

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

August Term 2011

(Argued: October 17, 2011

Decided: July 10, 2012)

Nos. 10-1904-cv(L), 10-2031-cv(XAP)

HOWARD CHIN, RICHARD WONG, SANRIT BOONCOME, MICHAEL CHUNG,
Plaintiffs-Appellees–Cross-Appellants,

THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW
JERSEY INC., CHRISTIAN ENG, NICHOLAS YUM, ALAN LEW, DAVID LIM, GEORGE
MARTINEZ, STANLEY CHIN, MILTON FONG,
Plaintiffs-Appellees,

-v.-

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY,
Defendant-Appellant–Cross-Appellee.

Before: MCLAUGHLIN, CABRANES, and LIVINGSTON, *Circuit Judges.*

Defendant-appellant the Port Authority of New York and New Jersey, Inc. (“Port Authority”) and plaintiff-appellants Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung appeal from a judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) holding, after a jury trial, that the Port Authority violated Title VII of the Civil Rights Act of 1964 by failing to promote seven plaintiffs, and awarding plaintiffs-appellees Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong back pay, compensatory damages, and equitable relief. We conclude that the pattern-or-practice method of proving liability was not available to plaintiffs in this private, nonclass action and so **REVERSE** as to the submission of this theory of liability to the jury. We also **REVERSE** with respect to the district court’s determination

that pursuant to the plaintiffs’ disparate impact theory, the “continuing violation” doctrine permitted the award of damages and equitable relief in connection with conduct predating the statute of limitations. We therefore **VACATE** the back pay awards to Eng, Lew, Stanley Chin, and Fong; **VACATE** the jury’s compensatory damage awards with respect to Eng, Yum, Lew, Lim, Martinez, Stanley Chin, and Fong; **VACATE** the retroactive promotion of Lew; **VACATE** the salary and pension adjustments for Lew, Stanley Chin, and Fong; and **REMAND** to the district court for a new trial on damages as to these plaintiffs and for reconsideration of the equitable relief afforded to them to the extent such relief was premised on failures to promote occurring outside the statute of limitations. With respect to all other issues raised by the parties on appeal, we **AFFIRM**.

KAREN R. KING (Susanna M. Buergel, *on the briefs*), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York, *for Plaintiffs-Appellees–Cross-Appellants and Plaintiffs-Appellees*.

KATHLEEN GILL MILLER (Milton H. Pachter & James M. Begley, *on the briefs*), Port Authority of New York and New Jersey, New York, New York, *for Defendant-Appellant–Cross-Appellee*.

LIVINGSTON, *Circuit Judge*:

Plaintiffs-appellees, eleven Asian Americans currently or formerly employed as police officers by the Port Authority of New York and New Jersey (“Port Authority”), sued the Port Authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that they were passed over for promotions because of their race. The plaintiffs asserted three theories of liability for discrimination: individual disparate treatment, pattern-or-practice disparate treatment, and disparate impact. After a nine-day trial, a unanimous

jury found the Port Authority liable for discrimination against seven of the plaintiffs under all three theories and awarded back pay and compensatory damages to each of those seven plaintiffs. The district court (Miriam Goldman Cedarbaum, *Judge*) also granted equitable relief to certain of the prevailing plaintiffs in the form of retroactive promotions, seniority benefits, and salary and pension adjustments corresponding with the hypothetical promotion dates that the jury apparently selected as a basis for calculating these plaintiffs' back pay awards.

On appeal, the Port Authority argues: (1) that evidence predating the onset of the statute of limitations should not have been admitted; (2) that the evidence was insufficient to support the jury's verdict with respect to each of the plaintiffs' theories; and (3) that the damages and equitable relief were premised on time-barred claims and were otherwise excessive. With regard to the plaintiffs' individual disparate treatment allegations, we hold that the district court properly admitted background evidence predating the onset of the limitations period and that there was sufficient evidence for a reasonable juror to conclude that the Port Authority discriminated against the seven prevailing plaintiffs within the limitations period. The district court erred, however, in: (1) submitting the pattern-or-practice disparate treatment theory to the jury in this private, nonclass action; and (2) concluding that the "continuing violation"

doctrine applied to the plaintiffs' disparate impact theory so that the jury could award back pay and compensatory damages for harms predating the onset of the statute of limitations. We therefore vacate the back pay for four of the plaintiffs, whose awards correspond with hypothetical promotion dates beyond the limitations period, as well as the injunctive relief for three of the same plaintiffs, and we also vacate the award of compensatory damages for all seven prevailing plaintiffs. We remand for a new trial on damages as to all seven prevailing plaintiffs and for reconsideration of equitable relief to the extent such relief was premised on failures to promote occurring outside the limitations period.

The four plaintiffs who did not prevail at trial cross-appeal, arguing that the district court erred by excluding expert testimony from an industrial psychologist. One of these plaintiffs, cross-appellant Howard Chin, further argues that the district court erred in denying the plaintiffs' motion for sanctions in the form of an adverse inference instruction due to the Port Authority's destruction of promotion records. Finding no abuse of discretion in the district court's determinations as to these matters, we affirm.

BACKGROUND

The Port Authority is a bi-state transportation agency whose facilities are policed by its Public Safety Department. The eleven plaintiffs-appellees in this case are Asian Americans who were employed by that department as police

determining that Dr. Lundquist's testimony was not relevant expert testimony that would help the jury understand the facts at issue.

V. Sanctions for Spoliation

Finally, cross-appealing plaintiff Howard Chin argues that the district court erred in denying the plaintiffs' motion requesting an adverse inference instruction due to the Port Authority's destruction of the promotion folders used to make promotions off of the 1999 eligible list.¹³ *See Port Auth. I*, 601 F. Supp. 2d 566 (S.D.N.Y. 2009). The Port Authority does not dispute that, upon receiving notice of the filing of plaintiffs' EEOC charge in February 2001, it had an obligation to preserve the promotion folders yet failed to do so. It argues, however, that the district court did not abuse its discretion in denying an adverse inference instruction. We agree.

"[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

¹³ Howard Chin is the only one of the four cross-appealing plaintiffs who claims to have lost relevant evidence due to the Port Authority's destruction of the promotion folders.

Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (internal quotation marks omitted). If these elements are established, a district court may, at its discretion, grant an adverse inference jury instruction insofar as such a sanction would “serve[] [the] threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation.” *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001). Our review of a district court’s decision on a motion for discovery sanctions is limited to abuse of discretion, which includes errors of law and clearly erroneous assessments of evidence. *See Residential Funding Corp.*, 306 F.3d at 107. “[A]bsent a showing of prejudice, the jury’s verdict should not be disturbed.” *Id.* at 112.

Howard Chin argues that the Port Authority’s failure even to issue a litigation hold regarding the promotion folders at any point between 2001 and 2007 amounted to gross, rather than simple, negligence. We reject the notion that a failure to institute a “litigation hold” constitutes gross negligence *per se*. *Contra Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010). Rather, we agree that “the better approach is to consider [the failure to adopt good preservation practices]

as one factor” in the determination of whether discovery sanctions should issue. *Orbit Comm’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010). Moreover, as the district court recognized, *see Port Auth. I*, 601 F. Supp. 2d at 570, a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction. *See Residential Funding Corp.*, 306 F.3d at 109; *Byrnie*, 243 F.3d at 108. Even if we assume *arguendo* both that the Port Authority was grossly negligent and that the documents here were “relevant,” we have repeatedly held that a “case-by-case approach to the failure to produce relevant evidence,” at the discretion of the district court, is appropriate. *Residential Funding Corp.*, 306 F.3d at 108 (quoting *Reilly v. Natwest Mkts. Grp.*, 181 F.3d 253, 267 (2d Cir. 1999)). In this case, the district court concluded that an adverse inference instruction was inappropriate in light of the limited role of the destroyed folders in the promotion process and the plaintiffs’ ample evidence regarding their relative qualifications when compared with the officers who were actually promoted. *See Port Auth. I*, 601 F. Supp. 2d at 570–71. At trial, Howard Chin was able to establish his service record and honors, and Chief Charles Torres testified that Howard Chin was very smart and a good employee. Under these circumstances, the district court did not abuse its discretion in concluding that an adverse inference instruction was inappropriate.

CONCLUSION

For the foregoing reasons, we affirm the district court's conclusion that the Port Authority is liable to Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong under both the individual disparate treatment and disparate impact theories. We also affirm the denial of individual relief to Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung. Because the district court erred in applying the continuing-violation exception to the plaintiffs' claims, however, we: (1) vacate the jury's back pay awards with respect to Christian Eng, Alan Lew, Stanley Chin, and Milton Fong; (2) vacate the jury's compensatory damage awards with respect to Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong; (3) vacate the retroactive promotion of Alan Lew; and (4) vacate the salary and pension adjustments for Alan Lew, Stanley Chin, and Milton Fong. We remand all of these remedies issues to the district court for a new trial solely on damages and for the reconsideration of equitable relief. On remand, individual relief should be awarded only insofar as it corresponds to discriminatory failures to promote committed after August 2, 2000.