SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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ANDRENIA BURGIS, CHRISTOPHER BURGOS, LETICIA SMITH, SAMUEL DUNCAN, ALONZO HUDGINS, RASHID SMITH, DOREN PINK, ANTHONY JOSEPH, and ISRAEL DEJESUS, on their own behalf and on behalf of others similarly situated,

Plaintiffs,

- against -

CITY OF NEW YORK DEPARTMENT OF SANITATION,

Defendant.

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DECISION & ORDER

Index No.: 652972/2014

ALEXANDER M. TISCH, J.

In this employment discrimination action, defendant City of New York Department of Sanitation (DSNY), moves, pursuant to CPLR 3211 (a) (2), (a) (5), and (a) (7), for dismissal of the complaint, on the grounds that: some or all plaintiffs lack standing to sue; the complaint is barred, in part, by the doctrine of collateral estoppel, the complaint is barred by the applicable statute of limitations and the complaint fails to state a cause of action. Plaintiffs oppose. For the reasons set forth below, the motion is granted.

Background

Defendant DSNY, located at 125 Worth Street, New York, NY, is the city agency responsible for garbage collection, recycling collection, street cleaning and snow removal. DSNY is the employer of all plaintiffs.

DSNY promotes supervisors from the ranks of sanitation workers to supervisor to general superintendent (complaint, ¶ 29). Supervisory positions include, in rank order, supervisor,

general superintendent level 1 (GS1), general superintendent level 2 (GS2), general superintendent level 3 (GS3) and general superintendent level 4 (GS4) (*id.*). Candidates for supervisor and general superintendent 1 are required to take a civil service examination (*id.*, ¶ 31). Test takers are ranked in accordance with their scores and then selected by DSNY human resources personnel (*id.*). According to the City's personnel rules only one out of every three applicants must be selected off the list (*id.*).

There is no examination required for the subsequent ranks of superintendent (complaint,¶ 30). Rather, the selection of those being promoted to GS2 through GS4 is done by submission of a superior officer's recommendation to a higher level DSNY official (*id.*). As a result, plaintiffs allege, the supervisory workforce maintains a significantly lower percentage of African American or Black and Latino or Hispanic supervisors at higher levels than at the sanitation worker level (complaint, ¶ 32).

Plaintiff Andrenia Burgis is African American and has been an employee of DSNY since 1998 (complaint, ¶ 3). In 2003, Burgis passed the civil service examination and was made supervisor (*id.*, ¶ 38 [a]). In 2007, after passing another civil service examination, she was promoted to GS1 (*id.*). In 2009, a white male replaced Burgis in her command; he was subsequently promoted to GS2 (*id.*). Burgis did not receive another command until August 2012 (*id.*). While Burgis had the prerequisites for promotion, i.e., experience commanding a sanitation district and recommendation from a superior, a number of white employees, some of whom did not have the requisite time in charge of a command or the superior evaluations, were promoted ahead of her (*id.*). These individuals, included, but are not limited to Eddie Gryson, James McGovern and Gareth O'Reilly (*id.*). Burgis alleges that these men all had less overall years of

experience at DSNY than her as well (*id.*).

Plaintiff Christopher Burgos is a Latino and has been employed by DSNY since 2000 as a sanitation worker (complaint, ¶ 38 [b]). In 2006, Burgos was promoted to supervisor (*id.*). Burgos took the civil service exam for GS1 and is currently on the list for this position.

Plaintiff Leticia Smith is a Latina and has been an employee of DSNY since 1995 as a sanitation worker (complaint, ¶ 38 [c]). In 2001, Smith passed the civil service exam, and was promoted to supervisor (*id.*). In 2007, after passing another civil service exam, Smith was promoted to GS1 (*id.*). Smith has never been recommended for promotion to GS2 despite that she alleges that she has the requisite experience and has received superior evaluations for a number of years (*id.*). White males and females who have significantly less experience and lack the requisite evaluations by supervisors, including, but not limited to, Janice Mooney, Rosa Rizzo, and Jared Scotti, have been promoted ahead of Smith to the GS2 position (*id.*).

Plaintiff Samuel Duncan, an African American and Latino male, has been employed by DSNY since 2001 as a sanitation worker (complaint, ¶ 38 [d]). In 2008, Duncan passed the civil service exam and was promoted (*id.*). Three days before the end of his probationary period, Duncan was demoted, allegedly for complaints made about him during the probationary period (*id.*). Plaintiffs claim that the same and/or similar complaints were received concerning white supervisors in the same position as Duncan, but these individuals were allowed to finish their probation and remain in their position as supervisors (*id.*).

Plaintiff Alonzo Hudgins is African American and has been employed by DSNY since 1995 (complaint, ¶ 38 [e]). In 2001, having passed the civil service exam, Hudgins was promoted from sanitation worker to supervisor (*id.*). He was subsequently promoted to GS1 after passing

the civil service exam for that title (*id.*). He has never been recommended for promotion to GS2, while a number of white males in his borough have been recommended and promoted to the position (*id.*).

Plaintiff Rashid Smith is an African American male employed by DSNY since 1995 (complaint, ¶ 38 [f]). Smith began his employment as a sanitation worker (*id.*). In 2000, he was promoted to supervisor after passing the civil service exam (*id.*). He was promoted to GS1 in 2011, after passing the civil service exam required for the title (*id.*). Smith claims that he has never been recommended for promotion to GS2, while a number of white males in his borough with less time and qualifications have been recommended and promoted to the position (*id.*).

Plaintiff Doren Pink is African American and has been employed by DSNY since 1999 (complaint, ¶ 38 [g]). In 2004, Pink was promoted from sanitation worker to supervisor after passing the required civil service exam (*id.*). He took the civil service exam for the position of GS1, but has not been promoted to that position, although the list remains in place (*id.*). Many of his white counterparts, who took the exam at the same time as Pink, have been promoted despite being less qualified (*id.*).

Plaintiff Anthony Joseph, an African American male, has been employed by DSNY since 1989 (complaint, ¶ 38 [h]). After passing the civil service exam, he was promoted from sanitation worker to supervisor (*id.*). Since then he has been unable to secure a promotion to the GS1 position despite having passed the exam (*id.*). Plaintiffs claim that white employees with lower scores have been promoted (*id.*).

Plaintiff Israel Dejesus is a Latino and has been an employee of DSNY since 1995 (complaint, ¶ 38 [i]). Dejesus began working at DSNY as a sanitation worker, and in 2005, after

passing the civil service exam for the position, he was made a supervisor (*id.*). In 2008, after again passing the civil service exam required, he was promoted to GS1 (*id.*). However, he has never been recommended for a promotion to GS2, even though he has had equal and superior experience to his white counterparts who have been recommended and promoted to GS2 ahead of him (*id.*).

Plaintiffs claim that numerous white employees in the GS1 position have been recommended for and promoted to the GS2 position and beyond, some with less than the requisite time in charge of a command and/or with "unsatisfactory" evaluations prior to being promoted (complaint, ¶ 32). As such, plaintiffs assert that the white employees occupy the majority of personnel in the GS2 through GS4 positions. For example, plaintiffs point to a white employee, Patrick Shannon, who had been employed at DSNY for eight years at the time when he was promoted to a GS2 position, much less time than many of the named plaintiffs who have been held at the GS1 position without promotion.

Plaintiffs offer a public chart of the fiscal year 2011, which reflects the alleged racial/national origin disparity in promotions, in that there is a decrease in the percentage of Black and Hispanic supervisors higher up the chain of command.

Title	**% White**	**% Black**	**% Hispanic**
Sanitation Worker	56	23.5	18
Supervisor	81	11	10
General Superintendent Level 1	81	13	9
General Superintendent Level 2 & 3	91	4	3

General Superintendent Level 4	80	10	10

(*see* complaint, ¶ 34, exhibit A). Upon information and belief, plaintiffs allege that the qualified candidates for supervisor are the same percentage racially as the sanitation worker workforce. Plaintiffs claim that promotion to DSNY supervisory positions, even those requiring a civil service examination, allows for subjective evaluation of candidates, which has fed a "policy and culture of discrimination against Blacks and Hispanics which goes back for decades" (complaint, ¶ 35). Plaintiffs claim that the criteria is clearly skewed to disfavor Black and Hispanic applicants.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), a complaint must be construed in the light most favorable to plaintiff, and the court must "determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Though employment discrimination cases are generally reviewed under a notice pleading standard (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2010]), "bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration" (*Garner v China Natural Gas, Inc.*, 71 AD3d 825, 826 [2d Dept 2010]).

A finding of discrimination may be based on two separate violations; disparate treatment, which requires proof of discriminatory intent, and disparate impact, where no proof of intent is required. To establish a prima facie claim for disparate treatment, a plaintiff must set forth that "the plaintiff is a member of a protected class, was qualified for the position and was terminated

or suffered some other adverse employment action" "giving rise to an inference of discrimination" (*Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

Here, as defendant contends, the Court finds that the complaint is devoid of any factual allegations from which an inference of discriminatory intent or animus may be drawn. Rather, the complaint asserts vague, conclusory allegations of plaintiffs' inability to be promoted beyond the GS1 position (*Barnes v Hodge*, 118 AD3d 633, 633 [1st Dept 2014] ["'claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss'"] [citation omitted]; *DuBois v Brookdale Univ. Hosp. & Med. Ctr.*, 29 AD3d 731 [2d Dept 2006]). While allegations must be construed liberally on motion to dismiss, plaintiffs "must support [their] claim with more than mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

Here, none of the plaintiffs identify a specific open position that they applied for and when or whether they expressed an interest in being promoted, nor are there any facts supporting which individuals were responsible for making the decisions to promote. As a result, these claims must be dismissed (*see e.g.*, *Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 572 [1st Dept 2012] ["(u)nder the circumstances, plaintiff's failure to specifically apply for the position is fatal to his claim of discriminatory failure to promote"]; *Barrett v Forest Labs., Inc.*, 39 F Supp 3d 407, 443–44 [SD NY 2014]; *Blue v Macy's Herald Sq.*, 2013 WL 3717777, * 4 [SD NY July 16, 2013, No. 12 Civ. 5673(PAE)]; *Adams v Foot Locker Retail, Inc.*, 2008 WL 5068965, *1 [SD NY 2008] ["plaintiff's complaints do not contain any specifics regarding the positions he applied for, his qualifications, or the circumstances under which he failed to obtain the positions. Without such basic details, the complaints must be dismissed for failure to state a claim"]).

Lastly, the Court turns to whether plaintiffs maintain a sustainable claim of discriminatory failure to promote under a disparate impact theory. To state a claim of discrimination under a disparate impact theory, a plaintiff must allege that a facially neutral practice had a disproportionate effect on a protected class (*Levin v Yeshiva Univ.*, 96 NY2d 484, 491 [2001]; *Hagan v City of New York*, 39 F Supp 3d 481, 499 [SD NY 2014]). Notably, disparate impact claims brought under Title VII and the New York State Human Rights Law (NYSHRL) "are analyzed using the same standards" (*Gordon v City of New York*, 2016 WL 4618969, *7 [SD NY Sept. 2, 2016, 14 Civ. 6115 [JPO] [JCF] [internal quotation marks and citation omitted]). Further, the New York City Human Rights Law (NYCHRL) explicitly states that a cause of action may be maintained where "a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any [protected] group" (Admin. Code § 8-107 [17] [a]). Such claims are subject to a "more lenient standard" (*Gordon*, 2016 WL 4618969, *7).

"How impact is measured is obviously a critical determination" (*Levin*, 96 NY2d at 492). "Allegations which contend that there is a bottom line racial imbalance in the workforce are insufficient" (*Brown v Coach Stores, Inc.*, 163 F3d 706, 712 [2d Cir 1998]; *see also Gordon v City of New York*, 2016 WL 4618969, * 5 ["(a)llegations that employment practices are nothing more than a cover for behind-the-scenes, intentional discrimination against a protected group will not suffice"] [internal quotation marks and citation omitted]). "A disparate impact is not established by a simple showing of statical disparities in an employer's workforce" (*Matter of New York State Off. of Mental Health, Manhattan Psychiatric Ctr. v New York State Div. of Human Rights*, 223 AD2d 88, 90 [3d Dept 1996]). In other words, plaintiffs must allege a causal

connection between the policy and the disproportionate effect.

"[A]n employment practice that includes the opportunity for a manager to subjectively evaluate an individual can serve as a basis for a disparate impact claim" (*Gordon*, 2016 WL 4618969, *5). However, plaintiffs must allege "that they were interested in a position or that there was an open position to which they could have (or would have) applied" (*Barrett*, 39 F Supp 3d at 442).

While plaintiffs, in opposition, attempt to refute the case law defendants rely on, they proffer no case law in support of their own claims.

The Court looks to *Brown* (163 F3d 706), wherein the plaintiff's allegations of disparate impact failed because they did not "adequately allege a causal connection between any facially neutral policy at Coach and the resultant proportion of minority employees" (*id.* at 712). There, as here, the plaintiff asserted that the employer's training and promotion policies were deliberately designed to keep minorities from being promoted, and offered statistics that showed a higher percentage of minority employees in low-level jobs versus a small percentage in other positions (*id.* at 712-713). Here, plaintiffs offer statistical evidence, i.e., raw data from four years prior to the date of the motion, which purports to show that approximately forty percent of the DSNY workforce constitutes sanitation workers who are either African American or Latino, and despite that only twenty percent are then promoted to supervisors and/or GS1s, and only ten percent are promoted to GS2s and/or 3s.

These statistics, however, fail to show what percentage of African American and/or Latino employees sat for the requisite civil service examinations for the supervisor and/or GS1 positions (*see Samuels v William Morris Agency*, 2013 NY Slip Op 30177[U] [Sup Ct, NY

County Jan. 14, 2013], *affd* 123 AD3d 472 [2014]). Plaintiffs' claim is also undermined by the statistic that African American and/or Latino employees made up twenty percent of the GS4 workforce in fiscal year 2011 (*see Brown*, 163 F 3d at 713).

Moreover, aside from the allegation that there is a bottom line racial imbalance in the GS2 through GS4 workforce, which alone is insufficient, plaintiffs fail to allege any facts that defendant's actions in passing over plaintiffs for promotions to the higher supervisory positions was racially motivated (*see Samuels*, 2013 NY Slip Op 30177[U], *affd*, 123 AD3d 472).

Based on the foregoing, the Court grants defendant's motion to dismiss the complaint, and the Court need not reach the other grounds for dismissal (timeliness, standing, and collateral estoppel).

Conclusion

Accordingly, it is ORDERED that the motion by defendant City of New York Department of Sanitation is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 20, 2018

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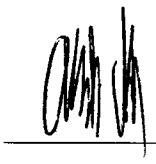

A.J.S.C.
HON. ALEXANDER M. TISCH