

(“Worth”) and all similarly situated employees of HUD and the federal government (collectively, “Plaintiffs”) have been repeatedly subjected to affirmative employment plans that discriminate on the basis of race, ethnicity and gender in violation of their Equal Protection rights under the Fifth Amendment of the United States Constitution. (As used in this Complaint, the term “race” will also include the term “ethnicity.”) If defendants are not enjoined, Plaintiff Worth and the class will continue to be subjected to discrimination.

Jurisdiction and Venue

2. This court has subject matter jurisdiction of this complaint and these claims pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and the laws of the United States, including but not limited to the Fifth Amendment to the Constitution; and the Declaratory Judgment Act, 28 U.S.C. § 2201.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

Parties

4. Plaintiff Worth is a current employee of HUD, and he is employed as a GS-13 Senior Project Manager in the St. Louis, MO office. He is white.

5. Plaintiff Worth has applied for new positions and promotions at HUD, and will continue to apply for new positions and promotions at HUD on a regular basis in the future.

6. Defendant Mel Martinez (“Martinez”) is the Secretary of the Department of Housing and Urban Development (“HUD”) and is named as a defendant in this action in his official capacity as the head of HUD. HUD is headquartered in Washington, DC and is an

executive department of the Federal Government of the United States of America. As the head of HUD, Martinez directs, approves, and/or is responsible for all official actions at HUD.

7. Defendant Cari M. Dominguez (“Dominguez”) is the Chair of the Equal Employment Opportunity Commission (“EEOC”) and is named as a defendant in this action in her official capacity as the head of EEOC. EEOC is headquartered in Washington, DC and is an independent agency of the United States of America. As the head of EEOC, Dominguez directs, approves, and/or is responsible for all official actions at EEOC.

Background

8. Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. (“Section 717”), requires, in part, that “[a]ll personnel actions affecting employees or applicants for employment [in the federal government] be made free from any discrimination based on race, color, religion, sex, or national origin.” Section 717 also obligates, in part, every department and agency to “maintain an affirmative program of equal employment opportunity for all such employees.”

9. In carrying out the mandate of Section 717, the Equal Employment Opportunity Commission promulgates regulations which require, inter alia, that every federal department and agency implement, and submit to the EEOC, an “affirmative employment plan” (“AEP”), which the EEOC reviews, evaluates, and approves. The AEP is intended to help monitor and address efforts and accomplishments in the recruitment, hiring, training, promotion, separation and other advancement opportunities in federal employment.

10. The EEOC issued compliance guidance in 1987 to all federal departments and agencies in an Equal Employment Opportunity Management Directive entitled “MD-714.”

EEOC's MD-714 obligates all federal departments and agencies to create an "affirmative employment plan for minorities and women" which is to identify alleged instances of "manifest imbalance" and "conspicuous absence" of women and racial minorities, by gender and race, and establish "goals" and "target dates" in order to eliminate such alleged "underrepresentation" at all organizational levels.

11. The EEOC's MD-714 makes department and agency heads accountable for the successful implementation of the AEP, and requires them in turn to review, evaluate, and hold accountable all subordinate officials, managers, and employees.

12. The EEOC's MD-714 has never been revised to reflect the higher scrutiny standard announced in Adarand v. Peña, 515 U.S. 200 (1995), for all race-based classifications by the federal government. Pursuant to its oversight and enforcement authority under Section 717, EEOC continues to require, cajole and induce federal departments and agencies, such as HUD, to discriminate on the basis of race and gender in employment.

13. In accordance with MD-714's requirements, the HUD AEP establishes certain racial and gender goals in employment, coupled with deadlines and target dates. HUD reviews and evaluates managers and supervisors, and provides performance appraisals and incentives, based on achieving these goals. Managers who fail to perform may receive lower evaluation ratings, a reduced or eliminated bonus, may be reassigned or lose a grade, and ultimately may be terminated.

14. These racial and gender preferences favor non-white racial groups over whites, and women over men.

15. HUD was established as a federal executive department on or about October 9, 1965. Prior to that date, Presidents Truman and Johnson promulgated Executive Order 9980 in

1948 and its successor Executive Order 11246 in September of 1965, both of which forbade discrimination on the basis of race in recruitment, hiring, promotions and other employment practices in federal employment. On information and belief, HUD has at all times maintained an official policy of non-discrimination against minorities and women, and in addition has employed affirmative employment policies to hire, elevate and promote them. There is no history, record or legacy of racial discrimination in employment against minorities or women at HUD.

16. HUD did not, and does not, have a strong basis in evidence of the continuing effects of past or present discrimination by HUD that would justify racial or gender preferences.

17. HUD did not, and does not, have a compelling or important governmental interest that justifies its race-conscious and gender-conscious programs and classifications. Assuming arguendo that HUD had a legitimate interest, its use of race and gender is not properly tailored to meet any such interest.

18. HUD provides employment goals, target deadlines, managerial appraisals and incentives only for alleged “underrepresented” racial minorities and women, and not for whites or males, even when whites or males are “underrepresented” in a job category.

19. HUD provides employment goals, target deadlines, managerial appraisals and incentives whenever there is an “underrepresentation,” regardless of its size.

20. HUD does not discontinue its racial and gender preferences after any alleged “underrepresentation” is eliminated. HUD instead resumes setting employment goals for the preferred racial and gender groups whenever any alleged disparity reappears, regardless of its size.

21. HUD's employment policies, practices and programs are unconstitutional because they contain and create impermissible race-conscious and gender-conscious preferences and classifications in recruitment, hiring, training, promotion and separation.

22. The EEOC has approved and sanctioned HUD's AEP, including its race-conscious and gender-conscious provisions. By lending its imprimatur to these preferences, rather than seeking to eliminate them, the EEOC has encouraged and aided HUD in promulgating those illegal preferences.

23. Plaintiff Worth has applied, or wanted to apply, for promotions as well as internal promotions (i.e., new positions available at higher grade levels) at HUD but has been unable to advance because of HUD's emphasis on meeting racial and gender employment targets.

24. Plaintiff Worth also has not been eligible for extra recruitment efforts and targeted training programs designed to groom employees for higher-level positions that have been extended to members of the preferred racial groups and women.

25. HUD's employment practices and policies continue to affect Plaintiffs. HUD continues to set employment goals, as evidenced by HUD's Department-wide Affirmative Employment Program Fiscal Year 2001 Update Report. Plaintiff Worth intends to continue to apply for new positions and promotion within HUD despite these HUD programs. He would apply more frequently if HUD's illegal policies are terminated. If Defendants are not enjoined, they will continue to violate Plaintiffs' equal protection and civil rights.

Class Action

26. Pursuant to Fed. R. Civ. P. 23, plaintiff Worth brings these claims on behalf of a class (the "Class") consisting of white, male individuals who are employees of federal

departments and agencies that promulgate AEPs subject to approval by the EEOC, who are applicants for employment, promotion or transfer at these federal departments and agencies, and who will in the future be subject to their respective federal departments' and agencies' race or gender-conscious recruitment, hiring, training, promotion and separation policies and practices, including the AEP. He also seeks to represent a sub-class of white males who are applicants for employment, promotion or transfer at HUD, and who will in the future be subject to HUD's race or gender-conscious recruitment, hiring, training, promotion and separation policies and practices, including the AEP.

27. Common questions of law and fact exist as to all members of the Class. Among the questions of law and fact common to the Class is whether Defendants violated the Fifth Amendment to the United States Constitution by discriminating against Plaintiff Worth and the Class on the basis of race or gender.

28. Plaintiff's claims are typical of the claims of the members of the Class, and Plaintiff Worth is an adequate representative of the Class. Plaintiff Worth and members of the Class have sustained injuries because of Defendants' unlawful activities alleged herein, and will sustain such injuries in the future unless Defendants are enjoined. Plaintiff Worth has retained counsel competent and experienced in race and gender discrimination litigation and intends to prosecute this action vigorously. Plaintiff Worth will fairly and adequately protect the interests of the Class.

29. The Class is so numerous that joinder of all its members is impracticable. A class action is superior to other available means for the fair and efficient adjudication of this controversy.

30. Defendants' actions are generally applicable to the class of white males making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

Count I

(Violation of Plaintiffs' Due Process Rights)

31. Plaintiffs incorporate by reference paragraphs 1 through 30 above.

32. Defendants intentionally have discriminated against Plaintiff Worth and the class he represents on the basis of his race and gender, and will continue to discriminate if not enjoined.

33. Defendants' actions, policies and practices violate the Due Process Clause of the Fifth Amendment of the Constitution.

34. Plaintiff Worth and the class he represents will suffer additional irreparable harm if Defendants' scheme of racial and gender preferences continues and Plaintiffs are prevented from competing for federal employment on an equal footing with, and receiving the same benefits and opportunities as, women and members of preferred racial and ethnic groups. Plaintiffs do not have an adequate remedy at law.

Request For Relief

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment for Plaintiffs and award the following relief:

- (a) A permanent injunction prohibiting Defendant Martinez, as head of HUD, and his employees, agents, officers, representatives and servants from using the AEP to make hiring, promotion and other employment decisions;

- (b) A permanent injunction against Defendant Martinez, as head of HUD, and his employees, agents, officers, representatives and servants from discriminating on the basis of race and gender in violation of the Fifth Amendment and violating Plaintiffs' constitutional and statutory rights;
- (c) A declaratory judgment that Defendants Martinez and Dominguez, as heads of their respective departments, violated Plaintiffs' rights to Equal Protection under the Fifth Amendment;
- (d) A permanent injunction against Defendant Dominguez preventing her, as head of EEOC, from encouraging and inducing other federal departments and agencies to engage in illegal race and gender discrimination, and sanctioning and approving such illegal discrimination;
- (e) An award to Plaintiffs of attorneys' fees and for costs of suit; and
- (f) An award of such other relief as the Court may deem just and proper.

Respectfully submitted,

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