

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ALBERT T. PINA, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 86-0171 P  
 )  
 SECRETARY, UNITED STATES )  
 DEPARTMENT OF TRANSPORTATION, )  
 UNITED STATES COAST GUARD, )  
 )  
 Defendant )

**MEMORANDUM DECISION<sup>1</sup>**

I. Introduction

Albert Pina is a black civilian employee of the United States Coast Guard and is stationed at the Coast Guard's Group Portland Base in South Portland, Maine. Pursuant to 42 U.S.C. ' 2000e-16 (Title VII of the Civil Rights Act of 1964, as amended), he has brought an action against the Secretary of the Department of Transportation based on the Coast Guard's alleged acts of racial discrimination against him. Mr. Pina specifically claims that the Coast Guard (1) has afforded him less opportunity for advancement; (2) has changed his job description and responsibilities in an unfair and discriminatory fashion thereby precluding his eligibility for higher pay; (3) has unfairly required him to report to work earlier in order to take an hour for lunch; and (4) has unlawfully issued a letter of reprimand, either as a result of racial discrimination or in retaliation for the plaintiff's prior complaints of discrimination. The case was tried before this court from January 23 to January 26, 1989. For the reasons set forth below, the court finds that the Coast Guard's actions in relation to Mr. Pina do not constitute racial discrimination under Title VII.

---

<sup>1</sup> Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

## II. Findings of Fact

In April, 1980 Albert Pina was offered and accepted a civilian position with the Coast Guard at its Group Portland base as a supply clerk with a GS-5/2 rating and a salary of \$11,618. Stipulation 1.<sup>2</sup> At the time he was hired he was the only black civilian employee at the base. Transcript pp. 141, 727. As supply clerk, the plaintiff's primary responsibility involved government procurement, i.e., the identification and purchase of items available through the federal supply system. Transcript p. 42. Based on the position description<sup>3</sup> then in force for that position and comments made by his immediate supervisor, Chief Warrant Officer (CWO) Landry, Transcript pp. 43, 50, Mr. Pina understood the job to include the supervision of three to five storekeepers (military personnel) in the supply office, the supervision of a civilian employee assigned to shipping and receiving, maintenance of property records for the 16 Coast Guard units under Group Portland, maintenance of a paint supplies account (Account 83.1) and a clothing locker account,<sup>4</sup> and liaison responsibilities between the 16 units and the district office. Transcript pp. 41, 226. At the outset, Mr. Pina also understood that the job would not involve physical labor in shipping and receiving, Transcript pp. 122, 290; he took the job at least in part because he expected that it would involve supervision, Transcript p. 206.

---

<sup>2</sup> This and following references are to the trial transcript, the stipulations and the exhibits admitted at trial.

<sup>3</sup> A position description enumerates the duties, supervisory controls, methods, guidelines and responsibilities which define a given job. Management reviews the description, assigns a recommended grade and then forwards the position description to the civilian personnel office which reviews it, assesses the described duties against a standard and then classifies the job at the appropriate grade level. Transcript pp. 677-78.

<sup>4</sup> Both the paint and clothing accounts were subsequently "disestablished" in Coast Guard terminology. Exhibit 18, Transcript pp. 449-51. The plaintiff does not press any claim that the disestablishment of the paint account constituted racial discrimination. Transcript p. 616.

The position description in effect at the time Mr. Pina began as supply clerk dated from 1971. It stated, in part, that the civilian employee in this position is to provide continuity as military employees are rotated, to serve in a "quasi-supervisory capacity" to the civilian employee assigned to the supply section and the three to five military employees assigned as storekeepers, to give technical guidance and assistance regarding inventory items, to maintain certain property records, and to supervise the clothing and paint locker accounts. Exhibit 4. The position description further stated that the supply clerk "is given wide latitude for independent action and judgment to select, adapt, apply and interpret the guidelines for any portion of his work," and "has considerable independence in day to day operations." Id.

In practice the "supervisory" and "quasi-supervisory" aspects of the supply clerk position consisted of training and assigning certain of the storekeepers to operate the clothing locker for two hours a week, and to submit the monthly report of clothing locker activity, Transcript pp. 48-49; providing guidance to the commercial procurement storekeepers regarding the availability of items through the government supply system,<sup>5</sup> Transcript p. 51; and preparing all shipping and receiving documents, Transcript p. 52. From the time of the plaintiff's arrival at Group Portland, the supply officer has had difficulties in filling the shipping and receiving position, and thus Mr. Pina's "supervision" over this position has consisted of either requesting assistance from the supply office storekeepers or performing the physical functions himself. Transcript p. 372; Exhibit 43. For example, Mr. Adams, one of the military storekeepers in 1980-82, considered Mr. Pina a colleague, not a supervisor, and helped out in shipping and receiving in the spirit of office collegiality, Transcript pp. 377-78. The plaintiff did not review the clothing locker monthly reports, Transcript pp. 48-49, nor did he sign leave slips, hire or fire, discipline, perform

---

<sup>5</sup> Federal regulations require the government to buy from itself, depending on availability, before buying from commercial vendors. Transcript p. 51.

evaluations or take responsibility for any deficiencies of the other supply office or shipping and receiving employees, Transcript pp. 225-29, 296.

The position also included certain functions not explicitly described in the position description, namely, use of the MILSTRIP<sup>6</sup> procedures which govern intergovernmental agency purchasing, provision of MILSTRIP guidance to the 16 units of Group Portland, and some training and technical assistance to the supply personnel of these units. Transcript p. 62-65. In addition, as of one week after Mr. Pina took the job, the civilian position in shipping and receiving was changed to a military billet,<sup>7</sup> Transcript p. 52. Mr. Pina asked CWO Landry, the supply officer, to include these functions and changes in the position description of his job but Landry retired in August, 1982 without making those revisions. Transcript p. 83. The plaintiff did not pursue this request through available administrative procedures in the civilian personnel office or through any grievance procedure. Transcript pp. 332-34, 701.

James Agar replaced CWO Landry upon the latter's retirement in August, 1982. Transcript p. 437. CWO Agar described Landry's management style as "relaxed" and felt that Landry had not delved deeply enough into details. Transcript p. 438. Agar's arrival coincided with an investigation regarding mismanagement of the paint account and he was involved in the eventual disestablishment of that account. Transcript p. 441. He also recommended and almost immediately implemented the disestablishment of the clothing locker as a result of advice and information he received at a Coast Guard management training session. Transcript pp. 449-50, 623-24. Shortly after his arrival, in October,

---

<sup>6</sup> Military Standard Requisitioning and Initial Procedures. Transcript p. 60.

<sup>7</sup> A billet is a military position which indicates the required rank for that position. Transcript p. 36.

1982, he began the process of rewriting the position descriptions of his two civilian employees, Mr. Pina and Mr. Stepnick, since they were both to some extent inaccurate. Transcript pp. 416, 447.

Accordingly, after meeting with Mr. Pina, CWO Agar made some changes in the supply clerk position description. He eliminated reference to the clothing locker because that had been disestablished. Transcript pp. 448-51. He also eliminated the language indicating that the supply clerk has quasi-supervisory authority over the storekeepers in the supply office because he had not observed any supervisory relationship between the plaintiff and those individuals. Transcript p. 448. Agar added to the position description the MILSTRIP function that the plaintiff had been performing and the plaintiff's liaison responsibilities between Group Portland and the First Coast Guard District in Boston. Exhibit 5. Lastly, Mr. Agar decided to leave the quasi-supervisory language regarding the plaintiff's responsibilities in shipping and receiving because Mr. Pina controlled all of that function's paperwork and directed the military employee regarding handling priority, Transcript pp. 458, 518-19; he did not, however, consider Mr. Pina to be a supervisor since he understood that term to imply responsibility for disciplining, evaluating, leave approval and task direction. Transcript p. 501.<sup>8</sup> Agar defined the term "quasi" to mean "seemingly but not really." Id. The plaintiff concedes that he saw the revised position description by December, 1982, but did not read it carefully, despite a notice from the civilian personnel office to do so, Exhibit 50, and thus did not become aware of the deletions until July, 1983. Transcript p. 92. The position description was sent to civilian personnel for evaluation; that office determined that the position remained at the GS-5 level. Exhibit 6.

---

<sup>8</sup> The civilian personnel office defines a supervisory position as one which confers authority to select, hire, fire, discipline, recommend awards and counsel employees on a regular basis. Transcript pp. 679-80.

In October, 1982, Agar also conducted the mid-year review of Mr. Pina's performance. The form indicates that Mr. Pina's position is non-supervisory, reflects a "fully successful" rating and is signed and dated October 25, 1982 by the plaintiff. Exhibit 11. Under the section listing critical job elements (CJE's)<sup>9</sup> is a handwritten section describing the MILSTRIP function. That section is crossed out, however, because Agar, subsequent to his meeting with the plaintiff, had learned that civilian personnel regulations prohibited evaluation of any critical job element if the supervisor had not observed the performance of that element for at least 60 days; his mistake was in simultaneously adding the MILSTRIP function to the position description and evaluating it before 60 days had elapsed. Transcript pp. 453, 456, 690. The MILSTRIP critical job element was thus crossed out after the plaintiff had signed the mid-year performance review. The review was subsequently misrouted, Transcript pp. 549-50, 554, 557, and the plaintiff did not see it again until July or August, 1983, Transcript p. 87. The MILSTRIP function, although part of the position description as of December, 1982, did not become an evaluated critical job element until the 1985-86 performance appraisal. Transcript p. 552.

---

<sup>9</sup> A critical job element is deemed an essential part of the job; poor performance in such an element indicates a deficiency. Transcript p. 689. Mid-year appraisals provide an opportunity to indicate such deficiencies, but the year-end appraisal is more significant. Transcript pp. 690-91.

In January, 1983 CWO Agar received reports that the plaintiff had been abusing the half-hour lunch policy in effect for civilian employees.<sup>10</sup> Transcript pp. 98-99, 462-63. The plaintiff concedes that he "frequently" took more than a half hour for lunch. Transcript p. 605. The galley, or mess hall, at the Group Portland Base, was too small to accommodate even the number of military personnel on base, and they had priority, so the plaintiff had found it necessary to leave the base to get lunch. Transcript pp. 97, 418, 466. Agar first advised the plaintiff not to continue his practice of taking more than one-half hour for lunch on a regular basis. Transcript p.463. After a second complaint, Mr. Agar observed the plaintiff for a week and confirmed that he was in fact regularly taking an hour for lunch; he also noted that the only other civilian employee under his supervision, Mr. Stepnick, took a half hour for lunch. Transcript pp. 463-64, 468. At this time Deputy Group Commander Jones also informed his staff officers of other complaints of lunch time abuse on the base and reiterated his intent to uphold the half-hour policy. Transcript p. 468. After a consultation with Commander Jones and reference to the Coast Guard's flex-time instruction, Exhibit 21, Agar reached an agreement with the plaintiff which permitted an hour lunch in exchange for an earlier morning arrival. Transcript pp. 103, 465.

Approximately a year later, after the plaintiff filed his formal Equal Employment Opportunity Commission (EEOC) discrimination complaint, this issue resurfaced in the form of general allegations that other employees were violating the lunch time policy. In response to a request from Commander Jones, the plaintiff supplied the names of certain individuals. Commander Jones then specifically contacted the supervising officers of these individuals and reminded them of the importance of enforcing the policy equitably. There is no evidence

---

<sup>10</sup> The plaintiff initially appeared to argue that military personnel were also restricted to a half hour lunch period. Military personnel, however, are required to be on call beyond the normal 7:30 a.m. to 4:00 p.m. working hours and are therefore entitled to an hour lunch within the discretion of the base commander. Transcript pp. 464, 628, 706-07; Exhibit 38.

that the alleged abuse continued after this second reminder from Commander Jones. Transcript pp. 627-28. Nor is there any evidence that any other nonmilitary personnel has requested a one-hour lunch period on a regular basis. The plaintiff is thus the only civilian employee to have such an arrangement.

The annual performance appraisal for the year ending April, 1983 reflects CWO Agar's assessment that Mr. Pina had been "fully successful." Stipulation 5; Exhibit 11. The rating of critical job elements, as set forth in Exhibit 11A, indicates that the paint supply account (the 83.1 stock) was by that date disestablished. The plaintiff's MILSTRIP function is missing from this form. Commander Jones signed the appraisal on July 21, 1983. The plaintiff also signed the appraisal in July, 1983 when he saw it on the civilian secretary's desk, Transcript pp. 114-15, but later asked Agar why he had not been provided an opportunity to review it before its approval and why the MILSTRIP function was crossed out. Transcript pp. 116-17. Agar responded that he had sent in the form because there were no problems with job performance<sup>11</sup> and that he would include the MILSTRIP function on the next review in six months. Transcript pp. 116-17. The plaintiff did not ask Agar to include as a critical job element his supervision over the supply office and shipping and receiving military personnel. Transcript p. 119.

At about the same time, the plaintiff's ongoing frustration with the lack of dependable assistance in shipping and receiving gave rise to the filing of a grievance. On July 26, 1983 one of the military storekeepers in the supply office had refused to unload a shipment, Transcript p. 107, and the plaintiff had reported this to CWO Agar, who informed the plaintiff that shipping and receiving functions, including the physical labor, were his responsibility. Transcript pp.

---

<sup>11</sup> Mr. Agar also testified that it was his practice to discuss a performance appraisal with the employee after it was signed by the group commander and before it was sent to the First District, but in this case it appeared that the secretary had misdirected the form. Transcript pp. 555-57.

120-23. On the same day and in connection with his work in shipping and receiving, the plaintiff aggravated a previous injury to his upper back and neck.

Transcript pp. 123-24. Mr. Pina subsequently filed an informal grievance based on his contention that his position description did not require him to perform the physical aspects of the shipping and receiving job, that CWO Landry had assured him at the time he took the job that a military employee would handle those aspects, and that his status as a disabled veteran prevented the performance of such functions. Exhibit 29. In response, Agar first temporarily and then permanently relieved the plaintiff of any duties requiring heavy lifting and informed the plaintiff of his intention to revise his position description "to more accurately describe [his] duties and responsibilities regarding shipping, receiving, and issues." Exhibit 27. Agar's letter also stated that the plaintiff was still responsible for the "administration and operation" of the shipping and receiving job. Id.

On that basis the plaintiff filed a formal grievance. Commander Michael Perkins served as the deciding officer and issued his final decision in October, 1983. The decision addressed the plaintiff's contention that since April, 1980, the date of his arrival at Group Portland, through the time of the decision he had been required to perform physical duties outside the scope of his past and then current position descriptions.<sup>12</sup> Commander Perkins concluded that the plaintiff had been performing satisfactorily in his "supervisory" capacity over the storekeeper assigned to shipping and receiving, that heavy lifting and physical exertion were never part of his position description, and that Agar was therefore in error when he stated he was relieving the plaintiff of "any duties requiring heavy lifting." Commander Perkins then ordered:

1. That Mr. Pina's immediate supervisor ensure that the Shipping and Receiving Storekeeper billet is covered by a permanent or temporary military personnel at all times such that Mr. Pina only be required to perform supervi-

---

<sup>12</sup> At this point the plaintiff was aware of the deletion of the "quasi-supervisory" language from his position description but he had not mentioned this in his grievance.

sory control and not perform the function itself as required by the currently approved Position Description.

2. That Supply Clerk GC 2005/05 Position be updated to accurately reflect what is required of a person filling that position and a new Position Description be written as soon as possible.

Exhibit 43. Commander Perkins' order did not require the Coast Guard to consider Mr. Pina a supervisor but only prohibited the Coast Guard from requiring him to perform functions not included in his position description. Transcript p. 30. Neither the grievance nor the decision presented any evidence of racial animus toward the plaintiff. Transcript p. 31.

During this time, Commander Jones and CWO Agar were considering a change in the command structure of the supply office. In part as a result of the 1982 investigation concerning missing inventory in the paint supply account and the subsequent elimination of that account, Commander Jones had been considering the addition of a mid-level or branch chief for the supply office. Transcript pp. 618-19. Agar was responsible not only for the supply division but also for the "general messing" (food supply) and the exchange (nonappropriated fund activity), and these other two branches already had mid-level chiefs. Creation of such a position would also help to reduce the instances in which junior military personnel were required to oversee the work of more senior military personnel during the forty to fifty percent of the time that Agar was out of the office dealing with non-supply responsibilities. Transcript pp. 471-72. In February, 1983 Agar drafted a "justification" for a chief billet to be filled by an enlisted military individual of lower rank than himself who would provide "experienced, mature supervision" and signatory authority for commercial purchasing. Exhibit 19; Transcript p. 537. The billet was approved in late 1983. Transcript p. 474.

The plaintiff learned that there would be a new supervisor between himself and CWO Agar about ten days after he received Commander Perkins' October, 1983 grievance decision in his favor. He had gone to Agar to inquire as to when he could expect compliance with the order; Mr. Agar then informed him that a chief

would be coming in within the next month. Transcript p. 136. At about the same time, Mr. Stepnick, the other civilian employee in the supply office who worked as a purchasing agent, learned of the new supervisory position. Transcript pp. 409-10. In December, 1983 or January, 1984 Chief Posgate arrived to fill the new billet. Transcript p. 153. Agar had no control over the selection of Posgate, Transcript p. 498, and discovered after Posgate's arrival that he was ineligible for signatory authority because he was not a commissioned officer. Transcript pp. 546-47. The new chief lacked purchasing and contracting experience and served more of a military function. Transcript pp. 351, 401-02. Chief Posgate was with the supply office for several months before employees became accustomed to sending their leave slips to him rather than to Agar. Transcript p. 496.<sup>13</sup> After Chief Posgate's arrival, Agar rewrote Section III of the plaintiff's position description; an amendment dated December, 1983 placed the plaintiff under Chief Posgate's immediate supervision. Exhibits 7, 36.

In response to these events, the plaintiff filed an informal racial discrimination complaint with the EEO officer in Boston in December, 1983. Transcript p. 143. There followed at least one meeting among the officer, Mr. Agar, and the plaintiff, and at some point during this period Mr. Agar suggested that the plaintiff take over responsibilities in small purchasing. Transcript pp. 316, 491-92. The plaintiff was dissatisfied, however, over the Coast Guard's lack of response to his proposal that his supervisory responsibilities be restored, and filed a formal complaint of discrimination on April 5, 1984. Transcript p. 149; Exhibit 3. In that complaint the plaintiff alleged that the Coast Guard discriminated against him in failing to identify and provide training; in requiring him but not others to come in early in order to take an extended lunch period; in assigning a storekeeper chief as his supervisor; and in

---

<sup>13</sup> Chief Posgate is no longer at the Group Portland base and the billet has been removed from the supply office. Transcript pp. 193, 376.

gradually removing other responsibilities which had been part of his job when he first arrived in 1980. Exhibit 3.

Several weeks later, the plaintiff was again without assistance in shipping and receiving. Because no one else was available and despite CWO Agar's memorandum relieving the plaintiff of any duties requiring heavy lifting, the plaintiff went down to shipping and receiving and, in the course of wrapping a package, cut his finger. Transcript pp. 157-58. After seeking medical attention, he returned to the base and went to Commander Jones to ask why the Coast Guard had not yet complied with Commander Perkins' order regarding shipping and receiving personnel. When Commander Jones learned that the plaintiff had been in shipping and receiving voluntarily and under no order, he stated that the plaintiff should have spoken to his supervisor. Transcript pp. 160, 323, 645. Commander Jones then informed the plaintiff that his position description had been rewritten; since the plaintiff had last seen the position description in rough draft form, he left Commander Jones' office to get a copy of the final version from the civilian secretary. Transcript p. 161. He then decided to take some sick leave. Id. When he returned the next morning he had an angry exchange with Chief Posgate, who had asked him to put down his newspaper. As a result, Chief Posgate and CWO Agar issued a letter of reprimand to the plaintiff based on charges of AWOL and abusive language. Exhibit 44.

Realizing that issuance of the letter did not comply with regulations which require prior consultation with an EEO officer in the event of any disciplinary action against an employee who had a pending EEO complaint, Exhibit 35, the Group Portland command rescinded the April 27 letter of reprimand. Exhibit 45. In the same communication, however, the Commander indicated that since the issuance of the April 27 letter he had consulted with the EEO officer through the civilian personnel office on May 4; accordingly he reissued the same letter of reprimand dated May 8, 1984. Exhibit 46. The plaintiff subsequently added to his EEO discrimination complaint the claim that this second letter had been illegally issued. Exhibit 24, p. 2.

During the winter of 1984, CWO Agar had been working on the rewrite of the plaintiff's position description as ordered by Commander Perkins. On February 10 he sent to the plaintiff copies of general classification standards for a GS-5 supply clerk; the plaintiff returned these to him on February 21 with no comment.

Transcript pp. 492-94. Agar then submitted the proposed position description to the First District; it was evaluated by the civilian personnel office on May 1, 1984, Exhibit 8, and went into effect that month, Transcript p. 319.<sup>14</sup> The new position description altered Section III, "Major Duties and Responsibilities," by eliminating any reference to "quasi-supervisory" capacity in the shipping and receiving area and by eliminating the paint account responsibilities. Exhibit 9.

Mr. Agar removed the quasi-supervisory language because Mr. Pina was not providing supervision and because "the terminology itself . . . seemed to be like more trouble." Transcript p. 487. The new position description also added "administrative duties in support of Base Shipping and Receiving function," and travel duties in connection with inventories, training, requisitioning, and inspections. Exhibit 9; Transcript p. 486. The civilian personnel office evaluated this new position description but again determined that the position remained at the GS-5 level. Exhibit 8. The plaintiff had seen a rough draft of this position description but had indicated that he would not approve it until it complied with Commander Perkins' order by putting him in charge of shipping and receiving. Transcript pp. 160, 179. It is the final version of the position description which the plaintiff picked up from the civilian secretary on April 26, 1984. Transcript pp. 160-61.

The performance appraisal for the year ending April, 1984, reflects Mr. Agar's assessment that the plaintiff's performance had been "highly successful."

Exhibit 12. Again, the form indicates that his position is nonsupervisory. Id.

---

<sup>14</sup> EEO regulations require prior consultation with an EEO officer regarding any changes in the job description of an employee who has filed a pending EEO complaint. The civilian personnel office complied with this regulation in relation to the plaintiff's new position description. Transcript p. 714; Exhibits 35, 58.

The appraisal reflects the fact that the paint account was by then disestablished. The plaintiff's MILSTRIP function is not included as a critical job element. Mr. Agar completed the evaluation himself because he felt it would be unfair to the plaintiff if Chief Posgate did it; Chief Posgate had been at Group Portland for only four months as of April, 1984. Transcript p. 559. The April, 1985 performance appraisal also reflects a "highly successful" rating. Exhibit 13. Not until the April, 1986 appraisal does the MILSTRIP function show up as a critical job element. Exhibit 14.

On March 6, 1986 the EEOC found no discrimination on the basis of the plaintiff's claims regarding the lack of training opportunities, the lunch period policy, and the changes in his position description, but it did find that the letter of reprimand had been issued as a result of racial discrimination. Exhibit 25. The Department of Transportation accepted those findings and on April 6, 1986 ordered that the letter and all reference to it be removed from the plaintiff's official and unofficial records. Stipulations 13-14; Exhibit 22. The First Coast Guard District has complied with this order. Exhibit 23.

Since the time the plaintiff arrived at the Group Portland base he has taken advantage of three training opportunities: a 1980 course in commercial procurement procedures, Stipulation 9; a one-day training conference on Minorities Obtaining Career Goals in 1985, Stipulation 10; and a 1985 course in Introduction to Automatic Data Processing, Stipulation 11. He has requested no other training. In 1980, he applied for two positions at higher grade levels but was rejected due to a lack of "sufficient credible experience." Transcript pp. 69-70. He does not allege that these rejections are evidence of racial discrimination. Throughout the time period in question, the plaintiff continued to receive regular within grade increases and has received either "fully" or "highly" successful ratings on his annual performance appraisals. Stipulations 2-8.

### III. Title VII Law

The plaintiff has brought this action under 42 U.S.C. ' 2000e-16(a) of Title VII, which requires that all of the federal government's personnel actions affecting employees such as the plaintiff "shall be made free from any discrimination based on race, color, religion, sex, or national origin." A Title VII plaintiff may proceed under a theory of disparate treatment or disparate impact or both; the former relies on proof of the employer's discriminatory intent or motive and the latter on proof of discriminatory effect due to a facially neutral employment practice.<sup>15</sup>

---

<sup>15</sup> Disparate treatment has been described as:

the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

. . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required

---

under a disparate-impact theory.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

### A. Disparate Treatment

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established rules applicable to the order and allocation of burdens of proof in what have come to be known as disparate treatment cases. In that case, a black civil rights activist alleged that his discharge from employment and his former employer's general hiring practices were racially motivated, while the employer argued that its decisions were justified by the former employee's admittedly illegal protest activities against it. The Court held that:

[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802 (footnote omitted). After noting that factual situations will vary and the prima facie elements should remain flexible, the Court identified a second stage, when "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. Once an employer has met this burden, the plaintiff must show that the employer's stated reason for rejection was in fact pretext. The Court offered examples of evidence which could be relevant to a showing of pretext in the McDonnell Douglas factual context, including evidence that white employees guilty of comparable illegal activities were retained or rehired, evidence of the plaintiff's treatment during his former period of employment, and the employer's general policy and practice regarding minority employment. Id. at 804-05.

Subsequent Supreme Court cases have elaborated upon McDonnell Douglas. In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court permitted the use of statistical evidence at the prima facie case step in a disparate treatment class action; "absent explanation, it is ordinarily to be

expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employers are hired," although Title VII imposes no such requirement and small sample size or lack of correlation between general population figures and the pool of qualified job applicants could detract from the value of such evidence. Teamsters, 431 U.S. at 340 n.20. The Teamsters Court found that the employer's assertions of good faith at step two were inadequate to dispel the plaintiff's prima facie case of systematic exclusion. Id. at 342-43 n.24. The Court also noted that application of the McDonnell Douglas prima facie formula eliminates the two most common legitimate reasons for rejection: lack of qualifications and absence of an employment position vacancy. Id. at 358 n.44.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court clarified any uncertainty regarding the nature of the defendant's burden at step two in disparate treatment cases, stating that it is a burden of production, not persuasion. The Court emphasized that:

[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. . . . The McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question . . . [and] is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Burdine, 450 U.S. at 253, 255 & n.8.

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. . . .

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the

plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion . . . that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at 254-56 (footnotes omitted). Lastly, the Burdine Court rejected the suggestion that an employer must prove by objective evidence that the person hired or promoted was more qualified than the plaintiff.

Title VII . . . does not demand that an employer give preferential treatment to minorities or women. . . . Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Id. at 259.

In a very recent opinion, the Supreme Court has identified another kind of Title VII case which appears to be a subset of the disparate treatment category.

In Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (May 1, 1989), a plurality of the Court announced that, when a Title VII plaintiff has shown that an employer's decision not to promote rests on a mixture of both legitimate and illegitimate considerations and an illegitimate consideration was a "motivating factor," the defendant must then shoulder the burden of proving by objective evidence that the decision would have been the same absent the illegitimate consideration. The

plaintiff in Price Waterhouse was a female candidate for partnership who alleged that she was not made partner because of sex discrimination. The plurality attempted to square its decision with the McDonnell Douglas/Burdine precedents by reasoning that an inquiry into whether the employer's legitimate reason was the real reason for the decision is illogical when the plaintiff has already shown that the real reason rests on both legitimate and illegitimate considerations. Price Waterhouse, 57 U.S.L.W. at 4475. The plurality also departed from earlier precedent in its holding that the plaintiff need not prove as part of her case that the employer would have decided in her favor "but for" its sexual bias, but merely that the employer's decision was tainted by such bias. Id. at 4473-76.<sup>16</sup>

#### B. Disparate Impact

When a plaintiff proceeds on a disparate impact theory, he must, in his prima facie case, show that certain facially neutral practices, such as preemployment testing or promotion criteria, have resulted in a statistical disparity and are thus, even if unintentionally, discriminatory in effect. The employer then has "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" Albemarle Paper Co. v.

---

<sup>16</sup> The only point which commanded a majority was the holding that the defendant must rebut the plaintiff's prima facie case by the less demanding preponderance of the evidence standard which is common in civil litigation, and not by the more rigorous clear and convincing evidentiary standard.

Justice O'Connor's concurrence took exception to the plurality opinion, arguing in part that the statute requires a showing of "but for" causation. She supported a shift of the burden of proof to the defendant but justified such a shift because the plaintiff in Price Waterhouse had introduced direct evidence of sexual discrimination; she distinguished McDonnell Douglas and Burdine on the basis of the fact that evidence of discrimination in those cases had been circumstantial and inferential. Id. at 4481.

Moody, 422 U.S. 405, 425 (1975), quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). If the employer proves job-relatedness, the plaintiff must identify some other practice or criteria which would serve the employer's business interests equally well but which would have a less discriminatory effect; such a showing would be evidence of pretext. Albemarle, 422 U.S. at 425, citing McDonnell Douglas, 411 U.S. at 804-05.

As in disparate treatment cases, the nature of the defendant's burden in disparate impact cases at step two of the evidentiary procedure has required clarification. See discussion of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), supra. A year ago the Supreme Court addressed this issue in Watson v. Fort Worth Bank and Trust, 487 U.S. \_\_\_\_, 108 S. Ct. 2777 (1988). In that case, a black bank teller was repeatedly rejected for a promotion. Her supervisors were white, and the successful applicants were white.

The supervisors relied on subjective judgments in the absence of formal selection criteria. The Court first noted that factual issues and the character of the evidence may differ when the plaintiff need not prove intent, and that, therefore, disparate impact cases usually focus on statistical disparities. A majority of the Court then recognized that an employer's system of decision-making may rely as much on subjective criteria as on standardized tests and agreed, therefore, that such subjective practices may be a part of the plaintiff's prima facie proof in disparate impact cases. Watson 108 S. Ct. at 2787.

Only a plurality of the Court, however, reached agreement on the defendant's burden at step two of a disparate impact case. Relying on congressional intent that employers not be required to grant preferential treatment to any individual group or to adopt quotas, see 42 U.S.C. ' 2000e-2(j), the plurality reasoned that the evidentiary standards should operate as a safeguard against such a Hobson's choice, and concluded, therefore, that the

defendant should bear only a burden of production at step two.<sup>17</sup> Watson, 108 S. Ct. at 2790. Based on the same reasoning, the plurality also held that at step one the plaintiff must identify the specific employment practice being challenged, show statistical disparities substantial enough to raise an inference of causation and produce evidence of the reliability of such statistical evidence. Id. at 2788-89.

On June 5, 1989, the Court, in a majority opinion, resolved, at least for the moment, some of the uncertainties created by Watson. In Wards Cove Packing Co. v. Atonio, 1989 U.S. Lexis 2794 (No. 87-1387 June 5, 1989), nonwhite cannery workers alleged that various employment practices were responsible for the work force's racial stratification. The Ninth Circuit Court of Appeals had held that a comparison of the percentage of nonwhite cannery workers and the percentage of nonwhite noncannery workers made out a prima facie disparate impact case. The Court reversed on this issue, holding that the proper statistical comparison is between the racial composition of the at-issue jobs and that of the qualified populations in the relevant labor market. 1989 U.S. Lexis 2794, 15-16, 22-23. Further addressing the plaintiff's burden in making out a prima facie disparate impact case, the majority explicitly followed the plurality in Watson v. Fort Worth Bank and Trust, 108 S. Ct. at 2788, holding that the plaintiff must identify the specific employment practice being challenged. Id. at 24. The Court also explicitly followed Watson in emphasizing that if on remand the plaintiffs succeed in making out a prima facie case, at step two the employer would have the burden of production, not the burden of persuasion, regarding its business justification for the specifically identified employment practice. Id. at 30-31.

---

<sup>17</sup> The dissent argued that the defendant should shoulder the burden of proof at step two because the plaintiff's prima facie case is proof of discriminatory effect. "Unlike a claim of intentional discrimination, which the McDonnell Douglas factors establish only by inference, the disparate impact caused by an employment practice is directly established by the numerical disparity." Watson, 108 S. Ct. at 2794-95.

### C. First Circuit Interpretation

Although the Supreme Court has broadcast some confusing signals regarding the evidentiary standards applicable to mixed motive Title VII cases, it appears to have reached agreement on the standards applicable to nonmixed motive disparate treatment cases and disparate impact cases. Cases from the First Circuit Court of Appeals provide interpretive guidance.

In Hallquist v. Local 276, Plumbers and Pipefitters Union, 843 F.2d 18 (1st Cir. 1988), the court affirmed a trial court finding that a female plumber had sufficiently established that her employer's proffered nondiscriminatory reason for firing and failing to rehire her was a pretext for sexual discrimination. The court relied particularly on evidence that the employer had taken active measures to retain his male employees and subsequently hired two additional males whose qualifications did not exceed those of the plaintiff; the record also contained direct evidence of disparaging comments about the plaintiff's gender and evidence of the employer's efforts to prevent the plaintiff from performing more complex work for which she was qualified. The First Circuit refused to find a Title VII violation, however, in Keyes v. Secretary of the Navy, 853 F.2d 1016 (1st Cir. 1988), despite the fact that the record showed apparent favoritism towards the white male who got the job after the plaintiff, a black female, was rejected. "Errors in judgment are not the stuff of Title VII transgressions -- so long as the 'mistakes' are not a coverup for invidious discrimination." Keyes, 853 F.2d at 1026.

In Fudge v. City of Providence Fire Department, 766 F.2d 650 (1st Cir. 1985), the First Circuit decided a step one disparate impact issue. In that case, an unsuccessful black applicant to a firefighting training academy alleged that the test-scoring system had a disparate impact on blacks. The lower court found, and the First Circuit agreed, that the plaintiff had failed to make out a prima facie case because the expert evidence did not sufficiently eliminate the possibility that the relatively small sample results showing a statistical

disparity were due to chance; "[w]here a plaintiff relies exclusively on a narrow base of data, . . . it is crucial for the court to consider the possibility that chance could account for the observed disparity." Fudge, 766 F.2d at 658.

#### D. Summary

It is clear that in a racial discrimination case involving a claim of disparate treatment, the plaintiff must establish a prima facie case of racial discrimination, the elements of which may vary with the factual situation but which will, in general, show the plaintiff's membership in a racial minority, his qualifications for an existing position or expected promotion, his application for that position or promotion, his rejection, the subsequent continuing availability of that position and his employer's consideration of other applicants with similar qualifications. McDonnell Douglas, 411 U.S. at 802.

At step two of a disparate treatment claim, the employer must produce evidence of some legitimate nondiscriminatory reason for the rejection, although he need not prove that the proffered reason was the real reason. McDonnell Douglas, 411 U.S. at 802-04; Burdine, 450 U.S. at 254. An employer's assertions of good faith alone are inadequate to rebut a plaintiff's prima facie case, Teamsters, 431 U.S. at 342-43 n.24; the defendant's reason must be legally sufficient to justify a judgment in his favor, Burdine, 450 U.S. at 255.

Once a defendant has met his burden of production at step two, the plaintiff must then persuade the court that the defendant's legitimate reason is but a pretext. Evidence of pretext can include evidence that individuals outside Title VII protection with similar qualifications were subsequently awarded the position or promotion, or evidence of the employer's policy towards minority employment. McDonnell Douglas, 411 U.S. at 804-05. The plaintiff may not prevail at step three, however, by showing merely that the employer misjudged an applicant's qualifications, Burdine, 450 U.S. at 259, or that the employer's decision was based on favoritism, Keyes, 853 F.2d at 1026.

The allocation of burdens in a mixed motive disparate treatment case is less clear due to the questionable precedential value of the plurality opinion in Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (May 1, 1989). Given a similar factual situation which includes specific and direct evidence of unlawful discrimination, as well as direct evidence of legitimate business reasons for a decision not to extend partnership status to an individual protected under Title VII, it appears that such a plaintiff need only show that such discrimination played some part, not necessarily a substantial or determinative part, in the partnership decision. Price Waterhouse, 57 U.S.L.W. at 4473-76. It also appears that, in such a case, the employer must then prove by a preponderance of objective evidence that its decision would have been the same absent the element of sexual discrimination. Id.

In disparate impact cases, the law is now clear that to make out a prima facie case the plaintiff must show that specific facially neutral employment practices have produced a discriminatory effect. In support, the plaintiff should produce statistical evidence comparing the racial composition of the at-issue jobs with that of the qualified population in the relevant job market; this evidence must reveal disparities substantial enough to eliminate the possibility of chance. Wards Cove Packing Co. v. Atonio, 1989 U.S. Lexis 2794 at 17, 22, 27; Fudge v. City of Providence Fire Department, 766 F.2d at 658. The plaintiff may present evidence of the employer's standardized testing practices, as well as subjective criteria. Watson, 108 S. Ct. at 2786. Once the plaintiff has established a prima facie disparate impact case, the defendant has the burden of producing evidence of the relationship between the specific employment practice and job-related requirements. Wards Cove Packing Co. v. Atonio, 1989 U.S. Lexis 2794 at 30. At step three, the plaintiff has the burden of proving that some other practice could serve the employer as well and yet have a less discriminatory effect. Id. at 31-32; Albemarle, 422 U.S. at 425.

#### IV. Conclusions of Law

The plaintiff's first claim is that the Coast Guard has discriminated against him by providing him with less opportunity for training than it provides for similarly situated white civilian employees. The court finds that the plaintiff has failed to prove discrimination on this basis. The evidence establishes that the plaintiff has received training each time he asked for it, and that his supervisors found no need to recommend training for performance of his job since his appraisals were consistently "fully" or "highly" successful. There is no comparative evidence of training opportunities afforded to nonminority civilian employees. Since the plaintiff has failed to make out a prima facie case under either the disparate treatment or disparate impact models, this claim must fail.

The plaintiff also claims that certain changes to his position description were motivated by racial discrimination. These changes consist of the elimination of the plaintiff's duties regarding the clothing locker; the elimination of "quasi-supervisory" authority over the military storekeeper billets in the supply office and in shipping and receiving; and the substitution of an enlisted storekeeper chief as his immediate supervisor in place of a chief warrant officer, a higher rank. The plaintiff sees these changes as a gradual and intentional erosion of the more prestigious aspects of his job which impacts on his eligibility for higher pay. In support of this claim he relies entirely on circumstantial evidence.

The Coast Guard has produced evidence of legitimate nondiscriminatory reasons for the position description changes.<sup>18</sup> Burdine, 450 U.S. at 254. First, it is clear that the Coast Guard as an employer has the right to establish job criteria, duties and organizational structure. Transcript pp. 676-77. In

---

<sup>18</sup> Because the defendant has met its burden of production at step two, the court does not analyze the adequacy of the plaintiff's showing at step one. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

this case, the disestablishment of the clothing locker resulted from the application of valid business considerations of efficiency and sound management.

An employer is not required to continue some aspect of his business merely so that an employee will not suffer the loss of a duty which had been part of the position at the time he was hired.

Elimination of the "quasi-supervisory" language regarding the plaintiff's responsibilities in the supply office had no effect on those responsibilities since the term "quasi-supervisory" had no precise meaning. Both before and after the elimination of the term, the plaintiff continued to provide continuity, convey information, and render technical assistance to his co-workers, functions which are inextricably bound up with the nature of his job as a supply clerk responsible for government procurement. Thus, the elimination of the term eliminated nothing of substance from the scope of the plaintiff's responsibilities. The plaintiff was not performing any of the functions which define a supervisor and in the interests of clarity and accuracy his employer reasonably removed the term.

The plaintiff particularly insists that the elimination of his quasi-supervisory responsibilities over the shipping and receiving storekeeper position is evidence of discrimination because it transformed his job from a white collar supervisory position to a blue collar manual labor position. The evidence shows that, in the 1982 position description, Mr. Agar decided to retain the quasi-supervisory language because the plaintiff did all the paperwork and directed others regarding the priority of items in shipping and receiving. After Commander Perkins' decision that the supply clerk position description did not include responsibilities for the physical aspects of the shipping and receiving function, CWO Agar rewrote the position description to eliminate future uncertainties regarding the scope of the plaintiff's shipping and receiving responsibilities. He reasonably concluded that the retention of the term "quasi-supervisory" could only be a continued source of confusion, especially in light of past and anticipated difficulties in filling the shipping and receiving

storekeeper billet. Agar was under no constraints regarding the content of the position description, and thus could define the job in the manner he saw fit; the grievance decision prohibited only the imposition of responsibilities beyond the scope of those contained in the position description. The Coast Guard has thus met its burden of identifying legitimate nondiscriminatory reasons for elimination of the plaintiff's quasi-supervisory responsibilities over both the supply and the shipping and receiving functions.

The plaintiff also contends that the creation of Chief Posgate's billet, which added a supervisory level between himself and CWO Agar, was a discriminatory act designed to further siphon off his own supervisory responsibilities. The Coast Guard has, however, adequately identified legitimate nondiscriminatory business reasons for the creation of that billet based on concerns of military hierarchy and efficiency.

The plaintiff has not produced any direct evidence of racial animus nor has he succeeded in showing that the proffered legitimate justification for the Coast Guard's actions are pretextual. McDonnell Douglas, 411 U.S. at 804-05. The fact that CWO Agar may have made some mistakes either in office procedure or in management decisions does not constitute the necessary discriminatory intent under Title VII. Burdine, 450 U.S. at 259; Keyes, 853 F.2d at 1026. The presence or absence of the term "quasi-supervisory" in the position description or annual performance appraisals has no effect on the plaintiff's eligibility for higher pay or other positions since it has no objective fixed meaning; it is clear that the removal of this term has had no negative effect on his eligibility for within grade increases or on his performance ratings. Moreover, since the plaintiff has failed to produce any direct evidence of discrimination or to show inferentially the presence of any discriminatory motive, he has failed to establish any claim under a mixed motive theory, see Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469.

The plaintiff next argues that the Coast Guard's lunch break policy and practice have resulted both in disparate treatment of him and disparate impact on

minorities. As legitimate justification for the accommodation reached with the plaintiff whereby he is permitted an hour for lunch in exchange for an earlier morning arrival, the Coast Guard points to the requirement that all civilian employees must work eight hours for eight hours' pay. Although other civilian employees occasionally abused the half-hour lunch policy, the plaintiff has failed to show that the abuse continued after Commander Jones contacted all his supervising officers to remind them that the policy would be enforced. The Coast Guard has thus identified a legitimate nondiscriminatory basis for its lunch hour arrangement with the plaintiff and the plaintiff has failed to show that this reason is a pretext for racial discrimination.

It is also clear that the plaintiff has failed to make out a prima facie case that this lunch policy and practice has had disparate impact on minorities.

To proceed on a disparate impact theory, the plaintiff must produce statistical data<sup>19</sup> which show disparities substantial enough to create an inference of causation and to eliminate the possibility of chance. Wards Cove Packing Co. v. Atonio, 1989 U.S. Lexis 2794 at 17, 22, 27; Fudge v. City of Providence, 766 F.2d at 658. In this case, the plaintiff is the only black at the Group Portland base. A sample of one is simply not sufficient to permit any conclusions about the relationship between the Coast Guard's lunch policy and its effect on other employees; it certainly does not allow for the elimination of the possibility of

---

<sup>19</sup> The plaintiff argues that under Watson evidence proving disparate treatment also proves disparate impact; "[d]isparate impact model proofs are no longer limited to objective criteria so long as the statistical evidence is present." Plaintiff's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law, p. 19. In fact, that decision permits plaintiffs to show that certain employer practices, including the use of subjective criteria, may result in disparate impact, but the decision does not change the requirement that the impact itself be shown through reliable statistical studies.

chance. Accordingly, both the plaintiff's disparate treatment and disparate impact claims based on the lunch policy must fail.

The last claim is that the Coast Guard unlawfully issued the letter of reprimand as a result of racial discrimination. In fact the EEOC has already found that the letter was issued as a result of racial discrimination and ordered that the letter be removed from the plaintiff's official and unofficial records and that all references to it be expunged. The plaintiff presses this claim now only to the extent that he seeks a remedy broader than that ordered by the EEOC.

Plaintiff's Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law, p. 21. This is a matter within the discretion of the court.

42 U.S.C. ' 2000e-5(g); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364-67 (1977). "[T]he purpose of Title VII [is] to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. at 418. In this case, the only Title VII injury suffered by the plaintiff was the receipt of a letter of reprimand; this court has found that the plaintiff's other claims are without merit. Thus, the removal of the letter from the plaintiff's files and the expungement of all references to it, a remedy already effected, fully and adequately compensates him for the injury suffered.

V. Conclusion

In accordance with the findings of fact and conclusions of law as set forth above, the court concludes that the plaintiff has failed to prove by a preponderance of the evidence that the United States Coast Guard discriminated against him, and hereby ORDERS that judgment be entered for the defendant.

Dated at Portland, Maine this 7th day of June, 1989.

---

David M. Cohen  
United States Magistrate