United States District Court, District of Columbia.
CONTRERAS, et al.,
v.
RIDGE.
No. 102CV00923.
June 16, 2006.

Date: June 16, 2006

Memorandum in Oppostion to Defendant's Renewed Motion for Summary Judgment on Plaintiffs' Pattern and Practice Claims

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INTRODUCTION

Plaintiffs Miguel Contreras et al., by counsel, respectfully submit their Opposition to Defendant's Renewed Mo- tion for Summary Judgment on Plaintiffs' Pattern or Practice Claims.

Plaintiffs oppose Defendant's Renewed Motion for Summary Judgment for the reasons set forth below and as set forth in Plaintiffs' previously filed Memorandum in Opposition to Defendant's Motion for Summary Judgment on the Pattern and Practice Claims (Docket # 103).

The evidence conclusively demonstrates that there exist numerous disputed issues of material fact, sufficient to deny summary judgment or, in the alternative, the need for Plaintiffs to take additional discovery to prepare a full response on the merits under Fed. R. Civ. 56(f). For these reasons, Plaintiffs oppose Defendant's Renewed Motion.

The Court's September 21, 2005, Memorandum Order permitted Plaintiffs to “take discovery on “definitions of... the fields, or the definitions of the values that can appear in those fields” in the PERHIS, VAACS, TECS and TRAEN databases, and, if they wish, on the reasons for the harshness of sanctions imposed on Hispanic and white agents.” Pursuant to that Order, Defendant provided Plaintiffs thousands of pages of documents pertaining to discipline. As this memorandum explains, those documents, along with Defendant's expert's analysis of those documents, do not demonstrate an absence of disputed material facts with respect to Plaintiffs' pattern or prac-

tice claims regarding discipline. Accordingly, Defendant's Renewed Motion for Summary Judgment must be denied.

Plaintiffs also respectfully request the Court to refer to Plaintiffs' previously filed Memorandum in Opposition to Defendant's Motion for Summary Judgment on the Pattern and Practice Claims. Based on its previous submis- sions and the arguments set forth below, Plaintiffs urge the Court to deny Defendant's Motion and permit Plaintiff to take discovery on matters pertaining to promotions, transfers and assignment, awards and bonuses, training opportunities, work assignments and further discovery on discipline.

BACKGROUND

In August 2004, the Defendant filed a motion for summary judgment seeking to dismiss Plaintiffs' complaint al- leging systemic discrimination against Hispanic Special Agents based on their national origin. The Court denied the government's motion and permitted Plaintiffs to take discovery on "definitions of... the fields, or the defini- tions of the values that can appear in those fields" in various databases as well as with respect to the reasons for and harshness of sanctions imposed on Hispanic and white agents."

After the limited amount of discovery was conducted, Defendant retained the services of Dr. Frank Landy to code the discipline data and tasked Dr. Bernard Siskin with the analysis thereof. Based on its depositions of vari- ous Customs personnel, Plaintiffs reassert their argument that the databases relied upon by Dr. Siskin and Dr. Landy are incomplete and unreliable. Without reliable and valid databases, the statistical inferences drawn by Dr. Siskin and Dr. Landy lack foundation and cannot be valid or considered sufficiently reliable to support a grant of summary judgment. Thus, Customs cannot demonstrate the absence of any genuine issue of material fact and therefore its motion should be denied.

Second, even if the databases were valid and reliable, there are sufficient questions about Dr. Landy's coding and Dr. Siskin's methodology that prevent summary judgment. Dr. Siskin's statistical analyses do not account for the myriad number of internal Customs personnel reports that contain admissions of discrimination, such as Customs' 1995 EEO Task Force Report or Blue Ribbon Panel Report.[FN1] Indeed, it does not appear that Dr. Siskin was even provided these documents. See Def. Mot. Summ. J., Siskin Decl., Exhibit 10. Thus, Customs can- not demonstrate the absence of any genuine issue of material fact and therefore its motion should be denied.

> FN1. *See e.g.* Blue Ribbon Panel, attached hereto as Exhibit 4; 1995 EEO Task Force Report," Pl. Opp. Defs. Mot. Summ. J., Exhibit 2.

Even if Dr. Siskin's and Dr. Landy's analyses could be credited, Plaintiffs have presented sufficient evidence to create material disputes of fact. Finally, statistical and anecdotal evidence from Customs' own internal reports support Plaintiffs' claims.

To defeat Customs summary judgment motion, it is sufficient at this stage for Plaintiffs to show that Defendant has not demonstrated an absence of disputed material facts by proving Plaintiffs failed to establish an essential element of their case. The evidence amply shows that such disputed questions exist.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy. Courts should grant it with caution so that no person will be deprived of his or her day in court to prove a disputed material factual issue. "As the Supreme Court has reminded us, the

nonmoving party is to be given the benefit of the doubt." *Greenberg v. FDA,* 803 F.2d 1213, 1216 (D.C. Cir. 1986). "If the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to significance, summary judgment is improper." *Id.; see also, Nat'l Ass'n of Gov't Em- ployees v. Campbell.,* 593 F.2d 1023, 1027 (D.C. Cir. 1978) (record must leave no room for controversy and must demonstrate that nonmoving party would not be entitled to prevail under any discernable circumstances). Thus, as Professor Wright has stated, "Summary judgment will only be granted in clear cases." 10A C. Wright A. Miller & M. Kane, Federal Practice and Procedure § 2725 at 428-29 (1998).

Summary judgment should be approached even more cautiously in complex cases. The resolution of complex questions of law frequently requires fuller development of the facts which cannot be accomplished through sum- mary judgment. See 10A. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2725 at 415 (1998). The Court, in Petition *of Bloomfield S. S. Co.,* 298 F.Supp. 1239, 1242 (D.C.N.Y. 1969) defined summary judg- ment with "ever-lurking issues of fact" as a "treacherous shortcut" that is "too fragile a foundation for so heavy a load" in complex cases. The Court continued, "Such a relief is always discretionary, and in cases posing com- plex issues of fact and unsettled questions of law, sound judicial administration dictates that the court withhold judgment until the whole factual structure stands upon a solid foundation of a plenary trial where the proof can be fully developed, questions answered, issues clearly focused and facts definitely found." *Id.*

Summary judgment is appropriate where "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment al- ways bears the initial responsibility of informing the court of the basis for its motion, and identifying those por- tions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affi- davits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

As noted by Justice White, "the movant must discharge the burden the Rules place on him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to support his case." *Id.* at 328 (White J., concurring). Thus, "[i]t is only after the mov- ing party has demonstrated the absence of any issue of material fact that the burden shifts to the party opposing the motion to demonstrate that an issue of material fact exists." *Greenberg v. FDA,* 803 F.2d 1213, 1215-16 (D.C. Cir. 1986) (emphasis in original); *see also Davis v. Chevy Chase Financial Ltd.,* 667 F.2d 160, 172 (D.C. Cir. 1981). As the D.C. Circuit has explained, "the crucial question is always whether the pleadings and other submissions show that there is no genuine issue of fact as to any material fact and that the moving party is en- titled to judgment as a matter of law." *See Beatty v. WMATA,* 860 F.2d 1117, 1121 (D.C. Cir. 1988).

Plaintiffs recognize that when the moving party does not bear the burden of proof at trial, it is required to prove that the nonmovant failed to establish an essential element to that party's case. To do so, the moving party must demonstrate that the nonmoving party's evidence itself is insufficient to establish an essential element of its claim. Once that is done, the nonmoving party must then dispute that contention by calling evidence to the atten- tion of the court. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 at 472 (1998).

STANDARDS FOR PROVING CLASS DISCRIMINATION

A plaintiff in a Title VII action can prove liability under two theories: disparate treatment or disparate impact. [FN2] Both pattern or practice disparate treatment claims and disparate impact claims are attacks on the system- ic results of employment practices. *Segar v. Smith,* 738 F.2d 1249, 1267 (D.C. Cir. 1984).

FN2. Although Customs argues that Plaintiffs must choose between disparate impact or disparate treat- ment theories, such is not the law. *See Segar* at 1266, ("Either theory may, of course, be applied to a particular set of facts." quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 366 n.15 (1977)).

In a disparate treatment claim, a plaintiff seeks to prove that an employer intentionally "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Int'l Bhd. Of Teamsters v. United States,* 431 U.S. 324, 324, 361-362 (1977). Proof of illicit motive is essential, but especially in cases al- leging class-wide discrimination, illicit motive can be inferred from a sufficient showing of disparity between members of the plaintiff class and comparably qualified members of the majority group. *Segar v. Smith,* 738 F.2d 1249, 1265-66 (D.C. Cir. 1984).

Suits alleging pattern or practice claims are typically divided into two phases, a liability phase and a damages phase. In the first phase, the plaintiffs must establish through a common method of proof that the employer is li- able to the class for the pattern or practice of discrimination. This is usually done with a combination of statistic- al evidence regarding the defendant's treatment of the class as a whole and anecdotal testimony from individual class members regarding specific acts of discrimination. *Taylor v. D.C. Water & Sewer Auth.,* 205 F.R.D. 43, 46 (D.D.C. 2002).

However, Plaintiffs in a Title VII pattern and practice case need not rely on statistical evidence alone. Because the ultimate issue in a disparate treatment case is whether the disparity resulted from unlawful discriminatory animus, plaintiffs may introduce any additional evidence which is probative of this issue.[FN3] *See Palmer v. Shultz.* 815 F.2d 84, 96 (D.C. Cir. 1987); *see also, Segar* at 1278 ("[t]o make out a prima facie case plaintiffs must meet the functional standard of *Teamsters, Burdine* and *Furnco;* they must present evidence sufficient to support an inference of discrimination. All evidence that a plaintiff presents can contribute to this inference, and should therefore be considered cumulative."); *EEOC v. American National Bank,* 652 F.2d 1176, 1188 (4th Cir. 1981) ("prima facie case can be made out ..." by a cumulation of evidence, including statistics, patterns, prac- tices, general policies, or specific instances of discrimination.").

FN3. The statistical evidence must meet the 5% level in Segar for it alone to establish a prima facie case under Title VII. Taken together, a two tailed test and a 5% probability of randomness require stat- istical evidence measuring 1.96 standard deviations. Palmer at 96. However, when plaintiffs in a Title VII pattern or practice case rely on evidence in addition to the evidence of the disparity itself, the issue for the trier of fact in determining whether the plaintiffs have established a prima facie case must be whether the totality of plaintiffs' evidence demonstrates, that, more likely than not, the disparity resul- ted from an unlawful discriminatory animus. Id. at 97.

In its Memorandum Order, the Court recognized that a showing of disparity may "theoretically be made by indi- vidual testimony alone", Memorandum Order, at pg. 4, citing *McKenzie v. Sawyer,* 684 F.2d 62, 71 (D.C. Cir. 1982). While the Court further explains that it has not found and Plaintiffs did not cite any cases "ruling in plaintiff's favor in a pattern or practice case in the absence of statistical proof of discrimination", *Id.* at pg. 5, that does not mean that the Court is precluded from doing so.

If the plaintiffs succeed in establishing liability in the first phase, the court may order class-wide injunctive and declaratory relief. If the plaintiffs seek monetary relief, they may proceed to second stage, "hearings," where each plaintiff enjoys the presumption that any adverse employment action taken against him or her was due to the pattern or practice of discrimination. *Taylor* at 46.

In a disparate impact case, a three-step, burden shifting framework is employed. The plaintiff must first make out a prima facie case by showing policies or practices that are neutral on their face and in intent but that non- etheless discriminate in effect against a particular group. *Anderson v. Zubieta,* 180 F.3d 329, 338-39 (D.C. Cir. 1999). In the second step, the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Id. citing 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971). Finally, if the defendant demonstrates business necessity, plaintiffs must be given the opportunity to demonstrate that an alternative em- ployment practice could meet the employer's legitimate needs without a similar discriminatory effect. Zubieta citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975).

ARGUMENT

As demonstrated below, Customs is unable to meet its burden of production under Fed. R. Civ. P. 56(c) by showing the absence of any genuine issue of material fact with respect to Plaintiffs' pattern and practice discrim- ination claims by establishing that Plaintiffs failed to establish an essential element of its case. Without such a demonstration, the burden does not shift to Plaintiffs to demonstrate an issue of disputed material fact. *See Greenberg v. FDA,* 803 F.2d 1213, 1215-16 (D.C. Cir. 1986).

However, even if Customs were successful in showing the absence of any genuine issue of material fact in their motion, Plaintiffs have presented sufficient evidence herein to create material disputes of fact. Thus, in either case, Customs' motion should be denied in its entirety.

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HISPANIC CUSTOMS AGENTS ARE DISCRIMINATED AGAINST WITH RESPECT TO PROMOTIONS

Defendant's Renewed Motion for Summary Judgment must be denied because it does not demonstrate an ab- sence of disputed material facts with respect to Plaintiffs' pattern or practice claims regarding promotions.

Dr. Siskin's statistical analyses should be disregarded because in setting up his "pools analysis," Dr. Siskin does not take into account the one year time-in-grade requirement. See Defs. Mot. Summ. J., Exhibit 10, Siskin Decl. at ¶¶ 23-38. In fact, Dr. Siskin recognizes that his "[m]ultiple pools analysis is limited that it cannot consider the factor of time-in-grade." Id. at 38.

As explained in its initial Opposition to Defendant's Motion for Summary Judgment, vacancy announcements is- sued under the U.S. Customs Service Merit Promotion Plan explicitly require that "[a]pplicants must have served 52 weeks at the next lower grade in Federal service to meet the time-in-grade requirement." *See e.g.* January 1999 Vacancy Announcement for Associate Special Agent-in-Charge, Pl. Opp. Defs. Mot. Summ. J., Exhibit 21. According to Dr. White, Customs' expert during the administrative process, "the minimum qualifica- tions for promotions into grades 13 through 15 include, but are not limited to, the requirement that the individual has at least one year of service in the next-lower pay grade."[FN4] It is not required that the time spent in a pay grade occurs immediately before the promotion. It may occur years prior to the agent's eligibility for promotion. [FN5]

FN4. Dr. White learned of these requirements through conversations with various Customs officials, in- cluding Tonya Bennett, Customs' Director of Employees Service. Because of the unreliability of the pay grade information, the year in grade requirement was not factored into Dr. White's statistical analysis. *See* Paul F. White, Analysis of Promotions to Series 1811, Pay grades 13-15 and SES positions at the

U.S. Customs Service, May 8, 2001 at 2, 5-6, Pl. Opp. Defs. Mot. Summ. J., Exhibit 11. Dr. Siskin ig- nored this critical factor as well.

FN5. This may be a particularly significant factor due to the lack of a mobility policy in Customs, many agents have taken downgrades from GS-14 to GS-13. Some hold GS-13 positions, but meet the 1 year time-in-grade requirement in GS-14 to compete for GS-15 positions.

Because Dr. Siskin failed to account for this minimum time-in-grade requirement, Palmer and Davis mandate that his statistical analyses be disregarded.[FN6] See also Koger v. Reno, 98 F.3d 631, 637 (D.C. Cir. 1996) (analyses that omit "major factors" may be inadmissible, as "[c]ourts have not, however, understood Bazemore to require acceptance of regressions from which **clearly major variables have been omitted - such as educa- tion and prior work experience.**") (emphasis added).

FN6. In addition, it is excludable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 US 579 (1993). *See Scales v. George Washington Univ.,* No. 89-0796-LFO, 1993 U.S. Dist. LEXIS 10692 (D.D.C. Jul. 27, 1993) (expert statistical testimony excludable under *Daubert*).

The question of whether the time-in-grade variable is a major factor alone establishes a material question of fact sufficient to defeat Defendant's summary judgment motion. *See Mozee v. Am. Comm. Marine Serv. Co.,* 940 F.2d 1036, 1048 (7th Cir. 1991) (vacating and remanding for resolution of a factual dispute involving whether a major factor accounted for a disparate impact).

Defendant erroneously argues that "controlling for time-in-grade would hurt plaintiffs' case". Even if that state- ment were true, it is immaterial in the instant proceeding. The fact that Defendant initially relied upon an incom- plete set of data is sufficient to give rise to a genuine issue of material fact.

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HISPANIC CUSTOMS AGENTS ARE DISCRIMINATED AGAINST WITH RESPECT TO TRANSFERS & ASSIGNMENTS

Customs' renewed motion for summary judgment must be denied because it does not demonstrate an absence of disputed material facts with respect to Plaintiffs' pattern or practice claims regarding transfers and assignments.

Despite the fact that the lack of a written rotation policy and inconsistent application of "policies by practice" was identified in Customs 1995 EEO Task Force Report as "problematic," Customs did not implement its Cus- toms border rotation policy until 2000.[FN7] *See* Defs. Mot. Summ. J. at 34. Even after the policy was imple- mented, Customs was not able to fund transfers for all agents who had completed a minimum of three years of service at designated locations. It should be noted that before any agent can be transferred under the rotation policy, the agent must clear an overall background review or vetting. *See* Royer Decl. at ¶ 18. Customs claims that it offered all eligible 1811 special agents an "opportunity" to submit self-funded lateral reassignment re- quests from the Southwest border locations.

FN7. *See* 1995 EEO Task Force Report at 58, Pl. Opp. Defs. Mot. Summ. J., Exhibit 2. In addition, the Report found that 32% of Hispanics had been asked to take a hardship post assignment and "[e]mployees were unable to identify the criteria management applies to promotions, transfer or train- ing..." *Id.* at 24, 61.

Defendant attempts to rebut Plaintiffs arguments with evidence that transfers to offices on the Southwest border

helped agents receive promotions. Defendant alleges that “Plaintiffs ... have failed to present any statistical ana- lysis that would create genuine issues of material fact on their pattern or practice claim relating to transfers.” Reply in Support of Defs. Mot. Summ. J., pg. 18. Defendant erroneously suggest that Plaintiffs were required to present statistical evidence pertaining to its transfer claim. Because Plaintiffs are in an unfair situation by having to defend their complaint prior to formal discovery, they do not have access to a complete set of statistical data pertaining to the transfer of Special Agents. Plaintiffs do, however, have anecdotal evidence from various Spe- cial Agents, including Special Agent Trujillo and Special Agent Renteria who both applied for and were denied transfers on numerous occasions. See Pl. Opp. to Defs. Summ. J.

Yet again, Dr. Siskin's transfer analyses should be disregarded in their entirety given that he relied on the VAACS database, which is not considered reliable by Customs.

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HISPANIC CUSTOMS AGENTS ARE DISCRIMINATED AGAINST WITH RESPECT TO AWARDS & BONUSES

Customs' renewed motion for summary judgment must be denied because it does not demonstrate an absence of disputed material facts with respect to Plaintiffs' pattern or practice claims regarding awards and bonuses. Bey- ond the problems previously referenced with respect to Customs' database, Dr. Siskin's analysis fails to control for several pertinent fields such as region and individual agent performance characteristics. Furthermore, Dr. Siskin's analysis fails to take into consideration various factors which would greatly affect the validity of its conclusions.

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HISPANIC CUSTOMS AGENTS ARE DISCRIMINATED AGAINST WITH RESPECT TO TRAINING OPPORTUNITIES

Customs' renewed motion for summary judgment must be denied because it does not demonstrate an absence of disputed material facts with respect to Plaintiffs' pattern or practice training claims during the class period. Ac- cording to Customs' 30(b)(6) designee, the TRAEN database is only complete from 1999. Thus, Dr. Siskin's stat- istical analyses of TRAEN (Tables 32-33), which purports to cover the 1993 through March 2003 period, cannot satisfy the foundational standard to be admitted as expert testimony, let alone satisfy the higher standard neces- sary for summary judgment.

Defendant argues that even though the even though the entry of information was not mandatory until 1999, the database is still reliable because Customs personnel entered the training data into the database prior to 1999, al- though they were not required to do so. The fact that some Customs personnel voluntarily chose to enter that in- formation into the database does not mean the database is complete thereby rendering it reliable.

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HISPANIC CUSTOMS AGENTS ARE DISCRIMINATED AGAINST WITH RESPECT TO UNDERCOVER, WIRETAP & OTHER UNDESIRABLE ASSIGNMENTS

Customs' renewed motion for summary judgment must be denied because it does not demonstrate an absence of disputed material facts with respect to Plaintiffs' claims relating to undercover, wiretap and other undesirable work assignments.

Plaintiffs respectfully request the Court to refer to Customs' 1995 EEO Task Force Report referenced in Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment. In that report, Customs

found that 67% of Hispanics reported doing at least some undercover work in the past two years and that 13% of Hispanics, double the amount of any other group, reported spending more than 25% of their time doing under- cover work. See 1995 EEO Task Force Report at 26, attached as Exhibit 2 to Pl. Opp. Mot. Summ. J. The Report further documented that Office of Investigations ("OI") field managers were concerned that "Hispanic agents were being put at a disadvantage by being heavily utilized in specialized assignments, including wiretaps and undercover assignments." Customs field managers stated that "those types of assignments resulted in Hispanic agents being unable to work their own cases and gain a broader base of professional experience." Id. at 67. While the Court indicates that the report "covers data collected for earlier periods", it also acknowledges that "the dated nature of these reports does not make them irrelevant" (internal citations omitted). Accordingly, the admissions contained in that report alone, or in combination with other matters or record, are sufficient to defeat Customs' motion for summary judgment.

Undercover:

In an attempt to defend its motion for summary judgment, Defendant alleges that "agents who worked some undercover were promoted faster than agents who did no undercover work." Reply in Support of Defs. Mot. Summ. J. at 28. To support its argument, Defendant relies on incomplete databases that do not accurately report undercover hours, and Dr. Siskin's faulty analysis. Defendant also unsuccessfully attempt to dismiss Plaintiffs' arguments about the "voluntary nature" of undercover work and affidavits of several agents who were adversely affected by Customs' "requirement" that they perform undercover work.

Plaintiffs provided more than sufficient evidence to establish their claim with respect to the disparate impact of undercover assignments through affidavits, testimony and/or depositions of Special Agent Contreras, Special Agent John Yera, Special Agent John Magaw and Special Agent Trujillo. See Pl. Opp. To Defs. Mot. Summ. J. and Exhibits thereto.

Wiretap:

Defendant fails to address Plaintiffs' claim with respect to the disadvantageous nature of wiretap assignments. Customs made findings in its 1995 EEO Task Force Report that Hispanic Agents were disadvantaged by wiretap assignments, because they were unable to work their own cases and gain a broader base of professional experi- ence. By itself, this alone is sufficient to defeat Custom's motion for summary judgment.

In their initial Motion for Summary Judgment, Defendant argued that summary judgment was appropriate because the partial data it had demonstrated that between 1993 through 1999, Hispanic agents logged hours to only 48 cases where field offices sought approval from headquarters. In 2000, Customs claims it implemented a policy whereby field offices were encouraged to hire contractors to monitor wires, transcribe them and, if neces- sary, to translate them into English. Customs used substantially more wiretaps in 2001. *See* Defs. Mot. Summ. J. at 53-54.

Customs' claim should be denied, not only because the database upon which it relies is incomplete, but also be- cause it fails to account for the agents assigned to wiretap duties with joint task forces in connection with the FBI, DEA or ATF or state or local law enforcement agencies.

A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HISPANIC CUSTOMS AGENTS ARE DISPROPORTIONATELY SUBJECT TO HARSHER DISCIPLINE THAN NON-HISPANIC AGENTS

In support of its initial Motion for Summary Judgment, Defendant submitted a Declaration and Report of Bern- ard R. Siskin, Ph.D. In that Report, Dr. Siskin concedes that, based upon his analysis, "Hispanic agents are more likely than white agents to be suspended for disciplinary reasons." Decl. of Bernard R. Siskin, Exhibit 10 to Defs. Mot. Summ. J., at p. 4. In an effort to dispel the clear inference of Dr. Siskin's initial statistical analysis, Defendant now submits a Supplemental Report of Dr. Siskin and a Supplemental Report of Dr. Frank Landy. However, these submissions, and Defendant's Renewed Motion for Summary Judgment, do not address the un- derlying disparity supported by Dr. Siskin's initial analysis.

Defendant's Analysis Is Directed to Only One Step in the Discipline Process

By his own admission, the purpose of Dr. Landy's investigation was an analysis of suspensions. Landy Report at p. 15. Neither his nor Dr. Siskin's Supplemental Report address the undisputed fact that Hispanic agents were disproportionately more likely to be charged with offenses which could and did result in suspension than their non-Hispanic counterparts. To analogize to the criminal process, the analyses provided by Defendant in support of its Renewed Motion for Summary Judgment address the sole issue of the application of "sentencing guidelines."

These analyses do not address the issue raised by Plaintiffs and confirmed by Dr. Siskin, i.e., Hispanic agents are disproportionately charged with and found to have committed offenses resulting in suspension. In order to refute this conclusion, Defendant must come forward with evidence demonstrating the basis for this dispropor- tionality, in order to rebut the clear inference that it is based on race. Defendant has put forth no analysis sup- porting a conclusion that Hispanic agents are more likely than non-Hispanic agents are more likely to commit such offenses. The uniformity of punishment, does not, in and of itself, resolve the underlying genuine issue of material fact as to the basis for Hispanic agents being disproportionately charged with offenses resulting in sus- pension. Decl. of Richard Startz, attached hereto as Exhibit 1.

Dr. Landy Was Selective in the Data Which He Considered in His Analysis

Exhibit E to the Report of Dr. Landy purports to be a spreadsheet of those suspensions which he had analyzed. However, assuming this to be the case, Dr. Landy's analysis was based upon selective data and, therefore, fatally flawed.

Attached hereto as Exhibit 2 is an undated memorandum from James Cottos, Assistant Inspector General for In- vestigations, to Assistant Commissioner, Office of Internal Affairs. This reflects that, based upon the same in- cident, three agents, one Hispanic and two non-Hispanic, were suspended. Of these, only one, George Ninmoor, is included in Dr. Landy's analysis. Ramon Martinez, the Hispanic agent who was both suspended and demoted, is not included on Exhibit E. Wayne Wallace, a non-Hispanic agent who received a shorter period of suspension than Agent Martinez for the same incident, is also not included on Exhibit E. Both of these would tend to under- cut Dr. Landy's conclusion. Further, this belies Dr. Landy's statement that there are no instances sufficiently similar to permit a proper comparison of suspension lengths. Landy Report at pp. 41, 42. Whether by design or carelessness, this demonstrates a defect in Dr. Landy's analysis which goes to his ultimate conclusions. There- fore, his analysis should not be considered by this Court.

CONCLUSION

Customs is unable to meet its initial burden of demonstrating the absence of any genuine issue of material fact with respect to Plaintiffs' pattern and practice discrimination claims. However, even if Customs were successful

in showing the absence of any genuine issue of material fact in their motion, Plaintiffs have presented sufficient evidence herein to create material disputes of fact. Therefore, Plaintiffs respectfully request the Court to deny Defendants Renewed Motion for Summary Judgment in its entirety.

Date: June 16, 2006

Respectfully submitted, GARVEY

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