Johnson v. Reno

United States District Court for the District of Columbia
April 17, 1996, Decided ; April 17, 1996, FILED
Civ. No. 93-206 (TFH)

Reporter: 1996 U.S. Dist. LEXIS 5347; 1996 WL 33658687
EMANUEL JOHNSON, Jr., et al., Plaintiffs, v. JANET RENO, Attorney General, Defendant.

Subsequent History: Motion granted by Johnson v. Reno, 2000 U.S. Dist. LEXIS 22652 (D.D.C., Dec. 12, 2000)

Prior History: Johnson v. Reno, 1993 U.S. Dist. LEXIS 21464 (D.D.C., Oct. 4, 1993)

Disposition: [*1] Defendant's motion is granted in part and denied in part.

Counsel: For EMANUEL JOHNSON, JR., BENJAMIN RUSSELL, III, plaintiffs: James William Morrison, [COR LD NTC ret], David James Shaffer, [COR LD NTC], ARTER & HADDEN, Washington, DC. Michael Wayne Beasley, [COR LD NTC ret], BERLINER, CORCORAN & ROWE, Washington, DC. Christopher W Poverman, [COR], SEMMES, BOWEN & SEMMES, Baltimore, MD. Avis E Buchanan, [COR NTC], Neal E. Kravitz, [COR LD NTC], WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, Washington, DC. For MORRIS A. BLUEFORD, SHERRY L. DAVIS, NOLAN DOBY, JOHNNIE M.M. GIBSON, CECILY GRAHAM, JOSEPH CALVIN JACKSON, ALLEN F. JORDAN, JR., RONALD D. KEMP, DONOVAN LEIGHTON, JAMES A. MCINTOSH, PRODUS M. PERKINS aka SCOTT, JULIAN STACKHAUS, on behalf of themselves and as Representatives of a Class of all others Similarly Situated, plaintiffs: David James Shaffer, [COR LD NTC], ARTER & HADDEN, Washington, DC. Christopher W Poverman, [COR], SEMMES, BOWEN & SEMMES, Baltimore, MD. Avis E Buchanan, [COR NTC], Neal E. Kravitz, [COR LD NTC], WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, Washington, DC. For LEADELL LEE, TYRONE POWERS, PRINCE EARL [*2] ROSS, PETER RENEAU, ALFRED JOHNSON, plaintiffs: James William Morrison, [COR LD NTC ret], David James Shaffer, [COR LD NTC], ARTER & HADDEN, Washington, DC. Christopher W Poverman, [COR], SEMMES, BOWEN & SEMMES, Baltimore, MD. Avis E Buchanan, [COR NTC], Neal E. Kravitz, [COR LD NTC], WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, Washington, DC.

For STUART M. GERSON, in his official capacity as Acting Attorney General of the United States of America, defendant: Richard Glen Lepley, [COR], Anne Marie Gulyassy, [COR], Andrea M. Sharrin, [COR LD NTC], U.S. DEPARTMENT OF JUSTICE, Civil Division, Washington, DC. For JANET RENO, in her official capacity as Attorney General of the United States of America, defendant: Richard Glen Lepley, [COR], Anne Marie Gulyassy, [COR], Andrew C. Phelan, [COR NTC ret], Andrea M. Sharrin, [COR], U.S. DEPARTMENT OF JUSTICE, Civil Division, Washington, DC.

For FBI AGENTS, intervenor-plaintiff: Stephen Neal Shulman, [COR LD NTC], FREEDMAN, LEVY, KROLL & SIMONDS, Washington, DC.

Judges: Thomas F. Hogan, United States District Judge

Opinion by: Thomas F. Hogan

Opinion

MEMORANDUM OPINION

Pending before the Court [*3] is Defendant's Motion For Clarification of Scope of Settlement Agreement. The defendant seeks an Order which she claims effectuates the terms of the Settlement Agreement approved by this Court on October 14, 1993 ("the Agreement"). According to the defendant, the Agreement bars all disparate impact claims that arose on or before October 14, 1993, in all areas where retroactive relief is provided. Moreover, the defendant urges this Court to construe that bar to be comprehensive enough to bar the complaints filed by various plaintiffs. The plaintiffs dispute this interpretation of the Agreement. After considering the parties' arguments, briefs, and all of the evidence in the record, the defendant's motion is granted in part and denied in part.

I. BACKGROUND

The motion pending before the Court actually has as its genesis an action pending before a different court. In a suit before Judge Thomas Penfield Jackson, an FBI agent alleged disparate impact claims dating back to 1989. [1] In that case the plaintiff argued that such claims are not

---

[1] Graham v. Reno Civ. No. 92-1018 (D.D.C.).

barred by the terms of the Agreement. However, the government filed a motion for summary judgment on *res judicata* grounds. Judge Jackson [*4] denied the government's motion, finding that the meaning of the agreement was ambiguous and thus needed to be resolved at trial. Subsequent to that decision, the defendant filed the instant motion to have the issue clarified by this Court.

The parties come to the Court seeking clarification of the terms of the Agreement, accordingly it is appropriate to the review the provisions that are primarily at issue. The relevant provisions read in part:

VI.*MISCELLANEOUS SECTIONS*

> B. *Preservation and Expedition of EEO Claims*
>
> 1. Any Black Special Agent who seeks to allege an individual claim of race discrimination, which arose between March 5, 1991, and the effective date of the agreement, may initiate such a claim for a period of 45 days after the effective date of this agreement in accordance with the provisions of 29 C.F.R. § 1614 and 42 U.S.C. § 2000e-16, provided that, if the claim involves an area for which retroactive relief was granted pursuant [*5] to Section III of this agreement, it may not be based on a disparate impact theory of recovery.Agreement at 54-55 ("Preservation of EEO Claims section").
>
> H. *Collateral Use Of The Agreement Prohibited*
>
> The parties to this action have entered into this Agreement as a compromise measure to terminate this action and resolve all issues in the class complaint filed in this action….Agreement at 66 ("Resolve All Issues section"). In addition, because the above cited section of the Agreement references the complaint, the meaning of portions of the complaint are also at issue. Therefore, it is also appropriate to examine relevant portions of the complaint. The complaint reads in part:
>
> Plaintiffs allege that the FBI's personnel policies, procedures and practices discriminate
> against Black Special Agents in the following areas: [1] selections to GM-14 positions, [2] performance evaluations ("PARs"), [3] initiation of disciplinary proceedings, [4] selection as Principal Relief Supervisors, [5] Relief Supervisor ratings, [6] selection to, and evaluation in, the Management Assessment Program ("MAP") and training, [7] assignment to field offices, [*6] [8] assignment to resident agencies, [9] awards and bonuses, [10] access to personnel files, [11] transfers, [12] access to special teams such as Special Weapons and Tactics, technical training, and Hostage Rescue Team.Complaint at 3.

The Agreement at issue was entered in order to resolve the class action lawsuit brought on behalf of all Black Special Agents of the Federal Bureau of Investigation ("FBI"), who had been employed by the FBI between March 5, 1991, and the effective date of the Agreement. As part of the Agreement the defendant agreed to certain Interim, Prospective, and Retroactive Relief, which the Agreement spelled out. Of particular importance to the Motion to Clarify is the retroactive relief awarded because the ability to bring claims under the Preservation of EEO Claims section is tied to whether the claim involves an area for which retroactive relief was granted. [2] Because the Agreement alters the playing field for bringing claims arising after March 5, 1991, it is important to consider the issues of claims arising before and after that date distinctly.

[*7] As an initial matter, the defendant asserts that the Agreement is a fully integrated contract that reflects the parties' entire understanding. Defendant Brief at 5. In support of that position the defendant argues that the Agreement (1) is a comprehensive document resolving all the claims in the complaint, (2) is the product of extensive negotiations over a period of two and one half years, (3) was negotiated by experienced trial counsel, and (4) contains a full integration clause. Defendant Brief at 5-6. That integration clause reads in part:

> This Settlement Agreement, including all appendices attached hereto, constitutes the entire agreement between and among the parties with respect to the subject matter hereof….Agreement at 67. Accordingly, the defendant argues

---

[2] The ten categories where retroactive relief was granted are: Promotions and Lateral Transfers: Performance Appraisal Reports: Discipline; Principal Relief Supervisors: Training; Resident Agency Assignments; Squad Assignments; Special Teams; Awards & Bonuses; and Transfers. *See* Agreement at 23-42.

that the Court, in determining the Agreement's scope and meaning, is limited to looking to the Agreement's plain language.

The defendant seeks clarification of the Agreement in light of the attempt by several class members to pursue disparate impact claims that the defendant claims are precluded by the express terms of the Agreement. [3] According to the defendant a review of the Agreement reveals that [*8] the parties' intent was to preclude the bringing of disparate impact claims prior to the effective date of the Agreement. The government relies principally on the language of the Resolves All Issues section. The defendant argues that this "all issues" language is an unequivocal reflection of the parties' intent as to the scope of the coverage of the Agreement. However, the defendant deems significant the absence of any reservation in the Agreement permitting the bringing of certain types of claims.

[*9] The Agreement states that its intent is to resolve all issues in the complaint. As the defendant points out, the cited section is not self-defining and requires reference to the complaint to determine the scope of the claims precluded. The defendant asserts, in essence, that consideration of the complaint's subject matter component and a time-frame component establish that disparate impact claims were contained in the complaint. [4] According to the defendant, if the Agreement resolves all issues in the complaint then that bar should be as broad as the twelve subject matter areas. Moreover, the defendant argues that the absence of a time frame limitation in the complaint precludes the Court from finding a similar limitation in the Agreement. The defendant argues that this reading is buttressed by the Agreement's definition of class to include all black Special Agents employed "at any time from March 5, 1991, until the effective date of this Agreement [October 14, 1993]." Agreement at 1-2. The defendant argues that inclusion of all black agents employed by the FBI through the effective date reveals the parties' intent to encompass all disparate impact claims that arose through that [*10] date. If the parties intended to preserve the right to bring some claims, the class could have been more narrowly defined. [5] [*11]

Moreover, the defendant asserts that whether the Agreement provided retroactive relief for disparate impact claims which arose prior to March 5, 1991, is of no matter. The awarding of retroactive relief is only relevant for claims that arose on or after March 5, 1991, as provided in the Preservation of EEO Claims section. For claims arising before that date, the defendant argues that the general statement that the Agreement "settles all issues in the class complaint" takes priority -- precluding relitigation of disparate impact claims regardless of whether retroactive relief was granted. Defendant Reply at 6.

In addition, the defendant argues that the language of the Agreement reveals that it was the parties' intent to extend the scope of the Agreement from the date upon which the class complaint was filed, March 5, 1991, through the date the Agreement [*12] became effective, October 14, 1993. The defendant argues that as to claims arising after March 5, 1991, the Agreement bars disparate impact claims in any "area" where retroactive relief was granted. The defendant argues that the Preservation of EEO Claims section is a tolling provision which expressly excludes disparate impact claims.

---

[3] The original motion for clarification was confined to this particular point. However, the class plaintiffs' response caused the defendant to request clarification on the following additional points:

> the Agreement bars all disparate impact claims that arose before March 5, 1991, concerning any area listed on page three of the Class Complaint, regardless of the retroactive relief provided by the Agreement.
>
> the term "area" in the Agreement refers to each employment category listed after the term "areas" on page three of the Class Complaint, not just to any subpart of the Agreement.Defendant Reply at 1.

[4] The subject matter component refers to the practices of the FBI in the twelve specific areas. The defendant argues that the complaint alleged a wide variety of practices and procedures that the plaintiffs considered at least in part to be based on a disparate impact theory. Moreover, the defendant argues that the allegations contained in the complaint were "all-encompassing." The time component refers to the suggestion in the complaint that these practices adversely affected agents throughout their careers. The complaint alleged that the plaintiffs and the plaintiff class had been discriminated against from the dates of their employment, continuing up to and including the present time. See Complaint at 8. Because the complaint challenged policies and practices which spanned the entire careers of the plaintiffs, the defendant argues that any settlement of claims must go back equally as far which in some cases was as early as 1970. Indeed, noting that at least one agent was hired as far back as 1970, the defendant asserts that it is inescapable not to conclude that the complaint addressed disparate impact claims prior to March 5, 1991.

[5] Moreover, the government argues that the plaintiffs' inclusion of substantial anecdotal allegations dating back to 1981 demonstrates the scope of conduct intended to be included within the complaint. See *generally* Defendant's Brief at 9.

With respect to the meaning of the term "area," contained in the Preservation of EEO Claims section, the defendant argues that it refers to employment categories, not the individual parts of employment areas where relief was granted, and that the term was intended to encompass the twelve "areas" listed on page three of the class complaint. Defendant's Reply at 4. Maintaining that the complaint determines what is precisely covered by corresponding terms in the Agreement, the defendant asserts that the plaintiffs defined the universe of the term "area" in the complaint when they alleged that "the FBI's personnel policies, procedures and practices discriminate against Black Special Agents in the following areas. . . ." Complaint at 3. The defendant asserts that to adopt the plaintiffs' interpretation would be to effectively allow them to re-define the term [*13] "area" and entitle many agents to relitigate issues that were addressed in the class complaint. [6]

Finally, the defendant raises several common sense arguments in support of its position regarding the breadth of the Agreement's preclusive effect. First, the defendant points out that the personnel policies challenged in the complaint were the same as those in effect when the Court approved the Agreement. The defendant argues that for the Court [*14] to construe the Agreement to permit challenges to policies for conduct after the filing of the complaint would make no sense. Defendant's Brief at 13. Moreover, the Agreement in question was intended to resolve a nationwide class action lawsuit challenging policies and procedures of the FBI. Permitting class members the right to challenge those same policies at a later date would be inconsistent with that resolution. Defendant's Brief at 13. Resolution of a class action is meaningless if not binding on all members of the class, and the defendant suggests that it never would have settled a nationwide class action alleging decades of discriminatory behavior by only precluding two years worth of claims. The defendant notes that this case involves a validly certified class which was approved by the Court only after a determination that it was fair to all members of the class, and that the class members approved the Agreement. To allow the class members to prosecute claims where retroactive relief has already been granted would allow individuals an opportunity to seek multiple recoveries for a single wrong. Defendant Brief at 14. [7]

[*15] Multiple factions purportedly representing the interests of the plaintiffs have filed briefs offering their own interpretation of how the Agreement should be construed. The primary opposition comes from the actual class plaintiffs who raise two points. First, they contend that claims that existed prior to March 5, 1991, are not barred by the terms of the Agreement. According to the class plaintiffs, when the parties negotiated the Agreement those claims that existed prior to March 5, 1991, and not filed by April 5, 1991, were thought to be barred by the statute of limitations. Plaintiffs' Brief at 2. In other words, the class plaintiffs take the position that these claims did not, as a matter of law, exist. Accordingly, to the extent that claims existed prior to March 5, 1991, but were not yet filed, the parties simply did not contemplate their existence, therefore, the Agreement could not have been intended to address or resolve these claims.

Second, the class plaintiffs agree that disparate impact claims that arose after March 5, 1991, are precluded to the extent, and "only to the extent," that retroactive relief was provided in the Agreement. It is the plaintiffs' position that [*16] there existed areas of dispute where settlement could not be reached and that it was the intent of the parties to allow individuals to proceed with such claims. [8] The plaintiffs recognize the bar on claims in areas where retroactive relief has been awarded but argue that the scope of this bar should be narrowly and literally construed. Plaintiffs' Brief at 3. In other words, if no relief

---

6 For example, the complaint alleges discrimination in the area of GM-14 promotions, but the Agreement only provided for retroactive relief in 3 divisions of the FBI. The government argues that the class plaintiffs' position would mean that only employees in the three divisions where retroactive relief was actually granted would have their lawsuits precluded. Others who sought GM-14 promotions in the remaining divisions would still be permitted to file lawsuits. The government argues that the parties could not have intended the agreement to have such a narrow meaning.

7 The defendant argues that if the Court were to find the terms of the Agreement ambiguous, a review of the relevant extrinsic evidence supports its position that the Agreement was intended to bar certain claims. *See generally* Defendant's Brief at 16-21. First, the defendant directs the Court's attention to language in briefs previously filed by the parties urging approvement of the Agreement, which they claim is consistent with the argument that the Agreement resolved all disparate impact claims. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Joint Motion For Court Order Granting Approval of Proposed Settlement, Agreement at 57 (filed May 21, 1993); Defendant's Memorandum In Support of The Proposed Settlement Agreement, at 1 (filed May 21, 1993). Second, the defendant argues that statistical and anecdotal evidence demonstrate conclusively that it was the parties' intent to resolve all existing disparate impact claims. Defendant's Brief at 18-20.

8 For example, according to the class plaintiffs there were many areas such as "in promotions to GM-15 positions, GM-14 positions in the field, and certain types of transfers, where no settlement was reached; rather, the parties agreed that individuals could pursue claims, including claims of disparate impact [] because no relief was provided, and therefore no claims were barred, by the final settlement." Plaintiffs' Brief at 2-3.

was provided for a specific disparate impact claim, such a claim is still viable.

Individually named plaintiffs of BADGE have also opposed the government's motion. [9] The BADGE plaintiffs initially [*17] urge the Court to view the government's motion as an improper attempt to circumvent Judge Jackson's ruling because it was unfavorable. [10]*See* Individual Plaintiffs' Brief at 1. The BADGE plaintiffs further argue that the Agreement is a fully integrated writing, thus extrinsic evidence should not be permitted when interpreting its provisions. [11] With regard to the substantive content of the Agreement the BADGE plaintiffs believe that the absence of any express provision precluding individual BADGE plaintiffs from pursuing disparate impact claims arising prior to March 5, 1991, is in itself evidence that such claims are not barred. [12] Individual Plaintiff's Brief at 4. The BADGE plaintiffs contest the government's right to come to Court and insert terms into an agreement that it neglected to insert in the first place, and note that contracts are to be construed against the party who supplies the words or from whom a writing otherwise proceeds. BADGE Brief at 6. [13] The BADGE plaintiffs acknowledge that the Agreement expressly precludes actions for disparate impact that involve areas where retroactive relief was granted when such actions arose between March 5, 1991, and the effective [*18] date of the Agreement. *Id.* at 11. [14] [*19]

On July 26, 1995, this Court conducted a hearing on the motion.. At that time, the Court permitted the parties to file supplemental pleadings concerning the motion for clarification. The government filed such a pleading in which it asserted that an additional investigation of its records had revealed a previous attempt to carve out a limited exception to the blanket preclusion to bringing disparate impact claims. [15] The government suggests that the terms of the compromise were accepted and incorporated into the Agreement, although it concedes that such a compromise is at odds with the plain meaning of the Agreement. Notwithstanding [*20] this apparent disparity, the government asserts that it is willing to live by the terms of the compromise. However, the government argues that if the Court finds that the compromise was not accepted, then the terms of the Agreement barring all claims should control. The class counsel appears to agree with the subject matter of the government's representations but cautions the Court against consideration of this parol evidence. The class counsel argue that opening the door to consideration of some parol evidence would require consideration of all parol evidence. The individual plaintiffs vigorously object to adoption of the compromise language, and claim that there exists many examples of conduct left unresolved by the Agreement which should be left to be addressed on a case by case basis.

[*21] **II. DISCUSSION**

A. The Settlement Agreement and the Parol Evidence Rule

A settlement agreement is a contract. *Greco v. Department of the Army,* 852 F.2d 558, 560 (Fed. Cir. 1988). Accordingly, the task of the Court is to construe the contract in order to give effect to the parties' mutual intentions. *NRM Corp. v. Hercules, Inc.,* 244 U.S. App. D.C. 356, 758 F.2d 676, 681 (D.C. Cir. 1985). Thus, before the Court can determine precisely what the meaning of the

---

[9] BADGE was the organization of black FBI agents who brought the original suit.

[10] Alfred Johnson' a plaintiff in a case pending before Judge Urbina, filed a *pro se* opposition to the defendants' motion for clarification alleging essentially the same. Johnson argues that the government should move separately in each individual case.

[11] The BADGE plaintiffs oppose the government's attempted use of extrinsic evidence because the Agreement is a fully integrated document, includes appendices, and contains and "Entirement Clause." The BADGE plaintiffs argue that the Agreement does not permit references to any other documents, including the complaint.

[12] This is particularly so in light of the tolling provision which according to the BADGE plaintiffs contains an express preclusion on certain claims.

[13] According to the Badge plaintiffs, the Agreement "should be interpreted against the government to the extent that the [Agreement] states that disparate impact claims which arose prior to March 5, 1991 are not precluded." BADGE Plaintiffs Brief at 6.'

[14] The BADGE plaintiffs assert that to the extent that they disagree with the class counsel, the class counsel does not accurately reflect the positions of class members. Moreover, the BADGE plaintiffs argue that the plaintiffs' class counsel are selling out their clients in exchange for the attorneys' fees that come from this action. Finally, the BADGE plaintiffs complain that the individual plaintiffs have not been properly informed about this pending motion.

[15] According to the government, "the FBI's proposal would have allowed a disparate impact claim to proceed if it met three conditions: (1) it was filed before March 5, 1991; (2) it was pending on October 26, 1992; and (3) it was cast as a disparate impact claim when filed." Defendant's Supplemental Filing at 2.

contract is, it must first determine whether the contract represents a complete integration of the parties' understanding, or whether there exists ambiguity in the meaning of the contract. Under the parol evidence rule, when the parties have reduced their entire agreement to writing the Court will disregard and treat as inoperative parol evidence of prior negotiations and oral agreements. *United States v. Sears, Roebuck and Co.,* 623 F. Supp. 7, 9 (D.D.C. 1984) (J. Hogan), *aff'd,*250 U.S. App. D.C. 189, 778 F.2d 810 (D.C. Cir. 1985). In determining whether the contract represents a complete integration the Court must examine the intent of the parties. In assessing that intent a court will examine [*22] "the written contract, and the conduct and language of the parties and the surrounding circumstances." *Standley v. Egbert,* 267 A.2d 365, 367 (D.C. 1970). A presumption exists that a written contract contains all of the parties' terms, and the presence of an integration clause strengthens that presumption. *Luther Williams, Jr., Inc. v. Johnson,* 229 A.2d 163, 165 (D.C. 1967).

The parties appear united in their belief that the Agreement is a fully integrated contract. A close inspection of the terms of the Agreement, as well as well as consideration of the circumstances surrounding its creation, lead this Court to reach a similar conclusion. Several factors drive the Court's analysis. First, the contract is a comprehensive document covering a broad variety of subjects. Second, the Agreement was reached with the assistance of experienced counsel after long and complicated negotiations. Finally, and most importantly, the contract contains an integration clause which states that the Agreement "constitutes the entire agreement between and among the parties with respect to the subject matter hereof and supersedes all prior agreements, written and oral, with respect thereto." Agreement [*23] at 67. In sum, consideration of these factors leave little question that the contract is fully integrated.

In the face of a fully integrated agreement the parol evidence rule generally precludes the consideration of extrinsic evidence. There are, of course, exceptions to that rule. For example, when there is ambiguity in the language of the agreement, evidence may be admitted to clarify the intent of the parties. *NRM Corp.,* 758 F.2d at 682 n.15. Conversely, it stands to reason that if the contract is unambiguous, the Court may not look to parol evidence or extrinsic circumstances to determine its meaning. *United States v. Sears, Roebuck and Co.,* 623 F. Supp. 7, 9 (D.D.C. 1984) (J. Hogan), *aff'd,*250 U.S. App. D.C. 189, 778 F.2d 810 (D.C. Cir. 1985). It is important to note that a contract does not become ambiguous merely because the parties disagree on its interpretation. *Clayman v. Goodman Properties Inc.,* 171 U.S. App. D.C. 88, 518 F.2d 1026, 1034 (D.C. Cir. 1973). It is only ambiguous if it is reasonably susceptible of different constructions or interpretations. *Lee v. Flintkote Co.,* 193 U.S. App. D.C. 121, 593 F.2d 1275, 1282 (D.C. Cir. 1979).

This Court concludes [*24] that the Agreement is unambiguous, and therefore interpretation of the contract is a question of law for the court. *NRM Corp.,* 758 F.2d at 682. [16] Examination of the relevant portions of the Agreement leaves little question that they are "unambiguous on [their] face." [17]623 F. Supp. at 9. Although the parties disagree over the meaning, the terms which are the subject of the present dispute are clear. It is axiomatic that the question for this Court is not whether the parties agree as to the meaning of particular contract terms but whether or not those disputed terms are *reasonably* susceptible to more than one interpretation. The Court finds that the relevant portions of the Agreement are reasonably susceptible to only one interpretation.

[*25] Having concluded that the Agreement represents a full integration of the parties' understanding and that its terms are unambiguous, this Court moves to the critical substantive questions presented by this Motion for Clarification. Ultimately, the question before the Court is rather straightforward: to what extent does the Agreement bar the bringing of disparate impact claims that arose before the effective date of the Agreement? Unfortunately, the raising of a simple question does not necessarily result in simple answers. The question before the Court is best split, as the parties have done, into two distinct issues. The first is whether the Agreement was intended to bar all disparate impact claims which arose prior to March 5, 1991. The second issue is the extent to which, if any, the Preservation of EEO Claims section allows plaintiffs to bring disparate impact claims.

B. Disparate Impact Claims Arising Prior to March 5, 1991

As to the first issue the Court finds that the Agreement was intended to bar the bringing of disparate impact claims arising before March 5, 1991, regardless of whether retroactive relief was granted. As with all contract

---

16 The interpretation of an ambiguous contract is still a question of law as long as the extrinsic evidence is undisputed. *NRM Corp.* 758 at 684 n.23.

17 The two portions of the Agreement at issue here read in principal part: "terminate this action and resolve all issues in the class complaint…." Agreement at 66, and "provided that, if the claim involves an area for which retroactive relief was granted pursuant to Section III of this agreement, it may not be based on a disparate impact theory of recovery." Agreement at 54-55.

interpretation the Court starts [*26] with the literal language of the Agreement. The parties entered into the Agreement in order to "terminate this action and resolve all issues in the class complaint…." Agreement at 66. In assessing plain meaning the Court cannot imagine more unequivocal language than to "resolve all issues." The Court is cognizant of the maxim that it is a rare occasion when even plain meaning can be assessed in a vacuum. Plain meaning must be viewed in context. In the present case, in order to determine the scope of the "all issues" language it appears clear that the parties expressly contemplated reference to the complaint. Moreover, such incorporation of an associated document does not run afoul of the parol evidence rule despite the absence of magic words such as "incorporating." Although the complaint was not included as an appendix, the specific reference to the complaint in the Agreement permits an interpreter of the Agreement to look to the complaint to determine what issues have been resolved.

Accordingly, the Court finds that because the complaint alleged a wide variety of conduct which could be considered to provide a basis for a disparate impact claim, those claims were resolved by the [*27] Agreement. The scope of the subject matter alleged in the complaint is laid out on page three where the plaintiffs asserted twelve distinct "areas" where alleged discrimination took place. Moreover, many of these allegations dated long prior to 1991. In fact, the complaint alleges discriminatory conduct occurring from the moment of the earliest class members' employment in 1970. That retroactive relief was not awarded for all twelve of these areas is not fatal to this portion of the analysis. It is not uncommon for parties to an agreement to pick and choose as to which areas agreements will be reached and relief granted, making tradeoffs and prioritizing according to that which is most essential to them. The language of the Agreement states that it is resolving all issues in the complaint. In order for the word resolve to mean what it says, disparate impact claims arising before March 5, 1991, must be barred. To hold otherwise would render the Resolve All Issues section meaningless. The Court finds that the parties intended, unless otherwise expressed, to put these claims to bed.

C. Disparate Impact Claims Arising Between March 5, 1991, and the Effective Date of the Agreement

[*28] The more difficult question is to what extent the tolling provision for claims arising after March 5, 1991, modifies the all issues language -- at least with regard to disparate impact claims. Again, the Court's analysis begins and ends with the terms of the Agreement. Subject to filing date restrictions, the Agreement provides that any Black Special Agent seeking to assert an individual claim of race discrimination allegedly arising between March 5, 1991, and the effective date of the Agreement may do so "provided that, if the claim involves an area for which retroactive relief was granted pursuant to Section III of this agreement, it may not be based on a disparate impact theory of recovery." Agreement at 54-55. The plain meaning of the Agreement carves out a small exception to the blanket preclusion regarding issues in the complaint.

In the original complaint the plaintiffs alleged discrimination on the part of the defendant "against Black Special Agents" in twelve expressly delineated areas. The defendant argues that because the complaint defined the term "area" as used in the Agreement, and that because all issues in the complaint were expressly resolved by the Agreement, the [*29] reference to "area" in the Preservation of EEO Claims section is synonymous with how the term is used in the complaint. Therefore, according to the defendant, plaintiffs are precluded from bringing a disparate impact claim which arguably falls within one of the twelve subject areas in the complaint. In essence, the defendant is arguing that the Preservation of EEO Claims section should be construed to read: if the claim is for one of the twelve areas listed on page three of the complaint, it cannot be asserted on a disparate impact theory.

The Court disagrees with the government's interpretation. The Preservation of EEO Claims section, notwithatanding the "all issues" language, clearly contemplates the bringing of some form of claim. This alone is sufficient to cast doubt on whether the Agreement is internally consistent. However, it is a fundamental tenet of the law of contracts that terms of an agreement be read, where possible, consistent with each other and the Court will attempt to do that here. Try as it might the Court is not convinced that the all issues resolved language can be applied to the Preservation of EEO Claims section. First, a review of the twelve subject areas [*30] in the complaint reveal no distinction between claims based on a disparate impact theory and those based on some other theory. If the defendants are correct then *all* types of claims would be barred by the all issues resolved language. Yet the Preservation of EEO Claims section unequivocally permits claims to be brought. In fact, he only substantive limitation in that section is whether retroactive relief was granted and even this limit applies only to disparate impact claims. In other words, even if retroactive relief were awarded, a potential plaintiff could bring a claim as long as it was not based on a disparate impact theory. Because there are clearly issues left unresolved by the Agreement, the "resolves all issues" language does not control the Court's analysis of the Preservation of EEO Claims section.

Having concluded that the Agreement permits the bringing of non-disparate impact claims arising during the relevant

time period even where retroactive relief was provided, the Court must now consider to what extent claims may be brought under a disparate impact theory. Of course, the term "area" in the Agreement could be read synonymously with "areas" in the complaint, and [*31] therefore because all issues in the complaint were resolved, all disparate impact claims up until the effective date of the Agreement would also be barred. The Court does not find this to be a reasonable interpretation. A more reasonable interpretation is that while the Preservation of EEO Claims section clearly intended to limit the situations under which a plaintiff could raise a disparate impact claim, it never intended to completely bar such claims. Because a reading of the Agreement makes clear that disparate impact claims are barred *only* to the extent that retroactive relief was granted, it is important to determine how extensive that relief was. When the areas of retroactive relief are laid side by side with the complaint there is little doubt that Section III of the Agreement was not intended be as broad as the requested relief in the complaint. In other words, retroactive relief was not co-extensive with the 12 areas of discrimination listed in the complaint. The language in the Agreement inextricably ties the ability to bring disparate impact claims to whether or not retroactive relief was granted, and there is no evidence, nor has the defendant ever suggested, that retroactive [*32] relief was granted in all areas of the complaint. [18] Moreover, the Court finds significant the choice of the term "if' in the Preservation of EEO Claims section because it is indicative of the parties' understanding that there existed areas where no retroactive relief was granted ("if the claim involves an area for which retroactive relief was granted…." Agreement at 55 (emphasis added)). Along these lines it is usefull to consider what the Agreement does not say. For example, in this case the Agreement does not state: "if the claim involves areas or an area listed in the complaint…." However, this is precisely the manner in which the government would urge the Court to construe the language. Retroactive relief was not granted for every single area in the complaint. Accordingly, there is an easily identified group of claims which can be brought completely consistent with the language of the Agreement. Finally, assuming arguendo that the term "area" in the Agreement was as wide ranging as that term is used in the complaint, the prohibition of those claims contained in the Preservation of EEO Claims section would be redundant. Adding the bar on disparate impact claims only makes [*33] sense if a scenario exists under which a disparate impact claim can be brought.

The Court, having concluded that the Agreement does not bar all disparate impact claims arising between March 5, 1991, and the effective date, must next decide how wide open is the door that the government neglected to shut. Ultimately, this final question turns on how the term "area" as used in the Preservation of EEO Claims section is defined. The only definition consistent with the language of the Agreement is treating the term "area" as limited to those subject areas where retroactive relief was granted. For example, retroactive relief was granted in the area of Performance Appraisal Reports (PARs). *See* Agreement § III. B. Under the Court's ruling the plaintiffs would be precluded from bringing a disparate impact claim arguably falling within the subject area of PARs. This definition permits a plaintiff to attempt to convince a court that for claims arising in the relevant time period, no retroactive relief was granted in that subject area and therefore the claim is viable.

In the spirit of clarification the Court believes it is worth noting what the Agreement does not say. First, the Court declines [*34] to adopt the defendant's suggestion that all disparate impact claims are barred and that "area" be defined by reference to the complaint. As previously discussed, the Court finds the Preservation of EEO Claims section "resolve[s] all issues" only to the extent that it preserves some. The categories where retroactive relief was actually granted do not track the areas listed in the complaint. Moreover, the mere listing of twelve areas in the complaint does not constitute, in this Court's view, a defining of that term for all subsequent purposes. Because the Resolves All Issues section has limited application to the Preservation of EEO Claims section, the Court sees no reason to allow it to compel the incorporation of definitions allegedly found in the complaint. Second, the Court is not convinced that the parties intended, as plaintiffs suggest, that the plaintiffs be permitted to bring disparate impact claims in subject areas where retroactive relief was granted. In the Court's view such an interpretation would render much of this comprehensive settlement agreement worthless. While the Agreement is not a model of artful drafting the Court is not convinced that the Government would [*35] have entered into an agreement that left them so exposed to future litigation of issues which were the core of the settled litigation. [19]

CONCLUSION

In accordance with the above analysis, the Court will grant in part and deny in part the defendant's motion.

---

[18] The Court could construe the term area in the Agreement to mean areas outside those raised in the complaint. However, such a reading would be inconsistent with the defendant's firm position that area is defined exclusively as the twelve subject areas listed in the complaint.

[19] The arguments raised by the individual BADGE plaintiffs can be addressed summarily. The individual BADGE plaintiffs present arguments which unfortunately raise more questions than they answer. For example, the BADGE plaintiffs suggest the Court should be guided by the lack of an express preclusion on pre-1991 disparate impact claims. These plaintiffs, however, fail to

April 17th, 1996

Thomas F. Hogan

United States District Judge

ORDER

[*36] For the reasons stated in the accompanying opinion, the Court will grant in part and deny in part the defendant's motion.

April 17th, 1996

Thomas F. Hogan

United States District Judge

---

even address the fundamental question of how the "all issues" language of page 66 is to be squared. Moreover, the individual plaintiffs suggest that the Court is precluded from considering the complaint in determining what issues were resolved despite the express direction that all issues in the complaint were resolved. The BADGE plaintiffs fail to even address the fact that the Agreement provided for contemplation of such consideration provided for in the Agreement.