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United States District Court, N.D. Illinois.

Glenn KOSKI, et al., Plaintiffs,  
v.  
Terrance GAINER, et al., Defendants.

No. 92 C 3293. | Sept. 30, 1997.

## Opinion

### MEMORANDUM OPINION AND ORDER

LEINENWEBER, J.

\*1 The plaintiffs are seven (7) white male state police officers who are suing the State and the Illinois State Police (“ISP”) for reverse race and gender discrimination in promotions. There is also a class action pending on behalf of white males passed over by the ISP for hiring in favor of less qualified minorities and females. The court certified a class consisting of:

all white male applicants for hire with the Illinois State Police, from 1975 to the present who were eliminated from contention, or whose hire date was delayed, by the imposition of a higher cut-off score for white male applicants on the written entrance test than for applications of all other race/sex groups.

*Koski v. Gainer*, 1993 WL 153828 (N.D.Ill.).

The class and individual claims are brought under 42 U.S.C. § 1983, based on the equal protection clause of the Fourteenth Amendment, and Title VII, 42 U.S.C. §§ 2000e–1 to 2000e–17. The case has been pending for a long time and has been the subject of piecemeal resolution. In 1995 the court considered summary judgments on the hiring class claims and found with respect to the § 1983 claim that the ISP affirmative action plan (“AAP”) was not narrowly tailored, although questions of fact existed whether there was a compelling governmental interest at stake to remedy past discrimination. *Koski v. Gainer*, 1995 WL 599052 \* 10 (N.D.Ill.). The court also granted summary judgment on behalf of the class dismissing a statute of limitations defense. The court however denied the class’ motion for summary judgment on the Title VII hiring claim because there were issues of fact as to whether there was a manifest imbalance in work force demonstrating past discriminatory hiring and whether the AAP unnecessarily “trammelled” the interests of white males. *Id.*

In 1997 the court considered summary judgment motions on the promotion claims of the individual plaintiffs. All motions were denied because the court determined that factual issues were present in both the § 1983 equal protection and the Title VII claims. Specifically the court found that there were fact questions concerning causation, *i.e.*, whether the failure to promote the plaintiffs was based on the AAP or other considerations and the validity of the AAP itself, *i.e.*, whether there was a compelling interest to support it. Because the court found issues of fact on these questions it did not reach the ultimate question of whether the AAP was narrowly tailored. The court did find that the plaintiffs made out a *prima facie* case of discrimination under the *McDonnell Douglas* approach. This also left the Title VII questions of whether there was a manifest imbalance suggesting a history of discrimination and whether the AAP trammelled the rights of the white males. The court also left unresolved the statute of limitations defense asserted against plaintiffs Koski and Bishop. *Koski v. Gainer*, 1997 WL 159530 (N.D.Ill.).

The court recently presided over a trial to resolve these issues.

### TITLE VII HIRING CLAIM

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\*2 The description of the AAP and its historical antecedents is set forth in the court's 1995 ruling and will not be repeated as the parties have not sought to introduce evidence that contradicts any of it. *See, Koski v. Gainer*, 1995 WL 599052 \*1 to 6. The issues remaining after that decision were whether the AAP was created to remedy a manifest imbalance and whether the AAP unnecessarily trammelled the rights of white males. What the court found missing in the defendant's presentation in 1995 was any evidence of what constituted the relevant work force to compare with the ISP actual work force in order to determine whether a manifest imbalance had existed which would justify an inference of past discrimination, a predicate to an affirmative action remedy.

Mystifyingly, the defendants made no attempt at the trial to supply any additional evidence of the relevant work force at the time of the adoption of the AAP to justify a conclusion that a manifest imbalance existed between the defendants' workforce and the relevant work force. Instead defendants simply relied on their observation that it was up to the plaintiff class "to show that the elements of manifest imbalance and no [*sic.*] unnecessary trammeling were not present in the ISP work force between 1975 and 1990." This frankly is not the law. The proponent of the AAP has the obligation to show that the plan was designed to remedy past discrimination. A permissible method of proof of past discrimination is to show that a manifest imbalance existed. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 2742, 53 L.Ed.2d 768 (1977); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 717, 102 L.Ed.2d 854 (1989). In other words the proponent of the AAP must establish that the defense exists, *i.e.*, that it was necessary to discriminate against the class to remedy past discrimination in favor of the class. As with any defense, the burden of establishing the defense is on the proponent of the defense. Otherwise a defendant could assert any defense in the world with the hope that the plaintiff could not disprove it by a preponderance of the evidence. The case of *Evans v. City of Evanston*, 881 F.2d 382 (7th Cir.1989), cited as authority by defendants, does not place the burden of proof on plaintiff. In *Evans* the Seventh Circuit merely said that *Wards Cove v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), placed the burden of persuasion in disparate impact cases on the party challenging the test or procedure alleged to cause the disparate impact. The analogous provision here would be a challenge by women or minorities to the use of police records or the physical agility test as having a disparate impact on them. In any event *Wards Cove* is no longer the law; the Civil Rights Act of 1991 modified this burden of proof and now requires an employer to prove that a procedure shown to have disparate impact was a business necessity. 42 U.S.C. § 2000e-2(k).

\*3 However the record is not totally devoid of proof as to the relevant work force. James Seiber, executive director of the Illinois State Police Merit Board, testified that minorities and woman, who pass the written exam and qualify for further consideration for hiring fall out at a rate of approximately two times that of white males. A major cause for the minority fall out is due to prior police records. The major cause for the female fall out is failure to pass the physical exam requirements. Thus, leaving out any differences due to pass-fail rate for the written exam or any differences in interest or lack thereof in joining the police force, the relevant workforce for minorities and females based on the fall out rate alone would be approximately 50% of their percentages in the overall workplace. Thus the use of the percentage of minorities and females in the population at large has not been justified by the defendants in this case. As stated in *Croson*:

[I] is ... clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Quoting *Hazelwood* at 2742, n. 13.

Therefore the court finds the defendants have failed to demonstrate a manifest imbalance so as to justify the AAP. Therefore the court finds that the defendants violated Title VII by discriminating in hiring based on race.

## PROMOTION CLAIMS

Unlike the AAP for hiring, the defendants maintain an informal AAP for promotions that attempts to achieve racial and gender parity in all of the sworn ranks. General considerations for promotion are as follows. Periodically promotional exams are given. When an opportunity for promotion arises applications are taken and the merit board computes a rank index based on the following criteria: 1) 50% written examination; 2) 45% performance evaluation; and 3) 5% seniority. Those scoring in the 65th percentile are considered "certified for promotion" and the merit boards considers those with the highest 10 scores "equally-eligible" for promotion. The district captain has the authority to recommend candidates for promotion from the top ten. His recommendation then goes to the area commander, and up the chain of command to the ISP Director who has final approval of the promotions. If a minority or a female ranks in the top 10, regardless of who gets the appointment a document called a Form 119 must be filled out. A Form 119 requires some basic information on the appointee and if the appointee is

not a minority or a woman a reason in writing why the minority and/or woman was passed over. If the appointment goes to a minority or a woman, no reason need be given for passing over a white male. Therefore there is no requirement that the board set forth in writing the reasons for not promoting white males. The defendants stoutly maintain however that promotions were always on merit and not related to sex or race. They claim with one exception that each of the plaintiffs was passed over on merit rather than for affirmative action reasons. Since these are disparate treatment cases we will have to examine each plaintiff's case in turn.

#### **KOSKI AND BISHOP**

\*4 The defendants claim a statute of limitation defense to the claims of Koski and Bishop. Both Koski and Bishop are bringing claims under §§ 1981 and 1983 as well as Title VII. The constitutional claims are subject to a statute of limitations of two years from the accrual date of the injury. *Smith v. City of Chicago Heights*, 951 F.2d 834, 836–37 n. 1 (7th Cir.1992). Claims under Title VII must be brought within 300 days from the accrual date. 42 U.S.C. § 2000e–5(c). Both plaintiffs brought their claims 6 years after they were passed over for promotion. Both were subject to motions for summary judgment based on the applicable statute of limitations. In response to the motion Koski relied on the principle of equitable tolling to attempt to get around the limitations. Specifically he claimed that he was unable to discover the truth concerning his failure to be promoted despite reasonable efforts. The court ruled at the summary judgment stage that there was a question of fact whether he exercised reasonable diligence. *Koski v. Gainer*, 1997 WL 159530\* (N.D.Ill. March 27, 1997). Bishop claimed equitable estoppel also known as fraudulent concealment. He said he was told that he was not promoted due for seniority reasons rather than reasons of race. The court felt that there was a fact question as to whether he was actively misled. *Id.*

At trial Koski testified that Stephen Crudup, an Afro–American with less seniority, was promoted over him. He said that he did not see the promotion list so he did not know whether Crudup had a higher score. He testified, however, that he suspected Crudup was promoted because he was black. Bishop testified that he was ranked No. 2 on the promotion list and that there were three promotions, including Crudup, made from this list. Crudup had less seniority than Bishop. He was told that the promotions were made strictly on seniority. He testified that he did not believe he was being told the truth. They also do not explain how they obtained the information for filing suit if they did not know the basis for the case until they received discovery in this suit.

In their post-trial briefs Koski and Bishop now both rely on equitable estoppel. They claim that the defendants should be estopped from pleading the statute of limitations. They contend that they were not told about “the dual promotion system for white males compared to minorities” and they did not find out about this system until documents were produced in this lawsuit.

Equitable estoppel comes into play when a there is fraudulent concealment, that is, where the employer defendant takes active steps to prevent a plaintiff from suing on time, such as hiding evidence from him or promising him not to plead the statute of limitations. However the wrongdoing justifying application of equitable estoppel cannot be the wrongdoing itself, *e.g.*, in the employment situation estoppel cannot be based on the employer telling an employee that the employment action was based on a reason other than the alleged illegal reason. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir.1990). To hold otherwise the court said would eliminate the statute of limitations in employment discrimination cases. *Id.* Since Koski's and Bishop's complaint upon which they base their case for equitable estoppel is that they were not told that they were turned down for promotion because of their sex and race, they fall squarely within the ambit of *Cada*. Furthermore, neither was fooled. They both thought that the stated reason was not the real reason and that the real reason was race and sex discrimination.

\*5 Although neither Koski nor Bishop rely on the principle of equitable tolling in their trial brief, Koski did rely on this principle in his response to the defendants' summary judgment motion. However even if the court does not consider the argument waived, neither Koski nor Bishop can rely on equitable tolling because neither was fooled. They both testified that they believed they were victims of discrimination at the time of the promotions and did not believe their bosses' professed reasons. Thus under equitable tolling the statute of limitations commences to run when a reasonable person concludes that “he may have” a discrimination claim. *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995). This is especially true when the plaintiff has no duty to make a pre-filing investigation and need only file a charge with an administrative agency. One of the purposes of filing an administrative complaint is to uncover facts relevant to the case. *Pacheo v. Rice*, 966 F.2d 904, 907 (5th Cir.1992) cited with approval in *Thelen* at p. 268.

Accordingly the court finds in favor of the defendants and against Koski and Bishop on their promotion claims.

### THE REST OF THE PLAINTIFFS

As stated by this court in the pretrial ruling on summary judgment, on a promotion claim the plaintiffs must prove that the defendants acted with discriminatory intent in failing to promote them. The plaintiffs bring claims pursuant to §§ 1981, 1983, and Title VII. The methods of proof under these various acts are identical. *Johnson v. City of Fort Wayne*, 922 F.3d 922, 940 (7th Cir.1996). All the plaintiffs rely on the familiar burden shifting approach of *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this approach the plaintiffs must first demonstrate a *prima facie* case of discrimination. To do so in a promotion claim the plaintiff must demonstrate (1) that he belongs to a protected group, such as an identifiable race, (2) that he was eligible for the promotion, (3) that he failed to get the promotion, and (4) members of a favored race similarly situated got the promotion. Once the employee establishes the *prima facie* case the burden of production shifts to the employer to establish a legitimate, non-discriminatory reason for the employment action. If the employer succeeds, the plaintiff must demonstrate by a preponderance of the evidence that the proffered reason is a pretext for discrimination. *Johnson* at 931. If the defendants choose not to challenge the notion that they have discriminated, they must prove that any such discrimination was narrowly tailored to meet a compelling governmental interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989). A government body has a compelling interest in remedying the effects of past discrimination. Past discrimination as we have seen can be proven by a manifest imbalance in the body's work force.

#### *Fred Winterroth*

The defendants in the defense of the claim of Fred Winterroth rely solely on their AAP. They state in their brief that "defendants have admitted that Winterroth was not promoted because of the AAP...." Surprisingly the defendants offered no evidence at trial concerning the reasons for their affirmative action program as it affected promotions other than the achievement of "gender parity." Therefore the record before the court consists only of the evidence that was before the court at the summary judgment stage which consisted of the comparison between the work force and the percentages of minorities and females in the population at large. The defendants' sole justification for the affirmative action as stated in their brief was: "the disproportionately low numbers of minorities and females in the supervisory ranks" due to the disproportionate number of hires of minorities and females "[dis]proportionate to their work force numbers."

\*6 The problem with this analysis is that the foundation for the perceived need for the AAP is bootstrapped upon the alleged disproportionate number of minorities and females in the employ of the Illinois State Police compared to the relevant work force. However in defense of the hiring claim the defendants have not shown the relevant work force. Instead they have relied on the population figures. Thus the so-called imbalance is based on the claimed hiring imbalance which defendants have not proved. Thus for the reasons stated earlier the defendants have failed to show that their AAP was "narrowly tailored to meet a compelling governmental interest." Accordingly the court finds in favor of Winterroth and against the defendants on all of his claims.

#### *Michael Mobley*

This plaintiff failed to establish a *prima facie* case. He was No. 2 on the promotion list and was passed over by other white males. Perhaps sensing the futility of Mobley's case plaintiffs fail to argue Mobley's case in their brief. In his testimony Mobley claimed that he was passed over in 1985 in favor of a female, Kim Rhodes. However, this claim was not brought presumably because it was stale. He admits that he was told that Rhodes was promoted because she was a female. Accordingly, the court finds in favor of the defendants and against Mobley on all his claims.

*Jerry Myers*

Myers established a *prima facie* case. He was No. 2 on the 1990 promotional exam in District 17 for sergeants. He was passed over by a Hispanic male, Rolando Matos, who was No. 7 on the list. The District 17 captain, Edward Kresl, testified that his procedure for recommending promotions was to interview the top ten candidates together with his operations lieutenant and two master sergeants in order to identify the top five candidates. He contended that the result of the interviews established a new order with Matos No. 1, and Myers No. 4. Consequently Matos was selected and Myers was not. However Kresl gave an affidavit prior to trial which did not mention this reordering but did say that Myers was in fact recommended which was contrary to his trial testimony. He also testified at trial that being a minority was a factor in his decision to recommend Matos. Kresl also testified that he had refused to recommend Matos two years before because of poor judgment. He had no misgivings about Myers. In evaluating all of the evidence the court finds by a preponderance of the evidence that the stated reason, the reordering of the candidates, was a pretext in order to justify an affirmative action appointment. Thus the court finds in favor of Myers on the § 1981 claim.

The defendants raise a statute of limitations defense to Myers' Title VII claim. He did not file with the EEOC within the 300-day limit. Myers testified that he was not told about the re-ranking. In fact he was told that he had been recommended but it did not work out. He knew he was No. 2 and that Matos was No. 7. He gives no reason for his failure to file within the limitations period. He must have concluded that one of the reasons was affirmative action. Therefore the statute of limitations bars his Title VII claim. Accordingly the court finds in favor of defendants and against Myers on the Title VII claim.

*Steven Sweeney*

\*7 Sweeney established a *prima facie* case of discrimination. He was No. 10 on the promotion list for District 13 sergeants and was passed over by a black male, Barry Stricklin, who was No. 13 on the list. Lt. Charles Mays testified to the reasons why Sweeney was passed over in favor of Stricklin. The sergeant's position in question was to be the supervisor of a Drug Interdiction Team ("DIT") located in southern Illinois. All of the promotions from this list were made to DIT members including one other trooper who had scored below Sweeney who was white. Mays stated that Stricklin got the promotion because he was an acting sergeant at the time of the promotion and he was a full time member of the DIT. Sweeney on the other hand was a full time road trooper. Mays also criticized Sweeney's work ethic describing him as a disappointment because he "did not take the initiative." He thought Stricklin was doing a good job. Mays denied that Stricklin's race played a role in the appointment. Sweeney, however, produced Performance Development Instruments ("PDIs"), rating sheets annually filled out by the trooper's immediate superior which showed that he had consistently high marks as a trooper.

The court finds that the issue is very close but that the plaintiff Sweeney failed to sustain his burden of proof that the reasons given for the promotion of Stricklin: his membership in the Drug Interdiction Team, his experience as an acting sergeant, and his superior work was pretextual. Accordingly judgment is entered in favor of the defendants and against Sweeney on all of his promotion claims.

*Dale Volle*

Volle's case is very similar to Sweeney's except it was stronger. They both were passed over by Stricklin, the African-American, who placed lower on the promotion list. Volle was No. 8. Mays gave basically the same reasons for passing over Volle in favor of Stricklin as he did concerning Sweeney. However Volle, in addition to his road duties, was a diver specialist and a member of the SWAT team. Mays testified that Volle had been eliminated for consideration early because in his opinion Volle's productivity was low and he did not possess the qualities to be a sergeant. Activity level is measured by logs and conversations with supervisors. However Mays testified that he did not consult with Master Sergeant James Spires, Volle's supervisor. Mays also denied that race played a role.

Volle called Spires, his supervisor, as his witness. He testified that Volle was highly capable. Prior to working for the state police Voile had been a member of a drug task force in Missouri and had received direct training from the DEA. He felt that Volle was highly qualified to supervise a drug task force. Mays did not supervise Volle and did not ask Spires for his opinion. Spires further explained that membership in the Dive and SWAT teams would lead to a low document count which formed

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the basis for Mays' opinion of Volle's low productivity. Spires prepared glowing PDIs for Volle which Mays had to sign off on. Therefore Mays must have been aware of Volle's good qualities.

\*8 Volle presented a much stronger case than did Sweeney. Accordingly the court does find that he did meet the burden of proof that he was passed over based on his race. Accordingly the court finds in favor of Volle and against the defendants on his promotion claims.

***James Harte***

James Harte was No. 2 on the 1991 Area 1 sergeant list. Area 1 is in the Cook County area. It is made up of a number of specialized units such as racetrack unit, Medicaid fraud unit, and a narcotics investigation task force known as MEG. Harte made out a *prima facie* case because he was passed over for appointment by an African-American, Cleotha Jones, who was No. 4 on the list. When the promotion list came out in December, 1991, Harte was assigned to the Medicaid Fraud Unit in Area 1. However he was transferred in to another area in September, 1992, before the promotions were made. According to Lt. Col. Robert Johnson, who at the time was in charge of Area 1 and who made the promotion recommendations, a transfer out does not technically kill an opportunity for promotion but effectively does. Harte introduced evidence that Jones had a severe disciplinary problem a few years before while Harte's record was unblemished. However Johnson testified that he was unaware of Jones' problem but in any event it was not a disqualifying problem. In addition the evidence showed that Jones' score on the promotion list was 90.475 compared to Harte's score of 90.769 which was very close. Although Harte's transfer was not voluntary, there was no evidence that the transfer itself was pretextual. There was also no evidence that promotions were ever made out of district. The court therefore finds that Harte has failed to meet his burden of proof that the reason given for not promoting him, that he was no longer in Area 1, was pretextual. Accordingly the court finds in favor of the defendants and against Harte on his promotion claims.

***Jeffery Hanford***

Hanford was No. 3 on the District 5 1991 sergeant promotion list. He was passed over by Joe Baldwin, an African-American, who was No. 7 on the list. The District 5 Captain who made the promotional recommendations was Thomas Lamb. Lamb testified that the reason for promoting Baldwin over Hanford was Baldwin's prior supervisory experience and he was superior to Hanford. Lamb further testified that he asked his command staff to recommend promotions and the staff recommended Baldwin but not Hanford. Lamb felt that the reason Hanford was passed over by the staff was the fact that he was a public information officer and not a road trooper. He admitted that he had told his staff to be mindful of affirmative action in making their recommendations. Lamb testified that he had previously recommended Hanford for an acting position sergeant in December, 1991, but due to a reduction in the number of available acting positions he did not receive the promotion. However three minorities received the acting positions at that time even though they placed lower on the list than did Hanford.

\*9 Hanford testified that he asked Lamb in writing for the reasons he was passed over and how he could improve his work performance. He testified that Lamb told him that he was not deficient in any way and specifically that the fact that he was a public safety officer rather than a road trooper was not why he failed to get the promotion. Lamb told him that this was a favorable consideration. Hanford testified further that Lamb told him that the real reason why he did not receive the promotion was because he had been told "by Springfield" to promote a minority. Hanford also testified that at the time of the appointments he was in fact working on the road, and not until June, 1992, was he made the public information officer. He also had made it clear that he was willing to go back on the road if he received the promotion. Lamb denied that he told Hanford that he had been instructed to promote an African-American. Lamb however did put in a memorandum to Deputy Director Thomas L. Schumpp, dated October 25, 1993, that affirmative action was a consideration in the promotion of Baldwin over Hanford.

This case is also close. The court finds by a preponderance of the evidence that the appointment of Baldwin over Hanford was a result of affirmative action and not for the stated reason: the unanimous staff support. Accordingly the court finds in favor of Hanford and against the defendants on his promotion claims.

***Lester Robert***

Since Robert also applied for promotion out of District 5 his case is quite similar to Hanford's. Robert was No. 4 on the list and therefore passed over for promotion by Baldwin. Captain Lamb's staff also passed him over. He had been likewise passed over for the acting position in favor of minority candidates. Accordingly the court finds in favor of Robert and against the defendants on his promotion claims.

***Jesse Bean***

Bean was No. 2 on the promotional list in District 8 right behind Fred Winterroth. He likewise was passed over for promotions which went to Terry Banks, an African-American and to Debra Dell, a white female. Banks was No. 3 on the list and Dell was No. 9. Captain Keith Karsted testified that Banks was a better candidate than Bean but he gave no explanation why Dell was given the preference. In fact he admitted that Dell did not have much support from the staff. Accordingly the court finds that Bean was passed over for affirmative action reasons, much the same as was Winterroth. The court therefore finds in favor of Bean and against the defendants on his promotional claims.

***James Bolerjack***

Bolerjack was a sergeant in District 5 and was seeking a promotion to the rank of Master Sergeant. He was No. 1 on the 1990 master sergeant's list and was passed over by the only two others on the list, including No. 3 Lloyd Burchett, an African-American. The stated reason given by Captain Lamb was lack of support for Bolerjack from the command staff at District 5. Lamb had only been at District 5 for two months prior to the promotion which was why he sought staff input. The other one on the list was also a white male who Lamb said also had more support from the staff. Bolerjack testified, without contradiction from Lamb, that he was told by Lamb that he did not receive the promotion because the position was for a road master sergeant, but that he, Bolerjack, had an administrative position. However Bolerjack pointed out, again without contradiction, that the road master sergeant position is in fact an administrative position and, in addition, he, Bolerjack, had 22 years experience on the road, two of which as a sergeant.

\*10 This case is also close but the court finds that Bolerjack has met his burden of proof and has shown that the stated reason, the vote of the command staff, was pretextual and he was passed over for reasons of race. Accordingly the court finds in favor of Bolerjack and against the defendants on the promotion claims.

**CONCLUSION**

The court finds in favor of the class and against the defendants on the Title VII hiring claim.

The court finds in favor of Winterroth, Volle, Hanford, Roberts, Bean and Bolerjack on all of their promotion claims.

The court finds in favor of Myers in his § 1981 claim, but in favor of defendants on his Title VII claim.

The court finds against Koski, Bishop, Mobley, Myers, Sweeney and Harte on all of their promotion claims.

The court denies defendants' Motion to Decertify the Class.

The matter is set for status to discuss remedies on Tuesday, October 14, 1997 at 9:00 o'clock a.m.

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**IT IS SO ORDERED.**