APPENDIX

Appendix A -
Summary Order of the United States Court of Appeals for the Second Circuit, Filed July 2, 2019

18-2572-cv
Paterno v. City of New York et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of July, two thousand nineteen.

PRESENT:

BARRINGTON D. PARKER,
PETER W. HALL,
CHRISTOPHER F. DRONEY,
Circuit Judges.

No. 18-2572-cv

JOHN PATERNO,

Plaintiff-Appellant,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, POLLY TROTTENBERG,

Defendants-Appellees.

Appearing for *Plaintiff-Appellant*: ARTHUR ZACHARY SCHWARTZ, Advocates for Justice, Chartered Attorneys, New York, NY.

Appearing for *Defendants-Appellees*: BARBARA GRAVES-POLLER (Richard Dearing, Jane L. Gordon, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Schofield, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on August 1, 2018, is **AFFIRMED**.

Plaintiff-Appellant John Paterno, formerly the Executive Director of Fleet Services for the New York City Department of Transportation ("DOT"), appeals from a judgment dismissing his 42 U.S.C. § 1983 lawsuit against Defendants-Appellees the City of New York, the DOT, and former Transportation Commissioner Polly Trottenberg (collectively, "Defendants"). Paterno asserted a "stigma-plus" claim stemming from a 2017 Title VII lawsuit brought by the United States against the City and DOT after an investigation, his 2016 transfer out of a supervisory position during that investigation, and the subsequent publication of allegedly false accusations against him. He also claimed that Defendants retaliated against him, in violation of his First Amendment right to speak on matters of public concern, after he confronted certain employees about the Title VII case. The district court dismissed his complaint for failure to state a claim. This appeal follows. We assume the parties' familiarity with the facts, record of prior proceedings, and arguments on appeal, which we reference only as necessary to explain our decision to affirm.

We review de novo a district court's grant of a motion to dismiss for failure to state a claim. *Vangorden v. Second Round, Ltd. P'ship*, 897 F.3d 433, 437 (2d Cir. 2018). To survive a motion to dismiss, a complaint must allege facts sufficient "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "[M]ere conclusory statements" will not suffice, *Iqbal*, 556 U.S. at 678: the "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "On a motion to dismiss, all factual allegations in the

complaint are accepted as true and all inferences are drawn in the plaintiff's favor." *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir. 2015). We may affirm on any ground that finds support in the record. *See, e.g.*, *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006).

To succeed on a "stigma plus" claim under § 1983, "a plaintiff must show (1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights." *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (internal quotation marks omitted). A plaintiff must also "show the stigmatizing statements were made concurrently in time" with the burden on his or her rights. *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004).

Setting aside the "stigma" prong of Paterno's claim, we have doubts as to whether he adequately alleged he was deprived without due process of a "tangible interest." *See Patterson*, 370 F.3d at 330. In any event, Paterno's appeal must fail because he did not—and cannot—plead that the alleged stigmatizing statements were made "concurrently in time" with the alleged deprivation. *See id.* The consent decree in the Title VII case was not made public until a year after Paterno's transfer, and any allegedly defamatory statements by Commissioner Trottenberg were even further removed in time. *See Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 32 (2d Cir. 1994) (holding that a five-month separation was too attenuated).

With respect to his First Amendment retaliation claim, Paterno failed to make out the first element of a prima facie case. The first element requires a plaintiff to "plausibly allege that [ ] his or her speech or conduct was protected by the First Amendment." *Montero v. City of Yonkers*, 890 F.3d 386, 394 (2d Cir. 2018) (internal quotation marks omitted). To determine whether an employee's speech was protected, the threshold question is "whether the employee spoke as a citizen on a matter of public concern." *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015) (internal quotation marks omitted). If the speech was not on a matter of public concern, "that is the end of the matter." *Id*.

Although Paterno insists otherwise, we conclude that the speech in question "was calculated to redress personal grievances," not directed toward "a broader public purpose." *See Lewis v. Cowen*, 165 F.3d 154, 163 (2d Cir. 1999); *see also Montero*, 890 F.3d at 400 ("[A] public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." (quoting *Ruotolo v. City of New York*, 514 F.3d 184, 190 (2d Cir. 2008))). Although Paterno contends "[t]here is nothing in the pleadings that places Appellant's speech outside the protection of the First Amendment," Reply Br. at 16–17, this argument misconceives Paterno's burden at the pleading stage. He must "plausibly allege" that his speech was *within* the protection of the First Amendment. That he has not done. The complaint's description of the speech at issue is vague and conclusory. To the extent it offers any clarity regarding the speech's "content, form, and context," *Montero*, 890 F.3d at 399 (internal quotation marks

omitted), it does not support an inference that Paterno was speaking on a matter of public concern.

We have considered Paterno's remaining arguments and find them to be without merit. The judgment of the district court is **AFFIRMED**.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Appendix B -
Opinion and Order of the United States District Court for the Southern District of New York, Filed July 31, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 8278 (LGS)

OPINION AND ORDER

JOHN PATERNO,

Plaintiff,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

LORNA G. SCHOFIELD, District Judge:

Plaintiff John Paterno brings this action against the City of New York (the "City") and Polly Trottenberg, the Commissioner of the New York City Department of Transportation (the "DOT"), pursuant to 42 U.S.C. §1983. This case arises out of actions taken by DOT against Plaintiff in connection with allegations of racial discrimination directed at DOT and Plaintiff when he was an Executive Director of a subdivision of DOT. In the Amended Complaint (the "Complaint") Plaintiff asserts two causes of action. The first is based on a "stigma-plus" theory, alleging that Defendants violated Plaintiff's due process rights "[b]y transferring and demoting [him] in a

manner that causes injury to his reputation, limiting his current and future earning opportunities, and denying him a venue to clear his name;" and the second cause of action alleges that Defendants violated Plaintiff's First Amendment rights by "taking disciplinary/retaliatory action against Mr. Paterno for talking to fellow employees . . . ." Defendants move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons below, the motion is granted.

I. BACKGROUND

The following facts are drawn from the Complaint and documents attached to or integral to the Complaint, and are accepted as true for the purposes of this motion. *See Tannerite Sports, LLC v. NBC Universal News Grp.*, 864 F.3d 236, 247-48 (2d Cir. 2017).

A. The Title VII Action

On January 18, 2017, the United States Attorney's Office for the Southern District of New York sued the City and the DOT for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, alleging a pattern and practice of racial discrimination and retaliation based on the failure to promote minority employees working at the DOT (the "Title VII Complaint"). The Title VII Complaint alleges that racial discrimination occurred in the Fleet Services subdivision of the Roadway Repair and Maintenance Division, and identifies two Executive Directors as the principal wrongdoers. Although the Title VII Complaint does not name either Executive Director, Plaintiff is easily identifiable as Executive Director II.

The Title VII Complaint accuses Plaintiff of promoting less-qualified Caucasian employees over their better-qualified minority counterparts, and giving Caucasian employees the most desirable jobs. The Title VII Complaint also accuses Plaintiff of reducing a subordinate's access to overtime payments, in order to punish him for complaining that a highly-qualified minority candidate was passed over for a promotion in favor of a less-qualified Caucasian employee. According to the Title VII Complaint, when a highly-qualified minority employee complained that he did not receive a promotion, Plaintiff yelled at the employee: "I'll take you outside and kick your fucking ass." The Title VII Complaint also states that Plaintiff lied to the DOT's Office of Equal Employment Opportunity ("EEO"), telling them that he never heard Executive Director I use racial epithets to refer to African American employees. On June 13, 2017, the City and DOT entered into a consent decree with the federal government, admitting to all allegations in the Title VII Complaint (the "Consent Decree").

Defendants never questioned Plaintiff about the critical allegations in the Title VII Complaint before the Consent Decree was signed and published. Plaintiff denies the allegations contained in the Title VII Complaint and Consent Decree. On June 16, 2016, before the filing of the Title VII Complaint, Plaintiff was transferred to a less-desirable position in the DOT, without any explanation or ability to appeal, and his pay was cut by approximately $60,000 per year (the "Demotion"). The basis for the Demotion was the allegations of discriminatory conduct that underpin the Title VII Complaint and Consent Decree.

B. The Press Accounts

Subsequent to the execution of the Consent Decree, *The Chief*, a widely circulated public employee newspaper, published multiple articles criticizing Plaintiff. An article published on June 26, 2017, described the incident in which Plaintiff "verbally threatened . . . with a threat of physical violence a non-management employee who confronted him about his racist treatment of minority employees." In a letter to the editor printed on July 3, 2017, and referenced in a June 30, 2017, article, Defendant Trottenberg identified Plaintiff by name, and stated that the DOT had taken "aggressive action" to rectify the matters discussed in the Consent Decree. Defendant Trottenberg stated that the DOT "removed John Paterno, the main subject of the investigation, from his position, reassigning him to a position without supervisory responsibility and no role in hiring or promotions." According to the article, Plaintiff's "compensation dropped from $197,000 in 2015 to $163,000 last year." In an article printed on July 17, 2017, the Chairman of the City Council Committee on Civil Service and Labor, I. Daneek Miller, called for Plaintiff's firing. The Demotion, coupled with the allegations in the Consent Decree and negative publicity, destroyed Plaintiff's opportunities for advancement in the DOT and hurt his job prospects outside the DOT.

C. The Flatlands Yard Incident

On approximately June 26, 2017, shortly after the first article about the Consent Decree appeared in *The Chief*, Plaintiff was served with a Notice of Complaint, which states that Plaintiff had been

accused of "retaliation" by his former coworkers. The Notice of Complaint states, in relevant part:

> On June 19, 2017, the New York City Department of Transportation's Office of Equal Employment Opportunity received a complaint against you alleging unlawful retaliation and has opened an investigation in connection with the complaint. In sum, the allegation contained in the complaint is that you have contacted DOT employees in connection with their participation in the lawsuit *U.S.A. v. City of New York*. Specifically, it is alleged that you appeared at Flatlands Yard on June 16, 2017 and spoke to DOT employees regarding the consent decree executed in *U.S.A. v. City of New York*, including speaking with individuals who are identified as Claimants in that action.

On July 19, 2017, Plaintiff's attorney sent a letter to Defendant Trottenberg, in which Plaintiff denied all allegations of wrongdoing. On July 24, 2017, *The Chief* published an account of Plaintiff's attorney's letter. Then, on approximately September 15, 2017, Plaintiff received a further letter stating that the EEO had finished its investigation, and found that the claims of retaliation were substantiated. On January 30, 2018, Plaintiff received a Notice of Informal Conference, notifying him that the charges against him would be adjudicated by the DOT, Office of the Advocate.

The Notice of Informal Conference further informed Plaintiff that if he did not accept the Conference Leader's decision, he would have the option of proceeding with an alternative hearing pursuant to § 75 of the New York Civil Service Law.

The informal conference was scheduled for February 14, 2018. The Notice of Informal Conference charged Plaintiff with (1) going to the Flatlands Yard facility on June 16, 2017, while on a leave of absence, and having no official business at the facility; (2) questioning subordinate minority employees at Flatlands Yard about their participation in the Consent Decree and whether they testified against him and (3) describing to subordinate minority employees what their specific awards were under the Consent Decree.

II. STANDARD

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly,* 550 U.S. at 555). On a Rule 12(b)(6) motion, "all factual allegations in the complaint are accepted as true and all inferences are drawn in the plaintiff's favor." *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir. 2015); *accord In re Neurotrope, Inc. Sec. Litig.*, No. 17 Civ. 3718, 2018 WL 2561024, at *3 (S.D.N.Y. June 4, 2018).

III. DISCUSSION

In order to succeed on a claim under 42 U.S.C. § 1983, "a plaintiff must allege that (1) the defendant was a state actor, i.e., acting under color of state law, when he committed the violation and (2) the defendant deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States." *Milan v. Wertheimer*, 808 F.3d 961, 964 (2d Cir. 2015) (citations omitted); *accord Mosca v. City of New York*, No. 17 Civ. 4327, 2018 WL 2277837, at *3 (E.D.N.Y. May 18, 2018). For the reasons below, the Complaint fails to state a constitutional claim under § 1983.

A. Fifth Amendment Due Process

The Complaint's Fifth Amendment claim is dismissed for failure to name a proper defendant. The Due Process Clause of the Fifth Amendment applies to only the Federal Government. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'") (internal citations omitted); *Garcia v. City of New York*, No. 15 Civ. 7470, 2017 WL 1169640, at *7 (S.D.N.Y. Mar. 28, 2017) ("[T]he Fifth Amendment only applies to claims against the federal government, and Plaintiffs have not named any federal defendants."). Here, the Complaint raises claims against only the City and the Commissioner of the DOT; it does not raise claims against any federal officials or entities. Accordingly, the Complaint fails to state a Fifth Amendment claim.

B. Fourteenth Amendment Due Process

The Complaint raises a "stigma-plus" theory of due process liability.[1] The "stigma-plus" claim is dismissed, because the Complaint does not identify a stigmatizing statement and Plaintiff received sufficient post-deprivation name clearing.

1. "Stigma-Plus"

"To establish a 'stigma-plus' claim, a plaintiff must show (1) [stigma --] the utterance of a statement sufficiently derogatory to injure [plaintiff's] reputation, that is capable of being proved false, and that he or she claims is false, and (2) [a plus --] a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights." *Vega v. Lantz*, 596 F.3d 77, 81 (2d Cir. 2010); *accord Dowd v. DeMarco*, No. 17 Civ. 8924, 2018 WL 2926619, at *7 (S.D.N.Y. June 12, 2018). Accordingly, "even where a plaintiff's allegations would be sufficient to demonstrate a government-imposed stigma, such defamation is not, absent more, a deprivation of a liberty or property interest protected by due process." *Vega*, 596 F.3d at 81; *accord McNaughton v. de Blasio*, No. 14 Civ. 221, 2015 WL 468890, at *14 (S.D.N.Y. Feb. 4, 2015). "Burdens that can satisfy the 'plus' prong under this doctrine include the deprivation of a plaintiff's property, and the

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[1] To the extent that other theories for a Due Process Clause violation could have been raised based on the facts described in the Complaint, they are deemed waived for a failure to brief. *See, e.g., Lin v. Sessions*, 681 F. App'x 86, 88 (2d Cir. 2017) (summary order) ("Issues not sufficiently argued in the briefs are considered waived . . ."); *Pirnik v. Fiat Chrysler Automobiles, N.V.*, No. 15 Civ. 7199, 2018 WL 3130596, at *2 n. 2 (S.D.N.Y. Jun. 26, 2018) (same).

termination of a plaintiff's government employment." *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (internal citations omitted); *accord Filteau v. Prudenti*, 161 F. Supp. 3d 284, 294 (S.D.N.Y. 2016). "However, deleterious effects flowing directly from a sullied reputation, standing alone, do not constitute a 'plus' under the 'stigma plus' doctrine." *Sadallah*, 383 F.3d at 38; *accord Autotech Collision Inc. v. The Inc. Vill. of Rockville Ctr.*, 673 F. App'x 71, 74 (2d Cir. 2016) (summary order).

In order to survive a motion to dismiss on a "stigma-plus" claim, the complaint must plead the particulars of a "statement sufficiently derogatory to injure" the plaintiff's reputation; not merely general characterizations or summaries of those statements. *Vega*, 596 F.3d at 81; *see, e.g.*, *Filteau*, 161 F. Supp. 3d at 293 (dismissing a "stigma-plus" complaint where the allegations of "stigma" were "conclusory and speculative"); *Miley v. Hous. Auth. of City of, Bridgeport*, 926 F. Supp. 2d 420, 432 (D. Conn. 2013) (dismissing a complaint where the "allegations are devoid of specific factual content to state a claim to relief for a stigma-plus violation that is plausible on its face").

In analyzing the "stigma" component of a "stigma-plus" claim, courts look to state substantive law of defamation. *See, e.g.*, *Sharpe v. City of New York*, No. 11 Civ. 5494, 2013 WL 2356063, at *6 n. 10 (E.D.N.Y. May 29, 2013), *aff'd*, 560 F. App'x 78 (2d Cir. 2014) ("federal courts in New York often look to New York defamation law when analyzing a "stigma-plus" claim."); *Boss v. Kelly*, No. 07 Civ. 2113, 2007 WL 2412261, at *6 (S.D.N.Y. Aug. 23, 2007) ("For purposes of [plaintiff's] section 1983 liberty interest claim, this Court looks to New York's substantive

state law regarding defamation."); *Pisani v. Westchester Cty. Health Care Corp.*, 424 F. Supp. 2d 710, 718 (S.D.N.Y. 2006) ("Establishing defamation in the § 1983 context is no different than under New York State law.").

For the "stigma" prong of the claim, the Complaint alleges that Defendants made "erroneous allegations of discriminatory conduct" about Plaintiff and refers specifically to the Consent Decree and Trottenberg's letter to *The Chief* as quoted in a July 30, 2017, article. The Consent Decree and the July 30 article are appended to the Complaint and are the only statements of Defendants' that the Complaint specifically identifies and challenges. These statements are insufficient to plead stigma.

First, the Consent Decree, which does not even mention Plaintiff by name, cannot constitute a stigmatizing statement, because it was made in the course of a legal proceeding. Under New York law, "statements uttered in the course of a judicial proceeding are absolutely privileged, as long as such statements are material and pertinent to the questions involved in the proceeding." *Stega v. New York Downtown Hosp.*, -- N.E.3d --, 2018 WL 3129383, at *4 (N.Y. June 27, 2018); *see also Front, Inc. v. Khalil*, 24 N.Y.3d 713, 718–20 (2015) ("[I]t is well-settled that statements made in the course of litigation are entitled to absolute privilege . . . ."). Such privileged statements cannot form the basis for a "stigma-plus" claim. *See, e.g., Sharpe*, 2013 WL 2356063, at *7 (denying a "stigma-plus" claim based on statements that "fall squarely within the scope of the privilege that attaches to statements made in the course of judicial proceedings"). Here, the Consent Decree and the statements in it are absolutely

privileged and cannot be the basis for a claim, because they are material and pertinent to the questions involved in the Title VII proceeding -- i.e., whether the DOT engaged in racial discrimination.

Plaintiff asserts that Defendant Trottenberg's statements to *The Chief*, as reflected in the June 30, 2017, article, are actionable because they "very publicly supported the characterization of the Plaintiff in the Consent Decree as a vile racist . . . ." Defendant Trottenberg is quoted as making the following four statements in that article:

1. The nine-year period described in the Consent Decree "represent[s] a terrible chapter in this agency's history."

2. "[U]nder my leadership, racism and discriminatory behavior of any sort are not tolerated. This administration and this agency believe diversity, tolerance and equal opportunity are fundamental principles . . ."

3. The DOT took "aggressive" action to "dramatically" restructure senior leadership in 2015 and 2016, in order "to address the concerns raised by the complainants."

4. The "DOT removed John Paterno, the main subject of the investigation, from his position, reassigning him to a position without supervisory responsibility and no role in hiring or promotions."

The first two statements -- referencing "a terrible chapter" and "fundamental principles" - - are not actionable because they are opinions, which are not "capable of being proved false." *Vega*, 596 F.3d at 81; *see, e.g.*, *Sharpe*, 2013 WL 2356063, at *6 ("a

statement of opinion, rather than fact . . . is not actionable as a stigmatizing remark."); *Wiese v. Kelley*, No. 08 Civ. 6348, 2009 WL 2902513, at *6 (S.D.N.Y. Sept. 10, 2009) ("The Attorney General's description of the conduct resulting in the loss of data as 'extremely troubling' is a statement of opinion, rather than fact, and as such is not actionable as a stigmatizing remark."); *cf. Apionishev v. Columbia Univ. in City of New York*, No. 09 Civ. 6471, 2012 WL 208998, at *10 (S.D.N.Y. Jan. 23, 2012) (dismissing a libel claim, because "[e]xpressions of opinion are not actionable"). The Complaint does not, and cannot, "raise the falsity of these stigmatizing statements as an issue," because, neither Defendant Trottenberg's description of the "terrible chapter" in the DOT's history, nor her affirmation of the DOT's belief in diversity as a fundamental principle is capable of being disproven. *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004).

The third and fourth statements by Defendant Trottenberg cannot establish "stigma," because the Complaint does not claim that they are false. *See Vega*, 596 F.3d at 81 ("To establish a 'stigma plus' claim, a plaintiff must show (1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false . . . ."); *see also DiBlasio v. Novello*, 413 F. App'x 352, 356 (2d Cir. 2011) (summary order) ("Because the statement was not false, it cannot form the basis for a stigma plus claim, however stigmatizing it might appear to be.") (citations omitted). The Complaint acknowledges that both statements are true; it states that Plaintiff was demoted to a lesser position on June 16, 2016, and that "[t]he basis for this Demotion was the false

allegations of discriminatory conduct that formed the basis for the Consent Decree . . .” Negative inferences that might be drawn from the factually accurate description of Plaintiff’s reassignment are not sufficient. *See, e.g.*, *O’Connor v. Pierson*, 426 F.3d 187, 195 (2d Cir. 2005) (“Even if O’Connor is correct that townsfolk drew negative inferences from his suspension, this is not enough to make out a stigma-plus claim.”); *Attallah v. New York Coll. of Osteopathic Med.*, 94 F. Supp. 3d 448, 455 n.8 (E.D.N.Y. 2015) (“such statements would not satisfy the ‘stigma plus’ requirements because they are facially accurate; simply ‘announc[ing]’ the fact of plaintiff’s expulsion, stigmatizing or not, cannot be shown or plausibly alleged to be false because plaintiff was indeed expelled.”). As none of the statements Defendant Trottenberg provided to *The Chief* establish “stigma,” the first cause of action is dismissed.

2. Post-Deprivation Process

Even if the Complaint had properly pleaded a “stigma-plus” claim, it nevertheless requires dismissal because Plaintiff received an adequate post-deprivation remedy. The Second Circuit has held that in cases “involving an at-will government employee, the availability of an adequate, reasonably prompt, post-termination name-clearing hearing is sufficient to defeat a stigma-plus claim.” *Segal v. City of New York*, 459 F.3d 207, 214 (2d Cir. 2006); *accord Schneider v. Chandler*, No. 16 Civ. 6560, 2018 WL 770395, at *7 (S.D.N.Y. Feb. 7, 2018). Under New York law, state employees may appeal adverse employment determinations made by their employers pursuant to an Article 78 proceeding in state court. *See* N.Y. CPLR 7801, *et seq*. “An Article

78 proceeding provides the requisite post-deprivation process" for a "stigma-plus" claim. *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 121 (2d Cir. 2011) (citations omitted); *see also Patterson*, 370 F.3d at 335 ("The appropriate remedy for a stigma-plus claim premised on a plaintiff's termination from at-will government employment is a post-deprivation name-clearing hearing."); *accord Gallagher v. New York City Health & Hosps. Corp.*, No. 16 Civ. 4389, 2017 WL 4326042, at *3 n.1 (S.D.N.Y. Sept. 20, 2017).

Plaintiff's decision not to avail himself of the process he was due -- i.e., an Article 78 proceeding -- does not constitute a denial of due process. *See, e.g.*, *Giglio v. Dunn*, 732 F.2d 1133, 1135 (2d Cir. 1984) ("Where, as here, Article 78 gave the employee a meaningful opportunity to challenge the voluntariness of his resignation, he was not deprived of due process simply because he failed to avail himself of the opportunity."); *Cole-Hatchard v. Hoehmann for Town of Clarkstown, New York*, No. 16 Civ. 5900, 2017 WL 4155409, at *7 (S.D.N.Y. Sept. 18, 2017) ("An Article 78 proceeding adequately serves as a post-deprivation name-clearing hearing. Plaintiff's failure to avail himself of this proceeding means he was not denied due process.").

Plaintiff argues that the availability of an Article 78 proceeding does not foreclose the present action, relying on cases that hold that post-deprivation remedies are insufficient where the due process violation "was pursuant to a statute, code, regulation, or custom, or made by a final decisionmaker," rather than "random acts." *Chase Grp. All. LLC v. City of New York Dep't of Fin.*, 620 F.3d 146, 152 n.3 (2d Cir. 2010) (internal citations

and quotations omitted). Plaintiff argues that "[t]he City's entry into the Consent Decree was not a random act, but the implementation of City policy -- indeed the whole point behind entry into the Consent Decree was to alter City and DOT Policy. It could not be addressed by an Article 78 petition."

This argument fails because these exceptions to the sufficiency of post-deprivation Article 78 hearings do not apply to "stigma-plus" claims. Although "[d]octrine in this Circuit has oscillated between requiring post-deprivation and pre-deprivation hearings in stigma-plus cases," *Spang v. Katonah-Lewisboro Union Free Sch. Dist.*, 626 F. Supp. 2d 389, 397 (S.D.N.Y. 2009), the Second Circuit acknowledged and resolved that ambiguity in *Segal*: "We now hold that, in this case involving an at-will government employee, the availability of an adequate, reasonably prompt, post-termination name-clearing hearing is sufficient to defeat a stigma-plus claim . . . ." 459 F.3d at 214; *accord Hughes v. City of New York*, 680 F. App'x 8, 10 (2d Cir. 2017) (summary order).

Because it is principally the "plaintiff's reputational interest . . . that is at issue" in a "stigma-plus" claim, "[t]he appropriate remedy for a stigma-plus claim . . . is a post-deprivation name-clearing hearing." *Patterson*, 370 F.3d at 336. The Second Circuit has repeatedly upheld the use of Article 78 "name-clearing" hearings for "stigma-plus" claims -- even when the facts appear to fit one of the exceptions. *See, e.g.*, *Anemone*, 629 F.3d at 121 (affirming the dismissal of a "stigma-plus" claim because a post-deprivation Article 78 hearing provided sufficient process to a plaintiff fired by the Executive Director of the MTA); *Hughes*, 680 F.

App'x at 10 (dismissing a "stigma-plus" claim because of the availability of a post-deprivation Article 78 hearing where the DOE Chancellor had instructed that the plaintiff be removed). Any damage to Plaintiff's reputation was addressable in an Article 78 proceeding; damaged reputations are precisely the harm that a "name-clearing" hearing under Article 78 is designed to address. *Anemone*, 629 F.3d at 121; *see also Gallagher v. New York City Health & Hosps. Corp.*, No. 17 Civ. 2942, 2018 WL 2049114, at *2 (2d Cir. May 2, 2018) (summary order) ("Gallagher does not plead that she did not have the opportunity to clear her name in an Article 78 proceeding, and we have no other reason to believe that she would be denied this avenue."). Accordingly, the Complaint's due process claim is dismissed for this additional reason.

C. First Amendment Retaliation

The Complaint alleges a second cause of action, that Defendants took "disciplinary/retaliatory action against [Plaintiff] for talking to fellow employees about matters of public concern," specifically the issuance by the DOT of the Notice of Complaint recounting the receipt of a complaint about Plaintiff's alleged unlawful retaliation against DOT employees who were claimants in the Title VII Complaint. The claim is dismissed because the Complaint does not allege facts sufficient to show that Plaintiff's speech was protected by the First Amendment.

"[T]he First Amendment protection of a public employee's speech depends on a careful balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting

the efficiency of the public services it performs through its employees." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014) (citations omitted). "Where, as here, a plaintiff claims that he or she was retaliated against in violation of the First Amendment, he or she must plausibly allege that (1) his or her speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him or her; and (3) there was a causal connection between this adverse action and the protected speech." *Montero v. City of Yonkers, New York*, 890 F.3d 386, 394 (2d Cir. 2018) (citations omitted).

Here, the Complaint fails to state the first element of a prima facie First Amendment retaliation claim with respect to the EEO investigation that stemmed from Plaintiff's visit to Flatlands Yard.[2] "A court conducts a two-step inquiry to determine whether a public employee's speech is protected: The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015) (citation omitted); *accord Kiernan v. Town of Southampton*, No. 17-212, 2018 WL 2251633, at *2 (2d Cir. May 17, 2018) (summary order). The first step contains two sub-questions: "(1) whether the subject of the employee's speech was a matter of public concern and (2) whether the employee spoke 'as a citizen' rather than solely as an employee." *Matthews*, 779 F.3d at 172. If the answer to either

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[2] The Demotion cannot constitute an adverse employment action for the purpose of the Complaint's First Amendment retaliation claim, because Plaintiff was demoted almost a full year before his visit to Flatlands Yard. Accordingly, Plaintiff's speech at Flatlands Yard cannot have caused the Demotion.

sub-question is no, then the employee was not speaking as a citizen on a matter of public concern, and their speech is not protected. *Id*. "If, however, both questions are answered in the affirmative, the court then proceeds to the second step of the inquiry, commonly referred to as the *Pickering* analysis: whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer." *Id*. Here, the speech identified in the Complaint fails at both steps of the First Amendment protection analysis.

1. "Public Concern"

"Whether speech is on a matter of public concern is a question of law, and is to be answered by the court after examining the content, form, and context of a given statement, as revealed by the whole record." *Montero*, 890 F.3d at 399. "While this determination may be somewhat fact-intensive, it presents a question of law for the court to resolve." *Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir. 2003); *accord Harris v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 230 F. Supp. 3d 88, 98 (E.D.N.Y. 2017). Accordingly, in order to state a plausible retaliation claim, a complaint must identify the content of the speech that is protected so that it is possible to engage in the required "fact-intensive" inquiry. *See, e.g.*, *Ortiz v. Russo*, No. 13 Civ. 5317, 2015 WL 1427247, at *11 (S.D.N.Y. Mar. 27, 2015) (dismissing a retaliation claim because "Plaintiff fails to specifically identify the speech or conduct at issue which he purports to be protected.").

The Complaint contains one paragraph about what Plaintiff discussed with his coworkers:

> All discussions Mr. Paterno had with coworkers about the Consent Decree, by its very nature, including denial of the City's "admissions" in the Complaint that touched his conduct, or asking other employees for their views, involved a matter of public importance, *i.e.*, discriminatory conduct at DOT, and his involvement in it.

The Notice of Informal Conference, which is attached to the Complaint, provides further detail. Plaintiff went to Flatlands Yard on June 16, 2017, while on a leave of absence, and having no official business at the facility; he questioned subordinate minority employees about their participation in the Consent Decree; he asked whether they had testified against him and discussed with two of them (who are named) the specific Consent Decree reward each had received. The Complaint also states that "[t]here was no allegation of any threatening or retaliatory action taken against any individuals in the Notice." However, this description of what Plaintiff did not say at Flatlands Yard does not elucidate what Plaintiff said.

These subjects that Plaintiff discussed with his co-workers are not matters of public concern. "To constitute speech on a matter of public concern, an employee's expression must be fairly considered as relating to any matter of political, social, or other concern to the community." *Montero*, 890 F.3d at 399. "[S]peech that principally focuses on an issue that is personal in nature and generally related to the speaker's own situation, or that is calculated to redress personal grievances -- even if touching on a

matter of general importance -- does not qualify for First Amendment protection." *Id.* at 399-400. "[A] public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." *Id.* at 400. "The heart of the matter is whether the employee's speech was calculated to redress personal grievances or whether it had a broader public purpose." *Ruotolo v. City of New York*, 514 F.3d 184, 189 (2d Cir. 2008) (internal quotation marks omitted); *accord Majied v. New York City Dep't of Educ.*, No. 16 Civ. 5731, 2018 WL 333519, at *4 (S.D.N.Y. Jan. 8, 2018).

Here, Plaintiff's discussions with his co-workers principally focused on his personal grievances -- not on matters of public concern. Plaintiff went to Flatlands Yard without any official reason to be there, suggesting a personal motivation. Plaintiff asked subordinate minority employees whether they had testified against *him* with respect to the Title VII Complaint, and informed two of the employees that he knew how much money they had been awarded as a result of the Consent Decree. Any tangential discussion of broader "discriminatory conduct at DOT" unrelated to Plaintiff -- which the Complaint does not describe -- was secondary to discussion of Plaintiff's involvement. Accordingly, Plaintiff's speech was not protected, because he did not speak "as a citizen on a matter of public concern." *Matthews*, 779 F.3d at 172.

2. *Pickering* Analysis

Even if the speech identified in the Complaint were on a "matter of public concern," it nevertheless would not trigger First Amendment protection,

because the City "had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer." *Matthews*, 779 F.3d at 172. "The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (citations and alterations omitted). A government entity may avoid liability for First Amendment retaliation if it can: "(1) demonstrate by a preponderance of the evidence that it would have taken the same adverse action regardless of the protected speech, or (2) show that the plaintiff's expression was likely to disrupt the government's activities, and that the likely disruption was sufficient to outweigh the value of the plaintiff's First Amendment expression." *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004); *accord Agyeman v. Roosevelt Union Free Sch. Dist.*, 254 F. Supp. 3d 524, 533 (E.D.N.Y. 2017).

Here, Plaintiff's speech was disruptive. Plaintiff went to Flatlands Yard without any official reason while on administrative leave. Plaintiff engaged minority subordinate employees in conversations about whether they testified against him, and how much money they received as a result of the Consent Decree. That speech motivated the subordinate minority employees to file a complaint with the EEO. Plaintiff's speech, all of which occurred in the workplace, was more likely to cause an immediate disruption than speech that occurs outside of the workplace, which numerous courts have determined to be punishable under the *Pickering* balancing test. *See, e.g.*, *Lynch v. Ackley*, 811 F.3d 569, 580 (2d Cir.

2016) (finding that a public employee's criticism of a supervisor at a union meeting was likely to be disruptive); *Heller v. Bedford Cent. Sch. Dist.*, 144 F. Supp. 3d 596, 619 (S.D.N.Y. 2015) (finding that a teacher could be punished for speech in an online chatroom, because it would have been disruptive "if his activities had become widely known while plaintiff was still employed as a teacher"). The City's interest in maintaining an orderly work environment at the DOT outweighs any First Amendment interest Plaintiff had. Accordingly, even if Plaintiff's speech was "on a matter of public concern," the EEO investigation was justified by the City's "needs as an employer," and the Complaint is dismissed. *Matthews*, 779 F.3d at 172.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion is GRANTED. The Clerk of Court is respectfully directed to close this motion at Docket No. 24, and to terminate the case.

Dated: July 31, 2018
New York, NY

/s/ Lorna G. Schofield
/s/ Lorna G. Schofield
United States District Judge

Appendix C -
Amended Complaint, Filed April 30, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 8278

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

JOHN PATERNO,

Plaintiff,

-against-

CITY OF NEW YORK (NEW YORK CITY DEPARTMENT OF TRANSPORTATION), and POLLY TROTTENBERG,

Defendants.

Plaintiff, by his attorneys below signed, alleges as follows:

INTRODUCTION

1. This is a civil rights lawsuit seeking injunctive relief, lost wages (including overtime), and compensatory emotional distress damages. Plaintiff John Paterno is employed by the New York City Department of Transportation. On June 17, 2016, Plaintiff was inexplicably transferred to a position that diminished his job advancement prospects and earning potential — he lost approximately $60,000 in annual compensation as a direct consequence of the transfer; the transfer was effectively a demotion. The

Defendants have since admitted that the demotion was carried out in response to allegations of racial discrimination directed at Plaintiff and that appeared in a Federal Lawsuit that was filed in January of 2017 by the United States Government. Those allegations were false. Instead of doing an appropriate investigation, which would have involved discussing those allegations with Plaintiff and contesting them when they appeared in the lawsuit, the City settled, without speaking to Plaintiff, and entered into a Consent Decree, which admitted most of the allegations against Plaintiff. Though the Consent Decree did not mention Plaintiff by name (it called him "Executive Director II"), his identity was thinly veiled. Reports about the Decree in local media identified Plaintiff as the principal wrongdoer almost immediately. When asked about the Consent Decree by the press, the City made public Plaintiff's demotion and decrease in pay, which the City described as the remedy for his transgressions. Defendants subsequently threatened to retaliate against Plaintiff for openly discussing the Consent Decree with other employees, even though Plaintiff has no legal obligation to keep silent about the allegations in the Decree or the DOJ Complaint, and then sought his termination even after he filed papers to retire.

2. The public spectacle that the Defendants indulged in had the effect of casting Plaintiff as a longtime racist manager, embarrassing him, branding him, diminishing his current and future earning potential, and obliterating his opportunities for alternative employment, much less advancement in his field of employment. As discussed, *supra*, this was done without affording Plaintiff the opportunity to confront the allegations against him and clear his

name before the City publicly admitted and confirmed the allegations of racially discriminatory actions and before punitive action was taken. This is a violation of Plaintiff's Constitutional Liberty interest and is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff accordingly seeks redress — lost pay and damages addressed to the emotional toll this episode has taken on his life.

JURISDICTION

3. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

PARTIES

4. John Paterno is a U.S. citizen, and at all relevant times was an employee of the New York City Department of Transportation. He resides in Staten Island, New York.

5. Defendant City of New York (the "City") is a Municipal Corporation existing by virtue of the New York State General Municipal Law. The New York City Department of Transportation ("DOT") is an agency of the City which addresses most of the City's non-bus and subway transportation issues, largely having to do with the condition of roads and bridges.

6. Defendant Polly Trottenberg, at all relevant times, was DOT Commissioner and is sued individually, for actions she took described below, under color of her authority as Commissioner, but in abuse of that position.

FACTS SUPPORTING ALL CLAIMS

7. On January 18, 2017, the United States sued the City and DOT in a Title VII Civil Rights Act lawsuit alleging a pattern and practice of discrimination and retaliation based on the failure to promote minority employees working at DOT. A copy of the Complaint, dated January 18, 2017 ("Complaint"), is attached herein as Exhibit A.

8. The Complaint alleged that the race-based discrimination took place at Fleet Services, a subdivision of the Roadway Repair and Maintenance Division ("RRM") of DOT.

9. The Complaint identifies two individuals as the main perpetrators of the discrimination at RRM: Executive Director I ("ED I") and Executive Director II ("ED II").

10. From factual allegations regarding the job responsibilities of ED I and ED II and the tenure of service of ED I and ED II identified in the Complaint, these individuals are easily identifiable as an employee named Darren Kaplan ("ED I") and Plaintiff John Paterno ("ED II").

11. Among other allegations, the Complaint falsely alleges that Plaintiff John Paterno:

(a) Actively aided and carried out discriminatory staffing practices directed by Darren Kaplan (something he denies).

(b) Failed to confirm Darren Kaplan's use of racial epithets on the job when confronted by EEO at an initial interview during a DOT EEO investigation of Mr. Kaplan. (While Mr. Paterno was never confronted with any such question at his initial

interview, his subsequent testimony was one of the pillars underlying DOT EEO's successful case against Mr. Kaplan.)

(c) Continued race-based hiring practices once Mr. Kaplan left. Almost every "example" proffered in the Complaint to support this point was carried out for non-race-related reasons and was carried out at the direction of DOT management and/or with the imprimatur of upper management at DOT.

12. These allegations were directed at Mr. Paterno by the U.S. Attorney for the Southern District of New York, without one interview of Plaintiff or other relevant DOT employees by the U.S. Attorney, DOT staff, or New York Corporation Counsel before the Complaint was filed.

13. Had the City actually investigated the U.S. Attorney's Complaint, the case against the City arising from Mr. Paterno's purported conduct would likely have been disproven.

14. Indeed, the Complaint is replete with specific allegations against Mr. Paterno that would have crumbled if Mr. Paterno had been allowed the opportunity to defend himself.

For example:

(a) In paragraphs 28 and 29 of the Complaint, the United States alleges that Mr. Paterno discussed with and urged Supervisor I (upon information and belief, a Mr. Brian Connolly) to remove Mechanic I (upon information and belief, a Mr. Oliver Redman III) from his position. Instead, it was actually Mr. Paterno who prevented Mr. Kaplan from removing Mr. Redman.

(b) The Complaint goes on to state in paragraph 33 that Mr. Connolly refused to comply with an order from Mr. Kaplan to remove Mr. Redman's computer from his workspace. The person who refused to comply with the order, and who counseled against it, was Mr. Paterno. Moreover, the Complaint (at paragraph 35) alleges that Mr. Paterno ordered the removal of Mr. Redman's phone, when, in actuality, it was Mr. Kaplan who gave this directive.

(c) The Complaint's recitation of the details of Mr. Paterno's interviews with DOT EEO regarding Mr. Kaplan are replete with errors which cast aspersions on Mr. Paterno's character. In paragraph 47, the United States alleges that Mr. Paterno denied ever hearing Mr. Kaplan ever using racial epithets when confronted about it in his first interview. Mr. Paterno was never asked such a question in his first interview with DOT EEO.

(d) The Complaint states, in paragraph 48, that Mr. Paterno later recanted his testimony. He did no such thing; he did supplement his testimony after being approached by EEO on a second occasion and learning that Mr. Kaplan had projected his own discriminatory conduct onto the shoulders of Mr. Paterno.

(e) The Complaint alleges in paragraph 53 that Mr. Paterno promoted a culture of fear and intimidation and, in paragraph 54, that he systematically excluded minorities from preferred assignments and special projects. In fact, Mr. Paterno helped numerous minority employees (such as Eugen McNeil, John Matthews Jr., and Colvert Dwyer) keep pay grades they would otherwise have lost, and helped transition minority employees into

preferred assignments (such as Seupersand Bharat, Luis Ramirez, and others).

(f) The Complaint alleges in paragraph 55 that Mr. Paterno hand-picked white candidates to fill preferred assignments that lead to supervisory positions that opened up during his tenure as Executive Director, rather than have an open process that involved consultation. This is false; every single alleged preferred assignment and/or supervisory position that was filled under Mr. Paterno's tenure was filled after consultation with a committee and/or direction and/or approval from Mr. Paterno's superiors. If minorities were underrepresented in the ranks of those who were selected to fill supervisory openings, it was the consequence of policies and procedures promulgated by higher-ups at DOT and not Mr. Paterno.

(g) The Complaint, in paragraphs 56 through 63, alleges that Mr. Paterno conspired to have Seupersaud Bharat replaced as the assistant supervisor to Supervisor II, a Mr. Robert Conca, in 2009. These paragraphs are completely false. Mr. Bharat never served as an "Assistant Supervisor" to Mr. Conca. Mr. Paterno transferred Mechanic II (upon information and belief a Mr. Michael Moliero) to provide more supervisory help to Mr. Conca following Mr. Conca's direct request. Moreover, after Mr. Moliero was transferred, Mr. Paterno was instrumental in helping to keep Mr. Bharat employed, performing the administrative tasks he was performing for Mr. Conca. In mid-2010 (after training under Mr. Moliero), Mr. Bharat was given greater supervisory tasks under Mr. Conca.

(h) An even greater falsehood is the Complaint's recitation in paragraphs 64 through 77 that involved what it calls the Biodiesel Retrofit Program, or BRP. No such program ever existed during Mr. Paterno's tenure as Executive Director.

(i) Paragraphs 78 through 123 of the Complaint lay at the feet of Mr. Paterno the purported exclusion of minorities from consideration for or promotion into SOMME title vacancies. As stated before, every single supervisory position, including provisional and permanent SOMME title promotions, that were filled under Mr. Paterno's tenure, were filled after consultation with a committee and/or recommendation from Mr. Paterno, and the approval from his superiors. If minorities were underrepresented in the ranks of those who were selected to fill supervisory openings, it was the consequence of policies and procedures promulgated and enforced by DOT, not Mr. Paterno.

(j) Likewise, paragraphs 129 through 136 of the Complaint, which discuss a series of threats that were allegedly made by Mr. Paterno against Donald Prophete (identified in the Complaint as "Blacksmith I"), are completely false.

15. Instead of contesting any of these allegations, the City and DOT, with the approval of Defendant Trottenberg, entered into a Consent Decree, dated June 13, 2017, and admitted to the entirety of the allegations in the Complaint, including demonstrably false allegations that were directed at Mr. Paterno and incorporated into the Consent Decree. A copy of the Consent Decree is attached herein as Exhibit B.

16. The Consent Decree reiterated and even embellished many of the allegations in the Complaint directed at Mr. Paterno.

17. As with the Complaint, all allegations concerning discriminatory/retaliatory conduct on the part of Mr. Paterno were false.

18. By entering into the Consent Decree, the City and DOT joined the United States in making false, damaging accusations directed at Mr. Paterno.

19. Mr. Paterno was never questioned by the Defendants about the critical allegations in the Complaint before the Consent Decree was signed and published.

20. When the Consent Decree was filed it was widely reported by the press, which was able to easily identify Mr. Paterno as Executive Director II. See, for example, Exhibits C and D.

21. The publication of the Consent Decree had the effect of casting Mr. Paterno as a racist villain at DOT who needed to be purged. Editorials calling for punitive action against Mr. Paterno were published in the press, and at least one New York City Council member publicly called for his immediate removal from any employment with the City. See Exhibit E.

22. In fact, the City had already punished Plaintiff. On June 16, 2016, Plaintiff was transferred to a new, lesser position (the "June 2016 Demotion"), without (at the time) any explanation, with a loss in pay of around $60,000 per year.

23. The basis for this Demotion was the false allegations of discriminatory conduct that formed the basis for the Consent Decree, that had been adopted

around DOT without affording Plaintiff the opportunity to rebut them, and that now carried the imprimatur of a Consent Decree.

24. When confronted by editorial writers in the press with fallout from the Consent Decree, Defendant Trottenberg wrote in a letter to *The Chief*, a widely circulated public employee newspaper

> [ ] that DOT had been proactive and that "[sic] before the agency even entered into its consent decree with the Department of Justice, it had undertaken "aggressive" action, including in 2015 and 2016, "dramatically" restructuring senior leadership within both the Fleet and Equal Employment Opportunity units "to address the concerns raised by the complainants." A previous Executive Director of Fleet Services who engaged in racist practices was simultaneously working with the EEO unit before he was forced to retire eight years ago.
>
> --
>
> DOT added four additional EEO staff members in September 2016, and promoted three minority candidates to the Supervisor of Mechanics Mechanical Equipment title. In July 2016, Ms. Trottenberg wrote, "DOT removed John Paterno, the main subject of the investigation, from his position, reassigning him to a position without supervisory responsibility and no role in hiring or promotions." His compensation dropped from $197,000 in 2015 to $163,000 last year.

25. A copy of the article, dated July 30, 2017, in which this statement appears is annexed as Exhibit D.

26. The statements made by Trottenberg were outrageous. In fact, the three promotions of minority individuals that are cited as "corrective action" were carried out at the behest and direction of Mr. Paterno.

27. The Trottenberg letter is an admission that the June 2016 Demotion was carried out to remedy the purported conduct outlined in the Complaint and Consent Decree.

28. It is also clear from this admission that the June 2016 Demotion was punitive in nature and an effective demotion that deprived Plaintiff of compensation.

29. Moreover, by directly linking the June 2016 Demotion to the Complaint and Consent Decree, the Defendants reiterated their support for the outrageously false allegations contained in the Complaint and Consent Decree.

30. The June 2016 Demotion was carried out without giving Mr. Paterno recourse to any process through which he could have cleared his name or appealed what was being done to him.

31. On or around June 26, 2017, shortly after the first articles about the Consent Decree appeared in the local press, Mr. Paterno was served with a Notice of Complaint which alleged that Mr. Paterno had been accused of "retaliation." The Complaint stated, in part:

> [I]t is alleged that you appeared at Flatlands Yard on June 16, 2017 and spoke to DOT employees regarding the consent decree executed in *USA v. City of New York*, including

speaking with individuals who are identified as claimants in that action.

32. There was no allegation of any threatening or retaliatory action taken against any individuals in the Notice. A copy of the Notice is attached herein as Exhibit F.

33. All discussions Mr. Paterno had with coworkers about the Consent Decree, by its very nature, including denial of the City's "admissions" in the Complaint that touched his conduct, or asking other employees for their views, involved a matter of public importance, *i.e.*, discriminatory conduct at DOT, and his involvement in it.

34. On or around September 15, 2017, Mr. Paterno received correspondence from DOT that stated "EEO has concluded its investigation of the above referenced complaint [EEO Complaint 841-2017-00021] filed alleging discrimination on the basis of retaliation … DOT finds the allegations were substantiated against you." See Exhibit G.

35. The September Letter goes on to name "corrective measures" to be taken, including but not limited to "appropriate and applicable" disciplinary proceedings. *Id.*

36. The September Letter was issued shortly after Mr. Paterno's attorney provided a statement to the press contesting the allegations of discrimination directed against Mr. Paterno in the Consent Decree. A copy of the article in which this statement was reported is attached herein as Exhibit H. A copy of counsel's letter is annexed as Exhibit I.

37. Defendants announced an intention to punish Mr. Paterno, not for taking any adverse action against his subordinates, or threatening them, but for voicing his opinions about a matter of public concern, the Consent Decree, in and outside the workplace.

38. Mr. Paterno is set to retire effective sometime on or around May 15, 2018.

39. Despite his retirement, Defendants, in a subsequent notice outlining the specific charges against Plaintiff, stated that Mr. Paterno was not being disciplined for threatening his subordinates but for purportedly questioning co-workers about the Consent Decree and disclosing the details of Specific Consent decree award(s). A copy of the Notice of Informal Conference, dated January 30, 2018, which includes formal charges, is annexed as Exhibit L.

40. The allegations in the charges are not violations of New York City's Equal Employment Opportunity policy.

41. Plaintiff incorporates by reference all pleadings in paragraphs 1 through 36 into the Causes of Action listed below.

AS AND FOR A FIRST CAUSE OF ACTION

42. The June 2016 Demotion was carried out on erroneous allegations of racially discriminatory conduct on the part of the Plaintiff.

43. The June 2016 Demotion of Plaintiff caused severe and permanent injury to his reputation.

44. Those erroneous allegations of racially discriminatory conduct have since been widely published, as a result of efforts undertaken by Defendants.

45. The Defendants have confirmed that the demotion of Plaintiff, and his concomitant loss of pay, was carried out in response to these erroneous allegations of discriminatory conduct.

46. Plaintiff has never been afforded the opportunity to rebut or even argue the erroneous allegations of discriminatory conduct in front of a City investigatory official, much less a neutral arbiter.

47. The demotion of Plaintiff, with the Defendants' stated endorsement of the erroneous allegations which precipitated the City's transfer of Plaintiff, limited and in fact eviscerated his opportunities for advancement within the DOT, already diminished his earned income by approximately $60,000 per year, and imperils all future job prospects, within or outside the DOT.

48. By transferring and demoting Plaintiff in a manner that causes injury to his reputation, limiting his current and future earning opportunities, and denying him a venue to clear his name, Defendants violated Plaintiff's rights to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

AS AND FOR A SECOND CAUSE OF ACTION

49. By taking disciplinary/retaliatory action against Mr. Paterno for talking to fellow employees about matters of public concern within and outside the workplace, Defendants, individually and in

concert, under the color of state law, Defendants violated Plaintiff's First Amendment rights under the U.S. Constitution.

INJURY

50. The agreement to and publication of the Consent Decree and the City's subsequent press statements caused Plaintiff irreparable injury to his reputation.

51. The aforestated violation of Plaintiff's rights proximately caused Plaintiff:

a. to lose compensation of $60,000 per year (approximately $90,000 from June 2016 to the present);

b. to lose further opportunities to advance or to earn more or similar money elsewhere; and

c. to suffer emotional distress, with attendant physical symptoms, to his injury in a sum of $1,000,000, injury which is likely to bring about his departure from his City employment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter preliminary and permanent injunctive relief, and enter judgment:

1. Awarding Plaintiff full compensation for lost wages and future employment opportunities.

2. Awarding Plaintiff $1,000,000 in damages for emotional distress.

3. Awarding Plaintiff attorneys' fees, costs, and disbursements.

4. Granting such other and further relief as is just and equitable.

JURY DEMAND

Plaintiff demands a jury trial.

Dated: New York, New York
April 30, 2018

ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
Attorneys for Plaintiff

By: /s/
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Exhibit A to Amended Complaint - Complaint, Filed January 18, 2017

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 0364

COMPLAINT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants.

Plaintiff the United States of America (the "United States"), by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, alleges upon information and belief as follows:

INTRODUCTION

1. The United States brings this civil action to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* as amended ("Title VII"). As set forth more fully below, the United States alleges in this action that Defendants the City of New York (the "City") and the New York City Department of Transportation (the "NYCDOT") have engaged in a pattern or practice of racial discrimination and retaliation based on the failure to promote minority employees within the Fleet Services unit ("Fleet Services") of the Division of Roadway Repair and Maintenance within NYCDOT.

JURISDICTION & VENUE

2. This Court has jurisdiction over this matter under 42 U.S.C. § 2000e-6(b) and 28 U.S.C. §§ 1331 & 1345.

3. Under 28 U.S.C. § 1391(b), the Southern District of New York is the proper venue for this matter because Defendants are located in this District.

PARTIES

4. Plaintiff is the United States of America.

5. Defendant the City of New York (the "City") is a person within the meaning of 42 U.S.C. § 2000e(a) and an employer within the meaning of 42 U.S.C. § 2000e(b).

6. Defendant the NYCDOT is an agency of the City, a person within the meaning of 42 U.S.C. § 2000e(a), and an employer or the agent of an employer within the meaning of 42 U.S.C. § 2000e(b).

BACKGROUND

7. NYCDOT is the City agency charged with maintaining and enhancing the transportation infrastructure of New York City.

8. NYCDOT employs over 4,500 employees and has an annual operating budget of $900 million.

9. Polly Trottenberg is currently the commissioner of NYCDOT.

10. Commissioner Trottenberg was appointed on December 31, 2013, and she replaced Commissioner Janette Sadik-Khan, who held the position from 2007 until Commissioner Trottenberg's appointment at the end of 2013.

11. NYCDOT' s operations are overseen by members of its Executive Staff who report directly to Commissioner Trottenberg and are each responsible for one of NYCDOT's divisions.

12. These divisions are: Bridges; Finance, Contracting, and Program Management; Human Resources and Facilities Management; IT & Telecom; Roadway Repair and Maintenance (RRM); Sidewalks and Inspection Management; Staten Island Ferry; Traffic Operations; and Transportation Planning & Management.

13. Fleet Services is a subdivision of RRM within NYCDOT and is responsible for maintaining the fleet of vehicles owned and operated by NYCDOT.

14. These vehicles include both heavy machinery, such as pavers, cranes, and dump trucks, which the NYCDOT utilizes in its roadway repair and construction operations, as well as, lighter vehicles,

such as pickup trucks, agency passenger cars, and even mopeds.

15. Fleet Services employs approximately 200 individuals in a range of trades, such as: machinists, auto mechanics, electricians, blacksmiths, and engineers.

16. The bulk of the positions within Fleet Services, including supervisory positions, are represented by a union, and these positions are also subject to New York City's civil service rules.

17. At all times relevant to the complaint, RRM was overseen by a Deputy Commissioner ("Deputy Commissioner of RRM"), who reported directly to the Commissioner of NYCDOT.

18. As a subdivision of RRM, Fleet Services was managed by an Executive Director (the "ED"), who then reported directly to Deputy Commissioner of RRM.

19. For all periods of time relevant to the complaint, the Executive Directors of Fleet Services were "Executive Director I" and "Executive Director II."

I. Pattern or Practice of Discrimination Under Executive Director I

A. Incident Involving Mechanic 1

20. In October 2007, Executive Director I assumed the position of ED.

21. Executive Director I's second-in-command within Fleet Services was Executive Director II,[1] and although Executive Director I held the title of ED, the bulk of the day-to-day operations of Fleet Services were overseen by Executive Director II.

22. Beginning in 2007, upon Executive Director I's assumption of the ED position, Executive Director I requested that an African American auto mechanic, "Mechanic 1," who had been serving as an Assistant Supervisor in NYCDOT's Bronx garage operations (the "Bronx Shop"), be removed from his office duties and returned to mechanic duties.

23. The practice of an auto mechanic serving as an "Assistant Supervisor" or "Acting Supervisor" within a NYCDOT garage operation is widespread throughout Fleet Services. Individuals serving in this capacity do not have any difference in civil service title from their peers who are only serving as non-supervisory auto mechanics, and as such, they receive the same compensation.

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[1] The Complaint refers to the individual who succeeded Executive Director I in the ED position as "Executive Director II." This individual did not assume the ED title, however, until Executive Director I left the agency in 2010.

24. Assistant Supervisors serve a distinct operational function, however, and perform functions that are not performed by other auto mechanics within their assigned shop. These tasks include: the assignment of tasks to other auto mechanics; ordering parts from the NYCDOT system; performing intake for vehicles coming into the shop; working in the office; and serving as the supervisor when the SOMME in charge of the shop is on leave or otherwise away.

25. Because some of the tasks performed by the Assistant Supervisor require computer access that auto mechanics do not otherwise possess, or a presence in the office (a location where line auto mechanics do not otherwise generally go) the Assistant Supervisor is easily recognized by his peers, as well as others within NYCDOT as serving in a distinct role.

26. In discussing with subordinates his request to have Mechanic 1 removed from the Assistant Manager position, Executive Director I stated that Mechanic 1 "was forced down my throat by the two monkeys who put him in the office and I want him out!"

27. It was understood by those who heard these comments that Executive Director I's reference to "monkeys," was to Keith Howard and Leon Hayward, who were Deputy Commissioners at the time, and who were also African American.

28. At Executive Director I's direction, Executive Director II discussed relieving Mechanic 1 of his responsibilities with "Supervisor I," who was, at the time, the supervisor in charge of the Bronx Shop.

29. Supervisor I refused to take the requested action because he felt that Mechanic 1 was performing well as an Assistant Supervisor and believed there was no reason to remove him from his responsibilities.

30. Following this initial refusal by Supervisor I, Mechanic 1 continued to perform the same duties.

31. Several months later, however, Executive Director I renewed his request that Mechanic 1 be removed.

32. Shortly after Executive Director I renewed his request, Executive Director II then attempted to discuss the issue with Supervisor I a second time, who again refused to comply with the order to remove Mechanic 1 from his supervisory functions.

33. Following Supervisor I's refusal to comply with Executive Director II's order, Executive Director II then directed others to remove Mechanic 1's computer from his work space such that Mechanic 1 would no longer have the ability to perform some of the administrative functions of an Assistant Supervisor.

34. In spite of these actions, however, Supervisor I persisted in maintaining Mechanic 1 as his Assistant Supervisor.

35. Accordingly, Executive Director II next proceeded to have the phone lines which rang in the office where Mechanic 1 had been sitting, redirected to a different location.

36. Eventually, rather than continue to sit in his office without access to either a phone or a computer, Mechanic 1 chose to remove himself from the Assistant Supervisor position.

37. Within a few months after having been removed from his Assistant Supervisor duties, Mechanic 1 requested a transfer to another location.

B. Incident Involving "Blacksmith 1"

38. In the summer of 2008, "Blacksmith 1," an African American blacksmith in Fleet Services, requested a cell phone.

39. Blacksmith 1's request was denied.

40. In November 2008, Blacksmith 1 became aware that another cell phone had become available and had been given to a white blacksmith with less seniority.

41. When Executive Director I was reminded by Executive Director II that Blacksmith 1 had previously requested a cell phone, Executive Director I responded "that nigger gets nothing."

II. NYCDOT EEO Investigation of Executive Director I (2009 – 2010)

42. On October 15, 2009, Blacksmith 1 filed a complaint with NYCDOT's Equal Employment Opportunity Officer ("NYCDOT EEO").

43. In his complaint, Blacksmith 1 referenced both the 2007 incident involving Mechanic 1's removal as Assistant Supervisor in the Bronx Shop, as well as his own experience in 2008 relating to his cell phone request.

44. In response to Blacksmith 1's complaint, NYCDOT EEO conducted an investigation of Executive Director I.

45. In the course of that investigation, NYCDOT EEO interviewed numerous current NYCDOT employees who stated that Executive Director I routinely used racial epithets, such as "nigger," "monkey," and "gorilla," to refer to African American employees.

46. Executive Director I was reported to have made these statements in the presence of Executive Director II and other senior management of Fleet Services, and none of these individuals ever took any action to report the statements.

47. Indeed, upon first being questioned by NYCDOT EEO, Executive Director II denied ever hearing Executive Director I use a racial epithet to describe African Americans.

48. Executive Director II later recanted, but only after he became aware that Executive Director I had stated that Executive Director II was in fact responsible for the actions taken against both Mechanic 1 and Blacksmith 1.

49. Following its investigation, NYCDOT EEO recommended that Executive Director I be demoted, suspended, and removed from his responsibilities as a NYCDOT EEO counselor.[2]

50. Commissioner Sadik-Khan approved these recommendations on January 18, 2010.

51. Following the decision of Commissioner Sadik-Khan, Executive Director I chose to voluntarily retire.

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[2] As part of his duties, Executive Director I also served as an EEO counselor for Fleet Services.

52. Upon Executive Director I's retirement, Deputy Commissioner of RRM promoted Executive Director II to ED.

III. Discrimination Under Executive Director II (2010 – 2016)

A. Exclusion of Minorities from Preferred Assignments

53. The culture of fear and intimidation that predominated during Executive Director I's tenure as ED persisted under Executive Director II's leadership.

54. Throughout his tenure as ED, Executive Director II routinely and systematically excluded minorities from preferred assignments and special projects within Fleet Services.

55. Rather than engage in an open application process, or consult with a committee of supervisors who could provide objective feedback on employees' performance, Executive Director II handpicked white candidates for those assignments that provided the best opportunity for further advancement within Fleet Services. Executive Director II then promoted those same white candidates based on the experience they gained during those assignments. Because Executive Director II consistently picked only white candidates for these assignments, minority candidates were and continue to be excluded from promotional opportunities.

56. One example of this discriminatory practice is Executive Director II's decision to move "Mechanic 2," an auto mechanic who had been working as a parts coordinator at a NYCDOT facility in Brooklyn,

to NYCDOT's facility at 158th Street in Manhattan (the "Manhattan Shop") in May 2009.

57. Upon moving Mechanic 2, Executive Director I directed the supervisor at the Manhattan Shop at the time, Supervisor II, to install Mechanic 2 as his Assistant Supervisor and second-in-command.

58. At the time, however, another individual, Seupersaud Bharat ("Bharat"), a minority auto mechanic of East Indian descent, was already acting as the Assistant Supervisor in the Manhattan Shop.

59. Supervisor II had selected Bharat for this role because he excelled as a mechanic and was "far and away" superior to the other mechanics in the Manhattan Shop with respect to his skills at fixing vehicles. In addition, Bharat had foreman experience from previously working at Saturn Automotive.

60. As part of his duties as the Assistant Supervisor, Bharat served as the shop supervisor in Supervisor II's absence, including for the cumulative three month period in which Supervisor II was out of the office either on leave or attending meetings elsewhere for NYCDOT.

61. Because he was fully satisfied with Bharat' s performance as an Assistant Supervisor, Supervisor II had no desire to replace Bharat with Mechanic 2. Moreover, Supervisor II did not personally believe the addition of Mechanic 2 was necessary.

62. Executive Director II directed Supervisor II to have Mechanic 2 work in the office in the Manhattan Shop, and upon this instruction, Supervisor II relieved Mechanic 2 of his previously assigned duties.

63. Executive Director II never consulted with Supervisor II regarding his decision to replace Mechanic 2 and never informed Supervisor II of the reason for this change.

64. Another example of Executive Director II's discriminating against minorities in the distribution of desirable and high profile assignments within Fleet Services was his management of the Biodiesel Retrofit Program ("BRP"), a project to retrofit certain of Fleet Services machinery to biodiesel fuel.

65. NYCDOT undertook the BRP at some time in 2009 or 2010.

66. As a high profile agency initiative that would provide exposure to NYCDOT leadership and the opportunity to demonstrate suitability for promotion, the BRP was considered by many auto mechanics within Fleet Services to be a desirable assignment.

67. Following his transfer in May 2010 to Harper Street, Mechanic 2 was assigned by Executive Director II to lead the BRP.

68. Executive Director II then sought to assign two additional employees, in addition to Mechanic 2, to the BRP project.

69. Rather than competitively select for these positions, however, Executive Director II took steps to ensure that the positions would be given to "Mechanic 3" and "Mechanic 4," two white auto mechanics who also worked at the Manhattan Shop with Bharat.

70. In contrast to other auto mechanics within Fleet Services who had decades of experience in repairing vehicles, Mechanic 3 and Mechanic 4 were

both fairly inexperienced. Both Mechanic 3 and Mechanic 4 had only been working in automotive services since 2003, and both had only been employed at NYCDOT as auto mechanics since October 2008. Accordingly, at the time they were transferred, neither Mechanic 3 nor Mechanic 4 had more than two years of experience as auto mechanics within the NYCDOT.

71. This was reflected in their work at the Manhattan Shop, where their supervisor, Supervisor II, assessed both of them to have far less automotive expertise and knowledge than Bharat.

72. Executive Director II purposely took steps to obfuscate the true nature of the BRP positions, so that other applicants, including minority applicants like Bharat, would not apply. Specifically, in posting for the positions, Executive Director II purposely listed the job as an office position at Harper Street with a nighttime schedule. The advertised hours discouraged applicants, and as a result, very few eligible mechanics applied.

73. Once Mechanic 3 and Mechanic 4 were selected for the position, however, their hours were changed to the standard daytime schedules.

74. Executive Director II continued to preferentially assign Mechanic 3 desirable work assignments even after the BRP.

75. Following Mechanic 3's transfer and reassignment to the Fleet Services headquarters at Harper Street in Queens ("Harper Street"), Executive Director II assigned Mechanic 3 to report directly to him and to undertake certain duties that were never offered to any minority auto mechanics.

76. These responsibilities included oversight of special projects, in addition to the BRP, and writing specifications for acquisition of new vehicles and vehicle parts.

77. Mechanic 3 was assigned these tasks by Executive Director II as part of his new position, but that position had only been made available to Mechanic 3, a less qualified employee, due to Executive Director II's purposeful obfuscation of the true nature of the job.

B. Promotion of Provisional SOMME (2010)

78. In the summer of 2010, Executive Director II made the decision to promote a number of auto mechanics into the SOMME title "provisionally."

79. Compared to the positions that feed into it, such as an auto machinist, auto mechanic, electrician, or machinist, which have an approximate annual salary of $65,250, the salary range for a SOMME is between $92,899-$102,263.

80. The term "provisional," as used in this context, refers to the civil service status of the position, and it is contrasted with the civil service term "permanent."

81. The New York civil service rules dictate that candidates for permanent promotion must be drawn from a ranked list of candidates who have taken a written examination for the title (the "List").

82. The List, which is maintained by the Department of Citywide Administrative Services ("DCAS"), ranks candidates based on the score that they received on the written examination for the

supervisory title and other statutorily defined factors, such as their seniority and veteran's status.

83. Under the civil service rules, management cannot promote an individual "permanently" without first considering other candidates who are ranked higher on the List.

84. In addition, in selecting candidates, management is restricted to the three eligible candidates who are ranked highest on the List.

85. In contrast to permanent promotions, because provisional supervisors have no civil service rights to their positions, the civil service rules place no restrictions on the process used to provisionally promote candidates into supervisory titles.

86. On August 6, 2010, at Executive Director II's direction, NYCDOT posted a promotional opportunity notice for the position of SOMME.

87. The posting described the position and listed under "Qualification Requirements," under the subheading "License Requirements," that the candidate "will be required to obtain a New York State Class A only Commercial Driver License with no restrictions, within ninety days of promotion."

88. The posting accordingly did not require that any applicant possess a "Class A" driver license at the time of interview.

89. A total of 38 auto mechanics within NYCDOT responded to the posting, which was open for only two weeks.

90. Of these applicants, ten were minority candidates.

91. These minority candidates included at least two individuals who were known within Fleet Services to be presently performing the duties of Assistant Supervisor in their respective shops.

92. These two candidates were Bharat and "Mechanic 5," a Hispanic auto mechanic who served as the Assistant Supervisor at the NYCDOT garage operation in Brooklyn ("Brooklyn Shop").

93. Like Bharat, Mechanic 5 had been assigned as an Assistant Supervisor by the supervisor in charge of his respective shop.

94. Although the candidates for promotion were ostensibly selected by a committee which included Executive Director II, and three other senior managers from within Fleet Services and NYCDOT Human Resources, the real decision-maker in the process was Executive Director II.

95. Executive Director II alone selected the candidates for interview, and with one exception, he was effectively the sole decision-maker in the process.

96. In spite of the large number of minority applicants, including minority applicants who were already serving in a supervisory capacity within NYCDOT, of the twelve candidates who were interviewed, only one was a racial minority.

97. This candidate was interviewed and promoted at the request of Deputy Commissioner of RRM because of the candidate's role as a specification writer in NYCDOT's central office in downtown Manhattan, where Deputy Commissioner of RRM was also based, justified higher compensation.

98. The remaining three candidates who were promoted, all at the direction of Executive Director II, were white applicants.

99. One of these individuals was Mechanic 2, who in 2009 had been placed in a supervisory position at the Manhattan Shop, over Bharat, at Executive Director II's request.

C. Promotion of Permanent SOMME (2013)

100. In May 2013, Executive Director II took steps to promote nine individuals permanently into the SOMME position.

101. Throughout the process, NYCDOT management actively took steps which discriminated against minority applicants and promoted the candidacy of white applicants.

102. On May 1, 2013, a notice was sent to all candidates listed on the list of candidates eligible for promotion to SOMME.

103. These candidates were instructed to report to the NYCDOT headquarters in Manhattan on May 17, 2013, to be interviewed for the position.

104. In addition, in contrast to the 2010 posting for the provisional SOMME position, as well as all prior postings for permanent SOMME positions, the May 2013 posting directed candidates to bring their "CDL A License."

105. The reason the posting stated this requirement was because, in an unprecedented decision, NYCDOT management had elected to exercise what is known as a "selective certification," and to call only those candidates on the List who

already possessed a Class A license at the time of the interview.

106. By deciding to limit eligible candidates only to those who qualified for the Class A selective certification, rather than to allow any selected candidate to obtain a Class A license within 90 days, as had been the past practice, NYCDOT management removed from consideration any candidate who did not already possess a Class A license.

107. Mechanic 1, an African-American employee, was the only applicant within the top fourteen candidates without a Class A license at the time of the interview. NYCDOT management's decision to require a Class A license at the time of interview excluded Mechanic 1.

108. Given Mechanic 1's high ranking on the List, and the fact that he had been serving as an Assistant Supervisor in the Bronx Shop, it would have been very difficult for Executive Director II and NYCDOT management to justify not promoting Mechanic 1 had management not exercised the selective certification.

109. At an executive level supervisor meeting prior to the May 17, 2013 interview date, Executive Director II stated a desire to interview a white candidate who was ranked fourteenth on the List.

110. In response to this proposal, Supervisor I, who had since been promoted to an executive management position, expressed dissent. Supervisor I stated that, because the nine applicants that ranked highest on the List were experienced auto mechanics who had demonstrated their qualifications for

promotion through their service within Fleet Services, none of these candidates should be passed over in favor of others who were ranked lower on the List.

111. Based on Supervisor I's proposal, the top nine candidates, including Mechanic 1 and Mechanic 5, two minority applicants, would have been selected for the position.

112. Supervisor I was particularly adamant in asserting that Mechanic 1 should be promoted, as he had served for over fifteen years as an Assistant Supervisor.

113. Although others in the meeting agreed with Supervisor I's view, Supervisor I was the only individual to speak up against Executive Director II's proposal of interviewing candidates ranked lower on the list.

114. Following the meeting, Supervisor I was excluded from any further decision making regarding the selection of candidates for promotion.

115. On the date of the scheduled interview, although many eligible candidates reported to the scheduled interview date as directed in the notice, rumors were widespread that Executive Director II had already decided whom he would promote, and the interviews were therefore being conducted merely to satisfy technical requirements.

116. Upon arriving at the interview location, which was located at the NYCDOT headquarters, Mechanic 5 and other eligible candidates saw Deputy Commissioner of RRM in the same building. When Deputy Commissioner of RRM inquired as to why Mechanic 5 was there dressed in a suit, Mechanic 5

replied that he was there for the interviews for the SOMME posting.

117. In response, Deputy Commissioner of RRM stated "sometimes you just have to wait your turn."

118. After the interviews, which were conducted by Executive Director II, Executive Director II's second-in-command, and two employees from NYCDOT's human resources division, nine candidates were selected for promotion.

119. Although four individuals conducted the interviews, the promotion decisions were ultimately Executive Director II's, as the other interviewers deferred entirely to his authority.

120. Of the nine candidates selected for promotion, none of the eight candidates selected for promotion by Executive Director II was a minority candidate.

121. This was the case even though all three of the minority candidates who ranked high enough on the List to be considered had served as Assistant Supervisors in the past, and indeed, Mechanic 1 was continuing to serve as an Assistant Supervisor at the time of the interviews.

122. In addition, one of the candidates who was selected, Mechanic 3, was significantly less experienced than the minority candidates who were passed over.

123. In their written justification for Mechanic 3's selection, the interviewers cited his unique experience in writing specifications, a task he had been preferentially assigned by Executive Director II.

D. Retaliation Against Dissent

124. Some time after he had expressed criticism of Executive Director II's handling of the selection process for SOMME, Supervisor I received an e-mail that all weekday overtime for Fleet Services executive staff, such as himself, should be discontinued and that future overtime requests would have to be submitted to Executive Director II for prior approval.

125. The e-mail effectively discontinued what had been the prior practice for executive staff within Fleet Services to return to their desks for an extra hour at the end of each day, during which time they handled administrative duties and received overtime compensation.

126. Supervisor I interpreted the e-mail as a policy to reduce overtime and responded accordingly, reducing his salary by approximately $11,000 per year.

127. After he received the e-mail, however, Supervisor I became aware that other executive staff members were continuing to send e-mails after the normal work day.

128. As a result of receiving these e-mails, Supervisor I realized that what he had interpreted as an agency-wide "policy," may have instead been an e-mail sent specifically to him, as retaliation for his prior dissent in the SOMME hiring process.

E. Subsequent Threats Against Dissenters

129. On October 22, 2013, Blacksmith 1 expressed to his supervisor a complaint that a white blacksmith was being given preferential treatment

with respect to his overtime allowance and had been recently granted the option of "clocking in" in his home borough, a privilege which Blacksmith 1 had requested in 2011 and been denied by Executive Director II.

130. This complaint was relayed to Executive Director II on that same day, and Executive Director II then requested that Blacksmith 1 come to his office at Harper Street the following day for a meeting.

131. At the time of the appointed meeting, on October 23, 2013, Blacksmith 1, along with Supervisor I and Blacksmith 1's direct supervisor, reported to Executive Director II's office as requested. They were joined by other members of Fleet Services' executive leadership.

132. During the meeting, Blacksmith 1 stated his concern regarding how Executive Director II had treated the white blacksmith preferentially to how he himself had been treated. Executive Director II responded to this statement that "it's none of your concern what I do in this place."

133. Blacksmith 1 then raised a concern that the disparate treatment he had received was similar to Mechanic 1 having been denied the SOMME promotion. Blacksmith 1 further stated that Mechanic 1 should have been promoted to SOMME.

134. In response, Executive Director II said in a loud and threatening manner that was clearly heard by everyone in the room, "I'll take you outside and kick your fucking ass."

135. Upon Executive Director II's threat of physical violence, Blacksmith 1 feared for his safety and left the room.

136. Although this incident was reported by Blacksmith 1 to NYCDOT's Office of the Advocate in 2014, and was witnessed by all of the individuals present in the meeting, Blacksmith 1 never received a formal apology and Executive Director II remained in his position as ED following the incident.

EEOC Proceedings

137. On November 8, 2013, Bharat filed with the EEOC an individual charge of discrimination on the basis of race and national origin under Title VII.

138. In an Answer and Position Statement filed on February 28, 2014, NYCDOT denied Bharat's allegations and asserted that the nine candidates selected for promotion to SOMME were selected on the basis that: (1) four of the candidates were already serving provisionally in the title, and accordingly, possessed unique familiarity and experience in order to perform the job; and (2) the remaining candidates all possessed the requisite skills needed to fulfill the duties of the SOMME position.

139. On May 14, 2014, Bharat, through counsel, filed a letter rebuttal to the NYCDOT's Answer and Position Statement

140. On October 16, 2014, the EEOC's New York District Director issued a cause determination with regard to Bharat's charges of discrimination. The EEOC found that there was reasonable cause to believe Bharat' s allegation that he was not promoted to a supervisory position by the NYCDOT because of his race and national origin. After determining that

further conciliation efforts would be futile, on December 15, 2014, the EEOC referred this matter to the Department of Justice for possible litigation.

Conditions Precedent to Suit

141. All conditions precedent to the filing of this suit have been satisfied.

FIRST CLAIM FOR RELIEF
(Pattern or Practice of Discrimination)

142. The allegations in paragraphs one through 142 are repeated and realleged as though set forth fully herein.

143. The acts, omissions, policies, and practices described in paragraphs 1 through 142 above constitute a pattern or practice of employment discrimination on the basis of race in violation of 42 U.S.C. § 2000e-2(a)(1) and retaliation in violation of 42 U.S.C. § 2000e-3(a). This pattern or practice denies racial minorities and others employed within Fleet Services the full exercise of the rights secured by Title VII. Unless enjoined by the Court, Defendants will continue to engage in practices that are the same as or similar to those that are alleged in this Complaint.

SECOND CLAIM FOR RELIEF
(Discrimination Against Bharat and Similarly-Situated Individuals)

144. The allegations in paragraphs 1 through 142 are repeated and realleged as though set forth fully herein.

145. Defendants violated 42 U.S.C. § 2000e-2(a)(1) by discriminating against Bharat and similarly-situated individuals on the basis of race and national origin.

WHEREFORE, the United States demands judgment:

(a) declaring that Defendants engaged in a pattern and practice of discrimination based on race in violation of 42 U.S.C. § 2000e-2(a)(1) and retaliation in violation of 42 U.S.C. § 2000e-3(a);

(b) enjoining Defendants from engaging in discriminatory and retaliatory employment practices in violation of Title VII;

(c) ordering Defendants to take such other steps as may be necessary to prevent and remedy employment discrimination and the patterns or practices of discrimination in employment identified above;

(d) ordering Defendants to provide remedial relief, including but not limited to sufficient damages to compensate Bharat, similarly-situated individuals, and others, to make them whole for the losses they have suffered as a result of the discrimination and retaliation alleged in this Complaint; and

(e) granting the United States its costs and disbursements, and such further relief against Defendants as the Court may deem just and proper.

Date: New York, New York
January 18, 2017

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Exhibit B to Amended Complaint - Consent Decree, Filed June 14, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 0364 (JGK)

CONSENT DECREE

UNITED STATES OF AMERICA

Plaintiff,

v.

CITY OF NEW YORK,

Defendant.

WHEREAS, this action was brought by Plaintiff United States ("United States") against Defendant the City of New York (the "City") and the New York City Department of Transportation (the "NYCDOT") to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* as amended ("Title VII").

WHEREAS, this Court has jurisdiction over this matter under 42 U.S.C. § 2000e-6(b) and 28 U.S.C. §§ 1331 & 1345.

WHEREAS, the United States first notified the City of its investigation into the promotional practices of NYCDOT in November 2015.

WHEREAS, based on the information gathered during its investigation, the United States determined that the City has engaged in a pattern or

practice of racial discrimination and retaliation in the Fleet Services unit ("Fleet Services") within the New York City Department of Transportation ("NYCDOT").

WHEREAS, the United States notified the City in June 2016 that a lawsuit had been authorized.

WHEREAS, in its Complaint, filed on January 18, 2017, the United States alleges that, as part of an ongoing pattern and practice of discrimination against racial minorities in its Fleet Services, the City failed to promote racial minority employees to supervisory positions and retaliated against those who criticized the discrimination. Specifically, the United States alleges -that, since at least 2007, the City failed to take steps to remedy, and effectively condoned, a management culture in which overt racial animus and inferred racial preference were both tolerated and allowed to thrive.

WHEREAS, the United States and the City, desiring that this action be settled by an appropriate consent decree (the "Decree") and without the burdens of protracted litigation, agree to the jurisdiction of this Court over the Parties and the subject matter of this action.

WHEREAS, the United States and the City further agree to the entry of this Decree as final and binding between themselves as to the issues raised in the United States' Complaint in this action.

In resolution of this action, with the consent of the Parties, IT IS

THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

I. DEFINITIONS

1. The "Parties" to this Decree are the United States, by the Department of Justice, and the City.

2. "SOMME" means Supervisor of Mechanics (Mechanical Equipment). For the purposes of this Decree, the term SOMME shall be limited to SOMME positions and employees within NYCDOT Fleet Services.

3. "Applicant" means any individual employed by NYCDOT who applies or has applied for the position of SOMME within Fleet Services from August 6, 2010 through the term of this consent decree.

4. "Claimant" means a person who the Parties have agreed is entitled to an award of individual relief.

5. "Back Pay" means a monetary award that represents the value of the additional wages and/or other benefits that a Claimant would have received if he or she had: (a) been permanently and/or provisionally promoted to the position of SOMME between August 6, 2010 and July 5, 2016; and/or (b) not been retaliated against for having alleged racial discrimination in the selection of candidates for promotion to SOMME.

6. "Complainant" means Seupersaud Bharat.

7. "Day" or "Days" means calendar days unless business days are clearly specified. Any deadline referenced in this Decree shall be calculated pursuant to Rule 6 of the Federal Rules of Civil Procedure.

8. "Defendant" means the City.

9. "Effective Date" means the date on which the Court enters the Decree as final.

10. "Fleet Services" is a NYCDOT unit headed by an Associate Deputy Commissioner, who reports directly to the NYCDOT Chief Operations Officer. Until September 17, 2015, Fleet Services was a sub-division of NYCDOT Roadway Repair and Maintenance Division ("RRM").

11. "Individual relief' under this Decree means:

a. monetary relief in the form of back pay; and/or

b. retroactive seniority relief.

12. A "Job Vacancy" refers to any vacancy within Fleet Services for the position of SOMME.

13. "Permanent Appointment" refers to the appointment of an individual to the title of SOMME from an eligible list, as described in N.Y. Civil Service Law § 61(1).

14. "Posting" refers to any written or electronic notice or advertisement of a Job Vacancy.

15. "Provisional Appointment" refers to the appointment of an individual to the position of SOMME. as described in N.Y. Civil Service Law § 65.

16. "Retroactive Seniority Relief' means the award of retroactive seniority for the SOMME position of Complainant and/or a Claimant who is eligible for relief pursuant to Paragraph 37 of the Decree. A Claimant is eligible for Retroactive Seniority Relief under this Decree if the Claimant is a minority Applicant who was called from the Civil Service list in response to a vacancy for Permanent

Promotion to the position of SOMME from August 6, 2010, through July 5, 2016; was not selected in favor of non-minority applicants who were ranked lower than the minority applicant on the Certified Civil Service List; and, as described in Paragraph 23(e)(e), has since been permanently promoted to the position of SOMME.

17. "Retroactive Seniority" refers to seniority benefits in the SOMME position that a Claimant who receives retroactive seniority relief described in Paragraph 16 is entitled to receive.

a. Retroactive Seniority is comprised of retroactive benefits seniority, which includes seniority for purposes of calculating an individual's salary or other pay, as well as any other purposes for which seniority is used to determine the amount of or eligibility for employee benefits.

b. An award of Retroactive Seniority shall correspond to June 9, 2013.

18. The "Term of this Consent Decree" refers to the entire period of time during which the Court retains jurisdiction over the Decree, as set forth in Section III of this Decree.

II. RETENTION OF JURISDICTION

19. This Court has jurisdiction over the parties and the subject matter of this action. The Court shall retain jurisdiction over this action for a period of three years after the Effective Date to enforce or modify the Decree, to resolve any dispute that arises under the Decree, and to entertain any application by any party and issue any order that may be necessary or appropriate to effectuate its terms and objectives.

20. The Court may extend the term of the Decree upon consent of the parties, or upon an application of either party for good cause shown.

21. The parties will confer and attempt to negotiate a consensual resolution of any dispute before making an application to the Court.

III. PURPOSES OF THE DECREE

22. The purposes of this Decree are to ensure that:

a. The City does not violate Title VII by using policies or practices that have an adverse impact upon racial minorities for the position of SOMME, or that otherwise violate the Title VII rights of racial minorities to become SOMME;

b. The City utilizes lawful selection procedures that will ensure that promotion to the SOMME title is based on merit and that the City's selection procedure does not discriminate against qualified minority applicants; and

c. The City provides, as appropriate, monetary relief and/or retroactive seniority relief to qualified persons who were denied a promotion to the SOMME position or retaliated against due to the employment practices challenged by the United States in this case.

d. The City takes steps to remedy the manner in which claims of discrimination are investigated and addressed.

IV. STIPULATIONS

23. Subject to the Court's approval of this Decree, the Parties waive findings of fact and conclusions of law on all issues, except as to the following, which the Parties stipulate and which the Court finds:

a. In 2009, the NYCDOT Equal Employment Opportunity Office ("NYCDOT EEO") conducted an investigation into allegations of racial discrimination within Fleet Services.

b. As part of its investigation, NYCDOT EEO interviewed numerous Fleet Services employees.

c. During these interviews, employees reported that they had witnessed the Executive Director of the Fleet Services Unit within RRM at the time, "Executive Director I," use racial epithets to describe African American employees.

d. One of the employees interviewed during the investigation by NYCDOT EEO was "Executive Director II," a direct report of Executive Director I.

e. In his initial interview with NYCDOT EEO, on October 23, 2009, Executive Director II denied having ever observed Executive Director I behave inappropriately.

f. At his request, Executive Director II was interviewed again on October 26, 2009. In his subsequent interview, Executive Director II reported to NYCDOT EEO that he repeatedly observed Executive Director I using racial epithets over the course of several years.

g. Until he was interviewed for the second time by NYCDOT EEO in connection with its investigation of Executive Director I, Executive

Director II had never reported these racially discriminatory statements.

h. From 1997 to 2010, Executive Director I had served as the EEO counselor within Fleet Services for the NYCDOT EEO.

i. During the course of the interviews conducted by NYCDOT EEO, employees also reported that they believed that Executive Director I had taken personnel actions which were motivated by racial animus.

j. Following its investigation, NYCDOT EEO recommended that Executive Director I be demoted, suspended, and removed from his function as a NYCDOT EEO counselor.

k. These recommendations were reviewed by the Commissioner of NYCDOT at the time in January 2010, and were shared with NYCDOT's Office of the Advocate, the agency unit charged with overseeing the statutory and contractual disciplinary procedures.

l. After being informed by NYCDOT EEO that his case had been referred to the Office of the Advocate for further disciplinary action, Executive Director I chose to retire.

m. Upon learning of Executive Director I's decision to separate from City service, the City did not continue the formal disciplinary process against him.

n. At the time of his retirement, Executive Director I had never been subject to any formal disciplinary sanctions imposed by the City.

o. Upon Executive Director I's retirement, Executive Director II was promoted to the position previously held by Executive Director I.

p. Complainant is a racial minority who has been employed by NYCDOT as an auto mechanic from October 2008 to September 2016 and as a SOMME from September 2016 to the present.

q. At some time during Complainant's employment, Executive Director II instructed Complainant's direct supervisor to reassign Complainant's supervisory duties to a non-minority auto mechanic who had fewer years of experience as an auto mechanic than Complainant. Executive Director II gave this instruction over the expressed preference of Complainant's direct supervisor.

r. In 2010, Complainant submitted an application in response to a Job Vacancy notice for provisional appointment to the position of SOMME.

s. Complainant was not selected for this position.

t. In May 2013, Complainant was called from the Certified Civil Service List for interview for a permanent promotion to the SOMME position by three NYCDOT employees, including Executive Director II.

u. A three-person committee of NYCDOT management did not select Complainant for promotion to the position of permanent SOMME.

v. In 2013, Complainant was not selected in favor of non-minority applicants who had fewer years of experience working as an auto mechanic than Complainant.

w. During Executive Director II's tenure, from 2010 to 2016, Defendant promoted one minority applicant to the position of SOMME.

x. During Executive Director II's tenure as Executive Director of Fleet Services, non-minority applicants were selected for promotion over minority applicants, even when the minority applicants had more years of automotive experience and had been serving in a supervisory capacity without commensurate compensation or title.

y. When management employees challenged Executive Director II's promotional decisions, however, they were removed from the promotional decision-making process.

z. When a non-management employee accused Executive Director II of discriminating against racial minorities within Fleet Services, Executive Director II verbally threatened the employee, including a threat of physical violence. This verbal threat of physical violence was made in the presence of several other supervisory personnel within Fleet Services.

aa. Two minority employees, including Complainant, asserted complaints of discrimination by Executive Director II in the promotion process. Both of these complaints were investigated and determined to be unsubstantiated by NYCDOT EEO.

bb. On June 2, 2016, the City was informed that the U.S. Attorney's Office had conducted an investigation regarding the allegations in the Complaint.

cc. Up until June 2, 2016, 'Executive Director II continued to serve as Executive Director of Fleet Services.

dd. After June 2, 2016, the City: (I) removed Executive Director II from all supervisory duties and all functions associated with selecting candidates for promotion; and (2) permanently promoted three minority candidates to the position of SOMME, including Complainant.

V. GENERAL INJUNCTIVE RELIEF

24. The City, its officials, agents, employees, and successors shall not engage many act or practice that violates Title VII of the Civil Rights Act of 1964 in connection with the recruitment, selection, and employment of racial minorities for the position of SOMME.

25. The City, its officials, agents, employees, and successors shall not engage in any act or practice that has the purpose or effect of unlawfully discriminating on the basis of race against Applicants for the position of SOMME.

26. The City, its officials, agents, employees, and successors will take steps to investigate and address claims of discrimination that are brought to the attention of the NYCDOT's Office of Equal Employment Opportunities.

27. The City, its officials, agents, employees, and successors shall not adopt or implement any policy, process, or practice for job appointments, promotions or hiring that has the purpose or effect of discriminating on the basis of race against any Applicant for the position of SOMME.

28. The City, its officials, agents, employees, and successors are enjoined from retaliating against or otherwise adversely affecting any person because he or she opposed the alleged discrimination at issue

here, in any way participated in or cooperated with the investigation or litigation of the alleged discrimination at issue here, has been involved with the development or administration of this Decree, or received relief under or otherwise benefited from this Decree.

29. The NYCDOT Office of the General Counsel within the Division of Legal Affairs shall be primarily responsible for enforcing the provisions of this Decree. This Office of the General Counsel's responsibilities shall include, but not be limited to, ensuring that the City fully implements and complies with all paragraphs of this Decree.

VI. PROCESS FOR FILLING JOB VACANCIES

30. All permanent promotions to the position of SOMME shall be made from the Certified Civil Service List, in accordance with Civil Service Law § 61.

31. The City shall notify the United States within twenty-one (21) days if, at any time during the term of this Decree, there is no existing Civil Service List for the position of SOMME from which a permanent promotion can be made by NYCDOT.

32. If at any time during the term of this Decree, there is no existing Certified Civil Service List, and the exigencies of the City's staffing requirements render it impossible or impractical to delay in hiring for the position of SOMME until another civil service list has been certified, Defendant may fill Job Vacancies through provisional appointments pursuant to Civil Service Law § 65(1), provided, however, that it fills any such Job Vacancy in accordance with the following procedures:

a. Defendant shall publish a Posting for a period of at least thirty (30) days. The Posting shall be published at least forty-five (45) days prior to the deadline for applications for the Job Vacancy.

b. Defendant shall, at a minimum, publish the Posting on the NYCDOT's internet and intranet websites, as well as all other locations at which the NYCDOT typically posts a physical Posting. Defendant will also distribute the Posting to the appropriate union for the position.

c. The Posting shall include, at a minimum, a description of the position, a description of the application process, the salary for the position, the minimum qualifications necessary for the position, and any other eligibility requirements. The Posting shalt also include a statement that the NYCDOT is an Equal Opportunity Employer.

d. The City will review all applications received in response to a Posting to ensure that Applicants meet the minimum qualifications and are eligible to apply.

e. Qualified Applicants shall be contacted telephonically, letter and/or via email and scheduled for an interview. A letter and/or email confirming the time and date of each interview shall be sent to each Applicant.

f. Applicants selected for interviews in response to a particular posting shall be interviewed by the same panel of interviewers whenever possible.

g. During the interview, the panel will ask the same prepared questions of all selected Applicants. The interview questions will be prepared in advance by NYCDOT, and reviewed and signed off on by the

Associate Deputy Commissioner of the Fleet Services Division (or his/her equivalent), in consultation with the NYCDOT EEO Officer. Panel members may also ask appropriate, job-related follow-up questions of their own. Each panel member must separately fill out an interview rating sheet, ranking each interviewed Applicant based upon the panel member's evaluation of the Applicant's qualifications, including, but not limited to, relevant prior experience, job performance, years of service, and performance during the interview.

h. At the conclusion of the interviews, the pane[will meet to discuss the interviewed Applicants and to rank them based on the criteria described in subparagraph 32(g). The panel will produce a list reflecting ranking of the interviewed Applicants.

i. Offers for provisional appointment to the position of SOMME shall be made in order of the Applicant's ranking on the list prepared by the panel. The list shall exist only for the vacancy or vacancies being considered at that time.

j. Offers for the provisional appointment to the position of SOMME shall be made in writing.

33. Nothing in Paragraph 32 shall preclude the City from accepting as a transfer a permanent SOMME from another NYCDOT Division or City Agency for the purpose of filling a SOMME vacancy in Fleet Services.

VII. COMPLAINANT'S RELIEF

34. Within ninety (90) days after the Effective Date, in order to settle any and all claims and demands against the City by Complainant arising from the facts and circumstances giving rise to the Complaint, and any other pending claims Complainant has against the City in any court or other forum, the City agrees to provide the relief to the Complainant described in paragraphs (a), (b), and (c) below:

a. provide Complainant Back Pay and Retroactive Seniority relief pursuant to this Decree;

b. pay to Complainant the sum of one hundred and fifty thousand dollars ($150,000) as additional compensatory damages; and

c. pay Complainant's reasonable attorneys' fees and costs in the amount of $70,000.

d. In the event that Complainant becomes deceased prior to the payment of the above amounts, such amounts shall be paid in accordance with New York State law.

VIII. INDIVIDUAL RELIEF

A. Two Forms of Individual Relief

35. The City will provide individual relief to eligible Claimants in the form of monetary relief *(i.e.,* back pay) and/or retroactive seniority relief.

36. A Claimant is eligible for monetary relief *(e.g.,* back pay) under this Decree if the Claimant:

a. is a minority Applicant who submitted an application in response to a Posting for Provisional Appointment to the position of SOMME from August 6, 2010, through July 5, 2016, and was not selected in favor of a non-minority applicant; and/or

b. is a minority Applicant who was called from the Civil Service list in response to a vacancy for Permanent Promotion to the position of SOMME from August 6, 2010, through July 5, 2016; and was not selected in favor of non-minority applicants who were ranked lower than the minority applicant on the Certified Civil Service; and/or

c. is a current or fanner NYCDOT employee who was deprived of wages, or otherwise suffered a material adverse employment action, in retaliation for having alleged discrimination in the selection of candidates for promotion to the position of SOMME.

37. A Claimant is eligible for retroactive seniority relief if the employee satisfies Paragraph 36(b), and is one of the three minority candidates who, as described in Paragraph 23(d)(d), were permanently promoted to the position of SOMME after June 9, 2016.

B. Monetary Relief

38. The Parties have agreed upon fourteen (14) Claimants {the "Monetary Relief Claimants") who are eligible for monetary relief pursuant to Paragraph 36.

39. A list of the Monetary Relief Claimants, and the award that the Patties have agreed each Monetary Relief Claimant is entitled to as individual relief is attached as Appendix A to this Decree.

C. Retroactive Seniority Relief

40. The Parties have agreed upon three (3) Claimants (the "Retroactive Seniority Claimants") who are eligible for retroactive seniority relief pursuant to Paragraph 37.

41. A list of the Retroactive Seniority Relief Claimants is attached as Appendix B to this Decree.

IX. ADMINISTRATION OF INDIVIDUAL RELIEF

A. Notice of Individual Relief Awards and Acceptance of Individual Relief Award and Release of Claims Form

42. No later than fourteen (14) days after the Effective Date, the City shall provide notice to each Monetary Relief Claimant and each Retroactive Seniority Claimant entitled to relief.

43. The City shall send notice to each Monetary Relief Claimant and each Retroactive Seniority Claimant identified in Appendices A and B of this Decree via e-mail to the last-known e-mail address and via first-class U.S. mail to the last-known mailing address. The notice shall include:

a. The Notice of Individual Relief Award in the form set forth in Appendices C and D. If the Claimant is eligible for Retroactive Seniority relief. as set forth in Appendix D, this notice will include a statement of the Claimant's eligibility for such relief and a description of the retroactive seniority the Claimant will receive upon receipt of Retroactive Seniority relief;

b. An Acceptance of Individual Relief Award and Release of Claims Form in the form set forth in Appendix E; and

c. Any withholding tax forms necessary for the City to comply with its withholding obligations under law and Paragraph 54 of this Decree.

B. Acceptance of Individual Relief Award and Release of Claims

44. To receive an award of individual relief, a Claimant must return to the City an Acceptance of Individual Relief Award and Release of Claims Form as set forth in Appendix E of this Decree, along with any applicable withholding tax forms, no later than sixty (60) days after the Effective Date.

45. The submission date of each Acceptance of Individual Relief Award and Release of Claims Form shall be the date on which the form was e-mailed to the City, as determined by the e-mail date stamp, or the date on which the form was mailed to the City, as determined by the postmark. In the event the postmark is missing or illegible, the submission date of the Acceptance of Relief and Release of Claims Form shall be deemed to be five (5) days prior to the date the form was received by the City.

46. Within five (5) business days of the City's receipt of an Acceptance of Individual Relief Award and Release of Claims Form and any applicable withholding tax forms, or as soon as practicable, the City shall review the form(s) to determine whether it is fully executed with the information that is necessary to effectuate the Claimant's individual relief award.

47. An Acceptance of Individual Relief Award and Release of Claims Form is fully executed if the Claimant completes all blanks that require a response as indicated by an asterisk on the form. A withholding tax form is fully executed based on whether it complies with the protocol provided by the City pursuant to Paragraph 54.

48. If the form is not fully executed, within ten (10) business days, or as soon as practicable, after receipt of the form, the City shall notify the Claimant via mail. e-mail, and telephone that his/her form(s) was not fully executed, and provide information to the Claimant indicating what is required to fully execute the form.

49. The City shall continue to conduct such review of all returned forms and to notify Claimants who submitted forms that were not fully executed until the deadline set forth in Paragraph 44.

50. No later than five (5) business days after the deadline provided by Paragraph 44, the City shall forward to the United States copies of all Acceptance of Individual Relief Award and Release of Claims Forms and withholding tax forms it received from Claimants named in Appendices A and B of this Decree. The City shall also provide the United States with a list of all Claimants who submitted Acceptance of Individual Relief Award and Release of Claims Forms and withholding tax forms, identifying which Claimants submitted fully-executed forms, as described in Paragraph 44, and which Claimants submitted forms that were not fully executed.

51. No later than seventy-five (75) days after the Effective Date, Claimants whose Acceptance of Individual Relief A ward and Release of Claims Form

and/or any applicable withholding tax forms were not fully executed must provide any missing information, and Claimants must show good cause, to be determined by the United States, for failing to meet the prior deadline, and must return fully-executed forms. A Claimant's failure to return fully-executed forms or failure to show good cause by this deadline shall constitute a rejection of the offer of individual relief and shall release the Parties from any further obligation under the Decree to make an award of individual relief to the Claimant.

52. No later than five (5) business days after the deadline provided in Paragraph 51, the City shall provide the United States with all of the returned Acceptance of Individual Relief Award and Release of Claims Forms and any applicable withholding tax forms. The City shall also provide the United States with an updated list of all of the Claimants who submitted Acceptance of Individual Relief Award and Release of Claims Forms and any applicable withholding tax forms, identifying which Claimants submitted fully-executed forms and which Claimants submitted forms that were not fully executed.

C. Issuance of Back Pay Award Checks by City

53. No later than ninety days (90) after the deadline provided in Paragraph 52, the City shall mail via certified U.S. mail (return receipt requested) a back pay award check to each Monetary Relief Claimant listed on Appendix A who submitted a fully-executed, as defined in Paragraph 44, Acceptance of Individual Relief A ward and Release of Claims Forms and any applicable withholding tax forms. The amount of the back pay award check shall

be the amount shown for the Claimant on Appendix A, less all applicable deductions and withholdings in accordance with Paragraph 54, below.

54. The City shall withhold from each Monetary Relief Claimant's back pay award the employee portions of all appropriate federal, state, and local income taxes; the employee's Medicare and FICA tax; and any other amounts that are required to be withheld by law. The City shall be responsible for remitting and reporting such employee-side withholdings to the appropriate taxing authorities.

55. The City shall be responsible for and remit to the appropriate taxing authorities the employer portion of all federal and state payroll taxes applicable on any monetary relief award paid to a Monetary Relief Claimant, including employer contributions to Medicare and the Social Security fund. The employer portion of such taxes shall not be deducted from any Monetary Relief Claimant's back pay award.

56. The City shall keep records of all back pay award checks that are returned to the City as undeliverable. If any Monetary Relief Claimant's back pay award check is returned as undeliverable, the City shall promptly notify the United States and attempt to identify an updated mailing address as soon as practicable.

57. If the City or the United States identifies an alternate address, the City shall re-mail the back pay award check within five (5) business days to the Monetary Relief Claimant.

58. No later than two hundred and ten (210) days after the Effective Date, the City shall provide to the United States a statement indicating the amount of the payment made to each Monetary Relief Claimant, the amounts withheld from each such back pay award check for taxes, if applicable, and other amounts required to be withheld by law, and the purpose of each such withholding.

59. No later than thirty (30) days after the deadline in Paragraph 58, the City. shall provide to the United States a list of all Monetary Relief Claimants whose award payments are still outstanding. The list shall identify which Monetary Relief Claimant's checks appear to have been delivered (no returned check) but have not been cashed, and which Monetary Relief Claimant's checks have been returned to the City as undeliverable.

60. No later than forty-five (45) days after the deadline in Paragraph 58, the City shall email and mail a letter to all Monetary Relief Claimants whose award payments are still outstanding to inform such Monetary Relief Claimants that their awards may be redistributed or otherwise reallocated if they do not accept payment by a specified date that is ninety (90) days after issuance of the check. The letter shall state that no further warnings regarding such distribution will be given.

61. No later than ninety (90) days after the deadline in Paragraph 58, the City shall provide the United States with a list of all Claimants whose back pay award checks were returned as undeliverable and/or uncashed.

D. Retroactive Seniority Relief

62. As described in Paragraph 23(d)(d), the individuals listed on Appendix B were permanently promoted to the SOMME position prior to the City providing an offer of retroactive seniority pursuant to this Decree.

63. The City will send to all individuals listed on Appendix B, by e-mail to the last-known e-mail address and by U.S. mail to the last-known mailing address, a written offer to apply for retroactive seniority corresponding with the Claimant's retroactive seniority date as provided by this Decree. This offer will include: (i) the salary and retroactive seniority benefits based on his/her retroactive seniority date that the City will provide upon assumption of the SOMME title; (ii) the telephone number at which the Claimant may contact the City with any questions regarding the offer to have retroactive seniority applied; and (iii) that the Claimant has at least thirty (30) days from the date on which the Claimant receives the written offer to notify the City that the Claimant accepts the offer.

64. If a Retroactive Seniority Claimant fails to timely accept the City's offer of retroactive seniority, except for good cause as determined by the United States, the City's obligation to provide the offer of retroactive seniority of that Claimant ceases.

65. On the date on which a Retroactive Seniority Claimant is offered retroactive seniority pursuant to Paragraph 63, the City shall credit the Claimant with retroactive seniority corresponding with June 9, 2013. The City will notify the United States in writing within thirty (30) days of crediting any Retroactive Seniority Claimants with such

retroactive seniority, pursuant to Paragraph 66, below.

X. MONITORING AND OVERSIGHT

A. Reporting

66. No later than forty-five (45) days after such offers have been made, the City shall provide to the United States a written report identifying whether each Claimant identified in Appendix B accepted the offer of retroactive seniority.

67. During the term of this Consent Decree, the City shall provide the United States with six (6) reports, each covering a six-month reporting period. The first reporting period will begin on the first day of the month following the Effective Date. These reports will be due within thirty (30) days from the closing of the respective reporting period. Defendant will provide the United States with the sixth and final report thirty (30) days before the expiration of the Consent Decree and the reporting period for the final report will cover the period from the closing date of the fifth report until ten (10) business days prior to its issuance. For each of these six reports, Defendant will provide the United States with the following information and documents relating to the reporting period in question:

a. A list of all individuals transferred into or promoted to the SOMME position in Fleet Services during the reporting period, including (i) names; (ii) race; (iii) the manner in which the vacancy was filled (*i.e.*, from the civil service or through the procedures set forth in this Consent Decree), (iv) the date of promotion, and (v) ranking on the civil service list, if applicable.

b. To the extent that Defendant invoke their discretion under Civil Service Law § 61(1) to promote individuals from the certified civil service list out of rank order, (i) the names and races of all such persons promoted, (ii) the names and races of all persons who were ranked higher on the certified civil service list than the selectees who were not hired for the position of SOMME, and (iii) all information relied upon in making the hiring decision.

c. To the extent any individual receives a Provisional Appointment in accordance with the procedures set forth in Paragraph 32, (i) a list of all Applicants who submitted an application for a provisional appointment to the SOMME position for a prospective vacancy, broken down by race, (ii) a list of all Applicants interviewed for the provisional appointment to the SOMME position, and (iii) the complete application packages for each such Applicant, including all written materials submitted by the Applicant, the list of questions asked at the interview, the interview rating sheets, notes taken by the panel and the panel's ranking list.

d. For each Posting during the reporting period, (i) the date of such Posting, (ii) the content of such Posting, (iii) the manner of such Posting, (iv) the location of such Posting and (v) the duration of such Posting.

e. All complaints filed by Applicants with the NYCDOT EEO or any City, state or federal entity, alleging that s/he was not promoted on the basis of his or her race and/or national origin, or alleging retaliation for complaining regarding another individual being discriminated against because of his

or her race and/or national origin, and all reports of investigation or findings regarding those complaints.

68. If any of the information set forth above does not exist or is not applicable for the relevant reporting period, Defendant shall so inform the United States in writing.

B. Record-Keeping

69. In addition to the documents identified in Paragraph 67, above, during the term of this Consent Decree Defendant shall retain all documents created for purposes of compliance with the Decree.

70. During the term of this Decree, the United States may request, in writing, access to any other documents identified or not identified in this Decree that the United States deems necessary to assess Defendant's compliance with the terms of the Decree. Nothing in this Decree will be deemed to waive the City's attorney-client and/or work-product privileges.

XII. DISPUTE RESOLUTION

71. The Parties shall attempt in good faith to resolve informally any disputes that arise under this Decree. If the Parties are unable to resolve the dispute expeditiously, either party may submit the disputed issue to the Court for resolution upon fifteen (15) business days written notice to the other party, unless a different time period has been specified elsewhere in the Decree.

XIII. DURATION OF THE CONSENT DECREE

72. Provided there are no outstanding disputes being resolved pursuant to Paragraph 71, this Decree shall be dissolved without further order of the Court upon the completion of the following:

a. Fulfillment of the Parties' obligations regarding General Injunctive Relief set forth in Section V of this Decree;

b. Completion of the process regarding issuance of back pay award checks set forth in Paragraphs 53 through 61 of this Decree; and

c. The passage of forty (45) days after the date the City provides the last of the reports and statements required by Paragraphs 66 and 67 of the Decree.

73. The Parties will promptly notify the Court of the fulfillment of all obligations set forth under Paragraph 72 and request that this action be dismissed.

XIV. COSTS AND FEES

74. Other than the payment of costs pursuant to Paragraph 34, each party shall bear its own costs, and other expenses incurred as a result of obligations imposed by this Decree.

XV. MISCELLANEOUS TERMS AND PROVISIONS

75. If any collateral challenge to the Decree arises in any court and the City receives notice thereof, the City shall immediately notify counsel for the United States.

76. Any amendments or modifications to this Decree shall be in writing and signed by each of the parties.

77. Nothing in this Decree shall be construed to relieve the City of its obligation to comply with any federal, state or city statute or regulation. In the

event that any party contends that any Constitutional provision, statute or regulation conflicts with the City's obligations under this Consent Decree, such party may apply to the Court for clarification of the City's obligations.

78. Nothing in this Decree shall be construed to limit the authority of the United States, pursuant to Title VII or any other applicable statute, to investigate or act upon any complaint of discrimination brought to its attention, from any source, including but not limited to referrals of complaints by the EEOC, pursuant to 42 U.S.C. § 2000e-5.

79. Nothing in this Decree shall be construed to waive or limit the legal rights and remedies of any Claimant who declines the relief they are entitled to pursuant to this Decree by: (1) indicating their declination of relief in an Acceptance of Individual Relief Award and Release of Claims Form returned to the City; and/or (2) failing to return an Acceptance of Individual Relief Award and Release of Claims Form.

80. Nothing in this Decree shall be construed to waive or limit the legal rights and remedies of any individual who is not entitled to relief pursuant to this Decree.

81. Any applications to the Court under this Decree shall be on notice to all parties.

82. Copies of all notices, correspondence, reports or documents required to be provided by one party to the other under this Consent Decree shall be mailed to:

United States Attorney's Office
Southern District of New York
86 Chambers Street
New York, NY 10007
Attention: Chief, Civil Rights Unit

The City of New York Law Department
100 Church Street
New York. NY 10007-2601
Attention: Chief, Labor and Employment Law Division

The City of New York, Department of Transportation
Division of Legal Affairs
55 Water Street, 9th Floor
New York, NY 10041
Attention: General Counsel

83. Each party acknowledges that it has not relied upon any representations, warranties or statements of any nature whatsoever, whether written or oral, made by any person, except as specifically set forth in this Decree and that this Decree represents the entire agreement of the parties. No prior agreements, oral representations or statements shall be considered a part of this Decree.

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
Attorney for the United States of America
By: /s/ Jessica Jean Hu
JESSICA JEAN HU
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel. No.: (212) 637-2726
Fax No.: (212) 637-2717
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Dated: New York, New York
June 13, 2017

ZACHARY W. CARTER
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Attorney for Defendant
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(212) 356-4015
aoconnor@law.nyc.gov
By: /s/ Andrea O'Connor
ANDREA O'CONNOR
Assistant Corporation Counsel

Dated: New York, New York
June 13, 2017

SO ORDERED:
/s/ John G. Koeltl
JOHN G. KOELTL
United States District Judge

APPENDIX A

Last Name	First Name	Total
Arce	John	$168,625.58
Bharat	Seupersaud	$176,097.59
Conca	Robert	$10,000.00
Connolly	Brian	$50,000.00
Estrella	Biro	$64,167.20
Fernandez	Juan	$64,167.20
Grajales	Albert	$64,167.20
Oca	Pedro	$64,095.83
Phanisnaraine	Motie	$64,167.20
Prophete	Donald	$140,000.00
Purran	Honif	$64,167.20
Redman	Oliver	$104,387.67
Rios	Gustavo	$64,167.20
Thompson	Damon	$11,545.60

APPENDIX B

Last Name	First Name
Arce	John
Bharat	Seupersaud
Redman	Oliver

APPENDIX C

NOTICE OF AWARD OF INDIVIDUAL MONETARY RELIEF

Re: *United States of America v. City of New York*
17 Civ. 0364 (U.S. Dist. Ct. S.D.N.Y.)

On [date], the Court approved a final monetary award list pursuant to the Consent Decree entered by the Court earlier in this case. You are receiving this Notice because the Court has determined that you are eligible for an award of backpay and/or emotional distress damages.

PLEASE READ THIS NOTICE CAREFULLY

The Court has determined that you are eligible to receive an award of backpay and/or emotional distress damages in this case. The amount of this award is shown in the enclosed Acceptance of Monetary Relief and/or Retroactive Seniority Relief and Release of Claims form. To receive this award, you must:

a. Fill out completely the enclosed Acceptance of Monetary Relief and/or Retroactive Seniority Relief and Release of Claims form, including all requested information, initial the first page of the form. and sign it.

b. Fill out completely the enclosed tax forms, so that appropriate withholdings for taxes, FICA and Medicare may be made from any backpay award, and so that taxpayer identification is provided for any individual receiving damages for emotional distress.

c. Return the completed Acceptance of Monetary Relief and/or Retroactive Seniority Relief and Release of Claims form and other required forms to the NYCDOT Office of the General Counsel within the Division of Legal Affairs no later than [date]. Send these documents by U.S. mail to:

The City of New York, Department
of Transportation
Division of Legal Affairs
55 Water Street, 9th Floor
New York, NY 10041
Attention: General Counsel

Note: if your signed documents are not postmarked by [date], 2017, your monetary relief award may be forfeited.

APPENDIX D

NOTICE OF AWARD OF RETROACTIVE SENIORITY RELIEF

Re: *United States of America* v. *City of New York*
17 Civ. 0364 (U.S. Dist. Ct. S.D.N.Y,)

On [date], the Court approved a final monetary award list pursuant to the Consent Decree entered by the Court earlier in this case. You are receiving this Notice because the Court has determined that you are eligible for retroactive seniority for the Supervisor of Mechanics (Mechanical Equipment) position corresponding to June 9, 2013, which includes seniority for the purposes of calculating my salary or other pay, as well as any other purpose for Which seniority is used to determine the amount of or eligibility for employment benefits.

PLEASE READ THIS NOTICE CAREFULLY

a. Fill out completely the enclosed Acceptance of Monetary Relief and/or Retroactive Seniority Relief and Release of Claims form, including all requested information, initial the first page of the form, and sign it.

b. Return the completed Acceptance of Monetary Relief and/or Retroactive Seniority Relief and Release of Claims form to the NYCDOT Office of the General Counsel within the Division of Legal Affairs no later than [date]. Send these documents by U.S. mail to:

The City of New York, Department
of Transportation
Division of Legal Affairs
55 Water Street, 9th Floor
New York, NY 10041
Attention: General Counsel

Note: if your signed documents are not postmarked by [date], 2017, your monetary relief award may be forfeited.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 0364 (JGK)

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF NEW YORK,

Defendant.

ACCEPTANCE OF INDIVIDUAL RELIEF AWARD AND RELEASE OF CLAIMS

I, _____, have received notice from the United States Department of Justice of the monetary relief award offered to me pursuant to the provisions of the Consent Decree entered by the Court on _____ in the above-named lawsuit. The Complaint and the Consent Decree are included with this notice.

The MONETARY RELIEF AWARD I am being offered consists of:

1. A backpay award of _____ dollars ($_____), less required tax withholdings; and

2. An award for emotional distress of _____ dollars ($_____).

* ___ I ACCEPT THIS AWARD

* INITIAL HERE: _____

[Add where applicable]

I, _____, also am being offered the opportunity to be given retroactive seniority for the Supervisor of Mechanics (Mechanical Equipment) position corresponding to June 9, 2013, which includes seniority for the purposes of calculating my salary or other pay, as well as any other purpose for which seniority is used to determine the amount of or eligibility for employment benefits.

* ___ I ACCEPT THIS AWARD

* INITIAL HERE: _____

In consideration for this award of the relief stated above, I fully and finally release the City of New York, the New York City Department of Transportation, as well as any others that could have been named as defendants in this Action, their successors, or assigns, and all past and present officials, employees, representatives and agents of the New York City Department of Transportation (collectively "Released Parties") from any and all claims, liabilities or causes of action arising out of the allegations in the Complaint, including all claims arising under Title VII of the Civil Rights Act of 1964, the United States Constitution, the New York State Human Rights Law, the New York City Hunan Rights Law, and any and all common law claims, including claims for attorney's fees, costs and distributions.

The release of claims contained herein is not conditioned on my receipt of any other relief under the Consent Decree that was entered by the Court on [date] and resolved the above-referenced lawsuit.

I understand that this release may not be changed, modified or revoked orally.

I understand that I must properly and completely fill out this Acceptance of Monetary Relief and/or Retroactive Seniority Relief, initial the first page of this form, sign the form and return it to the NYCDOT Office of the General Counsel within the Division of Legal Affairs no later than [date] in order to receive the award.

I also understand that I must complete and return the enclosed forms.

I HAVE READ THIS ACCEPTANCE OF MONETARY RELIEF AND RETROACTIVE SENIORITY RELIEF AND RELEASE OF CLAIMS FORM AND UNDERSTAND THE CONTENTS THEREOF. I SIGN THIS FORM OF MY OWN FREE ACT AND DEED.

* _____ * _____
Date Signed Signature

* _____
(Street Address) (City) (State) (Zip Code)

* ( ) _____ (Home Telephone)
* ( ) _____ (Work Telephone)

* _____ (Social Security Number)

Your E-Mail Address: * _____

If your contact information, including your mailing address, changes at any time after you submit this form, please advise Department of Transportation, Division of Legal Affairs in writing of the change. You can direct any correspondence regarding a change in contact information to address listed

below. Otherwise, we may be unable to contact you during future steps in the award process.

Return this and the enclosed forms to:

The City of New York, Department
of Transportation
Division of Legal Affairs
55 Water Street, 9th Floor
New York, NY 10041
Attention: General Counsel

Exhibit C to Amended Complaint - Article, "DOT is Found to Have Permitted Climate of Bias and Racial Slurs", Published at http://thechiefleader.com on June 26, 2017

DOT is Found to Have Permitted Climate Of Bias and Racial Slurs

Union Leader 'At Loss For Words,' While Agency Ducks on Inaction

By BOB HENNELLY Jun 26,2017

[photographs in original]
[subtitles]
JOON H. KIM: A hostile climate for minority staff.
ARTHUR CHELIOTES: 'Still boys will be boys.'
JOSEPH COLANGELO: Stunned and 'disgusted.'

The admission of job bias by the City of New York in a consent decree it reached with the U.S. Department of Justice detailing the racist treatment of employees of color by supervisors in the Department of Transportation prompted labor leaders to call on the de Blasio administration to take a closer look at how it is handling race in the workplace.

On June 14, the city agreed to pay $1.3 million to settle allegations that, from 2007 up until the middle of 2016, employees of color in the Fleet Services unit were regularly called "monkey, nigger and gorilla," denied advancement to which they were entitled, retaliated against if they complained, and even threatened with bodily harm.

'Racial Animus Thrived'

In the consent decree, the DOJ asserted "the city failed to promote racial-minority employees to supervisory positions and retaliated against those

who criticized the discrimination" and "condoned a management culture in which overt racial animus and inferred racial preference were both tolerated and allowed to thrive."

"For almost a decade, in clear violation of Federal law, supervisors in New York City's Department of Transportation engaged in a pattern and practice of discrimination against racial minorities," Joon H. Kim, the Acting U.S. Attorney for the Southern District of New York, said in a statement. "They tolerated the use of racial epithets, systematically excluded racial minorities from preferred assignments, and discriminated against minority candidates for promotions."

According to the DOJ, the duration of the discrimination at Fleet Services reflected a failure of oversight by the agency of its most-basic compliance obligations under Federal civil-rights and employment law and an unchecked culture of fear and reprisal. Several deficiencies in the application of civil-service practice and procedures within NYC DOT were also flagged. All of the victims in the case were tenured employees and represented by a union.

14 to Collect

Under the terms of the consent decree, 14 former and current employees are entitled to a portion of the $1.3 million. According to a document filed with the court, the following individuals were listed as being entitled to back wages of at least $10,000: Seupersaud Bharat, $176,097; John Arce, $168,625; Donald Prophete, $140,000; Oliver Redman, $104,387; Damon Thompson, $71,545; Biro Estrella, $64,167; Juan Fernandez, $64,167; Albert Grajales, $64,167; Honif Purran, $64,167; Motic

Phanisnaraine, $64,167; Gustavo Rios, $64,167; Pedro Oca, $64,095; Brian Connolly, $50,000; and Robert Cona, $10,000. Mr. Bharat, as the initial EEOC complainant, is entitled to the "sum of $150,000 as additional compensatory damages" and "reasonable attorneys' fees and costs in the amount of $70,000."

The consent decree also calls for the granting of retroactive seniority to the minority employees who were denied promotions. Over the next three years, the city must submit regular reports on how it is addressing the issues involving the inadequacies of DOT's EEO program and its promotion process. Several paragraphs in the document enjoin the city from retaliating against anyone who cooperated with the DOJ probe.

'Institutional Racism'

"Even in a progressive administration, we see the institutional racism that is still reflected in the broader culture. It's still 'boys will be boys,'" said Arthur Cheliotes, president of CWA Local 1180. "We need a proactive plan, if we want to deal with discrimination in a city that still has one of the most-segregated public-school systems."

He continued, "The Mayor has begun doing that with the way he and the NYPD have been confronting the implicit bias in the way the city has historically been policed, but this same implicit bias needs to be acknowledged throughout the city's workforce."

Late in Mayor Michael Bloomberg's term, CWA Local 1180 brought a Federal EEOC complaint on behalf of its members of color who held the title of

Administrative Manager but were paid a great deal less than whites who had historically held the same title. In that case, the EEOC calculated righting the wage discrimination would cost the city $246 million. (Both the de Blasio administration and the union confirmed they are in the final stages of a settlement.)

Joseph Colangelo, president of SEIU Local 246, which represents mechanics, confirmed that most of the names on the list of employees who were victims belonged to his union at some point in their careers, but said because they were acting as provisional supervisors, or had made supervisor, were no longer part of it. He said provisional employees were particularly vulnerable to abuses by management, especially if they were looking for a promotion.

'Sickened by It'

"But I still am at a loss for words. I am so sickened by what I just read," Mr. Colangelo said, referring to the account last week about the landmark settlement in this newspaper. "To think this went on for 10 years and that individuals were subjected to that type of discrimination in their workplaces goes beyond anything I have seen on my own."

He continued, "If my members came to me with those kinds of allegations, I would have immediately contacted our attorneys and we would have filed their complaint with the appropriate agencies. I am disgusted."

SEIU Local 621 represents the mechanic supervisors at the heart of the case. In a phone interview, the union's president, Joseph Giattino, said that he had become aware of the DOJ

investigation "very late in the process," adding, "I have nothing to say at this time."

Former U.S. Attorney Preet Bharara had announced back in January that the DOJ was suing the city, following up on a successful November 2013 U.S. EEOC suit brought by Seupersaud Bharat. Mr. Bharat, a Fleet Services employee of South Asian ancestry, alleged he was improperly denied a Supervisory Mechanic's title that paid between $92,000 and $102,000 a year. On Oct. 16, 2014, the EEOC found for Mr. Bharat, and the DOJ decided to follow up.

Significant Move

"That in itself should say something, because the DOJ gets lots and lots of those cases, but they found this one compelling enough to proceed on," said Yetta Kurland, a labor lawyer who specializes in discrimination cases.

Fleet Services is composed of 200 individuals covered under civil-service titles like Machinists, Auto Mechanics, Electricians, Blacksmiths, and Engineers. The department is responsible for maintaining thousands of city vehicles, ranging from heavy-construction equipment to mopeds.

According to DOJ's filings in 2009, the then-Executive Director of Fleet Services was subject to a DOT internal EEO racial-discrimination complaint that was substantiated against the supervisor who, amazingly, was also responsible for handling EEO complaints. After its fact-finding, EEO recommended the supervisor be demoted, suspended and removed from his position as an EEO Counselor. The supervisor chose to retire rather than submit to the

sanctions and was succeeded in the post by his deputy, who the DOJ asserted continued the same racist actions and behaviors.

Mr. Colangelo identified the first Supervisor who retired as Darren Kaplan. The 2015-16 Green Book listed John Paterno as the Executive Director of Fleet Services. An answering machine picked up at that office's phone. The NYC DOT press office would not confirm the identities of the two individuals, only mentioned as Executive Director I and Executive Director II in the legal papers. The agency confirmed that Executive Director II was still on the city payroll, but said he had been demoted from any supervisory duties.

Verbal Threat Made

It was Executive Director II who the city stipulated in the consent decree with the DOJ had "verbally threatened ... with a threat of physical violence" a non-management employee who confronted him about his racist treatment of minority employees.

When a reporter asked DOT officials why they were keeping Executive Director II on the payroll after he physically threatened a city employee, the agency responded that "Executive Director II was disciplined for the specific action you mentioned."

The reporter was admonished not to call any other employees within DOT and to seek comment only from the press office. "Any questions about the content of the complaint should be referred to the DOJ. The consent decree was drafted consistent with the DOJ complaint," the press office wrote in an

e-mail. E-mails to the Mayor's press office got no response.

For Ms. Kurland, the decision to keep Executive Director II on the city payroll was problematic. "It is concerning that an employee that threatened physical violence is still on your workforce," she said.

Exhibit D to Amended Complaint -
(i) Article, "Victim of Bias at DOT Fleet Services Unit Says Demoting Culprit Not Enough", Published at http://thechiefleader.com on June 30, 2017

Claims Ex-Executive Director Still Has Influence

Victim of Bias At DOT Fleet Services Unit Says Demoting Culprit Not Enough

By BOB HENNELLY Jun 30, 2017

[photographs in original]
[subtitles]
JOHN PATERNO: Despite his bias, still on city payroll.
POLLY TROTTENBERG: 'Won't tolerate' biased behavior.

One of the 14 Department of Transportation employees who will share a $1.3-million dollar settlement in a landmark racial-discrimination case told this newspaper last week that the supervisor most responsible for his years of misery remains a powerful figure in the agency even in a lesser position.

That former supervisor, John Paterno, served as the Executive Director of Fleet Services from 2010 until last year but was stripped of that role, according to DOT officials. In the city's stipulation in the U.S. Department of Justice consent decree, it confirmed that in addition to Mr. Paterno's berating employees with racial epithets and denying them promotions they said they'd earned, he physically threatened workers when he was confronted about his biased actions.

‘People Owe Him Favors’

“The guys he has put in pretty high places owe him favors, and he created this culture, and the settlement doesn’t unwind that,” said the employee, who is one of the victims being compensated but does not want his name used due to the same fear of retaliation he says he has lived with for years at DOT. “Paterno continues to exercise influence because of the many years he’s been with the city, and one of his pals is even a part-time driver for the Commissioner herself.”

A call and text to Mr. Paterno’s phone were not returned.

Fleet Services, under the Division of Roadway Repair and Maintenance, is composed of 200 individuals in civil-service titles like Machinist, Auto Mechanic, Electrician, Blacksmith, and Engineer. The department is responsible for maintaining thousands of city vehicles, ranging from heavy-construction equipment to mopeds.

According to the consent decree signed on June 14, the racist conduct that violated the U.S. Civil Rights Act, as well as multiple state and city laws, occurred between 2007 and 2016. That period covers the tenures of Janette Sadik-Khan, who served as Transportation Commissioner under Mayor Michael Bloomberg, and Polly Trottenberg who was appointed by Mayor de Blasio.

‘A Terrible Chapter’

In a letter to the editor that appears on page 5, Ms. Trottenberg conceded that this nine-year period did “represent a terrible chapter in this agency’s history.” Her letter came after two weeks of stories

and editorials in this newspaper and multiple requests for comment from her agency that brought little substantive response.

In her detailed letter, Ms. Trottenberg added that "while some of the actions at issue took place over a decade ago, I have made it clear that, under my leadership, racism and discriminatory behavior of any sort are not tolerated. This administration and this agency believe diversity, tolerance and equal opportunity are fundamental principles of a fair and inclusive workplace."

She said that DOT had been proactive and that "before the agency even entered into its consent decree with the Department of Justice, it had undertaken "aggressive" action, including in 2015 and 2016, "dramatically" restructuring senior leadership within both the Fleet and Equal Employment Opportunity units "to address the concerns raised by the complainants." A previous Executive Director of Fleet Services who engaged in racist practices was simultaneously working with the EEO unit before he was forced to retire eight years ago.

DOT added four additional EEO staff members in September 2016, and promoted three minority candidates to the Supervisor of Mechanics Mechanical Equipment title. In July 2016, Ms. Trottenberg wrote that "DOT removed John Paterno, the main subject of the investigation, from his position, reassigning him to a position without supervisory responsibility and no role in hiring or promotions."

Further Action Possible

She continued, "This case has a long and complex timeline, dictated by the Department of Justice. In November 2015, DOJ first informed DOT they were conducting an investigation. In June 2016, the U.S. Attorney's Office for the Southern District of New York briefed DOT on the factual allegations. Subsequently, DOT took immediate action on multiple fronts. Some elements of the case remain confidential, but we wish to clarify that DOT will take additional appropriate action against any employee found to have violated the city's EEO Policy."

Based on the facts stipulated in the consent decree, Mr. Paterno earned a reputation for having the DOT bureaucracy wired. According to DOJ's filings in 2009, Darren Kaplan, then the Executive Director of Fleet Services, was hit with a DOT internal EEO racial discrimination complaint that was substantiated. Bizarrely, since 1997, Mr. Kaplan had also been an EEO counselor. After its fact-finding, EEO recommended he be demoted, suspended and removed from his position as a Counselor.

According to the consent decree, when Mr. Kaplan learned that the findings had been referred to the agency's Office of the Advocate for action, he chose to retire and the "the city did not continue the formal disciplinary process against him."

Paterno Defended Him

During the DOT probe, Mr. Paterno, Mr. Kaplan's right-hand man, was given two chances to describe what he knew and when he knew it regarding Mr.

Kaplan's racist and unlawful behavior. In his first interview on Oct. 23, 2009, Mr. Paterno stood up for his boss and he "denied having ever" seen discriminating behavior by Mr. Kaplan.

Just three days later, the consent decree stated, Mr. Paterno asked for another interview with investigators in which he said he had observed Mr. Kaplan "repeatedly" use "racial epithets over the course of seven years."

Evidently, Mr. Paterno's pirouette was executed successfully. He was given Mr. Kaplan's job, despite the fact that, as the stipulation makes clear, he "had never reported these racially-discriminatory statements."

Dr. Harriet Fraad, a city-based mental-health counselor who helps her clients deal with hostile-workplace issues, believes that the city is sending the wrong message by retaining Mr. Paterno while paying his victims the settlement money.

"It doesn't matter if you stipulate what he did but then don't act on it, because it sends this contradictory message to the victims that there is a difference between the publicly-stated policy and the day-to-day reality of the agency," she said in a phone interview.

'Perpetuating the Culture'

She continued, "The city can unwind this by going back and questioning all of the people that this boss promoted. If you don't, you are just perpetuating the culture.

"And there is a broader point here," she said. "You just can't threaten violence in the workplace. That has to be a fireable offense, because if you keep somebody on like that, you're saying, 'don't worry, we are looking out to help you preserve your tenure.' If you're a third-grader and you threaten violence in school, the police are called."

As for the DOT employee who came forward to this newspaper, he said, "it's really not about the money. I don't think Polly has a clue about how the structure really works. She meets with the bosses and not the working people who could let her know what's really going on. I think the least she and the Mayor could do is to meet with us."

At a press conference on an unrelated matter July 29, Mr. de Blasio told this newspaper he had no details on the landmark settlement, but would comment once he was updated.

In addition to individual payments ranging from $10,000 to $176,097, the consent decree also call for the granting of retroactive seniority to the minority employees who were improperly denied promotions. Over the next three years, the city must submit regular reports on how it addressed the issues involving the inadequacies of DOT's EEO program and its promotion process. Several paragraphs in the document enjoin the city from retaliating against anyone who cooperated with the DOJ probe.

Exhibit D to Amended Complaint -
(ii) Article, "Mayor Hints Probe at DOT May Not Be Over", Published at http://thechiefleader.com on July 10, 2017

In Racial-Bias Case

Mayor Hints Probe At DOT May Not Be Over

By BOB HENNELLY Jul 10, 2017

Mayor de Blasio last week stood by Transportation Commissioner Polly Trottenberg's decision to keep a former Department of Transportation supervisor on the payroll who used racial epithets, discriminated against subordinates of color and threatened some with physical violence.

But in an interview July 7, Ms. Trottenberg said that the work on the internal portion of the case was not yet completed. "Our communications have not been good on this, in part, because our work is not finished, but we are not ready to tell you everything that is coming next because we just can't," she said. "My message to you is that our work is not finished."

14 to Share $1.3M

A discrimination consent decree between the City of New York and the U.S. Department of Justice was filed last month that requires the city to pay 14 Department of Transportation employees a $1.3-million settlement for back pay.

The former supervisor, John Paterno, served as the Executive Director of Fleet Services from 2010 until last year. In the city's stipulation in the consent decree, it confirmed that in addition to Mr. Paterno's berating employees with racial epithets and denying them promotions they had earned, he physically

threatened workers with violence when he was confronted about his actions.

When the DOT was originally asked about Mr. Paterno continuing to work for the city, it told a reporter that he had been demoted and was no longer a supervisor.

Yet, the Mayor's response to the same question suggested that there was actually an ongoing probe, above and beyond the one that culminated in the consent decree and settlement. "We have zero tolerance for this behavior and we are working with DOT and DOJ on this investigation and reforms. Any termination in a situation like this would need to take place after the disciplinary hearings and investigation," a statement from the Mayor's press office said.

'Where's Accountability?'

City Council member Andy King was outraged that the administration opted to keep Mr. Paterno on the payroll in any capacity given what it had conceded about his behavior. "This is hypocritical in a city that prides itself on its tolerance and diversity," he said in a phone interview. "You just can't hand out hush money to the victims with no accountability for the perpetrator."

He continued. "Let's keep it real. If this were three white women who were complaining about a black male supervisor doing this stuff, he would have been terminated and arrested. He would have been paraded through the press. This is just more of that history of America where blacks just have to endure the hatred of whites."

One of the 14 DOT employees who will share a $1.3-million settlement in the landmark racial-discrimination case told this newspaper late last month that his prime tormentor, Mr. Paterno, remained a powerful figure in the agency even in a lesser position.

Texts and calls to Mr. Paterno phone failed to produce a response.

'Still Exercises Influence'

"The guys he has put in pretty high places owe him favors, and he created this culture, and the settlement doesn't unwind that," said the employee, who did not want his name used due to the same fear of retaliation he said he lived with for years at DOT. "Paterno continues to exercise influence because of the many years he's been with the city, and one of his pals is even a part-time driver for the Commissioner herself."

Ms. Trottenberg said that she very much wanted to meet with the 14 victims in the case, even on a confidential basis. She said she had been unaware of the internal anxiety within her agency about Mr. Paterno's continued presence and influence in the agency. "Those complaints had not come to me until you all wrote them and obviously now that you have written about them, it is something we are taking very seriously," she said.

She continued, "One of the things that is a little heart-breaking for me is that employees have gone to you ... We really do want to create a climate where people can do that" internally without fear of any retaliation.

Who's in Unit

Fleet Services, under the Division of Roadway Repair and Maintenance, is composed of 200 individuals in civil-service titles like Machinist, Auto Mechanic, Electrician, Blacksmith, and Engineer. The department is responsible for maintaining thousands of city vehicles, ranging from heavy-construction equipment to mopeds.

According to the consent decree signed on June 14, the racist conduct that violated the U.S. Civil Rights Act as well as multiple state and city laws occurred between 2007 and 2016 and covered the Bloomberg as well as the de Blasio administrations.

In a letter to the editor that appeared last week, Ms. Trottenberg conceded that this nine-year period did "represent a terrible chapter in this agency's history." Her letter came after two weeks of stories and editorials in this newspaper and multiple requests for comment from her agency that brought little substantive response.

She added that "while some of the actions at issue took place over a decade ago, I have made it clear that, under my leadership, racism and discriminatory behavior of any sort are not tolerated."

Making Amends

DOT added four additional EEO staff members in September 2016, and promoted three minority candidates to the Supervisor of Mechanics Mechanical Equipment title. In July 2016, Ms. Trottenberg wrote, "DOT removed John Paterno, the main subject of the investigation, from his position, reassigning him to a position without supervisory

responsibility and no role in hiring or promotions." His compensation dropped from $197,000 in 2015 to $163,000 last year.

In addition to individual payments ranging from $10,000 to $176,097, the consent decree calls for granting retroactive seniority to the minority employees who were improperly denied promotions. Over the next three years, the city must submit regular reports on how it addressed the issues involving the inadequacies of DOT's EEO program and its promotion process. Several paragraphs in the document enjoin the city from retaliating against anyone who cooperated with the DOJ probe.

Exhibit E to Amended Complaint - Article, "Councilman: Fire Racist Ex-Fleet Services Head", Published at http://thechiefleader.com on July 17, 2017

Demoted But Making $140G

Councilman: Fire Racist Ex-Fleet Services Head

By BOB HENNELLY Jul 17, 2017

[photograph in original]
[subtitle]
DANEEK MILLER: 'Threats should have ended career.'

The Chairman of the City Council Committee on Civil Service and Labor wants the de Blasio administration to immediately fire a former Department of Transportation Executive Director whom the city has admitted subjected subordinates to years of racist taunts and discriminatory treatment, and threatened one with physical force when confronted about his behavior.

"This is a zero-tolerance issue here," Council Member I. Daneek Miller said in an interview. "We just can't have employees threatening violent actions. It has to be an offense that prompts termination."

Spanned Two Mayors

The Federal court stipulations made by the city regarding ex-Fleet Services unit head John Paterno were part of a discrimination consent decree between the city and the U.S. Department of Justice that was filed last month. It required the city to pay 14 Department of Transportation employees a total of $1.3-million in back pay.

The consent decree covers events that occurred between 2007 and the middle of 2016 that spanned the tenures of Janette Sadik-Khan, who served as Transportation Commissioner under Mayor Michael Bloomberg, and current Commissioner Polly Trottenberg.

Mr. Paterno served as the Executive Director of Fleet Services from 2010 until last year. The city acknowledged in the consent decree that in addition to his berating employees with racial epithets and denying them promotions they had earned, he physically threatened one worker when confronted about his actions.

Neither Mayor de Blasio nor Commissioner Trottenberg have offered an explanation for why Mr. Paterno continues to be employed by the city in a non-supervisory capacity at $140,000 a year, except to say the city's investigation was ongoing. In an interview July 7, Ms. Trottenberg said that the work on the internal portion of the case was still not completed.

'Won't Tolerate This'

In a letter to the editor published earlier this month, Ms. Trottenberg conceded that this nine-year period did "represent a terrible chapter in this agency's history." She added that "while some of the actions at issue took place over a decade ago, I have made it clear that, under my leadership, racism and discriminatory behavior of any sort are not tolerated. This administration and this agency believe diversity, tolerance and equal opportunity are fundamental principles of a fair and inclusive workplace."

The city also stipulated that Mr. Paterno in 2009 had attempted to cover up racist conduct by his predecessor, whom the city permitted to retire rather than be demoted amid similar charges. After initially telling DOT investigators he had never seen any improper behavior out by his boss, Mr. Paterno changed his story after DOT staff let him know that his boss had tried to pin the discriminatory behavior on him. Ultimately, Mr. Paterno, despite his evolving story, was promoted to run Fleet Services.

The unit, under the Division of Roadway Repair and Maintenance, is composed of 200 individuals in civil-service titles like Machinist, Auto Mechanic, Electrician, Blacksmith, and Engineer. The department is responsible for maintaining thousands of city vehicles, ranging from heavy-construction equipment to mopeds.

Undermined Make-Up

One of the DOT employees of color who were victims told a reporter that the decision to keep his tormentor on the payroll totally undermined the agency's credibility as far as making amends for the racist behavior.

"The guys he (Paterno) has put in pretty high places owe him favors, and he created this culture, and the settlement doesn't unwind that," said the employee, who did not want his name used.

Council Member Andy King was outraged that the administration opted to keep Mr. Paterno on the city payroll in any capacity, calling it "hypocritical in a city that prides itself on its tolerance and diversity."

In addition to individual payments ranging from $10,000 to $176,097, the consent decree also calls for the granting of retroactive seniority to the minority employees who were improperly denied promotions. Over the next three years, the city must submit regular reports on how it addressed the past misconduct.

But for Mr. Miller, the issues raised by the scandal go deeper. "This is not just about Fleet Services. It goes to the entire agency, which I believe is one of the most diversity-challenged agencies in city government," he said. "I don't think that they are offering sufficient civil-service exams over there, and that plays out in a way where their workforce does not represent the diversity of our city. And without that open-competitive process, the whole system is more vulnerable to nepotism and politics."

He continued, "What this shows me is that the marquee policies that this administration supports, like diversity and inclusivity, are not trickling down enough to the neighborhoods and into our city workforce."

DOT: Working to Improve

In response to Mr. Miller's critique, DOT said in a statement that its 5,000-member workforce was more than half minority and roughly 30 percent African-American, comparable to many city agencies. "Nevertheless, we are continuing our work to improve diversity at all levels and doing our most to create a more inclusive workplace for all," it said. "DOT has taken a number of aggressive steps to address the legacy of challenges we face in our Fleet Division and to create a fairer, more-inclusive and more-diverse workplace agency-wide that better

mirrors the population of the city we so proudly serve."

The agency said it was "reaching out to all parties affected during this difficult time to provide support and address grievances or ongoing conflicts in a confidential way. This work will be ongoing for some time to come."

Exhibit F to Amended Complaint -
Letter from Department of Transportation
to John Paterno, Dated June 26, 2017

New York City Department of Transportation
POLLY TROTTENBERG, Commissioner

June 26, 2017

Transmitted via Overnight Mail and E-Mail

John Paterno
1346 Forest Hill Road
Staten Island, NY 10314

Re: Notice of Complaint

Dear Mr. Paterno,

On June 19, 2017, the New York City Department of Transportation's Office of Equal Employment Opportunity received a complaint against you alleging unlawful retaliation and has opened an investigation in connection with the complaint. In sum, the allegation contained in the complaint is that you have contacted DOT employees in connection with their participation in the lawsuit U.S.A. v. City of New York. Specifically, it is alleged that you appeared at Flatlands Yard on June 16, 2017 and spoke to DOT employees regarding the consent decree executed in U.S.A. v. City of New York, including speaking with individuals who are identified as Claimants in that action. It is a violation of the City's EEO policy to retaliate against or harass any person who asserts his or her rights regarding employment discrimination by: 1) opposing discriminatory practices in the workplace; 2) complaining about prohibited conduct; or 3)

participating in any way in the complaint and/or investigation.

You will be contacted by DOT's Equal Employment Opportunity office regarding the complaint that has been received against you. As a result of this complaint, you are prohibited from having any contact whatsoever, direct or indirect, with the following individuals: John Arce, Bharat Seupersaud, Robert Conca, Brian Connolly, Biro Estrella, Juan Fernandez, Albert Grajales, Pedro Oca, Motie Phanisnaraine, Donald Prophete, Honif Purran, Oliver Redman, Gustavo Rios and Damon Thompson. Given that you are on a leave of absence from DOT, there is no reason for you to communicate with these individuals for any reason. Furthermore, you are prohibited from discussing the lawsuit U.S.A. v. City of New York with any DOT employee. Your failure to comply with these directives may result in disciplinary action against you, up to and including termination.

Thank you,

/s/ James L. Hallman
James L. Hallman
Diversity & EEO Officer

NYC Department of Transportation
Office of Equal Employment Opportunity
59 Maiden Lane, New York, NY 10038
T: 212.839.6600 F: 212.839.6611
www.nyc.gov/dot

Exhibit G to Amended Complaint -
Letter from Department of Transportation
to John Paterno, Dated September 15, 2017

New York City Department of Transportation
POLLY TROTTENBERG, Commissioner

September 15, 2017

John Paterno
1346 Forest Hill Road
Staten Island, NY 10314

Re: EEO Complaint # 841-2017-00021

Dear John Paterno:

Please be advised that the EEO Office has concluded its investigation of the above referenced complaint which the New York City Department of Transportation filed alleging discrimination on the basis of retaliation, in which you were named respondent

Upon a review of all the pertinent facts presented in the complaint, DOT finds that the allegations were substantiated against you.

The following corrective measures will be taken:

1. Referral of John Paterno to the DOT Advocate's Office for appropriate and applicable disciplinary proceedings;

2. Explaining to employees of the DOT Fleet Services Unit the nature of pattern and practice lawsuits and the general terms of the Consent Decree entered in United States of America v. City of New York, 17 Civ. 0364,

United States District Court, Southern District of New York;

3. Providing appropriate EEO training regarding DOT's anti-retaliation policy and instruction on how to avoid engaging in retaliation, including a prohibition on questioning individuals about their actual or perceived engagement in protected activity, and instructing them to consult with the DOT EEO Office and General Counsel.

Please note that it is a violation of the City's EEO Policy to retaliate against or harass any person for filing a complaint of harassment or discrimination or cooperating with the investigation of a complaint.

If you have any questions, I can be reached at (212) 839-6600.

Sincerely,

/s/ James L. Hallman
James L. Hallman
Chief Diversity/EEO Officer

c: Commissioner

NYC Department of Transportation
Office of Equal Employment Opportunity
59 Maiden Lane, New York, NY 10038
T: (212) 839-6600 F: (212) 839-6611
www.nyc.gov/dot

Exhibit H to Amended Complaint - Article, "Ex-DOT Supervisor at Center of Discrimination Case: I'm Not Guilty", Published at http://thechiefleader.com on July 24, 2017

Ex-DOT Supervisor At Center of Discrimination Case: I'm Not Guilty

Lawyer Claims Paterno Was Never Interviewed Before City Reached Agreement

By BOB HENNELLY Jul 24, 2017

[photographs in original]
[subtitles]
JOHN PATERNO: Lawyer insists he's innocent.
ARTHUR SCHWARTZ: 'Fair hearing would clear him.'
POLLY TROTTENBERG: Threatened with lawsuit.

An attorney representing John Paterno, former head of the Department of Transportation's Fleet Services unit, has written Transportation Commissioner Polly Trottenberg denying that he ever berated subordinates of color using racial epithets, denied them advancement, or threatened physical violence when confronted about his behavior.

'Never Interviewed Him'

Those allegations were stipulated to as facts in a June 14 consent decree entered into between the city and the Department of Justice that authorized the payment of $1.3 million to 14 DOT employees who were allegedly victimized by Mr. Paterno and his predecessor as the director of the DOT's Fleet Services.

"Mr. Paterno denies, in its entirety, all of the allegations made against him in the Federal complaint and in the Consent Decree," wrote Arthur Z. Schwartz Jr., Mr. Paterno's counsel. "Not once was he interviewed by DOT staff, the Department of Justice, or Corporation Counsel's office. Earlier Equal Employment Opportunity allegations made against him at DOT had resulted in a full exoneration, and we believe that a fair hearing of the allegations here would similarly exonerate him."

He continued, "You and the Department and the City have violated Mr. Paterno's civil rights and opened him up to defamatory statements in THE CHIEF. We demand that you and others at DOT stop making negative statements about Mr. Paterno, and that the agency provide a name-clearing process for him." He concluded that without such a hearing, Mr. Paterno would sue "to secure" such a process.

Several times in recent weeks, a reporter reached out to Mr. Paterno on his cell phone and by text seeking a response to the charges and to his demolition. He called back once and left a message but did not return subsequent texts or calls.

This newspaper forwarded Mr. Schwartz's letter to the press offices for DOT, the city's Corporation Counsel, and the U.S. Attorney's Office for the Southern District seeking comment and asking whether Mr. Paterno had ever been interviewed by any of the parties as part of their fact-finding prior to the consent decree. Both the DOT and the city's Corporation Counsel declined to comment because the matter involved potential litigation. The DOJ had not responded by press time.

Goes Back to Bloomberg

Fleet Services, which Mr. Paterno ran until the middle of 2016, is composed of 200 individuals working as machinists, auto mechanics, electricians, blacksmiths, and engineers. The allegations cover the tenures of both Mayor Bloomberg's DOT Commissioner, Janette Sadik Khan, and Mayor de Blasio's DOT Commissioner, Polly Trottenberg.

The consent decree entered between the DOJ and the city goes back to 2009, when Mr. Paterno's predecessor as the Executive Director of Fleet Services was hit with a DOT internal EEO racial-discrimination complaint that was substantiated against him. After its fact-finding, EEO recommended his predecessor be demoted, suspended and removed from his position. Instead, that Fleet Services Director resigned.

During the DOT investigation, Mr. Paterno, the retiring Fleet Services boss's right-hand man, was given two chances to describe what he knew and when he knew it about his boss's alleged racist behavior. In his first interview on Oct. 23, 2009, according to the consent decree, Mr. Paterno stood up for his boss when asked if he had ever seen him behave in a racist or discriminatory manner and "denied having ever" seen such behavior from him.

And yet just three days later, the 2017 consent decree stated, Mr. Paterno asked for another interview with DOT EEO investigators in which he said he had observed his ex-boss "repeatedly" use "racial epithets over the course of seven years." Mr. Paterno got promoted to the top Fleet Services spot even though, according to the stipulation, he "had

never reported these racially-discriminatory statements."

'Systematic Bias'

In a press release issued last month announcing the settlement of the discrimination lawsuit with the city, Joon H. Kim, the Acting U.S. Attorney for the Southern District of New York, blasted the city for letting the alleged discriminatory behavior go on from 2007 until 2016, when DOT demoted Mr. Paterno from his supervisor status.

"For almost a decade, in clear violation of Federal law, supervisors in New York City's Department of Transportation engaged in a pattern and practice of discrimination against racial minorities," Mr. Kim said a statement. "They tolerated the use of racial epithets, systematically excluded racial minorities from preferred assignments, and discriminated against minority candidates for promotions."

Then-U.S. Attorney Preet Bharara back in January announced that the DOJ was suing the city, following up on a successful November 2013 U.S. EEOC suit brought by Seupersaud Bharat. Mr. Bharat, a DOT employee of South Asian ancestry, worked in the DOT's Fleet Services unit and alleged he was improperly excluded from a Supervisory Mechanic title that paid between $92,000 and $102,000 a year, based entirely on his race. On Oct. 16, 2014, the EEOC found for Mr. Bharat.

Under the terms of the settlement, besides the monetary payments to the victims, the city will provide retroactive seniority to the minority employees who were previously denied promotions. The individuals are entitled to back pay and

compensatory-damage awards ranging from $60,000 to in excess of $168,000. In addition, the city has agreed to pay the complainant who brought this case to the attention of the Equal Employment Opportunity Commission a total of $150,000 in compensatory damages and attorney's fees.

Over the next three years, the city must submit regular reports on how it is addressing the issues involving the demonstrated inadequacies of DOT's EEO program and its promotion process. Several paragraphs in the document enjoin the city from retaliating against anyone who cooperated with the DOJ probe.

Earlier this month, the Chairman of the City Council's Committee on Civil Service and Labor said the de Blasio administration needed to immediately fire Mr. Paterno after it had attested in Federal court to the former DOT supervisor's racist behavior. "This is a zero-tolerance issue here," Council Member I. Daneek Miller said in an extensive City Hall interview. "We just can't have employees threatening violent actions. It has to be an offense that prompts termination."

Exhibit I to Amended Complaint -
Letter from Advocates for Justice to
Polly Trottenberg, Dated July 19, 2017

Advocates for Justice
Chartered Attorneys

225 Broadway, Suite 1902
New York, New York 10007

t. (212) 285-1400
f. (212) 285-1410

www.afjlaw.com

Arthur Z. Schwartz
Principal Attorney

aschwartz@afjlaw.com

July 19, 2017

By Fax: (212) 839-6490

Polly Trottenberg
Commissioner
NYC Department of Transportation
55 Water Street
New York, NY 10041

Re: Joseph Paterno

Dear Ms. Trottenberg:

This office has been retained to represent Joseph Paterno, currently employed by the New York City Department of Transportation.

Recently the City of New York, represented by your agency, was sued by the Department of Justice, and the complaint contained numerous allegations about racially discriminatory actions by someone

identified as "Executive Director II." In June, the City entered into a Consent Decree in which it admitted some of the spurious allegations made against and about "Executive Director II." Subsequently, *The Chief,* a weekly newspaper widely read by City employees, published several stories identifying "Executive Director II" as Joseph Paterno.

In last week's *Chief,* you responded to questions about Mr. Paterno by stating that "Joseph Paterno, the main subject of the investigation" was "removed ... from his position, reassigning him to a position without supervisory responsibilities and no role in hiring or promotions." *The Chief* was also told that Mr. Paterno's compensation went from $197,000 in 2015 to $163,000 in 2016.

Mr. Paterno denies, in its entirety, all of the allegations made against him in the federal complaint and in the Consent Decree. Not once was he interviewed by DOT staff, the Department of Justice, or Corporation Counsel's office. Earlier EEO allegations made against him at DOT had resulted in a full exoneration, and we believe that a fair hearing of the allegations here would similarly exonerate him.

You and the Department and the City have violated Mr. Paterno's civil rights and opened him up to defamatory statements in *The Chief*. We demand that you and others at DOT stop making negative statements about Mr. Paterno, and that the agency provide a name-clearing process for him.

If we cannot work out such a process, a lawsuit to secure such a process will follow.

Very truly yours,

/s/ Arthur Z. Schwartz
Arthur Z. Schwartz

AZS:dr

cc: Andrea O'Connor, Esq.
Joseph Paterno
Kenneth Gordon, Esq.

Exhibit L to Amended Complaint - Notice of Informal Conference, Dated January 30, 2018, with Exhibit A Attached thereto

New York City Department of Transportation
POLLY TROTTENBERG, Commissioner

January 30, 2018

John Paterno
1346 Forest Hill Road
Staten Island, New York 10314

Re: NOTICE OF INFORMAL CONFERENCE

Dear Mr. Paterno:

You are hereby notified that the charges detailed in Exhibit A attached to this notice and made a part hereof are preferred against you.

An Informal Conference will be held before a Conference Leader on **Wednesday, February 14, 2018 at 10:00 am.** at the NYC Department of Transportation, Office of the Advocate, **55 Water Street, 8th Floor, New York, New York 10041** at which Informal Conference you may appear and be represented by a union representative or legal counsel.

The Conference Leader shall issue a written decision following the Conference. After you receive the Conference Leader's decision, you must choose whether to accept such decision or to proceed with a hearing pursuant to the provisions of Section 75 of the New York Civil Service Law. As a condition of accepting the Conference Leader's decision, you will be required to sign a waiver of your right to the

procedures available to you under Sections 75 and 76 of the New York Civil Service Law.

If you do not accept the Conference Leader's decision, a hearing, in accordance with Section 75 of the New York Civil Service Law, will be scheduled at the NYC Office of Administrative Trials and Hearings ("OATH") located at 100 Church Street, 12th Floor, New York, New York 10007.

At this hearing you may appear and be represented by counsel of your own choice and you may summon witnesses to testify on your behalf, present other proof and cross examine witnesses testifying against you.

As an alternative to a Section 75 hearing, and if your union contract contains such a provision, within five (5) work days of receipt of the Conference Leader's decision, your union, with your consent, may choose to proceed in accordance with the Grievance Procedure set forth in its contract with the City of New York. As a condition to submitting the matter to the Grievance Procedure, you and your union must file a written waiver of the right to utilize the procedure available to you pursuant to Sections 75 and 76 of the New York Civil Service Law or any other administrative or judicial tribunal, except for the purposes of enforcing the Arbitrator's award, if any.

All further notices, or communications addressed to you in connection with these charges will be mailed to your latest address on record with the NYC Department of Transportation, unless you request in writing that the same be sent to you at a different address.

If you are a permanent employee entitled to a hearing pursuant to Section 75 of the Civil Service Law, please see page 3 attached hereto, for a notice of your rights pursuant to the OATH Rules of Practice and Procedure.

Sincerely,

/s/ Erica Caraway
Erica Caraway, Esq.
Disciplinary Counsel

Attachments

cc: Conference Leader, files

NYC Department of Transportation
Human Resources and Facilities Management
55 Water Street, New York, NY 10041
T: 212.839-9456 F: 212-839-9729
www.nyc.gov/dot

NOTICE

Statement of your relevant rights pursuant to OATH Rules of Practice and Procedure.

1. You have a right to file an answer to these Charges. If you have been personally served, you have eight days from service of the Charges to file an answer. If you have been served by mail, you have thirteen days from mailing of the Charges to file an answer. Answers should be mailed to the NYC Department of Transportation, Office of the Advocate, 55 Water Street, 8th Floor, New York, NY 10041.

2. You have a right to representation by an attorney or other representative at each stage of the disciplinary hearing.

3. Your representative **must** file a Notice of Appearance with OATH, 100 Church Street, 12th Floor, New York, NY 10007.

4. OATH's Rules of Practice and Procedure are published in Title 48 of the Rules of the City of New York and are available at OATH, 100 Church Street, 12th Floor, New York, NY 10007.

Received By: _____

Date: _____

NYC Department of Transportation
Human Resources and Facilities Management
55 Water Street, New York, NY 10041
T: 212.839-9456 F: 212-839-9729
www.nyc.gov/dot

John Paterno
Supervisor of Mechanics (Mechanical Equipment)
Employee ID# 0176044
January 30, 2018

EXHIBIT A

PLEASE TAKE NOTICE THAT THE RESPONDENT JOHN PATERNO IS HEREBY CHARGED WITH VIOLATING THE NYC DEPARTMENT OF TRANSPORTATION'S ("DOT") CODE OF CONDUCT ("CODE") AND THE EQUAL EMPLOYMENT OPPORTUNITY POLICY OF THE CITY OF NEW YORK [2014] ("CITY OF NEW YORK EEO POLICY") AS FOLLOWS:

CHARGE I:

The Respondent is in violation Section II (D) of the Equal Employment Opportunity Policy of the City of New York (2014).

Specification I:

The Respondent is a Supervisor of Mechanics assigned to the agency's Fleet Services Division in Staten Island. Respondent has been on a leave of absence since April 16, 2017.

On or about June 16, 2017, while on a leave of absence, the Respondent went to a DOT facility located at 6080 Flatlands Avenue, Brooklyn, New York.

On June 16, 2017, the Respondent had no official business at the agency's Flatlands Avenue facility.

Upon his arrival at the DOT Flatlands Avenue facility on June 16, 2017, the Respondent informed DOT employee Andrew Cohen that a Federal Consent Decree in the matter of United States of America v. City of New York, 17 Civ. 0364 (JGK)(2017) was awarded. The Consent Decree awarded fourteen (14) DOT employees monetary damages related in part to alleged discriminatory actions taken by the Respondent.

Cohen viewed the Consent Decree on his DOT assigned computer.

On June 16, 2017 the Respondent questioned subordinate, minority employees assigned to the DOT Flatlands Avenue facility about their participation in the matter of United States of America v. City of New York, 17 Civ. 0364 (JGK)(2017) and the resulting Consent Decree.

On June 16, 2017, the Respondent engaged in retaliatory practices prohibited by Section II (D) of the City of New York EEO Policy when he questioned subordinate, minority employees who were recipients of monetary rewards resulting from the aforementioned lawsuit and related Consent Decree.

Specification 2:

On June 16, 2017, the Respondent questioned subordinate, minority employees assigned to the DOT Flatlands Avenue facility and asked them if they testified against him in the matter of United States of America v. City of New York, 17 Civ. 0364 (JGK)(2017) and the resulting Consent Decree.

On June 16, 2017, the Respondent engaged in retaliatory practices prohibited by Section II (D) of the City of New York EEO Policy when he questioned subordinate, minority employees who were recipients of monetary rewards resulting from the aforementioned lawsuit and resulting Consent Decree.

Specification 3:

On June 16, 2017, the Respondent met with subordinate, minority employees assigned to the DOT Flatlands Avenue facility. The Respondent discussed and disclosed to Auto Mechanic Honif Purran the specific Consent Decree reward issued to Mr. Purran stemming from the matter of United States of America v. City of New York, 17 Civ. 0364 (JGK)(2017).

On June 16, 2017 the Respondent engaged in retaliatory practices prohibited by Section II (D) of the City of New York EEO Policy.

Specification 4:

On June 16, 2017, the Respondent met with subordinate, minority employees assigned to the DOT Flatlands Avenue facility. The Respondent discussed and disclosed to Auto Mechanic Motie Phanisaraine the specific Consent Decree reward issued to Mr. Phanisaraine stemming from the matter of United States of America v. City of New York, 17 Civ. 0364 (JGK)(2017).

On June 16, 2017 the Respondent engaged in retaliatory practices prohibited by Section II (D) of the City of New York EEO Policy.

CHARGE II:

The Respondent is in violation of Paragraph 2 of the Code in that he engaged in conduct prejudicial to the good order and discipline of DOT.

Specification 1:

Repeat and reiterate Charge I and it's respective Specifications.

CHARGE III:

The Respondent is in violation of Paragraph 1 of the Code in that he engaged in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.

Specification I:

Repeat and reiterate Charges I through II and their respective Specifications.

ATTACHMENT A

Equal Employment Opportunity Policy Of The City of New York (2014)