

10-4208-pr; 10-4235-pr
Reynolds v. Barrett; Gould v. Chamberlin

1
2 UNITED STATES COURT OF APPEALS
3
4 FOR THE SECOND CIRCUIT
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8 August Term, 2011
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10 (Argued: December 6, 2011 Decided: July 11, 2012)

11
12 Docket Nos. 10-4208-pr; 10-4235-pr
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14
15 JERRY REYNOLDS,
16

17 *Plaintiff-Appellant,*
18

19 -v.-
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21 DAVE BARRETT, Industrial Superintendent of Elmira
22 Correctional Facility, LARRY POCCOBELLO, Assistant
23 Industrial Superintendent of Elmira, JACK RATHBUN, General
24 Foreman of Elmira Print Industry, TERRY CHAMBERLAIN,
25 Industrial Training Supervisor of Elmira Print Industry,
26 FLOYD BENNETT, Superintendent of Elmira Correctional and
27 Reception Center, GEORGE SARNO, Industrial Training
28 Supervisor of Elmira Print Industry, JANET KENT, Industrial
29 Training Supervisor of Elmira Print Industry, DANA M. SMITH,
30 Deputy Superintendent of Elmira, JAMES P. THOMPSON, Senior
31 Correction Counselor of Elmira, JOHN CONROY, Director of
32 Correctional Industry, Individually and in their official
33 capacities,
34

35 *Defendants-Appellees.*
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39 KHALIB GOULD,
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41 *Plaintiff-Appellant,*
42

43 -v.-
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1 TERRY CHAMBERLAIN, Industry Training Supervisor, LARRY
2 POCOBELLO, Industry Assistant Superintendent, DAVE BARRETT,
3 Industry Superintendent, JACK RATHBIN, Industry Foreman,
4 JANICE KENT, Industry Training Supervisor, FLOYD BENNETT,
5 Elmira Correctional Facility's Superintendent,
6

7 *Defendants-Appellees.**
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12 Before:

13 McLaughlin, Cabranes, and Wesley, *Circuit Judges*.
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15 Appeal from an order of the United States District
16 Court for the Western District of New York (Larimer, J.),
17 entered on October 4, 2010, granting summary judgment to
18 defendants-appellees on plaintiffs-appellants' individual
19 claims of racial discrimination, denying plaintiffs' motion
20 for class certification, and denying plaintiffs' motion for
21 leave to amend their complaints. Plaintiffs-appellants'
22 primary contention on appeal is that the district court
23 should have assessed the proposed amended class action
24 complaint, which alleged claims for intentional
25 discrimination against individual state officials, under the
26 disparate-impact theory of liability and the pattern-or-
27 practice evidentiary framework used in Title VII actions.
28 Disparate impact liability is unavailable because the
29 statutes on which they base their claims require intentional
30 discrimination. Further, the pattern-or-practice framework
31 is ill-suited to establish the liability of the individual
32 state officials named as defendants.
33

34 AFFIRMED.
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37
38 GUY A. TALIA, Thomas & Solomon LLP, Rochester, NY
39 (J. Nelson Thomas, *on the brief*), *for*
40 *Plaintiffs-Appellants*.
41

*The Clerk of the Court is respectfully directed to amend the official captions to conform to the above.

1 ANDREW B. AYERS, Assistant Solicitor General
2 (Barbara D. Underwood, Solicitor General,
3 Andrea Oser, Deputy Solicitor General, on the
4 brief), for Eric T. Schneiderman, Attorney
5 General of the State of New York, Albany, NY
6 for Defendants-Appellees.
7
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9

10 WESLEY, Circuit Judge:

11 Plaintiffs primary argument on appeal presents a
12 question of first impression in our circuit: whether
13 recourse to the pattern-or-practice evidentiary framework is
14 appropriate in a suit against individual state officials
15 brought pursuant to 42 U.S.C. § 1983 for intentional
16 discrimination.

17 **I. BACKGROUND**

18 This case has as a backdrop prior litigation involving
19 claims of racial discrimination at Elmira Correctional
20 Facility ("Elmira"), a state maximum-security prison in
21 Elmira, New York. See *Santiago v. Miles*, 774 F. Supp. 775,
22 782-88 (W.D.N.Y. 1991). In 1986, black and Hispanic
23 (jointly, "minority") inmates at Elmira commenced a class
24 action for injunctive relief, alleging widespread racial
25 discrimination at the facility in housing, job assignment,
26 and the imposition of discipline. *Id.* at 777. After a
27 bench trial, Judge Larimer found that the plaintiffs had

1 proven a "pattern of racism" at Elmira. *Id.* On April 13,
2 1993, Judge Larimer issued a decision requiring, among other
3 things, that the percentage of black and Hispanic inmates in
4 certain "preferred" jobs, including jobs in the Elmira print
5 shop, correspond to the percentage of black and Hispanic
6 inmates in the general prison population.

7 At the time the suits here were filed, inmates employed
8 in the Elmira print shop were paid an hourly wage, which
9 ranged from sixteen cents to sixty-five cents per hour
10 depending on the inmate's experience and expertise. In
11 addition, inmates were eligible to receive an "incentive
12 bonus" as a reward for good work. Civilian supervisors
13 determined, in their discretion, whether a particular inmate
14 merited promotion and higher pay. Similarly, these
15 supervisors could recommend to the Elmira Program
16 Committee—the entity tasked with assigning and removing
17 inmates from various prison programs—that inmates be
18 terminated from employment in the print shop. As a general
19 matter, an inmate would be removed upon two requests.

20 In the print shop, inmates were directly supervised by
21 civilian "Industrial Training Supervisors." The Industrial
22 Training Supervisors reported to a general foreman, who in

1 turn reported to an Assistant Industrial Superintendent and
2 the Industrial Superintendent. The Industrial
3 Superintendent answered to Elmira's Superintendent, among
4 other officials.

5 In 1999, plaintiffs-appellants Jerry Reynolds and
6 Khalib Gould (jointly, "plaintiffs"), inmates formerly
7 employed in the Elmira print shop, filed *pro se* complaints
8 alleging racial discrimination by civilian supervisors and
9 prison administrators. Two other Elmira inmates, Anthony
10 Mack and Joseph Ponder, commenced similar *pro se* actions in
11 2000.

12 Reynolds's *pro se* complaint asserted claims pursuant to
13 42 U.S.C. §§ 1981, 1983, 1985, and 1986 against Floyd
14 Bennett, Elmira's Superintendent; David Barrett, Elmira's
15 Industrial Superintendent; Dana Smith, Elmira's First Deputy
16 Superintendent; Larry Pocobello, the Assistant Industrial
17 Superintendent; Jack Rathbun, the print shop's general
18 foreman; Terry Chamberlain, George Sarno, and Janice Kent,
19 at the time all Industrial Training Supervisors; James
20 Thompson, the chair of Elmira's Program Committee; and John
21 Conroy, Director of Correctional Industry (jointly,
22 "defendants").

1 Reynolds alleged that Barrett, Pocobello, Rathbun,
2 Chamberlain, Sarno, and Kent demoted minority inmates more
3 often than white inmates, confined minority inmates to low-
4 paying positions, and unfairly docked the pay of minority
5 inmates. Reynolds specifically complained about an incident
6 in which Rathbun docked fifty-seven dollars from Reynolds's
7 pay to reimburse the print shop for a poorly-run print job.
8 Reynolds further alleged that minority inmates employed in
9 the print shop had their pay docked at a much higher rate
10 than white inmate-employees.

11 Gould's *pro se* complaint stated, among other things,
12 claims pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986
13 against Pocobello, Barrett, Rathbun, Chamberlain, Kent, and
14 Bennett. He alleged that they took adverse employment
15 actions against him because of his race and retaliated
16 against him for filing grievances.

17 In November 2000, the district court appointed counsel
18 for the plaintiffs in all four actions. Counsel moved to
19 consolidate the actions and file an amended complaint.
20 Finding the proposed amended complaint deficient because it
21 lacked detail as to the nature of each plaintiff's claims
22 against each defendant, a magistrate judge directed

1 plaintiffs to file a more detailed amended complaint by
2 December 17, 2001. Instead, the parties agreed to
3 consolidate the actions for the purpose of conducting
4 discovery. They further agreed that no party would suffer
5 prejudice if plaintiffs filed an amended complaint after
6 discovery was completed. The magistrate judge approved the
7 arrangement.

8 After conducting four years of discovery, plaintiffs
9 sought leave to file an amended class action complaint on
10 October 3, 2005. The proposed complaint defined the class
11 as "all non-Caucasian inmates at [Elmira Correctional
12 Facility] who were employed in the Print Shop from 1994 to
13 the present, as well as all non-Caucasian inmates at [Elmira
14 Correctional Facility] who were deterred from working within
15 the Print Shop because of the discriminatory policies and/or
16 practices set forth in this complaint." JA 64. In addition
17 to claims pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and
18 1986, the complaint claimed violations of Judge Larimer's
19 order in *Santiago v. Miles*, 774 F. Supp. 775 (W.D.N.Y.
20 1991), the New York State Human Rights Law, the New York
21 State Constitution, and New York Civil Practice Law and Rule
22 § 8601.

1 The proposed amended class action complaint asserted
2 that racial discrimination was the "standard operating
3 procedure in the Print Shop," that "incredible statistical
4 disparities" existed between minority and non-minority
5 inmates, and that minority inmates were evaluated more
6 harshly, fired and demoted more often, and paid less than
7 non-minority inmates. The complaint also claimed that the
8 facially neutral subjective evaluation process used by the
9 defendants, which gave them unfettered discretion when
10 making employment decisions, had a disparate impact on
11 minority inmates.

12 The proposed complaint provided several examples of
13 purportedly discriminatory acts taken against plaintiffs.
14 It stated that Reynolds had his bonus docked while white
15 inmates did not, and that he "was issued several reprimands
16 by defendants Chamberlain, Kent and Sarno in accordance with
17 the discriminatory policies and practices in effect." JA
18 95. Similarly, the complaint stated that Gould was denied a
19 promotion, demoted, and ultimately removed from the print
20 shop on account of his race. The plaintiffs sought both
21 injunctive relief and monetary damages.

1 In support of their motion to amend, plaintiffs
2 appended the expert report of statistician Michael J.
3 Guilfoyle, which purported to show, for the period between
4 April 1994 and December 1999, that white inmates had longer
5 average periods of employment in the print shop, were paid
6 more than minority inmates, and were demoted less frequently
7 than minority inmates. In Guilfoyle's view, the results of
8 his study suggested that "there [was] a strong bias against
9 non-white inmates working [in] the Elmira prison print shop
10 when tenure, rate of pay[,] and demotions are examined." JA
11 157.

12 On July 1, 2008, with the motion to amend still
13 pending, Judge Larimer ordered the parties to file summary
14 judgment motions no later than August 25, 2008. After an
15 extension of time was granted, defendants filed a summary
16 judgment motion directed at plaintiffs' original *pro se*
17 complaints on October 29, 2008. Plaintiffs opposed the
18 motion and moved to certify the class action.

19 Plaintiffs argued that in the event leave to file an
20 amended class action complaint was granted and a class
21 certified, the motion for summary judgment against their
22 individual complaints would be "irrelevant." They contended

1 that the pattern-or-practice method of proof used in Title
2 VII class actions could be employed in this § 1983 suit
3 against individual defendants. Despite the fact that this
4 Court has never applied the pattern-or-practice framework to
5 hold individual state actors liable for intentional
6 discrimination, plaintiffs did not give the district court
7 the benefit of their reasoning as to why the framework was
8 well-suited to that task.

9 On October 4, 2010, the district court granted summary
10 judgment to defendants on Reynolds's and Gould's individual
11 claims, denied the motion for class certification, and
12 denied the motion for leave to amend the complaint.

13 *Reynolds v. Barrett*, 741 F. Supp. 2d 416 (W.D.N.Y. 2010).¹

14 The district court recognized that "[d]espite the variety of
15 claims asserted, the § 1983 claims lie at the heart of these
16 cases. And though § 1983 provides a vehicle by which to
17 seek redress against state actors for a wide range of
18 constitutional violations, it is plaintiffs' equal
19 protection claims that form the core of their § 1983
20 claims." *Id.* at 425.

¹The district court denied in part defendants' summary judgment motion as to the other two inmates. Both inmates filed motions in this Court requesting immediate leave to appeal the district court's denial of class certification, and we denied their requests. See *Mack v. Barrett*, U.S.C.A. Dkt. No. 10-4212, doc. 31 (Motion Order); *Ponder v. Chamberlin*, U.S.C.A. Dkt. No. 10-4148, doc. 29 (Motion Order). Thus, only Reynolds and Gould are parties to this appeal.

1 The district court analyzed plaintiffs' individual
2 complaints under the *McDonnell Douglas* burden-shifting
3 framework generally employed in assessing individual claims
4 of disparate treatment under Title VII. *Id.* at 426-35. The
5 court determined that defendants were entitled to summary
6 judgment on both Reynolds's and Gould's individual claims of
7 discrimination. Although the court noted Guilfoyle's
8 statistical analysis, it concluded that Reynolds had not
9 demonstrated that any adverse action was taken against him
10 on account of his race. *Id.* at 427-29. Similarly, the
11 court found no evidence from which a factfinder could
12 reasonably conclude that race was a motivating factor in the
13 adverse employment actions taken against Gould. Instead,
14 the court determined that there was abundant evidence that
15 Gould was subject to adverse employment actions "for
16 nondiscriminatory reasons relating to his poor performance."
17 *Id.* at 433.

18 Having granted summary judgment on plaintiffs'
19 individual claims, the district court denied class
20 certification and leave to amend. In particular, the court
21 noted that "[a]t bottom, these cases present issues arising
22 out of discrete acts of alleged discrimination and

1 retaliation against two particular inmates." *Id.* at 444. As
2 such, the court held, among other things, that plaintiffs
3 had not met their burden of demonstrating the existence of
4 questions of law or fact common to the proposed class. *Id.*

5 The district court then turned to the remaining issues
6 related to plaintiffs' motion to file an amended complaint.
7 As relevant here, it held that the proposed complaint's
8 claims under New York law were barred by New York
9 Corrections Law § 24(1).² Similarly, it found that the
10 proposed §§ 1981, 1985, and 1986 claims were not viable.³
11 Finally, the district court determined that defendants had
12 not violated its prior order in *Santiago*.⁴ *Id.* at 445-46.

13 Reynolds and Gould timely appealed.

²New York Corrections Law § 24(1) provides:

No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department . . . in his or her personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.

³Specifically, the district court found that (1) the proposed claim under 42 U.S.C. § 1981 would be subject to dismissal because there was no contractual relationship between the parties; and (2) the proposed conspiracy claims under 42 U.S.C. §§ 1985 and 1986 were unsupported. See *Reynolds*, 741 F. Supp. 2d at 446.

⁴The district court noted that the *Santiago* order did not prohibit prison authorities from discriminating on the basis of race because such discrimination is already prohibited by the Equal Protection Clause. *Reynolds*, 741 F. Supp. 2d at 445-46. Instead, the *Santiago* order established certain rules and procedures to ensure that preferred employment in the prison would be apportioned among the inmates in ratios that corresponded to the racial makeup of Elmira's prison population. *Id.* On appeal, plaintiffs do not challenge the district court's determination on this issue.

1 **II. DISCUSSION**

2 On appeal, plaintiffs principally contend that the
3 district court should have examined the proposed amended
4 class action complaint under the pattern-or-practice
5 evidentiary framework and disparate impact theory of
6 liability generally applicable in class actions brought
7 pursuant to Title VII of the Civil Rights Act of 1964, 42
8 U.S.C. § 2000e *et seq.*⁵ Whether recourse to the pattern-or-
9 practice framework is appropriate in a suit against
10 individual state officials brought pursuant to 42 U.S.C.
11 § 1983⁶ for intentional discrimination is a question of
12 first impression in our Circuit. Indeed, we have not found,

⁵Reynolds and Gould also contend that the district court committed other errors. Specifically, they claim that the district court erred in (1) determining that New York Corrections Law section 24 barred their proposed claims under New York law and (2) finding that their conspiracy claims lacked support. Reynolds and Gould also argue that even if their complaints were best analyzed under the *McDonnell Douglas* burden-shifting framework, the district court erred in applying that framework and granting defendants summary judgment. We have considered these arguments and find they are without merit.

⁶42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

1 nor have the parties cited to us, a case squarely addressing
2 this issue.⁷

3
4 The gravamen of plaintiffs' proposed amended class
5 action complaint is that there was a "pattern or practice"
6 of racial discrimination in Elmira's print shop, as
7 evidenced by "incredible statistical disparities within the
8 [p]rint [s]hop between Caucasian and non-Caucasian
9 employees" regarding promotion, demotion, discipline, and
10 pay. The proposed class action complaint also asserts that
11 Elmira's facially neutral policy of vesting in the print
12 shop's civilian supervisors and other prison administrators
13 "unfettered discretion" to make employment decisions
14 resulted in a disparate impact on the print shop's minority
15 inmate-employees.

16
17 As an initial matter, plaintiffs' novel attempt to
18 impose disparate impact liability on defendants comes up
19 short. Under certain circumstances, Title VII prohibits
20 employment practices that have a disproportionately adverse

⁷The Seventh Circuit, albeit without much analysis, has suggested that the pattern-or-practice framework cannot be used to establish the liability of individual defendants for intentional discrimination. *Cf. Chavez v. Illinois State Police*, 251 F.3d 612, 638 n.8, 647-48 (7th Cir. 2001). Though some cases appear to assume that the framework may be employed to establish intentional discrimination under § 1983, the cases tend to focus on the application of the framework to hold an entity liable. *See, e.g., Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009); *Catlett v. Mo. Highway and Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987). As noted above, we have found no case that has employed the framework to hold individual defendants liable for intentional discrimination.

1 effect on minorities. See 42 U.S.C. § 2000e-2(k); *Ricci v.*
2 *DeStefano*, 129 S. Ct. 2658, 2672-73 (2009). Disparate
3 impact claims "are concerned with whether employment
4 policies or practices that are neutral on their face and
5 were not intended to discriminate have nevertheless had a
6 disparate effect on [a] protected group." *Robinson v.*
7 *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir.
8 2001).

9 But equal protection claims under § 1983 cannot be
10 based solely on the disparate impact of a facially neutral
11 policy. It is well established that "[p]roof of racially
12 discriminatory intent or purpose is required' to show a
13 violation of the Equal Protection Clause." *City of Cuyahoga*
14 *Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003)
15 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev.*
16 *Corp.*, 429 U.S. 252, 265 (1977)); see *Hayden v. Paterson*,
17 594 F.3d 150, 162 (2d Cir. 2010). Therefore, "a plaintiff
18 pursuing a claimed violation of § 1981 or a denial of equal
19 protection under § 1983 must show that the discrimination
20 was intentional." *Patterson v. Cnty. of Oneida*, 375 F.3d
21 206, 226 (2d Cir. 2004). Similarly, §§ 1985⁸ and 1986⁹

⁸ 42 U.S.C. § 1985 provides, in relevant part:

If two or more persons . . . conspire . . . for the purpose

1 require "some racial, or perhaps otherwise class-based,
2 invidiously discriminatory animus behind the conspirators'
3 action." *Griffen v. Breckenridge*, 403 U.S. 88, 102 (1971);
4 see *Soto-Padro v. Pub. Bldgs. Auth.*, 675 F.3d 1, 4 (1st Cir.
5 2012). Thus, plaintiffs cannot proceed under a disparate
6 impact theory of liability in their claims brought pursuant
7 to §§ 1981, 1983, 1985, and 1986.

8 What remains, then, is plaintiffs' assertion that the
9 Title VII pattern-or-practice framework¹⁰ may be applied to
10 analyze discrimination claims brought pursuant to 42 U.S.C.
11 § 1983 against individual state officials. We have never
12 employed the framework in such a manner, and we decline to
13 do so here.

of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

⁹ 42 U.S.C. § 1986 provides a cause of action against anyone "who, having knowledge that any of the wrongs conspired to be done, and mentioned in [42 U.S.C. § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do"

¹⁰ The pattern-or-practice burden-shifting framework is sometimes referred to as the *Teamsters* framework, referring to *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the seminal Supreme Court case in which the framework was first articulated.

1 It is true that we have previously observed that
2 "[m]ost of the core substantive standards that apply to
3 claims of discriminatory conduct in violation of Title VII
4 are also applicable to claims of discrimination in
5 employment in violation of . . . the Equal Protection
6 Clause." *Patterson*, 375 F.3d at 225; see also *Annis v. Cnty.*
7 *of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998); *Jemmott v.*
8 *Coughlin*, 85 F.3d 61, 67 (2d Cir. 1996). But each of those
9 occasions involved individual claims of discrimination, and
10 in each we applied either the *McDonnell Douglas* framework or
11 a hostile work environment analysis. By urging this Court
12 to find that the pattern-or-practice framework is applicable
13 to § 1983 claims against individual state officials,
14 plaintiffs seek a significant extension of our case law.

15 Employers, not individuals, are liable under Title VII.
16 See *Patterson*, 375 F.3d at 226; *Wrighten v. Glowski*, 232
17 F.3d 119, 120 (2d Cir. 2000) (per curiam). Title VII
18 disparate treatment claims are of two types: (1) individual
19 claims, which follow the familiar *McDonnell Douglas* burden-
20 shifting framework, and (2) pattern-or-practice claims,
21 which focus on allegations of widespread discrimination and
22 generally follow the *Teamsters* burden-shifting framework.
23 *Robinson*, 267 F.3d at 157 n.3.

1 Under the *McDonnell Douglas* framework, a plaintiff
2 establishes a *prima facie* case of intentional discrimination
3 by showing that "(1) he is a member of a protected class;
4 (2) he was qualified for the position he held; (3) he
5 suffered an adverse employment action; and (4) the adverse
6 action took place under circumstances giving rise to [an]
7 inference of discrimination." *Ruiz v. Cnty. of Rockland*,
8 609 F.3d 486, 491-92 (2d Cir. 2010). If the plaintiff
9 establishes a *prima facie* case of discrimination, the burden
10 shifts to the employer to come forward with a legitimate,
11 nondiscriminatory reason for the adverse employment action.
12 *Id.* at 492. If the employer does so, the burden then
13 returns to the plaintiff to demonstrate that race was the
14 real reason for the employer's adverse action. *Id.*
15 Importantly, "[t]he ultimate burden of persuading the trier
16 of fact that the defendant intentionally discriminated
17 against the plaintiff remains at all times with the
18 plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450
19 U.S. 248, 253 (1981). Statistics alone do not suffice to
20 establish an individual disparate treatment claim for a very
21 good reason: the particular plaintiff must establish *he* was
22 the victim of racial discrimination. *See Hudson v. Int'l*

1 *Bus. Mach. Corp.*, 620 F.2d 351, 355 (2d Cir. 1980).¹¹

2 In contrast to individual disparate treatment claims,
3 "[p]attern-or-practice disparate treatment claims focus on
4 allegations of widespread acts of intentional discrimination
5 against individuals." *Robinson*, 267 F.3d at 158.¹² To
6 prevail on a pattern-or-practice claim, the plaintiffs must
7 demonstrate that "intentional discrimination was the
8 defendant's 'standard operating procedure.'" *Id.* (quoting
9 *Teamsters*, 431 U.S. at 336).

10 A pattern-or-practice lawsuit proceeds in two phases.
11 First, during the "liability phase," the plaintiffs are
12 required to establish "a prima facie case of a policy,
13 pattern, or practice of intentional discrimination against
14 [a] protected group." *Id.* Unlike in individual disparate
15 treatment claims, "[s]tatistics alone can make out a prima
16 facie case of discrimination [in a pattern-or-practice suit]
17 if the statistics reveal a gross disparity in the treatment
18 of workers based on race." *Id.* (alterations and internal
19 quotation marks omitted). Anecdotal evidence of

¹¹ Statistics may, however, be used to support an individual disparate treatment claim. See *Stratton v. Dep't for the Aging*, 132 F.3d 869, 877 (2d Cir. 1997).

¹²We refer to our recent decision in *Chin v. Port Auth. of N.Y. & N.J.*, - - - F.3d - - -, 2012 WL 2760776, at *6-9 (2d Cir. July 10, 2012), for a discussion of the history of the pattern-or-practice framework.

1 discrimination may be highlighted to bring "the cold numbers
2 convincingly to life." *Teamsters*, 431 U.S. at 339.

3 Once the plaintiffs make out a prima facie case of
4 discrimination in a pattern-or-practice case, the burden of
5 production shifts to the employer to show that the
6 statistical evidence proffered by the plaintiffs is
7 insignificant or inaccurate. *See id.* at 360. Typically,
8 this is accomplished by challenging the "source, accuracy,
9 or probative force" of the plaintiffs' statistics.

10 *Robinson*, 267 F.3d at 159 (internal quotation marks
11 omitted). If the defendant satisfies its burden of
12 production, the trier of fact must then determine, by a
13 preponderance of the evidence, whether the employer engaged
14 in a pattern or practice of intentional discrimination. *Id.*
15 If the plaintiffs succeed in proving a pattern or practice
16 of discrimination, the court "may proceed to fashion class-
17 wide injunctive relief." *Id.* Importantly, the plaintiffs
18 are "not required to offer evidence that each person [who]
19 will ultimately seek [individualized] relief was a victim of
20 the employer's discriminatory policy" in order to prevail in
21 the liability phase. *Teamsters*, 431 U.S. at 360.

22

1 When plaintiffs seek individualized relief-i.e., back
2 pay, front pay, or compensatory recovery-the case proceeds
3 to the "remedial phase." *Robinson*, 267 F.3d at 159. During
4 this phase, a particular plaintiff "need only show that
5 he . . . suffered an adverse employment decision and
6 therefore was a potential victim of the proved class-wide
7 discrimination." *Id.* (internal quotation marks and
8 alteration omitted); see *Teamsters*, 431 U.S. at 361. The
9 employer then bears *the burden of persuasion* of
10 demonstrating that the employee was subjected to an adverse
11 employment action for legitimate, nondiscriminatory reasons.
12 *Robinson*, 267 F.3d at 159-60; see *Teamsters*, 431 U.S. at
13 361.

14 It bears noting that "[t]he heavy reliance on
15 statistical evidence in a pattern-or-practice disparate
16 treatment claim distinguishes such a claim from an
17 individual disparate treatment claim proceeding under the
18 *McDonnell-Douglas* framework." *Robinson*, 267 F.3d at 158
19 n.5. As this Court has recognized, the pattern-or-practice
20 framework "substantially lessen[s] each class member's
21 evidentiary burden relative to that which would be required
22 if the employee were proceeding separately with an

1 individual disparate treatment claim under the *McDonnell*
2 *Douglas* framework." *Id.* at 159.

3 The *McDonnell Douglas* and *Teamsters* frameworks differ
4 in important respects. However, both recognize that direct
5 proof of intentional discrimination by an employer is hard
6 to come by, and thus provide carefully calibrated burden-
7 shifting structures designed to determine whether the
8 employer intentionally discriminated against the plaintiffs.
9 See *Patterson v. McLean Credit Union*, 491 U.S. 164, 186
10 (1989).

11 As previously noted, proof of discriminatory intent is
12 required to show a violation of the Equal Protection Clause.
13 *City of Cuyahoga Falls*, 538 U.S. at 194. Because neither a
14 state nor a state official in his official capacity is a
15 "person" within the meaning of § 1983, see *Will v. Mich.*
16 *Dep't of State Police*, 491 U.S. 58, 71 (1989), the requisite
17 discriminatory intent must be held by the state official in
18 his individual capacity. Thus, liability for an Equal
19 Protection Clause violation under § 1983 requires personal
20 involvement by a defendant, who must act with discriminatory
21 purpose. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).
22 "[P]urposeful discrimination requires more than 'intent as

1 volition or intent as awareness of consequences. . . . It
2 instead involves a decisionmaker's undertaking a course of
3 action 'because of, not merely in spite of, the action's
4 adverse effects upon an identifiable group.'" *Id.* (quoting
5 *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279
6 (1979)).

7 The pattern-or-practice framework is ill-suited to the
8 task of identifying which individual defendants engaged in
9 purposeful discrimination in cases such as this one.
10 Statistics proffered during the "liability phase" of a
11 pattern-or-practice suit purport to demonstrate that a
12 pattern of discrimination exists at *an entity*. In a Title
13 VII case, these statistics can make out a prima facie case
14 that the *employer* was engaged in a pattern or practice of
15 discrimination. This is because an analysis of the
16 collective acts of those who do the employer's bidding
17 bespeak the employer's motivation.¹³

18 But statistics showing entity-level discrimination shed
19 little light on whether a particular individual defendant

¹³ Because statistics introduced in the "liability phase" of a pattern-or-practice suit that demonstrate widespread discrimination "change[] the position of the employer to that of a proved wrongdoer," *Teamsters*, 431 U.S. at 359 n.45, it makes eminent sense to shift the burden of persuasion to the employer in the "remedial phase" of the litigation. See *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 179 (3d Cir. 2009).

1 engaged in purposeful discrimination. Just as statistics
2 alone are insufficient to establish a prima facie case under
3 the *McDonnell Douglas* framework, see *Hudson*, 620 F.2d at
4 355, statistics demonstrating employer-wide discrimination
5 are insufficient to establish which individual defendants
6 engaged in purposeful discrimination. Statistical
7 disparities may be, and often are, attributable to a subset
8 of actors—not to every actor who had an opportunity to
9 discriminate. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 131 S.
10 Ct. 2541, 2555 (2011).

11 Thus, to import the pattern-or-practice framework into
12 the Equal Protection context would substantially circumvent
13 the plaintiffs' obligation to raise a prima facie inference
14 of individual discriminatory intent. If "[s]tatistics alone
15 [could] make out a prima facie case of discrimination,"
16 *Robinson*, 267 F.3d at 158, a § 1983 plaintiff could shift
17 the burden to the defendant without any showing of
18 individual discriminatory intent. Such a result would seem
19 to contravene well-established precedent that "[p]roof of
20 racially discriminatory intent or purpose is required to
21 show a violation of the Equal Protection Clause" in a claim
22 brought pursuant to § 1983. *City of Cuyahoga Falls*, 538
23 U.S. at 194 (internal quotation marks omitted).

1 Plaintiffs in this case offer no authority for the
2 proposition that a statistics-based evidentiary framework
3 used to determine the liability of an *entity* under Title VII
4 is appropriate to establish the liability of *individual*
5 *state officials* under § 1983. They argue only that
6 "individuals can engage in a pattern or practice of
7 discrimination and there is no reason why such
8 discrimination cannot be shown primarily through statistical
9 proof." Reynolds Reply Br. 7. In their view, this is
10 particularly true where the individual defendants "are the
11 only actors whose decisions could have resulted in the
12 statistical disparities." Reynolds Reply Br. 7-8. We
13 disagree. Proffering statistical evidence that purports to
14 show discrimination at an entity and naming as defendants
15 all of the individuals who could possibly be responsible for
16 such discrimination may support an inference that one or
17 more of the named individual defendants committed acts of
18 intentional discrimination. But such evidence provides
19 little or no basis for discerning *which* individual
20 defendants are responsible for the statistical disparities.

21 For example, the Guilfoyle report purports to show
22 statistically significant racial disparities in the average

1 employment tenure, rate of pay, and demotions of inmates in
2 the Elmira print shop during the period between April 1994
3 and December 1999. Defendant Janice Kent began working as
4 an Industrial Training Supervisor in the print shop in the
5 fall of 1998. Even assuming that the Guilfoyle report
6 supports the contention that discrimination was occurring in
7 the print shop during the relevant period, the report says
8 very little about whether Kent herself discriminated against
9 minority inmates on account of their race. In other words,
10 the statistics do not establish that discrimination was
11 Kent's standard operating procedure. Unlike the statistics
12 in a Title VII suit against an employer, the statistics
13 proffered here do not place Kent in the position of "a
14 proved wrongdoer," *Teamsters*, 431 U.S. at 359 n.45, and thus
15 do not justify shifting the burden of persuasion to Kent to
16 establish that every adverse employment action she took
17 against a class member was animated by legitimate,
18 nondiscriminatory reasons.

19 For the foregoing reasons, the pattern-or-practice
20 framework is ill-suited to establish the liability of the
21 individual defendants named in the proposed amended

1 complaint.¹⁴ We therefore conclude that the district court
2 did not err in declining to independently analyze
3 plaintiffs' proposed class action amended complaint under
4 the pattern-or-practice framework. We affirm the district
5 court's denial of leave to amend and denial of class
6 certification for substantially the same reasons stated by
7 the district court.

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¹⁴ We need not here determine if the pattern-or-practice framework can ever be used in a § 1983 suit against a policy-making supervisory defendant, although we note our considerable skepticism on that question in light of the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

In *Iqbal*, the Supreme Court held that "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." *Id.* at 676 (emphasis added). In so holding, the Court explicitly rejected the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution." *Id.* at 677. Thus, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.*

Iqbal has, of course, engendered conflict within our Circuit about the continuing vitality of the supervisory liability test set forth in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). See *Aguilar v. Immigration & Customs Enforcement Div.*, 811F. Supp. 2d 803, 814 (S.D.N.Y. 2011) ("The Court of Appeals has not yet definitively decided which of the *Colon* factors remains a basis for establishing supervisory liability in the wake of *Iqbal*, and no clear consensus has emerged among the district courts within the circuit.").

But the fate of *Colon* is not properly before us, and plaintiffs have not articulated any reason in their briefs to treat individual print shop supervisors and their policy-making superiors differently in the context of this suit. "It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (internal quotation marks omitted). Because plaintiffs have failed to develop any argument as to why the pattern-or-practice framework is suitable to establish the liability of individual supervisory defendants in § 1983 suits, we deem that argument waived.

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III. CONCLUSION

The district court's order of October 4, 2010 granting summary judgment to defendants on plaintiffs-appellants' claims of individual discrimination and retaliation, denying leave to amend the complaint, and denying class certification is hereby AFFIRMED.