

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 02-0923 (JR)
	:	
TOM RIDGE, Secretary, Department	:	
of Homeland Security,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

The eight named plaintiffs in this case seek to represent a class of between 400 and 500 Hispanic special agents who are or have been employed by the United States Customs Service ("Customs") under the Department of Homeland Security (the "Department"). They bring "pattern or practice" claims of disparate treatment and disparate impact under Title VII, 42 U.S.C. § 2000e-16. Before the Court is defendant's motion for summary judgment.¹ The plaintiffs oppose the motion but also seek further discovery pursuant to Fed. R. Civ. P. 56(f) before preparing a "full response on the merits."

Procedural History

Miguel Contreras filed an administrative complaint before the Equal Employment Opportunity Commission on March 23,

¹ On February 26, 2004, certain of plaintiffs' claims were dismissed on a previous motion for summary judgment for failure to exhaust administrative remedies (Dkt. #70). The instant motion would dispose of all remaining claims.

1995. An Administrative Law Judge recommended the matter for class processing on November 20, 1995. That recommendation was rejected by the Director of the Office of Equal Opportunity Programs on December 21, 1995, but accepted by the Commission on May 15, 1998. Customs' request for reconsideration was denied on October 22, 1999. The parties then engaged in discovery, which included the exchange of thousands of pages of documents and several meetings between the parties' expert witnesses to discuss the data they would use to perform that statistical analysis. Dkt. #38-1 at ¶ 7, 17-18; Dkt. #106-5 at ¶ 3; Dkt. #106 at 5-6; Dkt. #106-2 at ¶¶ 4-6 and accompanying exhibits. The administrative complaint was then sent to an Administrative Judge for a hearing that was scheduled to begin in June 2002. The hearing never took place, however, because, on May 10, 2002, the day on which plaintiffs were to serve and file their statistical analysis, Dkt. #38-1 at ¶ 7, plaintiffs moved for dismissal of their administrative complaint and filed suit here.

On August 30, 2004, Customs moved for summary judgment as to the claims that survived its first motion for summary judgment, see note 1, supra, namely, the claims of discrimination in promotions, transfers, work assignments, training, discipline, awards and bonuses, and retaliation. Plaintiffs did not respond to that motion for summary judgment for more than seven months. They finally did so only after they were ordered to show cause

why the summary judgment motion should not be granted as conceded. Plaintiffs' opposition and Rule 56(f) motion were filed on April 5, 2005.

Class period

Although the first class action complaint was not filed until 1995, the plaintiffs assert, invoking theories of equitable estoppel and continuing violation, that the class period should extend back to January 1, 1974 or January 1, 1977. Dkt. #1 at ¶ 1 -- to the time when the defendants were "first put on notice of the nature of its employment practices impacting the putative class." Dkt. #103-65 at 20. "To establish a continuing violation . . . [plaintiffs] would have to show 'a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the (limitations) period.'" Valentino v. U.S. Postal Service, 674 F.2d 56, 65 (D.C. Cir. 1982) (quoting B. Schlei & P. Grossman, Employment Discrimination Law 232 (Supp.1979)). See Anderson v. Zubieta, 180 F.3d 329, 337 (1999). The statutory period began December 23, 1992, 90 days before plaintiff Contreras filed his EEOC complaint, 29 C.F.R. §§ 1614.105, 1614.106. Before we reach the issue of whether the class period extends backwards from December 23, 1992, we must determine whether plaintiffs have satisfied their burden of production as to acts or events occurring since then.

Pattern or practice claims

Classwide allegations of discrimination are commonly referred to as "pattern or practice" cases. A pattern or practice case "challenges a host of employment decisions over time; in effect, it challenges an employment system." Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984). The "proof sequences" of disparate treatment and disparate impact pattern or practice cases are different, but for a case proceeding on both theories, as this one does, "an important point of convergence exists," id. at 1267:

Both pattern or practice disparate treatment claims and disparate impact claims are attacks on the systemic results of employment practices. The pattern or practice claim amounts to an allegation that an observed disparity is the systemic result of an employer's intentionally discriminatory practices. The disparate impact claim amounts to an allegation that an observed disparity is the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business. Consequently the proof of each claim will involve a showing of disparity between the minority and majority groups in an employer's workforce.

Such a showing may theoretically be made by individual testimony alone, see McKenzie v. Sawyer, 684 F.2d 62, 71 (D.C. Cir. 1982); cf. McReynolds v. Sodexo Marriott Services, Inc., 349 F. Supp. 2d 1, 7-8 (D.D.C. 2004) (citing Palmer v. Schultz, 815 F.2d 84, 90 (D.C. Cir. 1987)), but I have found no decision in this Circuit, nor have plaintiffs cited any, ruling in plaintiff's favor in a pattern or practice case in the absence of statistical proof of

discrimination. See Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination.")

These plaintiffs have adduced no statistical evidence of the disparities they claim. Indeed, they instructed their expert Dr. Mann not to perform any statistical analyses, Dkt. #103-34 at ¶ 11.

Defendant's motion for summary judgment

The main point of the government's motion is that these plaintiffs have not made, and cannot make, the requisite "showing of disparity" between Hispanic agents and white agents² in Customs' workforce. That point is somewhat obscured, to be sure, by the government's submission pursuant to Local Civil Rule 7(h) of 192 propositions of fact as to which it asserts there are no genuine issues -- a submission that has given the plaintiffs the opportunity to file a response disputing almost every one of them, or stating that they are unable to respond without discovery.³

² The terms "Hispanic" and "white" have become the lingua franca of this case, even though everyone knows that many Hispanic people identify themselves as Latino, and that Hispanic or Latino people may be of any race.

³ The government might reasonably respond that the shape of the motion was not its idea. At a status conference held on June 30, 2004, I said, "[T]he Defendant could narrow the issues

Almost all of the government's 192 assertedly undisputed facts, however, are material mostly to the defense the government would have to prove if the plaintiffs had established the requisite "showing of disparity between the minority and majority groups in [Customs'] workforce." Those factual propositions, in other words, chiefly support the negative of the proposition that it is plaintiffs' burden to prove. They relate primarily to the statistical report of the government's expert, Dr. Bernard Siskin, Dkt. #97-10. Using data maintained by Customs and made available to plaintiffs, Dr. Siskin concluded that Hispanic agents are generally more likely than or as likely as white agents to be promoted and receive transfers; that Hispanic agents are more likely to receive awards than white agents; that Hispanic agents receive more training than expected given their overall representation at Customs; that Hispanic agents are indeed more likely than whites to be assigned undercover work, but that the chances of promotion increase for agents who work fewer than 10 percent of their hours undercover and that the negative impact on the chances of promotion for agents who work more than 10 percent of their hours undercover is not

significantly if the Defendant were to move for summary judgment on the basis that the statistical evidence doesn't establish appropriate pattern and practice for the promotion claim. . . . [L]et's see that motion, and then the Plaintiff will proceed under Rule 56(f) and we will find out what we really need to learn in discovery." Dkt. #82 at 3.

statistically significant; and that Hispanic agents are not demoted or removed more often than white agents, although they are suspended more often than whites.⁴

Dr. Siskin's analysis does not deal with plaintiffs' claims of discrimination in retaliation -- here the government's motion does simply note that the plaintiffs have not produced statistical support for their claims -- but the government also argues that retaliation claims are not suitable for class treatment because of their individualized, fact-sensitive nature.

Plaintiffs' Opposition

Plaintiffs oppose the motion for summary judgment on four fronts. First, they assert that genuine issues of material fact are demonstrated by various internal and external studies of employment at Customs and by anecdotes recounted by the named plaintiffs. Second, they assert, primarily through the declaration of their expert Dr. Charles Mann, that Dr. Siskin's analysis is incomplete and unreliable. Third, they proffer the non-statistical testimony of Jan Duffy as an expert in management and equal opportunity practices. Fourth, they assert under Rule

⁴ Customs argues that a *prima facie* case of discrimination must show, not only that Hispanics were suspended more often than whites, but also that Hispanics received harsher punishments than whites for the same or similar offenses. Plaintiffs have made no such showing.

56(f) that they require more discovery in order to establish disputed issues of material fact.

1. Reports and investigations

Plaintiffs rely heavily on several internal and external reports and investigations into Customs employment practices. They are

1) A 1991 "Review of Integrity and Management Issues of the U.S. Customs Service" convened by the Commissioner of Customs. Dkt. #103-19. The panel found "fundamental deficiencies in the management systems" and found that managers' problem solving there depended in part on "various interpersonal networks (referred to . . . as 'old boy' networks)." Id. at 2. The panel also noted employee perceptions that discipline was not applied evenly across the board. Id. The panel's findings were based on over 150 briefings and interviews with law enforcement officials, and on discussions with Customs managers, supervisors, and employees. Id.

2) A 1990 Government Accounting Office (GAO) study of the relationship between certain employee characteristics and performance evaluations and promotions. GAO found an indirect relationship between ethnicity and employee ratings.⁵ As for promotions, GAO found indirect relationships between ethnicity and promotions for non-supervisory employees, and a direct relationship between ethnicity and promotion for managerial and supervisory employees. Dkt. #103-20 at 3-7. Among general management (GM) employees, white

⁵ "A direct relationship exists when, after we control for the influence of other factors, the outcome variable (e.g., performance rating) depends on the category of the independent variable (e.g., field or headquarters). An indirect relationship exists when, after we control for the influences of other factors, two or more variables jointly influence the outcome (e.g., being promoted depends on whether one is a black male or female or a white male or female)." Dkt. #103-20 at 3 n.2.

females had a 2.1 times greater chance than nonwhites of being rated outstanding instead of highly successful, and nonwhite males had 1.6 greater odds than whites of being rated satisfactory rather than highly successful. Id. at 5. For promotions, the report found that, for general schedule (GS) employees in headquarter locations, white employees had 1.4 times greater odds of being promoted than nonwhites, and that in field locations whites had .7 times lower odds of being promoted than nonwhites. Id. at 6. Among GM employees, whites were twice as likely as nonwhites to be promoted. Id. at 7.

3) Excerpts from a 1988 report on Customs Affirmative Employment Program for minorities and women. It notes an imbalance in the number of women and minorities above grade 12 and in supervisory positions. The report does not identify discrimination on the basis of race, ethnicity, or any other protected characteristic as one of the "Probable Barriers" to minority and female advancement. Dkt. #103-21 at 3.

4) A 1995 EEO Task Force Report issued by Customs' own Office of Equal Opportunity and Office of Investigations. The report's findings are based in large part on the results of surveys, employee interviews, and structured group interviews and on some statistical analysis of those survey and interview results. Dkt. #103-4 at 3. The report notes, among other things, that 23 percent of minorities compared to 14 percent of non-minorities reported being asked to take a hardship assignment; that all liaison positions in fiscal years 1992 to 1994 were filled by white males; that there is a "perception" among employees that "good old boy" networks exist and undermine EEO effectiveness; that employees feel hindered by lack of a career path handbook or written hiring, promotion, discipline and rotation policies; that field managers and agents expressed concern that Hispanic agents were over-utilized in wiretap and undercover assignments; that 37 percent of Hispanics reported that they had been subject to disciplinary investigation; and that in fiscal year 1994 disciplinary rates for minorities were higher than for whites. Dkt. #103-66 at 1-4.

5) An integrity oversight review published in 2001 and conducted by the Office of Inspector General (OIG) of the Department of Treasury "to assess the quality of their internal investigative operation". The study was based upon OIG's review of investigative files, management inquiry files, and discipline files. The study found that the majority of investigative files did not comply with reporting requirements, that inquiries into allegations of misconduct were not always efficiently addressed, that management inquiries were not sufficiently thorough, that Customs management did not always discipline employees in accordance with guidelines, and that the Discipline Adverse Action Tracking System (DAATS) database was incomplete and inaccurate. Dkt. #103-31.

6) A study of reprisals at Customs, conducted by an outside research team and published in July 2003. It found that Hispanics filed complaints in numbers disproportionate to their demographics within the agency. Dkt. #103-55, 56, 57.

The first three of these reports, published in 1991, 1990 and 1988, respectively, cover time periods earlier than the statutory beginning of plaintiffs' claim. The fourth report was published in 1995 but covers data collected for earlier periods. The dated nature of these reports does not make them irrelevant, see Valentino v. U.S. Postal Service, 674 F.2d 56, 71 n. 26 (D.C. Cir. 1982), but it does make them less important. The fifth report was published within the statutory period of plaintiffs' claim, but it relates to the quality of internal investigations, and does not speak to discriminatory treatment of Hispanics in either statistical or anecdotal terms. The sixth report, on reprisals, found that Hispanics filed more complaints than their

white counterparts, but that finding, without more, is no proof of discrimination.

Individual assertions of discrimination are found in the declaration of Special Agent Anita Trujillo, Dkt. #103-32, the declaration of Special Agent Arturo A. Renteria, Dkt. #103-41, the deposition of Miguel Contreras, Dkt. #103-46, the declaration of Agent John Yera, Dkt. #103-47, the deposition of Stephan Mercardo, Dkt. #103-41, the declaration of Special Agent E. William Velasco, Dkt. #103-50, the internal affairs report of investigation of Leonard Lindheim, Dkt. #103-51, and the deposition and trial testimony of Walter Biondi, Dkt. #103-53, 54.

Even if plaintiffs' proffered reports were admissible evidence, plaintiffs could not meet the challenge of the government's motion for summary judgment. The reports, together with the declarations and depositions filed by plaintiffs, are not sufficient to make a "showing of disparity" between the minority and majority groups in their employers's workforce during the time period covered by this case.

2. Attack on Dr. Siskin's report

Plaintiffs broadly assert that Dr. Siskin's statistical analysis should not be credited because it is based upon unreliable and incomplete data, and because Dr. Siskin did not

account for the findings of the studies upon which plaintiffs rely. Their specific complaints about the Siskin report are many, but the central ones are (a) that any findings based on VAACS should not be credited because of VAACS' shortcomings, as admitted by a Customs Rule 30(b)(6) witness; (b) that Dr. Siskin does not account for certain characteristics that may have an effect on his findings (for example, the effects of "maturity and ambition" on performance); (c) that Dr. Siskin does not account for "time in grade" and therefore, compares employees who may not have been similarly situated; (d) that the race and national origin (RNO) data relied upon by Dr. Siskin is inaccurate; and (e) that plaintiffs do not have enough information as to Dr. Siskin's method of analysis, or the data fields he used from the various Customs personnel databases, to replicate his findings.

The plaintiffs' attack on Dr. Siskin's report, and the government's defense of it, consume the great majority of the many pages of briefs and attachments submitted by the parties on this motion. All of this emphasis misplaces the burden of production. Plaintiffs cite only Greenberg v. FDA, 803 F.2d 1213, 1215-16 (D.C. Cir. 1986), for the proposition that Customs must "demonstrate the absence of disputed material facts" before plaintiffs are called upon to demonstrate an issue of disputed material fact. Dkt. #103-65 at 36. That proposition is

erroneous. “[I]f the movant is defending the claim at issue, the initial summary judgment burden is satisfied if the movant establishes that the claimant lacks adequate proof of an essential element of the claim,” or, in other words, “[i]f the movant does not bear the ultimate burden of persuasion on a particular claim at trial, it may satisfy its initial burden by pointing out that the record lacks substantial evidence to support a necessary element of the nonmovant’s claim.” Moore’s Federal Practice 3d ¶ 56.13[1] at 56-135, 56-138 (emphasis added) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324-26 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). Here, it is not necessary for the government to prove that Dr. Siskin’s statistical analyses are undisputed. Plaintiff’s attack upon them is thus beside the point.

3. Testimony of Jan Duffy

The opinion of Jan Duffy, an expert in management and equal employment opportunity practices, is that the flaws in Customs management and personnel practices -- as chronicled in the internal and external reports that plaintiffs have proffered -- were system-wide; that Customs’ practices were “seriously deficient and out of keeping with the usual and reasonable management practices of similarly situated American employers.” Dkt. #103-22 at ¶ 7; and that a general lack of leadership at Customs permitted the development of an

organizational culture that enabled discrimination, retaliation, and other unlawful practices to "flourish," failed to educate managers as to equitable practices, and failed to implement sound and accessible complaint systems. Ms. Duffy's opinion adds nothing to the "showing of disparity" that plaintiffs must make if they are to overcome defendant's motion for summary judgment.

4. Rule 56(f)

"Adequate time for discovery" should precede summary judgment. See Berkeley v. Home Ins. Co., 68 F.3d 1409, 1414 (D.C. Cir. 1995) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). If a party opposing summary judgment requires additional discovery and states its reasons in an affidavit, the court may "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed. R. Civ. P. 56(f). Rule 56(f) motions may also be granted when a party demonstrates facts indicating that genuine and disputed issues of material facts exist, but that "'for some good reason he is unable to produce them on the motion.'" Exxon Corp. v. F.T.C., 663 F.2d 120, 126 (D.C. Cir. 1980) (quoting Donofrio v. Camp, 470 F.2d 428, 431 (D.C. Cir. 1972)).

Plaintiffs argue, with justice, that their discovery has been circumscribed by orders of this Court and that a Rule

56(f) response to the government's motion was invited.⁶ Plaintiffs want to depose Dr. Siskin so that they can "understand and replicate his statistical analyses." They want "testimony from Customs representatives on the time-in grade and RNO [race and national origin] data and other database issues." They seek paper and deposition discovery about the policies, procedures, and practices Customs employed during the class period with respect to promotions, transfers and assignments, awards and bonuses, undesirable assignments, discipline, and vetting. They seek "all documents relating to Defendants' . . . equal opportunity issues and problems"; discovery on document retention and destruction; and discovery "into the issue of continuing violations, equitable estoppel and successorship." Dkt. #103-60 at ¶¶ 1-6. Pressed on this expansive discovery agenda at a hearing of the instant motion on August 19, 2005, plaintiffs' counsel conceded that the "big things" he needs in discovery relate to "the RNO question"; more detailed information about the meaning of codes used in the PERHIS database; and time in grade

⁶ At a hearing held on June 30, 2004, I limited discovery to the pertinent databases and did not approve depositions. "Not yet." Dkt. #82 at 27. I told the plaintiffs to "take as much time as you want to respond to that motion for summary judgment, but I expect you are going to want to respond pretty quickly, at least under 56(f), because I anticipate that your response will be, 'I can't possibly respond to this unless I have X, Y and Z.' But that's when we're going to take a targeted look at what your actual discovery request will be." Id.

information, plus information on "how the promotion system works." Dkt. #111 at 6-10.

The rhetoric of the government's argument against further discovery -- that giving plaintiffs leave to "boil the oceans in a vague hope that new evidence will come to light" would only "prolong a vexatious suit," Dkt. #106-1 at 2, citing Donofrio v. Camp, 470 F.2d 428, 431 (D.C. Cir. 1972) -- is overwrought. The substance of the argument, however, is for the most part correct.

Plaintiffs' asserted difficulty with the PERHIS database, and with the VAACS, TECS and TRAEN databases, is that their expert has "not been provided with definitions of either the fields, or the definitions of the values that can appear in those fields," Dkt. #103-34 at ¶ 3. Plaintiffs do not deny that Dr. Mann has worked previously with PERHIS data (and its various fields) in other cases, Dkt. #106-5 at ¶ 9, or dispute the government's assertion that "there was no suggestion at the administrative phase that he did not know what these codes meant," Dkt. #111 at 22. The databases used by Dr. Siskin were produced to plaintiffs during the administrative discovery period, Dkt. #38-1 at ¶ 18, and the experts met during the administrative stage to discuss the common data they would use in their analyses. Dkt. #106-4 at ¶ 3 ("We were both supplied with the data, layouts and data dictionaries for each file and then we

discussed and agreed upon the fields potentially relevant for study.”). Plaintiff questioned eleven Customs witnesses pursuant to Rule 30(b)(6) in 2003 and has received production of thousands of documents. Dkt. #106-2 at ¶¶ 4-6, Exs. A-B. I have considered whether responses to Dr. Mann’s questions about “definitions of . . . the fields, or the definitions of the values that can appear in those fields,” Dkt. #103-34 at ¶ 3, might satisfy the plaintiffs. Discussion of that point at the August 19 oral argument provides no basis for optimism. Plaintiffs’ counsel acknowledged that he had been provided a printout dictionary of the PERHIS database, describing each of the fields that are populated with data, but complained that the “codes are not self-explanatory.” Dkt. #111 at 6; see id. at 41. If further generalized discovery on this point were to be permitted, the government’s “boil the oceans” metaphor is perhaps not too far off the mark, for the kind of deposition discovery plaintiffs counsel has in mind to pursue his questions about the databases could go on “for months and months.” Dkt. #111 at 7. The parties may be assured that “months and months” of discovery will not be permitted. Nevertheless, because my previous orders have arguably constrained the discovery plaintiffs should have taken by now, and because Circuit precedent on Rule 56(f) so clearly frowns upon granting summary judgment without discovery, Information Handling Services v. Defense Automated Printing

Services, 338 F.3d 1024, 1031-1036 (D.C. Cir. 2003), plaintiffs will be permitted reasonable discovery in this limited area.

Plaintiffs' request for discovery as to RNO data is actually a request to re-poll a number of Customs agents to determine whether they are "really" Hispanic. The request will be denied. It is undisputed that Customs has used RNO data obtained through a self-identification process,⁷ and plaintiffs have not refuted the assertion by the government at the August 19 hearing that the two sides' experts agreed during the administrative stage to use an agent's last reported RNO designation as the basis for their analyses, Dkt. #111 at 16. Plaintiffs have not offered a persuasive rationale for re-measuring the height of the goalpost. Plaintiffs' concern with time-in-grade data appears to be principally one of law: that "[b]ecause Dr. Siskin failed to account for this minimum time-in-grade requirement, Palmer and Davis⁸ mandate that his statistical analyses be disregarded." Dkt. #103-66 at 39. As already indicated, however, Dr. Siskin's statistical analyses are

⁷ Plaintiffs purport to "dispute" this statement, see Dkt. #103-1 at ¶ 7, but they do so without the affidavit support required by Rule 56. The statement that "approximately 80 individuals have different Hispanic racial identities during the period provided," id., may be true, but it does not refute the proposition that the RNO data was the product of self-identification.

⁸ Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987); Davis v. Chevy Chase Financial Ltd., 667 F.2d 160 (D.C. Cir. 1981).

disregarded for purposes of this motion, and they need not be considered until, and unless, plaintiffs have made the requisite "showing of disparity." It is undisputed, in any event, that time-in-grade information is not available for employees who joined Customs before April 19, 1992, Dkt. #111 at 13, 40, and plaintiffs can offer nothing but speculation that the statistical picture might be more favorable to them if pre-1992 time-in-grade data were available, or that discovery into "document retention (and destruction) issues," Dkt. #103-16 at ¶ 5, might lead to adverse inferences, or both. See Greenberg v. Food and Drug Admin., 803 F.2d 1213, 1224 (D.C. Cir. 1986), ("If the court determines that the discovery sought . . . would be wholly speculative, relief under Rule 56(f) must be denied."); Exxon Corp. v. F.T.C., 663 F.2d at 128 ("It is not the intent of Rule 56 to preserve purely speculative issues of fact for trial").

The last of the "big things" plaintiffs seek in discovery is information on "how the promotion system works." If the plaintiffs had made a showing of disparity, and if Customs had responded that the disparity could be explained by a facially neutral promotion system, discovery on how the system works would be appropriate. Neither of those things has happened.

Discipline

The government itself has placed in the record statistical evidence favorable to plaintiffs on the subject of

discipline. Dr. Siskin finds that 42 Hispanic agents were suspended from 1993 to March 2003 compared to 156 White agents over the same period. Dkt. #97-10 at Table 39. Thirteen more Hispanic agents were suspended over this period than would be expected considering Hispanic representation at Customs -- a disparate number by 2.6 units of standard deviation. Id. at Table 40. When broken down by year and grade, the disparity in suspensions for the years 1993 through 1998 is not statistically significant, but for the years 1999 through March 2003 the disparity increases to 4.07 units of standard deviation. Id. at Tables 42A-B.

This evidence showing that Hispanics were suspended more frequently than whites, without evidence about the offenses for which suspensions were imposed, or the length of the suspensions, is not enough to satisfy plaintiffs' burden of production. See Wilmington v. J.I. Case Co., 793 F.2d 909, 915 (8th Cir. 1986) (*prima facie* case of discrimination in discipline includes showing "the discipline imposed was harsher than that imposed on comparably situated whites"); Pension Ben. Guar. Corp. v. Federal Labor Relations Authority, 967 F.2d 658, 667 (D.C. Cir. 1992) ("The linchpin of the disparate treatment analysis is the similarly situated status of the employees being compared.").

The plaintiffs have not emphasized their claim of disparate discipline in this case -- it has been my impression

that the crux of their complaint has been promotions -- and their submission under Rule 56(f) mentions the subject only in passing. Dkt. #103-60 at ¶ 3. Nevertheless, discovery on the reasons for and harshness of disciplinary sanctions imposed on Hispanic and white agents would be permitted, if plaintiffs wish to pursue the subject.

* * * * *

For the reasons set forth above, plaintiffs will be permitted to take discovery on "definitions of . . . the fields, or the definitions of the values that can appear in those fields" in the PERHIS, VAACS, TECS and TRAEN databases, and, if they wish, on the reasons for and harshness of sanctions imposed on Hispanic and white agents. Counsel are to meet and confer upon a discovery program consistent with this opinion and submit an agreed upon order no later than October 5, 2005. If they cannot agree, a discovery conference will be held on **October 6, 2005, at 3:00 p.m.** Discovery is to be completed within 90 days of the date of this order. For administrative and docket control reasons, the government's motion for summary judgment [#97] will be **denied without prejudice.** It may be refiled, if at all, in

abbreviated form, incorporating by reference any motions or other material already of record.

It is **SO ORDERED**.

JAMES ROBERTSON
United States District Judge