

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HELEN EBBERT, PAMELA EDWARDS,
ISABELLA MINNECI, WENDY MURO,
FRANCES KAMERER, AND LORI CONKLIN
and all others similarly situated,

Plaintiffs,

-against-

05-CV5445(FB)(AKT)

NASSAU COUNTY, NASSAU COUNTY
POLICE DEPARTMENT, NASSAU COUNTY
CIVIL SERVICE COMMISSION,
THOMAS R. SUOZZI, in his official capacity,

Defendants.

_____x

**MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in opposition to defendants' motion for summary judgment pursuant to Rule 56 of the Fed. R. Civ. P. Plaintiffs filed their class action Equal Pay Act and Civil Rights complaint on November 8, 2005. Defendants answered on June 22, 2006. Plaintiffs filed an amended complaint on May 29, 2007, which defendants answered on June 7, 2007. Discovery in this case included document production, depositions of four Fire Communications Technicians ("FCTs")¹; one Fire Communications Technicians Supervisor ("FCTS"); the six PCO and PCOS plaintiffs²; Nassau County Civil Service Commission personnel (Pierre Schlemel, Classification Unit Head and Gregory Stoeber, Personnel Specialist), and the N.Y.S. Dept. Civil Service Testing Services Chief Personnel Examiner (Marcia Dudden).

Plaintiffs retained an expert, Dr. Kathleen Lundquist, who conducted two job site visits, conducted detailed review of documents and deposition transcripts and interviewed plaintiffs. Dr. Lundquist submitted an expert report³, a rebuttal report⁴ and was deposed. Defendants retained an expert, Dr. Gerald Barrett, who also made a site visit, submitted expert reports and was deposed. The expert witnesses arrived at contrary conclusions as to the substantial similarity of the PCO and FCT jobs and the PCOS and the FCTS jobs. The experts' conflicting analyses alone demonstrate that there are substantial material facts in dispute.

Defendants' arguments in support of their summary judgment motion are each unavailing and in tandem border on frivolous. Defendants erroneously rely upon the procedural argument of *stare decisis*, which is not applicable here. Also, without merit are Defendants' arguments that the jobs are not substantially similar; that there is no pay

¹ FCTs: Thomas Simek, Victor Sowinski, Gregg Spaulding, Paul Weigand. FCTS: Charles Albers

² PCOs: Helen Ebbert; Pamela Edwards; Isabella Minneci; Wendy Muro. PCOSs: Frances Kameron; Lori Conklin

³ Dr. Lundquist's expert report is annexed to Eisenberg Affirmation as Exhibit "A".

⁴ Dr. Lundquist's rebuttal report is annexed to Eisenberg Affirmation as Exhibit "B".

disparity; acts complained of are not wilful; that members of the classes are precluded because of the statute of limitations and that there is no pattern or practice of discrimination. For the reasons stated below, summary judgment should not be granted.

STATEMENT OF FACTS

Plaintiffs are female Police Communication Operators (“PCOs”) who receive calls and dispatch appropriate emergency police and medical personnel and Police Communication Operator Supervisors (PCOSs) who supervise the PCOs. For most of plaintiffs’ careers, PCO wages were graded in a civil service grade that was lower than their respective comparators (Muro⁵ 44-46). The comparators are the all-male FCTs who receive calls and dispatch emergency fire and medical personnel and the all-male FCTSS (Weigand 42; Simek 41). Both PCOs and FCTs serve as the first to respond to emergency situations in Nassau County. They fulfill a vital governmental function by enabling and facilitating police, fire and medical assistance to provide for public safety.

PCOs and PCOSs and FCTs and FCTSS all work in an office environment in the same Nassau County underground facility (Schlemel 42). PCOs receive and answer incoming 911 calls placed to the Nassau County’s 911 emergency system (Minneci 74). Utilizing coded protocols, PCOs decide on the appropriate response to each call and dispatch appropriate aid (Conklin 198; Minneci 74). FCTs similarly receive and answer incoming phone calls placed directly to the Nassau County fire emergency system and answer incoming calls from Nassau County’s 911 system transferred to them by PCOs (Simek 28-29; Weigand 39; Conklin 67.132). Utilizing coded protocols, FCTs also

⁵ Citations to deposition transcript sections will be identified by the deponent’s name and page referred to. Albers deposition transcript is Def. Exh. O. Conklin deposition transcript is Def. Exh. I. Ebbert deposition transcript is Def. Exh. N. Edwards deposition transcript is Def. Exh. GG. Kamerer deposition transcript is Def. Exh. E. Minneci deposition transcript is Def. HH. Muro deposition transcript is Def. Exh. G. Schlemel deposition transcript is Def. Exh. Q. Simek deposition transcript is Def. Exh. EE. Sowinski deposition transcript is Eisenberg Aff. Exh. F. Spaulding deposition transcript is Def. Exh. M. Weigand deposition transcript is Def. Exh. FF.

facilitate the appropriate response to each call and dispatch appropriate aid (Schlemel 73; Spaulding 24, 57; Weigand 22-27).

PCOs and FCTs utilize computer aided dispatch systems ("CAD") to process incoming calls (Muro 55, Minneci 68,74, Schlemel 60, Edwards 65). They communicate by radio with respective police and fire emergency personnel. In parallel fashion, these jobs require the call answerer to gather information from people requesting help, often in stressful, emergency situations. Each employee must be able to receive, monitor and dispatch calls to the appropriate emergency personnel. PCOs and FCTs dispatch emergency responders such as police and fire personnel, as well as ambulances, jaws of life, marine and air assistance (Conklin 129-130; Simek 59-60; Spaulding 41-44; Weigand 65-66.) Each job requires contact with other public service and private agencies e.g., Long Island Power Authority, New York State Police, Metro North Police, New York City Police and New York City Fire Department, among others (Weigand 67-68; Conklin 186; Minneci, 80).

PCOs follow their dispatched incidents through to conclusion as do FCTs (Ebbert 50). They each follow the directions of the uniformed police or fire person in charge once that person arrives on-site (Simek 51; Weigand 68; Albers 128-129; Minneci 81; Muro 57-58; Ebbert 51-53). The dispatching PCO and dispatching FCT must be aware of the location of multiple units when dispatching equipment and personnel to the scene of various emergencies (Minneci 81-82; Spaulding 30-32). The PCO or the FCT remain in contact with the officers who arrive at the scene of an incident and they are called upon to dispatch additional assistance as needed by the officers until the completion of the call (Conklin 186, 202; Spaulding 57-58; Edwards 72-73; Weigand 72-75). When multiple calls have been dispatched, the PCO must remain in contact with all officers dispatched on the different calls (Ebbert 51). Given the high volume of calls dispatched by the PCOs, handling multiple calls at the same time is quite frequent (Conklin, 202).

PCOs and FCTs all work twelve-hour shifts (Conklin 193; Minneci 51; Simek 31-33; Spaulding 35-37; Weigand 42-47). While FCTs take breaks at the discretion of the FCTS and eat their meals while working at their consoles (Weigand 42-47), PCOs are required to take breaks during the course of their twelve-hour shift. In order to make up for the time off on these break periods, PCOs are required to work an extra twelve-hour shift once every seven weeks. (Muro 48)

For both PCO and FCT jobs, the consequence of error is the same: unnecessary injury and/or death could result. These jobs deal with life and death circumstances. Although both jobs follow defined procedures and protocols and have little or no discretion to alter these procedures, some level of independent decision-making is employed in deciding on the type and priority of the calls received (Conklin 129-130; Ebbert 40-43; Minneci 80; Simek 50). PCOs and FCTs are closely supervised by their first line supervisor, PCOS or FCTS respectively, who have the ability to listen in on their calls and override their decisions, if necessary (Weigand, 70-71; Kammerer 47).

Both PCOSs and FCTSs monitor and supervise the performance of their subordinates (Conklin 109-110; Spaulding 50-52). Both PCOSs and FCTSs provide guidance on the handling of more complex calls and exercise some level of independent judgment in resolving questions from their subordinates. They are assigned to perform administrative duties, such as updating the information in the CAD systems and completing performance evaluations, maintaining records and training new and retraining incumbent employees (Spaulding 35; Weigand 41-42; Kameroner 43,55).

SUMMARY JUDGMENT STANDARDS

A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish its right to judgment as a matter of law. *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-1061 (2d Cir. 1995), citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). “The duty

of the court is to determine whether there are issues to be tried; in making that determination, the court is to draw all factual inferences in favor of the party against whom summary judgment is sought, viewing the factual assertions in materials such as affidavits, exhibits and depositions in the light most favorable to the party opposing the motion.” *Id.* (citations omitted) “If reasonable minds could differ as to the import of the evidence in the record from any source from which a reasonable inference in the nonmoving party’s favor may be drawn, the moving party simply cannot obtain [] summary judgment.” *R.B. Venture, Ltd. V. Shane* 112 F3d 54, 59 (2d Cir. 1997) (internal citations, alterations and quotations omitted). *Osborn v. Home Depot U.S.A., Inc.*, 518 F. Supp. 2d 377 (D. Conn. 2007). “Summary Judgment is improper if there is any evidence in the record that could reasonably support a jury’s verdict for the non-moving party.” *Hudson v Universal Pictures Corp.* 2004 WL 1205762 (E.D.N.Y. April 29, 2004). *See. Holcomb v. Iona College*, 2008 U.S. App. LEXIS 6897 (2d Cir. 2008).

POINT I
STARE DECISIS IS NO BAR
TO PLAINTIFFS CLAIMS

Defendants seek to rely on the case of *AFSCME v. Nassau County*, 799 F. Supp 1370 (E.D.N.Y. 1992) to bar adjudication of plaintiffs claims on the basis of *stare decisis*⁶. Defendants misunderstand the doctrine of *stare decisis*, which requires the same underlying factual posture and is applicable where a legal principle has been handed down addressing the legal issue in question. The facts in this case are entirely different

⁶ Black’s Law Dictionary defines *stare decisis* as: Lat. To abide by, or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb settled point. (cite omitted) Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same. (cite omitted) Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy (cite omitted) Doctrine is one of policy, grounded on theory that security and certainty require the accepted and established legal principle.

than the 1992 case. Furthermore, that case did not pronounce any legal principle, but rather simply analyzed the facts as they existed 16 years ago. Defendants conspicuously omit mention of the fact that the *AFSCME* decision did not even address the Police Communication Operator Supervisor title. Yet they seek preclusive effect of the 1992 decision hoping to close the courthouse doors to both plaintiff classes here. Surely, a decision that does not involve similar issues or parties cannot have any preclusive effect.

As Justice Ginsburg recently stated in dissent:

Stare decisis is an important, but not an inflexible, doctrine in our law. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, (1932) (Brandeis, J., dissenting) ("*Stare decisis* is not . . . a universal, inexorable command."). The policies underlying the doctrine -- stability and predictability -- are at their strongest when the Court is asked to change its mind, though nothing else of significance has changed. *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750, 76 USLW 4033 (2008) (Ginsburg dissenting).

The 1992 *AFSCME* case was primarily a broad comparable worth challenge level against the entire civil service process and challenged most every position in Nassau County. This case is an Equal Pay Act and Civil Rights case brought by discrete classes of individual plaintiffs who answer 911 emergency calls and dispatch accordingly as well as their supervisors who work as PCOSs.

Over the past sixteen years, retooling, computerization and automation have entirely altered the job functions, duties and tasks for the employees working as PCOs and PCOSs. Since 1992 the PCO job is different in many ways including:

- PCOs now work 12 hour shifts as do FCTs, in 1992 PCOs worked 8 hour rotating shifts while FCTS worked 12 hour shifts. (Affidavit of Helen Ebbert)

- * PCOs and FCTs are now listed as Civil Service Grade 10 based on Thomas Suozzi's statement regarding equality of work⁷. In 1992, PCOs were Grade 7 while FCTs were Grade 9 (Affidavit of Helen Ebbert; 799 F. Supp. at 1407)
- * In 1992, calls were answered manually, information was written down by a PCO and then attached to a conveyor belt to transfer the information to the PCO dispatchers. Now, PCOs utilize an automated CAD emergency response system which requires the call answerer to input information regarding location and nature of emergency. (Affidavit of Helen Ebbert)
- * In 1992, the two PCO supervisors were uniformed police officers; today there are civilian PCOSs who supervise the PCOs. (Affidavit of Helen Ebbert)
- * In 1992 PCOs did not make decisions as to how to prioritize calls, today PCOs can make those decisions. (Affidavit of Helen Ebbert)
- * In 1992, police highway units and emergency services were dispatched by the uniformed officers at Highway Base. Now PCOs dispatch highway units and emergency services units. (Affidavit of Helen Ebbert)
- * Today PCOs check that equipment is operating properly including performing tests between HQ and officers on the street. This was not previously performed by the PCO. (Affidavit of Helen Ebbert)
- * Qualification to be a PCO was two years with telephone or radio communications experience. Today graduation from High School plus two years of general work experience or two years or college in lieu of experience. (Affidavit of Helen Ebbert)
- * County Executive Suozzi has acknowledged that the jobs are equal when he authorized the upgrade of PCOs to the same grade level as FCTs. (Eisenberg Affirmation Exhibit C)

In the 1992 AFSCME decision the Court found it significant that FCTs followed calls through and coordinated with responding units in the field. The court distinguished this from PCOs work finding they "simply process requests from the field." The Court

⁷ Suozzi Press Releases annexed to Eisenberg Affirmation as Exhibit "C".

found that the PCOs functioned as “mere dispatchers and transmitters of information...”

AFSCME, 799 F. Supp. at 1408 (EDNY 1992))

Neither FCTs nor PCOs function as “mere dispatchers and transmitters of information” now. Through their respective CAD systems, a call answerer (PCO or FCT) inputs the nature of the emergency and the system provides an automated assessment of how particular emergencies (all of which are coded) are responded to which are then dispatched accordingly. (Sowinski 27-28; Spaulding 41; Simek 43; Weigand 85-86; Conklin 56; Minneci 69) PCO’s maintain radio communication with police officers through their emergencies. They must ascertain from where and how to draw additional emergency response personnel if necessary. They must coordinate emergency response and activities with other police departments such as the New York State Police, the local police in certain Nassau County jurisdictions, the New York City Police Department, MTA police, the United States Coast Guard and the local volunteer ambulance corps. (Weigand 67-68; Conklin 73-74; Minneci 88-89)

In light of these many factual changes and the many others detailed in plaintiffs’ Rule 56.1 statement and affidavits submitted herewith, *stare decisis* does not prohibit or in any way limit the ability of this case to go forward.

The 1992 *AFSCME* case does not even address the PCOS supervisory job title and duties and accordingly cannot plausibly have any preclusive effect.⁸

⁸ If defendants intended instead to assert *res judicata* to preclude a merits-based adjudication of this case, *res judicata* is also inapplicable here. Among other reasons *because of the same reasons stare decisis* is inapplicable. The parties, the facts and the issues here are entirely distinct from the 1992 case defendants seek to rely upon.

POINT II
THE DISPUTED MATERIAL QUESTIONS OF FACT
REGARDING THE SUBSTANTIAL SIMILARITY
BETWEEN THE PCO AND FCT JOBS PRECLUDE
A GRANT OF SUMMARY JUDGMENT

A. EQUAL PAY ACT STANDARDS

The Equal Pay Act prohibits an employer from paying male employees a rate of pay higher than that paid to female employees performing equal work. 29 U.S.C. §206(d)(1). To prove liability under the Equal Pay Act, "plaintiff must show that (i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (iii) the jobs are performed under similar working conditions." *Lavin-McEleney v. Marist College*, 239 F.3d 476, 480 (2d Cir. 2001) (internal quotations and citations omitted). Plaintiffs need not demonstrate that their jobs are identical to the higher paid male position, but only must show that the two positions are *substantially equal* in skill, effort and responsibility. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995), *Lavin-McEleney v. Marist College*, 239 F.3d at 480.

"Whether two positions are 'substantially equivalent' for Equal Pay Act purposes is a question for the jury." *See, Tomka*, 66 F.3d at 1311 "It is for the trier of fact to decide if [there] is a significant enough difference in responsibility to make the jobs unequal. (cite omitted)" *Lavin-McEleney*, 239 F.3d at 480. In assessing the substantial equality of two positions, one must not focus rigidly on titles or job description; it is the content of the job that controls. *Tomka* at 1310 "This determination is, by its nature, necessarily a particularized one not amenable to the application of broad job classifications or reliance on job title nomenclature." *Waterman v. New York Tel. Co.*, 1984 U.S. Dist. LEXIS 19093, No. 82 Civ. 1512, 1984 WL 1482, *2 (S.D.N.Y. 1984).

There are statutory affirmative defenses expressly permitted to an employer under the Equal Pay Act. An employer is permitted to pay different wages to male and female employees when the wage differentials are the product of "(i) a merit system; (ii) a

seniority system; (iii) a system which measures earnings by quantity or quality of production; (iv) a differential based on any other factor other than sex.” 29 U.S.C. § 206(d). With respect to the fourth affirmative defense –a differential based on any other factor other than sex, the employer must prove that it has a legitimate business purpose and the differential is not a mere pretext for discrimination. *See, Aldrich v. Randolph Central School District*, 963 F.2d 520, 526-27 (2d Cir. 1992).

B. PCO AND FCT JOBS ARE SUBSTANTIALLY SIMILAR

The evidence demonstrates that PCO and FCT jobs are substantially similar. PCOs and FCTs each perform a vital governmental function. They each answer emergency calls and dispatch emergency personnel. These employees work in the same facility, albeit in different rooms (Schlemel 42). These employees each sit at computer consoles and utilize CAD systems (Muro 55, Minneci 68, 74, Simek, 26, 60, Edwards 65). They each take information from callers as to the location and nature of emergency. They enter this information into the computer, utilizing the many codes learned in their training regimen (Minneci 69, Simek 19-21, Weigand 16-19). The CAD systems then identify the appropriate protocol in response (Conklin 56, Simek 17-19, 23-26). PCOs and FCTs dispatch emergency police and fire personnel respectively. They both dispatch ambulances to aid those in medical need. They maintain radio communication with the respective emergency personnel on the scene and assist in coordination of additional emergency responders (Ebbert 50).

PCOs and FCTs must also interface with other public and private safety officials such as New York City Police and Fire Departments, Long Island Power Authority, the MTA Police, the New York State Police and the United States Coast Guard.

Plaintiffs have shown that their PCO positions are substantially equal in skill, effort and responsibility. The Equal Pay Act’s implementing regulations, which provide that “(s)kill includes consideration of such factors as experience, training, education and

ability.” 29 CFR §1620.15(a); “[e]ffort is concerned with the measurement of the physical or mental exertion needed for the performance of a job,” 29 CFR§ 1620.16(a); and “[r]esponsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.” 29 CFR §1620.17(a), *Drury v. Waterfront Media*, 2007 U.S. Lexis 18435 (S.D.N.Y. 2007).

C. PCOs AND FCTs PERFORM EQUAL WORK

In conclusory fashion, defendants argue that PCOs and FCTs are not performing equal work. They state, “[A]lthough plaintiffs focus only on the 911 call taking and dispatching aspects of the PCO position the job encompasses other clerical, administrative and staff duties which are entirely dissimilar to the duties performed by the FCTs. Beside 911 call taking and dispatching, Plaintiffs have not provided any competent and reliable evidence to support their position that the FCT and PCO jobs are similar at all.” Def. brief p. 16. This argument summarizes defendants’ effort to confuse and obfuscate the truth. Each of the named PCO plaintiffs work at computer consoles answering emergency calls alarms or work at computer consoles dispatching Nassau County emergency police, ambulance and related services. The “other clerical, administrative and staff duties” allegedly performed by plaintiffs do not appear in the PCO job description⁹ and are not detailed, enumerated or specified anywhere in their brief. As such, we cannot respond.

Plaintiffs are, and can only be, class representatives for those who do the same jobs as they do- those who are similarly situated to them. The standard of comparison is actual job content, not job titles or descriptions. *County of Washington v. Gunther*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff’d* 452 US 161; *Marshall v. Building Maint. Corp.*, 587 F.2d 567, 571 (2d Cir. 1978); *Rossini v. Ogilvy & Mather, Inc.*, 597 F. Supp. 1120,

⁹ PCO job description annexed to Eisenberg Affirmation as Exhibit “D”.

1154 (S.D.N.Y. 1984). (internal quotations and citations omitted), *Waterman v. New York Tel. Co.*, 1984 U.S. Dist. LEXIS 19093, No. 82 Civ. 1512, 1984 WL 1482, *2 (S.D.N.Y. 1984).

To suggest that the female PCOs performing substantially similar work to the male FCTs should be paid less because there may be other PCOs doing out of title work is absurd.

D. PCOs AND FCTs UTILIZE SUBSTANTIALLY SIMILAR SKILL

Defendants argue that because FCT employees are required to have five years of experience as a volunteer firefighter in Nassau County, PCOs and FCTs are not doing substantially similar work. Nassau County's five-year volunteer firefighting experience requirement bears little or no relationship to the actual FCT job. Prior volunteer firefighting experience does not assist the FCT in performing his duties. Each fire department has its own protocols. (Spaulding 25-28; Sowinski 16-21; Weigand 22: Simek 24; Albers 28). Experience in one department does not help in knowing the protocol of the other 54 departments. (Sowinski 20; Weigand 22; Simek 21; Albers 31). Moreover, the computer generates the protocol for responding to any given incident. Individual determinations are not made by the FCT. (Weigand 26-27, 31).

Additionally, no effort was ever made to validate the FCT job duties and the applicability and efficacy of this volunteer firefighting experience requirement (Schlemel 113). This requirement which was never validated probably precluded many women from even applying for the position and raises serious issue with its job relatedness. In a case on point, the Second Circuit held that passage of the civil service exam was not a factor other than sex so as to justify paying "custodians" more than "cleaners" absent

evidence that the exam was job-related. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526-29 (2d Cir. 1992). Given the comprehensive 26-week training program for new FCTs (Nassau County Fire Communications Training Manual for 2006, Bates # 000203-000436), the code-driven computerized protocols used by the FCTs in dispatching and the differences in protocols across the 38 volunteer Fire Departments served by the Fire Communications office, it is unlikely that five years of volunteer fire experience could legitimately be validated as a job-related requirement. (Lundquist Expert Rebuttal Report. Eisenberg Aff. Exh. "B" pp 9-12.)

Further evidence of the lack of job relevancy of volunteer firefighting experience can be found in the testimony of FCT Spaulding who, in trying to explain its import, said:

"It's difficult to explain. It's just the knowledge of what they are going into and the stress they are about to undertake if there is a fire. I have experienced it and it's very stressful and you are running into what people are running out of so I know what they are responding to, I know what they are dealing with and there is stress involved and if they are not able to answer me on the radio, I know from being in an engine company and being in the fire department that they are probably busy trying to save somebody's life and I might need to turn to a supervisor to get additional information or an apparatus there or start something that, you know, something else in the process, but yeah, it's very difficult to explain, but there's – I don't know how to explain it. (Spaulding 23)

Defendants also argue that the PCO and FCT jobs do not require equal skill because FCTs provide medical assistance to callers. Deposition testimony of the FCTs indicates that providing assistance in medical emergencies beyond asking and coding responses to questions was a relatively low frequency occurrence (Spaulding 63-65; Simek 63-64; Weigand 89-90; Sowinski 53-57). Both PCOs and FCTs gather information about medical emergencies from callers sufficient to dispatch ambulances

when needed (Spaulding 65; Sowinski 33; Weigand 69; Ebbert 51). FCTs, however, have been trained to gather and code specific information related to the medical emergency, which is transmitted to the Emergency Medical Technicians (EMTs) prior to their arrival on-scene (Schlemel 133; Albers 75-76). In contrast, PCOs are instructed to transfer such calls to Police Department Ambulance Medical Technicians (AMTs) who are trained to gather such information from callers.

The FCT Emergency Medical Dispatch function is extremely limited in scope. FCTs utilize a set of cards or identical computer pages (both are used) that specify questions to ask of a caller with a medical problem.

Q. You referred to cards and the computer screen that reflects these cards that you were given as, I believe, as Exhibit 2. Are you permitted to administer aid without these cards?

A. No.

Q. What is the reason for that?

A. Liability, mine and the County. You must read directly what's on the card which is the same as the computer. It must be line by line. You cannot make anything up.
(Albers 131)

While PCOs do not read medical cards to callers, they perform a number of tasks that could be considered analogous. For example, PCOs advise callers who may be in the midst of a burglary, domestic violence dispute or kidnapping. They counsel callers on how best to handle their emergency situation. They remain on the line with the caller awaiting arrival of the police. (Muro 57)

Finally, defendants make the fallacious argument that because they have not been trained in performing the FCT job, PCOs do not have equal skill as the FCTs. If female PCOs and male FCTs perform exactly the same job duties and functions but utilize different CAD software, defendants' argument would justify differing pay scales for these employees. That is similar to arguing that male word processors using an IBM computer system should be paid more than female word processors using an Apple computer

system. The Equal Pay Act does not countenance such unlawful pay disparity, contrary to defendants' assertion.

The standard for comparison under the Equal Pay Act is that the jobs in question be substantially *similar*, not that they be identical. *Tomka v. Seiler Corp.*, 66 F.3d at 1310. It is for the jury to determine whether the five year volunteer firefighting service requirement, the use of the emergency medical dispatch cards and the use of a different CAD software program renders the jobs in question such that they do not require substantially similar skill for the purposes of the Equal Pay Act. *Lavin-McEleney v. Marist College*, 239 F.3d at 480.

E. PCO AND FCT JOBS REQUIRE SUBSTANTIALLY SIMILAR EFFORT

The actual effort required to perform the PCO job is substantially similar to the actual effort required for the FCT job. Both jobs require responding to callers in emergency life and death situations. Focus, accuracy and attention to detail are imperatives for each of these jobs.

While each employee works a twelve-hour shift, to support their argument that the PCO and FCT positions do not require equal effort, defendants assert that FCTs do not receive a mandatory lunch or dinner break. FCTs eat at their consoles and are provided with one 45-minute break at the discretion of their supervisor. In contrast, PCOs have mandatory breaks, which consist of four 30-minute breaks and one hour-long meal break. Defendants omit mention of the fact that that PCOs are required to work an extra twelve hour shift once every seven weeks in order to make up for the additional unpaid time off on these mandatory breaks (Muro 48). Further, the need for more breaks is dictated by the significantly higher volume of calls received by the PCOs. It is estimated that the PCOs receive about 2000 calls a day while the FCTs handle 185 such calls. (Lundquist Expert Report, Eisenberg Aff. Exh "A" p.7). The mandatory break time serves to offset the extra effort required of the PCOs because of the sheer volume.

Defendants suggest that the use of the Field Communications Vehicle (“FieldCom”) is also significant distinguishing factor between these jobs. In fact, FieldCom is rarely used. FCTs rarely (if ever) drive to the scene of an emergency to perform FieldCom work. Some FCT or FCTS have never worked a FieldCom assignment. (Sowinsky 58). According to the County’s own data, FieldCom was used a total of 10 times in the two-year period for which they agreed to provide information. Half of those instances was for funerals or other ceremonial events. (See, Albers Deposition, Eisenberg Aff. Exh. G) FieldCom is not a substantial job component for the FCT force.

F. PCO AND FCT JOBS ENCOMPASS SUBSTANTIALLY SIMILAR RESPONSIBILITY

Both PCO and FCT jobs directly implicate life and death situations. Dispatching police, ambulance, fire, hazardous material teams, medical helicopters, and other emergency personnel and equipment is difficult, stressful and if not done properly can result in catastrophe. Defendants argue that the PCO job requires less responsibility than the FCT job and therefore is not similar. As each of these jobs fulfills clearly analogous vital governmental public safety functions, it is insulting and inappropriate that Nassau County should posture in this litigation by seeking to undermine and undervalue the importance of the PCO job.

G. CONCLUSIONS OF PLAINTIFFS’ EXPERT WITNESS.

Defendants conspicuously omit mention of the fact that the parties have each retained expert witnesses who have reached opposite conclusions after review of the facts here. Surely, this divergence of opinion, at a minimum, highlights that there are disputed material facts here.¹⁰

¹⁰ Pending before this Court are outstanding motions *in limine* seeking preclusion of the experts in this case. Plaintiffs filed their motion *in limine* because Defendants’ expert report, prepared by a law school trained expert, reads more like a legal brief rife with legal argument than an expert report. The factual analysis

Plaintiffs' expert witness Kathleen K. Lundquist, PhD. concluded that the jobs in question are substantially similar. Her findings were informed by her review of the entire discovery document production, review of the deposition transcripts, and two site visits. In her expert report, Dr. Lundquist included several tables, each of which is illuminating. These tables indicate that the job description as well as the job duties and tasks are substantially similar for the PCO and FCT jobs. She also concluded that the skills, effort, responsibility and working conditions rendered these jobs substantially similar.

Looking at the facts in the light most favorable to plaintiffs, as set forth in plaintiffs' 56.1 statement as well as in the expert report of Kathleen K. Lundquist, PhD., the jobs in question are substantially similar and summary judgment is wholly inappropriate.

POINT III
AS A CLASS PCOs AND PCOSs ARE PAID
LESS THAN FCTs AND FCTSs

There is no merit to defendants' claim that plaintiffs failed to establish a prima facie claim of pay disparity between PCOs and FCTs and PCOSs and FCTSs. During the relevant period, the FCTs and FCTSs were paid at a wage rate significantly higher than the PCOs and PCO supervisors.

Under the civil service system, each job is classified at a grade level: the higher the grade, the higher the salary schedule. Within each grade there are steps from 0A to 11. Each step is representative of seniority. 0A is the entrance level, which is increased after a year of service to step 1 and so forth until the 12th year of employment when the employee reached Step 11, which is the top salary step. (Muro 30; Def. Exh. W). Until October of 2001, PCOs were at a grade 7, with a starting salary of \$20,707 and rising to a

therein is unduly tainted by the expert's legal advocacy. Following oral argument on this motion, defendants filed a preclusion motion on the primary basis that plaintiff's expert with reached conclusions that are wrong.

salary of \$39,904 in the 12th year. At that same time the FCTs were at a grade 10, with a starting salary of \$25,162, and in the 12th year of service, a salary of \$49,413. For each year in between there were similar disparities which kept growing (Def. Exh. W). Similarly for the supervisors, while PCOSs were at Grade 9, the FCTSs were at Grade 11 with similar pay discrepancies. Id.

In 2001, there was an upgrade for PCOs to Grade 9 and supervisors to Grade 11, while FCTs and their supervisors remained at Grade 10 and 12 respectively. But the upgrade was not vertical. In other words, Ebbert went from a PCO Grade 7 step 11 to a Grade 9 step 8. (Def Exh. W, Bates #s 5518 and 5522) She lost three steps of pay, which means that it took her an extra three (3) years to reach the top salary step for her grade. Had she been upgraded vertically she would have gone to Grade 9 step 11, to accurately reflect her seniority. Even had she been promoted vertically she would have been paid less than her male colleagues because they were still at Grade 10. If she was raised vertically she would have received an annual salary of \$45,650, but in fact, she only received \$37,469. In the meantime, men who were at a step 11 in the higher salary Grade 10 earned \$49,413. (Def Exh. W at Bates 5535, 5549, 5550, 5567).

In October 2005, the PCOs and PCOSs were again upgraded, but this time to the same salary grade as the FCTs and FCTSs and the upgrades were vertical. Both PCOs and FCTs are Grade 10 and their supervisors are Grade 12. But the pay disparity continued to a greater or lesser degree because there was a carry over from the failure to vertically upgrade in 2001. For example, in 2000, plaintiff Wendy Muro was a Grade 7 Step 7 earning \$33,861 as compared to FCT Mark Bodnar who was Grade 10 Step 1 earning \$36,348. At this point, Ms. Muro had 6 years more seniority than Mr. Bodnar but earned significantly less. In 2001, Ms. Muro with the rest of the PCOs was upgraded to a Grade 9, but she was demoted to step 3, thus losing 4 years of seniority. The result is that she had to work 15 years, rather than 11 years to reach the top salary step in her grade. Thus in 2005, when she finally equalized in grade with the men, she was back where she

started at Step 7 earning \$49,755 rather than being at Grade 10 Step 11 and earning \$58,031. In 2008, after about 18 years of service she still has not reached to top salary step. (Def. Exh. W at Bates 5619, 5624, 5542.)

Another example is class member Maureen Borchick. In 2000, she was a Grade 7 step 3 earning \$31,224. In the 2001 upgrade, she too was promoted to Grade 9, but demoted to Step 1. Had it been a vertical upgrade, by 2005 she would have been Grade 10, Step 11 earning \$58,031. But the carry over from the 2001 non-vertical upgrade left her at Grade 10, Step 5 earning only \$47,681. (Def. Exh. W at Bates 5517, 5522, 5539) A survey of defendants' Exhibit W will reflect that the experience of Muro and Borchick are reflective of what happened to most of the PCOs and PCOSs by the non-vertical upgrade.

A. DEFENDANTS' ANALYSIS BASED ON TOTAL COMPENSATION DISTORTS THE MEANING AND PURPOSE OF THE EQUAL PAY ACT

Defendants seek to turn the Equal Pay Act on its head by arguing that there is no pay disparity between plaintiffs and the FCT employees because in some years some plaintiffs' total annual compensation, which included overtime, was well above their base salary. In other words, defendants are trying to foist upon this Court the proposition that an employer can avoid liability under the EPA by making female employees work twice as many hours as a male employee to earn the same amount of money. That is an absurd result and such an interpretation would undermine the entire purpose of the EPA, which is to "legislate out of existence a long-held, but outmoded societal view that a man should be paid more than a women for the same work." *Belfi v. Pendergast*, 191 F. 3d 129, 133 (2d Cir. 1999). The EPA must be construed in a manner to assure that it serves its broad remedial purpose. *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974). This

Court should not sanction a practice which “would frustrate. not serve. congress’ ends.”

Id.

The Equal Pay Act requires that men and women must be paid at an equal “rate” of pay for performing equal work. Section 206 (d)(1). Section 1620.12 of the CFR defines wage “rate” as:

(a) The term wage “rate,” as used in the EPA, refers to the standard or measure by which an employee’s wage is determined and is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis. The term includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. It further includes the rate at which a draw, advance, or guarantee is paid against a commission settlement. (Emphasis added)

Defendants totally ignore this section of the law. Rather, to reach their absurd conclusion they look only at Section 1620.10 which defines wages. However, when the two sections are read in conjunction, it is evident that what the law provides is that not only should base pay be analyzed when determining whether there is an EPA violation. Rather, all components of wages must be analyzed to assure that all are paid at an equal rate. In other words, an employer would violate the law if it paid the same base wage, but then paid the men a higher bonus. See: EEOC Compliance Manual, Chapter 10 C: Definition of Wages and Wage Rate. (Eisenberg Aff., Exh. E) That in no way, however, can be read to say that women must work twice as many hours as men to earn their compensation.

A case directly on point is *Bence v. Detroit Health Corp*, 712 F. 2d 1024 (6th Cir. 1983) where female employees sold health spa membership to women and men sold

membership to men. They all worked for commissions, but the women's commission rate was lower than that of the men. There was no dispute as to the equality of the jobs, but the defendant claimed the basis for the disparity was that the gross sales to women were always higher. As a result the saleswomen made more sales than the men resulting in their earning substantially equal wages, and sometimes more than the men. The Sixth Circuit rejected the total remuneration argument put forth by the employer, stating that "Comparison of pay rates entails measuring the amount of pay against a common denominator, typically a given period..." *Id* at 1027. A *prima facie* violation is established where the commission rate was different, even if the total compensation earned by both men and women was the same.

The case relied upon by defendants is not relevant to the instant action. In *Marting v. Crawford*, 203 F Supp. 2d 958, 966 (N.D. Ill. 2002) the Court primarily found that the female employee provided no evidence to demonstrate that her salary was lower than the male comparator and thus she could not survive summary judgment. There is *dicta* about inclusion of fringe benefits as part of wages, but that in no way speaks about overtime, where the female employee is paid at a lower "rate" and has to work more hours to earn the same amount of money. *Lavin -McEleney v. Marist College*, 239 F. 3d 476, 482 (2d Cir. 2001).

B. FAILURE TO NAME A SPECIFIC MALE COMPARATOR IS NOT FATAL IN THIS CLASS ACTION

The Equal Pay Act does not require female plaintiffs to identify one specific individual who constitutes the perfect male comparator. *Wheatley v. Wicomico County*,

390 F.3d 328, 334 (4th Cir. 2004) “The text of the EPA may not be brushed with such a demanding gloss. However, in choosing a proper comparator position, plaintiffs cannot indiscriminately aim at all department supervisors collectively, and then expect to meet with the EPA standard of “substantial equality [in] skill, effort [and] responsibility.”

In this case, there is no indiscriminate comparison of positions. The pay policies are uniformly applied on a class wide basis. The Nassau County Civil Service’s grade ranking systems determine the compensation of PCOs, FCTs, PCOSs and FCTSs. In 2005 when the positions were “equalized” the County Executive, Thomas Suozzi, specifically stated the basis of the upgrade to equal positions was the determination that the jobs were equal and women were underpaid. In an effort to end historic pay inequity for 911 Operators, he said, “[t]oday we are calling for equal pay for equal work.” (See Exhibit C annexed to Eisenberg Affirmation) Moreover, in the past, the Civil Service Commission did compare the two jobs at one point to determine whether they should be paid the rate. Although plaintiffs disagree with its outcome, the fact that the Commission thought the similarities sufficient to both comparing is indicative of the propriety of comparing the positions on a class wide basis, as has been done by the parties respective expert witnesses.

POINT IV

WHETHER DEFENDANTS’ CONDUCT CONSTITUTES WILFUL VIOLATION OF THE EPA IS A JURY QUESTION

An employer violates the Equal Pay Act when it knows or shows reckless disregard for whether its conduct was prohibited under the statute. *McLaughlin v Richmond Shoes Co.*, 486 U.S. 128 (1988). To prove wilfulness a Plaintiff “need not

show that an employer acted with intent to discriminate.” *Pollis v. The New School*, 132 F.3d 115, 119 (2d Cir. 1997); *Lavin -McEleney v. Marist College*, 239 F.3d 476, 482 (2d Cir. 2001). The determination of wilfulness is a quintessential jury question. Indeed, in one of the cases cited by defendants here the Court held: “Whether defendants acted wilfully in violation of the FLSA is a question of fact for the jury.” *Kaur v. Royal Arcadia Palace, Inc.*, 2007 WL 4591250 *14, 2007 U.S. Dist. Lexis 94556 *42 (E.D.N.Y. December 27, 2007)

In this case there is at least one substantial fact indicating that the County was aware that its actions were in violation of the law. In 2005 County Executive, Thomas Suozzi, acknowledged that the female “911 Operators [who] have historically been paid less than their male counterparts in fire communications...” (Eisenberg Affirmation Exhibit C)

Moreover, Defendants only argument regarding wilfulness is that if plaintiffs are allowed to proceed on that issue they would benefit from a three-year statute of limitations, rather than two years. See Def. Br. P. 10-11. However, that is of no consequence, since the equal pay claim is also filed under the State EPA and the court has designated a class under that law. Under the State EPA there is a six-year statute of limitations. In any case, that third year is captured.

POINT V
WHICH MEMBERS OF THE PUTATIVE CLASS FALL
WITHIN THE STATUTE OF LIMITATIONS IS A QUESTION
THAT THE COURT NEED NOT AND SHOULD NOT
ADDRESS ON THIS SUMMARY JUDGMENT MOTION

Defendants argue that those class members who opted in after November 1, 2006 are precluded from this action under the EPA two-year statute of limitations. The Court does not have to reach that issue on this motion for several reasons.

First, as discussed, whether the acts of the defendants were wilful and therefore the three (3) year limitations period applies, is an issue for the jury to determine. It would be premature to disqualify class members at this juncture.

Second, since these employees will be covered by the class action under the State EPA, where the statute of limitations is six (6) years, the date of the opt-in is irrelevant for the statute of limitations period.

Third, whether there is a two (2) year or three (3) year limitation period will only affect the issue of damages. If a jury finds that defendants' acts were wilful, then those who timely opt in will be entitled to liquidated damages under the Federal law, in addition to their back pay. The parties, however, have agreed to bifurcate the issue of damages. The Court has the inherent power to modify the class at any time. There is no need to make a determination at this juncture. The determination of damages owed to each individual plaintiff will be established in the damage phase of this action.

Defendants' argument that opt-ins filed after August 9, 2006 because the form used does not conform to the Court Order is also invalid. The question of the precise definition and parameters of the Class remains in dispute, and plaintiffs' request to define the class is *sub judice*. But again, precisely who is entitled to receive relief should

plaintiffs prevail is not an issue for summary judgment. For the same reasons as stated above, the Court should not address this issue on a motion for summary judgment.

POINT VI
PLAINTIFFS CLAIMS ARISING UNDER
42 U.S.C. §1983 ALLEGING
VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS
UNDER THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT
OF THE UNITED STATES CONSTITUTION
CANNOT BE RESOLVED BY SUMMARY JUDGMENT

Although plaintiffs hereby withdraw their claims against defendants Nassau County Police Department, Nassau County Civil Service Commission and Thomas R. Suozzi, in his official capacity, Nassau County adopted a custom, policy and practice of providing salary grade increases as detailed in Point III of this memo, where plaintiffs were treated differently than male employees in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution. Nassau County knowingly maintained a gender-based discriminatory wage disparity between the all-male FCTs and the predominantly female PCOs and their respective supervisors who are all female for the PCOS job and all male for the FCTS job. Nassau County knowingly had female PCOs and PCOSs perform equal work to their male Fire Department counterparts and knowingly paid plaintiffs lower wages than these men in violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution. Plaintiffs claim under 42 U.S.C. §1983 continues. Additionally, when upgraded in pay, women PCOs and PCOSs lost steps so as to lessen their pay increase whereas male FCTs and FCTSs were upgraded and did not lose any step thereby heightening their pay increases. Accordingly, plaintiffs' claims under 42 U.S.C. §1983 against Nassau County must go forward.

Municipal Liability (Monell Claims)

(T)he Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. See, e.g., *NYC Transit Auth. v. Beazer*, 440 U. S. 568, 593 (1979) (upholding city's exclusion of methadone users from employment under rational-basis review); *Harrah Indep. Sch. Dist. v. Martin*, 440 U. S. 194, 199–201 (1979) (classification between teachers who had complied with a continuing-education requirement and those who had not is rational and does not violate the Equal Protection Clause); *Massachusetts Bd. of Retirement v. Murgia*, 427 U. S. 307, 314–317 (1976) (upholding a mandatory retirement age—a classification based on age—under rational-basis review).

A municipal entity may only be held liable if the alleged offending conduct was undertaken pursuant to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipal] officers[,] * * * [or] governmental 'custom' even though such a custom has not received formal approval through the [municipality's] official decisionmaking [sic] channels." *Monell v. Dep't of Social Servs. of City of NY*, 436 U.S. 658, 690 (1978). Here there is clearly a "direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated be treated alike." *Latrieste Restaurant v. Village of Port Chester*, 188 F.3d 65, 69 (2d Cir. 1999) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

To establish an equal protection violation, a plaintiff must show purposeful discrimination by the defendants directed at an identifiable or suspect class. See, *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995). As detailed in Suozzi's press release:

“Today we are calling for equal pay for equal work – it’s the right thing to do.”

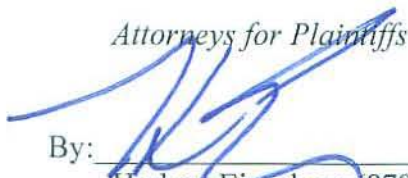
(Eisenberg Aff., Exh. C) Surely, defendants were aware that women were being paid less than men for equal work for a long time. That this did not get remedied demonstrates defendants’ discriminatory policies and animus. In light of these facts, plaintiffs’ §1983 claim must proceed and summary judgment is inappropriate.

CONCLUSION

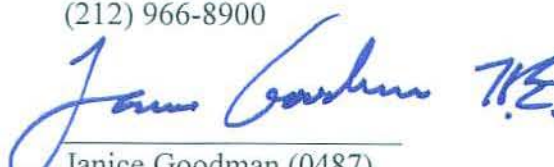
Based upon the foregoing, defendants’ motion for summary judgment should be denied in its entirety.

Dated: New York, New York
June 20, 2008

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