IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD DUFFY	)	
	)	
v.	)	
	)	CIVIL ACTION No. 99-3154
WILLIAM HALTER, Acting Commissioner Social Security Administration, and STEVEN R. COHEN, Acting Director, Office of Personnel Management	)	

MEMORANDUM

Padova, J. **March , 2001**

This matter arises on Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. Plaintiff filed a response, and Defendants filed a reply. For the reasons that follow, the Court grants in part and denies in part said Motion. Specifically, the Court denies the motion to dismiss for lack of subject matter jurisdiction, grants the motion to dismiss the disparate impact claim, denies the motion to dismiss the disparate treatment claim, grants the motion to strike the liquidated damages request, and grants the motion to strike the jury request.

I. Background

Plaintiff, who is over the age of 40, is an employee of the Social Security Administration ("SSA"). Plaintiff alleges that he and 129 others who were employed as Reconsideration Non-Disability Examiners ("RNDEs") and Reconsideration Reviewers ("RRs") were discriminated against on the basis of their age when the SSA refused to upgrade the pay classification for these positions. RNDEs and RRs were largely responsible for reviewing claims determinations made by Claims Representatives ("CRs") or Claims Authorizers ("CAs"). RNDEs and RRs were also

responsible for granting or denying attorneys' fees petitions.

Plaintiff alleges that the SSA redesigned the positions of the younger CR and CA employees, by giving them additional duties, including the review of attorneys' fees that was formerly carried out by the RNDEs and RRs. SSA then upgraded the CR and CA classification from GS-10 to GS-11. Meanwhile, in 1995, the SSA refused a request by the RNDEs and RRs to upgrade their pay classification from GS-11 to GS-12. The Plaintiff alleges that the SSA changed and manipulated work descriptions of the RNDE and RR positions, and reassigned work to other positions to justify the decision not to upgrade the pay scale. On appeal, the Office of Personnel Management ("OPM") affirmed the SSA's decision to keep the RNDE and RR positions at the lower pay grade classification.

On June 22, 1999, Plaintiff filed the instant action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §633a. Plaintiff sought certification of a proposed class consisting of all RNDE and RR employees over the age of 40 who, on or after March 20, 1995, did not have their positions upgraded to GS-12. Plaintiff named the SSA as defendant, and sought an order forcing the SSA to upgrade the positions a pay grade. By Order dated March 22, 2000, the Court dismissed the complaint on the ground that Plaintiff's claim was not redressable, because the OPM, and not the SSA, has ultimate authority over pay-grade classification decisions.

Plaintiff subsequently filed an amended complaint adding OPM as a defendant, and amending the prayer for relief with respect to SSA. Plaintiff now seeks to order the SSA to reengineer the positions to justify the higher pay classification.

II. Discussion

Defendants' Motion consists of multiple requests. The Court will discuss each in turn.

A. Lack of Standing Against SSA

Defendants first move to dismiss the claims against the SSA for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Defendants contend that Plaintiff lacks standing to pursue the claim against the SSA, because the SSA lacks the authority to re-classify the paygrade level of the position, rendering Plaintiff's claim unredressable. The Court disagrees.

The concept of standing is an integral part of "the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976). Whether or not a plaintiff meets the test for standing must be determined by the pleadings alone. United States v. SCRAP, 412 U.S. 669, 709 (1973); Paton v. La Prade, 524 F.2d 862, 867 (3d Cir. 1975). A motion to dismiss for want of standing implicates the court's subject matter jurisdiction, and is therefore appropriately brought under Federal Rule of Civil Procedure 12(b)(1). Miller v. Hygrade Food Prods. Corp., 89 F. Supp. 2d 643, 646 (E.D. Pa. 2000).

To maintain an action in federal court, a plaintiff must establish an injury in fact, that is fairly traceable to the action or actions complained of, and that the injury will likely be redressed by a favorable decision. Duquesne Light Co. v. United States E.P.A., 166 F.3d 609, 612 (3d Cir. 1999). "Redressability," the final prong of the standing requirement, necessitates that a plaintiff show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Bennett v. Spear, 520 U.S. 154, 167 (1997).

In his original Complaint, Plaintiff sought a court order against SSA ordering it to upgrade the positions to GS-12. Because SSA did not have the authority to do this (authority under the statute

rests with OPM), the Court dismissed the claim for lack of redressability.[1] Duffy v. Apfel, No. CIV. A. 99-3154, 2000 WL 347934, at *2 (E.D. Pa. Mar. 22, 2000). However, Plaintiff no longer seeks simply to order the SSA to reclassify the positions at the higher pay grade, an action which lies outside of SSA's authority. Rather, Plaintiff seeks to order the SSA to re-engineer the positions themselves so as to justify the higher pay grade classification. The amended prayer for relief speaks directly to Plaintiff's allegations that the SSA improperly re-engineered the positions (by shifting certain duties away from the RNDEs and RRs) and rewrote job descriptions because it sought to discriminate against those employees because of their age. More importantly, the relief sought would not require the SSA to circumvent the authority of the OPM, as did the prayer for relief in the original Complaint. See 5 U.S.C.A. § 5346. Court intervention under these circumstances would accomplish tangible good in Plaintiff's favor with respect to SSA. See Hardin v. Harshbarger, 814 F. Supp. 703, 707 (N.D. Ill. 1993). Thus, Plaintiff has standing to pursue the claims against SSA.

Moreover, as a matter of equitable principles, SSA is likely a necessary party to this action, because SSA's absence would deprive Plaintiff of his ability to obtain complete relief. Federal Rule of Civil Procedure 19, which codifies equitable practices, provides, in pertinent part, "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . in the person's absence complete relief cannot be accorded among those already parties, . . ." Fed. R. Civ. P. 19(a)(1). Here, particularly in light of Plaintiff's specific allegations, SSA would be a necessary party for crafting

[1]Reclassification decisions are wholly within the province of the Office of Personnel Management ("OPM"). Atwell v. Merit Systems Protection Board, 670 F.2d 272, 283 (D.C. Cir. 1981). OPM has exclusive and final authority on grade classification. 5 U.S.C.A. §5346 (West 1996).

complete relief, thus making it a necessary party to this action. See John T. v. The Delaware Cty. Intermediate Unit, Civil Action No. 98-5781, 2000 U.S. Dist. LEXIS 6169, at *28 (E.D. Pa. May 8, 2000) (finding state education agency to be a necessary party for total relief because agency would be financially responsible and would be required to change some of its policies).

Accordingly, the Court denies Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

B. Motion to Dismiss for Failure to State a Claim

Defendants next contend that the entire Amended Complaint should be dismissed because it fails to state a claim upon which relief can be granted.[2] A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true.[3] Id.

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[2]Defendants suggest that conversion to a summary judgment motion may be appropriate. The Court declines to treat the motion as one for summary judgment. A court converts a motion to dismiss into a motion for summary judgment "if matters outside the pleading are presented to and not excluded by the court." Fed. R. Civ. P. 56. When a District Court decides to convert a motion to dismiss into a motion for summary judgment, it must provide the parties "reasonable opportunity" to present all material relevant to a summary judgment motion. Fed. R. Civ. P. 12(b).

At this time, no discovery has taken place, and Plaintiff has not had the opportunity to refute Defendants' evidence. Furthermore, where the facts are in possession of the moving party, a continuance of a motion for summary judgment for purposes of discovery is warranted. See Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977). At this stage, the Court declines to consider summary judgment until at least some discovery has been held. See Fed. R. Civ. P. 56(f).

[3]Defendants attach several exhibits to their Motion and ask the Court to consider them in deciding the Motion to Dismiss. Courts in this posture generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record.

1. Disparate Impact Claim

Defendants first move to dismiss the disparate impact claim on the grounds that such a claim is not actionable under the ADEA. The Court grants Defendants motion to dismiss the disparate impact claim.

Neither the United States Supreme Court nor the United States Court of Appeals for the Third Circuit has ruled on the issue of whether a disparate impact claim is cognizable under the ADEA. The Supreme Court has, however, given reasons to suggest why it is not. In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), the Court noted that, "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." Id. at 610. The Court concluded that an employer who interferes with an older employee's pension benefits that would have vested does not thereby violate the ADEA, when thatdecision is wholly motivated by factors other than age. The Court noted, "We do not preclude the possibility than an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination." Id. at 612. Though the decision involved only a disparate treatment claim, and thus

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Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Courts may, however, consider exhibits to motions where the allegations in the complaint are based on such documents and the plaintiff has failed to attach them to the complaint. See, e.g., In Re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n.9 (3d Cir. 1993); Anderson v. Haverford Coll., 851 F. Supp. 179, 182 n.1 (E.D. Pa. 1994). See also Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993) (allowing courts to consider an undisputedly authentic document that defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on that document). The purpose of this rule is to prevent a plaintiff with a legally deficient claim from surviving a motion to dismiss simply by failing to attach a dispositive document on which it relied. See Goodwin v. Elkins & Co., 730 F.2d 99, 113 (3d Cir.), cert. denied, 469 U.S. 831 (1984).

The Court declines to consider any of these additional non-pleading documents for purposes of deciding the Motion to Dismiss. None of the nine exhibits appended to Defendants' Motion fall under the narrow exceptions to the general rule that allow the Court to consider them without converting the motion to one for summary judgment.

did not directly address the issue of disparate impact, the reasoning in the decision has been used by other courts to deny the cognizability of disparate impact claims.

The Circuit Courts of Appeals disagree on whether to recognize ADEA disparate impact claims. Several Circuits have refused to recognize a disparate impact claim in the context of the ADEA. See, e.g., Mullin v. Raytheon Co., 164 F.3d 696, 704 (1st Cir. 1999) ("[W]e join those courts of appeals which have held that the ADEA does not impose liability under a theory of disparate impact."); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.) ("[D]isparate impact claims are not cognizable under the ADEA."), cert. denied, 517 U.S. 1245 (1996); and EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994), cert. denied, 515 U.S. 1142 (1995). Meanwhile, the Second, Eighth, and Ninth Circuits, in both pre- and post-Hazen decisions, have explicitly recognized the cognizability of disparate impact claims under the ADEA. See, e.g., Smith v. Xerox Corp., 196 F.3d 358, 367 n.6 (2nd Cir. 1999) ("Other circuits, including this one, have continued to recognize disparate impact ADEA claims."); Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1369 (2d Cir. 1989) ("[A]n ADEA violation may be demonstrated either by a showing of disparate treatment or disparate impact."); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686 (8th Cir. 1983); EEOC v. Local 350, 998 F.2d 641, 648 n.2 (9th Cir. 1993) ("Because in this circuit a plaintiff may challenge age discrimination under a disparate impact analysis, both theories were potentially available . . . .")

The Third Circuit has not ruled directly on the issue, but has expressed its doubts, in light of Hazen, that disparate impact claims are cognizable under the ADEA. In DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995), the court observed, "It is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA." Id. at 732. However, the

court declined to settle the issue, adding that "resolution of that issue must await another day." Id. at 734. District courts in the Third Circuit have decided the issue both ways, and the Third Circuit has in turn upheld decisions both recognizing and refusing to recognize ADEA disparate impact claims. Compare Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254, 1259 (D.N.J. 1994), aff'd without opinion, 67 F.3d 291 (3d Cir. 1995) (recognizing disparate impact under the ADEA), with Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1077 (W.D. Pa.), aff'd without opinion, 43 F.3d 1461 (3d Cir. 1994) (refusing to recognize disparate impact under the ADEA).

The text of the ADEA suggests that a disparate impact claim is not actionable. Section 623(a) of the Act provides that it is unlawful for an employer: "to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. §623(a)(1) (West 1999). Thus, for recovery in an age discrimination suit, a plaintiff is required to prove not only that age was a factor in the employment decision at issue, but that it was the "determinative factor" in that decision. Billet v. Cigna Corp., 940 F.2d 812, 816 (3d Cir. 1991) (citing Bartek v. Urban Redevelopment Authority of Pittsburgh, 882 F.2d 739, 742 (3d Cir. 1989). The test, then, is the employer's motivation or intent. Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1077 (W.D. Pa. 1994).

A disparate impact claim, on the other hand, challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters v. United States, 431 U.S. 324, 335-336, n.15 (1977) (Title VII context). "Proof of discriminatory motive . . . is not required under a disparate-impact theory." Id. Under this formulation, a disparate impact claim therefore would not require proof that the motive to discriminate on the basis of age was a factor. Disparate

impact, with its absence of an intent requirement, appears incompatible with the intent requirement of the ADEA as expressed in the case law.

Finally, legislative history also suggests that ADEA claims are more properly expressed in terms of allegations of disparate treatment. The Western District of Pennsylvania concluded in Martincic that Congress purposefully excluded age from the explicit list of types of disparate impact discrimination cases in its 1991 amendments to 42 U.S.C. § 2000e-2, because disparate impact does not comport with the plaintiff's burden of proof in ADEA cases. Martincic, 844 F. Supp. 1073, 1078.

Congress' 1991 amendments to Title VII and the ADEA, which are often interpreted similarly, also suggest a conscious decision not to apply disparate impact to ADEA claims. Mullin, 164 F.3d at 703. As the First Circuit observed in Mullin, "Congress' insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA – which was undergoing revision at the same time by the same committees and in the same bill – highly significant. Id.

This Court agrees with those courts that have held that a disparate impact claim is not cognizable under the ADEA. Both the United States Supreme Court and the Third Circuit have expressed their doubts regarding the viability of such claims. The language of the statute and the legislative history of the ADEA both strongly suggest that Congress did not intend for disparate impact to be actionable under that statute. Because this Court determines that such a claim is not cognizable, Plaintiff's assertion of a disparate impact claim fails to state a claim upon which relief may be granted. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court grants Defendants'

Motion to Dismiss the disparate impact claim.[4]

2. Disparate Treatment Claim

Defendants next ask to dismiss the disparate treatment claim. For the reasons that follow, the Court denies the Motion.

In a disparate treatment case, liability depends on whether the protected trait (age under the ADEA) actually motivated the employer's decision. Hazen, at 610. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Id. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Id. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome. Id.

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C.A. § 623(a)(1). When a plaintiff alleges disparate treatment, the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." Reeves v. Sanderson Plumbing Prod. Inc., 120 S.Ct. 2097, 2105 (2000). A plaintiff may sustain an ADEA discrimination claim by presenting either direct or circumstantial evidence of discrimination.

In a direct evidence case, the plaintiff must produce "direct evidence that the decisionmakers

[4]In light of this decision, it is unnecessary for the Court to determine whether Plaintiff has properly stated the elements of a disparate impact claim.

placed substantial negative reliance on an illegitimate criterion in reaching their decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989). Both the burden of production and the risk of non-persuasion are shifted to the defendant who, because of the inference the overt evidence showing the employee's bias permits, must persuade the factfinder that even if discrimination was a motivating factor in the adverse employment decision, it would have made the same employment decision regardless of its discriminatory animus. Armbruster v. Unisys, Corp., 32 F.3d 768, 778 (3d Cir. 1994) (citing Price Waterhouse, 490 U.S. at 244-46).

Often, a plaintiff cannot produce direct evidence, and must rely on circumstantial evidence of discrimination. In such cases, courts employ the burden-shifting framework outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Reeves, 120 S.Ct. at 2105. Under this framework, the plaintiff must first produce sufficient evidence to convince a reasonable factfinder of all elements of a prima facie case of discrimination. Reeves, 120 S.Ct. at 2106; Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). Once the plaintiff satisfies this requirement, the burden shifts to the defendant to produce adequate evidence of a legitimate, nondiscriminatory reason for the adverse employment decision. Reeves, 120 S.Ct. at 2106; Stanziale, 200 F.3d at 105. The defendant bears only a burden of production, not persuasion. Stanziale, 200 F.3d at 105. The defendant, therefore, need not persuade the factfinder that the proffered reason actually motivated the adverse employment decision. Id. If the defendant satisfies this burden, the presumption of discrimination created by the presentation of a prima facie case "drops out of the picture." Reeves, 120 S.Ct. at 2106 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993)). Plaintiff must then submit evidence from which a factfinder could find that the defendant's allegedly legitimate reason was a pretext for discrimination. Reeves, 120 S.Ct. at 2106.

Defendants contend that Plaintiff's pleadings fail to state a prima facie case of disparate treatment in the indirect evidence context. The Court disagrees. Here, Plaintiff's pleadings raise an inference of age discrimination by showing: he was over forty at the time of the discrimination; he was qualified; he was rejected despite his qualification; and defendant gave preferential treatment to others sufficiently younger to permit an inference of age discrimination. See Reeves, 120 S. Ct. at 2106;Armbruster , 32 F.3d at 777. The sum of Plaintiff's allegations is that his position was re-engineered and not classified at the GS-12 level because of his age. The pleadings therefore set forth the elements of a prima facie case of discrimination.

Plaintiff also contends that his is a direct evidence case under the Price Waterhouse formula. Plaintiff claims certain managers made various statements regarding the problems associated with older employees and their ability to learn. Am. Compl. ¶¶ 38-39. The Court cannot say at this time whether Plaintiff's case will be a direct evidence case. However, the Court need not make this determination, because it determines that the pleadings sufficiently state a prima facie case under the McDonnell Douglas formula for purposes of the motion to dismiss.

C. Motion to Strike Liquidated Damages

In his Amended Complaint, Plaintiff asks for liquidated damages amounting to twice the amount lost as pay and benefits as a result of SSA's discriminatory conduct. Defendants move to strike the liquidated damages portion of Plaintiff's Complaint. The Court grants the motion to strike.

The Third Circuit has not ruled on the precise issue of whether liquidated damages are available in an ADEA action against the federal government. The only circuit to consider directly this issue found that the ADEA does not permit recovery against the federal government for liquidated damages. Smith v. Office of Personnel Management, 778 F.2d 258, 261 (5th Cir. 1985)

("Nothing in the ADEA indicates an intent by Congress to permit the recovery of damages [from the federal government] beyond lost wages."), cert. denied, 476 U.S. 1105 (1986). Lower courts addressing the issue have reached the same conclusion. See e.g., Edwards v. Shalala, 846 F. Supp. 997, 1001-02 n.8 (N.D. Ga. 1994) ("[although] liquidated damages . . . are provided for in the private-action portion of the ADEA, such relief is not available when proceeding against the federal government."), aff'd, 64 F.3d 601 (11th Cir. 1995); Colantuoni v. Macomber, 807 F.Supp. 835, 837 n. 12 (D.D.C. 1992) (same); Tietz v. Bowen, 695 F. Supp. 441, 446 (N.D. Calif. 1987) ("[l]iquidated damages are not available [against the federal government] under . . . ADEA, as a matter of statutory interpretation and sovereign immunity"), aff'd, 892 F.2d 1046 (9th Cir. 1990); Manziano v. Frank, No. 89-1208, 1990; Chambers v. Weinberger, 591 F.Supp. 1554 (N.D. Ga. 1984); Wilkes v. United States Postal Service, 548 F. Supp. 642 (N.D. Ill. 1982).

The Court agrees with those federal courts that have concluded that liquidated damages are not available in an ADEA action against the federal government. This rule against liquidated damages in such actions is based largely on the Supreme Court's rule in Lehman v. Nakshian, 453 U.S. 156 (1981), in which the Court determined that Congress did not intend to extend the right to jury trial to ADEA actions against the federal government. Id. at 160. The Lehman rationale logically extends to whether liquidated damages exist. The Court therefore grants Defendants' request to strike the prayer for liquidated damages.

D. Motion to Strike Jury Demand

Defendants move to strike the jury demand. Generally, the Seventh Amendment does not apply to actions against the federal government. Lehman, 453 U.S. at 160. In a suit against the federal government, a plaintiff has the right to a trial by jury only where Congress has provided an

affirmative statutory grant of the right. Id. at 165. The ADEA provides no such affirmative grant, and therefore there is no right to trial by jury for an ADEA claim against the federal government. Id. Plaintiff does not contest this Motion to Strike. Pl.'s Resp. at 28. Accordingly, the Court grants the Motion to Strike Plaintiff's jury demand as uncontested.

III. Conclusion

For the above reasons, the Court dismisses the disparate impact claim, strikes the liquidated damages request, and strikes the jury demand. The Court denies the Motion to Dismiss the disparate treatment claim, and allows this claim to go forward. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD DUFFY	)	
	)	
v.	)	
	)	CIVIL ACTION No. 99-3154
WILLIAM HALTER, Acting Commissioner Social Security Administration, and STEVEN R. COHEN, Acting Director, Office of Personnel Management	)	

ORDER

AND NOW, this day of March, 2001, upon consideration of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. No. 34) and any responses thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part and **DENIED** in part. In furtherance thereof, it is specifically **ORDERED** that:

1. Defendants' Motion to Dismiss for Lack of Standing is **DENIED**;
2. Defendants' Motion to Dismiss the Disparate Impact Claim is **GRANTED** pursuant to Federal Rule of Civil Procedure 12(b)(6);
3. Defendants' Motion to Dismiss the Disparate Treatment Claim is **DENIED** and may go forward;
4. Defendants' Motion to Strike the Liquidated Damages Request is **GRANTED**;
5. Defendants' Motion to Strike the Jury Request is **GRANTED**.
6. Defendants' Alternative Motion for Summary Judgment is **DENIED** without

prejudice.[5]

BY THE COURT:

_____
John R. Padova, J.

[5]For the reasons stated in the accompanying Memorandum, the Court declines at this time to treat Defendants' Motion as one for summary judgment. Defendants are not foreclosed from filing a new Motion for Summary Judgment after discovery has been held.