

1991 WL 127073

United States District Court, N.D. California.

Nancy J. STENDER et al., Plaintiffs,

v.

LUCKY STORES, INCORPORATED, Defendant.

No. C 88-1467 MHP.

|
April 4, 1991.

Opinion

PATEL, District Judge.

*1 Plaintiffs bring this class action on behalf of all past, present and future black and female employees of retail stores within Lucky Stores' Northern California division, alleging class-wide discrimination with respect to opportunities for advancement. Claims are brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), 42 U.S.C. § 1981 and the California Fair Employment and Housing Act, Govt. Code §§ 12900-12996 ("FEHA").

The parties are now before the court on defendant Lucky Stores' motion for partial summary judgment on claims of denial of promotional opportunities to specified store management positions.

Having reviewed the submissions and arguments of the parties, for the following reasons, the court Grants in part and Denies in part defendant's motion for partial summary judgment.

Background

This class action is brought on behalf of black and female employees of Lucky Stores' Northern California Division. Plaintiffs allege that defendant Lucky Stores maintains a discriminatory policy and practice of denying hours, full-time work, desirable job assignments and shifts, and training and promotional opportunities to female and black employees in its Northern Food Division.

Defendant Lucky Stores brings this motion for partial summary judgment on plaintiffs' claims of denial of promotional opportunities with respect to six positions in its retail food stores: Store Manager; Assistant Store Manager; Third Person; Produce Manager; Deli/Bakery Department Head; and General Merchandise Department Head¹ (hereinafter "Store Management Positions").

Lucky Stores argues that plaintiffs cannot establish a *prima facie* case of class-wide discrimination on the basis of race or sex. They argue first that plaintiffs cannot establish the statistically significant disparity required for a *prima facie* case of disparate impact with respect to either women or blacks. Secondly, they assert that plaintiffs cannot establish the strong anecdotal evidence of intentional discrimination required for a *prima facie* case of disparate treatment of blacks, with respect to whom the statistical disparity is less than 2.0 standard deviations. Finally, they argue that anecdotal evidence, however strong, fails to establish a *prima facie* case of disparate treatment of females, where statistical evidence reveals no disparity and, in fact, a negative disparity.

Legal Standard

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (the nonmoving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

*2 The court's function, however, is not to make credibility determinations. *Anderson*, 477 U.S. at 250. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

Although summary judgment should be used prudently in employment discrimination cases involving issues of motivation or intent, such relief may nonetheless be appropriate. *Foster v. Arcata Associates, Inc.*, [38 EPD ¶ 35,559] 772 F.2d 1453, 1459 (9th Cir.1985), *cert. denied*, [39 EPD ¶ 35,925] 475 U.S. 1048 (1986). One function of the allocation of burdens of proof and production in Title VII actions is “to enable the district courts to identify meritless suits and dispense with them short of trial.” *Id.* (citations omitted).

Discussion

A plaintiff in a Title VII action can establish liability under either of two theories: disparate treatment or disparate impact. In a disparate treatment claim, the plaintiff must prove that the employer intentionally treats some persons less favorably than others because of their race, color, religion, sex or national origin; proof of illicit motive is required. *Int’l Bhd. of Teamsters v. United States*, [14 EPD ¶ 7579] 431 U.S. 324, 335 n. 15 (1977). Allegations of class-wide discrimination typically involve a claim that the sum of an employer’s practices results in less favorable treatment of members of the plaintiff class than of others. In these cases, both a “pattern or practice” of discrimination and the presence of impermissible motive may be inferred from a sufficient showing of disparity between members of the plaintiff class and comparably qualified persons not in the plaintiff class. *Id.* at 335–36; *Segar v. Smith*, [34 EPD ¶ 34,488] 738 F.2d 1249, 1265–66 (D.C.Cir.1984), *cert. denied sub nom. Meese v. Segar*, [36 EPD ¶ 35,221] 471 U.S. 1115 (1985).

In a disparate impact claim, the plaintiff challenges employment practices that are facially neutral with respect to the protected group but in fact fall more harshly on that group than on others and cannot be justified by business necessity. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. at 335–36 n.15. Proof of discriminatory intent is not required. *Wards Cove Packing Co. v. Atonio*, [50 EPD ¶ 39,021] 490 U.S. 642, 656–58 (1989). In class claims of discrimination, plaintiffs may shift the burden of proving the job-relatedness of specific employment practices to the employer by bringing a disparate impact claim in addition to a “pattern or practice” disparate treatment claim. *See Segar*, 738 F.2d at 1266. To establish a *prima facie* case of disparate impact, the plaintiff must:

(1) identify the specific employment practices or selection criteria being challenged; (2) show disparate impact on a protected group of which he is a member; and (3) prove causation with respect to each challenged employment practice. *Wards Cove*, 490 U.S. at 656–58; *Rose v. Wells Fargo & Co.*, [53 EPD ¶ 39,920] 902 F.2d 1417, 1424 (9th Cir.1990).

I. Disparate Impact

*3 Lucky Stores argues that plaintiffs cannot make out a *prima facie* case of disparate impact with respect to Store Management Positions because they cannot establish that female or black employees have been disproportionately excluded from these positions.

A disparate impact claim requires plaintiffs to show that class members received fewer promotions than would be predicted by a neutral model and that the difference is statistically significant. Without such a showing, the challenged employment cannot be said to have an adverse impact. *Watson v. Fort Worth Bank & Trust*, [46 EPD ¶ 38,065] 487 U.S. 977, 987 (1988). Specifically, in a promotion case, the evidence must compare the rate of promotions of blacks or women into a given job category with their proportional representation in the pool of eligible employees. *Moore v. Hughes Helicopters, Inc.*, [32 EPD ¶ 33,688] 708 F.2d 475, 482 (9th Cir.1983).

If a disparity is shown, an inference of discrimination is permissible only if the disparity is statistically significant.² *Segar*, 738 F.2d at 1282. If the disparity is not statistically significant, no such inference can be supported. *Id.* Although courts have not applied a uniform test for statistical significance in discrimination cases, several courts have held that a level of .05 or a variance between expected and observed results of greater than two or three standard deviations, indicating that the odds are one in 20 that the result could have occurred by chance, is sufficient to support an inference of discrimination in Title VII cases. *Id.* (citations omitted). *See also Hazelwood School Dist. v. United States*, [14 EPD ¶ 7633] 433 U.S. 299, 308–309 n. 14 (1977); *Gay v. Waiters’ and Diary Lunchmen’s Union*, [30 EPD ¶ 33,026] 694 F.2d 531, 551 (9th Cir.1982).

Lucky Stores has submitted its statistical analysis of movement into the relevant management positions by gender and by race, along with the supporting declaration

of economist Dr. Joan Haworth. Haworth Decl., Ex. C. The analysis determines the class of promotion-eligible employees by reference to the job category from which promotion to a given position is usually drawn. Thus, for example, because one ordinarily must have experience as Assistant Manager to be qualified for promotion to Store Manager, DeAngelis Dep. at 514:9–19, when considering the rate of promotion to Store Manager positions, the relevant pool for comparison is blacks and women in Assistant Manager positions.

A. Women

Defendant's statistical analysis indicates that females are not disadvantaged with respect to movement into any of the management positions at issue; in fact, they received more promotions to each of the positions at issue than would be predicted by a neutral model. Haworth Decl., Ex. C. Plaintiffs therefore cannot establish the statistical disparity required for a disparate impact claim with respect to promotion into Store Management Positions.

*4 However, plaintiffs argue that summary judgment for defendant should not be granted with respect to promotions of women to Deli/Bakery and General Merchandise Management Positions because plaintiffs do not contend that women are discriminatorily denied such positions. Rather, plaintiffs allege that these jobs are "dead end" positions and that the over-representation of women in promotion to these jobs is in fact evidence of "channeling." First Amended Complaint at ¶¶ 34–35.

At most, then, plaintiffs seek to state a discriminatory disparate impact claim with respect to the positions of Third Person, Assistant Manager, Store Manager and Produce Manager.

With respect to these remaining positions, plaintiffs argue that Lucky Stores' statistical analysis is distorted by the inclusion of figures for 1988–89, during which period Lucky Stores' affirmative action plan was in place. Plaintiffs allege that implementation of the plan was litigation-driven and was the result of pressure on Lucky from the EEOC and this litigation. They argue that the figures resulting from this conduct should not be permitted to undermine plaintiffs' *prima facie* case.

The court agrees that "[a]ctions taken in the face of litigation are equivocal in purpose, motive and

permanence." *James v. Stockham Valves & Fittings Co.*, [15 EPD ¶ 7842] 559 F.2d 310, 325 n. 18 (5th Cir.1977), *cert. denied*, [15 EPD ¶ 8019] 434 U.S. 1034 (1978) (citations omitted). However, Third Person is the only position for which plaintiffs specifically argue that a significant shortfall is revealed by excluding from the statistical analysis the figures for 1988–89. The court finds that the doubling of the promotion rate of women to Third Person positions in 1988–89, as compared with the period 1984–87, raises an issue of material fact as to whether Lucky Stores conduct was litigation-driven and thus whether the 1988–89 figures should be included in a statistical analysis for disparate impact purposes. The court therefore concludes that the defendant is not entitled to summary judgment as to a disparate impact claim by women with respect to promotions to Third Person.

Based on this reasoning, the court finds that plaintiffs cannot establish a *prima facie* case of disparate impact on women with respect to promotions to Assistant Manager, Store Manager and Produce Manager.

B. Blacks

Lucky Stores argues that although blacks received fewer promotions into each of the Store Management Positions than would be predicted by a neutral model, the disparities are not statistically significant. They contend that with respect to the Third Person position, the difference was equivalent to 0.49 standard deviations; for the Assistant Manager position, the difference was equivalent to 0.47 standard deviations; for the Store Manager position, the difference was equivalent to 0.65 standard deviations; for the Produce Manager position, the difference was equivalent to 1.15 standard deviations; with respect to the position of Deli/Bakery Department Head, the difference was equivalent to a standard deviation of 1.24; and with respect to the position of General Merchandise Department Head, the difference was equivalent to 1.23 standard deviations. Haworth Decl., Ex. C.

*5 Because these numbers are less than the 2.0 or 3.0 standard deviations that courts have required for statistical significance, defendant argues that plaintiffs cannot establish the disparate impact with respect to blacks that is required for a *prima facie* case under a disparate impact theory.

Plaintiffs do not dispute the accuracy of defendant's figures, and they appear to concede that the disparities are not statistically significant for all positions with the exception of General Merchandise Department Head. Plaintiffs contend that the disparity for that position is statistically significant based upon a finding of a 2.74 standard deviations by plaintiffs' statistician. Drogin Decl. at ¶ 9 and Drogin Decl., Ex. B. In its Reply brief, defendant Lucky Stores acknowledges that this dispute can be resolved only by expert testimony at trial, and withdraws the position of Merchandise Department Head from this motion.

With respect to the remaining positions, plaintiffs argue that the figures are not statistically significant because of the extremely low representation of blacks in Lucky's overall workforce. Plaintiffs contend that this fact, coupled with direct and anecdotal evidence of racial discrimination, suffices to preclude summary judgment. Pl.Opp. at 11.

However, even if such direct and anecdotal evidence will ultimately support a claim of discriminatory promotion, it cannot support a claim of disparate impact where the statistics themselves do not permit such an inference. The court therefore finds that plaintiffs cannot establish a disparate impact claim for blacks with respect to promotions to Store Manager, Assistant Store Manager, Third Person, Produce Manager, and Deli/Bakery Department Head.

II. Disparate Treatment

A class claim alleging discrimination under a disparate treatment theory ultimately turns on the factual question whether there was a "pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised [or sex-based].'" *Intl Bhd. of Teamsters*, 431 U.S. at 335 (citations omitted). Proof requires more than the occurrence of isolated or sporadic discriminatory acts; it must establish by a preponderance of the evidence "that racial [or sex-based] discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 337, 1855.

Although statistics are the preferred and most effective means of establishing a "pattern or practice" of discrimination, *Boyd v. Bechtel Corp.*, [20 EPD ¶ 30,246] 485 F.Supp. 610, 618 (N.D.Cal.1979), where statistics

alone do not permit an inference of discrimination in promotions, the court may nevertheless draw such an inference if "enough other probative evidence exists to permit [that] inference." *Segar*, 738 F.2d at 1283 (finding that discrimination in initial assignments, supervisory evaluations and discipline were sufficient to support an inference of racial discrimination in promotions even where disparities were not statistically significant). The ultimate question is whether the evidence taken cumulatively can support an inference of discrimination. *See Segar*, 738 F.2d at 1278 (anecdotal evidence not required where gross statistical disparities have been shown); *see also EEOC v. American National Bank*, [26 EPD ¶ 31,920] 652 F.2d 1176, 1188 (4th Cir.1981), *cert. denied*, [29 EPD ¶ 32,720] 459 U.S. 923 (1982) (relying upon "cumulation of evidence, including statistics, patterns, practices, general policies or specific instances of discrimination"). The plaintiff's burden of production for a *prima facie* case of disparate treatment is "not onerous." *See Texas Dept of Community Affairs v. Burdine*, [25 EPD ¶ 31,544] 450 U.S. 248, 253 (1981).

*6 Plaintiffs argue that even in the absence of a statistically significant disparity, there is substantial direct and anecdotal evidence of intentionally discriminatory attitudes on the part of Lucky Stores managers, which alone can support an inference of discrimination. Pl.Opp. at 6–10. However, where statistics alone do not establish a *prima facie* case of disparate treatment, direct and anecdotal evidence of intentional discrimination must be strong. *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d at 551–54.

A. Women

Lucky Stores argues that where the figures reveal no disparity or, as in the case of women, a negative disparity, "no amount of anecdotal evidence can suffice to prove a *prima facie* case of intentional class-wide discrimination in regard to those positions." Def. MSJ at 22. However, the cases cited by defendant do not support such a sweeping claim; they merely reject the sufficiency of particular non-statistical evidence, standing alone, to establish a *prima facie* case of discrimination. *See, e.g., Boyd*, 485 F.Supp. at 621 ("[T]estimony by class members, without more, cannot realistically reverse the uniform trend of data.").³

The court does not accept defendant's argument that it is

impossible as a matter of law to establish a *prima facie* case of “pattern or practice” discrimination on the basis of strong non-statistical evidence. Plaintiffs have introduced direct evidence in the form of notes taken during manager training sessions by Lucky’s Equal Employment Opportunity Manager, Mark Foley. In discussing the promotion of women into management, managers present at the meeting expressed stereotypical views about the role of women and their unsuitability for certain kinds of jobs: women are characterized as the “weak sex”; they don’t want to work late shifts and fight among themselves; they only work to produce “the second income” in the household and have no incentive to be in management positions; customers might object to seeing a woman in management; the workforce would not perform for a black or female manager. Seligman Decl., Ex. 7, Foley Depo. at ¶ 283–84, 254–55; Seligman Decl., Ex. 8.

This direct evidence of discriminatory attitudes certainly could permit an inference that the defendant acted with discriminatory intent in the allocation of desirable job assignments and shifts, hours, full-time work, and training and promotional opportunities with respect to Store Management Positions. At a minimum, it raises an issue of material fact as to defendant’s motive and precludes summary judgment for defendant with respect to disparate treatment claims for the remaining job categories of Assistant Manager, Store Manager and Produce Manager.⁴

B. Blacks

The remaining issue is whether in the absence of a statistically significant case of disparate impact on black class members with respect to promotions to Store Management Positions,⁵ nonstatistical evidence is sufficient to permit an inference of disparate treatment.

*7 Lucky Stores argues that strong evidence of intentional classwide discrimination is required to bolster plaintiff’s weak statistical case, and that plaintiffs cannot support a claim of intentional discrimination against blacks. They cite the absence of any specific allegations of discrimination with respect to movement into the Store Management Positions at issue, with the exception of one named plaintiff who is black. *Id.* at 23–24. *See, e.g., Teamsters*, 431 U.S. at 336 n. 16 (isolated or sporadic discriminatory acts insufficient to demonstrate classwide discrimination).

Plaintiffs do not dispute this lack of direct evidence of discriminatory attitudes, intent or treatment against blacks with respect to promotions to Store Management Positions. Plaintiffs’ mere assertion that they “can identify a substantial pool of probable anecdotal witnesses to support a pattern and practice claim for these positions,” Pl.Opp. at 12, is both too vague and too speculative to raise an issue of material fact as to class-wide disparate treatment.

Moreover, the fact that few if any blacks were promoted to Store Management Positions during the period at issue, Pl.Opp. at 10–11, cannot by itself raise an inference of discriminatory intent where the statistical analysis, which takes into account not merely number of promotions of blacks but promotions relative to the appropriate eligibility pool, reveals no statistically significant disparity. *See, e.g., Moore v. Hughes Helicopters, Inc.*, 708 F.2d at 484 (absence of black females in higher job categories insufficient to establish *prima facie* case of discrimination without specific showing of disparate impact on class members among the pool of promotion-eligible individuals).

The court therefore concludes that plaintiffs cannot establish a *prima facie* case of disparate treatment of blacks with respect to promotions to the positions of Store Manager, Assistant Store Manager, Third Person, Produce Manager, and Deli/Bakery Department Head.

Conclusion

With respect to promotions of women to Store Management Positions, the court finds that plaintiffs have raised an issue of material fact as to a disparate impact claim with respect to promotions to Third Person and that they have raised an issue of material fact as to discriminatory intent with respect to promotions to Assistant Manager, Store Manager and Produce Manager. Defendant’s motion for summary judgment as to these positions is therefore Denied.

With respect to promotions of blacks to Store Manager, Assistant Store Manager, Third Person, Produce Manager and Deli/Bakery Department Head, the court finds that plaintiffs cannot establish a *prima facie* case of discrimination under either a disparate impact or a disparate treatment theory. Therefore, defendant’s motion

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57 Fair Empl.Prac.Cas. (BNA) 1431, 56 Empl. Prac. Dec. P 40,738

for summary judgment as to the promotion of blacks to these positions is Granted.

Not Reported in F.Supp., 1991 WL 127073, 57 Fair Empl.Prac.Cas. (BNA) 1431, 56 Empl. Prac. Dec. P 40,738

It Is So Ordered.

All Citations

Footnotes

- ¹ In their opposition brief, class counsel have disputed defendant's claim that there is no statistically significant shortfall with respect to promotions of blacks into the General Merchandise Department Head position. Pl.Opp. at 12. Defendant has conceded that this dispute raises a factual issue requiring expert testimony for its resolution and has withdrawn its motion for summary judgment as to a claim for discrimination against blacks in promotions to General Merchandise Department Head. Pl. Reply at 1 n. 2. *See below* at p. 9.
- ² Statistical significance is a measure of the probability that an outcome occurred by chance; the lower the probability of chance occurrence, the stronger the inference of discrimination that can be drawn from the data. *Segar v. Smith*, 738 F.2d at 1282. For example, a study that is significant at the .10 level indicates that the odds are one in ten that the result could have occurred by chance.
- ³ Nor does the court accept plaintiffs' assertion that where direct evidence of discriminatory attitudes exists, statistical or other circumstantial evidence is unnecessary to establish liability. Pl.Opp. at 6. The functional test for a prima facie case of disparate treatment is whether the evidence, taken as a whole, supports an inference of discriminatory intent. Where the proffered "direct evidence" is either weak, scant, or otherwise not highly probative, additional evidence will be required.
- ⁴ The court concluded above that plaintiffs have raised a material issue of fact concerning a disparate impact claim by women with respect to promotions to Third Person.
- ⁵ Since the defendant has eliminated the position of General Merchandise Department Head from the scope of its summary judgment motion, this discussion concerns only promotions to the positions of Store Manager, Assistant Store Manager, Third Person, Produce Manager, and Deli/Bakery Department Head.