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## The Second Circuit Rules Statistics Alone Can Be Sufficient to State an Inference of Discrimination in § 1981 or Equal Protection Class Claims

By Maria Tavano

Last month, the United States Court of Appeals for the Second Circuit decided as a matter of first impression that statistics alone can be sufficient to state the discriminatory intent element of 42 U.S.C. § 1981 and Equal Protection class claims. The court, however, dismissed the plaintiffs' complaint for failing to allege the kind of statistical data necessary to lead to an inference of discriminatory intent.

The plaintiffs in [\*Burgis v. New York Department of Sanitation\*](#) alleged, on their own behalf and on behalf of all similarly situated employees, they were discriminated against on the basis of race and/or national origin by the promotional practices of their employer, the New York City Department of Sanitation.

According to the opinion, there are five levels of promotions available to Department of Sanitation workers: first to the position of Supervisor, and then to the positions of General Superintendent Levels 1 (lowest) through 4 (highest). Prior to 1979, promotions to both Supervisor and General Superintendent Levels 1 through 3 were based on written examinations. After 1979, however, written examinations for promotions to General Superintendent Levels 2 and 3 were eliminated. Instead, all promotions for those positions, as well as General Superintendent Level 4, were based on

recommendations by superiors. Written examinations for promotions to both Supervisor and General Superintendent Level 1 remained intact.

The plaintiffs alleged the recommendation-based system created a supervisory workforce that did not fairly represent the sanitation workforce as a whole. The complaint alleged the system discriminated against Hispanic and African-American sanitation workers who were denied promotions despite meeting all requirements for the sought position. The plaintiffs further alleged Caucasian applicants with less experience and inferior evaluations were promoted more frequently.

Of the nine individually named plaintiffs, all had been promoted to Supervisor and six had been promoted to General Superintendent Level 1 by the time the complaint was filed. None had been recommended for a promotion to General Superintendent Level 2. In the complaint, the plaintiffs relied substantially on statistics to demonstrate discriminatory intent and provided the following chart summarizing the racial make-up of the Department's sanitation workforce by rank:

Title	% White	% Black	% Hispanic
Sanitation Worker	56	23.5	18
Supervisor	81	11	10
General Superintendent Level 1	81	13	9
General Superintendent Level 2 & 3	91	4	3
General Superintendent Level 4	80	10	10

Other than the foregoing statistical data, the plaintiffs pled only one sentence regarding discriminatory intent, conclusively stating the defendants' actions were undertaken purposefully and intentionally and/or in reckless disregard of the class plaintiffs' rights.

A federal district court dismissed the complaint finding, among other things, that the allegations, including the statistical allegations, were nothing more than threadbare conclusory statements that fell short of stating § 1981 and Equal Protection claims. The Second Circuit affirmed the lower court's dismissal, but further held, as a matter of first impression, that statistics alone can be sufficient to show discriminatory intent for Section 1981 or Equal Protection class claims, if the statistics provided adequately establish an inference of discrimination. The Court further guided that a complaint relying on

statistics to demonstrate a defendant's discriminatory intent must allege statistics that are "not only statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely."

The Second Circuit found that the statistics included in the complaint did not demonstrate discriminatory intent. Among other shortcomings, the court found the statistics provided only "raw percentages of White, Black and Hispanic individuals at each employment level without providing any detail as to the number of individuals at each level, the qualifications of individuals in the applicant pool and of those hired for each position, or the number of openings available." The Court reasoned one can just as easily infer from the statistics provided that the plaintiffs had not been promoted for valid, non-discriminatory reasons. Finally, the court found the fact that each of the plaintiffs had been promoted at least once, and some twice, further undermined the claims of discrimination (despite the fact that the plaintiff's promotions would have been based on written examinations rather than the complained-of recommendation-based system).

Thus, after *Burgis*, plaintiffs in the Second Circuit (which covers Connecticut, New York, and Vermont) alleging Section 1981 and Equal Protection class claims may rely on statistics alone to allege discriminatory intent in a complaint. Defendants faced with such allegations, however, should critically look at the statistics provided in the complaint to determine if they rise to the level of statistical significance required by *Burgis*. If not, the claims may be subject to a successful motion to dismiss.

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