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

DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, Joseph R. Zurlo, James Welsh, Charles J. Santarpia and Frank Desena, on behalf of themselves and all individuals similarly situated, Plaintiffs,
v.
The NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, the City of New York, and the New York City Department of Personnel, Defendants.

No. 93 Civ. 2580 (AGS). | Dec. 14, 1995.

Opinion

OPINION AND ORDER

SCHWARTZ, District Judge:

***1** Plaintiffs District Council 37, American Federation of States, County & Municipal Employees, AFL-CIO, ("DC37"), and the named individual plaintiffs on behalf of themselves and of a group of 141 Laborers who consented to be added as plaintiffs (collectively "plaintiffs"), following a jury verdict in favor of defendants on all claims of alleged age discrimination, move for a new trial under Federal Rule of Civil Procedure 59 on the grounds that the jury considered extraneous prejudicial information during its deliberations, to wit, one juror consulted outside sources in search of the definition of "pretextual," a term used on the jury verdict form.

Following a hearing, for the reasons set forth below, plaintiffs' motion is denied.

BACKGROUND

Plaintiffs, a class of 145 manual laborers formerly employed by the New York City Department of Parks and Recreation (the "Parks Department"), and DC 37 the labor union representing such employees, brought this action against the Parks Department, the City of New York and the New York City Department of Personnel (collectively "defendants") alleging age discrimination in employment in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §626 *et seq.* (the "ADEA"). Plaintiffs allege that as part of a reduction in force in June 1991, defendants discriminatorily eliminated the job title of Laborer to which the 145 individuals belonged. This job title consisted of 187 employees aged 40 and older. Plaintiffs, having brought this collective action under the Fair Labor Standards Act, 29 U.S.C. §216(b), incorporated by the ADEA, 29 U.S.C. §626(b), claimed that the layoffs, forced retirements and demotions of the Laborers were unlawful under two doctrines of age discrimination law: disparate impact and disparate treatment.

Following a trial by jury, which began on September 13, 1995, the jury found for defendants as to all claims. Specifically, the jury found that plaintiffs had failed to prove by a preponderance of the evidence (1) the disparate treatment discrimination claim in that plaintiffs had failed to prove that age was a motivating factor in defendants' decision to lay off all or substantially all individuals in the title of Laborer in the Parks Department, and (2) the disparate impact claim in that plaintiffs had failed to prove that an identified employment practice had a disparate impact on the 145 Laborers and that an identified employment practice caused the statistical disparity of which plaintiffs complained.

1. Facts Underlying the Respective Claims and Defenses

The City of New York operates on a fiscal year which begins on July 1 and ends on June 30. State law requires that the City maintain a balanced budget each year in accordance with generally accepted accounting principles. In early 1991, the City, which projects its revenues and expenditures monthly, projected an unprecedented budget deficit for the year of $3.5 billion.[1]

***2** In fiscal year 1991 in the face of the enormous deficits confronting the City, the administration of Mayor David N. Dinkins embarked upon negotiations with the City's municipal unions in an effort to arrive at budget reductions sufficient to satisfy the City's obligations under law. The City was unable to arrive at agreements with various unions, including plaintiff DC 37. Accordingly, as the end of the fiscal year approached, the City was required to effect work force reductions citywide. Reductions in the Parks Department budget resulted in personnel reductions of approximately 1,585 employees out of a total of approximately 5,100 employees. These reductions of Parks Department employees were spread over 128 Civil Service Titles, certain of which were eliminated in their entirety, including the elimination of the Laborer title and the positions held by the plaintiffs in this action.

2. Elimination of Laborer Positions

Laborers are divided into four categories depending upon the particular tasks that they are ordinarily assigned: A, B, C and C+ Laborers. The tasks performed by A and B Laborers in the Parks Department are also ordinarily assigned to workers in two other Parks titles: City Park Workers ("CPWs") and Associate Park Service Workers ("APSWs"). Laborers employed by the Parks Department performed manual labor maintaining the grounds and facilities of the parks in New York City. The salaries of Laborers have consistently been higher than the salaries of either CPWs or APSWs.

The salary of persons in the Laborer title is determined by the Comptroller's office pursuant to Labor Law § 220, which requires that Laborers be paid the hourly prevailing wage earned by employees in the private sector who perform the same or similar tasks as do Laborers. The salaries of CPWs and APSWs are not based on a prevailing wage determination, but are instead set by contract between their union, DC 37, and the City.

In 1986, the Laborer title was earmarked by the City's Department of Personnel for permanent incumbents only. This meant that permanently appointed Laborers could continue to be employed in that title, but that no further tests for, and no appointment of, employees could be made to the Laborer title citywide. Beginning in fiscal year 1987, the Parks Department began replacing each Laborer who left the agency with a CPW, thereby saving the difference between the two salaries.

On July 11, 1990, the City submitted a Four Year Financial Plan to the Financial Control Board. The financial plan reflected estimates of revenues and expenditures for fiscal years 1991, 1992, 1993 and 1994. The estimates for 1991 were based upon the Adopted Budget for fiscal year 1991. For fiscal year 1992, the City projected a gap of $970 million between revenues and expenditures. However, as a result of declining tax revenues, State budget reductions and mandated expenditure increases (e.g. public assistance and Medicaid assistance costs), the gap for fiscal year 1992 grew to $3.5 billion. To deal with this enormous problem, the City proposed a number of measures which included a tax program of $926 million and agency reductions of $2.2 billion.

***3** The budget cut demanded by the City from the Parks Department for fiscal year 1992 was proportionately the largest cut of any City agency. In June 1991, the projected budget in City funds for the Parks Department for fiscal year 1992 had been $175,935,000. By June 1991, the Parks Department was required to cut their budget for fiscal year 1992 by $64,368,000, or 36.9%. The Parks Department's final adopted budget in City funds for fiscal year 1992 was $111,559,000, as compared to an adopted budget in City funds for the previous year of $172,065,000.

As part of their effort to meet the drastic Parks Department budget cut target, the Parks Department decided that it must conduct a reduction in force, or lay off, of employees. Prior to the fiscal year 1992 cuts in June of 1991, the Parks Department had approximately 4,300 full-time employees and employed approximately 800 additional year-round "seasonal" employees. The Parks Department's adopted budget in June 1991 for fiscal year 1992 provided for a reduction in the Parks Department staff of 1,217 full-time employees. In addition, it significantly reduced the year-round seasonal staff.

Of the 187 Laborers employed in the Parks Department immediately prior to the June 1991 layoff, 123 were A, 29 were B; 3 were C; and 31 were C+. As of June 1991, the annual salaries of Laborers ranged from $34,515 to $37,939. A Laborers received the lowest salary; C+ Laborers received the highest salary. As of June 1991, CPWs earned annual salaries in the range of $20,543 to $27,745. APSWs earned annual salaries in the range of $26,884 to $33,347. Most of the CPWs and APSWs, in fact, had earnings at the low end of the salary range.

Among the cuts the Parks Department concluded it must make was the cut of all but one employee in the Laborer title because the bulk of the work done by Laborers could be done by the lower-salaried CPWs and APSWs. On or about June 28, 1991, 15 laborers were laid off, 10 chose to "bump down" to a previously held position, 161 chose retirement, and one was retained.

On or about April 6, 1992, the Parks Department offered to rehire the 25 Laborers who had been either bumped down or laid off. Twenty-one accepted the offer and were rehired as Laborers by the Parks Department; two chose to remain in their bumped-down positions, and two never returned. Fourteen persons in the Laborer title were working for the Parks Department at the time of the trial.

3. Plaintiffs' Claims

The thrust of plaintiffs' claims is that the defendants laid off, forced to retire or downgraded Laborers to a lower title at least in part because of their age. Plaintiffs claim that the employees in the Laborer title, all of whom were age 40 or over, were on average the oldest workers in the Parks Department and that after the Laborers' positions were eliminated, the work that they had been performing was assigned to younger employees in other job titles. Plaintiffs' claims are predicated on disparate treatment of older employees and disparate impact on such employees

of the layoffs, retirements and downgrading. Plaintiffs argued that there were reasonable alternatives available to defendants to resolve their budgetary problems and that such alternatives would not have had a disparate impact on older workers. In sum, plaintiffs claimed that the evidence showed that defendants wanted to eliminate their older work force and chose a method to accomplish their goal. Plaintiffs urged that "defendants intended to cause disparate impact on older workers when they decided to eliminate the Laborer classification." Joint Pretrial Order, Plaintiff's Contentions of Fact at 10, ¶ 13.

4. The Jury Verdict Form

***4** The Court provided the jury with a verdict form, which had been agreed upon by both parties. In fashioning the jury verdict form, plaintiffs requested that the Court use the term "pretextual" in framing question 3. Specifically, the following dialogue took place between the Court and plaintiffs' counsel:

> THE COURT: How would question 3 be changed to make it consistent with what you believe the Second Circuit requires?
>
> MS. RASKIN (Attorney for plaintiffs): I believe it would be "pretextual."
>
> THE COURT: Where would that word appear?
>
> MS. RASKIN: Did plaintiffs prove by a preponderance of the evidence that the reasons given by defendants for laying off all or substantially all of the individuals in the title laborer in the Parks Department were pretextual, because the Court has spent the time to define pretext.

Trial Transcript dated September 13, 1995 ("Tr.") at 1129.

On the fourth day of jury deliberations, defendants requested that a change be made to the jury verdict form, which the jurors had with them in the juryroom. Plaintiffs opposed the defendants' request both because of the delay in making such request and on the grounds that the jury verdict form was accurate in its present form. The Court held a conference on the record to address this issue, at which the following dialogue took place between the Court and plaintiffs' counsel:

> THE COURT: And therefore, what you are saying to me, if I understand you correctly, is the jury's verdict form is accurate; is that correct?
>
> MS. RASKIN: That's correct, your Honor.
>
> THE COURT: And that the jury verdict form is consistent with the law as you understand it?
>
> MS. RASKIN: Yes, your Honor.

Id. at 1217.

The Court denied defendants' request to change the jury verdict form.

5. The Jury Verdict

The jury found for defendants on both the disparate treatment and disparate impact claims and responded to the key questions on the jury verdict form as follows:

Disparate Treatment Discrimination Claim

Question 2. Did defendants present credible evidence of one or more legitimate nondiscriminatory reasons for their decision to lay off all or substantially all individuals in the title of Laborer in the Parks Department?

Yes	x	No	

If you answered "No" to question 2, go to question 4. If you answered "Yes" to question 2, go to question 3 and then question 4.

Question 3. Did plaintiffs prove by a preponderance of the evidence that the reason(s) given by defendants for laying off all or substantially all of the individuals in the title of Laborer in the Parks Department were pretextual.

Yes		No	x

Question 4. Did plaintiffs prove by a preponderance of the evidence that age was a motivating factor in defendants' decision to lay off all or substantially all individuals in the title of Laborer in the Parks Department.

Yes	No	x

x x x x x x x x

Disparate Impact Claim

***5** Question 6. Did plaintiffs by a preponderance of the evidence show that an identified employment practice had a disparate impact on them and that the identified employment practice caused this statistical disparity of which they complained?

Yes	No	x

6. Attorneys Interview Juror and Submit Attorney Affidavits

Following the jury verdict and discharge of the jury, the attorneys for plaintiffs and defendants, together, approached Juror No. 2 in the hallway outside of the courtroom and spoke with him. Based upon the statements alleged to have been made by Juror No. 2, plaintiffs filed the within motion for a new trial under Fed. R. Civ. p. 59. Plaintiffs' motion was supported by two affidavits, one by a trial attorney for plaintiffs and the other by an in-house attorney for plaintiff DC 37. Defendants, in opposition, submitted affidavits of three trial attorneys. The affidavits submitted by plaintiffs' attorneys and defendants' attorneys reflect that the juror, speaking to all of the attorneys at the same time, stated that he had not understood the word "pretextual" which appeared in one question on the jury verdict form and that he had consulted a dictionary, or dictionaries, and was unable to find an entry for "pretextual." The juror (the only juror, according to plaintiffs, who would agree to talk with the attorneys) then allegedly said that he "got on the phone with some lawyers to try to find out what it meant but nobody could explain the term 'pretextual.'"

All five attorneys agree that they were *all* present when the juror made his alleged statements. Four of the five attorneys aver that the juror said only that he had sought a dictionary definition but had been unable to find one for the word "pretextual" and that he had consulted lawyer friends but that none had been able to explain the term. Plaintiffs' attorneys' affidavits agree in material respects with the three affidavits submitted by defendants' attorneys, i.e. that the juror sought a dictionary definition but was unable to find one and called lawyer friends who then were unable to explain the term. One of plaintiffs' attorneys avers that the juror allegedly "translated for the rest of the jury what he learned [from the lawyer friends] as to the word 'pretextual.'" That statement by an in-house attorney of plaintiff union is in conflict with the four other attorney affidavits, including the affidavit submitted by a trial attorney for plaintiff which did not contain any reference or statement to the effect that the juror had learned anything about the word "pretextual" outside of court or had ever translated anything to the jury that had been told to him by anyone outside of court.

7. The Hearing

Although there was no direct evidence of any extraneous prejudicial information having been considered by the jury, the Court, in an exercise of caution, granted plaintiffs' application for a hearing and ordered that Juror #2 appear for examination. The hearing took place on November 28, 1995, exactly two months from the date the jury rendered its verdict. At the hearing, the juror testified that he and other jurors had difficulty with the word "pretextual" in the one question on the special verdict form. In response to the Court's questioning, the juror testified as follows:

***6** THE COURT: There have been statements made in affidavits submitted by certain of the lawyers who were present that you told the lawyers that you did certain research, including looking up a certain word in Black's Law Dictionary or a dictionary. Did you say that?

JUROR: Yes.... I looked up one word, not in Black's -- Blackstone's law dictionary. I looked up a word in Webster's dictionary. And the word was -- it was a word that didn't exist that was ... in one of the questions that the jurors had to answer in order to reach a verdict. And I felt I just wanted to confirm whether or not the word, in my considered and educated opinion, actually existed in the English language. And my instincts were proven correct, that that word did not exist....

THE COURT: Did you ever bring [the dictionary] into the jury room?

JUROR: No....

THE COURT: ... [D]id you call anyone during the days the jury was deliberating to ask them any question or to have any conversation with regard to any of the matter that touched upon this trial or your services as a juror or the deliberations that were then in progress?

JUROR: I made one phone call to a friend of mine who happens to be a lawyer.... I said, knowing as he did that I was on jury duty, I called him up and I said, "You know, I am having a very strange experience in this jury room." And he said, "I can't talk to you about this." And I said, "Well, I am just having this very strange experience because of some confusing language." He said, "I can't talk to you about this." I said, "Well, come on. Never mind that you are a lawyer. You and I are pals. I have a few questions." He said, "I can't talk to you about this. It is as simple as that. You can say anything you want, but I can't talk to you about this." I said, "Okay," and I hung up.

THE COURT: Have you told us the entire conversation?

JUROR: That's the entire conversation.

THE COURT: Now, did you at any time bring into the jury room any information that you had gathered or learned of or become aware of from any research, any dictionary, any other source that you had access to ... and tell it to the jury?

JUROR: No.

THE COURT: Did you at any time ever tell the jury that you had called a friend who was a lawyer and that you had obtained certain information and related that to the jury, that is, with regard to a word or any other matter that you had learned about outside of the jury room?

JUROR: No.

Transcript of November 28, 1995 Hearing ("Hearing Tr.") at 8-11.

On cross-examination by plaintiffs' attorney, the juror was asked whether, when he was examining the dictionary for the word "pretextual," he had seen the word "pretext." The juror said that he had seen the word "pretext" but did not recall what the dictionary definition of the word was. *Id.* at 15. Further, he stated that he never paraphrased the word "pretext" as "a lie" to the jury in deliberations and never related any information regarding anything he had found in the dictionary to the jury. *Id.* at 17.

***7** The juror's testimony was consistent with affidavits submitted by the lawyers for both plaintiffs and defendants. All of the affiants were in agreement that the juror had said that he had searched the dictionary for the word "pretextual" and had been unable to find the word.

With regard to the affidavit of the in-house attorney for plaintiff union, suggesting that the juror, having called "lawyer friends" had stated that he had "translated" what he had allegedly learned to the jury, the juror testified that although he had called one attorney friend who he identified by name, the lawyer, knowing him to be a juror, refused to talk to him and that the juror never translated, or told the jury anything that any lawyer or other person had told him. The juror's testimony was entirely credible.

In response to questions put to him by counsel for plaintiffs, the juror testified that he made certain handwritten notations on the copy of the jury verdict form which he once had but had since discarded, but that he did not recall what was on the form. He stated that nothing he had written on the form reflected anything he had learned outside of court. He repeated that he had never said anything to the jury as to any matter he had learned of from the dictionary or from anyone outside of court. The juror agreed that he and all the jurors had discussed the word "pretext," a term that was defined in the Court's charge, but stated that in doing so he did not refer to anything he had read in the dictionary. *Id.* at 17-18.

Plaintiffs, having learned that (1) the juror found nothing in the dictionary as to the word "pretextual" and (2) there was no information generated from the lawyer friend called by the juror, now assert an entirely different ground in support of their request that the Court continue the hearing and call three additional jurors, to be selected at random. Specifically, plaintiffs contend that the mere fact that the juror found the word "pretext" in the dictionary

suggests that the juror, himself, may have been tainted and that his statements to the other jurors in the course of deliberations may reflect this taint. Plaintiffs ignore the fact that in response to questions put to the juror by counsel for plaintiffs, the juror said that he did not remember what the dictionary said as to "pretext" and that he did not refer to the dictionary or anything in the dictionary in his statements during jury deliberations. Moreover, the juror never testified that he did not understand the Court's charge as to "pretext," that any other juror had difficulty with that term or that he had brought any information that he had learned outside of the proceedings as to that word into the jury's deliberations.

DISCUSSION

Notwithstanding the clear, credible and convincing testimony of the juror under oath at the hearing referred to above, and the absence of any evidence that extraneous prejudicial information was considered by the jury during its deliberations, plaintiffs urge the Court to summon three additional jurors, to be selected at random, for questioning by the Court and counsel. The Court declines to do so for the reasons stated by the Second Circuit in *United States v. Ianniello,* 866 F.2d 540 (2d Cir. 1989):

> ***8** The gravity of granting such a request should not be underestimated, however, because even a post-verdict evidentiary hearing raises serious questions. "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *United States v. Barshov,* 733 F.2d 842, 851 (11th Cir. 1984) *cert. denied,* 469 U.S. 1158, 105 S.Ct. 904, 83 L.Ed. 2d 919 (1985), citing *United States v. Winkle,* 587 F.2d 705, 714 (5th Cir.), *cert. denied,* 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979).

> As we have said before, post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts. *Miller v. United States,* 403 F.2d 77, 82 (2d Cir. 1968); *United States v. Crosby,* 294 F.2d 928, 950 (2d Cir.1961), *cert. denied sub nom., Mittelman v. United States,* 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962).

Id. at 543.

The Second Circuit in *United States v. Ianniello, supra,* in granting a post-verdict evidentiary hearing further stated that

> [A] post-trial jury hearing must be held when a party comes forward with clear, strong, substantial and incontrovertible evidence ... that a specific, non-speculative impropriety has occurred[.]" *Moon,* 718 F.2d at 1234, citing *King v. United States,* 576 F.2d 432, 438 (2d Cir.), *cert. denied* 439 U.S. 850, 99 S.Ct. 155, 58 L.Ed.2d 154 (1978).

866 F.2d at 543.

In the instant case, plaintiffs have wholly failed to come forward with clear, strong, substantial or incontrovertible evidence of a specific non-speculative impropriety that infected the jury's deliberations or would constitute an adequate showing of extrinsic influence to overcome the presumption of jury impartiality. The sole allegation, belatedly made by plaintiffs, is that Juror No. 2 having failed to find the word "pretextual" in Webster's dictionary, then saw the word "pretext," a term included within the Court's charge to the jury. The juror testified, however, that although he found the word, he does not recall the dictionary definition and never communicated that definition to any of the other jurors.

The charge, having defined "pretext," invited jury discussion as to that term.[2] There is no evidence, however, of any extrinsic matter or extra-record information as to that term having been brought into the juryroom. To direct jurors to return to court and be examined as to whether Juror No. 2 referred to a dictionary definition of "pretext" without any evidence of his having done so, is nothing more than an invitation to a fishing expedition. *United States v. Ianniello,* 866 F.2d at 543; *United States v. Moten,* 582 F.2d 654, 667 (2d Cir. 1978).

Plaintiffs urge that the juror may have seen the word "pretext" in the dictionary and paraphrased the definition for the benefit of the jury, equating "pretext" with the word "lie." In a subsequently filed affidavit, one of plaintiffs' trial attorneys stated that he recalled a matter that he had not included in his earlier affidavit in support of plaintiff's motion for a new trial, i.e., that the juror had with him a copy of the jury verdict form on which the juror had written "Has the union convinced you, to your satisfaction, that the reasons given for the layoff of the Laborers were a lie."

***9** The juror, at the hearing, in response to questions by the Court and plaintiffs' counsel stated that he had no recollection of ever having stated any such thing to the other members of the jury. He stated emphatically that he

had never brought into the jury deliberations anything he had found in the dictionary as to the word "pretext" or any other term. He stated that all of the jurors had discussed the term, "pretext," as expected, but that he had not referred to anything he learned as to that word outside of court. The juror never said that he or any other juror had not understood the Court's charge as to the term "pretext."

Plaintiffs refer the Court to *Mayhue v. St. Francis Hosp., Inc.,* 969 F.2d 919, 922 (10th Cir. 1992), in support of the principle that a rebuttable presumption of prejudice arises whenever a jury is exposed to external information in contravention of a district court's instructions. In *Mayhue,* after the jury had requested and been denied a dictionary, the jury returned its verdict. The Court's staff found a handwritten note *in the juryroom* that contained definitions of the words "discriminate," "prejudice," "administer," "clinical" and "hypertension." The handwritten note included precise definitions obviously copied from a dictionary,[3] strongly, if not incontrovertibly, indicating that a dictionary had been used and that a definition of a word ("prejudice") which was not in any of the Court's instructions to the jury and a definition of a word ("discriminate") which varied from the legal definition of a term that was referred to in the Court's charge, had been available to the jury during deliberations. *Id.* at 925.

As set forth above, no such evidence is present in this case. There were no dictionary definitions in the juryroom and no showing that any such definition was made available to the jury. The evidence at the hearing established conclusively that the juror did not find the word "pretextual" in the dictionary and did not receive any information as to that term from the one lawyer friend whose assistance he requested. The only contention made by plaintiffs is that, although the juror said he did not recall any definition in the dictionary of the word "pretext," he may have seen that word when he was searching for the word "pretextual." Based upon that alone, plaintiffs now seek to have the Court direct three jurors to return to Court for examination. Plaintiffs' request is founded upon the weakest of speculations. Plaintiffs claim that the fact that the juror had written on his copy of the verdict form a sentence *that did not contain any dictionary definition or other extrajudicial information,* but did equate "pretext" with "lie" requires that the Court summon other jurors to inquire as to whether a translation of a dictionary definition occurred.

Rule 606(b) of the Federal Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

***10** Fed. R. Evid. 606(b).

The sole issue presented by plaintiffs is whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Rule 606(b) makes clear that except with regard to extraneous prejudicial information or outside influence, jurors may not testify as to matters or statements occurring during the course of the jury's deliberations or to the effect of anything on jurors' minds or emotions as influencing jurors or concerning jurors' mental processes. To grant plaintiffs' request that the Court summon jurors at random, months after deliberations, in the absence of clear or strong evidence that extraneous prejudicial information was brought into the jury's deliberations invites the very offense that the Rule was designed to preclude.

Further, the courts have made abundantly clear that there can be no claim of prejudice if the alleged misconduct is harmless. *See United States v. Calbas,* 821 F.2d 887, 897 (2d Cir. 1987), *cert. denied,* 485 U.S. 937, 108 S.Ct. 1114, 99 L.Ed.2d 275 (1988); *United States v. Ianniello,* 866 F.2d at 544; *United States v. Bagnariol,* 665 F.2d 877, 886 (9th Cir. 1981), *cert. denied,* 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982). Defendants, by affidavit (not challenged by plaintiffs), identify 14 different dictionaries containing the name "Webster's" in their titles. None of the dictionaries include as a definition for "pretext" the word "lie," strongly suggesting that even if plaintiffs proved that resort had been had to Webster's dictionary and that Juror No. 2 had equated "pretext" with "lie," the clear inference is that such statement was not derived from any dictionary definition, i.e., information

from an extraneous source. Affidavit of Naomi Sheiner dated December 6, 1995 at 4-6. Interestingly, the 14 different dictionary definitions closely track the definition of the term "pretext" contained in the Court's charge to the jury ("not [defendants'] true reasons").

The Court concludes that plaintiffs have failed to submit clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety has occurred, as required by the Second Circuit in *United States v. Ianniello,* 866 F.2d at 543; *United States v. Moon,* 718 F.2d 1210, 1234 (2d Cir. 1983), *cert. denied,* 466 U.S. 971, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984); and *King v. United States,* 576 F.2d 432, 438 (2d Cir.), *cert. denied,* 439 U.S. 850, 99 S.Ct. 155, 58 L.Ed. 2d 154 (1978), to support further inquiry.

The Second Circuit clearly established the governing principles and procedure in *United States v. Moon,* as follows:

> It hardly bears repeating that courts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences. As we explained in *United States v. Moten,* 582 F.2d 654, 666-67 (2d Cir.1978), a trial court is required to hold a post-trial jury hearing only when reasonable grounds for investigation exist. Reasonable grounds are present when there is clear, strong, substantial and incontrovertible evidence, *King v. United States,* 576 F.2d 432, 438 (2d Cir.), *cert. denied,* 439 U.S. 850, 99 S.Ct. 155, 58 L.Ed.2d 154 (1978), that a specific non-speculative impropriety has occurred which could have prejudiced the trial of a defendant. A hearing is not held to afford a convicted defendant the opportunity to "conduct a fishing expedition." *United States v. Moten,* 582 F.2d at 667. Although the circumstances in the decided cases are instructive, each situation in this area is *sui generis. United States v. Barnes,* 604 F.2d 121, 144 (2d Cir.1979), *cert. denied,* 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).
>
> ***11** This same standard, which applies to a trial judge's determination of whether to hold a post-verdict hearing, is also useful in ascertaining whether the scope of a hearing that has been held is adequate. While the breadth of questioning should be sufficient "to permit the entire picture to be explored," *United States v. Moten,* 582 F.2d at 667, that picture is painted on a canvass with finite boundaries. *Therefore, in the course of a post-verdict inquiry on this subject, when and if it becomes apparent that the above-described reasonable grounds to suspect prejudicial jury impropriety do not exist, the inquiry should end.* (emphasis supplied).

718 F.2d at 1234.

The Court finds that although Juror No. 2 violated the Court's repeated instructions when he examined a dictionary for the word "pretextual," his failure to find such word in the dictionary or to obtain assistance as to such word from the attorney friend whom he called, renders the juror's misconduct harmless. The Court further finds that although Juror No. 2 may have seen the word "pretext" (while searching in the dictionary for the word "pretextual"), there is no evidence that he remembered the dictionary definition of "pretext" or that he then brought a definition of the word "pretext" into the juryroom during deliberations. Nothing submitted by plaintiffs or adduced at the hearing supports the contention that anything that transpired was prejudicial to plaintiffs.

CONCLUSION

Plaintiffs' motion for a new trial under Federal Rule of Civil Procedure 59 on the grounds that the jury considered extraneous prejudicial information during its deliberations is denied.

SO ORDERED:

[1] History reflects that in November 1977, at a time that the City projected an annual budget deficit of less than $1 billion, the City lost its access to the credit markets, teetered on the brink of bankruptcy and appealed for assistance to the State and Federal governments. In 1978, in response to the City's plight, the State amended the Financial Emergency Act ("FEA"), enacted three years earlier, to mandate annual balanced budgets under the supervision of the New York State Financial Control Board. *See* 65 Unconsol. Laws § 5406, *et seq*. (McKinney's 1979). The federal government, having conditioned loan guarantees upon the enactment of the FEA, then authorized federal loan guarantees of New York City bonds to be sold to the City's pension systems. *See id.* § 5418.

[2] The jury charge provided a two-page explanation of the term "pretext," which included the following: "You may find for plaintiffs on the issue of discrimination if you find that the *reasons offered by defendants are not their true reasons* for selecting the Laborer title for lay-offs, downgradings, and forced retirements. In making this determination, you should consider the reasonableness or lack thereof of defendants' explanation, and any evidence that the stated reasons are implausible. *If you find the reasons articulated by defendants to be unbelievable,* such a finding permits you to infer that defendants were motivated by a discriminatory reason." Jury Charge at 29 (emphasis supplied).

[3] The Tenth Circuit noted that

> The two definitions that the Court relied upon in granting a new trial were:
> P[re]judice--an opinion formed without taking time and care to judge fairly [[[,] to damage, harm, injury as by some action that weakens a right or claim.
> Discriminate--to see or note a differ[e]nce to make or see a differ[e]nce between to constitute a differ[e]nce between.
> *Mayhue,* 969 F.2d at 921.