IA hotline number, the Customs' Customer Satisfaction Unit, mail, e-mail, referrals from the IG or referrals from IA field offices. Id.

151. Until 1999, all allegations of employee misconduct, whether they came from the public, other federal agencies, or within the agency, were investigated by the IA field office in the particular region in which alleged misconduct arose. Id. at ¶¶ 11, 28.

152. In 1999, Customs centralized the intake system for investigations of misconduct so that all allegations, regardless of the source, were forwarded to the Intake Group, a centralized intake office located at headquarters, for processing and assignment. Id. at ¶¶ 27, 29.

153. An allegation was classified into one of four classes: Class 1 involved allegations of criminal misconduct; Class 2 involved serious non-criminal misconduct; Class 3 allegations involved management issues; and Class 4 allegations were considered minor or frivolous allegations and were generally closed without action or investigation. See Declaration of Chris W. Pignone ("Pignone Decl.") at ¶ 31 (attached hereto as Exhibit 2).

154. Employees within the Intake Group conducted an initial analysis of an allegation to determine its appropriate classification. See Pignone Decl. at ¶ 32.

155. The Intake Group determined whether the allegation should be referred to management for action or to IA for investigation, or closed with no action taken. Id.

156. Allegations of misconduct on the part of OI employees at grade of GS-15 or higher or IA employees were investigated by the Department of the Treasury Office of Inspector General ("IG"). Id. at ¶ 30.

157. Less serious allegations of employee misconduct were referred by IA to Customs' management for examination and appropriate action. See Pignone Decl. at ¶ 33.

158. Management had the option of taking immediate action or assigning a fact finder to conduct an inquiry into the allegation. Id. at ¶¶ 33, 34.

159. On February 25, 1999, Customs established a formalized program for management inquiries, which provided training and written guidelines for a group of fact finders responsible for addressing allegations of misconduct not subject to an investigation by IA. Id.

160. IA provided guidance and oversight to fact finders. See Pignone Decl. at ¶ 34.

161. When a fact finding inquiry was concluded, the inquiry report was reviewed and approved by IA to ensure the inquiry was complete and thorough. See Pignone Decl. at ¶ 34.

162. Following one of the inquiry procedures described above, agents faced two major categories of discipline, if they were subject to discipline: the first category was discipline for less serious misconduct, for which employees received discipline that would range from an oral admonishment to a letter of reprimand to a suspension from duty and pay of fourteen-days or less; and the second category of discipline was an adverse action for serious misconduct, which included suspensions from duty and pay for more than 14 days, reductions in pay and/or grade, and removal. Id. at ¶¶ 4, 5.

163. Under Customs' formal discipline process, a proposing official issued a proposal letter to the employee informing him or her of the proposed discipline and outlining the specific facts and charges against the employee. See Pignone Decl. at ¶ 6.

164. The employee had the right to respond both orally and in writing to the charges and proposed discipline, setting out any mitigating circumstances. Id.

165. The deciding official determined whether or not the charges against the employee could be sustained, and if so, selected the specific penalty to impose. Id.

166. The deciding official took into account certain factors, known as the "Douglas Factors" when selecting an appropriate penalty, which include, among other things: the nature and seriousness of the offense; the employee's job level and type of employment; the existence of any past disciplinary record; whether or not the offense would have an effect on the employee's ability to perform at a satisfactory level; the consistency of the penalty with those imposed upon other employees for the same or similar offenses; the consistency of the penalty with the applicable agency table of penalties; the impact of the offense on the reputation of the agency; and the potential for the employee's rehabilitation. Id. at ¶ 7.

167. The deciding official could either sustain the original proposed action, reduce the penalty or impose no penalty but could not increase the penalty from the original proposed action. Id. at ¶ 8.

168. From 1982 until January 1996, supervisors in the individual local field offices had the responsibility for proposing and deciding disciplinary actions. Id. at ¶ 10.

169. In January 1996, both IA and OI established independent Disciplinary Review Boards ("DRBs") to issue proposals for adverse actions. Id. See Pignone Decl. at ¶ 13.

170. The DRBs for both OI and IA consisted of a panel of three members from that organization as well as an employee relations specialist from the Office of Labor and Employee Relations, in the Office of Human Resources. Id. at ¶¶ 14, 15.

171. The panel members were selected from approximately 50 senior managers and supervisors from the field and from headquarters. See Pignone Decl. at ¶ 14.

172. After reviewing the investigative reports produced by IA or the IG, the DRB panel would determine whether or not to propose an adverse action. Id. at ¶ 15.

173. If the DRB determined that the offense charged merited less discipline, the DRB would normally remand the case to local management for consideration of a lesser penalty. See Pignone Decl. at ¶ 16.

174. If the DRB determined that the offense charged merited an adverse action (something greater than a 14-day suspension), a member of the DRB panel would serve as the proposing official and would issue a letter to the employee outlining the proposed discipline. Id.

175. The SAIC from the particular region to which the employee was assigned was delegated the authority to be the deciding official on the proposed discipline for OI employees. Id. at ¶ 18.

176. Decisions on proposed actions issued by the IA DRB were made by the Assistant Commissioner. Id.

177. In May 1999, the Commissioner of Customs, Raymond Kelly, established a service-wide DRB for all employees, including Customs Inspectors and non-law enforcement personnel, which had similar procedures as the preceding DRBs within IA and OI. See Pignone Decl. at ¶ 21.

178. As compared to the IA/OI DRBs, the panel members of the service-wide DRB were composed of a mix of managers and supervisors from the various divisions

within Customs (i.e., IA, OI and Field Operations with authority over Customs' Inspectors). Id. at ¶ 22.

179. Hispanic agents were no more likely than white agents to be removed or demoted for disciplinary reasons. See Siskin Decl. at ¶ 75.

180. Demotions for disciplinary reasons were very rare (five cases total) and only white agents were demoted. Id.

181. Removals were a rare event (only 12 cases). Id.

182. Only two Hispanic agents were removed, which is statistically equivalent to what would be expected given the Hispanic representation among 1811 agents at Customs. Id. at ¶ 75, Table 38.

183. The number of Hispanic agents ever suspended, 42 agents, was only 13 more than would be expected to be suspended (28.9) based on their representation in the workforce. Id. at ¶ 77, Table 40.

184. The Hispanic surplus in suspensions primarily occurred after the disciplinary process at Customs was revised to implement a service-wide procedure under Commissioner Raymond Kelly in 1999. Id. at ¶ 79; Tables 42A, 42B.

VETTING

185. In 1999, Customs instituted a formalized type of reference check, known as "vetting," whereby the employment history of all candidates for promotion, transfers, and awards and bonuses would be reviewed for past disciplinary problems or past or pending IA investigations. See Shepherd Decl. at ¶ 5.

186. Vetting involved a three-step process: first, the vetting office would check with IA

or the IG to determine if the candidate for selection was the subject of any former or pending investigation; second, the vetting office would contact the Office of Labor and Employee Relations to determine if the individual had been subject to any past disciplinary action; finally, the vetting office would do a manual check of the individual's Official Personnel File ("OPF") to determine the awards and promotion history of that individual. Id. at ¶ 6.

187. If no derogatory information was found, the vetting office would "clear" the individual for selection. Id. at ¶ 7.

188. If, on the other hand, the individual had a closed investigation or prior disciplinary problems, the vetting office would forward the relevant information to the Office of the Assistant Commissioner or Deputy Assistant Commissioner for a determination of whether the information was sufficiently serious to warrant not allowing the individual's selection to go forward. Id.

189. If the individual was the subject of an open investigation, the Assistant Commissioner of IA would provide an oral briefing to the Assistant Commissioner of the selecting office, who would decide if the information was sufficiently serious to warrant not allowing the selection to go forward. Id. at ¶ 8.

190. All candidates selected for promotions for positions at GS-12 and above, with the exception of persons applying for the Senior Executive Service ("SES") positions, were subject to vetting before the promotion was finalized. Id. at ¶ 9.

191. All persons selected for reassignment or transfer, persons selected to receive awards or bonuses, persons selected to be EEO counselors or persons selected to

serve on the agency's disciplinary review board were subject to vetting. Id. at ¶ 10.

192. There was no statistically significant difference between white and Hispanic agents in the same grade in their likelihood of being cleared by the vetting process.

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