UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, Defendant.	)	Civil Action No. 5:15-cv-05079-JLV

REPLY MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States moved for partial summary judgment because the undisputed evidence establishes a *prima facie* case that Defendant South Dakota Department of Social Services ("DSS") engaged in a pattern or practice of intentional discrimination against Native American applicants when hiring Specialists at its Pine Ridge office from 2007 through 2013. (Dkt. 45.) In response, DSS does not dispute many of the facts on which the United States relies. (*See* Dkt. 52 at 1.) DSS nevertheless argues (1) that partial summary judgment is inappropriate for a plaintiff's *prima facie* case of a pattern or practice of discrimination (*see id.* at 3-5), and (2) that its claimed disputes of fact undermine the United States' *prima facie* case (*see id.* at 6-14). Because partial summary judgment is an appropriate vehicle to tailor litigation and the fact disputes DSS cites are immaterial, the United States asks the Court to resolve these issues in its favor and to grant partial summary judgment on its *prima facie* case.

I. Partial Summary Judgment on the Plaintiff's *Prima Facie* Case is Neither Advisory Nor Impractical

The United States' Motion seeks to narrow the issues before the Court by obtaining a finding that it has established its *prima facie* case based on the stipulated and undisputed evidence gathered during discovery. (Dkt. 45 & 46.) This limited ruling would allow the Court to efficiently focus a bench trial on the remaining issues in dispute.

DSS acknowledges that the United States' Motion is "narrowly tailored" to only the first step in the burden-shifting process set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), but objects based on a hodge-podge of legalisms. (Dkt. 52 at 3-5.) DSS suggests that the United States' Motion is procedurally inappropriate because, if granted, it would not be dispositive. (*See id*. at 3.) DSS also contends that the Court should deny the United States' Motion because it "appears to be requesting an advisory opinion" to present to the jury. (*See id*.) Finally, with reference to judicial economy and efficiency, DSS questions the "procedural propriety" of the United States' Motion. (*See id.*) DSS provides no case law to support any of its three mock procedural concerns. Each, in turn, lacks substance.

First, a motion for partial summary judgment is, by definition, not dispositive of the case. Nevertheless, the Federal Rules of Civil Procedure expressly provide that a Court may grant summary judgment on all or "*part* of each claim" for which there is no genuine dispute of material fact. *See* Fed. R. Civ. P. 56(a) (emphasis added). In fact, this Court has found in favor of other plaintiffs on their motions for partial summary judgment. *See, e.g.*, *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015) (granting plaintiffs' motions for partial summary judgment regarding claims that defendants violated the Indian Child Welfare Act and the Due Process Clause), *amended by* 2016 WL 697117 (D.S.D. Feb. 19, 2016). Partial

summary judgment is a valid means for either party to move the Court to narrow the issues for trial, even if not dispositive.

Second, in equating partial summary judgment with an "advisory opinion," DSS's procedural objection rests on a mistaken belief that this case will be tried to a jury. (Dkt. 52 at 3.) Not only does DSS fundamentally misunderstand what constitutes a prohibited "advisory opinion,"[1] but DSS is also mistaken that there will be a jury to whom the Court would need to explain its summary judgment ruling. Under Title VII, as amended by the Civil Rights Act of 1991, the parties are not entitled to a jury trial *unless* the plaintiff seeks compensatory or punitive damages. 42 U.S.C. § 1981a(c)(1). Because the United States' Amended Complaint does not include a demand for either type of damages (Dkt. 26), DSS simply is not entitled to a jury.[2]

In a similar Title VII case brought by the EEOC, the court denied the defendant's demand for a jury trial based on the limited relief sought by the government:

> Plaintiff's amended complaint requests both equitable relief and backpay but expressly and deliberately excludes compensatory and punitive damages. Since plaintiff does not claim any compensatory or punitive damages, defendants are not entitled to a jury trial on this Title VII claim.

EEOC v. HI 40 Corp., Inc., No. 93-cv-0230, 1994 WL 421494, at *1 (W.D. Mo. Apr. 5, 1994); *see also Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 (7th Cir. 2004) (denying employee a jury trial because she could not recover compensatory or punitive damages for a retaliation claim

[1] Article III of the Constitution limits federal courts to deciding actual "Cases" and "Controversies," which, in turn, prohibits the courts from issuing "advisory opinions." *See, e.g., Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005). Because, here, the United States has alleged that DSS failed to hire a clearly-defined group of Native American applicants from 2007 through 2013, the harm at issue is both significant and far from hypothetical. So it is unclear how the ripeness doctrine could apply.

[2] Originally, DSS demanded a jury trial "of all issues triable of right by a jury." (Dkt. 9.) In the United States' subsequent Motion to Amend its Complaint, it expressly stated that it had "withdrawn its prayer for compensatory damages" in its proposed Amended Complaint. (Dkt. 24 at 1-2.) Noting that DSS did not object, the Court granted the motion to amend. (Dkt. 25.)

under the ADA); *cf. David v. Signal Int'l, LLC*, 37 F. Supp. 3d 814, 820-21 (E.D. La. 2013) (where EEOC brought a claim under Section 706 of Title VII seeking compensatory damages and a claim under Section 707 of Title VII seeking injunctive relief, court found jury trial applied to both claims). Here, because the United States amended its complaint to exclude compensatory damages for all of its claims, DSS is not entitled to a jury trial. The Court is the ultimate trier of fact in this case and will consider—either now or at trial—whether the United States has presented sufficient evidence regarding its *prima facie* case.

Third, DSS's objection to the "procedural propriety" of partial summary judgment (Dkt. 52 at 3) ignores the well-established role that summary judgment plays in shaping the issues in advance of trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ."). Far from being impractical or inefficient (*see* Dkt. 52 at 3), partial summary judgment on the United States' *prima facie* case will assist the Court in narrowing the issues for a subsequent bench trial. At a bench trial, the Court can direct the parties to present their evidence in a manner that will assist in its determination of the remaining issues.

The utility and practicality of partial summary judgment does not change just because the plaintiff has moved on its *prima facie* case. In support of its Motion, the United States provided three examples of cases that confronted *prima facie* cases at the summary judgment stage. (*See* Dkt. 46 at 7.) DSS dismissed these examples as "inapposite and non-binding," but provided no precedent for its novel proposition that summary judgment cannot be used for this part of a pattern-or-practice disparate treatment claim. (*See* Dkt. 52 at 3-5.)

Two of these cases explicitly rejected similar arguments from defendants that summary judgment was inappropriate on a *prima facie* case. In *Massie v. Indiana Gas Company*, the defendant argued that "the plaintiff's request for summary judgment regarding the establishment of her prima facie case is not within the contemplation of Fed. R. Civ. P. 56(c)." 752 F. Supp. 261, 263 (S.D. Ind. 1990). The district court expressly "disagree[d], finding that a ruling on the plaintiff's motion will appropriately narrow the issues in dispute and thus lead to a more efficient resolution of this litigation," *id.*, and granted partial summary judgment on the plaintiff's *prima facie* case under the ADEA, *id.* at 267. Likewise, in *Schulz v. Veterans Administration*, the district court dismissed defendant's argument that "summary judgment with respect to [the plaintiff's *prima facie* case of national origin discrimination] is inappropriate," and granted partial summary judgment. No. 81-1629, 1982 WL 31077, at *3 (D.D.C. Oct. 26, 1982). The court explained that, "[i]n the context of summary judgment, [t]he court's task [is] to ascertain, successively at each stage reached, whether any issue of material fact emerged authentically and, if not, whether the case called for judgment as a matter of law." *Id.* at *2 (internal quotation marks and citation omitted) (second and third alterations in original).

The third case, *United States v. City of New York*, moved through the stages of the *Teamsters* burden-shifting analysis when considering summary judgment in a pattern-or-practice disparate treatment claim. *See* 683 F. Supp. 2d 225, 246-55 (E.D.N.Y. 2010), *vacated*, 717 F.3d 72 (2d Cir. 2013) (reversing on the second stage of the *Teamsters* analysis). Looking first to the intervenors' *prima facie* case, the district court found that, "as a matter of law, the Intervenors have established a prima facie case that the City had a pattern or practice of disparate treatment." *Id.* at 251. DSS is correct that the court continued to analyze the City's defense "[b]ecause the

Intervenors have satisfied their prima facie requirement." *See id.* Here, the Court could certainly do so if DSS had chosen to move for summary judgment on liability. It did not.

Accordingly, contrary to DSS's unsupported arguments, partial summary judgment on the United States' *prima facie* case is neither advisory nor impractical, but rather it efficiently tailors the issues in dispute prior to a bench trial.

II. The Undisputed Statistical and Anecdotal Evidence Establishes the *Prima Facie* Case that DSS Engaged in a Pattern or Practice of Intentional Discrimination

As explained in its Motion, the United States has established its *prima facie* case that DSS engaged in a pattern or practice of intentional discrimination with undisputed evidence. (Dkt. 45 & 46.) The undisputed applicant-flow data shows that DSS hired Native American applicants at a statistically significantly lower rate than white applicants across the seven years. (Dkt. 46 at 8-14.) This "gross statistical disparity" is buttressed by the undisputed evidence that DSS offered to hire *zero* Native Americans in five of the seven years (*id.* at 14-16), and that DSS repeatedly rejected admittedly qualified Native American applicants (*id.* at 16-21).

In its response, DSS claims that "there are genuine issues of material fact regarding Plaintiff's prima facie case" (Dkt. 52 at 6) but points to only two such disputes, neither of which is material to the United States' Motion. First, DSS asserts that "the experts disagree as to whether the differences in DSS's hiring rates of Native Americans and Caucasians were statistically significant." (*Id.* at 8.) However, this misstates the dispute. DSS does not dispute that there would be a statistically significant disparity if the stipulated applicant-flow data was aggregated, but instead disputes the appropriateness of aggregation. (*Compare* Dkt. 47 & 50, Pl. SMF and Def. Resp. ¶¶ 66, 74, 85.) This dispute regarding aggregation is immaterial to the United States' *prima facie* case. Second, DSS suggests that its hiring supervisors selected "the *most qualified* applicants" for hire. (Dkt. 52 at 10 (emphasis in original).) While the relative

qualifications of Native American applicants and white hires are very much in dispute (*see* Dkt. 53 at 16-19), it is immaterial to the United States' affirmative Motion for Partial Summary Judgment. Left with no other genuine disputes of material fact, DSS contests the significance of the United States' evidence rather than the evidence itself.

A. DSS's Dispute Regarding the Statistics is Immaterial for the *Prima Facie* Case

Critically, there is no genuine dispute of *material* fact over the United States' statistical evidence. DSS does not dispute: (1) the underlying applicant-flow data, (2) that the United States' expert, Dr. Juliet Aiken, found a statistically significant disparity when analyzing the aggregated data, or (3) that a statistically significant disparity exists if the stipulated applicant-flow data is aggregated. (*Compare* Dkt. 47 & 50, Pl. SMF & Def. Resp. ¶¶ 24, 36, 66, 74, 85.) Nor does DSS dispute that the Court may find a *prima facie* case established based on a "gross" statistical disparity alone. (Dkt. 52 at 6.) The only dispute—the statistical technique of aggregation—is immaterial to the narrow issue on which the United States moved. (*See* Dkt. 50, Def. Resp. ¶ 85; *see also* Dkt. 46 at 13-14.)

"To be legally sufficient" in the Eighth Circuit, "the plaintiffs' statistical evidence must show a disparity of treatment, eliminate the most common nondiscriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination." *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 463-64 (8th Cir. 2004) (internal quotation marks and citation omitted). The United States' statistical evidence amply meets this standard. Dr. Aiken concluded that the difference in hiring rates for Native American and white applicants was statistically significant at 3.47 units of standard deviation, which means that "there is about a 0.1% chance that the difference in hiring ratios could have arisen by chance." (Dkt. 46 at 10-11.) This statistically significant disparity between Native American and white applicants cannot be explained by differences in their

qualifications or education. In fact, for those Native American and white applicants who DSS selected for interviews and thus deemed to have met the required minimum qualifications for the position, the statistically significant disparity increases. (*Id.* at 11-12.) These statistically significant disparities "may perhaps safely be used absolutely to exclude chance as a hypothesis, hence absolutely to confirm the legitimacy of an inference of discrimination." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981). No more is required for the *prima facie* case. *See id.*; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

DSS argues that the statistical analysis of the undisputed applicant-flow data is nevertheless insufficient to establish the *prima facie* case because of the looming dispute between the experts regarding the appropriateness of aggregation. (Dkt. 52 at 7.) "While one may argue," DSS writes, "that attacks of a plaintiff's expert in a pattern-or-practice case may be appropriately classified as the defendant's 'rebuttal' case under the burden shifting framework, this type of theoretical analysis ignores the practicalities of how the case will proceed at trial." (*Id.*) This type of "theoretical analysis" is exactly what the Supreme Court prescribed in *Teamsters* and what subsequent courts have implemented. Referencing the practicalities of trial cannot circumvent the "carefully calibrated burden-shifting structures designed to determine whether the employer intentionally discriminated against the plaintiffs," *see Reynolds v. Barrett*, 685 F.3d 193, 204 (2d Cir. 2012). Once the burden shifts, "it is always open to a defendant to meet its burden of production by presenting a direct attack on the statistics relied upon to constitute a prima facie case." *United States v. City of New York*, 717 F.3d 72, 85 (2d Cir. 2013). At a later bench trial, this Court can determine how to efficiently hear the remaining disputes concerning DSS's rebuttal and ultimate liability.

B. There is No Dispute Regarding DSS's Lack of Native American Hires for Most of the Seven-Year Period

DSS does not and cannot dispute that it hired zero Native American applicants for five of the seven years. Instead, DSS prides itself on "the simple fact that [it] *did* hire Native Americans" (Dkt. 52 at 8 (emphasis in original)) because it hired one Native American applicant in 2011 and 2013. (*Compare* Dkt. 47 & 50, Pl. SMF & Def. Resp. ¶¶ 51, 53.) But DSS cannot dispute that, even crediting these two hires, it hired zero Native American applicants for any of the Specialist positions in 2007, 2008, 2009, 2010, or 2012. (*Compare* Dkt. 47 & 50, Pl. SMF & Def. Resp. ¶ 49.)

Instead, DSS implies that the United States cannot establish its *prima facie* case because it cannot explain "why DSS would violate its own alleged 'standard operating procedure' of intentional discrimination in two out of the seven years." (Dkt. 52 at 8.) To be clear, the United States established DSS's "standard operating procedure" based on the gross statistical disparity in hiring rates for Native American and white applicants over the *entire* seven-year period. The United States has offered the evidence of a "glaring absence" of Native American hires for five of these seven years to "bolster[] its statistical evidence." *See Teamsters*, 431 U.S. at 338, 342 n.23; *see also EEOC v. Mavis Discount Tire, Inc.*, 129 F. Supp. 3d 90, 111 (S.D.N.Y. 2015).

Moreover, courts agree that "[a] pattern or practice of discrimination may be found even if a defendant does not discriminate uniformly." *United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 807 (E.D. Pa. 1989) (discussing *Teamsters* in a case under Title II of the Civil Rights Act), *aff'd*, 894 F.2d 83 (3d Cir. 1990). In *United States v. Ironworkers Local 86*, the Ninth Circuit rejected the employers' argument "equat[ing] the phrase 'pattern or practice' with 'uniformly engaged in a course of conduct aimed at denying rights secured by the Act.'" 443 F.2d 544, 552 (9th Cir. 1971). The court found "that such an interpretation is overly restrictive

and does violence to the meaning intended by Congress to be accorded the phrase." *Id.* Here, too, this Court should reject DSS's contention that hiring two Native American applicants over a seven-year period (a hiring rate of 1.1%) somehow negates the United States' evidence demonstrating that "unlawful discrimination has been a regular procedure or policy followed by" DSS from 2007 through 2013, *see Teamsters*, 431 U.S. at 360.[3] (*Compare* Dkt. 47 & 50, Pl. SMF & Def. Resp. ¶ 64.)

C. There is no Dispute Regarding the Qualifications of the Native American Applicants DSS Rejected

In addition to the inexorable zero for five of the seven years, the United States offers additional anecdotal evidence regarding the individual treatment of admittedly qualified Native American applicants. (*See* Dkt. 46 at 16-21.) DSS admits that many of the Native American applicants whom it interviewed and rejected were qualified: "DSS does not dispute that as a general proposition, if an applicant was granted an interview, the applicant was considered to have met the minimum qualifications for the position." (Dkt. 52 at 9.) Nor does DSS dispute that the specific examples of Native American applicants provided in the United States' Memorandum in Support of its Motion met the minimum qualifications for the positions to which they applied. (*See id.* at 9-14.) Instead, DSS jumps to its rebuttal argument that the white applicants who were hired were better qualified.[4]

[3] To the extent DSS attempts to re-raise its contention that its hiring decisions consist of too small a sample size to analyze (*see* Dkt. 52 at 8), the United States' opposition to DSS's cross-motion clarifies that 35 hiring decisions over the seven-year time period is "quite sufficient" to support an inference of discrimination (Dkt. 53 at 8 (quoting *Am. Nat'l Bank*, 652 F.2d at 1193-94).

[4] DSS argues, without reference to any record evidence, that "it also interviewed and rejected 'qualified' Caucasian applicants" when it cancelled requisitions without a hire. (Dkt. 52 at 9.) Under *McDonnell Douglas Corporation v. Green*, the qualifications of other rejected applicants are immaterial to the four elements of the *prima facie* case. *See* 411 U.S. 792, 802 (1973).

The Eighth Circuit "has squarely rejected the proposition that [an individual] plaintiff must prove her *relative* qualifications to meet her prima facie burden" for an individual intentional discrimination case under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1047 (8th Cir. 2011) (en banc) (emphasis in original). In its opposition to DSS's cross-motion, the United States disputes the assertion that DSS always hired the best-qualified applicant. (Dkt. 53 at 16-19.) For its own affirmative motion, however, the United States relies on the undisputed qualifications of the rejected Native American applicants, which establish repeated instances of individual *prima facie* cases of intentional discrimination irrespective of any dispute regarding who was better qualified. (*See* Dkt. 46 at 16-21.)

To avoid this clear legal holding, DSS suggests that the *prima facie* case for individual intentional discrimination should not be "conflate[d]" with the *prima facie* case for a pattern or practice of intentional discrimination. (*See* Dkt. No. 52 at 9.) To be sure, the two types of cases have distinct procedures, burdens, and relief. (*See* Dkt. 53 at 4.) Nevertheless, examples of specific incidents of discrimination are not irrelevant to the larger picture of a pattern or practice. As the Third Circuit explained, "[t]his prima facie showing [of a pattern or practice] may in a proper case be made out by statistics alone, . . . or by a cumulation of evidence, including statistics, patterns, practices, general policies, or *specific instances of discrimination*." *Am. Nat'l Bank*, 652 F.2d at 1188 (citations omitted) (emphasis added). Here, the United States presents statistics, the inexorable zero for much of the time period, and specific instances of discrimination. The repeated and undisputed instances where specific individuals can make out *prima facie* cases of discrimination is part of the United States' cumulative evidence that DSS engaged in a pattern or practice of intentional discrimination against Native American applicants.

Finally, DSS seeks refuge in the summary judgment standard, arguing that the Court cannot infer intentional discrimination based on the *prima facie* case under *McDonnell Douglas* because "all reasonable inferences" must be drawn in its favor. (*See* Dkt. 52 at 9-10; *see also id.* at 2.) DSS stretches the well-established summary judgment standard too far. "On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party *only if* there is a genuine dispute as to those facts." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (emphasis added) (internal quotation marks and citation omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Torgerson*, 643 F.3d at 1042. As the Supreme Court has emphasized, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphases in original); *see also Oglala Sioux Tribe*, 100 F. Supp. 3d at 756 (quoting same). Because there is no genuine dispute of material fact in support of the United States' Motion for Partial Summary Judgment on its *prima facie* case, the United States is entitled to the accompanying inference of intentional discrimination that necessarily follows.

III. Conclusion

The United States asks only that the Court consider whether it has met its initial *prima facie* burden to show a pattern or practice of intentional discrimination. In response, DSS highlights disputes of fact that are simply immaterial at this stage and argues unconvincingly that the tried and true practice of partial summary judgment is somehow inappropriate for this type of claim. This Court will decide the disputed issues at a bench trial, but there is no reason, based on the undisputed evidence, that the Court cannot rule on the United States' *prima facie* case as a matter of law on summary judgment. The United States maintains that its evidence of a gross statistical disparity, further supported by the inexorable zero Native American hires for five of

the seven years and the repeated examples of rejected Native American applicants whom DSS admits were qualified, easily meets this standard. Therefore, the United States asks that its Motion be granted.

Date: October 10, 2017

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General
Civil Rights Division

BY: DELORA L. KENNEBREW
Chief

/s/ Alisa C. Philo
JOHN P. BUCHKO
(D.C. Bar No. 452745)
Deputy Chief
JEFFREY MORRISON
(MO Bar 44401)
ALISA C. PHILO
(CA Bar No. 295892)
JENNIFER M. SWEDISH
(DC Bar No. 977746)
Trial Attorneys
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
601 D Street, NW
PHB 4029
Washington, D.C. 20004
Telephone: (202) 616-2424
Facsimile: (202) 514-1005
Email: Alisa.Philo@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I, Alisa Philo, hereby certify that on October 10, 2017, the foregoing Reply Memorandum in Support of United States' Motion for Partial Summary Judgment was served on the following attorneys of record for the South Dakota Department of Social Services via the Court's CM/ECF system:

Gary P. Thimsen
Woods, Fuller, Shultz & Smith P.C.
300 S. Phillips Ave., Suite 300
Sioux Falls, SD 57104-6322
(605) 336-3890
Gary.Thimsen@woodsfuller.com

Joel E. Engel III
300 S. Phillips Ave., Suite 300
Sioux Falls, SD 57104-6322
(605) 336-3890
Joel.Engel@woodsfuller.com

/s/ Alisa C. Philo
ALISA C. PHILO
(CA Bar No. 295892)
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
601 D Street, NW
PHB 4029
Washington, D.C. 20004
Telephone: (202) 616-2424
Facsimile: (202) 514-1005
Email: Alisa.Philo@usdoj.gov