For Opinion See 89 Empl. Prac. Dec. P 42747 , 305 F.Supp.2d 126 , 225 F.Supp.2d 16

United States District Court, District of Columbia.
Miguel A. CONTRERAS, et al., Plaintiffs,
v.
Michael CHERTOFF, Secretary, Department of Homeland Security, Defendant.
No. 1:02CV00923(JR).
May 5, 2006.

Defendant's Renewed Motion for Summary Judgment on Plaintiffs' Pattern or Practice Claims

Marc Weinberger, U.S. Customs and Border Protection (CBP), William R. Kraus, U.S. Immigration and Customs Enforcement (ICE), Of Counsel.Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, United States Attorney, Stuart A. Licht, Assistant Director, Federal Programs Branch, Civil Division, Karen K. Richardson (Tex. Bar No. 785610), James J. Schwartz (D.C. Bar No. 468625), Adam D. Kirschner (Ill. Bar No.6286601), Trial Attorneys, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, NW, Room 6126, Washington, DC 20530, Telephone: (202) 514-3374, Facsimile: (202) 616-8460, Attorneys for Defendant.

Defendant Michael Chertoff, Secretary for the Department of Homeland Security, hereby renews his Motion for Summary Judgment on Plaintiffs' Pattern or Practice Claims, pursuant to Rule 56 of the Federal Rules of Civil Procedure and pursuant to this Court's Order dated September 21, 2005 [Docket # 112]. In support of defendant's renewed Motion for Summary Judgment, the Court is respectfully referred to Defendant's previously filed Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (Docket #97), Defendants' Reply In Support of Motion for Summary Judgment (Docket #106), and the Memorandum of Points and Authorities in Support of Defendant's Renewed Motion for Summary Judgment and Exhibits attached hereto.

Respectfully submitted,

OF COUNSEL:

MARC WEINBERGER

U.S. CUSTOMS AND BORDER PROTECTION (CBP)

WILLIAM R. KRAUS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

Date: May 5, 2006

PETER D. KEISLER

Assistant Attorney General

KENNETH L. WAINSTEIN

United States Attorney

STUART A. LICHT

Assistant Director

Federal Programs Branch

Civil Division

/s/

KAREN K. RICHARDSON (Tex. Bar No. 785610)

JAMES J. SCHWARTZ (D.C. Bar No. 468625)

ADAM D. KIRSCHNER (Ill. Bar No.6286601)

Trial Attorneys

U.S. Department of Justice

Civil Division

Federal Programs Branch

20 Massachusetts Avenue, NW

Room 6126

Washington, DC 20530

Telephone: (202) 514-3374

Facsimile: (202) 616-8460

Attorneys for Defendant

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs have received all of the discovery to which they are due by order of this Court dated September 21, 2005, including approximately 182,000 pages of discipline files. Rather than helping them, however, such discovery defeats their discipline claim. The statistical evidence derived from those files conclusively demonstrates that Hispanic agents did not receive harsher discipline than white agents.

In his initial Motion for Summary Judgment on Plaintiffs' Pattern or Practice Claims, defendant presented uncontradicted statistical evidence showing that Hispanic Special Agents at the former U.S. Customs Service ("Customs") were treated as well as, if not better than, white Special Agents in almost every aspect of their employment, including promotions, transfers, awards, training and assignment claims. Defendant further demonstrated that Customs did not engage in a pattern or practice of retaliation. In this renewed motion for summary judgment, defendant presents additional statistical evidence that also defeats plaintiffs' discipline claim.

Defendant retained Dr. Frank Landy, an expert in the field of industrial organization psychology, to review and code the 182,000 pages of discipline files to extract relevant information pertaining to the suspensions of Hispanic and white agents, including the length of the suspensions, the number and type of offenses charged, whether the penalty was consistent with the range of penalties recommended by Customs' Table of Offenses and Penalties ("TOP"), and whether any mitigating or aggravating circumstances ("Douglas Factors") were a factor in the length of the suspension. Dr. Landy's coding of the discipline files resulted in the creation of a new data

set that defendant's statistical expert, Dr. Bernard Siskin, then analyzed. Dr. Siskin's analyses confirm that Customs did not treat Hispanic agents any more harshly than white agents in discipline.

First, there is no instance in which a white Special Agent and an Hispanic Special Agent were charged with the same offense, had the same number of prior offenses and had other, comparable mitigating and/or aggravating Douglas Factors that would make them similarly-situated. In the absence of statistical comparisons to similarly-situated white agents, plaintiffs cannot establish a pattern or practice of discriminatory discipline against Hispanics.

Even when one performs other, alternative statistical comparisons, no “pattern” of discrimination against Hispanic agents in discipline emerges. For example, when Dr. Siskin compared the average number of days that the 234 white and Hispanic agents were suspended during the relevant time period, regardless of the type of offense committed or other relevant factors, he found no statistically significant difference in the number of suspension days that white and Hispanic agents received.

Dr. Siskin also compared white and Hispanic agents who were charged with the same offense and had the same number of previous offenses, irrespective of the differences in individual employees' circumstances that make employees not similarly-situated (e.g., performance record, length of service or other Douglas Factors). Even when excluding the Douglas Factors, he found only five Hispanic agents who had committed similar offenses and had the same number of prior offenses as white agents. More importantly, in all five of the matched groups, the Hispanic Special Agents received *fewer*, or the same number of, suspension days than the white Special Agents received, on average.

To increase the relevant sample size for his statistical analysis, Dr. Siskin also compared the lengths of suspensions imposed on agents who committed different offenses, but where the offenses carried the same recommended penalty length (i.e., treating as equivalent two different offenses that both carried a recommended penalty of, for example, 5 to 14 days). Again, Dr. Siskin found no statistically significant difference in the penalties received by white and Hispanics.

Finally, Dr. Siskin conducted a logistic regression analysis to study the impact that an agent's national origin may have had on an agent's suspension length by specifically controlling for factors that might otherwise affect the penalty imposed (i.e., the minimum and maximum penalty recommended by Customs' TOPs and the Douglas Factors). Dr. Siskin concluded that Hispanic agents received *fewer* days of suspension, on average, than expected as compared to white special agents. The result favoring Hispanics, although not statistically significant, is clearly inconsistent with a finding of discrimination. In sum, whichever way the data is analyzed, the conclusion remains the same; Customs did not treat Hispanic agents more harshly than white agents in discipline.

The burden of production is on the plaintiffs and the data show that they cannot sustain that burden on any of their claims. Accordingly, pursuant to the instructions of this Court by its Order dated September 21, 2005, defendant hereby renews its motion for summary judgment on plaintiffs' pattern or practice claims, including the claims relating to promotions, transfers, training, awards, assignments, retaliation and discipline. Defendant refers the Court to the memorandum in support of defendant's initial motion for summary judgment on plaintiffs' pattern or practice claims [Docket #97] and defendant's Reply [Docket#106] for a full recitation of the legal authority and evidence supporting defendant's renewed motion. The statistical evidence presented in that earlier motion, as well as the supplemental evidence set forth herein conclusively demonstrates that Customs did not engage in a pattern or practice of discrimination and that defendant is entitled to summary judgment on all of

plaintiffs' claims.

BACKGROUND

On August 30, 2004, defendant moved for summary judgment on plaintiffs' pattern or practice claims, including promotions, transfers, awards, training, work assignments, discipline and retaliation. *See* Mem. in Support of Def's Mot. for SJ on Plfs' Pattern or Practice Claims ("Def's SJ Mem") [Docket #97]. In that motion, defendant presented statistical evidence showing that

(1) Hispanic special agents at Customs were promoted to supervisory positions at a rate slightly higher, not lower, than whites, *see* Mem. in Support of Def's Mot. for SJ on Plfs' Pattern or Practice Claims ("Def's SJ Mem") [Docket #97], at 26-29; Exhibit 10 Declaration of Bernard R. Siskin ("Siskin Decl."), ¶¶ 18, 21-24, 29, 34;

(2) Special agents assigned to the Southwest border or Puerto Rico were more, not less, likely to be promoted than agents not assigned to those areas and Hispanic agents transferred to the Southwest border or Puerto Rico were more likely to be promoted than similarly situated white agents assigned to those same areas, *see* Def's SJ Mem at 35-37; Exhibit 10, Siskin Decl. at ¶¶ 47, 56;

(3) Hispanic special agents were proportionately represented in foreign posts, including those in Europe, *see* Def's SJ Mem at 37-38; Exhibit 10, Siskin Decl. at ¶ 36;

(4) Hispanic agents 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, *see* Def's SJ Mem at 43-44; Exhibit 10, Siskin Decl. at ¶ 46;

(5) Hispanic special agents received statistically significantly more training than white agents, *see* Def's SJ Mem at 49; Exhibit 10, Siskin Decl. at ¶¶ 61-63;

(6) 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, *see* Def's SJ Mem at 53; Exhibit 10, Siskin Decl. at ¶ 66;

(7) Only 13 more Hispanic agents were suspended than expected by chance over the entire ten-year period from January 1, 1993 and March 9, 2003, *see* Def's SJ Mem at 65-66; Exhibit 10, Siskin Decl. at ¶ 79, Tables 42A & B; and

(8) No statistical evidence existed that would show that Hispanics received harsher discipline than similarly-situated white agents for the same or similar offense, *see* Def's SJ Mem at 65-66; Exhibit 10, Siskin Decl. at ¶¶ 9, 75, 76 & 79.

In his motion, defendant also cited legal authority supporting the conclusion that retaliation claims are not suitable for class treatment because of their fact-sensitive and individualized nature. *Id*. at 68-71. Defendant also demonstrated that Customs had a formal discipline system that was designed to promote consistency and neutrality. *Id*. at 60-64.

"For administration and docket control reasons," this Court denied without prejudice the defendant's Motion for Summary Judgment on Plaintiffs' Pattern or Practice Claims. *See* Order dated Sept. 21, 2005 at 21. The Court also partially granted plaintiffs' Rule 56(f) discovery requests, permitting plaintiffs discovery on the "reasons for and harshness of sanctions imposed on Hispanic and white agents." *Id*.[FN1] Defendant produced approximately 182,000 pages of investigative and discipline files responsive to plaintiffs' discovery requests. Defendant is entitled to summary judgment based on the data derived from those produced files with respect to plaintiffs' discipline claim, and on all of plaintiffs' other claims -- promotions, transfers, training, awards, assignments, and retaliation -- for the reasons set forth in defendant's prior briefs.

FN1. Defendant also produced to plaintiffs the definitions of the fields in the PERHIS, TRAEN, VAACS and TECS data systems, as well as the possible values that are contained in those fields. *See* Order dated Sept. 21, 2005, at 21.

ARGUMENT

I. THERE IS NO STATISTICAL EVIDENCE OF A PATTERN OR PRACTICE OF DISCRIMINATORY DISCIPLINE AGAINST HISPANIC SPECIAL AGENTS.

A. To Establish A Pattern Or Practice Discipline Claim, Plaintiffs Bear The Burden Of Showing That The Discipline Imposed On Hispanic Agents Was Harsher Than That Imposed On Comparably Situated White Agents For The Same or Similar Offenses.

To establish a *prima facie* case of discriminatory discipline, it is not sufficient for plaintiffs to show that Hispanics were suspended more often than whites; they must show that Hispanic agents received harsher penalties than white agents who committed the same or similar offenses and had "nearly identical" employment histories. *See Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995); *Carter v. Rubin*, 14 F. Supp. 2d 22, 38 (D.D.C. 1998), As this Court stated, "a *prima facie* case of discrimination in discipline includes showing that 'the discipline imposed [on the minority group] was harsher than that imposed on comparably situated whites.' " *See* Order dated Sept. 16, 2005, at 20, *quoting Wilmington v. J.I. Case Co.*, 793 F.2d 909, 915 (8th Cir. 1986): *see also Stotts v. Memphis Fire Department*, 858 F.2d 289, 298 (6th Cir. 1988) ("What is essential to proof of 'pattern and practice' is a showing that the other 'employees involved in acts against [the employer] of *comparable seriousness' received less stringent discipline*"), *quoting McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 283 n.11 (1976) (emphasis in original); Def's SJ Mem. at 64-65. Therefore, "evidence showing that Hispanics were suspended more frequently than whites, without evidence about the offenses for which suspensions were imposed, or the length of the suspensions, is not enough to satisfy plaintiffs' burden of production." Order dated Sept. 16, 2005, at 20.

The burden is on plaintiffs to show a statistically significant "disparity between the minority and majority groups in an employer's workforce." *See* Order dated Sept. 16, 2005, at 4, *quoting Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984). For a discriminatory treatment case. "[t]his usually means providing evidence -- often in statistical form -- of a disparity in the position of members of the plaintiff class and *comparably qualified* whites. Similarly, on the disparate impact challenges to specific employment practices the plaintiff class must present evidence that the practices have a disproportionately adverse effect on the plaintiffs." *Segar*, 738 F.2d at 1267 (emphasis retained): *see also Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) ("[w]hile anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systematic pattern of discrimination.").

As applied to this case, plaintiffs' burden requires a statistically significant showing that Hispanic agents received harsher penalties than similarly situated whites for comparable offenses. A proper statistical comparison requires (1) that the offenses of whites and Hispanics be the same or similar, and (2) that the employees being compared have "nearly identical" employment histories,

1. To Be Similarly-Situated, Hispanic and White Employees Must Have Committed The Same or Similar Offense.

Offenses are not comparable simply because they fall into the same category of misconduct (e.g., firearm viola-

tions), they must be the same or of comparable seriousness within that category. *See Carter v. Rubin*, 14 F.Supp. 2d 22, 39 (D.D.C. 1998). In *Carter*, the plaintiff, a GS-1811 Special Agent at the Bureau of Alcohol, Tobacco, and Firearms (ATF), had resigned after being threatened with removal for a firearms violation. *Id*. at 26. The plaintiff had been involved in a dispute that had "resulted in an automobile accident between plaintiff's government-owned vehicle and the vehicle that [her adult male friend] was operating and the firing of the government-issued Smith and Wesson revolver by [plaintiff] at [her friend]." *Id*. at 27. The Court examined each of the eight firearm violations the plaintiff cited as evidence that similarly situated males were treated more favorably, but found that none were similar enough for comparison. *Id*. at 39. Of the eight incidents, two did not involve firearms, a third was an accidental discharge of a government-issued firearm, a fourth involved an individual who failed to report the discharge of a firearm, and three others did not involve the firing of the gun at an individual. *Id*. at 39-40. The final incident involved the same offense as the one plaintiff committed, discharge of a government-issued firearm, but due to the factual circumstances surrounding that incident, the court did not consider the individual committing the offense to be similarly situated to the plaintiff. *Id*. at 40.[FN2] Thus, even when offenses are within the same general category of misconduct, one must still determine if the employees' misconduct is truly the same or of comparable seriousness.

> FN2. Similarly, in *Stotts*, the Sixth Circuit found that the plaintiff did not demonstrate a pattern or practice of disparate discipline even though "in each of the four incidents [of fighting], if a black participated he initially received more severe discipline than the whites at the hands of the Department." *Stotts*, 858 F.2d at 296 (internal punctuation omitted). The Sixth Circuit examined the fights involved and found the "district court's finding of a pattern and practice to be clearly erroneous because it is based upon comparisons of a series of factually unique and qualitatively dissimilar incidents and a corresponding series of appropriately individualized disciplinary actions which have been imposed in complete consistency with racially neutral and nonarbitrary guidelines," *Id*. at 298.

2. To Be Comparably-Situated, Hispanic and Whites Must Have "Nearly Identical" Employment Histories.

Not only must the offenses be comparable, but the employees being compared must have "nearly identical" employment circumstances. *See Carter*, 14 F. Supp. 2d at 38 ("[t]he plaintiff must prove that all of the relevant aspects of her employment situation are nearly identical to those of the male employees who she alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.") (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (internal quotations omitted); *see also Neuren*, 43 F.3d at 1514 ("In order to show that [plaintiff] was similarly situated to the male employee, [she] was required to demonstrate that all of the relevant aspects of her employment situation were 'nearly identical' to those of the male associate.") (internal citation omitted).

Whether compared employees have "nearly identical" employment circumstances can be ascertained by analyzing "Douglas Factors," a series of twelve factors federal agencies use to determine appropriate discipline penalties. *See Douglas v. Veteran's Administration*, 5 MSPB 313, 305-06 (1981). 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 impact of the offense on the reputation of the agency; and the potential for the employee's rehabilitation. *Id*; *see also* Supplemental Expert Report: Discipline by Dr. Frank Landy ("Suppl. Landy Report"), Attachment C (attached hereto as Exhibit 1).

At Customs, deciding officials considered more than whether the investigated employee committed the miscon-

duct for which he or she was charged; they also considered the Douglas Factors in determining the appropriate discipline penalties. *See* Declaration of Christopher Pignone ("Pignone Decl.") at ¶ 7 (attached as Exh. 2 to Def's SJ Mem). For example, two individuals who commit identical offenses may not have the same employment record. One employee may have had a long history of disciplinary problems while the other may have had a long history of good behavior. Because the application of the Douglas Factors played an important role in the determination of the appropriate penalty, they must be analyzed as a predicate to any statistical comparison of individuals (white and Hispanic) to ascertain whether they can be classified as similarly situated. *See* Suppl. Landy Report at 33; *see Stotts*, 858 F.2d at 298 (disciplinary penalties cannot be adequately compared without considering employees' "disparate personnel histories," including whether individuals were "repeat offenders].").

In short, plaintiffs bear the burden of presenting statistical evidence showing that Hispanics received harsher penalties than comparably situated whites for similar offenses. Any statistical analysis would have to compare Hispanic and white agents who were "nearly identical" in employment circumstances and similarly situated in the offenses that they committed. As shown below, plaintiffs cannot sustain their burden because, for purposes of a proper statistical comparison, there are no similarly-situated white and Hispanic agents who committed the same or similar offenses.

B. No White and Hispanic Agents Are Sufficiently Similar in the Offense Charged and Employment History To Conduct A Proper Statistical Comparison.

Plaintiffs' claim that Hispanics were treated differently than white agents must fail because the data show that there are no Hispanic and white agents who are similarly-situated. Customs did not maintain a data set that would allow for a statistical analysis of the harshness of penalties imposed. Therefore, Dr. Frank Landy, an expert in the field of industrial organization psychology, reviewed all of the discipline files recently produced to plaintiffs to determine whether Hispanic agents received lengthier suspensions than comparably situated white agents for the same or similar offenses. Dr. Landy established a protocol for coding the 234 discipline files for white and Hispanic agents who were suspended from January I, 1993 to March 9, 2003.[FN3] *See* Suppl. Landy Report at 17-21. Each discipline file was then coded for information relating to the length of suspension, the date of the decision, the offense(s) charged, whether the penalty imposed was consistent with the penalty ranges recommended by Customs' Tables of Offenses and Penalties ("TOPs"), and whether there were mitigating and/or aggravating Douglas Factors that influenced the penalty imposed (e.g., whether the employee had a prior disciplinary record). *Id*. at 17-18, The coding resulted in the creation of a new data set that was then analyzed by Dr. Bernard R. Siskin, a statistical expert. *Id*. at 15.

> FN3. As this Court noted, the statutory period for this putative class action began ninety days before plaintiff Contreras filed his EEOC complaint. *See* Mem. Order dated Sept. 21, 2005, at 3; 29 C.F.R, §§ 1614.105, 1614.204. Because the EEOC complaint was filed on March 3, 1995 (EEOC complaint attached hereto as Exhibit 2), the appropriate class period began on December 23, 1994, not December 23, 1992, as the Court surmised. However, for purposes of statistical analysis, defendant voluntarily included (and produced) data extending back almost another two years to January 1, 1993.

Analyzing the new data set, both Dr. Landy and Dr. Siskin concluded that there were no truly comparable white and Hispanic discipline cases for purposes of conducting a statistical analysis. Out of the 234 discipline cases reviewed, there was not any instance in which an Hispanic agent and a white agent were charged with the same offense(s), had the same number of previous offenses, and had corresponding Douglas Factors applied to their cases. *See* Suppl. Landy Report at 40-41; Supplemental Report of Dr. Bernard R. Siskin ("Suppl. Siskin Re-

port") at 4 (attached hereto as Exhibit 3). Accordingly, no white and Hispanic agents were sufficiently comparable in terms of their employment circumstances and the offenses charged to make them similarly-situated. [FN4] Consequently, plaintiffs cannot sustain their burden and defendant's summary judgment motion must be granted.

> FN4. Many discipline cases are not comparable for evident reasons. First, an agent charged with multiple offenses (e.g., drinking while on duty and misuse of a government owned vehicle) cannot be compared to one charged with a only a single offense (e.g., drinking while on duty). *See* Suppl. Landy Report at 43; Suppl. Siskin Report at 6-7. Nor can an agent who has a history of disciplinary problems be compared to one who has no history of prior discipline. *See* Suppl. Landy Report at 32, 42. Even when comparing two agents who are charged with the same offense and have the same number of prior offenses, the employment circumstances of the two agents may differ significantly. One could be an employee with many years of service; the other could be a new hire with a less than perfect performance record. Such factors can play a role in the length of suspension imposed and must be considered when determining whether agents are similarly situated. *Id*. at 33, 42.

II. EVEN USING ALTERNATIVE STATISTICAL ANALYSES, THE EVIDENCE SHOWS THAT HISPANIC AGENTS DID NOT RECEIVE HARSHER PENALTIES THAN WHITE AGENTS.

In the absence of truly comparable discipline actions to analyze, Dr. Siskin undertook a series of alternative analyses to determine whether there was any statistical "pattern" of disparity that was adverse to Hispanics based on the lengths of suspensions imposed. He concluded that no such statistical disparity exists in this case.

A. Overall Analysis of Days Suspended, Excluding Comparison of Offenses And Employment Histories

First, Dr. Siskin examined the data to ascertain whether Hispanic agents received, on average, longer suspensions than white agents, irrespective of the type of offenses charged or whether any Douglas Factors affected the penalties imposed. Dr. Siskin found that there is no statistically significant difference between the suspension lengths imposed on whites and Hispanics. *See* Suppl. Siskin Report at 8-9, Table 1.

B. Analysis Of Similar Offenses, Excluding Comparison of Employment Histories

Dr. Siskin then matched white and Hispanic discipline cases by the type of offense charged. He excluded other factors, like the Douglas Factors, that might otherwise be included because, as noted above, *see supra* Section I, B, when he analyzed these factors, he found no comparable white and Hispanic cases. *See* Suppl. Siskin Decl. at 4, 5. Even excluding Douglas Factors, he found only five matched groups of offenses. In four of the five matched offenses (involving 4 Hispanics and 9 whites), the Hispanics agents received *fewer* days of suspension than the white agents received, on average. *See* Suppl. Siskin Report at 9, Table 2. In the fifth matched offense, involving one Hispanic agent and one white agent, the Hispanic and white agents received an equal number of days suspended. *Id*.

C. Analysis of Different Offenses With Same Recommended Penalty Range

Because the sample size of comparable discipline cases was too small to draw meaningful statistical conclusions, Dr. Siskin performed a third alternative analysis grouping offenses that were different in nature, but that carried the same recommended penalty range as set forth in Customs' TOPs. *See* Suppl. Siskin Report at 9. During the relevant period (1993 to 2003), Customs had in place two separate TOPs; one issued in 1990 and a modified version issued on August 23, 1999. *See* Suppl. Landy Report at 8, Attachments A & B, In those TOPs, Cus-

toms provided guidance as to the recommended penalty range for particular offenses. *Id*. at 26. For example, in the 1990 TOP, the recommended penalty for an agent with no prior offenses who was charged with refusal to carry out a proper order (i.e., insubordination) was 5 to 10 days of suspension. *See id*., Attachment A. In that same TOP, the recommended penalty range for an agent with no prior offenses who was charged with unnecessary display of a firearm was also a 5 to 10 day suspension. *Id*.

By treating as equivalent different offenses that carried the same recommended penalty range, Dr. Siskin was able to study a total of 69 cases, involving 16 Hispanic agents and 53 white agents. *See* Suppl. Siskin Report at 9-10. He found seven sets of offenses for which the offenses in each set carried the same penalty range. *Id*. at 9. Analyzing those sets of offenses, he found no statistically significant difference in suspension length for Hispanic and white agents. *Id*. at 9-10 & n.8. In three of the seven penalty range groups, the white agents had, on average, longer suspensions than the Hispanics. *See* Suppl. Siskin Report at 9, Table 3.[FN5] Moreover, of the 16 Hispanic agents represented in the seven groups, a majority (11) were in the three penalty range groups in which the white agents had, on average, longer suspensions than the Hispanic agents. *Id*. at 10, Table 3. Of the remaining five Hispanic agents studied, there was no statistical significance when compared with whites. Three received substantially longer suspensions than white agents, with those three Hispanics receiving suspensions of 6 to 10 days longer than the whites in the groups. *Id*. Because of the small sample size, those three outlier Hispanic suspensions resulted in Hispanics receiving, on average, slightly longer suspensions than whites among all of the 16 Hispanics studied. *Id*. Nevertheless, the disparity was not statistically significant, representing only 0.62 units of standard deviation. *Id*. Table 3.

> FN5. As Dr. Siskin notes in footnote 8 of his Supplemental Report, because 3.5 (half of the seven groups) is not a possible outcome, one would expect either 3 or 4 of the groups to favor Hispanics by chance. *See* Suppl. Siskin Report at 10, n. 8. Thus, Dr. Siskin's finding that Hispanics were favored in three out of seven of the matched groups comports with statistical expectations and does not support plaintiffs' allegation of discrimination.

Moreover, the suspension data showed no statistically significant disparity adverse to Hispanics regardless of the TOP period (i.e., from January 1, 1993 to August, 22, 1999, representing the period before Customs' TOP was substantively revised, and from August 23, 1999 to March 9, 2003, the period after the revisions to the TOP occurred).[FN6] *See* Suppl. Siskin Report at 10-11, Tables 3A & 3B. Thus, no statistically significant difference in the length of suspension for Hispanics and whites existed during either period or overall. *Id*.

> FN6. Dr. Landy opined in his report, and Dr. Siskin concurred, that revisions to the TOP in 1999, as well as other changes to the discipline system at Customs that occurred in 1999, require that the period prior to August 23, 1999, be treated distinctly from the period from August 23, 1999, to March 9, 2003. *See* Suppl. Landy Report at 37-41; Suppl, Siskin Report at 3. Accordingly, both Dr. Landy and Dr. Siskin analyzed the data from the two periods separately, as well as over the entire time period between January 1, 1993 to March 9, 2003, *See* Suppl. Landy Report at 37-41; Suppl. Siskin Report at 3.

D. Analysis of Penalties Falling Below or Above Recommended Penalty Range

To increase the sample size of his study, Dr. Siskin also examined whether the penalties imposed on white and Hispanic special agents were either below or above the recommended penalty guidelines of the relevant TOPs. This was done to determine whether the chance of receiving a suspension either above or below the recommended range of penalties was affected by Hispanic national origin. *See* Suppl. Siskin Report at 6. For the analysis of suspension lengths exceeding the recommended penalty guidelines, Dr. Siskin studied 90 white and Hispanic

suspensions, involving 16 Hispanics and 74 whites.[FN7] *See* Suppl. Siskin Report at 7. Dr. Siskin found that two out of 16 Hispanic agents received a suspension above the recommended maximum penalty, while 7 of 74 white agents received above the recommended maximum penalty. *Id*. at 11. The difference between whites and Hispanics was not statistically significant, representing 0.441 units of standard deviation. *Id*. For the analysis of suspension lengths that fell below the recommended penalty guidelines, Dr. Siskin studied 80 suspensions, involving 17 Hispanics and 63 whites. *See* Suppl. Siskin Report at 7. Dr. Siskin found parity between whites and Hispanics, with 0.0 units of standard deviation. *Id*. at 11. All of these results are exactly what one would expect if national origin was irrelevant to the discipline process. *Id*., Tables 4, 4A, 4B, 5, 5A, & 5B (statistical results reported during the overall period and separately for the two distinct periods).

FN7. Dr. Siskin excluded all cases where multiple offenses were charged because there was no way to determine in those cases whether the penalty imposed was outside of the penalty range. *See* Suppl. Siskin Report at 6; Suppl. Landy Report at 43. In addition, Dr. Siskin excluded offenses that carried a possible minimum penalty of zero days suspended from his analysis of suspensions falling below the minimum recommended penalty range because there is no possibility of receiving a suspension of less than 1 day. Similarly, for his analysis of suspensions above the maximum recommended penalty range, Dr. Siskin excluded offenses that carried a maximum penalty of removal because an agent could not receive a penalty greater than a removal. *See* Suppl. Siskin Report at 6.

E. Regression Analysis Controlling for Recommended Penalty Range

Finally, Dr. Siskin performed regression analyses which allowed him to increase further the number of cases studied and, thus, the validity of the statistical analysis. The purpose of Dr. Siskin's regression analysis was to examine the effect, if any, of Hispanic status as a factor in the length of suspension. *Id*. at 12. To do so, he controlled for other factors that could affect the discipline decision.

In the first regression analysis, Dr. Siskin studied 138 suspensions, including 111 white and 27 Hispanic suspensions, excluding only cases involving multiple offenses and indefinite suspensions where an agent did not receive a specified number of days of suspension. *See* Supp. Siskin Report at 7. In this regression, he controlled for the penalty range recommended in the TOP for the particular offense charged and, in doing so, eliminated that factor as a cause for the penalty imposed. *Id*. at 12, Table 6.[FN8] By controlling for the minimum and maximum penalty and the number of prior offenses, Dr. Siskin found that, on average, Hispanic agents received 1.45 *fewer* days of suspension than would be expected if they were compared to white agents who committed offenses with the same range of recommended penalties and had the same number of prior offenses. *See* Suppl. Siskin Report at 12, Table 6. The difference favoring Hispanics was not, however, statistically significant. *Id*.

FN8. It is necessary to control for penalty ranges because, as Dr. Landy notes in his Supplemental Report, the TOP guidelines influenced the length of suspensions. *See* Suppl. Landy Report at 42-45.

F. Regression Analysis Controlling for Recommended Penalty Range and Douglas Factors

In addition to the TOP, the Douglas Factors play a significant role in the discipline decision. As Dr. Landy noted, in fully 82% of the 234 discipline cases studied, the deciding officials specifically indicated that they applied the Douglas Factors for purposes of determining the appropriate penalty. *See* Suppl. Landy Report at 33.[FN9] For this reason, Dr. Siskin also controlled for the effect of the Douglas Factors in his next regression analysis. *See* Suppl. Siskin Report at 12.[FN10] Again, Dr. Siskin found that controlling for the Douglas Factors tended to *favor* Hispanic agents in terms of the length of suspensions, although not to a statistically significant degree. *Id*., Table 7. Dr. Siskin found that Hispanics were receiving, on average, shorter suspensions than expec-

ted if they were compared to whites who committed offenses that carried the same recommended penalty range, had the same number of prior offenses and had the same mitigating and aggravating Douglas Factors. *Id*. at 13.

> FN9. Application of the Douglas Factors and the TOP guidelines is an important aspect of any state of the art discipline system. Use of the Douglas Factors and TOP guidelines provide consistency in the imposition of discipline, create a perception of fairness among employees and put employees on fair notice of the consequences of misbehavior. *See* Suppl. Landy Report at 27-29, 34-36.
>
> FN10. By controlling for Douglas Factors, Dr. Siskin could determine the effect of national origin on suspension length independent of the Douglas Factors applied to each individual, and could include in the study individuals who had different Douglas Factors.

In sum, statistical evidence shows that plaintiffs cannot satisfy their burden of demonstrating a statistically significant disparity adverse to Hispanics in the length of suspensions. Rather, the statistical evidence shows that Customs did not treat Hispanic Special Agents any more harshly than white Special Agents in the suspension lengths imposed. Therefore, defendant is entitled to summary judgement on plaintiffs' discipline claim.

CONCLUSION

For the reasons set forth above and as set forth in the Memorandum In Support of Defendants' Motion for Summary Judgment on Plaintiffs' Pattern or Practice Claims (Docket #97) and Defendants' Reply In Support of Motion for Summary Judgment (Docket # 106), defendant respectfully requests that the Court grant summary judgment to defendant on all of plaintiffs' claims.
Respectfully submitted,

OF COUNSEL:

MARC WEINBERGER

U.S. CUSTOMS AND BORDER PROTECTION (CBP)

WILLIAM R. KRAUS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

Date: May 5, 2006

PETER D. KEISLER

Assistant Attorney General

KENNETH L. WAINSTEIN

United States Attorney

STUART A. LICHT

Assistant Director

Federal Programs Branch

Civil Division

_____ /s _____

KAREN K. RICHARDSON (Tex. Bar 785610)

JAMES J. SCHWARTZ (D.C. Bar No. 468625)

ADAM D. KIRSCHNER (Ill. Bar No. 6286601)

Trial Attorneys

U.S. Department of Justice

Civil Division

Federal Programs Branch

20 Massachusetts Avenue, NW

Room 6126

Washington, DC 20530

Telephone: (202) 514-3374

Facsimile: (202) 616-8460

Attorneys for Defendant

Miguel A. CONTRERAS, et al., Plaintiffs, v. Michael CHERTOFF, Secretary, Department of Homeland Security, Defendant.
2006 WL 1780818 (D.D.C.) (Trial Motion, Memorandum and Affidavit)

END OF DOCUMENT