The New York Times https://www.nytimes.com/1994/01/25/nyregion/giuliani-revamps-minority-program-on-city-contracts.html

GIULIANI REVAMPS MINORITY PROGRAM ON CITY CONTRACTS

By Jonathan P. Hicks

Jan. 25, 1994


The New York Times

GIULIANI REVAMPS MINORITY PROGRAM ON CITY CONTRACTS

PENTAGON DEPUTY IS CLINTON'S CHOICE FOR DEFENSE CHIEF

U.S. REJECTS PLEA TO ACT IN BOSNIA

U.S. Issues a Warning to Russia To Keep Economic Reform Going

Candidate, Once Reluctant, Says Family Gave Him Go-Ahead

Health Plan's Foes Tap Well of Public Fear

Court Rules Abortion Clinics Can Use Racketa Law to Sue

Giuliani Urges Street Policing Refocused on Crime

About the Archive

This is a digitized version of an article from The Times's print archive, before the start of online publication in 1996. To preserve these articles as they originally appeared, The Times does not alter, edit or update them.

Occasionally the digitization process introduces transcription errors or other problems; we are continuing to work to improve these archived versions.

Mayor Rudolph W. Giuliani said yesterday that the city had eliminated a significant element of a Dinkins administration affirmative action program that has directed a fifth of city contracts to companies owned by minorities and women.

Mr. Giuliani said that since his inauguration, he had effectively terminated a provision of the program under which companies owned by women or by members of minorities could be awarded city contracts, even if their bids were 10 percent higher than the lowest bid. Calling

that aspect of the program "indefensible," Mr. Giuliani said he would take steps to officially terminate the provision.

At the same time the new Mayor said he would maintain, at least for now, the practice of encouraging city agencies to steer as much as 20 percent of their contracts to minority- and female-owned companies. More Changes Planned

But he made it clear he will ultimately make changes in the overall program, too. "That program, over a period of time, has to become an ethnic-, race-, religious-, gender- and sexual-orientation-neutral program," Mr. Giuliani said during a news conference in City Hall.

"The theory of it is to remedy past discrimination," he said. "Now you can agree or disagree with whether that is necessary. But the city has to present a program that is leading us to a remedy that is going to get us back to the day when we will no longer have set-asides and goals."

The decision drew strong criticism from organizations representing businesses owned by women or members of minorities. They said the 10 percent bidding allowance did not cost the city a significant amount of money and that they viewed the action as being an insensitive, first step in dismantling the entire program.

Rudy Washington, the Commissioner of business services, said that the difference between the low bid and the cost of the contracts awarded under the set-asides was $2.7 million in the last fiscal year. Over all, the contracts awarded under the affirmative action program totaled $270 million.

The set-aside program was created two years ago by former Mayor David N. Dinkins. In a report issued during the mayoral campaign, Mr. Dinkins said that in its first year in operation, the program had increased the percentage of city contracts awarded to female- and minority-owned companies from 9 percent in 1990 to 17.5 percent last year.

The program, which Mr. Dinkins highlighted as one of his major achievements, became a highly contentious issue in the mayoral race when Mr. Giuliani criticized the program as "bad social policy" and vowed to make significant changes. That drew vehement criticism from Mr. Dinkins as well as from some female, black and Hispanic voters.

But a few days after the election, Mr. Giuliani traveled to Harlem to meet with Representative Charles B. Rangel and said he was reconsidering some of his objections to the program.

Mr. Giuliani yesterday said that by offering any advantage in bidding to some companies, the city encouraged not only a practice that was unfair but one that would lead to mountainous litigation. Also, he said such a practice was unsound at a time when the city is facing a $2.3 billion deficit in the budget for the next fiscal year.

"The city is paying 10 percent more for a contract and it's going to have to pay damages to a company that should have gotten the contract in the first place," he said. "If you continue this for four, five or six years, you're now talking about another serious fiscal jeopardy for this city."

The Mayor said that rather than set aside a percentage of contracts or establish numerical goals the city should "try to create and have a lot more assets in community development banks." He added that the city should encourage banks to lend money to minority- and female-owned businesses. Also, he said that the city should provide "training and help, particularly in how you develop small businesses." 'Trying to Compete'

Roy A. Hastick, president of the Caribbean American Chamber of Commerce and Industry, said that the Mayor's remarks were disappointing. The 10 percent allowance on contracts, he said, created the impression "that the city was serious about helping minority-owned businesses."

"Our members, and minority businesses throughout the city, are only trying to compete and that was a way to help," he added.

Harriet R. Michel, president of the National Minority Supplier Development Council, an organization that helps corporations identify minority contractors said, "I'm incensed because it shows he doesn't understand economic development.

"In the real world, no small business can compete against the giants of the world," said Ms. Michel, who also served on the advisory board of the Dinkins administration program.

She and other supporters of the program said that the price preference affected fewer than 5 percent of the companies and that often the company chosen was within 5 percent of the lowest bid.

"The 10 percent component of the program simply means that the city has some latitude," Ms. Michel said. She added that the Mayor's action signaled that Mr. Giuliani is "playing to his core constituents who believe that any attempt to reach out to minorities is reverse discrimination."

At a town hall meeting in Queens last night, Mr. Giuliani hinted at some of the other government reorganization plans he is considering. He said he would reveal in the next week and a half a plan to create competition between city agencies and private businesses in the collection of parking fines.

He also said he was looking at moving the taxi and limousine commission under the jurisdiction of the Police Department and would consider giving guns to the taxi inspectors.

And he said that his preliminary budget plan, which is due out next week, would contain a proposal to put two to four of the city's municipal hospitals under the control of private voluntary boards.

A version of this article appears in print on , Section A, Page 1 of the National edition with the headline: GIULIANI REVAMPS MINORITY PROGRAM ON CITY CONTRACTS

The New York Times https://www.nytimes.com/1997/03/24/nyregion/giuliani-defends-his-decision-on-issuing-city-contracts.html

Giuliani Defends His Decision on Issuing City Contracts

By Randy Kennedy
March 24, 1997

Facing criticism that minority-owned businesses are suffering under his administration, Mayor Rudolph W. Giuliani yesterday vigorously defended his decision three years ago to dismantle an affirmative action program that steered city contracts to such businesses.

Mr. Giuliani said that the program, a major initiative of former Mayor David N. Dinkins, had been of questionable legality ever since several court decisions declared such practices unconstitutional.

And besides, he added, the program often helped businesses that needed no help or employed few minorities or women. Since the program was eliminated, the city has instead encouraged banks to lend to small minority businesses and has expanded bidding on smaller contracts as a way to include more struggling businesses in poor neighborhoods.

But even as he touted this approach, the Mayor conceded that the city no longer keeps track of how many city contracts are awarded to minority-owned businesses, suggesting that officials have no way of knowing whether their efforts are working.

''I've done away with a lot of that race-based analysis,'' Mr. Giuliani said. He was responding to questions about an article in The Daily News yesterday that stated that the city had not compiled statistics on the number or value of contracts awarded to businesses owned by minorities or women since mid-1994.

''Our analysis is, 'How are we helping small businesses? How are we helping poor people in the city?' '' Mr. Giuliani said. ''How are we helping people who are poor, not people who are poor who are white or black?''

Under the old program, companies owned by women or minority group members could be awarded city contracts even if their bids were 10 percent higher than the lowest bid.

In its first year, 1992, the program increased the percentage of contracts awarded to such companies to 17.5 percent, up from 9 percent in 1990.

Two earlier studies had found that minorities and women represented 25 percent of qualified contract bidders, but received less than 8 percent of the public money spent in a given year.

While Mr. Giuliani defended the philosophy of his policies yesterday, he said nothing about what effect they have had, even in a general sense. Instead, he repeatedly emphasized that even if the city had wanted to keep minority contracting goals in place, it would have been foolhardy.

''Had I gone ahead with the program I inherited and awarded contracts on that basis, the City of New York would now be paying hundreds of millions of dollars in damages for unconstitutionally and illegally used race-based criteria as a way of helping people,'' Mr. Giuliani said.

Deputy Mayor Rudy Washington, who oversaw the implementation of the new policies when he was commissioner of the Department of Business Services, said the administration had focused on strengthening minority businesses to compete for contracts in an open market. ''Most programs just seek to give somebody a contract and subsequently they default or fail on that contract,'' he said.

Although court rulings do not prevent the city from compiling data that identifies contractors by race or sex, Mr. Washington said, he questioned ''the real significance of trying to keep data on 'Who's doing what?' '' Rather than ''sitting by idly and playing

the numbers game,'' he said, ''we wanted to do something proactive.''

A version of this article appears in print on , Section B, Page 2 of the National edition with the headline: Giuliani Defends His Decision on Issuing City Contracts

Giuliani's Office Clarifies Affirmative-Action Goals

By Alan Finder

June 27, 1994


Errors Inflated New York City's Affirmative-Action Success in Contract Awards

Some Contractors Say Special Help Is No Favor

Giuliani's Office Clarifies Affirmative-Action Goals

AN ISSUE WE MUST CALL TO YOUR ATTENTION:

The New York Times

About the Archive

This is a digitized version of an article from The Times's print archive, before the start of online publication in 1996. To preserve these articles as they originally appeared, The Times does not alter, edit or update them.

Occasionally the digitization process introduces transcription errors or other problems; we are continuing to work to improve these archived versions.

The Giuliani administration sought yesterday to clarify how it has altered the program to steer more city contracts to companies owned by women or minorities that was created by former Mayor David N. Dinkins.

Randy Mastro, the chief of staff for Mayor Rudolph W. Giuliani, said the administration had eliminated the long-term goal of awarding 20 percent of all city contracts to women- or minority-owned companies -- a goal that Mr. Dinkins established two years ago. Mr. Giuliani eliminated another major component of the Dinkins program last February, when he dropped a measure allowing such companies to win a contract even if their bids were as much as 10 percent higher than the lowest bid.

In several interviews over the last two months, the Giuliani aide who is in charge of the program -- Rudy Washington, the Commissioner of Business Services -- said the city was maintaining the long-term goal. But Mr. Washington also said that the goals were voluntary, and would not be binding on commissioners who award contracts. Mr. Washington was on vacation and could not be reached for comment last night.

Mr. Mastro insisted yesterday that the city would no longer "set arbitrary number goals."

Two months ago, Mr. Giuliani announced a new program in which the city would begin to put out for competitive bidding certain small contracts that had not previously been bid upon. The Mayor said the city would seek aggressively to have small businesses, including companies owned by minorities or women, bid for these contracts.

Mr. Mastro said yesterday that the administration thought it could award more contracts to minority- and women-owned businesses by expanding the number of contracts that are put out to bid. "We fully expect our program to be much more successful," Mr. Mastro said.

A version of this article appears in print on , Section B, Page 4 of the National edition with the headline: Giuliani's Office Clarifies Affirmative-Action Goals

The New York Times https://www.nytimes.com/1996/08/29/nyregion/giuliani-promotes-his-chief-of-staff-to-no-2-spot.html

Giuliani Promotes His Chief of Staff to No. 2 Spot

By David Firestone
Aug. 29, 1996

Tightening his inner circle of top aides, Mayor Rudolph W. Giuliani yesterday promoted his chief of staff, Randy M. Mastro, to the position of Deputy Mayor for Operations, effectively making him the second-in-command at City Hall.

Mr. Mastro replaces Peter J. Powers, the Mayor's lifelong friend who recently announced his resignation and plans to return to private business at the end of this month. Though Mr. Mastro will get Mr. Powers's commanding office at the head of City Hall's central corridor, he will not receive Mr. Powers's former title, First Deputy Mayor.

Administration officials said the Mayor thinks that title must be earned in office, noting that Mr. Powers was not named First Deputy until after his first year as a deputy mayor. They also said there was still a possibility that Randy L. Levine, the city's former labor commissioner who is now the chief labor negotiator for Major League Baseball, would eventually return to the administration in a co-equal position with Mr. Mastro.

At least for now, however, Mr. Mastro will be first among equals among the city's four deputy mayors when he takes over on Sept. 3, supervising the day-to-day operations of city government and acting on the Mayor's behalf on those rare occasions when Mr. Giuliani leaves

town. Most of the city commissioners will report directly to him, and he will also act as the liaison with Federal and state agencies and other elected officials.

The appointment is considered unlikely to bring any significant change in direction in the administration; Mr. Mastro is already an important member of the four-man circle of advisers, who along with the Mayor, determine the administration's agenda and policy. (The others are Mr. Powers, Mr. Levine and Dennison Young Jr., counsel to the Mayor.) Mr. Giuliani acknowledged as much yesterday at a news conference.

''This doesn't signify a change in direction, because Randy is very much a part of this team,'' Mr. Giuliani said. ''It means the administration will be moving in very much the same direction.'' He added that he thought the administration was ''very successful, and what we need to do is to keep doing the same things we've been doing.''

Although Mr. Mastro has worked with Mr. Giuliani for much of the last decade, since joining the United States Attorney's office in 1985, he does not have as intimate a relationship with the Mayor that Mr. Powers has had, and administration insiders predicted that he would not carry as much authority. Nor will he make Mr. Powers's salary of $139,500, instead continuing to make $138,000.

In particular, Mr. Powers, who is to become the Mayor's campaign manager in next year's re-election effort, will continue to have the Mayor's ear on political matters, an area where Mr. Mastro will likely play less of a role.

''I have enormous respect for Randy, but he doesn't have a lot of political experience,'' said Guy V. Molinari, the Republican borough president of Staten Island. ''We'll have to see how that factors in.'' Unlike Mr. Powers or Mr. Giuliani, who are both Republicans, Mr. Mastro is a Democrat.

Also yesterday, the Mayor named Bruce Teitelbaum, the deputy chief of staff and the administration's liaison to the Jewish community, as acting chief of staff after Mr. Mastro changes jobs.

The announcement ceremony, held in the Blue Room of City Hall, was packed with city commissioners and aides in a display of the loyalty that both Mr. Giuliani and Mr. Mastro value so highly.

Standing beside his 6-month-old daughter, Arianna, and his wife, Dr. Jonine Bernstein, an assistant professor of epidemiology at the Mount Sinai School of Medicine, Mr. Mastro received sustained applause as he twice embraced the Mayor, whom he called both ''a role model and an inspiration'' in his life.

''I'm very much looking forward to this challenge and very much looking forward to supporting the important mission and agenda that he has set for all of us,'' Mr. Mastro said in his quiet rasp of a voice. ''So let's go forward and keep doing the good things we're doing.''

Somehow, during the ceremony, Mr. Molinari wound up holding Mr. Mastro's baby, just as he held his own granddaughter during his daughter Susan's keynote speech at the Republican National Convention earlier this month.

''Nowadays, it's required if you give a speech that you hold a baby,'' the Mayor joked. ''And Guy Molinari will show us how to hold the baby.''

Mr. Mastro, who turned 40 last week, has been a Giuliani loyalist since 1985, when he served as an assistant United States Attorney under Mr. Giuliani in the Southern District of New York.

More than any of the other former prosecutors who joined the administration, he carried Mr. Giuliani's prosecutorial zeal against organized crime into City Hall, achieving a high profile in his legal battles against mob influence in the Fulton Fish Market and other wholesale food markets, the San Gennaro festival, and the carting industry.

Law enforcement authorities have credited him with achieving most of his goals in those areas, evicting more than 20 companies linked to organized crime at the fish market and bringing in new companies to haul commercial waste in the city, thereby bringing down prices. For his efforts, he has received numerous death threats, and he and his family are protected by police bodyguards.

Inside the administration, however, Mr. Mastro is better known as the gatekeeper to high-level appointments in city agencies and the dispenser of patronage positions. Several commissioners, speaking privately, said they had been told by Mr. Mastro to hire staff members with political connections, and said he passed judgment on their choices of top aides.

Last spring, Mr. Mastro was interviewed, along with Mr. Powers and other city officials, by the United States Attorney's office, which is investigating improprieties in the awarding of city contracts to a Queens social service agency, the Hellenic American Neighborhood Action Committee, known as Hanac. Investigators have said they are trying to determine the role played by one of Mr. Mastro's top aides, Anthony Carbonetti, the director of appointments, in the awarding of the $43 million contracts.

Mr. Mastro is said by administration officials to be more impetuous and peremptory than the more deliberative Mr. Powers, more likely to display his temper with commissioners who resist instantly implementing City Hall's orders.

One official said that the administration runs on a mixture of loyalty, fear and affection, and suggested that the first two elements would now be more prominent than the third. Another said that Mr. Mastro was thought to be more socially liberal than Mr. Powers.

But virtually everyone interviewed yesterday said that as long as the strong-willed Mr. Giuliani remained the city's chief executive, the configuration of his aides was of lesser importance than it had sometimes been in other administrations.

''The players may come and go,'' said one commissioner, ''but the director remains the same.''

PROFILE

Randy M. Mastro

BORN: Aug. 21, 1956, Bernardsville, N.J.

FAMILY: Married to Dr. Jonine Bernstein, assistant professor of epidemiology at Mount Sinai School of Medicine. Father of 6-month-old girl, Arianna.

RESIDENCE: Manhattan.

EDUCATION: Bachelor's degree, Yale University, 1978. Law degree, University of Pennsylvania, 1981.

CAREER: 1981: law clerk to Justice Alan B. Handler, New Jersey Supreme Court. 1982-85: associate, Cravath, Swaine & Moore. 1985-89: assistant U.S. Attorney and deputy chief of the Civil Division, Southern District of New York. 1989-93: partner, Gibson, Dunn & Crutcher. 1993: outside counsel to Rudolph W. Giuliani's mayoral campaign. 1994-present: Mayor's chief of staff.

DOG: Bogart, a collie.

A version of this article appears in print on , Section B, Page 1 of the National edition with the headline: Giuliani Promotes His Chief of Staff to No. 2 Spot

The New York Times

City Room
Blogging From the Five Boroughs

City Settles Parks Bias Suit for $21 Million

By Sewell Chan February 26, 2008 1:29 pm

Updated, 4:14 p.m. | After 14 months of negotiation, New York City has agreed to pay more than $21 million to settle a federal class-action discrimination lawsuit filed against the Department of Parks and Recreation and will make "major changes in certain of its personnel practices" as part of the settlement, the NAACP Legal Defense and Educational Fund announced today. The settlement, which is expected to be ratified by Judge Denny Chin in United States District Court in Manhattan, includes $11.9 million in back pay and compensatory damages to a group of about 3,500 former and current workers.

"We decided that it would be better to settle than to litigate," Mayor Michael R. Bloomberg told reporters at a news conference in Chinatown today. "It was something that took place a long time ago and I think we are satisfied that our procedures today in that department, and I think in all departments, do not discriminate against anybody."

The settlement could signal the end of a case that dates to 1999, when 20 black or Hispanic parks workers filed complaints with the federal Equal Employment Opportunity Commission asserting that the department — under the Giuliani administration and the parks commissioner at the time, Henry J. Stern — had illegally discriminated on the basis of race and national origin in assigning and promoting employees. In February 2001, the E.E.O.C. found "reasonable cause" to believe the discrimination had occurred, clearing the way for the lawsuit.

The suit was a particular blow to Mr. Stern, a colorful former City Council member who served as parks commissioner under Mayor Edward I. Koch and Mayor Rudolph W. Giuliani, uses the name StarQuest and sends out regular e-mail messages with political commentary through a small nonprofit group he established, New York Civic. The plaintiffs complained that they were bypassed by promotions because of a recruiting program Mr. Stern had started to recruit young graduates of elite colleges — nearly all of them white — to fill positions in the agency. Embarrassed by the publicity, the Giuliani administration for a while ordered Mr. Stern to remain silent.

Then, in June 2002, the Parks Department — now under a new commissioner, Adrian Benepe, reporting to a new mayor, Michael R. Bloomberg — received another blow: a Justice Department lawsuit that accused the agency of of discriminating against black and Hispanic workers for the past seven years by favoring whites for promotions — including those who were part of the special recruiting program. Time and again, the suit contended, the Parks Department failed to follow any objective guidelines for determining promotions and filling management positions, failed to post notices of job openings, and "rarely, if ever" conducted the required interviews for vacancies.

The department said its practices had changed, but documents provided as part of the federal lawsuit detailed the extent of the discriminatory practices. In June 2005, the city settled the federal lawsuit, agreeing to broad changes in its promotion practices, including posting job vacancies so that all employees would be aware of them and making promotions on the basis of positive performance evaluations and other proof of merit.

Meanwhile, the original 2001 employees' lawsuit, known as Wright v. Stern, continued to drag on.

"Today's settlement is a clear victory for those who were denied equality in the workplace for so long," said Theodore M. Shaw, director-counsel and president of the defense fund, which uses the initials L.D.F. and is independent of the NAACP fund. "L.D.F. commends the black and Latino workers of the New York City Department of Parks and Recreation who stood up to this injustice and had the courage to fight for change."

Since December 2006, the defense fund worked with several lawyers — including Cynthia Rollings of Beldock Levine & Hoffman and Lewis M. Steel — to reach a settlement with the city.

The settlement announced today includes just $11.9 million to be distributed to the class of plaintiffs, which includes about 3,500 former and current parks employees; about $8 million in lawyers' fees, and about $1 million in litigation expenses.

Under the settlement, the city has agreed over the next three years to establish ways for employees to obtain review of salary differences that they believe are discriminatory; to obtain adjustments in those salaries if disparities are not justified; to increase pay in certain specific job titles; to train interviewers to ensure that employees who apply for promotions are treated fairly and objectively; and to examine the process by which managers are selected in the future.

Robert H. Stroup, head of the economic justice group at the legal defense fund, said the pay disparities arose in large part because the Parks Department had used a system of

provisional promotions that often ended up being permanent and were less transparent than promotions made through regular civil service procedures. The settlement calls for the Parks Department to show greater transparency in promoting managers. Also, as a result of the settlement, employees feel they are not being paid as much as a colleague for the same work, they will be able to bring the matter to the department for a formal review.

Georgia Pestana, chief of the Labor and Employment Law Division at the city's Law Department, said in a statement:

> This agreement should not be construed as an admission of wrongdoing by the Parks Department. The City defended the Parks Department in this litigation for almost a decade, because we do not believe it discriminated or retaliated against its African-American and Hispanic employees. Nonetheless, the City must evaluate the risks presented by a lengthy, multi-phased trial and seek to attain a result in its best interests. We believe this proposed settlement achieves that objective.

Mr. Stern, who was parks commissioner from 1983 to 1990 and again from 1994 to 2002, said in a phone interview today, "We never practiced discrimination on the basis of race, except for affirmative action." He added, "We deny any discrimination and thank the corporation counsel."

Mr. Stern said of the recruiting program: "The program was to get young college graduates to work long hours at low salaries. The problem was you couldn't black graduates to work for $22,000 or $25,000, either because they had loans or were offered better jobs by companies that wanted them. Nonetheless, we never turned one down – we accepted every black graduate that applied to the program. We went out of our way to recruit at historically black colleges. Any black employee who wanted to could have asked to be in this program. None of them asked to because they were being paid more."

Comments are no longer being accepted.

FORWARD SPIN

Bad economics in the Big Apple

New York Mayor Rudolph Giuliani kills a program designed to give 20% of city contracts to minority- and women-owned companies.

The New York Times called the move "wrong-headed—and hard-headed."

Anthony W. Robinson, president of the Minority Business Enterprise Legal Defense and Education Fund in Washington, D.C., says it was "an economic lynching."

But the strongest response to New York Mayor Rudolph W. Giuliani's decision to eliminate a city contracting policy crucial to the development of the city's minority- and women-owned business enterprises (M/WBEs) came from the entrepreneurs themselves. "This is a step back to the 1960s when minority contractors had to picket and riot in order to get the jobs," says Dolly Williams, vice president of A. Williams Trucking and Trenching Inc., a Brooklyn-based excavation and demolition company.

Mayor Giuliani

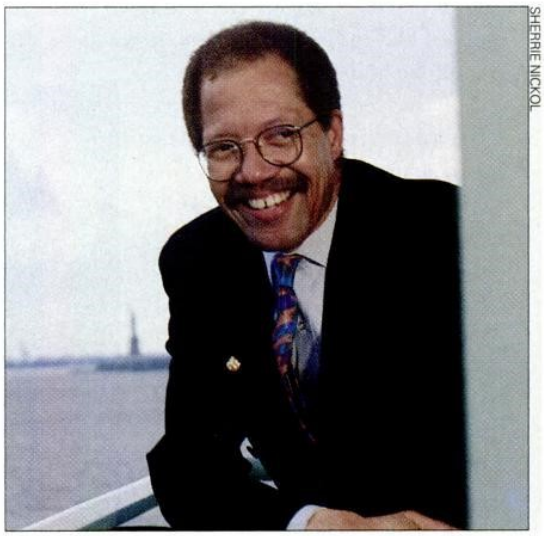
On January 24, Giuliani announced that he had eliminated the city contracting provision under which M/WBEs could be awarded city contracts even if their bids were up to 10% higher than the lowest bid. Minority business advocates say that Giuliani's decision cripples the two-year-old New York City minority contracting program launched during the administration of his predecessor, David N. Dinkins.

Giuliani had condemned the provision during his mayoral race against Dinkins. Then, during a brief period of outreach to New York's minority communities shortly after the election, he said that he'd reconsider his position. (Several calls to officials in the Giuliani administration went unreturned.)

"With all of the city's problems," says Williams, whose company gained contracts through the program, "why is the mayor making the dismantling of this program his first priority?"

It wasn't because the program was a burden on the city economy. It cost the city only $2.7 million in added contracting expenses, while giving $270 million in city contracts to M/WBEs. Between 1990 and 1993, the share of city business received by minorities and women nearly doubled, from 9% to 17.5%.

And while Giuliani painted the program as an "indefensible" form of reverse discrimination against white males (a view upheld by New York's Supreme Court on February 2), firms owned by white men actually got the largest share of city business through the program. Thanks to provisions giving preferences to majority firms joint-venturing with M/WBEs, companies headed by white men got $22.8 million in city contracts last year, versus $13.4 million for Hispanic firms, and $2.9 million for black firms.



SHERRIE NICKOL

Ford was commissioner of New York's Department of Business Services.

"This just shows the connection between political concerns and economic development concerns," says Wallace L. Ford II, the former commissioner of New York's Department of Business Services under Dinkins. "Many people are now relearning this lesson in a much different classroom."

–Alfred Edmond Jr. & Cassandra Hayes

INSIDE NEWSPOINTS

EDITED BY
ALFRED EDMOND Jr.

AN, THE MYTH, THE MANIA

THE FUTURE

JACK NEWFIELD

THE FULL RUDY: *The Man, the Myth, the Mania*

Published by
Thunder's Mouth Press/Nation Books
161 William St., 16th Floor
New York, NY 10038

Nation Books is a co-publishing venture of the Nation Institute and Avalon Publishing Group Incorporated.

Library of Congress Cataloging-in-Publication Data is available.

ISBN 1-56025-482-3

9 8 7 6 5 4 3 2 1

Book design by Michael Walters
Printed in the United States of America
Distributed by Publishers Group West

pendent Latino political leaders, like Congressman Serrano and Bronx Borough President Fernando Ferre if they were black.

During his first month in office, Giuliani discarded affirmative-action plan that had been city policy un David Dinkins. He stopped advertising job opening black newspapers. He ignored a mandate in the C Charter that he consult with the Equal Employment Pr tices Commission, a quasi-independent body that created to monitor minority hiring.

Giuliani also announced his decision to eliminate N York City's minority-contracting program, which sa 1992 had overseen $270 million worth of contra awarded to qualified firms owned by minorities a women.

A *New York Times* editorial on January 28, 1994, cal the move—in the first month of his term—"wro headed." The *Times* described the program he killed "One of the most socially beneficial and cost-effect programs of its kind anywhere."

These decisions at the outset of his first term sen message to his commissioners and administrators that one would be looking over their shoulder on the issue minority hiring. They could do whatever they wanted

Every morning at 8:00 A.M. the new mayor met w his loyal inner circle to plan strategy and make decisio There was not one black in this daily meeting. For seve years, its participants were First Deputy Mayor Pe Powers; Chief of Staff Randy Mastro; Counsel Dennis

Young; Corporation Counsel Paul Crotty; Communications Director Christine Lategano; Budget Director Joe Lhota; Deputy Mayors John Dyson and Fran Reiter; senior advisor Richard Schwartz; and Deputy Mayor Ninfa Segarra.

Like many political leaders, Giuliani was comfortable surrounded by people who were in his own image—who were like him. He liked to be around ex-prosecutors who had worked for him in the U. S. Attorney's office, like Mastro and Young. Powers had been his best friend since high school.

Ed Koch was also most comfortable surrounded by Jews with working-class origins like himself, and with similar politics and cultural taste, like Bess Myerson, Dan Wolf, Henry Stern, Victor Botnick, and David Garth.

Jimmy Carter hired a lot of White House staff from Georgia. JFK had his famous "Irish Mafia" from Massachusetts.

But as a result of the dismantled affirmative action program, fewer blacks were getting jobs in city government, even as the city was becoming more black and Latino.

In March 1996, Michael Powell made an analysis of black employment in top-level jobs for the *New York Observer*. His most striking discovery was that "since Rudolph Giuliani took office, 4,632 fewer blacks worked in agencies under Mayoral control. In contrast, white male employment has edged up by 387.

"The Mayor has appointed 600 additional white officials and administrators; at the same time, the number of

senior black officials had decreased by 258. In the Mayor's office, 20 employees earn more than $100,000; one is African-American."

As a candidate in 1993, Giuliani waffled back and forth about affirmative action as a legal concept. After he was elected, he practiced a hiring policy that came close to being discriminatory against blacks. It was certainly discriminatory.

Giuliani often said that his favorite mayor in New York history was the passionate populist Fiorello La Guardia, who governed the city colorfully and competently for three terms, from 1934 to 1945. Giuliani kept a picture of La Guardia in his office and invoked his legacy at every opportunity.

But *Newsday* columnist Joseph Dolman once asked La Guardia's biographer Thomas Kessner to compare the two Italian-American mayors.

"LaGuardia did not have a permanent disagreement with a whole part of the city," Kessner replied, making the essential distinction.

Two of Giuliani's original appointees had severely disturbed attitudes about race: Deputy Mayor for Economic Development John Dyson and Parks Commissioner Henry Stern.

Dyson was probably just an arrogant elitist. But I would have to say, based on personal experience, that Stern was a racist and never should have been appointed.

In 1978, Stern told me that he believed that blacks

Complaint - U.S. v. City of New York Department of Parks and Recreation

JAMES B. COMEY

United States Attorney for the

Southern District of New York

By: LISA R. ZORNBERG (LZ-1299)

RAMON E. REYES, JR. (RR-5545)

Assistant United States Attorneys

100 Church Street, 19th Floor

New York, New York 10007

Telephone: (718) 422-5706/5677

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

Plaintiff, :

: COMPLAINT

-v.-:

: 02 Civ.

CITY OF NEW YORK and NEW YORK CITY :

DEPARTMENT OF PARKS AND : Jury Trial Demanded

RECREATION, :

Defendants. :

----------x

Plaintiff, United States of America (the "United States"), upon information and belief, alleges for its complaint as follows:

1. This is an action brought by the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended ("Title VII").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. § 2000e-6 and 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this district under 28 U.S.C. § 1391.

THE PARTIES

4. Defendant, the City of New York (the "City"), is an employer within the meaning of 42 U.S.C. § 2000e(b).

5. Defendant, New York City Department of Parks and Recreation ("Parks"), is an agency of the City, and is an employer, or an agent of an employer, within the meaning of 42 U.S.C. § 2000e(b).

6. Plaintiff, the United States, is authorized to commence suit against an employer pursuant to 42 U.S.C. § 2000e-6 when the Attorney General of the United States has reasonable cause to believe that the employer has violated Title VII by engaging in a pattern or practice of unlawful discrimination.

PATTERN OR PRACTICE OF DISCRIMINATION

7. Parks engages in a pattern or practice of discrimination against its black and Hispanic employees on the basis of their race and/or national origin in making promotion decisions.

A. Failure to Post Vacancy Notices, Solicit Applications, or Conduct Interviews

8. Parks fails to follow any objective, formalized guidelines or procedures for determining which employees to promote to management positions.

9. Parks' stated policy is to post vacancy notices anytime there is a job opening for a managerial position in order to solicit applications for the vacant position.

10. Contrary to its stated policy, however, Parks has repeatedly failed to post vacancy notices announcing job openings for its vacant managerial positions.

11. As a corollary to its pattern and practice of not posting notices for vacant management positions, Parks engages in a pattern or practice of not conducting formal interviews for those positions.

12. According to its own Equal Employment Opportunity Policy ("EEOP"), Parks is required to conduct panel interviews and use a prescribed rating system in making its promotional decisions.

13. Contrary to that policy, however, Parks rarely, if ever, conducts panel interviews for vacant management positions.

14. Rather, Parks' pattern or practice with respect to vacant management positions is that its senior managers, including the Parks Commissioner and his executive staff, seek out and promote whites to management positions without conducting any formal interview process and in disregard of Parks' own EEOP.

15. For example, in and around 1995, Lynda Ricciardone, a white employee, was promoted to Center Manager of the Asser Levy Recreation Center ("Asser Levy") despite never having applied for that position. Contrary to its stated policies, including the EEOP, Parks promoted Ricciardone without ever having posted a vacancy notice, solicited applications, or conducted a formal interview process for the position.

16. Ricciardone was later promoted to Deputy Chief of Recreation for Manhattan, and then to Chief of Recreation for Manhattan. Again, Parks promoted Ricciardone to these positions without ever having posted vacancy notices, solicited applications, or conducted a formal interview process.

17. Similarly, Christopher Caropolo, another white employee, who began working at Parks in 1993 in a low-level clerical position at Asser Levy, was promoted to Deputy Center Manager at Asser Levy in 1994, then to Center Manager at the East 54th Street Recreation Center ("East 54th Street") in 1997, and then to Deputy Chief of Recreation for Manhattan in 1998, without ever having to respond to a posting, or submit an application. Again, Parks promoted Carapolo to these positions without ever having posted vacancy notices, solicited applications, or conducted a formal interview process.

18. In addition, Dorothy Lewandowski, a white employee, was promoted to Chief of Operations for the Bronx when then-Parks Commissioner Henry Stern called her and informed her that she was being promoted from Deputy Chief of Operations for Queens. Again, Parks promoted Lewandowski to this position without ever having posted a vacancy notice, solicited applications, or conducted a formal interview process.

19. Further, Parks promoted Keith Kerman, a white employee, to Director of Managed Competition, and then to Citywide Chief of Operations. Again, Parks promoted Kerman to these positions without

ever having posted vacancy notices, solicited applications, or conducted a formal interview process.

20. Similarly, Susan Silvestro, a white employee, was promoted to Chief of Administrative Services for Parks' "5-Boro Office." Parks promoted Silvestro to this position without ever having posted a vacancy notice, solicited applications, or conducted a formal interview process.

B. The "Class Of" Program

21. Parks uses its "Class Of" program in furtherance of its pattern or practice of discrimination against black and Hispanic employees, creating a separate promotional track for white Class Of participants whom Parks recruits directly from college.

22. In comparison to Parks' overall workforce, the composition of the Class Of program is disproportionately white and non-Hispanic.

23. Although many Class Of members leave Parks after two years to pursue other employment or continue their education, those Class Of members who chose to continue their employment with Parks routinely and swiftly have been promoted into high level permanent positions throughout the agency - over equally or more qualified black and Hispanic veteran employees.

24. Parks promotes Class Of participants to management positions for which it never posts vacancy notices, seeks applications, or conducts a formal interview process. Indeed, certain management positions are created specifically for Class Of recruits, so that it is impossible for anyone else to apply, interview, and be considered for the positions.

25. For example, within the span of two years, Stacy Leimas, a white Class Of member, was promoted from Parks' Recruitment Coordinator, to Aide to the Senior Advisor to the Commissioner, to Director of Work Experience Program ("WEP") Operations, a newly created position. Parks hand picked Leimas for these positions without affording black and Hispanic employees an opportunity to apply.

26. Parks replaced Leimas as Director of WEP Operations with Janice Felderstein, another white Class Of member who had been working for Parks for only a couple of years. Again, Parks selected Felderstein for this position without affording black and Hispanic employees an opportunity to apply.

27. Parks promoted K.C. Sahl, a white Class Of member, to become the first Manager of Washington Square Park (a job that had not previously existed), to Parks Recreation Manager, and then to Deputy Chief of Operations for Brooklyn. Parks selected Sahl for these positions without affording black and Hispanic employees an opportunity to apply.

28. Parks promoted Chris Clouden, a white Class Of member, who had been working for Parks for only two or three years, to replace Lynda Ricciardone in June 2000 as Chief of Recreation for

Manhattan. Parks selected Clouden for this position without affording black and Hispanic employees an opportunity to apply.

29. Parks promoted Chris Trevino, a white Class Of member who had been working for Parks for only one or two years, to Parks Recreation Manager in the Bronx. Parks selected Trevino for this position without affording black and Hispanic employees an opportunity to apply.

C. Individuals Injured by Parks' Discriminatory Promotion Policies

30. Parks' promotion policies discriminate against qualified black and Hispanic employees who have been excluded from seeking promotional opportunities, including, but not limited to, the three individuals discussed below.

Paula Loving

31. For example, Paula Loving is a 37 year-old black woman who was employed full-time at Parks from 1987 through December 1999.

32. Prior to leaving Parks, Loving had been working for approximately seven years as the citywide coordinator for Parks' component of the City's WEP. As such, Loving had been responsible for overseeing the daily operations of Parks' component of WEP in all five boroughs.

33. In 1997, Parks created and filled the position of Director of WEP Operations, a position which was never posted and for which no interviews were held.

34. Parks selected Stacy Leimas, a white woman and Class Of recruit, to be Director of WEP Operations.

35. Contrary to its own stated policies, Parks promoted Leimas to the position of Director of WEP Operations without posting the position, soliciting applications, or conducting a formal interview process.

36. As Director of WEP Operations, Leimas performed many of the same job duties Loving was already performing or had performed in the past as citywide WEP coordinator.

37. Loving was equally or more qualified than Leimas to be Director of WEP Operations, but Parks never considered Loving for the promotion.

38. Had Parks posted a vacancy notice for the position, Loving would have applied.

39. In the summer of 1998, Parks replaced Leimas as Director of WEP Operations with Janis Felderstein, another white woman and Class Of recruit.

40. Contrary to its own stated policies, Parks promoted Felderstein to the position of Director of WEP Operations without posting the position, soliciting applications, or conducting a formal interview process.

41. Loving was equally or more qualified than Felderstein to be Director of WEP Operations, but Parks never considered Loving for the promotion.

42. Had Parks posted a vacancy notice for the position, Loving would have applied.

Robert Wright

43. Robert Wright is a 46 year-old black man who has been a Parks employee in the Recreation Division since 1979.

44. Wright has vast recreation experience, including coordinating youth recreation programs throughout the City, and managing recreation centers in Queens and Manhattan.

45. Wright is currently working as a Park Recreation Manager at Marcus Garvey Park in Manhattan.

46. In 1995, Mr. Wright sought to transfer from Queens to Manhattan, and spoke with then-Assistant Commissioner of Recreation Rosemarie O'Keefe about the desired transfer.

47. O'Keefe initially offered Wright a choice of recreation centers to manage in Manhattan.

48. Wright chose Asser Levy. At the time, the Center Manager position at Asser Levy was vacant although Parks had not posted a vacancy notice announcing the opening of the position.

49. Asser Levy, located in lower Manhattan, is one of Parks' premier recreation centers. Because of its prominence, the position of Center Manager at Asser Levy often serves as a stepping stone to higher promotions.

50. Although O'Keefe initially agreed to transfer Wright to the Asser Levy manager position, a week or two later, she told Wright that the position was not available, and that his choices for transfer were limited to four recreation centers in predominantly black and Hispanic communities.

51. When Wright asked O'Keefe why he had to make another choice, she responded "you just have to." As a result, Wright chose to become the Center Manager for the Hansborough Recreation Center in Harlem.

52. Shortly after O'Keefe rescinded Wright's transfer to Asser Levy, Parks promoted Lynda Ricciardone, a white woman, to Center Manager at Asser Levy.

53. Ricciardone had not even applied for the Asser Levy Center Manager position; rather, Parks offered her the position after she interviewed for a different position in the Operations Division.

54. Wright was equally or more qualified than Ricciardone to be Center Manager at Asser Levy.

55. Since 1995, the Center Manager position at Asser Levy has been vacant on at least two occasions. Contrary to its own stated policies, Parks failed to post vacancy notices, solicit applications, or conduct a formal interview process for the position on either occasion.

56. Had Parks posted vacancy notices announcing the positions, Wright would have applied. Instead, on each occasion, a white employee who did not submit an application for the position was appointed Center Manager of Asser Levy.

Angelo Colon

57. Angelo Colon is a 48 year-old Hispanic man who has been a Parks employee since approximately 1988. Colon currently holds the position of Maintenance and Operations Coordinator.

58. In or around 1996, Colon became the Acting Center Manager at East 54th Street. East 54th Street, located in Manhattan, is one of Parks' premier recreation centers. Because of its prominence, the position of Center Manager at East 54th Street often serves as a stepping stone to higher promotions.

59. In 1997, while Colon was Acting Center Manager at East 54th Street, his supervisor, Deputy Chief of Recreation Ricciardone, rated him "excellent" in every category and commented that "Mr. Colon has always gone above and beyond in any situation. He is currently . . . doing an exceptional job."

60. Nonetheless, in the spring of 1997, Ricciardone transferred Colon to the Center Manager position of the Thomas Jefferson Recreation Center at 112th Street and First Avenue in Harlem - a far less prominent recreation center with significantly fewer resources than East 54th Street.

61. Almost immediately thereafter, Ricciardone promoted Christopher Caropolo, a white employee, to Center Manager of East 54th Street.

62. Colon was equally or more qualified than Caropolo to be Center Manager at East 54th Street.

63. Contrary to its own stated policies, Parks failed to post a vacancy notice, solicit applications, or conduct a formal interview process for the East 54th Street Center Manager position.

64. Had Parks posted a vacancy notice announcing the position, Colon would have applied.

65. As a result of Parks' discriminatory pattern or practice with respect to promotion decisions, qualified black and Hispanic employees seeking promotions have been denied the opportunity even to learn of vacancies, let alone apply for them and be considered for promotion.

66. As a result of Parks' discriminatory pattern or practice with respect to promotion decisions, white employees are promoted to management positions to the exclusion of qualified black and Hispanic employees.

Conditions Precedent to Suit

67. All conditions precedent to the filing of this suit have been satisfied.

CLAIM FOR RELIEF

Pattern and Practice of Discrimination

68. Paragraphs 1 through 67 are realleged and incorporated herein by reference.

69. Defendants have engaged in a pattern or practice of employment discrimination in violation of 42 U.S.C. § 2000e-2(a) that has the purpose or effect of excluding qualified blacks and Hispanics from opportunities for promotion within Parks.

Jury Demand

70. The United States hereby demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

WHEREFORE, the United States, prays that this Court enter judgment:

A. awarding compensatory damages to individuals injured by defendants' discriminatory conduct;

B. enjoining defendants from engaging in discriminatory employment practices in violation of Title VII, and requiring that Parks provide a fair, open, and competitive selection process for promotions;

C. directing defendants to take such other affirmative steps as may be necessary to prevent and to remedy employment discrimination and the patterns or practices of discrimination in employment identified above; and

D. granting such further relief as the Court may deem just, together with the United States' costs and disbursements in this action.

Dated: New York, New York

_____ __, 2002

JOHN D. ASHCROFT

Attorney General

By: _____

RALPH F. BOYD, JR.

Acting Assistant Attorney General

Civil Rights Division

JAMES B. COMEY

United States Attorney for the

Southern District of New York

By:

LISA R. ZORNBERG (LZ-1299)

RAMON E. REYES, JR. (RR-5545)

Assistant United States Attorneys

Telephone: (718) 422-5706/5677

Updated June 7, 2023

Civil Rights Division

U.S. Department of Justice

950 Pennsylvania Avenue NW

Office of the Assistant Attorney General, Main

Washington DC 20530

Civil Rights Division

202-514-3847

TTY

202-305-1435

450 F.Supp.2d 335
United States District Court, S.D. New York.

Robert WRIGHT, et al., Plaintiffs,
v.
Henry J. STERN, et al., Defendants.

No. 01 Civ. 4437(DC)
|
Sept. 15, 2006.

Synopsis

Background: Eleven African-American and Hispanic current and former New York City Department of Parks and Recreation (DPR) employees sued City, DPR, and DPR's Executive Director and Commissioner in their individual and official capacities, alleging they engaged in pattern or practice of race-based discrimination and retaliation. The District Court, 2003 WL 21543539, granted class certification. Defendants moved for summary judgment dismissing certain class and individual claims, and to exclude reports and testimony of employees' expert witnesses.

Holdings: The District Court, Chin, J., held that:

[1] testimony of employee's experts would not be excluded under *Daubert*;

[2] fact issues existed as to whether defendants engaged in pattern or practice of disparate treatment of African-American and Hispanic employees as class in promotions and compensation;

[3] defendants did not engage in pattern or practice of assigning employees and allocating funds based on race;

[4] reasonable jury could find that employees met their prima facie burden of demonstrating disparate impact ;

[5] employees failed to establish pattern or practice hostile work environment claim;

[6] fact issues existed as to whether defendants engaged in widespread retaliation against those opposing what they believed to be discriminatory practices;

[7] *Teamsters* presumption applied to compensation, promotion and retaliation claims of individual class members; and

[8] fact issues precluded summary judgment on those claims.

Motion granted in part and denied in part.

West Headnotes (57)

[1] Evidence Helpfulness; assisting trier of fact

Witness qualified as expert will be permitted to testify if his or her testimony will assist trier of fact to understand evidence or to determine fact in issue. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[2] Evidence Necessity of both reliability and relevance

To be admissible, expert testimony must be both relevant and reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[3] Evidence Methodology and reasoning; scientific validity

Evidence Sources of Information Relied Upon by Expert

To be reliable, expert testimony must be based on sufficient facts or data, and it must be the product of reliable principles and methods properly applied. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[4] Evidence Assumptions and hypotheses; assumed facts

Evidence Speculation, guess, or conjecture; probability or possibility

Expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2 Cases that cite this headnote

[5] **Evidence** Ipse dixit

Expert's opinion is inadmissible if it is connected to existing data only by the ipse dixit of the expert. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[6] **Evidence** Determination as to basis of expert's opinion and reliability in general

Trial court has latitude in deciding how to test an expert's reliability. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] **Evidence** Daubert and Frye tests as to reliability in general

Under *Daubert*, factors that trial court may consider in testing expert's reliability include, among others, whether theory or technique relied on by expert can be and has been tested, has been subjected to peer review and publication, and has been generally accepted in the relevant community, whether there is known or potential rate of error, whether discipline itself lacks reliability, where an expert's methodology is experience-based whether the methodology has produced erroneous results in the past and has been generally accepted in the relevant community, and whether expert's method is of a kind that others in the field would recognize as acceptable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[8] **Evidence** Relevance and materiality

In addition to being reliable, expert testimony must be relevant; expert opinion is relevant if it will assist trier of fact to understand the evidence or to determine a fact in issue, as ultimately expert's role is to assist trier of fact by providing information and explanations. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[9] **Evidence** Presumptions, Burden, and Degree of Proof

Proponent of expert testimony must establish its admissibility by a preponderance of the evidence. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

[10] **Evidence** Determination of Question of Admissibility

Rejection of expert testimony is still the exception rather than the rule, and trial court's role as gatekeeper is not intended to serve as replacement for the adversary system; thus, in close case the testimony should be allowed for jury's consideration. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[11] **Evidence** Daubert and Frye tests in general

Evidence Necessity of both reliability and relevance

In race discrimination suit against New York City Department of Parks and Recreation (DPR), sociologist's testimony summarizing relevant scientific literature in field of cognitive bias would not be excluded under *Daubert*; to extent sociologist would testify that, based on his understanding of the relevant scientific literature, DPR's personnel practices "allow decisions to be made in arbitrary and racially biased manner" and that they were "suited to produce and tolerate racial discrimination in employment, promotion and job assignment," his testimony was both relevant and reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[12] **Evidence** Particular Experiments, Tests, and Studies

In race discrimination action against New York City Department of Parks and Recreation (DPR) on behalf of class of African-American and Hispanic employees, testimony of expert with Ph.D. in Business and Applied Mathematics who concluded, based on series of regression analyses he had performed, that class members

(1) were systematically underpaid relative to similarly situated non-class members, (2) were systematically placed in lower paying job titles, resulting in a significant salary gap, (3) were denied their proportionate share of wage promotions, i.e., one-time increase in salary of predetermined amount (4) received systematically smaller wage increases, and (5) had experienced slower growth in pay rate over time than their similarly-situated Caucasian counterparts would not be excluded under *Daubert*, although written report itself would not be received into evidence; whatever the alleged deficiencies of his report, rebuttal report was sufficiently reliable and defendants could challenge his analyses through cross-examination and admission of their own experts' testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3 Cases that cite this headnote

[13] **Evidence** Statistics

In race discrimination suit against New York City Department of Parks and Recreation (DPR), although her written report would not be received into evidence, testimony of psychologist who had extensively researched, designed and conducted statistical analysis and provided consultation in areas of job analyses, test validation, performance appraisal, employment testing, and research design and who had served as expert on testing and validation for both U.S. Department of Labor (DOL) and Department of Justice (DOJ) would not be excluded under *Daubert* on grounds that her statistics were based on small sample, that sampling was not random, or that her conclusions were based on improperly aggregated data. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[14] **Civil Rights** Discrimination in General

"Pattern or practice" disparate treatment claims involve allegations of widespread acts of intentional discrimination against individuals.

2 Cases that cite this headnote

[15] **Civil Rights** "Pattern or practice" claims

To prevail on "pattern or practice" disparate treatment claim, whether brought individually or on behalf of a class, plaintiffs must demonstrate that intentional discrimination was the employer's standard operating procedure.

2 Cases that cite this headnote

[16] **Civil Rights** "Pattern or practice" claims

Proof of random or isolated acts of discrimination will not be enough to make out pattern or practice disparate treatment claim; instead, employees must present sufficient evidence to meet their prima facie burden of showing that employer had a policy, pattern, or practice of intentionally discriminating against a protected group.

2 Cases that cite this headnote

[17] **Civil Rights** Prima facie case

To meet their prima facie burden in pattern or practice disparate treatment case, employees typically rely on two types of evidence: (1) statistical evidence aimed at establishing employer's past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination.

1 Case that cites this headnote

[18] **Civil Rights** Presumptions, Inferences, and Burdens of Proof

For statistics to give rise to inference of discrimination, they must be statistically significant, for disparity among protected and unprotected groups will sometimes result by chance; though not dispositive, statistics demonstrating disparity of two standard deviations outside of the norm are generally considered statistically significant.

3 Cases that cite this headnote

[19] **Civil Rights** Effect of prima facie case; shifting burden

If employees meet their prima facie burden in pattern or practice disparate impact case, burden then shifts to employer to demonstrate that employees' proof is either inaccurate or insignificant.

[20] **Civil Rights** Admissibility of evidence; statistical evidence

Though statistics are not irrefutable, errors in statistical evidence do not necessarily render them meaningless in disparate impact employment discrimination cases.

1 Case that cites this headnote

[21] **Civil Rights** Questions of law or fact

Summary Judgment Public employment

Genuine issue of material fact, as to whether New York City, its Department of Parks and Recreation (DPR), and DPR's Executive Director and Commissioner intentionally discriminated against African-American and Hispanic employees in granting promotions and setting wages, precluded summary judgment on current and former employees' disparate treatment claims relating to pattern or practice of discrimination against those employees in promotions and compensation; statistical evidence showed that class members were systemically placed in lower-paying jobs, were systemically underpaid relative to similarly situated Caucasians, and experienced slower growth in pay compared to similarly situated Caucasians, employees offered anecdotal evidence of specific instances of discrimination and retaliation in promotions and compensation, evidence of numerous statements by DPR officials that demonstrated discriminatory and racially hostile attitudes on part of decisionmakers, and evidence of personnel practices at DPR that would permit discrimination to flourish. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

3 Cases that cite this headnote

[22] **Civil Rights** Hiring

Civil Rights Promotion, demotion, and transfer

Greater possibilities for abuse are inherent in subjective definitions of employment selection and promotion criteria.

2 Cases that cite this headnote

[23] **Constitutional Law** Public employees and officials

Public employee work assignments based on race generally run afoul of Equal Protection Clause. U.S.C.A. Const.Amend. 14.

[24] **Civil Rights** Practices prohibited or required in general; elements

Civil Rights Motive or intent; pretext

Even where clients request that an assignment be based on race, government employer does not have carte blanche to dole out work assignments based on race; rather, employer must demonstrate that the racially-based assignment was motivated by a truly powerful and worthy concern and that the racial measure adopted is a plainly apt response to that concern.

[25] **Civil Rights** Disparate treatment

Civil Rights Weight and Sufficiency of Evidence

New York City, its Department of Parks and Recreation (DPR), and DPR's Executive Director and Commissioner did not engage in disparate treatment of African-American and Hispanic employees on basis of purported segregation in assignments and underfunding of Parks in predominantly African-American or Hispanic neighborhoods; employees failed to present sufficient evidence that it was DPR's standard operating procedure to make assignments based on race, and conclusory testimony of class members that parks in African-American and Hispanic neighborhoods were in worse condition and received repairs and new equipment less frequently than parks

in Caucasian neighborhoods was not supported by concrete particulars, or by any statistical analysis. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

1 Case that cites this headnote

[26] **Civil Rights** Disparate impact

Title VII prohibits not only overt and intentional discrimination, but also facially neutral practices that have a disparate impact on protected groups. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6 Cases that cite this headnote

[27] **Civil Rights** Disparate impact

Civil Rights Disparate impact

Civil Rights Disparate impact

To meet their prima facie burden in Title VII disparate impact case, employees must demonstrate that employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin; specifically, employees must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. Civil Rights Act of 1964, § 703(k)(1)(A)(I), 42 U.S.C.A. § 2000e–2(k)(1)(A)(I).

[28] **Civil Rights** Disparate impact

In identifying specific employment practice in Title VII disparate impact case, employees must do more than rely on bottom line numbers in employer's workforce; rather, employees must demonstrate a statistical disparity sufficient to show that practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Civil Rights Act of 1964, § 703(k)(1)(A)(I), 42 U.S.C.A. § 2000e–2(k)(1)(A)(I).

[29] **Civil Rights** Disparate impact

Civil Rights Weight and Sufficiency of Evidence

As in pattern or practice disparate treatment cases, statistics must be statistically significant to give rise to inference of causation in Title VII disparate impact case; however, statistical results cannot be persuasive absent close fit between population used to measure disparate impact and population of those qualified for a benefit. Civil Rights Act of 1964, § 703(k)(1)(A)(I), 42 U.S.C.A. § 2000e–2(k)(1)(A)(I).

4 Cases that cite this headnote

[30] **Civil Rights** Questions of law or fact

Summary Judgment Public employment

Genuine issue of material fact, as to whether members of class of current and former African-American and Hispanic employees of New York City Department of Parks and Recreation (DPR) had been adversely impacted by DPR's failure to regularly post and interview for vacancies, by its interview procedures, and by "Class Of" program which recruited employees from elite colleges around the country, precluded summary judgment for DPR on employees' Title VII disparate impact claims relating to promotion, compensation and "Class of" program based on absence of prima facie case; employees identified policies and practices that they contended were discriminatory, they presented evidence of statistically significant disparities between class and non-class members with respect to those claims, and they presented evidence of causal connection between policies and practices in question and the statistical disparities. Civil Rights Act of 1964, § 703(k)(1)(A)(I), 42 U.S.C.A. § 2000e–2(k)(1)(A)(I).

[31] **Civil Rights** Scope of administrative proceedings; like or related claims

Though federal courts generally do not have jurisdiction over employment discrimination claims not alleged in Equal Employment Opportunity Commission (EEOC) charge, there is jurisdiction where claim is reasonably related

to the EEOC charges. Civil Rights Act of 1964, § 706, 42 U.S.C.A. § 2000e–5.

[32] **Civil Rights** Discrimination in General

There is nothing inconsistent in acting with intent to discriminate while adopting facially neutral policy that has disparate impact; the two are not mutually exclusive.

4 Cases that cite this headnote

[33] **Civil Rights** Discrimination in General

Disparate impact and disparate treatment theories are simply alternative doctrinal premises for a statutory violation, and either theory may be applied to a particular set of facts.

4 Cases that cite this headnote

[34] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

In context of individual hostile work environment claims, for employee to recover, her working environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so; where employees allege pattern or practice of hostile work environment, however, legal standards become murkier.

[35] **Civil Rights** Knowledge or notice; preventive or remedial measures

Where an employer has a policy or practice of tolerating hostile work environment, pattern or practice claim is an appropriate mechanism by which employees may challenge that discriminatory conduct.

[36] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Sporadic or episodic instances of harassment will generally not be sufficient to survive summary judgment on claim of hostile work environment harassment; rather, employee must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of the working environment.

[37] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Factors to be considered in evaluating whether work environment is sufficiently hostile include frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

[38] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

In context of pattern or practice hostile work environment cases, focus is on landscape of the total work environment, rather than subjective experiences of each individual claimant.

[39] **Civil Rights** Knowledge or notice; preventive or remedial measures

Civil Rights Vicarious liability; respondeat superior

Even where hostile work environment exists, employees must demonstrate a specific basis for imputing liability to employer, and in pattern or practice case employees must demonstrate that employer had notice of hostile work environment and was negligent in its response thereto; to demonstrate negligence, employees must show that employer knew or should have known that the work environment was hostile and nevertheless failed to take steps to correct the problem on an agency-wide basis.

[40] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Civil Rights Knowledge or notice; preventive or remedial measures

Class of African-American and Hispanic New York City Department of Parks and Recreation (DPR) employees failed to establish pattern or practice hostile work environment claim; although they offered evidence of sporadic or episodic incidents of discriminatory conduct, they did not show systemic culture of harassment or that racial harassment was standard operating procedure at DPR. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

1 Case that cites this headnote

[41] **Civil Rights** Activities protected

Title VII has two different clauses that each protect a different type of activity from employer retaliation; "opposition clause" protects employee's opposition to unlawful employment practice, while "participation clause" protects participation in proceeding under Title VII. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[42] **Civil Rights** Activities protected

Summary Judgment Employment Practices; Discrimination

On motion for summary judgment on Title VII retaliation claim, employee must first demonstrate that he was engaged in protected activity and that employer was aware of that activity; "protected activity" refers to action taken to protest or oppose statutorily prohibited discrimination. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

6 Cases that cite this headnote

[43] **Civil Rights** Activities protected

Informal as well as formal complaints constitute "protected activity" for purposes of Title VII retaliation claim. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

2 Cases that cite this headnote

[44] **Civil Rights** Activities protected

To establish that his activity is protected for purposes of Title VII retaliation claim, employee need not prove the merit of his underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[45] **Civil Rights** Adverse actions in general

Employee bringing Title VII retaliation claim must demonstrate that he was subject to action that a reasonable employee would have found materially adverse, i.e., it well might have dissuaded reasonable worker from making or supporting charge of discrimination; thus, category of challenged actions that might be considered retaliatory is broader than adverse employment actions or ultimate employment decisions. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

3 Cases that cite this headnote

[46] **Civil Rights** Causal connection; temporal proximity

Employee bringing Title VII retaliation claim must show that there was a causal connection between the protected activity and the allegedly retaliatory action; employee may prove causation either indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or directly, through evidence of retaliatory animus directed against employee by employer. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

2 Cases that cite this headnote

[47] **Summary Judgment** Employment Practices; Discrimination

Although burden that employee must meet to establish prima facie case of retaliation at summary judgment stage is de minimis, employee must at least proffer competent evidence of circumstances that would be

sufficient to permit a rational finder of fact to infer a retaliatory motive. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

1 Case that cites this headnote

[48] **Civil Rights** Questions of law or fact

Summary Judgment Public employment

Genuine issue of material fact, as to whether New York City Department of Parks and Recreation (DPR) and its Executive Director and Commissioner engaged in pattern or practice of retaliating against employees who engaged in protected activity, precluded summary judgment for them on retaliation claim by class of African-American and Hispanic employees who had complained of race discrimination; there was evidence that class members were subjected to adverse, material consequences for their protected activity and that causal connection existed between the adverse actions and the protected activity. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[49] **Civil Rights** Effect of prima facie case; shifting burden

Under Supreme Court's 1977 *Teamsters* decision, where trier of fact concludes that employer engaged in pattern or practice of discrimination, individual class members are entitled to presumption that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy; class member therefore need only show that he or she was subjected to an adverse employment decision, and employer may then rebut this presumption by offering admissible evidence from which jury could conclude that the employment decision was made for lawful reasons. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[50] **Civil Rights** Presumptions, Inferences, and Burden of Proof

Summary Judgment Presumptions and Inferences

Teamsters presumption generally arises in context of determining parties' burdens at trial rather than on summary judgment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[51] **Civil Rights** Disparate treatment

Summary Judgment Employment Practices; Discrimination

To survive motion for summary judgment on discriminatory compensation claims under *Teamsters* presumption, individual members of class of African-American and Hispanic employees had to first present evidence from which reasonable jury could find that they were subjected to an adverse employment decision, i.e., that employers failed to compensate them equally; specifically, individuals had to demonstrate that they were paid less than member of nonprotected group for work requiring substantially the same responsibility but they did not have to demonstrate that the two positions were identical, and it was sufficient to show that the positions were substantially equivalent. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

1 Case that cites this headnote

[52] **Civil Rights** Effect of prima facie case; shifting burden

Under *Teamsters* presumption, if individual class member meets minimal burden of showing that he or she was subjected to an adverse employment decision, employer must then offer admissible evidence that a legitimate nondiscriminatory reason existed for the employment decision; employer's asserted nondiscriminatory reason is subject to further evidence by employee that purported reason for adverse employment decision was in fact a pretext for unlawful discrimination.

[53] **Civil Rights** Questions of law or fact

Whether positions are "substantially equivalent" for purposes of establishing valid comparator is

usually a question of fact for jury in employment discrimination case.

[54] **Civil Rights** Questions of law or fact

Summary Judgment Employment Practices; Discrimination

Genuine issue of material fact, as to whether individual members of class of African-American and Hispanic employees who were relying on *Teamsters* presumption had identified an appropriate comparator, precluded summary judgment for employer on employees' claims of discriminatory compensation. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

[55] **Civil Rights** Promotion, demotion, and transfer

Summary Judgment Employment Practices; Discrimination

To survive summary judgment on discriminatory-failure-to-promote claims under *Teamsters* presumption, individual members of class of African-American and Hispanic employees had to first demonstrate evidence from which reasonable jury could find that they were subjected to an adverse employment decision, i.e., that employer failed to promote them, during relevant time period; where position was posted, class members had to demonstrate that they applied for position but were rejected, and where positions were not posted, that they would have applied for position had they known of its availability or that they applied through employer's informal processes and were rejected. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

[56] **Civil Rights** Questions of law or fact

Summary Judgment Employment Practices; Discrimination

Genuine issue of material fact, as to pretextual nature of legitimate, nondiscriminatory explanations offered by employer for not selecting individual members of class of African-American and Hispanic employees who were relying on *Teamsters* presumption, for posted positions for which they applied or unposted positions of which they were not aware, and for which they were qualified, precluded summary judgment for employer on their Title VII claims of discriminatory promotion. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

1 Case that cites this headnote

[57] **Civil Rights** Questions of law or fact

Summary Judgment Employment Practices; Discrimination

Genuine issues of material fact, as to whether individual members of class of African-American and Hispanic employees who were relying on *Teamsters* presumption engaged in protected activity of which employer was aware, whether they were subjected to materially adverse consequences, and whether causal connection existed between the two, precluded summary judgment for employer on their Title VII retaliation claims. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e–3(a).

Attorneys and Law Firms

***343** Beldock Levine & Hoffman LLP by Cynthia Rollings, Esq., Jody L. Yetzer, Esq., Lewis M. Steel, Esq., NAACP Legal Defense & Education Fund, Inc. by Robert H. Stroup, Esq., Melissa S. Woods, Esq., New York City, for Plaintiffs.

Michael A. Cardozo, Esq., Corporation Counsel of the City of New York by Barbara B. Butler, Esq., Kathleen M. Comfrey, Esq., Sherri R. Rosenberg, Esq., New York City, for Defendants.

OPINION

CHIN, District Judge.

In this action, plaintiffs allege that the New York City Department of Parks and Recreation ("Parks") violated federal, state, and city discrimination laws. Plaintiffs, eleven

African–American and Hispanic current and former Parks employees, allege that defendants engaged in a pattern and practice of employment discrimination on the basis of race, color, and national origin. They allege also that defendants engaged in a pattern or practice of retaliation against employees who attempted to oppose the discriminatory practices. Plaintiffs sue on their own behalf as well as on behalf of similarly situated individuals.

Before the Court is defendants' motion for summary judgment dismissing certain class claims and certain individual claims. As part of the motion, defendants also seek to exclude the reports and testimony of plaintiffs' expert witnesses, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Except to the extent set forth below, defendants' motion is denied, for plaintiffs have presented substantial, concrete evidence ***344** to support their claims of discrimination and retaliation. Plaintiffs' statistics, for example, show that in 2000, the year before this lawsuit was filed, 92.9% of the Parks employees earning less than $20,000 per year were African–American or Hispanic, while only 14.2% of those earning between $50,000 and $60,000 per year were African–American or Hispanic. Plaintiffs have also presented evidence of discriminatory remarks by high-ranking Parks officials as well as evidence of subjective and ad hoc employment practices that created roadblocks to advancement, including, for example, the filling of vacancies based on personal connections without posting or other public announcement. Plaintiffs have also presented evidence that Parks officials repeatedly retaliated against class members who complained of discrimination. Class members, for example, were denied promotions and raises after they complained. Indeed, two of the named plaintiffs were assigned to work in basements after they complained.

A reasonable jury could find from this and other evidence in the record that Parks engaged in widespread discrimination against African–American and Hispanic employees, in terms of promotions and compensation, and that Parks engaged in widespread retaliation against those who opposed what they believed to be discriminatory practices. I conclude, however, that plaintiffs have not presented sufficient evidence to sustain their claims that defendants engaged in a pattern or practice of assigning employees and allocating funds based on race. Likewise, I conclude that plaintiffs have not presented sufficient evidence to support their hostile environment racial harassment claim. Accordingly, defendants' motion for summary judgment is denied in part and granted in part. Defendants' request for preclusion of the testimony of plaintiffs' experts is denied.

BACKGROUND

A. *The Facts*

Construed in the light most favorable to plaintiffs as the parties opposing summary judgment, the facts are as follows:

1. *The Parties*

a. *Plaintiffs*

The named plaintiffs—Carrie Anderson, Walter Beach, Jacqueline Brown, Angelo Colon, Paula Loving, Odessa Portlette, David Ray, Elizabeth Rogers, Henry Roman, Kathleen Walker, and Robert Wright—are current and former Parks employees who are African–American or Hispanic. [1]

The named plaintiffs are long-time Parks employees, some of whom have been employed at Parks for as many as twenty-five or thirty years. All but one (Beach) were denied promotions because they applied for positions and were rejected or they were unable to apply because the positions were not posted. Eight of the eleven (Brown, Colon, Loving, Portlette, Rogers, Roman, Walker, and Wright) contend they were paid less and/or received fewer discretionary pay raises than comparably ***345** situated Caucasian employees. Seven of the eleven (Beach, Brown, Colon, Portlette, Roman, Walker, and Wright) contend that after they complained of discrimination, they were subjected to adverse and retaliatory treatment.

b. *Defendants*

Parks is an agency of defendant City of New York (the "City"). (Compl. [2] ¶ 16). Defendant Henry Stern, who was Executive Director of Parks in 1966, served as Commissioner of Parks during the Koch and Giuliani mayoral administrations, from in or about 1983 until 1989 and from 1995 until February 2002. (Stern Dep. at 38, 43, 49, 61). Defendant Adrian Benepe has been the Parks Commissioner since February 2002. Benepe worked at Parks as a seasonal employee for several years during the 1970s. After joining Parks full-time as an Urban Park Ranger in 1982, Benepe served in a variety of positions before his appointment as Commissioner by Mayor Bloomberg. (Benepe 12/23/05 Decl.

¶¶ 4–8). Stern and Benepe are sued in both their individual and official capacities.

2. *Parks*

a. *Overview*

Parks is responsible for the care of more than 4,000 City properties, covering almost 29,000 acres of parklands, 7 public beaches, 993 playgrounds, 608 ball fields, 63 swimming pools, 36 recreation areas or senior citizen centers, 17 golf courses and driving ranges, 6 ice skating rinks, 5 major stadia, more than 500 tennis courts, 22 historic house museums, hundreds of statues and monuments, and more than 600,000 street trees. (*Id.* ¶ 2). Parks' mission is to keep the City's parklands safe and clean, while also providing quality recreational opportunities to the public. (*Id.* at ¶ 3).

The Commissioner is responsible for the overall operation of the agency. The Commissioner appoints Deputy, Borough, and Assistant Commissioners who are responsible for managing the agency divisions. (*Id.* ¶ 9). During Stern's term as Commissioner, the third floor of the Arsenal in Central Park served as the main headquarters for central management and high-level employees ("Arsenal Officials"). (Moss Dep. at 16–17, 202–04; Garafola Dep. at 52–53; Spiegel Dep. at 311). In addition, each borough has its own headquarters and a management team, composed of a Borough Commissioner, Chief of Operations, and a Deputy Chief of Operations. (Benepe 12/23/05 Decl. ¶¶ 10, 25–26; Stark Decl. ¶ 35; Stern Dep. at 66–67).

b. *The Workforce*

Although the numbers fluctuated over time, Parks employed roughly 3,400 to 5,000 full-time year-round employees at a time during the period in question. Some 2,000 to 4,000 were formal year-round employees and some 1,400 to 1,600 were "seasonal" employees who were paid from the seasonal budget but worked year-round. An additional 3,000 to 7,000 employees worked on a seasonal basis only. (Benepe Decl. ¶ 9; Schneider Report Table C–1; Stark Dep. at 481–82, 486; Stark Dep. at 327–30; Stark Decl. ¶ 22). In addition, there are "seasonal step-up" positions, which involve a year-round employee receiving a temporary, seasonal promotion to a supervisory function. (Stark Decl. ¶ 24). When an employee receives a seasonal step-up, his regular salary is paid out of the full-time budget but the temporary ***346** increment is paid out of the seasonal budget. (*Id.*).

Between January 1, 1997, and December 31, 2003, Parks employed 6,295 full-time, year-round employees. Of these, 15 were Native American, 227 were Asian–American, 1,163 were Hispanic, 2,124 were African–American, 2,753 were White, and 13 were unknown. (Schneider Decl. ¶ 13 (class members approximately 52.2%; White 43.7%); *cf.* Stark Decl. ¶ 3 (48% class members)).

c. *Employment Classifications and Regulations*

The terms and conditions of employment at Parks are subject to both the civil service structure and the union contracts in place in New York City. (Stark Decl. ¶ 6). As of December 2005, 94.3% of full-time Parks employees were unionized. (*Id.* ¶ 12). Each union contract sets salaries, including minimum and maximum salaries where applicable, and provides for non-discretionary salary increments. (*Id.* ¶ 14). Employees covered by unions work in non-management positions. (Terhune Dep. at 44). For managerial employees, compensation is determined by the "Managerial Pay Plan," which sets minimum and maximum salaries for employees at eight assignment levels. (Stark Decl. at ¶ 16). The Mayor's Personnel Order sets forth revision to those salaries. (*Id.*).

Under the New York State Constitution, all public employees are "civil service" employees. (*Id.* ¶ 7). There are 220 civil service job titles at Parks, 184 of which are actively held by Parks employees. (*Id.* ¶ 8; Schneider Decl. ¶ 15). One position, "Commissioner," is "unclassified," and all other positions are "classified." Classified service is divided into four classes—exempt, non-competitive, labor, and competitive, with "[t]he majority of titles ... in the competitive class." (Stark Decl. ¶¶ 8–9). Employees in different classes are subject to different terms of employment with exempt and non-competitive classes serving at the will of the appointing officer. (*Id.* ¶ 10).

Under civil service law, appointments and promotions of employees in the competitive class are to be made either permanently from a civil service list of employees who have passed an examination or, where no employees are on the civil service list, by provisional appointment. (Stark.Decl.¶ 10). [3] The Parks Working Conditions Agreement, which was in force during the times relevant to this lawsuit, provides that provisional promotions shall be made by seniority. (Pl. Dep. Ex. 42 ¶ 7; Stark Dep. at 337–38).

For most or all of Stern's term as Commissioner, citywide examinations were not given for a number of positions. From

at least as early as 1995 until 2000 or 2001, the City did not administer civil service examinations for the title of Park Supervisor, Principal Park Supervisor, Associate Park Service Worker, Urban Park Ranger, Recreation Assistant, and Recreation Supervisor. (Def.Resp.Pl.RFA ## 258–59, 277–78, 280–81).[4] As a result, employees ***347** in the competitive class frequently served on a provisional basis, which allowed them to advance without passing a civil service examination. (Terhune Dep. at 154; Lawless Dep. at 291–92).

In addition to civil service titles, Parks uses "in-house" titles for its employees. Typically, in-house titles are more descriptive of the employee's actual role and responsibilities at Parks. (Terhune Dep. at 133–35). Though there may sometimes be a correlation between certain in-house titles and civil service titles, there is no Parks document setting forth which in-house titles correspond to which civil service titles. (*Id.* at 143–48).

3. *Evidence of Discrimination*

In support of their claims of discrimination, plaintiffs have offered evidence of: (a) statistical imbalances, (b) discriminatory comments purportedly made by Stern and other Parks management officials, (c) displays of nooses, (d) discriminatory practices in awarding wage increases, (e) discriminatory practices in promotions, postings of vacancies, and the interview process, (f) the discriminatory nature of the "Class Of" program, and (g) discriminatory decisions regarding assignments, funding, and staffing.

a. *Statistics*

In terms of salary, plaintiffs' statistics show a significant disparity, as the lower-paid positions are overwhelmingly held by class members while class members hold only a small percentage of the higher paid positions. For example, class member composition by income group in 2000 was as follows:

Salary	Percentage Class Members
Less than $20,000	92.9%
$20,000–$30,000	68.8%
$30,000–$40,000	54.3%
$40,000–$50,000	30.2%
$50,000–$60,000	14.2%
$60,000–$70,000	20.7%
$70,000 +	13.3%

(Schneider Rebut. App. Table A–6; Ex. ETH–00001; *see also* Pl. Dep. Exs. 64 & 186).[5] Likewise, controlling for job title, class members were paid between $16.44 and $32.59 less than Caucasian members on a bi-weekly basis between 1997 and 2003. (Schneider Rebut. Table 2). Without controlling for job title, class members were paid from $283.25 to $364.09 less than Caucasians on a bi-weekly basis over the same time period. (*Id.*).

With respect to pay growth from a starting salary of $30,000 in January 1997, the salaries of Caucasians increased, on average, at a 4% higher rate than class members' salaries. (Schneider Rebut. Table 4; App. Table A–14). Similarly, Stern and Benepe recommended salary increases 2.5% greater for non-class members than for class members. (Schneider Report ¶¶ 72–73). Moreover, non-class members received significantly higher average salaries than class members for each year from 1996 to 2003. For non-managers, the difference in salaries ranged from $6,909 in 1996 to, increasing steadily each year, $9,994 in 2003. (Schneider Rebut. App. Table A–9). For managers, the difference ranged from $5,284 in 1996 to $7,957 in 2001 to $3,407 in 2003. (Schneider Rebut. App. Table A–8).

With respect to promotions, class members suffered statistically significant lower probabilities of receiving "wage

promotions"[6] than Caucasians, controlling for ***348** job title, experience, and tenure. (Pl. Mem. at 25; Schneider Rebut. Table 3 (ranging from 4.2 to 5.23 standard deviations)). From 1996 until 2003, class members made up between 50% and 56% of the non-"Class Of" Parks workforce. (Schneider App. Table A–5). Nevertheless, they constituted only some 18 to 23% of the managerial workforce from 1996 to 2001. After the filing of this lawsuit, the number of class members in the managerial workforce increased to around 25% in 2002 and 2003. (Schneider Rebut. Fig. 4, App. Table A–4). A review of the in-house rosters shows that non-class members received 70.9% of the managerial in-house promotions from July 1995 to August 2004 while class members received 29.1% of those promotions. (Schneider Rebut. Fig. 13). Though the parties dispute what constitutes a promotion, defendants' own records show 77% of promotions going to non-class members in 1998 and 82% of promotions going to non-class members in 1999. (Pl. Dep. Ex. 85 (41 out of 53 promotions went to non-class members in 1998 and 53 out of 65 promotions went to non-class members in 1999)). As of February 2000, all 27 Principal Parks Supervisors were Caucasian and approximately 72% of Parks Supervisors were Caucasian. (Ex. ETH 0078).

Moreover, plaintiffs' expert Kathleen Lundquist, Ph.D., created a database containing overall panel interview scores for applicants for certain positions between 1995 and January 2004. (Lundquist Report at 12). The race of each applicant was tracked according to the DCAS database or the interview panel summary rating form. Based on her analysis of this database, Lundquist concluded that class members received statistically significant lower interview scores than Caucasians. (*Id.* at 12–13).

As EEO Officer, Lesley Webster met weekly with Stern and submitted investigation reports and status reports to Stern. Webster testified that she informed Stern that minorities were underutilized in Parks management positions. (Webster Dep. 280–86). Indeed, in January 1997, the City Equal Employment Practices Commission ("EEPC") issued a report finding significant underrepresentation of class members in numerous job titles and managerial titles at Park. (Pl.Ex. 67 at 7–9). Parks' reports to the EEPC for the years 1998–1999 contained a section describing the steps Parks would take to address the underutilization of women and minorities in certain positions. (*See* Pl. Dep. Ex. 89b-h).

b. ***Comments***

i. ***Stern***

Stern's former employees describe him as "eccentric" (*e.g.,* Ricciardone 12/04/02 Dep. at 21) and a "combination of Groucho Marx and Woody Allen" (Benepe DOJ Int. at 57), and there is much in the record to support these characterizations. For example, Stern developed "Parks nicknames" for Parks employees, which were included in the agency-wide manual and by which he referred to employees, even during depositions. (*E.g.,* Def. Vol. II, Ex. 24; Stern Dep. at 35 ("Gorilla" and "Gorilla Gorilla"), 135 ("Zorro"), 258 ("Igor"), 386 ("Home Boy")). Various Parks employees reported that Stern made fun of everyone, regardless of race, including himself. (Benepe DOJ Int. at 57–58; Castro DOJ Int. at 81). Stern prides himself on not being politically correct. (Stern Dep. at 250–54).

***349** From the evidence on the record, a reasonable jury could find the following:[7]

● Stern said to Tanya Bowers, a former employee of Parks who is Jewish and African–American, "It's wonderful, Tanya. You look black, but when you talk, I know you're Jewish. I can bring you home and know that the silverware will still be there when you leave." (Bowers Dep. at 203).

● Responding to a complaint of discrimination in promotions forwarded from the Mayor's office, Stern asked the complainant, Bernard Lewis, whether he was a drug addict or drank on the job. (Lewis Aff. ¶¶ 7–9).

● Stern attributes the lack of African–Americans in managerial positions to the "smaller number of blacks who are able to perform managerial positions." (Stern Dep. at 150). He further explained that this was because of "background, because they have not in a sense climbed the ladder." (*Id.* at 150–51).

● Stern believed, as he testified, that class members "racialized" conflicts with non-class member employees. (*Id.* at 159).

● At a going away party for a Parks employee who was leaving to attend Yale Law School, Stern said that he was "pleased" the departing employee would be attending Yale "where he could meet and rub arms with important people like the DuPonts and the Rockefellers and also he could rub elbows with the quota kids." (Beach 4/3/03 Dep. at 196–97; Stern Dep. at 257–59; Castro Dep. at 152–53 (testifying that

he interpreted "quota kids" as referring to African–Americans and Hispanics)).

● While walking with his dog, Boomer, Stern told a group of Chinese children that "they could pet Boomer, but not eat him." (Stern Dep. at 33). Stern described the incident as "warm and affectionate" and "clearly a joke rather than a remark denigrating anyone." (*Id.* at 33, 37). Nevertheless, he apologized when an adult complained about the incident, clarifying that he had not meant to offend anyone. (*Id.* at 36).

● Stern recommended that "Class Of" employees—who are recruited primarily from elite colleges through a program described in more detail below—read *The Bell Curve,* a book describing purported differences in levels of intelligence among racial groups. (Bowers Dep. at 133–34).

Other Parks officials testified that they had heard that Stern had a reputation for making racial remarks. Castro testified that he occasionally heard Stern use "racial references" in a derogatory manner. (Castro Dep. at 155). Likewise, Moss admitted that Stern had a reputation for making derogatory remarks. (Moss Dep. at 148).

ii. ***Other Parks Employees***

Plaintiffs also point to statements and conduct of other Parks employees. For example,

● Robert Garafola, a Deputy Commissioner under Stern, wrote "incompetent people accusing racism" though he admitted that he did not know all of the plaintiffs who had filed lawsuits. (Garafola 9/10/03 Dep. at 122–23). Further, Garafola admitted that there was merit in the statement that minorities had been underrepresented ***350** in management and middle management at Parks. (*Id.* at 30; Garafola Dep. at 12/30/02 at 285). Though Garafola attempted to attribute this underrepresentation to few minorities passing the required tests, he admitted that Parks employees were promoted without taking civil service tests. (Garafola 9/10/03 Dep. at 30–33).

● Charlie Cousins, a Caucasian Parks Supervisor in Manhattan, said to class member Jose Cintron, "[Y]ou people are a bunch of animals" in reference to the Puerto Rican Day Parade. (Cintron Dep. at 48–49). He also repeatedly referred to Cintron as a "stupid spic." (*Id.* at 56). In the presence of Cintron, Cousins also said to class member Richie Laylock, "you are a stupid black Mother Fucker." (*Id.* at 53–55).

● In March 1999, in a Brooklyn Parks facility, Greg Dawson, Brooklyn's Deputy Chief of Operations, said to Henry Roman, "[W]hat kind of Puerto Rican are you that you don't carry a knife." (Roman Dep. 9/4/02 Dep. at 73; Roman 1/16/03 Dep. at 213–14).

● Patricia Gracia, a Caucasian supervisor, muttered "black bitch" under her breath when class member Arlene Dunbar refused to sign a supervisory conference report dated August 15, 1998. (Dunbar Dep. at 123–24, 139).

● Class member Dennis Moody heard that Phil Rabena, a Caucasian Supervisor on Staten Island, asked an African–American WEP worker named Montgomery to pull down his pants to see if black men had larger penises than whites. Moody learned this from three workers who were present at the incident and the WEP worker. Verne Reilly, a Caucasian Parks Supervisor and EEO representative on Staten Island, encouraged the WEP worker to report the incident. (Moody Dep. at 30–34; Pl. Dep. Ex. 537).[8] Thereafter, Reilly informed Webster that he was concerned Rabena would retaliate against him. (Pl. Dep. Ex. 537; Webster Dep. at 620–22). Indeed, Reilly was transferred shortly thereafter from Staten Island, where he lived, to Harlem, purportedly for disciplinary reasons. (Reilly Dep. at 58).

● In August 2001, Jack Bero, a Caucasian supervisor, made a joke containing the phrase, "It's time to get the niggers out of here." (As Salaam Dep. at 88–89).

● Following a catered special event at the Historic House in the Bronx, Kathleen Walker overheard Commissioner Linn say, "[I]f you give them maybe the bottles that are halfway open, ... maybe they won't steal the rest of the bottles." (Walker 9/17/02 Dep. at 106).

iii. ***Nooses***

In 1998, a noose was found hanging from a pipe in the Forestry Office in Staten Island. (Webster Dep. at 315; Moody Dep. at 124–28). A picture of a black man was on the wall behind the pipe so that the head of the man in the picture could be seen through the opening of the noose. (Moody Dep. at 124–28). The noose was removed after a Parks employee complained. Though a complaint was filed, it is unclear whether an investigation was conducted. No one was disciplined for hanging the noose. (Webster Dep. at 315–16).

In 2000, a noose was hung on a forestry truck in Queens. (Webster Dep. at 319–20, 688–90; Pl. Dep. Ex. 9). Webster testified that she "conducted an investigation[,] ... found ... that the noose was taken ... down, that they were not sure ***351** who put the noose up and how long it had been there, and that was it." (Webster Dep. at 320). Again, no one was disciplined. Webster did not refer either allegation to the City's Advocate's Office, and she was unable to specify whether she dealt with the nooses in subsequent trainings. (*Id.* at 320–22, 692).

Each October, between 1995 and 1997 or 1998, Susan Silvestro, a Caucasian supervisor, hung a noose in her office at Five–Boro on Randalls Island, apparently as part of a Halloween display. (Silvestro 4/15/03 Dep. at 180–81, 185; Portlette 8/26/02 Dep. at 89–90; Green Dep. at 124–36). Silvestro continued to display the noose even after an African–American employee complained. (Green Dep. at 125–36).

Stern acknowledged that he was aware that a noose was placed on Parks property in 1998 or 1999 and that McCoy had complained about it, but he did not know if Parks investigated it. (Stern Dep. 159–63). Stern explained that McCoy was of "limited capacity." (*Id.* at 160). Further, while he understood that nooses could be offensive to African–Americans, Stern did not order any investigation of the nooses on Parks property though he considered them "childish" and "silly." (*Id.* at 163–68). From January 1, 1995, until August 20, 2004, defendants did not discipline any Parks employee for displaying a noose on Parks property. (Def. Resp. Pl. RFA # 457).

iv. ***Wage Increases and Promotions***

When an employee was recommended for a wage increase or promotion, a Planned Action Report form ("PAR") was prepared identifying the candidate and proposing an increase or promotion but leaving a blank for the salary and Stern's signature. (Stark Dep. at 64–65, 69, 259–61, 274–81). David Stark, who oversees the Personnel Department as Chief Fiscal Officer of Parks, would bring these forms to Stern, and together they would review the proposed action. (*Id.* at 273–74). If Stern approved a request, he would determine a salary and write it on the PAR form. (*Id.* at 221, 270–78; Terhune Dep. at 56, 65). Generally, Stern did not consult Civil Service law or collective bargaining agreements in determining the salary. (Stark Dep. at 276–78 (observing that Stern filled in salary on PAR forms without consulting any guidelines but also noting that Stern knew the salary structure of the agency)).

After Stern approved a planned action and determined a salary, Stark and Terhune would select a civil service title that matched the salary selected by Stern. (*Id.* at 285–89). Thus, the salary determined the civil service title the employee would receive. (*Id.*). In some circumstances, employees would have received a change in their in-house titles prior to a PAR being submitted and approved. These individuals, however, would not be eligible for a salary promotion until the PAR was approved. (*Id.* at 264).

In the case of year-round employees paid from the seasonal budget, the PAR would be implemented after Stern signed it. (*Id.* at 288). In the case of employees paid from the regular Parks budget, Stark and his associates would fill in the "justification" on the PAR after Stern set the salary and signed the form. (*Id.* at 257–59, 288–89). The completed PARs for these employees would then be sent to City Hall for approval. (*Id.* at 293).

Stern had ultimate authority to approve or disapprove a job action. (*Id.* at 270–78; Stern Dep. at 18). In practice, he generally approved the action recommended by his subordinates though sometimes he did not approve salary increases at the level recommended by them. (Stern Dep. at 18; ***352** Stark Dep. at 280–85). The level of the raise was almost always determined by the Commissioner. (Stark Dep. 276–68 ("I never knew what [number] he was going to put in there until he did it.")).

Stern said he did not want "to stigmatize" minorities by giving them a plus for diversity, but he nonetheless stated that all things being equal, he would give a slight preference to a minority to help to create diversity. He could not think of an employee to whom he had given that benefit. (Stern Dep. at 315–16).

v. ***Postings and Interviews***

The City of New York Affirmative Employment Plan for 1991 requires that Parks notify employees when job openings occur. (Pl. Dep. Ex. 3 at 5). The City's Personnel Policy, dated June 30, 1998, requires that vacancy notices be posted. (*Id.* Ex. 45). Likewise, the Citywide Contract, which applied to Parks as of May 24, 1998, and the Parks Working Conditions Agreement require that Parks post notices of job positions, including promotional provisional vacancies, two weeks before the positions are filled. (Def. Resp. RFA ## 60–

62; Pl. Dep. Ex. 42 at 2). Since 1994, Stark has maintained a policy that all job vacancies are to be posted. (Stark Dep. at 83–88).

Despite these requirements and policies, Parks did not have an official policy regarding the posting of vacancies and regularly failed to post vacancies prior to the filing of this lawsuit.[9] (Terhune Dep. at 180, 405–06; Stark Dep. at 83–88). Indeed, when the personnel department received notice of a vacancy, Terhune would ask whether he had "the go ahead" to post the position. (Terhune Dep. at 406). Between 1995 and March 1999, there were no postings for the following in-house positions: Borough Chief of Operations; Chief of Recreation; Chief/Director of Recreation; Deputy Chief of Operations; Assistant to the Commissioner; and Chief of Staff. (Def. Resp. Pl. RFA # 74). There were no postings for Principal Parks Supervisor ("PPS") positions during 1995, 1997, or 1999 (Def. Resp. Pl. RFA # 76), and the majority of the PPS positions available during these years went to non-class employees. (Ex. ETH 00078). Terhune counted 34 postings for 1995; 11 for 1996; 32 for 1997; 36 for 1998; 62 for 1999; 97 for 2000; 111 for 2001; and 222 for 2002. (Terhune Dep. at 442, 447, 449, 453, 456, 467; Terhune 1/6/03 Dep. at 146, 165). For at least some of these years, many more promotions occurred than were posted. (Pl. Dep. Ex. 85. (at least 53 promotions in 1998)).

Parks did not have any formal policy for selecting employees for non-posted positions. (Def. Resp. Pl. RFA # 232). Promotions to managerial positions were sometimes made by Arsenal Officials without the knowledge or input of Borough Commissioners. (Spiegel Dep. at 215–17, 237–39). Further, it was not unusual for Stern or other officials to personally choose employees for seasonal step-ups. (Terhune 1/6/03 Dep. at 34–37).

Even when a position was posted, interviews were not always held. During the relevant time period, Parks did not have a written policy regarding when interviews should be used to fill vacant positions or how to determine which applicants should be interviewed. (Def.Resp.Pl.RFA ## 130–31, 144–45). Sometimes an interview would serve only as a formality; an employee previously selected for a position would interview while other employees ***353** would not be given the opportunity to interview. For example, in 1995, Wright approached Assistant Commissioner of Recreation, Rosemary O'Keefe, to request a transfer to the Asser Levy Center, a top facility in Manhattan, which had posted an open position. (Wright 3/26/03 Dep. at 33–35). After making his initial request, Wright was told that Asser Levy was no longer available. In fact, Lynda Ricciardone, a Caucasian, had accepted the position at Asser Levy. In contrast to Wright, however, Ricciardone had not applied for the position or even been aware of or had an interest in the position when the Manhattan Chief of Recreation called her to offer her the position. (Ricciardone Dep. at 91–98).

When interviews were conducted, the interviewers rated the candidates and these ratings were then given to Garafola or Moss, depending on the department in which the promotion fell. (Stark Dep. at 611–12). Parks did not provide interviewers with standard guidelines for conducting interviews, or instructions on how to evaluate and rate answers or how to arrive at an overall rating. (Def.Resp.Pl.RFA ## 194–95, 204). Parks did not have a formal policy establishing what weight the interviewers' scores would be given, and the person selected for promotion was not necessarily the applicant with the highest interview rating. (*Id.* RFA # 140; Stark Dep. at 614–15). Indeed, on one occasion, a Caucasian applicant with the lowest interview scores was selected over an African–American applicant with the highest score. (Pl. Dep. Ex. 118 at 2).

In its January 1997 report, the EEPC required that Parks review "[s]election, evaluation, and promotion devices/ criteria ... to determine if they have a disparate impact on protected group members." (Pl.Ex. 67 at 12). Between the issuance of that report and the initial filing of this action, Parks did not conduct a disparate impact analysis. (Def.Resp.Pl.RFA ## 237–38). Between 1995 and August 2004, neither Parks nor any other city agency has conducted any validity study[10] regarding the interview processes used by Parks for selection of candidates for job vacancies. (*Id.* RFA ## 173, 181).

The Uniform Federal Guidelines provide that

> Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's

> representation in the relevant labor market, or, in the case of jobs filled from within, the applicable work force.

(Lundquist Report at 6 (quoting *Uniform Guidelines,* Section 4D, pp. 38297–98 (1978))). Between 1995 and August 2004, Parks failed to keep records: (a) of forms indicating ratings given to interviewees; (b) of the numbers of applicants meeting minimal qualifications for vacant positions; (c) identifying the applicants accepted for interviews for posted jobs; and (d) identifying who was hired as part of the "Class Of" program. (Def.Resp.Pl.RFA ## 193, 223–24, 368).

Personnel practices did not change when Benepe became commissioner. (Terhune Dep. at 343; Benepe Dep. at 462). Benepe ***354** operated Parks under the same policies and practices as former Commissioner Stern until around June 2005 when Parks entered a consent decree with the United States Department of Justice ("DOJ") in the companion action, discussed below.

vi. ***The "Class Of" Program***

In 1994, Stern created the "Class Of" program to "expose recent college graduates to Parks and to city government." (Pl. Dep. Ex. 18 at 2). "Class Of" employees were recruited from colleges across the country, including many Ivy League schools and similar elite, private institutions. (*Id.* Exs. 27 & 28). The recruitment brochure promised that "[r]ecent graduates who come to Parks work closely with senior officials, learning from them on a daily basis," and "take on a high-level of responsibility within the agency." (*Id.* Ex. 18 at 2). According to a "Class Of" employee quoted in the brochure, recruits may be "considered for positions normally given to individuals with more experience." (*Id.* at 8). Beginning in 1995, Parks hired between ten and more than forty recent college graduates to work for the "Class Of" program each year. (Def. Resp. Pl. RFA # 314). Though these employees worked full-time on a year-round basis for Parks, Parks paid the majority of them from the seasonal budget and therefore they were not included in Parks' headcount. (Stark Dep. at 234–35; Def. Resp. Pl. RFA ## 316, 321, 324). Until August 2000, "Class Of" employees were promised and received an approximate 20% raise (roughly $5,000) following their first year of employment with Parks. (Pl. Dep. Ex. 24; Def. Resp. Pl. RFA # 326; Kay Dep. at 220–21). Further, "Class Of" employees had first priority for junior manager vacancies. (Terhune 1/6/03 Dep. at 101). Several "Class Of" employees were assigned to work directly with Stern or his deputies on the third floor of the Arsenal; these "Class Of" employees were predominantly or exclusively non-class members. (Stern Dep. at 264).

Though Stern testified that there was a policy to hire all minority applicants who applied to the program, the "Class Of" recruiter testified that she had not been so instructed. (*Id.* at 388–89; Kay Dep. at 49–50, 55). The racial and national origin composition of "Class Of" employees was approximately: 72.1% Caucasian; 6.3% Hispanic; 11.0% African–American; 0.4% Native American; 7.4% Asian; and 2.8% Unidentified. (Def. Resp. Pl. RFA # 378). Parks never conducted any analysis to determine if Parks' method of recruitment, hiring, or selection of "Class Of" employees had a disparate impact on African–Americans or Hispanics. (*Id.* RFA ## 369–71).

vii. ***Segregation, Underfunding, and Understaffing***

With the exception of the EEO officer, Webster, and one or two class members who served in secretarial or administrative jobs, all thirty to forty employees on the third floor of the Arsenal were non-class members. (Weizmann Dep. at 67–68; Moss Dep. at 44; Sahl Dep at 191–92). Noting the absence of class member employees working at the Arsenal, Danny Weizmann, a "Class Of" employee, described Parks as being run like it was a "private club" for whites only. (*Id.* at 69–71).

Benepe, as well as other high-level Parks personnel, acknowledged that Parks sometimes assigned employees on the basis of race and/or linguistic abilities to neighborhoods reflecting that language or race because of demands from the neighborhood. (Benepe 7/19/01 Interview at 46 ("It's true that we have placed people by demand from a community, both implied ***355** and stated."); *see also* Spiegel Dep. at 126–28; Ricciardone Dep. at 196–98). As an example of an implied request, Benepe noted that community groups would ask that Parks' employees understand the needs and interests of the community. Beyond these requests, some community groups would "be as bold as to say [someone] who looks like us, who speaks our language, who belongs to our community." (Benepe 7/19/01 Interview Tr. at 46–47). Likewise, the recruiter for the "Class Of" Program acknowledged that the "Class Of" Program, at the request of supervisors, took race into account in making assignments. (Kay Dep. at 49–51). Further, multiple high-level Parks personnel noted that the staff of a facility often reflected the racial composition of the area. (Moss Dep. at 40–41; Stern Dep. at 342–67).

Many class members worked in one or more boroughs where they did not reside, and Terhune did not have a policy of assigning people to locations near their homes. (*E.g.,* Wright Aff. ¶¶ 1–3; Lewis Aff. ¶ 2; Clark Aff. ¶ 3; Henry Aff. ¶¶ 1–2, 5; Terhune Dep. at 293). At least some class members indicated that they would not mind moving work locations or working outside the borough in which they lived if it would facilitate their advancement at Parks. (Jacobs–Pittman Dep. at 174–75; Wright 3/26/03 Dep. at 33–35; Brown 1/3/03 Dep. at 216).

All named plaintiffs and additional class members observed that the Parks workforce was geographically segregated by race or national origin. (*See* Pl. Additional Facts at 29 # 17–18 (collecting citations)). Throughout the relevant time period, the few African–American and Hispanic Park and Recreation Managers and Center Managers were assigned to predominantly African–American and Hispanic neighborhoods. (Wright Aff. ¶ 12; Henry Aff. ¶ 2; Ex. G00616–620; Ex. G00905–953; Ex. REC000072–73). Conversely, Parks' facilities and districts in non-African-American or Hispanic neighborhoods were supervised and managed almost exclusively, if not exclusively, by non-class employees. (Wright Aff. ¶ 12; Roman Dep. at 57–58; Ex. G00616–620; Ex. G00905–953; Ex. REC000072–73). Indeed, when Beach recommended certain class members for a Center Manager position at a pool in Williamsburg, Brooklyn, a predominantly Caucasian neighborhood, the Borough Commissioner informed Beach that he and Garafola would make the decision, a step the Borough Commissioner had not taken with any other Center Manager promotion Beach had made. (Beach 4/3/03 Dep. at 156–65 (noting that he had unilaterally selected employees for Center Manager positions in the past); 9/29/02 Dep. at 109). Similarly, African–American and Hispanic supervisors have supervised predominantly African–American and Hispanic crews. (Wright 9/12/02 Dep. at 65; Beach 9/29/02 Dep. at 108–09).

Multiple class members testified that many facilities and parks in predominantly African–American and Hispanic neighborhoods were in disrepair and underfunded and understaffed by Parks. (*See, e.g.,* Anderson 9/5/02 Dep. at 80–83; Brown 8/28/02 Dep. at 75–78). Stark testified that there are no documents reflecting the budget allocation or funding of individual centers, and Parks does not conduct a cost analysis for each park. (Stark Dep. at 304, 681).

4. *Evidence of Retaliation*

When Webster, who has served as Parks EEO Officer since 1995, began in the position, no one told her what her functions were. (Webster Dep. at 393–95).

In 1996, the City issued a report card on City agencies' discrimination complaint ***356** and investigation practices. (Pl.Dep.Ex.66). The report noted that Parks'

> EEO officer[11] expressed a preference for the "quick solution" approach to resolving complaints of discrimination, which is evidenced in the majority (93%) of the 15 formal complaint files available for review.... Complaints involving serious allegations of race discrimination, sexual harassment and retaliation were resolved within one to two days and often did not reflect any components of the Plan's investigation procedures had been performed ... The file displays an apparent misunderstanding that race discrimination laws may be violated even while civil service laws and rules have been complied with.

(*Id.* Ex. 66 at 11–12). Commenting on the poor record-keeping at Parks, the report further observed that the summaries of the complaints and investigations "appear to have been written up for purposes of our review." (*Id.* at 12).

Many class members did not feel comfortable filing complaints with the EEO Office. (Anderson 9/5/02 Dep. at 106–08; Brown 8/28/02 Dep. at 102–06; Roman 9/4/02 Dep. at 99–102; Walker 9/17/02 Dep. at 94–100; Wright 9/12/02 Dep. at 107–110). Anderson explained that "most blacks and Latinos [who] work in the agency do not go to Leslie Webster, because she wasn't going to do anything about it." (Anderson 9/5/02 Dep. at 107–08). Those who did file complaints did not feel that Webster took those complaints seriously. (Cintron Dep. at 114 (she seemed incompetent); Beach 4/3/03 Dep. at 118–24 (never responded to his allegations); Brown 8/28/02 Dep. at 102–05).

Employees who filed complaints were at least sometimes left in the dark regarding the outcome of those investigations or the basis for the outcome. In a 2001 report, the EEPC observed that notices to parties did not state explanations for the EEO's decision. In a survey conducted by the EEPC, seven of eleven respondents indicated that they did not receive written notification of their complaints. (Pl. Dep. Ex. 78 at 4–5). Webster was not aware of a single case where anything beyond a supervisor's conference was sought. (Webster Dep. at 603–05).

Approximately thirty separate Parks employees filed retaliation complaints with agencies outside of Parks between 1995 and 2003—seven named plaintiffs brought individual retaliation claims, and between twenty and twenty-five claims were filed by other Parks employees. (Def.Ex.37).

Multiple class members, including Brown, Colon, Portlette, Roman, Walker, and Wright, indicated they were denied promotions and/or salary increases after filing complaints. Additionally, Portlette was moved to a basement office after filing her complaint and Wright's pay was cut when he was promoted.

Various class members testified that Parks officials either implicitly or explicitly indicated Parks' disapproval of the filing of discrimination complaints. In 1997, Webster told Brown that complaining was frowned upon by the agency. (Brown 8/28/02 Dep. at 103–05). In 2001 and 2002, Colon's supervisor, Christopher Caropolo, repeatedly conditioned any salary increases on the termination of this lawsuit. (Colon 9/9/02 Dep. at 7–8; Colon 4/17/03 Dep. at 27–35). After filing charges with the EEOC, Roman was informed that his request for a transfer to Staten Island would be approved if he withdrew his claims. ***357** (Roman 1/16/03 Dep. at 173–74; Pl. Dep. Ex. 438). Benepe told Wright that he should not file EEOC charges to avoid "any bad feelings." (Wright 9/12/02 Dep. at 122–23; Wright 3/26/03 Dep. at 155–57).

B. *Prior Proceedings*

Plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission (the "EEOC") beginning in March 1999. The same year, the United States Department of Justice ("DOJ") commenced its own investigation into plaintiffs' claims. On January 30, 2001, the EEOC issued a Determination, amended on March 14, 2001, finding reasonable cause to believe that Parks engaged in a pattern and practice of racial discrimination through its promotions and assignments, and referred its findings to DOJ. Specifically, the EEOC concluded that:

> The evidence of record shows that since 1997 a greater proportion of Caucasians were placed in permanent positions in at least six (6) out of eight (8) categories where permanent positions were offered. In comparison, African American and Hispanic employees filled a higher percentage of provisional, seasonal, non-competitive and labor class positions in twelve (12) out of sixteen (16) job categories.
>
> The record also shows that the promotion ratios for Hispanics and Blacks do not correspond with the entire workforce profile ratios. For example, for fiscal years 1998 and 1999, 70% of the employees given promotions were Caucasian while only 50% of Respondent's workforce was Caucasian. In contrast, in 1998 and 1999, respectively[,] Blacks got 17% and 11% of promotions while representing the workforce [12] and Hispanics got 1.5% and 11% [of promotions] while comprising 16% of the workforce.
>
> Examination of the evidence further reveals that Respondent's supervisory lines of authority are almost completely segregated by race and color. The investigation has revealed that all of the managers and directors at the Recreation Centers are Caucasian. The investigation also uncovered that almost no Caucasian employees report to minority supervisors.
>
> Based on the above, there is reasonable cause to believe that Respondent has unlawfully discriminated on the basis of race and national origin through promotion and assignment. The investigation also reveals that certain individuals were retaliated against for attempting to protect their rights as employees under Title VII....

(First Am. Compl. Ex. 3).

Plaintiffs commenced their lawsuit on May 24, 2001. On June 19, 2002, the United States filed an action against the City and Parks alleging a pattern and practice of racial and national origin discrimination in promotional decisions. By order of this Court dated July 15, 2002, the two cases were consolidated. Following extensive discovery, I certified the class by memorandum decision dated July 9, 2003. *Wright v. Stern,* No. 01 Civ. 4437(DC), 2003 WL 21543539, at *1 n. 1 (S.D.N.Y. July 9, 2003). On June 8, 2005, DOJ and Parks entered into a consent decree in which Parks agreed

to implement certain personnel practices, and the DOJ action was closed.

On August 4, 2005, plaintiffs filed their Third Amended Complaint, in which they assert pattern or practice and individual ***358** disparate impact and disparate treatment claims based on alleged failures to promote and compensate, segregation in work assignments, discriminatory allocation of resources, and discouragement of the filing of discrimination claims. Plaintiffs further assert a pattern or practice hostile work environment claim. Finally, plaintiffs assert pattern or practice and individual claims that Parks retaliated against class members who filed complaints. [13]

This motion followed.

DISCUSSION

Defendants move to exclude the reports and testimony of plaintiffs' experts and for summary judgment on the class claims and most of the individual claims. First, I address defendants' *Daubert* challenges. Second, I discuss defendants' motion for summary judgment dismissing the various class claims. Third, I discuss defendants' motion for summary judgment dismissing the individual claims.

A. *Plaintiffs' Expert Witnesses*

Plaintiffs rely on the testimony of three expert witnesses, as follows:

Dr. Donald Tomaskovic–Devey, who holds a Ph.D. in Sociology, is a Professor of Sociology at the University of Massachusetts and the former Director of Graduate Programs of Sociology at North Carolina State University. He has served as an expert in numerous employment discrimination cases. Additionally, he served as a consultant to DOJ for cases involving automobile stops. His research focuses primarily on gender and racial workplace inequality and organizational research methodologies. (T–D Report [14] at 2; Pl. Mem. at 73). Dr. Stephen Schneider, who holds a Ph.D. in Business and Applied Mathematics, has served as an expert in multiple federal actions, including actions involving employment discrimination and wage and hour dispute cases. (Schneider Report at 1–2). Dr. Kathleen Lundquist, who holds a Ph.D. in Psychology, has extensively researched, designed and conducted statistical analysis, and provided consultation in the areas of job analyses, test validation, performance appraisal, employment testing, and research design. She has served as an expert on testing and validation for both the U.S. Department of Labor and the DOJ. (Lundquist Report at 2–3). [15]

Defendants move to preclude these experts from testifying, and argue that their reports are so flawed that the Court may not consider them in ruling on defendants' motion for summary judgment. I discuss the law governing the admissibility of expert reports and then apply it to the reports here.

***359** 1. *Applicable Law*

[1] **[2]** A witness qualified as an expert will be permitted to testify if his or her testimony " 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' " *United States v. Lumpkin,* 192 F.3d 280, 289 (2d Cir.1999) (quoting Fed.R.Evid. 702). To be admissible, expert testimony must be both relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[3] **[4]** **[5]** To be reliable, expert testimony must be based on sufficient facts or data, and it must be the product of reliable principles and methods properly applied. *Figueroa v. Boston Scientific Corp.,* 254 F.Supp.2d 361, 365 (S.D.N.Y.2003). The trial court's task

> is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). In other words, expert testimony should be excluded if it is "speculative or conjectural," or if it is based on assumptions that are " 'so unrealistic and contradictory as to suggest bad faith.' " *Boucher v. U.S. Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir.1996) (quoting *Shatkin v. McDonnell Douglas Corp.,* 727 F.2d 202, 208 (2d Cir.1984)). An expert's opinion is inadmissible if it "is connected to existing data only by the

ipse dixit of the expert." *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

[6] **[7]** The trial court has latitude in deciding how to test an expert's reliability. *Daubert* listed a number of factors, but this "list of factors was meant to be helpful, not definitive." *Kumho Tire,* 526 U.S. at 151, 119 S.Ct. 1167. Hence, factors that a trial court *may* consider include, among others: whether a theory or technique relied on by an expert can be and has been tested; whether the theory or technique has been subjected to peer review and publication; whether there is a known or potential rate of error; whether the theory or technique has been generally accepted in the relevant community; whether the discipline itself lacks reliability; where an expert's methodology is experience-based, whether the methodology has produced erroneous results in the past and whether the methodology has been generally accepted in the relevant community; and whether an expert's method is of a kind that others in the field would recognize as acceptable. *Daubert,* 509 U.S. at 593, 113 S.Ct. 2786; *Kumho Tire,* 526 U.S. at 151, 119 S.Ct. 1167.

[8] In addition to being reliable, expert testimony must be relevant. An expert opinion is relevant if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702; *see Daubert,* 509 U.S. at 591, 113 S.Ct. 2786 ("This condition goes primarily to relevance."). Ultimately, an expert's role is to assist the trier of fact by providing information and explanations.

[9] **[10]** The proponent of expert testimony must establish its admissibility by a preponderance of the evidence. *See Astra Aktiebolag v. Andrx Pharms., Inc.,* 222 F.Supp.2d 423, 487 (S.D.N.Y.2002) (citing Fed.R.Evid. 104(a) and *Bourjaily v. United States,* 483 U.S. 171, 175–76, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)); Fed.R.Evid. 702 advisory committee's note (2000 Amendments) ("[T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."). Rejection of expert testimony, however, is still "the exception rather than the rule," ***360** Fed.R.Evid. 702 advisory committee's note (2000 Amendments), and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land,* 80 F.3d 1074, 1078 (5th Cir.1996); *see also Lippe v. Bairnco Corp.,* 288 B.R. 678, 685–87 (S.D.N.Y.2003). Thus, "in a close case the testimony should be allowed for the jury's consideration. In a close case, a court should permit the testimony to be presented at trial, where it can be tested by cross-examination and measured against the other evidence in the case." *Lippe,* 288 B.R. at 700 n. 6.

2. *Application*

a. *Tomaskovic–Devey*

[11] In his report, Tomaskovic–Devey summarizes relevant scientific literature in the field of cognitive bias. In the context of the work environment, Tomaskovic–Devey reports that research has demonstrated that cognitive errors such as stereotyping, in-group bias, and attribution are more likely to arise when evaluation criteria are "vague, ambiguous, and subjective." (T–D Report at 6). Tomaskovic–Devey further reports that employers can "substantially reduce cognitive bias in personnel decisions" if they implement "[a] well designed system for posting job vacancies, for collecting reliable, timely, and job relevant information on candidates for promotion, and for systematically assessing candidates' qualifications relative to valid criteria." (*Id.* at 7). Applying the scientific literature to the personnel practices of Parks, he concludes that "the policies and practices at [Parks] *allow* decisions to be made in an arbitrary and racially biased manner.... Managerial practice at [Parks] was ideally suited to produce and tolerate racial discrimination in employment, promotion, and job assignment." (*Id.* at 25–26) (emphasis added).

In response, defendants have offered the expert report of Winship, who attacks Tomaskovic–Devey's report on multiple grounds, on the basis of which defendants seek exclusion of Tomaskovic–Devey's report and testimony. Specifically, defendants argue: first, Tomaskovic–Devey failed to review all relevant evidence before forming an opinion; second, Tomaskovic–Devey summarized the evidence in an argumentative, one-sided manner; third, Tomaskovic–Devey failed to present evidence that is inconsistent with his own; fourth, Tomaskovic–Devey's reliance on stranger-to-stranger interactions was misplaced; and fifth, Tomaskovic–Devey offered his personal evaluation of the testimony.

Though several of these arguments have merit, they do not warrant exclusion of the testimony of Tomaskovic–Devey nor do they preclude the Court from considering the report at summary judgment. Instead, these arguments go to the weight rather than the admissibility of this evidence. Tomaskovic–Devey's conclusions are based on research examining the effect of cognitive errors on personnel decisions. The scientific research relied upon by Tomaskovic–Devey has

"been developed through laboratory, field, and survey research ... [and] has been replicated repeatedly and ... validated through peer review." (*Id.* at 3). The proper course of action therefore is to permit Tomaskovic–Devey to testify, subject to "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof[, which] are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596, 113 S.Ct. 2786.

To the extent Tomaskovic–Devey will testify that, based on his understanding of the relevant scientific literature, Parks' personnel practices "allow decisions to be ***361** made in an arbitrary and racially biased manner" and that they were "suited to produce and tolerate racial discrimination in employment, promotion, and job assignment" (T–D Report at 25–26), his testimony is both relevant and reliable. Accordingly, defendants' request to exclude the testimony of Tomaskovic–Devey is denied.

b. *Schneider*

[12] Using the personnel data from the three databases provided by Parks,[16] Schneider performed a series of regression analyses—analyses controlling for variables that might impact the results of the data, such as job title, job tenure, and tenure with the City and employee age (as a proxy for work experience). These regression analyses evaluate full-time, year-round employees—whether paid out of the seasonal budget or the regular budget—who were paid for at least six months of the year.[17] (Schneider Report at 4–5). Schneider's report also includes "simple statistics"—statistics showing the breakdown of Parks personnel without controlling for variables other than race. For example, Schneider compared the salaries of class members and non-class members without controlling for title, tenure with Parks, or any variables other than race.

Based on his analyses, Schneider concludes as follows: (1) class members are systematically underpaid relative to similarly situated non-class members; (2) class members are systematically placed in lower paying job titles, resulting in a significant salary gap; (3) class members are denied their proportionate share of wage promotions, *i.e.,* a one-time increase in salary of a pre-determined amount; (4) class members receive systematically smaller wage increases; and (5) class members have experienced a slower growth in pay rate over time than their similarly-situated Caucasian counterparts. (*Id.* at 25). In response, defendants offer the expert report of Erath, who criticizes Schneider's report on various grounds. Schneider rebutted Erath's report, responding to the various criticisms and modifying some of his data based on Erath's report.

Defendants seek to exclude Schneider's report, arguing that "his flawed methodology precludes consideration of his opinions." (Def. Mem. at 8; *see also* Erath Report at 1) (the data set created by Schneider contains "so many errors that the ultimate analyses are rendered meaningless"). The request for preclusion is denied. First, most of the alleged errors cited by defendants—some of which also existed in Erath's report—result from the nature of the raw data maintained and provided to plaintiffs by Parks. (Schneider Rebut. at 3). For example, some year-round employees are consistently coded as temporary seasonals while some who received seasonal step-ups are not tracked on the Parks Seasonal Tracking System. (*Id.* at 4). Second, to the extent ***362** errors existed in Schneider's initial report, Schneider's rebuttal report adopted Erath's revised database, with minor modifications, and still reaches the same conclusions. Hence, whatever the alleged deficiencies of his report, the rebuttal report is sufficiently reliable. Even Erath concedes that the database in the rebuttal report would permit experts to "perform statistical analysis and obtain meaningful results." (Erath Dep. at 83). As to the remaining criticisms, they go to the weight rather than the admissibility of the evidence.

Defendants argue, for example, that Schneider should have used "applicant flow figures" rather than the "wage promotion" methodology he adopted. (Def. Mem. at 9). But Schneider's wage promotion analysis reflects the hiring practices at Parks—Parks' routine failure to post vacancies severely limited the applicant pool and its practices with respect to changing titles made it difficult to create databases reflecting applications. *See, e.g., Malave v. Potter,* 320 F.3d 321, 326–27 (2d Cir.2003) (allowing alternative statistical methodologies where defendants' failure to maintain proper records created impediments to statistical analyses); *cf. Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 651, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (noting that alternative statistical proof is permissible where preferred statistical proof would be difficult or impossible to ascertain).

Schneider's conclusions are neither speculative nor conjectural. As with Tomaskovic–Devey's testimony and report, defendants may challenge Schneider's analyses through cross-examination and the admission of the

testimony of their own experts. Defendants' request to exclude Schneider's testimony is denied.

c. *Lundquist's Report*

[13] Finally, defendants move to exclude Lundquist's report and testimony for three reasons: (1) Lundquist's statistics are based on a small sample; (2) the sampling was not random; and (3) her conclusions are based on improperly aggregated data. (Def. Mem. at 54–55). These arguments do not require exclusion.

Lundquist and defendants' experts dispute whether sufficient data was available to create a database depicting applicant pools. (*Compare* Lundquist Rebut. at 2–4 (Cline improperly failed to aggregate data) *with* Cline Report at 20–25 (explaining her analysis of interviews)). According to Lundquist, Parks "failed to provide complete data and documentation on the selection procedures as required by Federal guidelines. The Parks Department has not produced records of all vacancies, listings of candidates for all vacancies, and was unable to identify the selected candidates for all the positions filled." (Lundquist Rebut. at 1). Further, both sides contest the appropriate method for evaluating small samples such as the interview data, and I cannot say as a matter of law that only one or the other is permissible. Both sides may challenge the methods employed by the opposing party's experts at trial; however, the conclusions are sufficiently reliable to be admissible.

In short, defendants' motion to exclude the testimony of plaintiffs' expert witnesses is denied, although the written reports themselves will not be received into evidence. Plaintiffs' experts may testify to their conclusions and will be subject to cross-examination and specific objections under the Federal Rules of Evidence. The experts will not allowed to bridge the gap between their conclusions and the ultimate question of whether Parks unlawfully discriminated; they will not be permitted to testify in an argumentative manner; ***363** and they will not be permitted to opine on the credibility of fact witnesses.

B. *Class Claims*

Under Title VII, "pattern or practice" claims present a means by which plaintiffs may challenge systemic discrimination in the work place. Plaintiffs have brought pattern or practice disparate treatment, disparate impact, hostile work environment, and retaliation claims. Defendants move for summary judgment on these claims.

1. *Disparate Treatment*

a. *Applicable Law*

[14] **[15]** **[16]** **[17]** Pattern or practice disparate treatment claims involve "allegations of widespread acts of intentional discrimination against individuals." *Robinson v. Metro–North Commuter R.R.,* 267 F.3d 147, 158 (2d Cir.2001). To prevail on a pattern or practice disparate treatment claim, whether brought individually or on behalf of a class, plaintiffs must demonstrate that intentional discrimination was the employer's "standard operating procedure." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ("*Teamsters* "); *see also Robinson,* 267 F.3d at 158. Proof of random or isolated acts of discrimination will not be enough to make out such a claim. *See Teamsters,* 431 U.S. at 336, 97 S.Ct. 1843. Instead, plaintiffs must present sufficient evidence to meet their prima facie burden of showing that defendants had a policy, pattern, or practice of intentionally discriminating against a protected group. *Robinson,* 267 F.3d at 158. To meet this burden, plaintiffs typically rely on two types of evidence: " '(1) statistical evidence aimed at establishing the defendant's past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination.' " *Id.* (quoting 1 Arthur Larson et al., *Employment Discrimination* § 9.03[1], at 9–18 (2d ed.2001)); *see also* 1 Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 2:28, at 2–94 (2006) ("It is important always to present stories of actual discrimination against individuals to make the statistics come alive....").

[18] For statistics to give rise to an inference of discrimination, they must be statistically significant, for disparity among protected and unprotected groups will sometimes result by chance. *Ottaviani v. State Univ. of N.Y.,* 875 F.2d 365, 371 (2d Cir.1989). Though not dispositive, statistics demonstrating a disparity of two standard deviations outside of the norm are generally considered statistically significant. *See, e.g., Smith v. Xerox Corp.,* 196 F.3d 358, 365–66 (2d Cir.1999) (disparate impact claim); *Ottaviani,* 875 F.2d at 371 (disparate treatment claim, collecting cases). "A finding of two standard deviations corresponds approximately to a one in twenty, or five percent, chance that a disparity is merely a random deviation from the norm...." *Ottaviani,* 875 F.2d at 371. Where plaintiffs demonstrate "gross statistical disparities" between the protected and unprotected groups, statistics "alone may ... constitute prima facie proof of a pattern or practice of discrimination."

Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (citing *Teamsters,* 431 U.S. at 339, 97 S.Ct. 1843).

[19] If plaintiffs meet their prima facie burden, "[t]he burden then shifts to the employer to ... demonstrat[e] that the [plaintiffs'] proof is either inaccurate or insignificant." *Teamsters,* 431 U.S. at 360, 97 S.Ct. 1843; *see Robinson,* 267 F.3d at 159. For example, a defendant might introduce evidence challenging "the source, ***364** accuracy, or probative force" of the statistics offered by plaintiffs or counter plaintiffs' statistics with their own statistical evidence. *Robinson,* 267 F.3d at 159 (quotations and citation omitted). Consequently, the parties in pattern or practice litigation frequently engage in "the well-known phenomenon of 'statistical dueling' between ... highly-paid experts." *McReynolds v. Sodexho Marriott Servs., Inc.,* 349 F.Supp.2d 1, 6 (D.D.C.2004).

[20] Though "statistics are not irrefutable," *Teamsters,* 431 U.S. at 340, 97 S.Ct. 1843, errors in statistical evidence do not necessarily render them meaningless. *See EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.,* 186 F.3d 110, 116 (2d Cir.1999) (finding that even though EEOC's statistics were not "flawless," they were sufficient to establish prima facie case of discrimination). Whether plaintiffs' statistical analyses "carry the plaintiffs' ultimate burden will depend ... on the factual context of each case in light of all the evidence presented by both the plaintiff[s] and the defendant[s]." *Bazemore v. Friday,* 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (per curiam). Moreover, "statistics come in infinite variety and ... their usefulness depends on all of the surrounding ... circumstances." *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 n. 3, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) (citation and quotation omitted).

b. ***Application***

I apply the law first to plaintiffs' promotion and compensation claims and second to plaintiffs' segregation and underfunding claims.

i. ***Promotion and Compensation***

[21] From the evidence before the Court, a reasonable jury could find that defendants engaged in a pattern or practice of discriminating against African–American and Hispanic employees in promotions and compensation. That evidence includes the following:

First, plaintiffs' statistical evidence shows, as summarized above, that class members were systemically placed in lower-paying jobs, were systemically underpaid relative to similarly situated Caucasians, and experienced slower growth in pay compared to similarly situated Caucasians. For example, between 1996 and 2003, class members held roughly 85% of the positions paying less than $20,000 while holding less than 16% of the positions paying more than $50,000 and barely holding 10% of the positions paying more than $70,000. [18] Controlling for job title, class members were paid between $16.44 and $32.59 less than Caucasian members on a bi-weekly basis between 1997 and 2003—statistically significant disparities. (Schneider Rebut. Table 2). Salaries of Caucasians increased, on average, at a 4% higher rate than class members' salaries—again, a statistically significant level.

With respect to promotions, compared to Caucasians, there was a statistically significant lower probability that class members would receive a wage promotion. Although more than 50% of Parks' non-managerial workforce consisted of class members, ***365** for the five-year period from 1996 through 2001, class members made up only 18 to 23% of the managerial workforce. Even the EEOC, the EEPC, and DOJ concluded that the statistics showed significant underrepresentation of class members in managerial and higher-paid positions.

Second, plaintiffs offer anecdotal evidence of specific instances of discrimination and retaliation in promotions and compensation. For example, Rogers earned approximately $27,000 per year when she was the Center Manager of the East 54th Street Recreation Center, while Lynda Ricciardone's salary was $35,000 per year one month after securing the Center Manager Position at the Asser Levy facility. (Pl.Dep.Ex.140). Moreover, Wright's salary was decreased when he received a promotion to Parks Recreation Manager; he therefore earned between $6,000 and $8,000 less than Caucasian Parks Recreation Managers. Even though she had been working as WEP Citywide Coordinator for several years, Loving was denied the chance to even apply for a newly created "Director of WEP" position. A Caucasian employee with less experience than she was awarded the position instead.

Third, plaintiffs have offered evidence of numerous statements by Stern and other Parks officials that demonstrate discriminatory and racially hostile attitudes on the part of

decision-makers. A reasonable jury could conclude that these comments reflected a discriminatory animus.

Finally, plaintiffs have offered evidence of personnel practices at Parks that would permit discrimination to flourish. Managerial positions were routinely filled without announcement or posting. Stern had unilateral authority to determine salaries, which would then drive the assignment of civil service titles. Moreover, Stern and other senior officials would sometimes personally select employees for promotions, including for low-level positions. Parks did not have policies in place for determining which vacant positions should be posted, who would be given interviews, or how interviewees should be rated; Parks only haphazardly followed the policies and procedures that were in place.

Defendants offer several arguments in response, but defendants fail to demonstrate that no genuine issue of material fact exists for trial. For example, defendants contend that "[t]he mere absence of minority employees in upper-level positions does not suffice to prove a prima facie case of discrimination without a comparison to the relevant labor pool." (Def. Mem. at 8 (quoting *Carter v. Ball,* 33 F.3d 450, 456–57 (4th Cir.1994))). In this case, however, plaintiffs do not rely solely on the absence of class members in upper-level positions. Rather, they rely on other statistics, personnel practices, and anecdotal evidence as well. Though several of these statistics do not take into account factors other than race, they nevertheless provide support for plaintiffs' regression analyses and weaken defendants' challenges to those analyses. Moreover, again, many of defendants objections—including their objections to Schneider's wage promotion analysis—go to weight rather than admissibility, and it will be up to the jury to decide whether to accept these criticisms.

[22] Defendants also argue that there is nothing inherently sinister about subjective or ad hoc employment practices. Such "subjective and ad hoc" employment practices, however, bolster plaintiffs' claim that defendants discriminated against class members. Multiple courts have observed that " '[g]reater possibilities for abuse ... are inherent in subjective definitions of employment selection and promotion criteria,' " such as those in place at Parks. ***366** *Davis v. Califano,* 613 F.2d 957, 965 (D.C.Cir.1979) (quoting *Rogers v. Int'l Paper Co.,* 510 F.2d 1340, 1345 (8th Cir.1975)) (omission in original); *accord Grant v. Bethlehem Steel Corp.,* 635 F.2d 1007, 1016 (2d Cir.1980) (recognizing that subjective hiring practices might mask racial bias). Indeed, plaintiffs argue that the dangers inherent in subjective employment practices are even greater at Parks because Stern was at the helm, citing Stern's alleged "racist statements, racially discriminatory acts by him and others, and his indifference to EEO matters, including his racially discriminatory justifications for Parks' failure to promote class members." (Pl. Mem. at 6). Defendants respond that plaintiffs have "embarked on a diatribe against Henry Stern" (Def. Reply at 1) and describe some of his statements as neutral or ambiguous (Def. Mem. at 34). Though Stern's various statements and actions are susceptible to multiple interpretations, a reasonable jury could conclude that he held racial prejudices and that these prejudices influenced his treatment of Parks employees. Though certainly not determinative, evidence of Parks' personnel practices further support plaintiffs' prima facie case.

Defendants have offered meritorious criticisms of many of the statistical analyses offered by plaintiffs. Nevertheless, though plaintiffs' analyses are imperfect, the variety of analyses and the consistency of the results decrease the risk and degree of harm of potential errors. Because material issues of fact exist as to whether Parks' intentionally discriminated in granting promotions and setting wages, defendants' motion for summary judgment with respect to plaintiffs' disparate treatment compensation and promotion claims is denied.

ii. *Segregation and Underfunding*

[23] **[24]** Defendants also move for summary judgment on plaintiffs' disparate treatment claims based on purported segregation in assignments and underfunding of Parks in predominantly African–American or Hispanic neighborhoods. Plaintiffs have raised fair concerns, particularly in light of admissions of Parks management officials that, on occasion, employees were placed in work locations based on race. Work assignments based on race generally run afoul of the Constitution. *See Patrolmen's Benevolent Ass'n of N.Y. v. City of N.Y.,* 310 F.3d 43, 52 (2d Cir.2002) (upholding jury finding that police department violated Equal Protection Clause in assigning policemen to precinct based on race). Even where clients, in this case New York City residents, request that an assignment be based on race, a government employer does not have "carte blanche to dole out work assignments based on race." *Patrolmen's Benevolent Ass'n,* 310 F.3d at 52–53. Rather, the employer must demonstrate that the racially-based assignment was " 'motivated by a truly powerful and worthy concern and that the racial measure ... adopted is a plainly apt response to that concern.' " *Id.* (quoting *Wittmer v. Peters,* 87 F.3d 916, 918 (7th Cir.1996)). Where an agency assigns employees based

on race, even if only occasionally, it gives effect to racial prejudices. *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

[25] Despite these concerns, the motion to dismiss the segregation claim is granted because plaintiffs have failed to present sufficient evidence that it was Parks' standard operating procedure to make assignments based on race. Plaintiffs have relied primarily on anecdotal evidence—testimony of class members who note that in their experience assignments ***367** are based on race, and that park crews correspond to the ethnicity of the neighborhoods in which the parks were located. But plaintiffs have not presented sufficient statistical evidence to support their claim, as the only statistics offered in this respect are the flawed statistics of Schneider based on the mistaken belief that employees worked in the zip codes used in his analysis when they did not. Nor have plaintiffs offered any evidence to show that, even assuming there are statistical disparities, the disparities resulted from a practice or policy of assigning employees based on race.

Likewise, plaintiffs' underfunding claim primarily relies on the testimony of class members that parks in African–American and Hispanic neighborhoods were in worse condition and received repairs and new equipment less frequently than parks in Caucasian neighborhoods. This conclusory testimony, however, is not supported by concrete particulars, or by any statistical analysis. Plaintiffs have not presented sufficient evidence to demonstrate that Parks had a policy, pattern, or practice of underfunding parks in predominantly African–American or Hispanic neighborhoods. Accordingly, defendants' motion is granted in this respect.

2. *Disparate Impact*

Plaintiffs also allege that Parks' policy regarding the posting of positions and the application and interview process disparately impacted class members. Defendants move for summary judgment as to this claim.

a. *Applicable Law*

[26] Title VII prohibits not only overt and intentional discrimination, but also facially neutral practices that have a disparate impact on protected groups. *Malave v. Potter,* 320 F.3d 321, 325 (2d Cir.2003); *Smith v. Xerox Corp.,* 196 F.3d 358, 364 (2d Cir.1999) ("[D]isparate impact theory targets practices that are fair in form, but discriminatory in operation.") (citation and internal quotation marks omitted). Thus, disparate impact claims offer a means to erase "employment obstacles, not required by business necessity, which create built-in headwinds and freeze out protected groups from job opportunities and advancement." *Robinson v. Metro–North Commuter R.R.,* 267 F.3d 147, 160 (2d Cir.2001) (quoting *EEOC v. Joe's Stone Crab, Inc.,* 220 F.3d 1263, 1274 (11th Cir.2000)).

[27] **[28]** **[29]** To meet their prima facie burden in a disparate impact case, plaintiffs must demonstrate that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(k)(1)(A)(I). Specifically, plaintiffs "must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two." *Robinson,* 267 F.3d at 160; *see also Gulino v. New York State Educ. Dep't,* 460 F.3d 361, 382 (2d Cir.2006). In identifying a specific employment practice, plaintiffs must do more "than rely on bottom line numbers in an employer's workforce." *Smith,* 196 F.3d at 365. Rather, plaintiffs must demonstrate a statistical disparity " 'sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.' " *Id.* (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). As in pattern or practice disparate treatment cases, statistics must be statistically significant to give rise to an inference of causation. *Id.* Statistical results cannot be "persuasive," however, "absent a close fit between the population used to measure disparate impact and the ***368** population of those qualified for a benefit." *Carpenter v. Boeing Co.,* 456 F.3d 1183, 1197 (10th Cir.2006)

In disparate impact cases, parties frequently disagree on the proper populations or markets to be compared in statistical analyses. For cases involving allegations of discriminatory hiring, the relevant comparison is "between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market." *Malave,* 320 F.3d at 326 (quoting *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650–51, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)) (alterations in original). In contrast, for cases alleging discrimination in promotions, the relevant comparison "is customarily between the composition of candidates seeking to be promoted and the composition of those actually promoted." *Id.* Despite these principles, the

Supreme Court has clarified that alternative comparisons may be appropriate where such statistics "will be difficult if not impossible to ascertain." *Wards Cove,* 490 U.S. at 651, 109 S.Ct. 2115.

b. ***Application***

i. ***Plaintiffs' Prima Facie Case***

[30] Plaintiffs have identified policies and practices that they contend are discriminatory; they allege that class members have been adversely impacted by Parks' failure to regularly post and interview for vacancies and Parks' interview procedures. Plaintiffs further allege that class members have been adversely impacted by the "Class Of" Program.

Plaintiffs have also presented evidence of statistically significant disparities between class members and non-class members with respect to promotions, compensation, and the "Class Of" Program, as discussed above. The numbers are stark, as there are far lower percentages of class members in the higher-paid positions than there are in the lower-paid positions. Class members received statistically significant lower interview scores than Caucasians. Notably, the level of disparity dramatically increased after the time period in which this lawsuit was filed. (Lundquist Report at 13).

Plaintiffs have also presented evidence of a causal connection between the policies and practices in question and the statistical disparities. First, plaintiffs' statistics are statistically significant and therefore give rise to an inference of causation. *See Smith,* 196 F.3d at 365.

Second, Parks failed to examine the validity of its interview process or its minimum requirements for jobs. (Lundquist Report at 16–32). The Uniform Federal Guidelines provide that "an inference of adverse impact of the selection process" may be drawn where an employer fails to maintain data on adverse impact where an employer "has an underutilization of a group in the job category, as compared to the group's representation in ... the applicable work force." (*Id.* at 6 (quoting Uniform Guidelines, Section 4D, p. 38298)). Here, Parks repeatedly indicated an awareness of underutilization of class members in certain job categories in its annual reports to the EEPC, and yet failed to maintain data.

Third, as numerous Parks officials acknowledged, Parks did not regularly post available positions. With the exception of Beach, all of the named plaintiffs identified positions for which they would have applied had they been posted. Further, Parks officials conceded that it did not have any policies regarding when interviews should be conducted or how interviewees' scores should be evaluated.

As Tomaskovic–Devey concluded, Parks' subjective personnel practices could "allow ***369** decisions to be made in an arbitrary and racially biased manner" and were "ideally suited to produce and tolerate racial discrimination in employment, promotion, and job assignment." (T–D Report at 25–26). A reasonable jury could accept these conclusions and find that plaintiffs have met their prima facie burden of demonstrating that Parks' subjective employment practices adversely impacted class members.

ii. ***Defendants' Contentions***

Defendants move for summary judgment on this claim because: (1) it was not included in the named plaintiffs' EEOC charges; (2) it is not truly a disparate impact claim; and (3) plaintiffs have failed to make the requisite statistical showing of disparate impact. (Def. Mem. at 49–50).

[31] Defendants' first argument fails. Though federal courts generally do not have jurisdiction over claims not alleged in an EEOC charge, it is well settled that there is jurisdiction where a claim is "reasonably related" to the EEOC charges. *See Brown v. Coach Stores, Inc.,* 163 F.3d 706, 712 (2d Cir.1998). Here, the disparate impact claim is clearly reasonably related to the EEOC charges, for Parks' promotion policies " 'would fall within the scope of the EEOC investigation ... of the charge that was made.' " *Williams v. N.Y.C. Housing Auth.,* 458 F.3d 67, 70 (2d Cir.2006) (per curiam) (quoting *Fitzgerald v. Henderson,* 251 F.3d 345, 359–60 (2d Cir.2001) (internal quotation marks omitted)).

[32] **[33]** Defendants' next argument—that the disparate impact claim alleges that defendants acted with discriminatory intent and, therefore, they have not identified a facially neutral policy or practice (Def. Mem. at 52)—also fails. First, disparate impact and disparate treatment theories are "simply alternative doctrinal premises for a statutory violation," *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.,* 964 F.2d 106, 115 (2d Cir.1992), and "[e]ither theory may ... be applied to a particular set of facts," *Teamsters,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). There is nothing inconsistent in acting with intent to discriminate while adopting a facially neutral policy that has a disparate impact; the two are not mutually exclusive.

Second, defendants' argument misconstrues the facially neutral practice alleged by plaintiffs. Plaintiffs' disparate impact claim focuses on Parks' subjective promotion practices, the type of practice that the Supreme Court has held can give rise to a disparate impact claim. *Watson,* 487 U.S. at 990–91, 108 S.Ct. 2777. These practices—failing to post, failing to interview, the interview procedures used by Parks, and the "Class Of" Program—are not discriminatory on their face, for they apply regardless of an employee's race. As these subjective practices were employed, however, plaintiffs allege—and a reasonable jury could conclude based on the statistical and other evidence—that class members were disparately impacted.

Finally, defendants challenge plaintiffs' disparate impact statistics. For the reasons stated in the discussions of the experts' reports and the disparate treatment claims above, defendants' objections are overruled. This prong of defendants' motion is denied.

3. *Hostile Work Environment*

a. *Applicable Law*

[34] **[35]** "[W]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." ***370** *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 116, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)) (internal quotation marks omitted); *see also Schiano v. Quality Payroll Sys., Inc.,* 445 F.3d 597, 604 (2d Cir.2006).[19] In the context of individual hostile work environment claims, it is well settled that for a plaintiff to recover, her working environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (citing *Harris,* 510 U.S. at 21–22, 114 S.Ct. 367). Where plaintiffs allege a pattern or practice of a hostile work environment, however, the legal standards become murkier. Though neither the Supreme Court nor the Second Circuit has clarified the requirements plaintiffs must meet to satisfy their prima facie burden in a pattern or practice hostile work environment action,[20] several district court opinions provide guidance.

In *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.,* 990 F.Supp. 1059 (C.D.Ill.1998), plaintiffs alleged that defendants engaged in a pattern or practice of sexual harassment. Defendant moved for summary judgment, arguing that, because hostile work environment claims require proof that conduct was subjectively offensive, they are inconsistent with the pattern or practice framework. The district court rejected defendants' argument, concluding that it did "not need to make a great leap of faith to state the obvious: Title VII authorizes a pattern or practice action for sexual harassment." *Id.* at 1070.

Next, the court turned to how such a claim should be proven. Adopting the two-stage liability process used in pattern or practice disparate treatment and disparate impact claims, the court found that at the liability stage, plaintiffs must demonstrate, "by a preponderance of the evidence, that an objectively reasonable person would find the existence of: (1) a hostile environment of sexual [or racial] harassment within the company (a hostile environment pattern or practice) ...; and (2) a company policy of tolerating (and therefore condoning and/or fostering) a workforce permeated with severe and pervasive sexual [or racial] harassment." *Mitsubishi,* 990 F.Supp. at 1073. Multiple district courts have since adopted this two-pronged standard in evaluating claims for sexual or racial hostile work environment pattern or practice claims. *See, e.g., Employees Committed for Justice v. Eastman Kodak Co.,* 407 F.Supp.2d 423, 430 (W.D.N.Y.2005) ("Rather, the issue under the pattern or practice framework is whether there was a systemic culture of harassment and whether it was 'standard operating procedure' to permit such conduct without consequences or discipline to those responsible."); *EEOC v. Dial Corp.,* 156 F.Supp.2d 926 (N.D.Ill.2001) (denying summary judgment for defendants on pattern ***371** or practice hostile work environment claim, concluding that triable issue of fact existed as to whether a reasonable person would find the working environment at issue severely or pervasively hostile).

[36] **[37]** As to whether a hostile work environment existed under the first prong, summary judgment will only be appropriate "if it can 'be concluded as a matter of law that no rational juror could view [the alleged conduct] as ... an intolerable alteration of ... working conditions.' " *Holtz v. Rockefeller & Co., Inc.,* 258 F.3d 62, 75 (2d Cir.2001). Sporadic or episodic instances of harassment will generally not be sufficient to survive summary judgment on a claim of hostile work environment harassment; "[r]ather, the [employee] must demonstrate either that a single incident

was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of [the] ... working environment." *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 570 (2d Cir.2000) (quoting *Perry v. Ethan Allen, Inc.,* 115 F.3d 143, 149 (2d Cir.1997)). Factors to be considered in evaluating whether a work environment is sufficiently hostile include "the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Holtz,* 258 F.3d at 75 (quoting *Faragher,* 524 U.S. at 787–88, 118 S.Ct. 2275). Though these standards have been articulated in the context of individual hostile work environment claims, they are equally useful in determining whether a work environment was sufficiently hostile for a pattern or practice claim.

[38] The totality of the circumstances must be considered, for a hostile work environment "occurs over a series of days or perhaps years and ... a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts." *Morgan,* 536 U.S. at 115, 122 S.Ct. 2061; *see also Mitsubishi,* 990 F.Supp. at 1073 (trier of fact must consider totality of circumstances); *Jenson v. Eveleth Taconite Co.,* 824 F.Supp. 847, 885 (D.Minn.1993) (fact-finder should consider that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment ... created may exceed the sum of the individual episodes"). In the context of pattern or practice cases, the focus is on the "the landscape of the total work environment, rather than the subjective experiences of each individual claimant." *Mitsubishi,* 990 F.Supp. at 1074. [21]

[39] Even where a hostile work environment exists, plaintiffs must demonstrate a specific basis for imputing liability to the employer. In individual actions, an employer is not liable if it demonstrates that (1) it took reasonable steps to prevent and to promptly remedy harassing conduct, and (2) the harassed employee unreasonably failed to avail herself of any corrective or preventive opportunities made available by the employer. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 760–61, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275. In a pattern or practice case, plaintiffs must demonstrate that the company had notice of the hostile work environment and was negligent in its response to the environment. *Mitsubishi,* 990 F.Supp. at 1074. "When harassing behavior ***372** occurs frequently enough and is both common and continuous, a company can reasonably be said to be on 'notice' of a severe and pervasive problem of ... harassment that constitutes a hostile environment." *Id.* (citing *Robinson v. Jacksonville Shipyards, Inc.,* 760 F.Supp. 1486, 1531 (M.D.Fla.1991) ("an employer incurs liability when harassing behavior happens frequently enough that the employer can take steps to halt it")). To demonstrate negligence, plaintiffs must show that the employer knew or should have known that the work environment was hostile and nevertheless failed to take steps to correct the problem on an agency-wide basis. *Id.* at 1075.

b. ***Application***

[40] Although plaintiffs have offered evidence of sporadic or episodic incidents of discriminatory conduct, they have not presented evidence from which a reasonable jury could find a systemic culture of harassment or that racial harassment was standard operating procedure at Parks. On the record before the Court, no reasonable jury could find that Parks was permeated with discriminatory conduct of a severe or pervasive nature, sufficient to alter the conditions of employment on a classwide basis.

Parks was spread out over the five boroughs, with employees working in more than 4,000 locations. Though plaintiffs have offered evidence of offensive statements made by Stern and others, this evidence is insufficient to show that racial harassment was standard operating procedure at Parks. The statements were spread out over a period of time and many were made in private. In fact, several of the named plaintiffs denied being subjected to a hostile work environment. [22]

It would be mere speculation for a jury to conclude that a significant number of class members were subjected to severe or pervasive conduct or that the conditions of employment for a significant number of class members were altered, both subjectively and objectively.

4. ***Pattern or Practice Retaliation***

a. ***Applicable Law***

[41] Title VII prohibits an employer from subjecting an employee to adverse consequences "because he has opposed any practice made an unlawful employment practice ... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a). Thus, Title VII has two different clauses that each protect a different type of activity; the "opposition clause" protects an

employee's opposition to an unlawful employment practice, while the "participation clause" protects participation in a proceeding under Title VII. *See Deravin v. Kerik,* 335 F.3d 195, 203 n. 6 (2d Cir.2003). Further, "Title VII is violated when 'a retaliatory motive plays a part in adverse ... actions toward an employee, whether or not it was the sole cause.' " *Terry v. Ashcroft,* 336 F.3d 128, 140–41 (2d Cir.2003) (internal citations omitted).

[42] **[43]** **[44]** On a motion for summary judgment, a plaintiff must first demonstrate that "[he] was engaged in protected activity ... [and that] the employer was ***373** aware of that activity." *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55, 66 (2d Cir.1998); *see also Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170, 1178 (2d Cir.1996). The term "protected activity" refers to action taken to protest or oppose statutorily prohibited discrimination. *See* 42 U.S.C. § 2000e–3; *see also Wimmer v. Suffolk County Police Dep't,* 176 F.3d 125, 134–35 (2d Cir.1999). Informal as well as formal complaints constitute protected activity. *Sumner v. United States Postal Serv.,* 899 F.2d 203, 209 (2d Cir.1990). Moreover, to establish that his activity is protected, a plaintiff "need not prove the merit of his underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed." *Id.; see also Grant v. Hazelett Strip–Casting Corp.,* 880 F.2d 1564, 1569 (2d Cir.1989).

[45] Next, as the Supreme Court recently clarified, a plaintiff must demonstrate that he was subject to an action "that a reasonable employee would have found ... materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Burlington N. & Santa Fe Ry. v. White,* 548U.S. 53, —— – ——, 126 S.Ct. 2405, 2414–15, 165 L.Ed.2d 345 (2006) (quoting *Rochon v. Gonzales,* 438 F.3d 1211, 1219 (D.C.Cir.2006)) (quotation omitted). Thus, the category of challenged actions that might be considered retaliatory is broader than "adverse employment actions" or "ultimate employment decisions," for the scope of Title VII's "anti-retaliation provision extends beyond [the] workplace-related or employment-related retaliatory acts and harm" prohibited by Title VII's anti-discrimination provision. *Id.*

An adverse action is not defined "solely in terms of job termination or reduced wages and benefits[.] ... [L]ess flagrant reprisals by employers may indeed be adverse." *Wanamaker v. Columbian Rope Co.,* 108 F.3d 462, 466 (2d Cir.1997). At the same time, however, " 'not every unpleasant matter short of [discharge or demotion] creates a cause of action' for retaliat[ion]." *Id.* (quoting *Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir.1994)); *see also Burlington N. & Santa Fe Ry.,* 548 U.S. 53, —— – ——, 126 S.Ct. 2405, 2414–15, 165 L.Ed.2d 345 (noting that petty slights and minor annoyances will not suffice). Whether a particular action is considered retaliatory will "often depend on the particular circumstances," for "[c]ontext matters." *Burlington N. & Santa Fe Ry.,* 548 U.S. 53, —— – ——, 126 S.Ct. 2405, 2415–16, 165 L.Ed.2d 345. Courts must examine closely "each case to determine whether the challenged employment action reaches the level of 'adverse,' " *Wanamaker,* 108 F.3d at 466, for an action that makes little difference to one employee may be materially adverse to another employee, *Burlington N. & Santa Fe Ry.,* 548 U.S. 53, 126 S.Ct. 2405, 2415–16, 165 L.Ed.2d 345.

[46] **[47]** Finally, a plaintiff must show that "there was a causal connection between the protected activity" and the allegedly retaliatory action. *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55, 66 (2d Cir.1998). A plaintiff may prove causation either "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or ... (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Gordon v. N.Y. City Bd. of Educ.,* 232 F.3d 111, 117 (2d Cir.2000); *see also Cosgrove v. Sears, Roebuck & Co.,* 9 F.3d 1033, 1039 (2d Cir.1993). Although the burden that a plaintiff must meet to establish a prima facie case at the summary judgment stage is de *minimis,* the plaintiff must at least proffer competent evidence of circumstances that would be sufficient ***374** to permit a rational finder of fact to infer a retaliatory motive. *See Cronin v. Aetna Life Ins.,* 46 F.3d 196, 203–04 (2d Cir.1995).

Here, plaintiffs allege that Parks engaged in a pattern or practice of retaliating against employees who engaged in protected activity. Accordingly, plaintiffs must demonstrate that retaliation in response to protected activity was Parks' standard operating procedure. *Teamsters,* 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

b. *Application*

[48] Plaintiffs have presented evidence from which a reasonable jury could find that Parks engaged in a pattern or practice of retaliating against employees who engaged in protected activity.

First, class members engaged in protected activity of which defendants were aware both informally by complaining to supervisors and more formally by filing charges or complaints

of discrimination with the Parks' EEO office or the EEOC as well as by filing this lawsuit.

Second, a reasonable jury could find that class members were subjected to adverse, material consequences, including, for example, the following:

● Walter Beach, the Chief of Recreation in Brooklyn until May 1999, was asked by the Brooklyn Commissioner to resign after Beach wrote memoranda in August 1998 and March 1999 expressing concern over Parks' treatment of class members and several named plaintiffs filed charges with the EEOC. (Beach 4/3/03 Dep. at 84–89).

● Jacqueline Brown received a negative performance evaluation after she complained to the EEO officer of discriminatory treatment; the evaluation referred to her complaints. (Brown 1/30/03 Dep. at 140–41).

● Angelo Colon received warnings and a downgraded performance evaluation after he filed discrimination charges with the EEOC. (Ex. G00462–63, G00403; Colon 4/17/03 Dep. at 268–70). In 2001 and 2002, Colon's supervisor repeatedly conditioned salary increases on the termination of this lawsuit. (Colon 9/9/02 Dep. at 7–8; Colon 4/17/03 Dep. at 28–35).

● After she complained about being denied a position, Odessa Portlette was assigned to work in the basement for six months. (Portlette 2/12/03 Dep. at 117–19).

● Kathleen Walker was also moved to a basement office after she filed charges with the EEOC. (Walker Dep. 9/17/02 Dep. at 100–02).

Third, a reasonable jury could also find a causal connection between the adverse actions and the protected activity. Plaintiffs have offered, for example, direct evidence of causation, as some supervisors explicitly offered raises, promotions, or desired transfers in return for the dropping of claims of discrimination. Plaintiffs have offered evidence directly showing retaliatory animus: Jacqueline Brown was told by Webster that complaining was frowned upon by Parks and Benepe asked Wright not to file this lawsuit. Plaintiffs have also offered circumstantial evidence of causation, including, for example, the timing of adverse actions shortly after a class member engaged in protected activity.

Finally, the record also contains evidence that retaliation occurred on an agency-wide basis. Between 1995 and 2003, for example, some thirty Parks employees filed retaliation complaints with outside agencies. Seven of the named plaintiffs have offered specific evidence of retaliation against them. Moreover, the record contains evidence of lack of receptiveness to discrimination complaints, not just from ***375** individual Parks supervisors, but an attitude flowing from the top down. The EEPC also found a number of flaws in Parks' EEO complaint processing procedures.

This prong of the motion is denied.

C. *Individual Claims*

1. *Teamsters Presumption versus McDonnell Douglas Burden Shifting*

[49] Where a trier of fact concludes that an employer engaged in a pattern or practice of discrimination, individual class members are entitled to a presumption "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters,* 431 U.S. at 362, 97 S.Ct. 1843. A class member therefore need only show that she was subjected to an adverse employment decision. *Robinson v. Metro–North Commuter R.R.,* 267 F.3d 147, 159 (2d Cir.2001). The employer may then rebut this presumption by offering admissible evidence from which a jury could conclude that the employment decision was made for lawful reasons. *Id.* at 159–60; *see also Ghosh v. N.Y. City Dep't of Health,* 413 F.Supp.2d 322, 335–36 (S.D.N.Y.2006) (holding that defendants did not meet burden of articulating non-discriminatory reason for employment decision where they did not submit admissible evidence to support their articulation) (citing *Mandell v. County of Suffolk,* 316 F.3d 368, 380 (2d Cir.2003)).

[50] The *Teamsters* presumption generally arises in the context of determining the parties' burdens at trial rather than on summary judgment. Nevertheless, defendants have conceded that, for the purposes of summary judgment only, the individual plaintiffs' claims are entitled to the *Teamsters* presumption should the class claims survive summary judgment. (Def. Opp. to Mot. to Bifurcate at 7). Hence, because I have found that material issues of fact exist with respect to the pattern or practice disparate treatment, disparate impact, and retaliation claims, plaintiffs receive the benefit of the *Teamsters* presumption as to their individual compensation, promotion, and retaliation claims.

2. *Compensation*

Defendants move for summary judgment dismissing the compensation claims of Jacqueline Brown, Angelo Colon, Paula Loving, Odessa Portlette, Elizabeth Rogers, Henry Roman, Kathleen Walker, and Robert Wright.

[51] To survive a motion for summary judgment on the compensation claims under the *Teamsters* presumption, each plaintiff must first present evidence from which a reasonable jury could find that she was subjected to an adverse employment decision, *i.e.,* that defendants failed to compensate her equally. Specifically, a plaintiff must demonstrate that she was paid less than a member of a non-protected group for work requiring substantially the same responsibility. *See Belfi v. Prendergast,* 191 F.3d 129, 139 (2d Cir.1999); *Wright v. Milton Paper Co.,* No. 99 Civ. 5724(SJ), 2002 WL 482536, at *8 (E.D.N.Y. Mar. 26, 2002). A plaintiff need not demonstrate that two positions are identical; rather, it is sufficient to show that the positions are substantially equivalent. *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1310 (2d Cir.1995).

[52] If the plaintiff meets this minimal burden, defendants must then offer admissible "evidence that a legitimate nondiscriminatory reason existed" for the employment decision. *Robinson,* 267 F.3d at 162. The employer's asserted nondiscriminatory reason is "subject to further evidence ***376** by the [plaintiff] that the purported reason for ... [the adverse employment decision] was in fact a pretext for unlawful discrimination." *Teamsters,* 431 U.S. at 362 n. 50, 97 S.Ct. 1843 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804–06, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

[53] For most of plaintiffs' compensation claims, the analysis turns on whether plaintiffs have identified an appropriate comparator. Whether positions are "substantially equivalent" is usually a question of fact for the jury. *Lavin–McEleney v. Marist Coll.,* 239 F.3d 476, 480 (2d Cir.2001) (equal pay claim); *see also Tomka,* 66 F.3d at 1312 ("A claim of unequal pay for equal work under Title VII ... is generally analyzed under the same standards used in an EPA claim.").

[54] Defendants' motion for summary judgment dismissing the individual compensation claims is denied, for each of the individual plaintiffs in question has presented sufficient evidence to raise a genuine issue of material fact for trial. Jacqueline Brown, for example, received only one discretionary pay increase—a $3,000 raise in 1988—in more than twenty years at Parks, while arguably comparably situated Caucasian employees received more discretionary pay increases. (Brown 8/28/02 Dep. at 66; Def. Exs. 41, 79; Pl. Mem. at 118). Angelo Colon, a Center Manager, points to at least four Caucasian Center Managers who received higher salaries than he did from May 1977 through October 2000. (*See* Pl. Mem. at 114; Compl. ¶ 122). A reasonable jury could conclude that Odessa Portlette was similarly situated to Brian Clark and Sarah Horowitz, Caucasian employees who were paid more than Portlette. (Pl. Mem. at 103; Portlette 8/26/02 Dep. at 18–19; Portlette 2/12/03 Dep. at 17–18; I00346–47). Elizabeth Rogers earned $27,148 as Recreation Director of Thomas Jefferson Recreation Center, while non-class member Thomas Medich earned $32,985 as the Recreation Director of the Carmine Street Center. (Def.Ex.41). Though Rogers has earned $27,962 since 1999, her Caucasian replacement as Recreation Director of the 54th Street Center, Christopher Miller, earned $31,314 shortly after taking over the position. (*Id.;* Pl. Mem. at 99).

Some of the purported comparators relied on by plaintiffs are not similarly situated, as a matter of law, but I do not take the time now to discuss each purported comparator. Plaintiffs will not be permitted at trial to put into issue an unreasonable number of comparators. The Court will set a limit, and defendants may also move in limine to narrow the number of comparators plaintiffs may put into issue at trial.

3. *Promotion Claims*

With the exception of Robert Wright and Elizabeth Rogers, defendants move for summary judgment on plaintiffs' promotion claims.

[55] To survive summary judgment on their failure to promote claims under the *Teamsters* presumption, each plaintiff must first demonstrate evidence from which a reasonable jury could find that he or she was subjected to an adverse employment decision, *i.e.,* that defendants failed to promote him or her, during the relevant time period. Where a position was posted, the plaintiff must therefore demonstrate that he applied for that position but was rejected. Where a position was not posted, the plaintiff must demonstrate either that he would have applied for the position had he known of its availability or that he did apply through the employer's informal processes and was rejected. *See Petrosino v. Bell Atl.,* 385 F.3d 210, 227 (2d Cir.2004); ***377** *Mauro v. S. New Eng. Telecomms., Inc.,* 208 F.3d 384, 387 (2d Cir.2000) (per curiam). Defendants may then offer evidence demonstrating

a legitimate, non-discriminatory reason for the employment decision, which the plaintiffs may argue is pre-textual.

[56] Defendants' motion is also denied to the extent it seeks dismissal of the individual promotion claims. With the backdrop of the statistical, anecdotal, and other evidence that supports the pattern and practice claims, the individual plaintiffs have presented sufficient additional evidence to meet the minimal *Teamsters* burden. All of the individual plaintiffs have identified positions for which they were qualified, and for which they were rejected or of which they were not aware because of Parks' failure to post them. Issues of fact exist as to whether the explanations offered by defendants were pretextual. Some examples are illustrative:

● Carrie Anderson testified that she submitted an application for the position of Parks Recreation Manager to Chief of Operations Dorothy Lewandowski and identified the job posting to which she responded. (Anderson 9/5/02 Dep. at 63–64; Anderson 1/09/03 Dep. at 168–69; Ex. PL–00029). She did not receive this promotion. Likewise, Anderson produced evidence that she applied for a PPS position but was also denied. (Anderson 9/5/02 Dep. at 96–97; D00705–706). Thus, Anderson has demonstrated that she was subject to adverse employment decisions with respect to these positions. Defendants have not offered any non-discriminatory explanation for the failures to promote. Indeed, defendants do not contest that Anderson was qualified, instead arguing that Anderson did not apply for these positions or that these positions did not exist. (Def. Mem. at 79). But these are factual arguments to be made to the jury.

● Jacqueline Brown asserts that she was denied promotions to the posted positions of Queens Deputy Chief of Recreation in 1999 and Deputy Chief of Operations in 2001 and to the unposted or improperly posted positions of Director of Central Recreation, Director of Urban Parks Rangers, Assistant to the Commissioner, Parks Administrator, Chief of Operations, PRM, and Chief of Recreation. Defendants have not addressed Brown's claims as to the unposted or not properly posted positions.

● Paula Loving's supervisor testified that Loving was smart, ambitious, reliable, a good communicator, and a very good worker. Indeed, he nominated her for and she was awarded the January 1997 employee of the month award, because she had coordinated the WEP Program, which had grown from 250 participants to more than 4,000 participants, supervised the WEP coordinators in all five boroughs, acted as a liaison with HRA, and produced reports documenting the program's growth. (Pl.Dep.Ex.95A). Loving had worked as Citywide WEP Coordinator for four years when Parks created a Director of WEP Operations position in 1997. Leimas, who had been working on a WEP-related matters for less than one year, was awarded the position. Because the position was not posted, Loving could not even apply for the new position. When Leimas left Parks one year later, Parks appointed Felderstein—a 1997 college graduate who had worked at Parks for less than one year—without posting the position. As to both positions, a reasonable jury could certainly conclude that defendants' explanations for these decisions are pretextual, for Loving had significantly more experience performing substantially the same responsibility.

● Robert Wright received a decrease in salary from $55,433 to $49,920 when he ***378** received a promotion to Park Recreation Manager. (Def. Resp. Pl. RFA # 697). In contrast, similarly situated Caucasians received *raises* upon their promotions. As a result, Wright was paid between six and eight thousand dollars less annually than Caucasian PRMs. (RW St. ¶¶ 144–49; compare R10383 and R20011). Defendants have not offered a non-discriminatory explanation for Wright's treatment.

Again, defendants have asserted fair arguments as to a number of the positions put into issue by plaintiffs. I do not take the time to review all the positions now, for plaintiffs will not be permitted to put a limitless number of positions into issue at trial. Rather, each plaintiff will be limited to a reasonable number of positions, drawn from positions that were the subject of discovery, which will have to be identified in advance of trial.

4. *Retaliation*

The legal standards applicable to retaliation claims are set forth above. The individual plaintiffs asserting retaliation claims have submitted evidence from which a reasonable jury could find all three elements: (1) plaintiffs engaged in protected activity of which defendants were aware; (2) plaintiffs were subjected to materially adverse consequences; and (3) the existence of a causal connection between the protected activity and the allegedly retaliatory action.

Each of the plaintiffs in question engaged in protected activity. For example, Brown sent a letter to Webster complaining of discriminatory treatment by her supervisor. Brown, Colon, Roman, and Walker filed EEOC charges.

Portlette complained to Cafaro about a denial of a promotion. Wright wrote letters raising concerns about discrimination.

[57] Each of the plaintiffs in question was subjected to material adverse employment actions—or at least a reasonable jury could so find. Some were given negative evaluations. Some were denied promotions or raises or transfers. Some were disciplined. Two were allegedly banished to working in basements. A reasonable jury could find that these actions " 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Burlington N. & Santa Fe Ry. v. White,* 548U.S. 53, —— – ——, 126 S.Ct. 2405, 2414–15, 165 L.Ed.2d 345 (2006) (quoting *Rochon v. Gonzales,* 438 F.3d 1211, 1219 (D.C.Cir.2006)).

A reasonable jury could also find, with respect to each plaintiff in question, a causal connection between the protected activity and the material adverse actions. The direct and circumstantial evidence in support of such a conclusion is discussed above, and includes, for example: Webster's comments to Brown that complaints were frowned upon; the timing and sequence of events; the conditioning of salary increases or transfers on the dropping of claims; the arguably vindictive nature of some of the actions taken after complaints were made; and the apparent general unreceptiveness of Parks to the filing of discrimination complaints. Again, here plaintiffs are also assisted by the *Teamsters* presumption.

Defendants' motion is denied in this respect as well.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted in part and denied in part. Plaintiffs' claims of (i) discriminatory assignment of employees and allocation of funding and (ii) a racial hostile work environment are dismissed; their remaining c:aims survive. The request to preclude plaintiffs' experts from testifying is denied, to the extent set ***379** forth above. A pretrial conference will be held on October 13, 2006, at 2:00 p.m.

SO ORDERED.

All Citations

450 F.Supp.2d 335

Footnotes

1 As discussed in the decision certifying the class, plaintiffs inexplicably refer to non-class members as "Caucasian" even though this group includes Asian Americans, Native Americans, and others who do not identify themselves as White. *See Wright v. Stern,* No. 01 Civ. 4437(DC), 2003 WL 21543539, at *1 n. 1 (S.D.N.Y. July 9, 2003). In contrast, Stephen Schneider, plaintiffs' expert, uses "Caucasian" to refer to White employees. (*See, e.g.,* Schneider Report at 10 n. 13). As the class is now certified, I refer to employees who are not African–American or Hispanic collectively as "non-class members." Where I use the term "Caucasian," I am referring to White employees.

2 References to "Compl." are to the Third Amended Complaint and Supplemental Class Action Complaint, filed on August 4, 2005.

3 Under Department of Citywide Administrative Services rules, provisional appointments are limited to nine months. According to David Stark, the Chief Fiscal Officer of Parks, all city agencies ignore this rule because "if anyone upheld that rule, twenty-six thousand people would be terminated in the city." (Stark Dep. at 332–33).

4 After a lawsuit was filed in New York Supreme Court alleging that Parks unlawfully employed employees in provisional positions beyond the eleven-month cap, the positions of Principal Park Supervisors and Park Supervisors were merged into the title Supervisor of Parks Maintenance and Operations. A Civil Service

test was conducted for this position. The majority of those who passed the test were non-class members. (Def.Resp.Pl.RFA ## 260–61, 270).

5 While the numbers varied slightly from year to year, the numbers for 2000—the year before this suit was filed—are representative.

6 A wage promotion occurs when an employee's salary is increased by a specified percentage, for example ten percent. Schneider compared incidents of 5–10% wage increases, at 2.5% intervals, received by Caucasian employees and non-class members.

7 Plaintiffs offer a statement purportedly made by Stern in 1978 to a friend that African–Americans had “smaller brain pans” and were therefore intellectually and genetically inferior. (Newfield Dep. at 9–12). Defendants argue that this statement is inadmissible. (Def. Reply at 15). Defendants' objection is sustained. Assuming the statement was made, it is a classic stray remark unrelated to any employment decision and was made almost thirty years ago.

8 To the extent plaintiffs rely on Moody's testimony regarding this incident, it is hearsay. At trial, they must offer evidence of a witness who heard Rabena make this statement.

9 As a term of the consent decree in the related action, discussed below, Parks adopted a new policy for posting and filling vacancies. Parks increased the number of jobs it posted after EEOC charges were filed. (Garafola DOJ Int. at 271–72, 287).

10 “The current thinking in the field of Industrial Psychology is that validity is the accumulation of evidence about the appropriateness of the test (or in this case the interview and minimum qualification selection procedures) as a measure of job performance.” (Lundquist Report at 8).

11 It is unclear whether the report card refers to Webster or her predecessor. Though the report was issued after Webster had assumed the EEO Officer position, the complaint refers to the Officer as a “he.”

12 The amended determination omits the percentage of the workforce made up by African–Americans.

13 Plaintiffs also purport to assert “First Amendment” and “Freedom of Speech” claims. (Compl. pp. 66, 69). Plaintiffs do not appear to be pursuing these claims, which, in any event, are more properly treated as retaliation claims. Accordingly, the “First Amendment” and “Freedom of Speech” claims are dismissed, without prejudice to plaintiffs' retaliation claims under the employment statutes.

14 References to “T–D Report” and “T–D Rebut.” are to the report and rebuttal report of Tomaskovic–Devey.

15 Defendants offer their own experts. Dr. Catherine S. Cline holds a Ph.D. in Psychology and has worked for twenty-five years in the areas of job analysis and test construction. (Cline Report at 2–3). Dr. Christopher Erath, who holds a Ph.D. in Economics, is Senior Vice President at National Economic Research Associates in Boston, Massachusetts. (Erath Report at 1). Dr. Christopher Winship holds a Ph.D. in Sociology from Harvard University, where he serves as the Norman Tishman and Charles M. Diker Professor of Sociology. (Winship Report at 1–2).

16 Schneider relied on Department of Citywide Administrative Services (“DCAS”) data, Payroll Management System (“PMS”) data, and Parks Seasonal Tracking System (“STS”) data. PMS and DCAS are both databases maintained by the City; DCAS is the repository of personnel information for City employees, and PMS is the system used by the City to pay its employees. STS is maintained by Parks to track seasonal personnel. Because STS only provides usable data starting in 1996, Schneider's analysis focuses on the period between January 1996 and December 2003. (Schneider Report at 3).

17 Parks Opportunity Program ("POP") workers were excluded from his database. The POP was implemented to provide on the job training to persons on public assistance. POP workers are paid out of the Human Resources Administration budget rather than the Parks budget. Further, POP workers work only temporarily for Parks. (Schneider Report at 5–7).

18 Though these figures do not take into account factors other than race, "simple statistics" may be considered in evaluating discrimination claims. *See* *Stratton v. Dep't for the Aging for the City of New York,* 132 F.3d 869, 877 (2d Cir.1997). Moreover, plaintiffs' regression analyses—analyses taking into account factors other than race—show statistically significant disparities in the wages and promotions received by class members and non-class members. Thus, plaintiffs' statistical evidence taken as a whole demonstrate a pattern or practice of discrimination at Parks.

19 The same standards govern hostile work environment claims whether such claims are based on race or sex. *Morgan,* 536 U.S. at 116 n. 10, 122 S.Ct. 2061.

20 Indeed, as defendants observe, the Supreme Court and Courts of Appeal have not held that hostile work environment claims are consistent with the pattern or practice framework. (Def. Reply at 12 n. 8). In the absence of contrary authority, I agree, as held in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.,* 990 F.Supp. 1059 (C.D.Ill.1998), and *EEOC v. Dial Corp.,* 156 F.Supp.2d 926 (N.D.Ill.2001), that, where an employer has a policy or practice of tolerating a hostile work environment, a pattern or practice claim is an appropriate mechanism by which employees may challenge that discriminatory conduct.

21 Although a single "extraordinarily severe" incident may be sufficient to create a hostile environment in an individual case, *Cruz,* 202 F.3d at 570, it is hard to conceive of any single incident that could support a pattern and practice claim.

22 Plaintiffs have also offered admissible evidence of three noose incidents in the late 1990s. These incidents, however, were few in number and remote in time and location. Only a small number of employees observed the nooses. Moreover, one of the noose incidents involved a supervisor displaying a noose in her workplace as part of her annual Halloween decorations.

End of Document

RUDY: BLACKS BEST WITH MY NO-TALK STYLE: RIPS MINORITY LEADERS IN HIS REVIEW OF ‘00

By David Seifman

Published Dec. 29, 2000, 5:00 a.m. ET

Mayor Giuliani claimed yesterday that by ignoring New York’s black leaders, he’s actually been able to accomplish more for minority communities.

The mayor said he adopted a strategy to avoid dialogue with black leaders because many of them espouse a philosophy of dependence that has kept their constituents “enslaved” and “oppressed.”

And the mayor argued the tactic worked because minorities “are much better [off] today than they were the day before I came into office.”

“If I had spent my time engaged in that dialogue, the changes that you saw take place would not have taken place,” Giuliani said in his year-end interview at City Hall. “Because what happens when you engage in the dialogue is, you compromise. I think the things we’ve done are better for the community than the things they’ve been fighting for the last 20 to 30 years.

“I thought the welfare policies we had in the city were racist because they kept people in prison, they kept people enslaved, they kept people dependent, they kept people oppressed.”

At least one black leader, New York Urban League President Dennis Walcott, said the Giuliani administration actually has opened lines of communication.

“He may say he has not compromised, but he has,” said Walcott. “There is outward dialogue and there is behind-the-scenes dialogue.”

In an even sharper jab, the mayor contended he’s enhanced life for minorities far more than David Dinkins, the city’s first black mayor, whom he unseated in 1993.

“The irony they’re going to have to deal with – meaning the leadership of the minority community that criticized me so much – they’re going to have to deal with the following fact: That under my mayoralty there was more help for people of the minority community than under my predecessor’s,” Giuliani said.

Black leaders were furious.

“I guess he sees himself as some sort of Tarzan cartoon figure saving the savages from themselves,” fumed City Councilman Bill Perkins (D-Manhattan).

“It’s the kind of attitude he dared not display with other communities. His attitude is what has polarized our city.”

Comptroller Carl McCall, the state’s top black elected official, said Giuliani’s comments, which came a day after he said he had done more for Harlem than any mayor since Fiorello La Guardia, were further

evidence of his “rather confrontational style.”

“Basically, what he’s saying is he knows better what the minority community needs than the people in those communities and their leaders,” said McCall.

Giuliani broached the sensitive topic of race relations when a reporter asked why he hadn’t reached out to minorities, as he promised during his emotional speech last May when he withdrew from the Senate race.

“What I said was, I would reach out to them based on my beliefs and my philosophy and my agenda, and I think I’ve done that in a significant way,” Giuliani responded.

He cited the sweeping HealthStat initiative to provide medical insurance to the poor and “a difference” in the way the NYPD “is dealing with people.”

In another surprise, Giuliani disclosed that he intends to name another Charter revision commission next year to “institutionalize” some of the changes he has enacted.

City Council Speaker Peter Vallone (D-Queens) pointed out that, under the law, the mayor’s commission would automatically block any other ballot initiative in 2001.