

681 F.Supp.2d 456  
United States District Court,  
S.D. New York.

The PORT AUTHORITY POLICE ASIAN JADE  
SOCIETY OF NEW YORK & NEW JERSEY INC.,  
Christian Eng, Nicholas Yum, Alan Lew, Howard  
Chin, David Lim, George Martinez, Stanley Chin,  
Milton Fong, Richard Wong, Sanrit Booncome and  
Michael Chung, Plaintiffs,

v.

The PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY, Defendant.

No. 05 Civ. 3835(MGC). | Jan. 14, 2010.

### Synopsis

**Background:** Asian-American members of Port Authority Public Safety Department (PSD) brought action alleging that authority had pattern or practice of intentionally discriminating against Asian-Americans in making promotions to sergeant and that PSD's practices for promotion to sergeant had disparate impact on them. The District Court, Miriam Goldman Cedarbaum, J., 601 F.Supp.2d 566, denied officers' motion for sanctions against Port Authority for failure to preserve evidence. After jury returned verdict that seven of eleven plaintiffs had proven discrimination and awarded back pay and compensatory damages to them, Port Authority moved for judgment as matter of law (JMOL) or, in the alternative, for new trial or for remittitur of compensatory damages award.

**Holdings:** The District Court, Cedarbaum, J., held that:

<sup>[1]</sup> use of events more than 180 days prior to filing of Equal Employment Opportunity Commission (EEOC) charge as background evidence for indisputably timely claims was not error that required new trial;

<sup>[2]</sup> disparate impact and pattern or practice claims identified discriminatory policy, and jury was properly permitted to consider acts 180 days or more before filing of EEOC charge under "continuing violations" doctrine;

<sup>[3]</sup> admission of testimony by employees' statistical expert did not warrant new trial;

<sup>[4]</sup> claimed inconsistencies in jury verdict did not merit new trial;

<sup>[5]</sup> jury did not lack legally sufficient evidentiary basis to return its verdict on disparate impact and pattern or practice claims, and verdict was not against weight of the evidence; and

<sup>[6]</sup> while \$250,000 compensatory damages awarded to two employees were extremely large, they did not shock the conscience and would not be subject to remittitur.

Motion denied.

### Attorneys and Law Firms

\*459 Paul, Weiss, Rifkind, Wharton & Garrison LLP, by Karen R. King, Esq., Susanna M. Buerger, Esq., Jane B. O'Brien, Esq., Allison Grodin Weiss, Esq., New York, NY, for Plaintiff.

The Port Authority of New York and New Jersey Milton H. Pachter, Esq., by Kathleen Gill Miller, Esq., Kathleen M. Collins, Esq., Caren K. Lee, Esq., New York, NY, for Defendant.

### Opinion

#### *OPINION*

CEDARBAUM, District Judge.

Plaintiffs sue the Port Authority of New York and New Jersey ("Port Authority") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, for discriminating against Asian-American officers in making promotions to Sergeant. The jury trial began on March 11, 2009, and the jury returned its verdict on March 26, 2009. The Port Authority now moves for judgment as a matter of law, or in the alternative, for a new trial or for a remittitur of the jury's compensatory damages award. For the following reasons, the Port Authority's motion is denied in its entirety.

## BACKGROUND

### I. The Parties

The Port Authority is a bi-state agency created by compact between the States of New York and New Jersey to develop transportation facilities in the New York metropolitan area. The Port Authority's thirteen facilities are policed by the Port Authority's Public Safety Department.

The plaintiffs are eleven Asian-American members of the Port Authority Public Safety Department. All of the plaintiffs began their careers with the Department as Officers. Christian Eng was hired in 1977, David Lim in 1980, Richard Wong in \*460 1983, Milton Fong in 1985, Howard Chin and Alan Lew in 1987, and Stanley Chin in 1988. George Martinez and Nicholas Yum joined in 1993, and both Michael Chung and Sanrit Booncome in 1999.

The Port Authority Police Asian Jade Society of New York and New Jersey ("Asian Jade Society") is a fraternal organization of Port Authority Police officers of Asian or Pacific Islander descent. Each plaintiff is a member of the Asian Jade Society.

### II. The Port Authority's Promotion Process

The entry-level rank in the Public Safety Department is Officer. To be eligible for promotion to Sergeant, a police officer must have served two years as an officer or detective as of the date of the Sergeant's Examination, meet certain attendance requirements, and pass the examination. Beginning in 1996, all officers who passed were equally eligible for promotion without regard to their score. Once the exam was scored, a list of officers eligible for promotion was circulated.

The commanding officers of the various facilities were charged with recommending eligible officers for promotion. Some commanding officers made the recommendations themselves, while others delegated full authority to the officers' direct supervisors. Still others made the recommendations themselves after receiving advice from the direct supervisors.

The Public Safety Department had no set criteria or protocol for recommendation for promotion. The factors relevant to promotion and the weight assigned to those factors varied among the commanding officers. An officer's supervisor or commanding officer completed a "Performance Appraisal Form" only after selecting that

officer to be recommended for promotion. The form required the supervisor to rate the officer on a scale from "unacceptable (clearly below standard)" to "outstanding (among the very best)."

From 1996 to 2001, the next step in the promotion process was the so-called Chiefs' Board, at which the chiefs and deputy chiefs would review the promotion folders of the officers recommended for promotion. During Superintendent Morrone's tenure, no minutes or notes were taken of meetings of the Chiefs' Board. Chief Farrell testified that during that time, the chiefs of each command advocated for the candidates put forth from that command. (Trial Tr. 194, March 13, 2009.) The Chiefs' Board then decided which officers to recommend to the Superintendent, who made the final decision.

Chief Morris assumed the role of Acting Superintendent shortly after Superintendent Morrone was killed on September 11, 2001. Instead of using a Chiefs' Board, he solicited recommendations for promotions from deputy chiefs, who in turn asked the assistant chiefs to collect recommendations from the commanding officers of each facility. Once the recommendations were made, the assistant chiefs decided among themselves which officers to recommend to the deputy chiefs. The deputy chiefs then reviewed those and made recommendations to Chief Morris for promotion.

Charles DeRienzo became the Superintendent of Police in April 2002. He reinstated a Chiefs' Board comprised of all chiefs and the Acting Superintendent, but excluded himself and Chief Morris. At these meetings, the chiefs voted after every candidate was discussed. Officers receiving a majority in favor of promotion were recommended to the Superintendent. A memorandum listed the officers recommended for promotion and those not recommended with the reason why they were not recommended, and, on occasion, the tally of votes for and against each officer.

\*461 Superintendent Plumeri again changed the process when he succeeded Superintendent DeRienzo in 2004. He did away with the Chiefs' Board and made promotion decisions without formal input from the chiefs.

### III. Procedural History

Before 2001, no Asian-American officer had ever been promoted to Sergeant. On January 31, 2001 the Asian Jade Society, on behalf of its members, filed a Charge of Discrimination with the Equal Employment Opportunity

Commission (“EEOC”). The Asian Jade Society received a Right to Sue letter on January 25, 2005. On April 15, 2005, the Asian Jade Society and the individual plaintiffs filed the Complaint in this case. The Complaint alleges that the Port Authority intentionally discriminated against Asian–Americans in making promotions to Sergeant, that the Port Authority had a pattern or practice of intentionally discriminating against Asian–Americans in making promotions to Sergeant, and that the Port Authority’s practices for promotion to Sergeant had a disparate impact on Asian–American officers.

After hearing all the evidence, the jury found that the Port Authority’s promotion practices for Sergeant had a disparate impact upon Asian–American police officers. The jury also found that the Port Authority had a pattern or practice of intentional discrimination against Asian–American police officers, and that plaintiffs Christian Eng, Milton Fong, Alan Lew, Stanley Chin, Nicholas Yum, George Martinez, and David Lim had been discriminated against as a part of this pattern or practice. In addition, the jury found that the Port Authority’s decision not to promote those officers was motivated by their ethnicity.

The jury returned a verdict that Howard Chin, Richard Wong, Michael Chung, and Sanrit Booncome had not proven that they were discriminated against either as part of the Port Authority’s pattern or practice of discrimination or individually. The jury awarded back pay and compensatory damages only to Christian Eng, Milton Fong, Alan Lew, Stanley Chin, Nicholas Yum, George Martinez, and David Lim.

The Port Authority now moves for judgment as a matter of law overturning the jury’s verdict for the successful plaintiffs. It also moves in the alternative for a new trial, or a remittitur.

## DISCUSSION

### IV. The Port Authority’s Motions for Judgment as a Matter of Law or a New Trial

#### A. Standard of Review

##### 1. Rule 50(b) Motion for Judgment as a Matter of Law

<sup>[1]</sup> <sup>[2]</sup> The Port Authority renews its motion for judgment

as a matter of law under Fed.R.Civ.P. 50(b). Rule 50(b) permits the jury verdict to be set aside when the jury “would not have a legally sufficient evidentiary basis to find for the [nonmoving] party on that issue.” Fed.R.Civ.P. 50(a)(1). To grant such a motion, there must be “such a complete absence of evidence supporting the verdict that the jury’s findings could only have been the result of sheer surmise and conjecture” or “such an overwhelming amount of evidence in favor of the movant that [a] reasonable and fair minded” jury could not have returned a verdict in favor of the non-moving party. *Fidelity & Guaranty Insurance Underwriters, Inc. v. Jasam Realty Corp.*, 540 F.3d 133, 142 (2d Cir.2008) (quoting *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir.1992)). When considering a Rule 50(b) motion, all reasonable inferences are drawn in favor of the non-moving party, evidence may not be weighed or assessed for credibility. *Reeves v. Sanderson \*462 Plumbing Prod., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

### 2. Rule 59 Motion for a New Trial

<sup>[3]</sup> <sup>[4]</sup> In the alternative, the Port Authority moves for a new trial under Rule 59(a)(1)(A). A new trial may be granted when “the jury has reached a seriously erroneous result” or when the verdict “is a miscarriage of justice,” that is, when the jury verdict is against the weight of the evidence. *DLC Mgmt. v. Town of Hyde Park*, 163 F.3d 124, 133–34 (2d Cir.1998) (citing *Song*, 957 F.2d at 1047 and *Metromedia v. Fugazy*, 983 F.2d 350, 363 (2d Cir.1992)). Although evidence may be weighed and need not be viewed in the light most favorable to the nonmoving party, I should only grant a new trial if I conclude the jury verdict is “egregious.” *DLC Mgmt.*, 163 F.3d at 134 (citing *Song*, 957 F.2d at 1047).

## B. Analysis

### 1. Statute of Limitations

At trial, the jury was permitted to consider events prior to August 2, 2000 (180 days prior to the filing of the EEOC charge) for two distinct purposes. First, those events could be considered as evidence bearing on whether the Port Authority made a discriminatory decision not to promote a particular plaintiff after August 2, 2000. Second, under

the “continuing violations” doctrine, the jury was permitted to consider whether events that occurred before August 2, 2000 could give rise to liability if they were part of an “ongoing policy of discrimination” that persisted into the limitations period, that is, after August 2, 2000.

#### **a. Introduction of Evidence that Arose Before August 2, 2000.**

<sup>161</sup> The Port Authority first argues that the use of events prior to August 2, 2000 as background evidence for indisputably timely claims was error that requires a new trial. At the outset, this argument confuses the limitations period on a claim with the admissibility of evidence relating to that claim. Otherwise admissible evidence does not become inadmissible if the statute of limitations would have run on a claim that arose on that date. As the Supreme Court commented in *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the statute of limitations does not “bar an employee from using ... prior acts as background evidence in support of a timely claim.” Moreover, it is reversible error to preclude otherwise admissible evidence solely because it dated to a time when a claim would have been time-barred. *Jute v. Hamilton Sundstrand*, 420 F.3d 166, 175 (2d Cir.2005). Evidence from a truly remote period may be precluded under Fed.R.Evid. 403 but only because its probative value is attenuated by the passage of time. The Port Authority’s argument that I erred by permitting the jury to consider events that occurred before August 2, 2000 as background evidence for timely claims is therefore without merit.

#### **b. Substantive Claims**

The Port Authority’s second argument is that the verdict cannot stand because the jury was permitted to consider liability for events before August 2, 2000 for the plaintiffs’ pattern and practice and disparate impact claims.

##### **i. The Limitations Period for Title VII Claims**

<sup>171</sup> Title VII prohibits certain “employment practices.” 42

U.S.C. §§ 2000e–2(a). To preserve a claim, a plaintiff must file an EEOC charge within 180 or 300 days after the complained-of practice “occurred.” 42 U.S.C. § 2000e–5(c). In determining the timeliness of a Title VII claim two interrelated \*463 questions must be considered: “what [is the] ‘unlawful employment practice’ ” at issue, and “when has that practice ‘occurred.’ ” *Morgan*, 536 U.S. at 110, 122 S.Ct. 2061. As the Supreme Court noted in *Morgan*, the timeliness of any claim “varies with the practice.” *Id.*

<sup>181</sup> At one end of the spectrum, certain practices are “discrete acts” that occur at a particular moment in time. *Id.*, at 114, 122 S.Ct. 2061. Almost by definition, an untimely claim based upon them cannot become timely simply because that claim is related to a timely claim based on another discrete act. *Id.*, at 113, 122 S.Ct. 2061.

<sup>191</sup> On the other end, certain practices are “continuing violations.” These claims are based on an “ongoing policy of discrimination,” that is, a single unlawful employment practice comprised of events extended over time. Because such a claim encompasses the entire unlawful employment practice, events outside the statutory period may give rise to liability. *Id.*, at 118, 122 S.Ct. 2061.

The plaintiffs’ individual disparate treatment claims are examples of “discrete act[s].” Each claim is based on a particular, isolated decision (or decisions) not to promote a plaintiff motivated by ethnicity. Thus, the jury was instructed that it could only find the Port Authority liable if the decision (or decisions) in question had been made after August 2, 2000. (Trial Tr. 1307, March 24, 2009; Verdict Form, Part Three, pp. 5–7.)<sup>1</sup>

<sup>1</sup> The jury’s verdict that plaintiffs Eng, Fong, Stanley Chin, Lew, Martinez, Yum, and Lim were each discriminated against after August 2, 2000 was by itself sufficient for the jury to award each of them back pay and compensatory damages.

The Port Authority proffers two—largely interrelated—reasons why the plaintiffs’ disparate impact and pattern or practice disparate treatment claims are not continuing violations. First, it contends the “continuing violations” doctrine is inapplicable because the plaintiffs failed to identify a discriminatory policy. Second, it asserts that *Morgan* limits the “continuing violations” doctrine to hostile work environment claims, and requires discriminatory policies to be analyzed as “discrete acts.”

**ii. The plaintiffs' disparate impact and pattern or practice claims properly challenged a discriminatory policy.**

The plaintiffs' disparate impact and pattern or practice claims each charged that the Port Authority's practices for promotion to Sergeant discriminated against Asian-American police officers. Because the unlawful employment practice at issue was an "ongoing discriminatory policy," each claim is a "continuing violation," not a discrete act.

A disparate impact claim challenges an employment practice that causes an imbalance in opportunities among protected groups. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (to make out a prima facie case, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact"); *Gulino v. New York State Dept. of Ed.*, 460 F.3d 361, 382 (2d Cir.2006) (quoting *New York City Tran. Auth. v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979) (defining "disparate impact" as when "an employment practice has the effect of denying the members of one race equal access to employment opportunities.")). To press a disparate impact claim, the plaintiffs must identify a particular employment practice. In this case, the plaintiffs identified the Port Authority's practices for promotion to sergeant. Although the Port Authority's practices were occasionally altered during the relevant period, the overall policy was continuously maintained from 1996 until at least August 2, 2000.

\*464 The Port Authority makes the subsidiary argument that the plaintiffs failed to identify which element of the Port Authority's promotion practices caused a discriminatory impact. While § 2000e-2(k)(1)(B)(i) provides that a plaintiff must demonstrate that each challenged practice causes a disparate impact, that subsection goes on to provide that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." *Id.* See also *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir.2003) (quoting § 2000e-2(k)(1)(B)(i) ..)

<sup>110]</sup> The Port Authority's process for making promotions from the list of eligible officers was comprised of several steps. But these steps cannot be separately analyzed both because records do not exist for every step and because

the causal role of each step is called into doubt by the records that do exist. For example, Superintendent DeRienzo testified that he could not recall ever having promoted someone not recommended by the Chiefs' Board. (Trial Tr. 261-62, March 13, 2009.) At a Chiefs' Board in 2003 during his tenure, Plaintiff Nicholas Yum received a unanimous vote in favor of promotion. (Pls.' Ex. 18.) At another Chiefs' Board on January 7, 2003, Peter Hernandez was given a "No" recommendation, with five votes against, three for, and the notation "Sick History Record." (Pls.' Ex. 17.) Steven Grossi's vote stalemated at the January 7, 2003 Chiefs' Board. (*Id.*) Grossi and Hernandez were promoted on January 24, 2003; Nicholas Yum was not promoted until October 2005. (Pls.' Ex. 28.) In sum, for many of the plaintiffs, all that could be shown is whether they were recommended and that they were ultimately not promoted.

Because the role of each step cannot be determined, the steps cannot be examined separately to discover whether a particular step causes a disparate impact. The jury was instructed to consider whether the decision making process as a whole caused a disparate impact if the steps of the process could not be separated for analysis. (Trial Tr. 1304, March 24, 2009.) Therefore, the Port Authority's practices for promotion to Sergeant are properly analyzed as a continuously maintained discriminatory policy that caused a disparate impact on Asian-American police officers.

<sup>111]</sup> <sup>112]</sup> <sup>113]</sup> A pattern or practice claim is a means of challenging a persistent "unlawful employment practice," that is, an enduring policy or custom of intentional discrimination. See *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2001) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). Pattern or practice claims are defined in opposition to "discrete acts"; a pattern or practice can only be found when the practice is of such a "routine, or of a generalized nature" that it is the defendant's "standard operating procedure." *Int'l Bhd. of Teamsters*, 431 U.S. at 336, n. 16, 97 S.Ct. 1843; *Robinson*, 267 F.3d at 160. The Port Authority now argues that the plaintiffs failed to identify a specific discriminatory policy or general practice of discrimination. This is incorrect. The plaintiffs consistently argued that intentional discrimination was so pervasive in the Port Authority's practices for promotion to sergeant that it amounted to a discriminatory policy or custom. This is a sufficient identification to proceed on a pattern or practice theory. *Cf., Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 303, 97 S.Ct. 2736, 53 L.Ed.2d 768

(1977) (attorney general's "pattern or practice" suit identified "standardless and highly subjective" hiring practices); \*465 *Robinson*, 267 F.3d at 154 (company-wide policy of delegating discipline and promotion procedures to supervisors allegedly resulted in a pattern or practice of intentional discrimination.) Thus, the plaintiffs' pattern or practice claim properly challenged a discriminatory policy or custom.

**iii. Title VII claims that challenge a discriminatory policy are analyzed as "continuing violations."**

Next, the Port Authority argues that *Morgan* limits the "continuing violations" doctrine to claims involving a hostile work environment and therefore, both the plaintiffs' disparate impact and "pattern or practice" claims must be analyzed as "discrete acts."

The Second Circuit developed the "continuing violations" doctrine to address the problem of longstanding discriminatory policies and customs. In a series of cases, the Court of Appeals rejected the argument that only plaintiffs to whom the policy was applied within the limitations period could sue. Instead, the Court of Appeals held that "a continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy" and "all plaintiffs injured by ... adherence to that policy are therefore entitled to relief." *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir.1978); *The Guardians Association of the New York City Police Department et al. v. Civil Service Commission (Guardians III)*, 633 F.2d 232, 251 (2d Cir.1980) (citing *Acha*, 570 F.2d at 65). See also *Association Against Discrimination v. Bridgeport*, 647 F.2d 256, 274 (2d Cir.1981); *Lambert v. Genesee Hospital*, 10 F.3d 46, 53 (2d Cir.1993) (citing *Association Against Discrimination v. Bridgeport*, 647 F.2d at 274).

<sup>14</sup> The Port Authority argues that the Supreme Court's holding in *Morgan* restricts the Second Circuit's continuing violations doctrine to cases involving a hostile work environment. In support, the Port Authority points to the Supreme Court's statement in *Morgan* that "discrete acts such as termination, failure to promote, denial of transfer ... are easy to identify" and that Title VII "precludes recovery for discrete acts ... that occur outside the statutory time period." *Morgan*, 536 U.S. at 105, 114, 122 S.Ct. 2061. From this, the Port Authority concludes that any unlawful employment practice touching on one

of these acts (e.g. promotion, e.g.) is a "discrete act."

But that is not the holding of *Morgan*. *Morgan* did not involve a "pattern-or-practice" claim, or any claim, other than that of a hostile work environment, which would be a proper "continuing violation" under the Second Circuit's doctrine. The "continuing violation" at issue in *Morgan* was analyzed under the Ninth Circuit's "serial violation" theory, which permits a series of "related acts" to be treated as a single "continuing violation." *Morgan*, 536 U.S. at 107, 122 S.Ct. 2061. The Supreme Court held that a series of related but ultimately discrete acts could not be treated as a single unlawful employment practice. *Id.*, at 114, 122 S.Ct. 2061. This is in keeping with the Second Circuit's pre-*Morgan* precedent. Compare *Lambert v. Genesee Hospital*, 10 F.3d 46, 53 (2d Cir.1993) (multiple similar instances of discrimination cannot form a continuing violation unless they stem from a discriminatory policy or mechanism) with *Morgan v. National Railroad Passenger Corporation*, 232 F.3d 1008, 1015 (9th Cir.2000) (a continuing violation may be shown by a "series of related acts").

The contrast *Morgan* drew was between "discrete acts" on the one hand and ongoing unlawful employment practices, which includes a hostile work environment, on \*466 the other. A hostile work environment, the *Morgan* court noted, "cannot be said to occur on any particular day" and is based on the "cumulative effect of individual acts." *Id.*, at 116, 122 S.Ct. 2061. Each act that contributed to that environment "encompass[es] a single unlawful employment practice." Thus, a hostile work environment claim is timely as long as it is filed within 180 or 300 days of an act that was part of that hostile work environment. *Id.*, at 118, 122 S.Ct. 2061.

The continuing violations at issue in this case demand an analysis analogous to *Morgan's* treatment of a hostile work environment. Every act that was part of those discriminatory policies was part of a single, ongoing unlawful employment practice that did "not occur on any particular day." In a recent § 1983 case, the Second Circuit relied on *Morgan* for the proposition that the "continuing violation doctrine can be applied when the plaintiff seeks redress for injuries resulting from 'a series of separate acts that collectively constitute one 'unlawful act ...' ' " *Shomo v. City of New York*, No. 07-1208-cv, 2009 WL 2462213, 2009 U.S.App. LEXIS 23076 (2d Cir. August 13, 2009). Because the plaintiffs' disparate impact and pattern or practice claims each challenged a single, ongoing unlawful employment practice, the jury was properly permitted to consider acts 180 days or more

before the filing of the EEOC charge under the “continuing violations” doctrine.

## 2. Dr. Cavanaugh’s Testimony

<sup>[15]</sup> The plaintiffs offered the testimony of Dr. Cavanaugh, a statistical expert. The Port Authority now argues that his testimony was inadmissible and a new trial is required to correct this error. At the outset, I note that the Port Authority did not move *in limine* to preclude Dr. Cavanaugh’s testimony, and that the trial transcript reveals no clear objection to his testimony under Rule 702. Failure to make an objection either *in limine* or at trial ordinarily constitutes waiver. *See United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir.1995); *see also* Fed.R.Evid. 103.

<sup>[16]</sup> <sup>[17]</sup> In any event, the Port Authority’s argument addresses the weight of Dr. Cavanaugh’s testimony, not its admissibility. Under Rule 702, as interpreted by the Supreme Court in *Daubert v. Merrell Dow Pharma.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny, expert testimony that will assist the jury in understanding the facts at issue is admissible if the expert uses reliable methods and properly applies them to the facts in the case at hand. The Port Authority’s principal objection to Dr. Cavanaugh’s testimony is that his analyses did not consistently show statistical significance at the 5% level.<sup>2</sup> It is correct that statistical significance at the 5% level is generally “sufficient to warrant an inference of discrimination.” *Smith v. Xerox Corp.*, 196 F.3d 358, 366 (2d Cir.1999). But evidence is not inadmissible because it does not itself make out a prima facie case for its proponent. Dr. Cavanaugh presented the results of his analyses to the jury and then explained why, in his opinion, they were significant given the sample size at issue. The Port Authority had a full opportunity to cross-examine Dr. Cavanaugh. Its own expert, Dr. Zellner, disagreed with Dr. Cavanaugh’s choice of groups for comparison, but did not “have any concerns” about his choice of statistical methods or his application of those methods to that data set. (Trial Tr. 986, March 19, 2009). My role is to act as a gatekeeper, and permit evidence that uses accepted statistical methods properly applied to the facts of \*467 the case. It is the jury’s role to decide between competing conclusions based on the data and analysis. Therefore, the admission of Dr. Cavanaugh’s testimony does not warrant a new trial.

<sup>2</sup> Put otherwise, some of Dr. Cavanaugh’s analyses showed that the observed distribution would occur by chance more than 5% of the time.

## 3. The Jury Verdict and the Verdict Form

### a. The Jury Verdict

<sup>[18]</sup> As noted above, the jury returned a verdict in favor of the Port Authority on the “pattern or practice” claims of plaintiffs Howard Chin, Wong, Chung, and Booncome, and awarded those plaintiffs no damages. The Port Authority asserts that the jury verdict is inconsistent and thus merits a new trial. A jury verdict may be set aside for inconsistency only if it is “ineluctably inconsistent,” that is, when there is no rational means of harmonizing the jury’s answers. *Munafu v. Metropolitan Transportation Authority*, 381 F.3d 99, 105 (2d Cir.2004).

<sup>[19]</sup> <sup>[20]</sup> The first alleged inconsistency is that the jury’s finding that the Port Authority’s promotion practices for Sergeant had a disparate impact upon Asian–American police officers is inconsistent with the jury’s decision not to award any back pay to Howard Chin. The jury was free to conclude that Howard Chin would not have been promoted even absent the disparate impact and therefore was not entitled to back pay. *See EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110, 122–23 (2d Cir.1999). The Port Authority also attempts to cast the jury’s “pattern or practice” verdict as inconsistent because the jury did not return a verdict for every plaintiff on that claim. This is not inconsistent. Each of the eleven plaintiffs was required to prove, by a preponderance of the credible evidence, that he was discriminated against as part of that pattern or practice. The fact that the jury found that several plaintiffs had not met that burden does not render the verdict inconsistent. Because the jury verdict can be harmonized rationally, it cannot be overturned as inconsistent.

### b. Verdict Form

The Port Authority argues that a new trial is required because the jury failed to understand the verdict sheet and

was “confused as to whether this was a class action.” (Def.’s Mem. at 28.) There is simply no reason to believe that the jury was confused about whether the action was a class action. The jury answered separate questions and evaluated damages separately for each plaintiff. Second, it is understandable that the jury would seek further guidance about the meaning of the complex questions this case presented. The fact the jury asked for clarification does not suggest that the jury failed to understand the verdict sheet. Finally, my instruction that the jury was required to find disparate impact after August 2, 2000 in order to return a verdict for the plaintiffs on that claim accurately states the law and did not “direct a verdict against the Port Authority.”

### c. The Jury’s Back Pay Award

The Port Authority maintains that the jury’s back pay award must be vacated because it awarded back pay beginning as early as October 31, 1999. 42 U.S.C. § 2000e–5(g)(1) provides that back pay cannot be awarded from a date earlier than two years prior to the filing of a charge with the EEOC. The plaintiffs’ EEOC charge was filed on January 31, 2001. Two years prior to that date is January 31, 1999. The jury’s back pay award for three plaintiffs exactly matches the back pay plaintiffs’ expert calculated would be due had those plaintiffs been promoted on October 31, 1999. October 31, 1999 is within the two-year statutory period. The Port Authority’s argument that back pay cannot be awarded from a \*468 time more than 180 days before the filing of the EEOC charge in effect reargues the statute of limitations issue that I addressed above.

## 4. Sufficiency and Weight of the Evidence

The Port Authority also moves for judgment as a matter of law on the ground that the jury lacked a legally sufficient evidentiary basis to return its verdict on the plaintiffs’ disparate impact and pattern or practice claims, or for a new trial on those claims on the ground that the verdict is against the weight of the evidence.

[21] [22] The main thrust of the Port Authority’s argument is that the statistical evidence presented by plaintiffs’ expert, Dr. Cavanaugh, was insufficient to support the jury’s findings of disparate impact and a pattern or practice of

intentional discrimination. As the Port Authority points out, statistical significance at the 5% level is generally “sufficient to warrant an inference of discrimination.” *Smith*, 196 F.3d at 366; *see also Ottaviani v. State University of New York at New Paltz*, 875 F.2d 365, 371 (2d Cir.1989) (significance at 5% level supports an inference of discrimination); *Waisome v. Port Authority*, 948 F.2d 1370, 1376 (2d Cir.1991) (statistical disparity of “two or three standard deviations ... is generally highly probative of discriminatory treatment”). That said, the Court of Appeals has cautioned that “where statistics are based on a relatively small number of occurrences, the presence or absence of statistical significance is not a reliable indicator of disparate impact.” *Waisome*, 948 F.2d at 1379. In such an instance, “other indicia raising an inference of discrimination must be examined.” *Id.* *See also International Brotherhood of Teamsters v. T.I.M.E., Inc.*, 431 U.S. 324, 340, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (warning that “[the usefulness of] statistics depends on all of the surrounding facts and circumstances”).

At trial, Dr. Cavanaugh presented an analysis comparing the promotion rates of eligible Asian–American officers with that of eligible White officers. Dr. Cavanaugh used the Fisher Exact Test to calculate the likelihood of observing the promotion rates between the two groups under the hypothesis that the observed distribution is due to chance.<sup>3</sup> Dr. Cavanaugh determined that between August 1996 and January 31, 2001, the Fisher Exact Test returned a p-value of 13%. (Trial Tr. p. 729, March 17, 2009) According to Dr. Cavanaugh, this means that there is an approximately 13% likelihood of observing by chance the given distribution of Asian–American officers promoted (zero out of twelve) and White officers promoted (36 of 259).(*Id.*) On cross-examination, Dr. Cavanaugh stated that although his results were not significant at the 5% level, he believed that those results were significant because the small sample size made it impossible to provide statistical evidence at the 5% level “even with perfect discrimination.” (Trial Tr. at 754–55, March 18, 2009.)<sup>4</sup>

<sup>3</sup> *See generally*, R.M. Fisher, *On The Interpretation of [Chi-Squared] from Contingency Tables, and the Calculation of P*, 85 J. Royal Stat. Soc’y 87 (1922).

<sup>4</sup> The Port Authority argues that Dr. Cavanaugh “did not take into account the small number of Asian police officers in the entire force.” The factual basis of this argument is unclear given Dr. Cavanaugh’s testimony



and the fact that the Fisher Exact Test uses number of officers in each category to calculate the p-value, reflecting the small number of Asian-American officers eligible for promotion.

The Port Authority's statistical expert, Dr. Zellner, also used the Fisher Exact Test, but instead compared the number of Asian-American officers promoted from all Asian-American officers on eligible lists \*469 between August 9, 1996 and April 15, 2005, with the number of all other officers promoted from all other eligible officers during that time period. She concluded that the Fisher Exact Test returned a p-value of 38.5% for that data set, suggesting an over one-in-three chance that the given distribution would be observed due to chance. (Trial Tr. 954-960, March 19, 2009)

The statistical evidence was not sufficient to either prove or disprove the plaintiffs' claim, and so the jury considered other evidence of discrimination. *See Waisome*, 948 F.2d at 1379. Each plaintiff testified about his qualifications, service record, awards, commendations, and achievements, and the Port Authority had an opportunity to cross-examine each plaintiff.

The plaintiffs presented evidence that the Port Authority's promotion process lacked clear standards and guidelines, and that non-Asian-American officers who may have been less-qualified were promoted, sometimes even after one of the plaintiffs had been recommended for promotion by the Chiefs' Board. The jury deliberated for several days and made a number of requests to review the evidence presented at trial. The jury verdict reflects careful attention to whether each plaintiff had proven his individual claim. Ultimately, I cannot conclude that the verdict could "only have been a result of sheer surmise and conjecture" or that the evidence was so overwhelmingly in favor of the Port Authority that a "reasonable and fair minded" jury could not have returned its verdict. *Fid. & Guar. Ins. Underwriters*, 540 F.3d at 142.

Although I may weigh evidence and draw inferences against the plaintiffs when considering the Port Authority's motion for a new trial, I am satisfied that the jury's verdict is not so erroneous or so contrary to the evidence as to constitute a "miscarriage of justice." *DLC Mgmt.*, 163 F.3d at 133-34.

## II. Remittitur

[23] [24] [25] The Port Authority asks that I remit the jury's compensatory damages award to plaintiffs Christian Eng and David Lim from \$250,000 to \$50,000; from \$100,000 to \$25,000 for plaintiffs Milton Fong and Stanley Chin; and for plaintiff Alan Lew from \$75,000 to \$20,000. Remittitur permits me to put the plaintiffs to a choice between accepting a reduction in the damages awarded or a new trial. *Earl v. Bouchard Transp.*, 917 F.2d 1320, 1328 (2d Cir.1990). When federal law provides the cause of action, remittitur is appropriate when the jury award includes an identifiable error of a quantifiable amount or is so high as to "shock the conscience." *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 165 (2d Cir.1998) (quoting *O'Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir.1988)). In the Second Circuit, the preferred method of calculating a remittitur is to reduce an excessive award to the maximum amount that I would sustain as not excessive. *Martinez v. Port Authority*, 445 F.3d 158, 160 (2d Cir.2006) (citing *Earl*, 917 F.2d at 1330). Comparison to similar cases can help illuminate whether an award is unconscionably high, but the award in a particular case must be seen in light of the facts and circumstances of that case. As a result, it is difficult to discern a consistent practice, notwithstanding the formula that "garden variety" emotional distress claims merit an award between \$30,000 and \$100,000. *See, e.g., Lynch v. Town of Southampton*, 492 F.Supp.2d 197, 207 (E.D.N.Y.2007) (quoting *Watson v. E.S. Sutton, Inc.*, 02 CV 2739, 2005 WL 2170659, 2005 U.S. Dist. LEXIS 31578 (S.D.N.Y. Sept. 6, 2005)).

In certain cases, other judges of this District and of the Eastern District have upheld compensatory damage awards in excess of the \$250,000 award to Christian \*470 Eng and David Lim, or remitted larger awards to a still substantial amount. *See, e.g., Osorio v. Source Enter'rs.*, No. 05 Civ. 10029(JSR), 2007 WL 683985, 2007 U.S. Dist. LEXIS 18725 (S.D.N.Y. March 5, 2007) (upholding a \$4 million compensatory damages award in a Title VII and state-law retaliation case); *Marchisotto v. City of New York*, No. 05 Civ. 2699(RLE), 2007 WL 1098678, at \*11, 2007 U.S. Dist. LEXIS 27046, at \*37-38 (S.D.N.Y. April 11, 2007) (upholding \$300,000 compensatory damages award for retaliation); *Quinn v. Nassau County Police Dep't.*, 53 F.Supp.2d 347 (E.D.N.Y.1999) (\$250,000 compensatory damages award for protracted harassment did not shock the conscience); *Quinby v. WestLB AG*, No. 04 Civ. 7406(WHP), 2008 WL 3826695, 2008 U.S. Dist. LEXIS 62366 (S.D.N.Y. August 15, 2008) (remitting a compensatory damages award of \$500,000 for "garden variety emotional distress" to \$300,000.)

[26] [27] The Port Authority cites *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43, 55 (2d Cir.2002) for the proposition that an award for emotional damages must be supported by "competent evidence" in addition to the plaintiffs' testimony. As that case goes on to hold, "competent evidence" is not limited to medical evidence; the award should be considered in light of the "circumstances of the violation itself." *Id.* The compensatory damages awarded to Christian Eng and David Lim are extremely large. But, I do not conclude that they "shock the judicial conscience."

### CONCLUSION

For the foregoing reasons, the Port Authority's motion is denied in its entirety.

SO ORDERED.