UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

JANET A. CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. MCGREAL, MARIANNE MAOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Plaintiff-Intervenors

-against-

NEW YORK CITY BOARD OF EDUCATION; CITY OF NEW YORK, WILLIAM J. DIAMOND, Commissioner, New York City Department of Citywide Administrative Services (in his official capacity); and NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendants,

and

JOHN BRENNAN, JAMES C. AHEARN, KURT BRUNKHORST, SCOTT SPRING, ERNEST TRICOMI, and DENNIS MORTNESEN,

Defendant-Intervenors.

Civ. No. 96-0374
(RML)

PROPOSED COMPLAINT IN INTERVENTION

This is an action seeking a declaration by this Court that the awards provided to plaintiff-intervenors in the settlement agreement entered into in *United States v. New York City Board of Education*, Civil Action No. 96-0374, do not violate the Fifth and Fourteenth Amendments of the Constitution or Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

JURISDICTION AND VENUE

1. This is an action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(3), and 42 U.S.C. § 2000e-5(f)(3).

2. Declaratory relief is authorized pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202 for the purpose of determining a question of actual controversy between the parties. There is a present and actual controversy between the parties to this action. A declaration that benefits awarded to plaintiff-intervenors pursuant to the settlement agreement entered into in this case by the United States and the municipal defendants do not constitute unlawful gender or race discrimination and do not violate the Constitution or Title VII of the Civil Rights Act of 1964 is warranted.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because all or a substantial part of the events giving rise to the claims in this action took place in this district.

PARTIES

4. Plaintiff-intervenor Janet A. Caldero is a white woman employed as a Custodian[1] by defendant New York City Board of Education[2] at P.S. 199Q and was among those designated

[1] Since the initial filing of *United States v. New York City Board of Education*, the job titles of Custodians and Custodian Engineers have changed. The position formerly designated "Custodian" is now designated "Custodian Engineer Level I." The position formerly designated "Custodian Engineer is now designated "Custodian Engineer Level II." To preserve continuity,

"offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

5. Plaintiff-intervenor Celia I. Calderon is a Hispanic woman employed as a Custodian by defendant New York City Board of Education at P.S. 154K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

6. Plaintiff-intervenor Martha Chellemi is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 108K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

7. Plaintiff-intervenor Andrew Clement is an African-American man employed as a Custodian by defendant New York City Board of Education at P.S. 743K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit

8. Plaintiff-intervenor Kristen D=Alessio is a white woman employed as a Custodian Engineer by defendant New York City Board of Education at I.S. 259K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

9. Plaintiff-intervenor Laura Daniele is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 42X and was among those designated

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the terms "Custodian" and "Custodian Engineer" will nevertheless be used throughout this complaint.

[2] The New York City Board of Education has been replaced by the New York City Department of Education. This complaint will nevertheless refer to it as the Board of Education, since it is so designated in this action.

"offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

10. Plaintiff-intervenor Charmaine DiDonato is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 91Q and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

11. Plaintiff-intervenor Dawn L. Ellis is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 82Q and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

12. Plaintiff-intervenor Marcia P. Jarrett is an African-American woman employed as a Custodian by defendant New York City Board of Education at P.S. 101Q and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

13. Plaintiff-intervenor Mary Kachadourian is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 68Q and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

14. Plaintiff-intervenor Kathleen Luebkert is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 98Q and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

15. Plaintiff-intervener Adele A. McGreal is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 58 and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

16. Plaintiff-intervener Marianne Manousakis is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 153K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

17. Plaintiff-intervener Sandra D. Morton is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 217K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

18. Plaintiff-intervener Maureen Quinn is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 1X and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

19. Plaintiff-intervener Harry Santana is a Hispanic man employed as a Custodian by defendant New York City Board of Education at P.S. 288K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

20. Plaintiff-intervener Carl D. Smith is an African-American man employed as a Custodian by defendant New York City Board of Education at P.S. 15 Old K and was among

those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

21. Plaintiff-intervener Kim Tatum is an Asian woman employed as a Custodian by defendant New York City Board of Education at P.S. 262K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

22. Plaintiff-intervener Frank Valdez is a Hispanic man employed as a Custodian Engineer by defendant New York City Board of Education at P.S. 26K and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

23. Plaintiff-intervener Irene Wolkiewicz is a white woman employed as a Custodian by defendant New York City Board of Education at P.S. 144Q and was among those designated "offerees" under the settlement agreement entered into by the United States and the municipal defendants in this lawsuit.

24. Defendant New York City Board of Education is an agency of the City of New York, created pursuant to the laws of the City of New York, responsible for the administration and maintenance of the New York City public school system.

25. Defendant City of New York is a body politic and corporate in fact and in law created pursuant to the New York City Charter.

26. Defendant New York City Department of Citywide Administrative Services is an agency of the City of New York responsible for recruiting personnel; reviewing qualifications; scheduling, developing, and administering examinations; establishing, promulgating, and certifying eligible lists; and keeping records regarding candidates for appointment for positions

in the civil service with the New York City Board of Education. William Diamond is its commissioner and is sued in his official capacity.

27. Defendants New York City Board of Education, City of New York, New York City Department of Citywide Administrative Services, and William Diamond are collectively referred to in this complaint as "municipal defendants."

28. Defendant-intervenors John Brennan, James G. Ahearn, Kurt Brunkhorst, Scott Spring, Ernest Tricomi, and Dennis Mortensen are white males currently permanently employed as Custodians and Custodian Engineers by defendant New York City Board of Education.

PROCEDURAL HISTORY

29. On or about January 30, 1996, the United States brought the above-entitled action against the municipal defendants in this Court, alleging that they had pursued and continued to pursue policies and practices that have discriminated against African-Americans, Hispanics, Asians, and women, and that have deprived or tended to deprive African-Americans, Hispanics, Asians, and women of employment opportunities in the positions of Custodian and Custodian Engineer on the basis of race, national origin, and gender in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

30. In February 1999, the United States and the municipal defendants entered into an agreement in settlement of this action. The agreement's provisions included awards of retroactive seniority to identified offerees, who were women and persons of color employed as Custodians and Custodian Engineers by the New York City Board of Education. The agreement's provisions also included awards of permanent employment status to identified offerees, who were women and persons of color provisionally employed as Custodians and Custodian Engineers by the New York City Board of Education. The agreement also provided

that the United States and the municipal defendants would defend the agreement's provisions against any challenges.

31. On or about June 18, 1999, defendant-intervenors John Brennan, James G. Ahearn, and Kurt Brunkhorst moved to intervene and filed a proposed complaint in intervention, alleging that the settlement agreement discriminated against them as white men on the basis of their race and gender.

32. On or about February 9, 2000, this Court approved the settlement agreement and denied the motion to intervene. The settlement agreement's provisions as to the offerees were implemented promptly thereafter.

33. On or about August 3, 2001, the Court of Appeals for the Second Circuit vacated approval of the settlement agreement and remanded to permit defendant-intervenors John Brennan, James G. Ahearn, and Kurt Brunkhorst to intervene in this action.

34. On or about January 7, 2002, defendant-intervenors Scott Spring, Ernest Tricomi, and Dennis Mortensen moved to intervene and filed a proposed complaint in intervention alleging that the settlement agreement discriminated against them as white men on the basis of their race and gender.

35. On or about April 9, 2002, the United States filed papers in this action indicating that it had ceased to defend the constitutionality and legality of the awards under the settlement agreement as to 32 of the 59 offerees, including plaintiff-intervenors.

36. On or about September 30, 2002, this Court granted defendant-intervenors Scott Spring, Ernest Tricomi, and Dennis Mortensen's motion to intervene and redesignated defendant-intervenors' complaints in intervention as "objections in intervention."

FACTS

37. This lawsuit arose in 1996, when the United States sued the municipal defendants alleging that (1) they failed or refused to recruit African-Americans, Hispanics, Asians, and women for the positions of Custodian and Custodian Engineer on the same basis as white non-Hispanic men; (2) they failed or refused to hire African-Americans and Hispanics on the same basis as whites for the position of Custodian; (3) they failed or refused to hire and promote African-Americans and Hispanics on the same basis as whites for the position of Custodian Engineer; (4) they used entry-level written examinations for the positions of Custodian and Custodian Engineer that disproportionately excluded African-Americans and Hispanics from employment; (5) they failed or refused to take appropriate action to eliminate their discriminatory policies and practices or correct the present effect of those policies and practices; and (6) they failed or refused to provide offers of make-whole relief, including back pay with interest, offers of employment, retroactive seniority and pension rights to individuals who had suffered loss as a result of the discriminatory employment policies and practices alleged in the complaint.

38. In 1999, the United States and the municipal defendants entered into a settlement agreement that designated women and persons of color employed either provisionally or permanently as Custodians or Custodian Engineers as offerees. This group included plaintiff-intervenors.

39. In support of the settlement agreement, the United States demonstrated a gross disparity between the representation of women, African-Americans, Hispanics, and Asians in the relevant labor market and the representation of those groups in the total number of applicants for the positions of permanent Custodian and permanent Custodian Engineer.

40. The United States also demonstrated a gross disparity between the percentage of African-Americans and Hispanics taking the challenged civil service examinations and the percentage of African-Americans and Hispanics passing the challenged civil service examinations.

41. As offerees, under the settlement agreement plaintiff-intervenors received awards of retroactive seniority designed to remedy past race and gender discrimination practiced by municipal defendants in the recruitment and hiring of Custodians and Custodian Engineers. The retroactive seniority date assigned to each offeree was the earlier of either his or her provisional hire date or, if he or she took one of the written examinations challenged as discriminatory, the median date for the challenged examination as established in the settlement agreement.

42. The settlement agreement also provided that time subsequent to the retroactive seniority date and prior to the initial date of employment as a Custodian or Custodian Engineer would be deemed service as a permanent Custodian or Custodian Engineer for the purpose of purchasing credit in the New York City Board of Education Retirement System. Thus, as offerees plaintiff-intervenors could "buy back" the years for which they had received retroactive seniority by contributing to the retirement system, and several did so. Because pension amount is based on years of service, this provision permits affected plaintiff-intervenors to retire at an earlier date or to receive a larger pension.

43. Fourteen of the plaintiff-intervenors, Celia I. Calderon, Martha Chellemi, Kristen D'Alessio, Laura Daniele, Charmaine DiDonato, Dawn L. Ellis, Marcia P. Jarrett, Adele A. McGreal, Marianne Manousakis, Sandra D. Morton, Harry Santana, Carl D. Smith, Kim Tatum, and Frank Valdez, also received awards of permanent employment status designed to remedy

past race and gender discrimination practiced by municipal defendants in the recruitment and hiring of Custodians and Custodian Engineers.

44. The settlement agreement did not award back pay to any offeree. It did not set hiring goals. It did not require that any benefit be given to any individual not already competently serving as a provisional or permanent Custodian or Custodian Engineer. It did not require the lay-off or demotion of any white male employee. It ordered one-time relief to qualified women and persons of color already competently serving as Custodians and Custodian Engineers.

45. The same minimum qualifications are required for provisional and permanent Custodians and Custodian Engineers. However, the recruitment and hiring process is different for provisional and permanent employees. Nevertheless, once hired, provisional and permanent Custodians and Custodian Engineers receive the same orientation training and the same performance evaluations. Their duties are the same.

46. Permanent employment status is more desirable than provisional employment status. Permanent employment status provides civil service protections, including enhanced due process rights.

47. Permanent employment status provides greater stability than does provisional employment status. Provisional Custodians and Custodian Engineers are regularly transferred from building to building, which undermines their authority and makes it more difficult for them to complete their jobs.

48. Only permanent Custodians and Custodian Engineers may seek voluntary transfers to other buildings.

49. Only permanent Custodians and Custodian Engineers may qualify for temporary care assignments, which permit a Custodian or Custodian Engineer assigned to one school to take on

responsibility for a short time at a second school, receiving a percentage of the Custodian or Custodian Engineer's salary for that school in addition to his or her regular salary.

50. Seniority typically only begins to accrue upon the date a Custodian or Custodian Engineer obtains permanent status.

51. The ability of Custodians or Custodian Engineers to transfer voluntarily between schools is affected by their seniority. With some exceptions, permanent Custodians and Custodian Engineers may bid for transfers. When there is more than one qualified bidder for a particular transfer, the bidder with the higher job performance rating receives the transfer. If the bidders have the same job performance ratings, the placement is determined by the seniority of the bidders.

52. The ability to transfer affects salary, as the salary of Custodians and Custodian Engineers is based on the square footage of the school for which they have responsibility.

53. A lack of seniority can render Custodians or Custodian Engineers ineligible to compete for placement at certain schools. Larger schools are designated for Custodians and Custodian Engineers with a certain minimum number of years of seniority. If a bid for placement at such a school is received from a Custodian or Custodian Engineer with the requisite seniority, bids from those without the requisite seniority will not be considered for the placements.

54. Plaintiff-intervenors have reasonably relied on the awards they received under the settlement agreement and have made plans and arrangements for their future based on these awards.

55. Should the plaintiff-intervenors lose their retroactive seniority awards, their ability to compete for desirable transfers would be significantly diminished. Accordingly, their ability to obtain higher salaries would be diminished.

56. Plaintiff-intervenors who purchased credit in the retirement system based on their retroactive seniority would presumably lose this credit and perhaps lose their investment should they lose their retroactive seniority. Their retirement plans would be upended, as they would be forced either to retire with smaller pensions or to put off their retirement dates.

57. Should plaintiff-intervenors lose their retroactive seniority awards, they might lose their current job placements, if they received them based on their seniority. Where they would then be placed is unclear.

58. According to declarations filed by the municipal defendants, should twelve of the fourteen plaintiff-intervenors who received permanent employment status through the settlement agreement lose that status, the Board would be unable to retain them as provisional employees, since provisional appointments are only permitted when there is no eligible list outstanding for making permanent appointments, and such a list is currently outstanding for permanent Custodians. Thus, these twelve individuals—Celia I. Calderon, Martha Chellemi, Laura Daniele, Charmaine DiDonato, Dawn L. Ellis, Marcia P. Jarrett, Adele A. McGreal, Marianne Manousakis, Sandra D. Morton, Harry Santana, Carl D. Smith, and Kim Tatum—would lose their jobs. As a result of their reasonable reliance on the benefits provided in the settlement agreement, their position would be incalculably worse than it was prior to the entrance of the settlement agreement.

59. In reliance on the settlement agreement, many of the fourteen plaintiff-intervenors who received permanent employment status under the settlement agreement have lost

opportunities to receive permanent employment status that have arisen since implementation of that agreement. When these individuals were called off the most recent eligibility lists for permanent appointment, they declined the appointments, because they believed they had already received permanent employment status. Thus they lost the opportunity to otherwise receive permanent employment status.

60. Plaintiff-intervenors' awards under the settlement agreement are no longer being defended by the United States, despite its obligation under the settlement agreement to defend all provisions thereof from challenge and despite its status as the party that sought and obtained the challenged awards.

CAUSES OF ACTION

First Cause Of Action (no violation of the Fifth and Fourteenth Amendments of the United States Constitution)

61. The provision of benefits to plaintiff-intervenors under the settlement agreement was fully consistent with the requirements of the Fifth and Fourteenth Amendments of the United States Constitution and did not constitute unconstitutional race or gender discrimination because

a. the benefits provided under the settlement agreement were race-conscious remedies narrowly tailored to serve the compelling state interest in remedying the effects of past race discrimination and gender-conscious remedies substantially related to the important state interest in remedying the effects of past gender discrimination *or*

b. the benefits provided under the settlement agreement were make-whole relief to victims of unlawful race and gender discrimination.

Second Cause of Action (no violation of Title VII)

62. The provision of benefits to plaintiff-intervenors under the settlement agreement was fully consistent with the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and did not constitute unlawful race or gender discrimination as it was justified by a manifest imbalance in the representation of persons of color and women in the relevant positions and did not unnecessarily trammel the rights of affected third parties.

PRAYER FOR RELIEF

WHEREFORE, plaintiff-intervenors respectfully request this Court:

a. Declare that the provision of benefits to plaintiff-intervenors under the settlement agreement was fully consistent with the requirements of the Fifth and Fourteenth Amendments of the United States Constitution and did not constitute unconstitutional race or gender discrimination.

b. Declare that the provision of benefits to plaintiff-intervenors under the settlement agreement was fully consistent with the requirements of and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and did not constitute unlawful race or gender discrimination.

c. In accordance with the relief requested in paragraphs (a.) and (b.) above, permanently enjoin defendant-intervenors from challenging the settlement agreement awards as constituting unlawful race or gender discrimination.

d. Provide such additional relief as justice may require, together with plaintiff-intervenors' costs and disbursements in this action and reasonable attorney fees pursuant to 42 U.S.C. § 1988.

Dated:

Respectfully submitted,

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