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# *Who Can Challenge the Settlement of an Employment Discrimination Suit?*

by Jay E. Grenig

**Evelyn Marino**
**v.**
**Juan U. Ortiz**

**Wayne Costello**
**v.**
**New York City Police Department**
(Docket No. 86-1415)

*Argued November 30, 1987*

**ISSUE**

This case presents the question of whether individuals who did not intervene in employment discrimination litigation may challenge a consent order promoting minority police officers with the same or lower promotion examination scores than those of nonminority police officers.

**FACTS**

In 1983 and 1984, the New York City Police Department (NYCPD) gave civil service examinations to nearly 12,000 police officers who were seeking promotion to the rank of sergeant. Of the candidates for promotion, 79 per cent were white, 12.3 per cent were black and 8.7 per cent were Hispanic. After scoring the examination, the NYCPD established a cut-off that left 1,041 officers eligible for promotion—93 per cent of whom were white, 2.3 per cent of whom were black and 4.2 per cent Hispanic.

In late 1984, two groups representing black and Hispanic police officers—the Guardians Association and the Hispanic Society—filed separate suits in federal district court to prevent the eligibility list from being used in selecting officers for promotion. They alleged that the examination and the eligibility list it produced were not job-related and had a disparate impact on black and Hispanic officers. The NYCPD promptly agreed not to use the eligibility list as a basis for permanent promotions pending outcome of the litigation. The NYCPD then received approval from the court to make provisional promotions of 534 officers from the eligibility list.

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Three groups then intervened in the lawsuit: the Sergeants Benevolent Association, on behalf of officers who had been provisionally promoted to the rank of sergeant from the eligibility list; the Sergeants Eligibles Association, on behalf of those officers who had not been provisionally promoted but who remained on the eligibility list; and a group called the "Schneider intervenors," on behalf of certain white ethnic groups and other individuals who had not been promoted and who had taken the examination but were not on the eligibility list.

These three groups, the two plaintiff groups and the NYCPD attempted to negotiate a settlement of the lawsuits. Ultimately, the suits were consolidated and all parties except the Schneider intervenors agreed to the terms of a settlement. The proposed settlement provided for permanent promotion of all officers on the eligibility list as well as a sufficient number of black and Hispanic officers so that each group would be promoted to sergeant in proportion to the number of those taking the civil service examination. The parties proposed to select these additional black and Hispanic officers on the basis of their scores on the written portion of the civil service examination.

In 1985, the court gave its interim approval to the proposed settlement, allowing 573 more officers of whom 160 were not on the eligibility list to receive provisional promotions to the rank of sergeant.

Approximately one month later, two groups, referred to as the Marino petitioners and the Costello petitioners, filed suit against various city officials. The groups represented white officers who were not on the eligibility list, but who had examination scores at least as high as the lowest scoring minority officer receiving a provisional promotion under the interim settlement order. The Marino petitioners alleged that the provisional promotions made pursuant to the settlement orders violated the Equal Protection Clause of the Fourteenth Amendment. The Marino petitioners asked that members of their class be promoted to current and future sergeant vacancies.

Thereafter, the district court dismissed the lawsuit by the Marino petitioners and it approved the entry of a consent order in the *Hispanic Society* litigation. The Marino petitioners and Costello petitioners appealed the action, but the United States Court of Appeals for the Second Circuit upheld the district court's dismissal of

the Marino petitioner's complaint as an impermissible collateral attack on the *Hispanic Society* settlement (806 F.2d 1144 (1986)). It also ruled that the Costello petitioners had no right to file an appeal because they had not formally intervened in the *Hispanic Society* litigation.

## BACKGROUND AND SIGNIFICANCE

This case raises important questions concerning the rights and obligations of persons whose interests may be affected by, but who are not party to, ongoing litigation under federal employment discrimination laws. The courts have struggled to find the proper role for nonminority employees in employment discrimination lawsuits brought by their minority colleagues. The Supreme Court here has the opportunity to define the proper procedures for employees, allegedly aggrieved by a consent order settling an employment discrimination lawsuit and establishing an affirmative action plan, to challenge the consent order.

Some courts, including the Second Circuit in this case, have taken the position that intervention in an employment discrimination lawsuit is the only procedure available for litigating the question of the validity of the consent order. This is referred to as "mandatory intervention." Chief Justice Rehnquist and Justice Brennan have previously criticized mandatory intervention and at least one federal court of appeal has rejected the doctrine.

Although this case presents several complex and difficult procedural issues, the case represents yet another chapter in the ongoing struggle to determine when and under what conditions the courts may grant relief in an employment discrimination suit that treats racial minorities differently than nonminorities.

If the Supreme Court upholds the Second Circuit's decision, this will encourage voluntary settlements of employment discrimination suits, and minimize the possibility of further litigation and the possibility of inconsistent results. However, because of strict rules concerning timeliness of intervention and application of the collateral attack doctrine, such a decision may leave many interested third persons without an opportunty to be heard.

## ARGUMENTS

***For Evelyn Marino and Wayne Costello** (Counsel of Record, Ronald Podolsky, Fifteen Park Row, New York, NY 10038; telephone (212) 460-8218)*

1. Marino and Costello were denied equal protection because the racial remedy employed was not sufficiently narrowly tailored to prevent unnecessarily excluding them from the rank of sergeant.
2. Marino and Costello were necessary parties to the *Hispanic Society* litigation under Rule 19 of the Federal Rules of Civil Procedure.
3. The *Marino* suit was not an impermissible collateral attack on the *Hispanic Society* consent order.
4. The Costello petitioners had standing to appeal.

***For the Sergeants Benevolent Association of the City of New York** (Counsel of Record, Richard K. Walker, 1200 Seventeenth Street, NW, Washington, DC 20036; telephone (202) 857-9800)*

1. The court of appeals correctly held that, as nonparties to the *Hispanic Society* case, Marino and Costello lacked standing to appeal.
2. The *Marino* suit was properly dismissed as an impermissible collateral attack upon the settlement in *Hispanic Society* and the orders implementing it.
3. Marino and Costello do not have standing to challenge the consent decree because the promotions of others inflicted no redressable injury on them.

***For New York City** (Counsel of Record, Peter L. Zimroth, 100 Church Street, New York, NY 10007; telephone (212) 566-6037)*

1. Marino and Costello were aware of the existence of their claim, knew of the *Hispanic Society* litigation, were advised to move to intervene and warned that if they did not intervene their claim would be precluded. Because they deliberately chose to appear at the *Hispanic Society* settlement hearing and present their claim without moving to intervene, Marino and Costello may not pursue a separate lawsuit attacking a Title VII consent decree.
2. Because Marino and Costello were not a party to the *Hispanic Society* litigation and they deliberately chose not to intervene, they cannot appeal the entry of the consent decree.
3. Marino and Costello have not been passed over for a promotion they were entitled to, because if there had been no employment discrimination litigation, they would not have been promoted and the consent decree does not alter their status.

***For the Guardians Association of the Police Department of the City of New York, Inc.** (Counsel of Record, Robert David Goodstein, 56 Harrison Street, New Rochelle, NY 10801; telephone (914) 632-8382)*

1. Marino and Costello are "jealous" whites—jealous because other failing test takers were promoted solely to undo the disparate impact of a racially discriminatory test.

***For the Hispanic Society** (Counsel of Record, Kenneth Kimerling, 99 Hudson Street, New York, NY 10013; telephone (212) 219-3360)*

1. The Marino complaint was correctly dismissed as an improper collateral attack and because the Marino petitioners lack standing.
2. The Costello petitioners are not necessary parties to

the *Hispanic Society* litigation under Rule 19 of the Federal Rules of Procedure.

## AMICUS ARGUMENTS

### *In Support of Neither Party*

The United States Department of Justice filed a brief arguing that the Marino petitioners who failed to intervene in the *Hispanic Society* suit are nevertheless entitled to pursue an action challenging the employment-related orders entered in the original suit. It also argues that the Costello petitioners who did not move to make themselves a formal party to the *Hispanic Society* suit are not entitled to appeal the entry of a consent decree in that litigation.

### *In Support of Evelyn Marino and Wayne Costello*

New York Assemblyman Dov Hikind and The Citizens' Crusade Against Crime filed an *amicus* brief contending that the courts' current insistence on imposing affirmative action quotas to accomplish statistical equality among racial and ethnic groups in employment exacerbates the social and juridical problems they seek to solve. They also argue that a "well-meaning but obstinate unwillingness to face the reality that statistical differences in performance are not the necessary product of discrimination and have not been eliminated by quotas has led to procustean solutions like that imposed in this case, in which passing scores for 'minority' applicants are shaped to meet the ability of the job applicants instead of to meet the needs of the job."

### *In Support of Juan Ortiz and the New York City Police Department*

The Lawyers' Committee for Civil Rights Under Law; the City of Birmingham, Alabama; the Equal Employment Advisory Council; the National League of Cities, the National Governors' Association; the U. S. Conference of Mayors; the International City Management Association; and the National Association of Counties