UNITED STATES OF AMERICA, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, ET AL., Defendants. and SAN FRANCISCO FIREFIGHTERS LOCAL 798, et al., and SAN FRANCISCO CITIZENS FOR THE MERIT SYSTEM, et al., Defendants, In Intervention. FONTAINE DAVIS, et al., Plaintiffs, In Intervention, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants, In Intervention. and SAN FRANCISCO FIREFIGHTERS LOCAL 798, et al., and SAN FRANCISCO CITIZENS FOR THE MERIT SYSTEM, et al., Defendants, In Intervention

Case No. C-84-7089 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPINION BY: [*1] PATEL

OPINION

MEMORANDUM DECISION AND ORDER RE CERTIFICATION OF SUB-CLASSES AND MOTIONS FOR SUMMARY JUDGMENT

MARILYN HALL PATEL, UNITED STATES DISTRICT JUDGE

Plaintiff-intervenors in *United States v. City and County of San Francisco* move to certify sub-classes and for partial summary judgment. Those motions are each granted in part and denied in part. Plaintiff Leon in the related case moves for summary judgment. The motion is denied without prejudice.

Plaintiff-Intervenors' Motion to Certify Sub-Classes

Plaintiff-intervenors move to certify the following sub-classes:

(a) All minority women applicants who have taken or will take the San Francisco Civil Service entrance examinations required of all persons seeking employment as a firefighter with the San Francisco Fire Department;

(b) All non-minority women applicants who have taken or will take the San Francisco Civil Service entrance examinations required of all persons seeking employment as a firefighter with the San Francisco Fire Department;

(c) All black males who have taken or will take the San Francisco Civil Service entrance examinations required of all persons seeking employment as a firefighter with the [*2] San Francisco Fire Department;

(d) All blacks who have taken or were eligible to take the promotion examinations for positions above the rank and file (H-2) firefighters' positions with the San Francisco Fire Department.

Defendant City and County of San Francisco and defendant-intervenor Local 798 argue that the proposed classes are too broadly defined. Rule 23(a)(3), Fed. R. Civ. P., states that the claims of the representative parties must be typical of the claims of the class. In addition, the representative must be a member of the class he claims to represent. *Bailey v. Patterson*, 369 U.S. 31 (1962). Defendants argue that representatives can only represent those members of the class who passed or failed the same portions of the exams.

Named plaintiffs Fontaine Davis and Brandi Swanson participated in the 1982 H-2 Firefighter exam. They passed the written portion but failed both the original physical agility exam and the special re-test offered to female candidates. Defendants argue that they can only represent those female candidates who passed the written but failed both physical exams. Anne Young passed both the written and the physical re-test portions of the 1982 H-2 [*3] Firefighter exam and was named on the 18-person female hiring list.

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." While those who passed the retest might be tempted to compromise the interests of those class members who passed neither, the interests of both are represented by at least one of the named plaintiffs. While those who passed the original test are not represented, as a practical matter those who passed the original test are in the same position and have the same interests as those who did not, because they did not score high enough to have a realistic possibility of being hired. *See* Order Granting Preliminary Injunction (Feb. 12 1986) at 5.

At oral argument, in response to the court's inquiry about representation of black females who claimed dual discrimination, plaintiff-intervenors proferred the named

plaintiff Jerilyn North as an adequate representative for these class members. They also proferred Ms. North as a representative in their reply papers. Reply Memorandum of Plaintiff-Intervenors at 3, n.3. In order to assure adequate representation of black women who have claims based on the written [*4] examination and the physical agility test and to avoid an overlap of their representation by persons who may have conflicts, the court finds a subclass consisting of persons doubly aggreived should be certified. There is no evidence that Ms. North is not an adequate representative for that purpose. The same counsel will be representing this sub-class. Thus there is no danger of new counsel unfamiliar with the case undertaking their representation. Counsel are very experienced litigators in employment discrimination matters and can ably represent the classes.

The named black male plaintiffs also satisfactorily represent the class. Eric Washington failed the written portion of the 1982 H-2 Firefighter exam. Defendants argue that he may only represent those black male candidates who failed the exam. However, the physical exam for black male candidates is not being challenged and, unlike the female candidates, no special hiring list has been established for black male candidates. All black male candidates are likely to benefit from a challenging of the exam because even those who passed might have scored higher if not for the alleged discrimination.

Those who passed high on the list [*5] may have their positions jeopardized if plaintiffs prevail and they have to take a different test. However, this will happen whether or not they are members of the class. If it is true that the exam discriminates, there is a strong probability they will better their scores on a new, non-discriminatory exam. Those who passed and were hired off the list might have scored higher and been hired sooner, thereby increasing their earnings at an earlier date, if not for the alleged discrimination.

Robert L. Demmons is a current H-2 firefighter who passed the 1978 H-20 Lieutenant exam and was ranked 191 on the eligible list. He was not appointed from the list before it expired. Defendants argue that he may only represent those candidates for the 1978 exam who did not place high enough to be appointed. The same discussion applies. He and members of his sub-class may be able to show that but for the alleged discrimination those who were appointed would have scored even higher and been hired earlier. The argument that the named plaintiffs cannot represent anyone who took the 1984 H-20 Lieutenant exam because no eligibility list has been established yet would bar anyone from challenging the 1984 [*6] exam. Precisely because no eligible list has been established yet, all members of the class have an interest in challenging it, for even those who did well might have done better and thus stand a better chance of being hired off the list if not for the alleged discrimination.

Plaintiff-intervenors would also include in the class those who "will take" the entrance exams in the future. It is impossible to tell at this time what those future exams will consist of and who will take them. While it is true that, as plaintiffs point out, a court may certify a class for future examination, that is not the same as saying that a class may include unidentifiable members whose injuries have not yet occurred. It means only that a court may wish to await further development of the record before defining the class. The inclusion in the class of unspecified persons who have not yet suffered injury requires undue speculation. In addition, because this action will determine either that the tests do not presently discriminate or that they may not in the future discriminate, it is unclear what injury future test takers will suffer. "Any . . . injunctive relief that may be entered will redound to the [*7] benefit of these persons in any event [whether or not they are members of the class], but certainly no monetary relief can be awarded to them for discrimination not yet inflicted." *Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562, 577 (S.D.N.Y. 1984) (quoting *Williams v. Wallace Silversmiths,* Inc., 75 F.R.D. 633, 636 (D. Conn. 1976).)

Intervenor San Francisco Citizens for Merit argues that a conflict exists because the same lawyers propose to represent each of the sub-classes. According to plaintiff-intervenors, the responsibilities have been divided. Equal Rights Advocates represents the minority female plaintiffs. Dunlap and Thorkelson represent the white female plaintiffs. The San Francisco Lawyers Committee and Pearl, McNeill & Gillespie represent the black male plaintiffs.

The designated plaintiff-intervenors are hereby certified as class representatives for these four limited subclasses:

1. Women who passed the written 1982 H-2 Firefighter exam and took the physical agility test(s).

2. All black candidates who took the 1982 H-2 Firefighter exam, whether or not they passed.

3. All black women candidates who took the 1982 written and/or physical agility [*8] tests, whether or not they passed.

4. All black candidates who took or were eligible to take the 1978 and 1984 H-20 Lieutenant exams. (A pattern and practice of discrimination may inhibit some who are eligible from even attempting the exam.)

Plaintiff-Intervenors' Motion for Partial Summary Judgment

Plaintiff-Intervenors move for partial summary judgment on the following issues:

(1) the adverse impact of the San Francisco Fire Department's written entry exam on black applicants

(2) the adverse impact of the the department's physical entry exam on female applicants.

(3) the adverse impact of the department's procedure of separating racial harassment claims from other rule violations and allegedly rejecting them in 100 percent of the cases

(4) the alleged failure of defendants to take action to correct a known pattern of racial hostility and harassment directed against black firefighters.

Local 798 claims, with no further documentation or argument, that plaintiffs have not exhausted EEOC administrative remedies. Opp. to P/I MSJ.

Adverse impact of the exams. The court has dealt with the first two issues at some length in its Order Granting Preliminary Injunction, [*9] Feb. 12, 1986. There it noted a history of underrepresentation in the department--no blacks until 1955, only four until 1971, 57 blacks and no women at the H-2 firefighter rank as of December 1, 1985. *Id*. at 5. Of 313 women who applied to take the entrance exam at the first opportunity in 1976, none passed. Of 685 who applied to take it at the second opportunity in 1982, five passed but were too low on the tentative hiring list to have any "realistic" chance of being hired. *Id*. The statistics for the 1982-83 exam demonstrate a disparate impact. Of 7273 applicants, 2034 (30 percent) were black. 685 (9.5 percent) were women. On the written exam, 93 percent of of the white applicants passed, while only 55 percent of the black applicants passed. On the physical agility test, 77 percent of the male applicants passed while only 23 percent of the female applicants passed.

Defendant challenges the statistics as suspect on the grounds that the applicant pool, due to the department's recruiting effort, consisted of 54.7 percent "minorities." Of 1,178 blacks who applied to take the examination, only 626 actually appeared for the written exam. Defendant argues that a 53 percent appearance [*10] rate shows that the applicants were not serious and that they should be allowed to introduce evidence that applicants failed to prepare seriously for the exam. Similarly, of 695 women who applied, only 195 took the written test. Only 52 percent of those who passed the written test appeared to take the physical test. Defendant must come forward with evidence consisting of "specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e), not mere speculation, in response to the summary judgment motion. It has not done so. "There is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process may itself not adequately reflect the actual potential applicant pool, since otherwise qualified people may be discouraged from applying because of a self-recognized ability to meet the very standards challenged as being discriminatory." *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977). Similarly, otherwise qualified people may be discouraged from following through with the exam after applying because of doubts that they would meet the allegedly discriminatory [*11] standards.

The court stated that, although the 80 percent rule found in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. ß 1607 *et seq*.) is not a rigid one, in this case the minority rate in general falls 10 percent short of the guideline while the black rate falls 18 percent short. The pass rate for women was much lower. The court found that statistical disparity to be substantial or significant. *Id*. at 7. It held that plaintiff-intervenors had made a prima facie case. *Id*. at 8. On the basis of that holding, the court now grants plaintiff-intervenors' motion as to the first two issues.

Dual complaint procedure. Plaintiff-intervenors allege that the department, pursuant to its "Equal Employment Opportunity Policy," Plaintiff-Intervenors' Exh. C, operates a separate and unequal sysem for handling violations of its rules and regulations pertaining to racial harassment or unequal treatment. The racial harassment complaints allegedly are denied in 100 percent of the cases. They are subject to a "grievance" rather than a "complaint" procedure, which go through the EEO Unit for investigation. The unit consists of Assistant Chief Storti and one support [*12] person. Memorandum in Support of Motion at 7. The grievance procedure allegedly lacks the disciplinary guidelines spelled out in Article No. 40, ßß 4001 *et seq*. of the department rules and regulations (Exh. G) for the complaint procedure. Plaintiff-intervenors point to the deposition testimony of Chief Cresci to demonstrate the alleged separate and unequal treatment. While the excerpt quoted does indicate that the chief has much discretion in how to deal with the grievances and Chief Cresci concedes that "our process isn't clean at this point," it does not in itself put the allegation beyond factual dispute.

A Black Firefighters Association study concluded that discipline is frequently ordered in non-racial incidents and rarely ordered in racial harassment incidents. Rockett Decl., Attachment A. The report is based on a review of the department's annual reports and materials received from the Secretary of the Fire Commission. It concludes that of 112 disciplinary actions taken between July 1971 and July 1982, 26.78 percent were against black firefighters, who represent only 5.5 percent of the workforce.

Plaintiff-intervenors also allege that there has never been a finding of [*13] merit to a complaint filed by a black firefighter alleging racial harassment, and no member of the department has been disciplined for harassing a black firefighter Demmons Decl; Exh. D at 170-71; Exh. E at 148; Exh. F at 163. 168-71, 196, 208, 211. They allege that non-racial complaints are frequently upheld. Demmons Decl.; Rockett Decl. The chief testified that, in general, a complaint is deemed meritorious only when corroborated by evidence other than the claimant's testimony. Condon Decl. at 169. Plaintiff-intervenors' Exh. D.) [1] In addition, plaintiff-intervenors argue that the attitudes of the chief officers reveal an inherent distrust of black firefighters' charges and that firefighters have been disciplined in retaliation for bringing complaints. Defendant-intervenor Local 798 objects to the declarations as without foundation, containing inadmissible hearsay, lacking in personal knowledge, and conclusory. It claims the descriptions of incidents lack identifying data such as dates.

1 Plaintiff-intervenors' citations to the declarations of Cresci and Storti do not support the claim.

Plaintiff-intervenors argue that defendant has not contested (1) that a dual complaint [*14] procedure exists and (2) that there is a significant statistical difference in the outcomes. In fact, defendant has contested both issues. While conceding that both procedures are available, defendant contends that racial claims may be pursued through either. Plaintiff United States points out that intervenors' disparate impact argument assumes that the racial harassment claims would meet with success if pursued through the standard complaint procedure.

Defendant-Intervenor Local 798 argues that this is not an adverse or disparate *impact* case but rather a disparate *treatment* case. The difference is important because a disparate impact case does not require the plaintiff to prove that the discrimination was intentional, while a disparate treatment case does. Disparate impact analysis applies to a practice neutral on its face that is discriminatory in effect. *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1131 (9th Cir. 1985). "[T]he disparate impact model was created to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove." *Id*. at 1133. [*15]

The dual complaint procedure is not facially neutral. The department acknowledges that it has two separate procedures for processing complaints or grievances and that different standards are used for reviewing complaints of racial harassment. This is not facially neutral. The reasons for the two systems and the manner in which the claims are handled involve subjective criteria and evaluations. They are susceptible of proof of intentional discrimination. They are not the type of practices that can be evaluated by disparate impact analysis. *Id*. at 1133.

Furthermore, the showing on this issue presents disputed questions of fact. The Chief of the Department states that unequal treatment does not occur and details efforts the department has made to prevent discrimination. Condon Decl. of 112 disciplinary actions taken by the department (Rockett Decl.), nine involved Billy Garrett, a black firefighter on whom Judge Vukasin of this court has imposed $ 5,000 in sanctions for challenging his termination as racially discriminatory without basis in fact, "in bad faith and to harass defendants." *Garrett v. San Francisco Fire Commission*, No. C-82-7087 JPV (N.D. Cal. May 8, 1986) (Exh. [*16] to Local 798's Opp.). In addition, the nature of the dual complaint procedure is a matter of factual dispute. Defendant contends that it is not an either/or procedure; a claimant may pursue a racial harassment claim through either of the two tracks *or* through a civil service procedure. Civil Service Commission Rule 1.03 (cited in Defendant's Memorandum in Opposition at 4); Exh. C to Plaintiff-Intervenors' Motion for Summary Judgment. It further contends that both racial and non-racial charges can result in formal censure, suspension, or the filing of a formal complaint. San Francisco City Charter, ß 8.343 (cited in Defendant's Opp. at 5). Finally, there is no showing that plaintiffs would fare better under the alternative procedure.

These questions of fact are not appropriate for summary judgment and the motion is denied as to the third issue.

Alleged failure to correct racially hostile environment. "[A] working environment overrun by racial antagonism constitutes a Title VII violation." *Snell v. Suffolk County*, 782 F.2d 1094, 1102 (2d Cir. 1986) (citing *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th [*17] Cir. 1982); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981)). However, the harassment must be sufficiently pervasive to create an abusive working environment, and that determination must be made from the totality of the circumstances. *Id*. at 1103. Because of plaintiff-intervenors reliance on the similarity of their allegations to those in *Snell*, it is important to note that the *Snell* court made its determination only after trial. Plaintiff-intervenors present a long list of incidents involving racial epithets, violence, hazardous work assignments, abusive and gratuitous insults, and threats of retaliation for filing of complaints. Such inherently factual questions, some if not all disputed on the facts and on admissibility of the evidence, cannot properly be re-

solved on summary judgment. While defendants may not have refuted each allegation, the determination must be made on the totality of the circumstances.

Summary judgment is granted as to the prima facie case on the first two issues--the adverse impact on blacks and women in the entry examination. The motion is denied with respect to the third issue, the dual complaint procedure, and the fourth issue, [*18] the racially hostile environment.

Plaintiff Leon's Motion for Summary Judgment

Plaintiff Leon seeks summary judgment on his request that the court permanently enjoin the appointment of any female applicant to the H-2 firefighter position who has benefited from the special training and retesting program unless the opportunity is made available on an equal basis to plaintiff and all other male applicants. He also seeks to enjoin the hiring of any female applicant who has not been certified for appointment pursuant to the "Rule of Three" set forth in ß 8.329 of the San Francisco Charter and ß 11.02 of the San Francisco Civil Service Commission rules. [2] Defendants, in their opposition to the motion but without formally moving, seek summary judgment in their favor. Because defendant is presently so enjoined, under the terms of the preliminary injunction, and because other parties seek conflicting injunctive relief, the court denies the motion without prejudice. Depending on the resolution of other issues at trial plaintiff may new his request for relief at that time.

> 2 Section 8.329 states: "Whenever a position controlled by the civil service provisions of this charter is to be filled . . . the commission shall certify to the appointing officer the names and addresses of the three persons standing highest on *the list* of eligibles for such position . . . The appointing officer shall fill the position by the appointment of one of the persons certified."

[*19] The department proposes to use two eligibility lists, one consisting of 190 men and the other of 18 women, 13 of whom were retrained and allowed to retake the physical exam. The "Rule of Three" requires that appointment be made from the top three applicants on the list. It does not appear to refer to more than one list and, in fact, the use of a second list would allow the department to circumvent the merit system rule.

Plaintiff focuses on the question of whether the department may provide preferential treatment to remedy traditional underrepresentation. However, the court need not reach that question if the "Rule of Three" does not apply in this case or if plaintiff does not have standing to challenge the appointments.

The court noted in its Order Granting Preliminary Injunction, Feb. 12 1986 at 14, that plaintiff might lack standing because the original list appeared to be a tentative list rather than a final list. However, it now appears from defendant's papers that the department fully intends to use *both* lists and contends that it may do so as long, as hiring from either list follows the "Rule of Three". Opp. at 11 ("Both eligible lists were adopted on October 21, 1985"). [*20] As the court noted earlier, "If the City may use more than one list, it could seemingly circumvent the rules entirely, by creating new lists any time it did not want to hire off the existing list." Order at 14. The department does not assert in its present papers that plaintiff lacks standing to challenge the list.

Rather, the department goes directly to the question of whether it may adopt an affirmative action program in this case. The question is not only whether the city may adopt a voluntary affirmative action program designed to remedy past gender-based employment discrimination. Subject to certain standards, it may. *La Riviere v. E.E.O.C.*, 682 F.2d 1275 (9th Cir. 1982). The question rather is a more specialized one: whether the city may adopt such a program if the program violates a neutral local regulation.

If the local regulation in question violates Title VII, it must be suspended. *United States v. City of Chicago*, 549 F.2d 415, 438 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *cited in City and County of San Francisco v. San Francisco Police Officers Association*, C-84-4045-RFP (N.D. Cal. Mar. 14, 1985). A local regulation that, if followed, would prevent [*21] the city from complying with a consent decree based on a Title VII violation violates Title VII and must be suspended. *Id*. If they conflict, Title VII prevails over the municipal regulation because of the Constitution's supremacy clause. In the *Police Officers Association* case, however, a consent decree not only permitted but required an action that put the city in conflict with the municipal provision. Here, the city is under no order to provide an affirmative action program. It wishes to do so voluntarily in order to remedy past underrepresentation, but the city charter and civil service rules prohibit the method it has chosen.

The court need not reach the question at this time because the existing preliminary injunction effectively bars the use of the two lists. However, if plaintiffs in the related case prevail and the court orders the city to remedy a past history of discrimination, the city could legitimately proceed with its plan. Depending on the nature of the order at that point, the city might be entitled, as in *Police Officers Association,* to suspend the local regulation in order to avoid violating Title VII. To enter a permanent injunction now would deprive [*22] the court of that option. For that reason, plaintiff's motion for summary judgment is denied without prejudice and may be

renewed at such time as the possible remedies for all parties are fully determined.

Summary

The designated plaintiff-intervenors are hereby certified as class representatives for these limited sub-classes:

1. Women who passed the written 1982 H2 Firefighter exam and took the physical test(s).

2. All black candidates who took the 1982 H2 Firefighter exam, whether or not they passed.

3. All black women candidates who took the 1982 written and/or physical agility tests, whether or not they passed.

4. All black candidates who took or were eligible to take the 1978 and 1984 H20 Lieutenant exams but were not hired.

Summary judgment is granted on plaintiff-intervenors' prima facie case of adverse impact on blacks and women in the entry examination. The motion is denied with respect to the dual complaint procedure and the allegation that the environment was racially hostile.

Plaintiff Leon's motion for summary judgment is denied without prejudice.

IT IS SO ORDERED.

DATED: June 23, 1986