

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JOHN BRENNAN, JAMES AHEARN, KURT BRUNKHORST, :  
ERNIE TRICOMI, SCOTT SPRING, DENNIS : AMENDED  
MORTENSEN, JOHN MITCHELL, and ERIC SCHAUER, : COMPLAINT  
on behalf of themselves and all others :  
similarly situated, :

Plaintiffs, : Civ No. 02-0256  
(FB) (RML)

-against- :

JOHN ASHCROFT, RALPH BOYD, UNITED STATES :  
DEPARTMENT OF JUSTICE, NEW YORK CITY BOARD :  
OF EDUCATION, CITY OF NEW YORK, NEW YORK :  
CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE :  
SERVICES, and WILLIAM J. DIAMOND, :

Defendants. :

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This is an action for race and sex discrimination in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs seek forward-looking injunctive and declaratory relief, on behalf of a class, preventing defendants from continuing to discriminate on the basis of race and sex in violation of the Constitution and various federal laws. Plaintiffs Mitchell and Schauer also seek damages against the municipal defendants on their individual claims.

JURISDICTION AND VENUE

1. This is an action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(3), and 42 U.S.C. § 2000e-5(f)(3). Jurisdiction over the United States Department of Justice is pursuant to 5 U.S.C. § 702.

2. Venue is proper in this Court because the discriminatory actions about which plaintiffs complain were effected pursuant to an agreement (the "agreement") that was reached to settle a case litigated in this Court, *viz.*, *United States v. New York City Board of Education, et al.*, Civil Action No. 96-0374 (the "earlier lawsuit"). Moreover, because the discriminatory actions involve the New York City school system, many of them are taking place in this district.

#### PARTIES

3. Plaintiffs John Brennan, James G. Ahearn, Kurt Brunkhorst, John Mitchell, and Eric Schauer are permanently employed as Custodian Engineers, Assignment Level 2, by defendant New York City Board of Education ("NYC Board of Education").

4. Plaintiffs Scott Spring, Ernest Tricomi, and Dennis

Mortensen are permanently employed as Custodian Engineers, Assignment Level 1, by defendant NYC Board of Education.

5. Each of plaintiffs is a Caucasian male.

6. Defendant United States Department of Justice ("DOJ") is a department within the federal government.

7. Defendant John Ashcroft is the Attorney General of the United States, and the head of defendant DOJ. Defendant Ralph Boyd is the Assistant Attorney General for Civil Rights within DOJ. Each of Ashcroft and Boyd is sued in his official capacity only. Ashcroft, Boyd, and DOJ will sometimes collectively be referred to in this complaint as the "Federal Defendants."

8. Defendant New York City is a municipality in the State of New York.

9. Defendant NYC Board of Education operates the New York City school system and employs plaintiffs.

10. Defendant New York City Department of Citywide Administrative Services ("NYC Administrative Services") is an agency of the City of New York. William Diamond is its commissioner. He is sued in his official capacity. Defendants

New York City, NYC Board of Education, NYC Administrative Services, and Diamond will occasionally be referred to collectively in this complaint as the "Municipal Defendants."

#### FACTS

11. The New York City school system operated by defendant NYC Board of Education contains many positions for Custodian Engineers. There are two levels for Custodian Engineers: Level One and Level Two. Custodian Engineer Level Two is a more desirable position because it allows the Custodian Engineers at that level to work at larger schools with higher pay and receive other job benefits.

12. The particular school to which a given Custodian Engineer may be assigned is often determined in part by the individual preferences of that Custodian Engineer. The more seniority a Custodian Engineer has, the more likely it is that (s)he will be able to work at the school of his or her choice.

13. In the past, each of plaintiffs has applied for job benefits (like school assignments) that are determined to a large degree by competitive seniority. Each of plaintiffs intends to apply for such benefits on a regular basis in the future, for as

long as he is employed by the NYC Board of Education.

14. In the earlier lawsuit, the United States sued the Municipal Defendants claiming that they engaged in employment discrimination in violation of Title VII in the hiring of Custodian Engineers at both levels. (At the time that the earlier lawsuit was commenced, and at the time of the execution of the agreement, Custodian Engineers Level One and Level Two were referred to as Custodians and Custodian Engineers, respectively.)

15. The Employment Litigation Section of the Civil Rights Division of the Department of Justice represented (and continues to represent) the United States in the earlier lawsuit. Defendant Boyd has submitted papers in the earlier lawsuit.

16. In February 1999, the United States and the Municipal Defendants entered into an agreement to settle the earlier lawsuit. Pursuant to that agreement, the Municipal Defendants provided benefits to a group of Custodian Engineers (some of whom, at the time, were referred to simply as Custodians). The beneficiaries were called "Offerees."

17. There were 59 Offerees who received benefits pursuant

to the agreement.

18. The Offerees received two primary benefits under the agreement. First, those Offerees whose jobs were "provisional" were given permanent jobs. Second, the Offerees were provided retroactive seniority, with seniority dates ranging from January 23, 1989 to February 28, 1996.

19. Permanent jobs are more desirable and provide better civil service benefits than provisional jobs.

20. As a consequence of the benefits provided in the agreement, many of the Offerees moved ahead of plaintiffs in seniority.

21. Only African Americans, Hispanic Americans, Asian Americans and women were selected to be Offerees. Only members of those groups were eligible to be Offerees.

22. In choosing the Offerees, the Municipal Defendants, conspiring with and at the inducement of the Federal Defendants, intentionally discriminated on the basis of race, ethnicity, and sex.

23. Defendants did not have a compelling governmental

interest to justify the Municipal Defendants' intentional discrimination in selecting certain Offerees on the basis of race or ethnicity. Even if they had had such an interest, the selection of Offerees was not narrowly tailored to achieve that compelling interest.

24. Defendants did not have an important governmental interest to justify the Municipal Defendants' intentional discrimination in selecting certain Offerees on the basis of sex. Even if they had had such an interest, the selection of Offerees did not substantially further that important interest.

25. Although an order approving the agreement was entered in the earlier lawsuit, that order was vacated on appeal.

First Claim (for Injunctive/Declaratory Relief)

26. This claim incorporates each of the previous allegations set forth above. It is brought on behalf of all the plaintiffs against all the defendants, and seeks injunctive and/or declaratory relief.

27. The plaintiffs seek to represent a class of plaintiffs on this claim. The class consists of those current Custodian Engineers who were not Offerees, who had one or more Offerees

move ahead of him or her in relative seniority (and/or obtain permanent status) as a consequence of the benefits provided to the Offerees, and who intends to apply for job benefits in the future that are determined in whole or part by relative seniority.

28. The class is so numerous as to make joinder impracticable. There are more than 800 Custodian Engineers, and only 59 Offerees. Many of the Custodian Engineers will fit the class definition given the wide range of retroactive seniority dates provided to the Offerees.

29. In fact, when the United States and the Municipal Defendants proposed the agreement in 1999, the Municipal Defendants received 350 written objections. Most of the objections were from Custodians and Custodian Engineers employed by defendant NYC Board of Education objecting to the benefits received by the Offerees.

30. Plaintiffs' claims have questions of law and fact in common with the claims of the class members.

31. Plaintiffs' claims are typical of the claims of the class.



32. Plaintiffs will adequately represent and protect the interests of the class. They have retained counsel familiar with this matter, and with class litigation in general.

33. Defendants have acted (and are acting) on grounds generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Accordingly, a class should be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

34. The Municipal Defendants acted (and are acting) under color of state authority in voluntarily entering into an agreement with the United States that provided for benefits to the Offerees, in selecting the Offerees on the basis of race and sex, and in continuing to provide benefits to the Offerees based upon the permanent status and increased seniority provided to them.

35. The Federal Defendants acted (and are acting) under color of state authority in inducing and/or conspiring with the Municipal Defendants to provide benefits to the Offerees, to select certain Custodians and Custodian Engineers as Offerees, and to continue to provide benefits to the Offerees based upon

the permanent status and increased seniority provided to them.

36. The Federal Defendants also acted (and are acting) under color of federal authority.

37. If not enjoined, the Municipal Defendants will continue to give the Offerees the benefits of the permanent status and retroactive seniority that were called for by its agreement with the United States.

38. If not enjoined, the Federal Defendants will continue to require that the Municipal Defendants provide the Offerees with the benefits of the permanent status and retroactive seniority called for by the agreement between the Municipal Defendants and the United States.

39. Plaintiffs and the members of the plaintiff class will be harmed in the future by the benefits provided to the Offerees because both the Offerees and plaintiffs (and the members of the plaintiff class) will apply for job benefits like school assignments that are determined in large part by relative seniority.

40. Accordingly, plaintiffs and the class they represent are entitled to declaratory relief declaring that the provision

of benefits to the Offerees on the basis of race, ethnicity, and sex violated the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1981, 1983 and 1985. (As set forth below, plaintiffs Mitchell and Schauer have also proceeded pursuant to Title VII, 42 U.S.C. §§ 2000e *et seq.* Accordingly, they and the class they represent are also entitled to an injunction prohibiting violations of that statute.)

41. Plaintiffs and the class they represent are entitled to an injunction prohibiting the Municipal Defendants from providing the Offerees with the benefits of the permanent status and retroactive seniority that was given to them pursuant to the agreement in any competition for a job benefit in the future.

42. Plaintiffs and the class they represent are entitled to an injunction prohibiting the Federal Defendants from requiring and/or inducing the Municipal Defendants to provide the Offerees with the benefits of the permanent status and retroactive seniority that was given to them pursuant to the agreement in any competition for a job benefit in the future.

Second Claim (for John Mitchell's Damages)

43. This claim incorporates each of the previous

allegations of the complaint. It is asserted on behalf of John Mitchell against the Municipal Defendants.

44. During the year 2001, Mitchell applied for a position as a Custodian Engineer at P.S. 166 in the Bronx.

45. Mitchell did not obtain the position. Instead, one of the Offerees did.

46. Had the Offeree who obtained the position not received the retroactive seniority benefits provided for in the agreement, Mitchell would have obtained the position at P.S. 166.

47. On January 17, 2002, Mitchell filed a charge of employment discrimination under Title VII against the NYC Board of Education and New York City with the Equal Employment Opportunity Commission ("EEOC"). The EEOC refused to accept jurisdiction of the matter because of this pending lawsuit and dismissed the charge.

48. Pursuant to 42 U.S.C. §§ 1981, 1983, and 1985, Mitchell is entitled to damages at an amount to be determined at trial. Mitchell is also entitled to damages against New York City and/or NYC Board of Education, as his employer, pursuant to Title VII (42 U.S.C. §§ 2000e *et seq.*).

Third Claim (for Eric Schauer's Damages)

49. This claim incorporates each of the previous allegations of the complaint. It is asserted on behalf of Eric Schauer against the Municipal Defendants.

50. During the year 2001, Schauer applied for a position as a Custodian Engineer at Junior High 145.

51. Schauer did not obtain the position. Instead, one of the Offerees did.

52. Had the Offeree who obtained the position not received the retroactive seniority benefits provided for in the agreement, Schauer would have obtained the position at Junior High 145.

53. On January 17, 2002, Schauer filed a charge of employment discrimination under Title VII against the NYC Board of Education and New York City with the EEOC. The EEOC refused to accept jurisdiction of the matter because of this pending lawsuit and dismissed the charge.

54. Pursuant to 42 U.S.C. §§ 1981, 1983, and 1985, Schauer is entitled to damages at an amount to be determined at trial. Schauer is also entitled to damages against New York City and/or

NYC Board of Education, as his employer, pursuant to Title VII (42 U.S.C. §§ 2000e *et seq.*).

Demand For Judgment

WHEREFORE plaintiffs demand judgment:

A. Declaring that defendants' conduct in selecting Offerees (or inducing or requiring the selection of Offerees) on the basis of race, ethnicity, and gender violates the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1981, 1983, 1985, and 2000e *et seq.*;

B. Enjoining the Municipal Defendants from providing the Offerees with the benefits of the permanent status and retroactive seniority that was given to them pursuant to the agreement in any competition for a job benefit in the future;

C. Enjoining the Federal Defendants from requiring and/or inducing the Municipal Defendants to provide the Offerees with the benefits of the permanent status and retroactive seniority that was given to them pursuant to the agreement in any competition for a job benefit in the future;

D. Damages for plaintiff Mitchell against the Municipal

Defendants in an amount to be determined at trial;

E. Damages for plaintiff Schauer against the Municipal Defendants in an amount to be determined at trial; and

F. Attorney's fees and costs pursuant to 28 U.S.C. § 1920, 28 U.S.C. § 2412, 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k), or any other applicable authority;

G. Any other relief that is appropriate.

Respectfully submitted,

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