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United States District Court,
S.D. New York.

LATINO OFFICERS ASSOCIATION CITY OF NEW YORK, INC., et al., Plaintiffs,
v.
THE CITY OF NEW YORK, et al., Defendants.

No. 99 Civ. 9568(LAK). | July 14, 2003.

Group of Latino and African-American police officers filed action alleging that New York City Police Department (NYPD) engaged in race, color, and national origin discrimination in violation of state and federal law. The District Court, 2003 WL 21437057, dismissed certain claims as barred by res judicata or claim preclusion. On cross-motions for summary judgment on remaining claims, the District Court, Kaplan, J., held that: (1) statistical evidence in report of defendants' expert did not conclusively refute, nor did NYPD's Equal Employment Opportunity (EEO) program defeat, any claim of discrimination; (2) court would consider equitable relief in event plaintiffs prevailed, despite defendants' claim it would violate principles of federalism; (3) genuine issues of material fact precluded summary judgment on claim that pattern or practice of discrimination against minority police officers existed as to commencement and prosecution of departmental charges; and (4) report and declaration of defendants' expert would not be excluded by way of motion in limine.

Motions denied.

Opinion

ORDER

KAPLAN, J.

***1** This matter is before the Court on cross-motions for summary judgment.

Defendants' Motion
Defendants' motion makes three assertions: (1) plaintiffs lack statistical evidence sufficient to make out a *prima facie* case of a pattern and practice of intentional discrimination, harassment and retaliation, (2) the NYPD's allegedly extensive EEO program defeats any claim of a pattern or practice of discrimination, and (3) the injunctive relief plaintiffs seek would violate principles of federalism.

[1] Upon examination, the first of defendants' arguments is not really that plaintiffs' lack statistical evidence sufficient to make out a *prima facie* case, but that defendants' expert's report conclusively shows that the statistics conclusively refute any such claim. It does not remotely approach doing so.

The contention based on the EEO program stands no better. For one thing, several aspects of the program upon which the City relies either began just a few months ago or are planned for the future. Def. Mem. 14, 16–17. These are no answer to charges which, at least in their predominant aspect, are retrospective. Equally significant, the unstated premise of the City's argument is that sincere efforts at training and the distribution of anti-discrimination literature cannot co-exist with a discriminatory workplace culture sanctioned by responsible ranking officials. If such efforts are made, the City reasons, such a culture cannot exist. That syllogism, however, defies human experience. While management efforts to combat workplace discrimination surely are relevant, they do not logically or legally foreclose plaintiffs' possibility of prevailing here.

Finally, there is no serious question that the Court would be obliged to consider fashioning appropriate equitable relief in the event plaintiffs prevail. This is not the time to determine the form such relief might take in such circumstances.

Plaintiffs' Cross–Motion

1. Summary Judgment
Plaintiffs' cross-motion, in addition to being untimely, is equally baseless.

[2] In a pattern or practice discrimination case such as this, the plaintiff "must establish that intentional discrimination was the defendant's 'standard operating procedure.' " *Robinson v. Metro–North Commuter Railroad Co.,* 267 F.3d 147, 158 (2d Cir.2001), *cert. denied,* 535 U.S. 951, 122 S.Ct. 1349, 152 L.Ed.2d 251 (2002) (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). As plaintiffs recognize, the core of such a showing typically is statistical evidence. *Id.* at 158 n. 5. They posit that the statistical evidence in this case shows that African–American and Latino officers ("Class Members") are disparately charged when compared to white officers, that plea offers made to Class Members steer them

disproportionately to trial rather than consensual resolution of departmental charges, and that Class Members receive a disproportionate share of the worst case dispositions. And from these premises they spring to the conclusion that there is nothing left to try. In doing so, however, they overlook a good deal.

***2** To begin with, the statistical evidence is far from conclusive even with respect to the propositions that plaintiffs assert. For example, the assertion that Class Members are being overcharged compared to white officers presupposes knowledge of the rates at which each group engages in conduct for which charges appropriately might be brought. Both sides agree that these rates are unknown and resort to proxies. It is not unequivocally clear that the proxies upon which they rely are appropriate or compel the conclusions that plaintiffs would have drawn.

More basically, plaintiffs' cross-motion ignores the basic nature of statistical evidence. "[S]tatistical analysis, by its very nature, can never scientifically prove discrimination." *EEOC v. Joint Industry Apprenticeship Committee of the Joint Industry Board of the Electrical Industry,* 186 F.3d 110, 116 (2d Cir.1999). In a case such as this—one in which the employment practices in question, the commencement and prosecution of departmental charges, serves the obviously legitimate purpose of rooting out misconduct by police officers—the ultimate burden of persuasion that any disparities revealed by the statistics reflect discrimination rather than something else "remains at all times with the plaintiff." *Id.* at 120. In other words, the question whether to infer discrimination is for the trier of fact.

2. The* In Limine *Motion

[3] Plaintiffs devote a portion of their memorandum to an effort to have the Court exclude the testimony of defendants' expert, Dr. Saad, on the grounds, *inter alia,* that certain of the data upon which his report was based were incomplete and that he based at least some of his conclusions of charges dispositions rather than case dispositions. The former argument, to a large extent, is a continuation of a discovery squabble that has occupied far too much of the attention of both the parties and the Court for far too long. The latter appears to go to weight rather than admissibility—while plaintiffs are entitled to argue that case dispositions are more important than charge dispositions, defendants are equally entitled to argue that charge dispositions are also relevant in an action charging that the disciplinary system is biased against Class Members.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment dismissing the complaint [docket item 79] and plaintiffs' cross-motion for summary judgment and to exclude the report and declaration of Ali Saad [docket item 159] are denied.

SO ORDERED.