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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KHALIL NOURI,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation,

Defendant.

NO. C99-1227L

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON CLASS CLAIMS

Note for Motion Calendar: January 30, 2003

CONTENTS

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT/AUTHORITY 3

A. Plaintiffs' Class Claims Are Not Maintainable as Ones for "Race" or "National Origin" Discrimination Under Title VII or Section 1981 3

1. Plaintiffs' New Aggregation Does Not Constitute a "Race" 4

a) Plaintiffs Improperly Combine Members of the Majority Race *With Minorities* in a Class Action for Race Discrimination 5

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Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

b) Plaintiffs' Statistical Analyses *Demonstrate* that Any Disparities in Treatment of Their Class Are Not Based on Discrimination Against the *Asian Race* 6

2. Plaintiffs' New Aggregation Does Not Constitute a "National Origin" or "Ethnicity" 7

a) Collections of "National Origins" Are Not Themselves "National Origins" or "Ethnicities" Within the Meanings of Title VII or Section 1981 7

b) Selective Statistical Aggregation Is Improper 8

B. Plaintiffs' Claims Regarding Retention Ratings Should Be Dismissed Because Assignment of a Retention Rating Is Not an Actionable Event Under Title VII or Section 1981 13

C. Because Plaintiffs Lack Evidence That a Specific Employment Practice Results in Adverse Impact, Their Impact Claims Fail 16

D. The Court Should Dismiss Plaintiffs' Time-Barred Claims for Damages 17

E. Plaintiffs Lack Statistical Support for Their Claims on Behalf of Technical Workers 17

1. Plaintiffs' Statistics Do Not Support a Disparate Impact Claim for Technical Workers 18

a) Compensation 19

b) Retention 20

2. Plaintiffs' Statistics Cannot Support a Finding of Intent; Plaintiffs' Claims of Disparate Treatment for Technical Workers Should Be Dismissed 20

III. CONCLUSION 24

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

I. SUMMARY OF ARGUMENT

Named plaintiffs represent a class of Boeing engineers and technical workers from seven diverse ethnicities—some racially Asian and some racially white. Plaintiffs claim to have experienced race and national origin discrimination in the Company's annual salary adjustment and retention rating processes. They sue under Title VII of the Civil Rights Act of 1964 as amended, and 42 U.S.C. § 1981. Discovery has closed, all expert reports have been finalized and submitted, and trial is set for April 5, 2004.

The final report of plaintiffs' expert statistician, Dr. Bernard Siskin, makes clear that plaintiffs are now presenting their case as a single aggregation of their various ethnic and racial groups. Plaintiffs intend to ignore the many obvious differences among their seven ethnicities and proceed as if there were a *single* "race" or a *single* "national origin" comprising Cambodians, Vietnamese, Indians, Pakistanis, Iranians, Afghanis, and Filipinos. This contrasts with plaintiffs' strategy at the class certification stage, which included separate statistical analyses by country of origin, enabling plaintiffs to argue that *each* of the cognizable ethnic groups suffered statistically demonstrable discrimination and that trial of their claims together was feasible and appropriate. Plaintiffs have abandoned this approach; their expert has conducted no such analyses for trial. At the direction of counsel, he has instead focused entirely on undifferentiated, aggregated statistics for the class. Plaintiffs' "aggregated" approach is unprecedented and insupportable.

Plaintiffs' claim for race discrimination fails because they include in their monolithic and fictional "race" both racial whites and racial non-whites. This confounds any statistical analysis with a white comparator group and runs contrary to the most fundamental principles of race discrimination analysis and proof. Further, plaintiffs' "cherry-picking" technique

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

excludes from the class many ethnic Asians, such as Japanese and Chinese, thus masking the reality that large constituencies of the Asian race undisputedly do as well or better than their white peers. Plaintiffs' own expert's analysis shows that non-class Asians, despite their shared race with the Asian portion of plaintiffs' class, received pay comparable to whites. Thus, the inequities plaintiffs allege cannot be based on disparate treatment of a recognizable *race*.

Under a national origin/ethnicity analysis, plaintiffs' claims also fail because they improperly aggregate the class without reference to any defining principle other than the goal of creating statistical disparities. In other words, plaintiffs do not and cannot articulate any unifying characteristics that arise out of a shared national origin or ethnicity. Their collective shares no common culture, language, religion, tradition, or other cohering feature. Plaintiffs' expert concedes he is aware of no basis for aggregating his analysis other than that counsel directed him to do so, *without* explanation. Neither Title VII nor Section 1981 permits this liability-manufacturing technique. Plaintiffs' case should be dismissed in its entirety.

Should the Court deny Boeing's motion for summary judgment as to plaintiffs' entire case, several component parts of it should be dismissed for independent reasons:

- All claims based on the assignment of retention ratings should be dismissed because retention ratings, as distinct from layoffs, do not rise to the level of adverse employment actions actionable under Title VII or Section 1981.

- All disparate impact claims should be dismissed because plaintiffs cannot identify any specific, facially neutral employment practice that is causally related to the alleged adverse impact their statistical expert has reported.

- All claims for damages that relate to periods outside of the statutes of limitation should be dismissed as time-barred.

- All claims relating to technical workers should be dismissed because they are unsupported by adequate record evidence.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

II. ARGUMENT/AUTHORITY

A. Plaintiffs' Class Claims Are Not Maintainable as Ones for "Race" or "National Origin" Discrimination Under Title VII or Section 1981

Title VII prohibits employers from discriminating against any individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

Although Section 1981 does not itself use the word "race," it has been interpreted by the Supreme Court to prohibit acts of race discrimination. Runyon v. McCrary, 427 U.S. 160, 168 (1976). Moreover, under the rubric of "race," Section 1981 has been held to protect "identifiable classes of persons . . . subjected to intentional discrimination solely because of their *ancestry* or *ethnic* characteristics." Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (emphasis added). Thus, the notions of "race" and "ethnicity" under Section 1981 overlap to a great extent with the concept of "national origin" under Title VII.[1] Id. at 614 (Brennan, J., concurring).

By contrast, "race" under Title VII is a separate concept from national origin, as is apparent from its being identified separately in the statute. Under Title VII, racial categories have their generally understood meanings, similar to those used by the United States Census

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[1] "The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973); Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 673 (9th Cir. 1988) (for purposes of Title VII, "'national origin' includes the country of one's ancestors").

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

Bureau.[2] Thus, the Equal Employment Opportunity Commission, which is charged with enforcing Title VII, has established the following racial categories: White (not of Hispanic origin), Black (not of Hispanic origin), Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native, with set definitions and boundaries.[3]

Plaintiffs have been conspicuously vague in their treatment of this class, never firmly committing as to whether their theory is of a "race" class or a "national origin" class. But under either analysis, plaintiffs' claims fail.

1. Plaintiffs' New Aggregation Does Not Constitute a "Race"

To the extent that plaintiffs' "race" discrimination theory is separable from their national origin/ethnicity theory, it now flies directly in the face of all commonly understood principles of race and race discrimination. This is true for at least two reasons: (a) because plaintiffs' "race" class includes members of the classic comparator group; and (b) because even using the statistical analysis of Dr. Siskin, large racially Asian groups excluded from plaintiffs' class fare well at Boeing, thus dispelling any inference that the Asian race is an object of discrimination.

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[2] In revising the racial categories to be used in the 2000 Census, the U.S. Census Bureau articulated that one of the principles guiding the review of the categories was that the concepts and terminology "should reflect clear and generally understood definitions that can achieve broad public acceptance." Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 210 (October 30, 1997), available at www.whitehouse.gov/WH/EOP/OMB/html/fedreg.html. The revised standards include five minimum categories for data on race: (1) American Indian or Alaska Native, (2) Asian, (3) Black or African American, (4) Native Hawaiian or Other Pacific Islander, and (5) White; and two categories for data on ethnicity: (1) Hispanic or Latino and (2) Not Hispanic or Latino. Id.

[3] Equal Employment Opportunity Commission, Standard Form 100, Rev. 3-97 Employer Information Report EEO-1 100-118 Instruction Booklet, available at www.eeoc.gov/eeo1survey/e1instruct.html.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

a) Plaintiffs Improperly Combine Members of the Majority Race *With Minorities* in a Class Action for Race Discrimination

By including members of the majority race in their claims of class *race discrimination*, plaintiffs embark on a unique and insupportable course. Courts have certainly allowed more than one minority race to proceed in a single class action, alleging that the majority race (white) is treated better.[4] In addition, courts have allowed whites to sue for reverse race discrimination, alleging that minorities receive preferential treatment.[5] But those kinds of claims of discrimination are entirely distinct from what plaintiffs attempt here. Here, the class claims for race discrimination are made on behalf of *part* of one racial minority and *part* of the racial majority—*together*, alleging discrimination as compared to the *rest* of the majority. Allowing members of the majority race--the classic comparator group—to litigate claims of race discrimination *with* the minority plaintiffs as a monolithic block, violates the basic tenets of Title VII and Section 1981. See, e.g., Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (the racial animus addressed by §1981 must be "directed towards the kind of group that Congress intended to protect when it passed the statute"); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 970-71 (10th Cir. 1979) (plaintiffs must constitute an identifiable

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[4] See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 647 (1989) (class of *all non-white* cannery workers); Paige v. California, 291 F.3d 1141, 1149 (9th Cir. 2002) (class of *all non-white* officers), cert. denied, 537 U.S. 1189 (2003); Thomas v. County of Los Angeles, 978 F.2d 504 (9th Cir. 1992) (proposed class of *all minority* residents); Domingo v. New England Fish Co., 727 F.2d 1429, 1442 (class of *all non-whites*), modified on other grounds at 742 F.2d 520, (9th Cir. 1984); Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832 (9th Cir. 1976) (class of "Negroes, Asians, American Indians, [and] Spanish-surname Americans").

[5] See, e.g., McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) (under section 1981); Rudebusch v. Hughes, 313 F.3d 506 (9th Cir. 2002) (under Title VII). One court has even allowed a Caucasian of Portuguese extraction to sue for "race" discrimination under Title VII, comparing himself to non-Portuguese whites. Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 578 n.2 (1st Cir. 1999). See also St. Francis College, 481 U.S. at 613 (holding that an Arab (Caucasian) of Iraqi descent can sue under Section 1981 for "race" discrimination, comparing himself to whites).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

group so that treatment of that group may be measured against treatment of the "*standard group*"); Martinez v. Oakland Scavenger Co., 680 F. Supp. 1377, 1389 (N.D. Cal. 1987) ("Section 1981 affords protection to identifiable *groups* of *non-whites*.") (emphasis added).

b) Plaintiffs' Statistical Analyses Demonstrate that Any Disparities in Treatment of Their Class Are Not Based on Discrimination Against the *Asian Race*

Plaintiffs pursue *class claims* for race discrimination on behalf of only *some* members of the traditionally recognized minority Asian race. Large portions of that same traditionally recognized minority race, such as Chinese and Japanese workers, are excluded. All available evidence as to the treatment of these excluded Asian groups—including the analysis of plaintiffs' own expert—demonstrates that they fare much better than plaintiffs' hand-picked subset of so-called "Asian" nationalities and, in almost all comparisons, do as well as whites.[6]

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[6] See, e.g., Declaration of Bernard Siskin, October 24, 2003 (Siskin Decl. III) (Declaration of Rima Hartman ("Hartman Decl.") at pp. 58-92). The difference between class "Asians" and other Asians, such as Japanese and Chinese, is most dramatically demonstrated by comparing salary differentials that can be calculated from Dr. Siskin's tables. Table SE2 reflects the shortfall in compensation for class "Asians" as calculated by Dr. Siskin. Table SE3 displays the average shortfall for all persons who are classified as Asian in Boeing's computer database –*i.e.*, those persons who would *qualify* as Asian under *standard government* classifications. Although Dr. Siskin does not calculate the total shortfall for the Boeing-coded Asians, it is extremely easy to do so. All one needs to do is multiply the total number of persons reflected on Table SE3 by the salary differences reflected on Table SE3. The total number of non-class Asians can then be calculated quite closely by subtracting the number of class "Asians" set out in column 2 of SE2 from the number of "Asians" set out in column 2 of SE3. It is then simple to calculate what impact the non-class Asians have upon *any theoretical* compensation shortfall.

Dr. Siskin's data for March 1, 1999 (reflecting the time period of March 2, 1998 through March 1, 1999) can be used as an example. At Table SE2, Dr. Siskin indicates that there were 909 class "Asians", with an average "difference in salary" of $1,647 and total "damages" in the amount of $1,497,123. Table SE3 indicates that there were 1,811 Boeing-coded Asians with an average salary difference" of $833. Multiplying these latter two numbers together, one comes to a shortfall of $1,508,563. However, it is apparent from Table SE2 that the alleged shortfall for the class "Asians" makes up $1,497,123 of that amount. Thus, the additional 902 non-class Asians add only $11,440 to the shortfall. In other words, the non-class Asians were, on average, paid $13 a year less than those white persons Dr. Siskin claims are "similarly situated" to them. By contrast, he calculates the classmembers as being $1,647 behind "similarly situated" whites. The data at March 1, 2000 are even more telling, with class "Asians" calculated with a shortfall of $1,674 and non-class Asians actually being *advantaged* in comparison to whites by $30, on average.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

If *some* racial Asians are disfavored at Boeing while *other* racial Asians are not, the inescapable conclusion is that whatever the cause of any perceived inequity, discrimination against the *Asian race* is not the culprit.

2. Plaintiffs' New Aggregation Does Not Constitute a "National Origin" or "Ethnicity"

a) Collections of "National Origins" Are Not Themselves "National Origins" or "Ethnicities" Within the Meanings of Title VII or Section 1981.

Nor is plaintiffs' class claim tenable as one for national origin or ethnic discrimination. Plaintiffs have elected to eschew any notion of subgroups among their class and instead to treat the seven ethnicities in their class as if they were *one national origin/ethnic block*. Thus, plaintiffs' counsel directed their statistical expert, in preparing his current report for trial, to lump the class statistics together, rather than analyze them as seven individual and recognizable ethnicities as he had done at the certification stage.[7] By treating the group collectively, plaintiffs ignore the fundamental fact that the seven distinct ethnic groups comprising their class are plainly *not* a national origin or ethnicity.[8] They are seven *separate* ethnicities, not united by tradition, culture, language, religion, or history.

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[7] Deposition of Bernard R. Siskin, December 2, 2003 ("Siskin Dep.") at 34:17-25 (Hartman Decl. at p. 106); see Declaration of Bernard Siskin, dated July 30, 2001 ("Siskin II Decl.") at Tables 3A, 4A, 9, 10 (Hartman Decl. at pp. 16-19, 30-31).

[8] Plaintiffs side-stepped this issue at the class certification stage, by offering statistical studies by individual country and arguing that the individual ethnicities experienced similar treatment at the hands of Boeing. Siskin Decl. II at Tables 3A, 4A, 9, 10 (Hartman Decl. at pp. 16-19, 30-31). But those statistical studies have been superseded by studies done using the data gathered in the Court-ordered national origin survey. Order Regarding Contents of Survey, March 7, 2003 (Dkt. # 257). Because plaintiffs have abandoned the country-by-country breakdowns, there is now an entirely different landscape against which this question must be considered. In other words, while Boeing disagreed with plaintiffs' legal theory on class certification, it believes that plaintiffs' new approach is even less defensible—doing irreparable harm to the concepts of national origin/ethnic discrimination under Title VII and Section 1981.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

Title VII and Section 1981 protect against animus directed at "national origin" or their "ethnicity"—not because of membership in an utterly fictional, attorney-concocted conglomeration of selected ethnicities, who when bundled together in statistical studies can *create* a disparity.

b) Selective Statistical Aggregation Is Improper

Plaintiffs' melding of their races and ethnicities constitutes a final act of contortion of the definition of "Asian." The history of this case shows that plaintiffs began with an overinclusive definition of "Asian" that encompassed the entire Asian continent. Plaintiffs' Memorandum in Support of Motion for Class Certification, January 3, 2001 (Dkt # 80), at 12 n.12. When the Court rejected that group as intolerably disparate, even for purposes of Rule 23,[9] plaintiffs' counsel asked Dr. Siskin to provide statistical data regarding employees from each of the countries on the Asian continent. Siskin Dep. at 15:16-17:5 (Hartman Decl. at pp. 103-05). With that data, counsel strategically redefined "Asian" to include not only the five ethnicities of their former named Nouri representatives, but also to add Filipinos and Vietnamese. This decision was reached, Boeing suspects, because the latter two ethnicities' statistics served plaintiffs' litigation purposes.

It was not difficult to identify named plaintiffs from the two additional ethnicities plaintiffs' counsel had chosen. Counsel simply pulled two named plaintiffs from their Sharma[10] clients (Elena Olinares, a Filipino engineer, and Bao Trinh, a Vietnamese engineer)

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[9] Order Denying Motion for Class Certification, May 24, 2001 (Dkt # 152) at 5-6 (concluding that the five then-named class representatives were inadequate to represent such a diverse group).

[10] In a series of complaints filed over a ten-day period in March of 2000, plaintiffs' counsel brought a companion action to Nouri in King County Superior Court, under the caption of Sharma v. Boeing Co. (Cause No. 00-2-06292-3SEA). The Sharma case was removed to federal court on April 6, 2000 (Cause No. C00-0582L) and consolidated with the Nouri case on July 10, 2000. Order Granting Plaintiffs' Motion for

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

and added them to their Nouri group. Second Amended Consolidated Class Action Complaint, July 11, 2001 (Dkt # 156). Extremely telling is the fact that plaintiffs chose *not* to add Chinese and Japanese plaintiffs from the Sharma group.[11]

Plaintiffs' gerrymandered definition of "Asian" constitutes an improper attempt to selectively aggregate ethnic groups into a class in order to achieve their statistical ends. The fact that plaintiffs' counsel used the statistical breakdown regarding all 50 individual continental Asian countries to cherry-pick ethnicities for inclusion in, and exclusion from, their artificial definition of "Asian" impeaches any value their statistical evidence may otherwise have had. Even their own expert agrees. Dr. Siskin testified that "when counsel asked us for this list by national origin I told him specifically that they could not base class definition on—that ***it would be inappropriate from a statistician's viewpoint to look at the data to define the groups.***" Siskin Dep. at 152:14-153:2 (Hartman Decl. at pp. 112-13) (emphasis added).

Moreover, statistics that meld seven *distinct* national origins into one large block do not shed any reliable light on the treatment of any one national origin cognizable under law. Rich v. Martin-Marietta Corp. 522 F. 2d 333, 346 (10th Cir. 1975). In Rich, one Hispanic and six black plaintiffs filed claims under Title VII and §1981 alleging discrimination in hiring and promotion. The district court found for the defendants, relying on their favorable statistics that *combined* data regarding "blacks, women, and Chicanos and Orientals and American Indians" into one statistical block. Id. The appellate court reversed and remanded

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Consolidation, Leave to File a Consolidated Amended Complaint, and Extend Time to Move for Class Certification (Dkt # 168).

[11] Like Ms. Olinares and Mr. Trinh, former named Sharma plaintiffs Willy Chang (a Chinese engineer) and William Tomita (a Japanese engineer) were available to expand the class representation. Sharma, Plaintiffs' Second Amended Complaint for Damages for Employment Discrimination and Other Claims, filed on March 13, 2000.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

the case, making particular note of the fact that the combined statistics masked known differences in the treatment of the subgroups. Id. The court stated strongly that under such circumstances, ***undifferentiated statistics were "not relevant and . . . useless."*** Id.

Here, the same reasoning holds true. Amalgamation of seven *distinct* and *individually identifiable* national origins into one artificial "national origin" destroys the significance of the statistics. Aggregation in such a case is wholly inappropriate.[12] To hold otherwise would be to strip the terms "national origin" and "ethnicity" of all meaning and to encourage the sort of liability-creating engineering of class statistics that has occurred here.

An oft-cited Fourth Circuit opinion lays plain the dangers of statistical manipulations:

> [S]tatistical evidence . . . "must not be accepted uncritically," and, because of the sophistication and complexity of many of the statistical models being used in discrimination cases by professional econometricians, ***courts must give "close scrutiny [to the] empirical proof" on which the models are erected, in order to guard against the use of statistical data which may have been "segmented and particularized and fashioned to obtain a desired result."***

EEOC v. Fed. Reserve Bank, 698 F.2d 633, 645-46 (4th Cir. 1983) (internal citations omitted) (emphasis added), rev'd on other grounds sub nom. Cooper v. Fed. Reserve Bank, 467 U.S. 867 (1984).

That admonition has been heeded in several cases like this one, where a party has created arbitrary groupings upon which to conduct statistical analysis in order to serve their

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[12] The Ninth Circuit has held that aggregated statistical data may be used where it is more probative than subdivided data, Paige, 291 F.3d at 1148, but that plainly is not the situation here. In Paige, plaintiffs were claiming that the employer's practices had an identical discriminatory effect "upon members of *all* minority groups, and that those practices unlawfully benefit *solely* the members of the white majority." Id. at 1149 (emphasis added). In contrast, in the present case the plaintiffs' statistics include only *some* traditionally Asian minorities and even *include* members of the majority. Plaintiffs' class of select ethnicities presents no logical explanation for using aggregated statistics, particularly given that plaintiffs' own statistics show that some racial Asians do better than class "Asians" and even better than whites. See supra n.6.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

litigation ends. See, e.g., Smith v. Xerox Corp., 196 F.3d 358 (2nd Cir. 1999); Fisher v. Vassar College, 70 F.3d 1420 (2nd Cir 1995); Flores v. Hartford Police Dep't, 1981 U.S. Dist. LEXIS 11484 (D. Conn. Feb. 17, 1981).

In Flores, the plaintiffs offered no reason for their analytical grouping of Puerto Rican and black applicants other than the need to obtain a useful data collection for statistical analysis. The court held:

> ***The selection of subjects for comparison by a statistical analysis cannot depend on a mere desire on the part of the plaintiffs to generate numbers***. The figures generated by application of statistical formulae are meaningless if they are not backed by supporting facts and theory. When an employment test disqualifies applicants along lines of national origin, the discriminatory effect, presumably, could be caused by a cultural or linguistic bias. The experience of blacks is not presumptively comparable or relevant, under such a theory, to judging the impact of a test on Puerto Ricans. . . . ***Litigants may not pick and choose among various minorities to find numerical differences that happen to suit their cases.***

1981 U.S. Dist. LEXIS 11484 at *44-45 (emphasis added).

Likewise, in Fisher, the plaintiff manipulated the population studied by the statistician to preclude analysis of data that did not support her case. There, the plaintiff propounded statistical evidence to support her claim that no married woman on the Vassar faculty had been granted tenure in the "hard" sciences in the three decades preceding her 1985 denial of tenure. Plaintiff's definition of a "hard" science included biology, chemistry, math, physics and geology but not psychology, even though at the time of plaintiff's tenure review, Vassar's administrative structure included psychology in her division. The Second Circuit declared that the District Court's reliance on such selective data was clearly erroneous, and the judgment was vacated. The court stated, "*[p]laintiff's statistical case is built on gerrymandered data and a series of statistical fallacies.*" 70 F.3d at 1443 (emphasis added).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

Plaintiffs' exclusion in this case of groups such as Chinese and Japanese employees, who are clearly members of the Asian race, is far more blatant than the exclusion committed in Fisher.

And in Smith, the plaintiffs' statistician had attempted to group each plaintiff with the coworkers to whom that particular plaintiff was compared for selection in a reduction in force. However, when the number of persons in a particular unit was too small to yield a statistically valid result, plaintiffs' expert pooled units that he thought were reasonably homogeneous. The defendant argued that these were impermissibly pooled units, making the findings of statistical significance invalid. The court agreed, stating:

> In any large population a subset can be chosen that will make it appear as though the complained of practice produced a disparate impact. Yet, when the entire group is analyzed any observed differential may disappear, indicating that the identified employment practice was not the cause of the disparity observed in the subset.

196 F.3d at 369.

In the present case, the statistical data have obviously been "segmented and particularized and fashioned to obtain a desired result." Fed. Reserve Bank, 698 F.2d at 646. Plaintiffs have strategically engineered a definition of "Asian" that suggests statistical disparities by removing groups of Asian employees with positive statistical data, adding groups of Asians whose data better suits plaintiffs' purposes, and aggregating all statistical analyses. Although Boeing has questioned the bizarre composition of plaintiffs' class many times in this litigation, plaintiffs have never come forward with any logical explanation as to *why* the class is composed of some, but not all, traditional racial Asian ethnicities or *why* it makes sense culturally, traditionally, or linguistically to lump these seven ethnicities and not

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

others together for a discrimination suit.[13] The answer came from their expert, Dr. Siskin, who testified that plaintiffs' counsel knew how the individual ethnicities' statistics looked *before* they formulated their class, and whose analyses show that non-class Asians fare far better than class "Asians" in the employment practices at issue here. See Siskin Dep. at 16:13-18; supra n.6. Boeing respectfully submits that the Court should disregard plaintiffs' gerrymandered "class" statistics, and in so doing, dismiss plaintiffs' case in its entirety.

B. Plaintiffs' Claims Regarding Retention Ratings Should Be Dismissed Because Assignment of a Retention Rating Is Not an Actionable Event Under Title VII or Section 1981

It is unlawful under Title VII to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Court's orders during the life of this case have clearly, and properly, distinguished between the assignment of retention ratings and decisions regarding actual layoff.[14] No class claim for layoffs exists in this case. However, plaintiffs continue to attempt to blur the line between retention ratings, which have no impact whatsoever on the terms and conditions of employment, and layoffs, which obviously do.

The mere assignment of a retention rating—without more—does not constitute an actionable event, because it does not affect the terms, conditions or privileges of employment. Indeed, a retention rating is merely a number, recorded in a personnel database, and is *only*

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[13] Plaintiffs have suggested only that the individual named plaintiffs come from these seven countries but, as has been shown, the current named plaintiffs have, in fact, been selected from a pool that included persons of Chinese and Japanese origin as well.

[14] See, e.g., Order Regarding Defendant's Motion for Clarification, December 2, 2002 (Dkt # 236) at 4,and n.1.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

used if layoffs are necessary in the particular job classification or location at issue. For most of the relevant years in this case, Boeing was not engaged in layoffs, which meant that employees' retention ratings had no effect whatsoever on the terms and conditions of their employment. Even when layoffs do occur at Boeing, if an individual's job classification is not impacted, he or she is utterly unaffected by whatever retention rating has been assigned.[15] And employees who *are* laid off can sue, either as individuals or, in appropriate circumstances, as a class, if they believe discrimination has occurred.

A low retention rating is somewhat analogous to a negative performance review, sitting in an employee's file—possibly for a set duration—which may ultimately have no impact at all on the employee's compensation, employment status, grade level, or any other actual employment condition. Unless and until it results in a material change in the actual terms and conditions of employment, that evaluation is simply not actionable. On that point, the D.C. Circuit has written as follows:

> Performance evaluations are likely to be "[i]nterlocutory or mediate decisions having no immediate effect upon employment." The result of an evaluation is often speculative, making it difficult to remedy. For example, a single poor evaluation may drastically limit an employee's chances for advancement, or it may be outweighed by later evaluations and be of no real consequence. This reasoning is reflected in *Brown* [*v. Brody*, 199 F.3d 446 (D.C. Cir. 1999)] where the court suggested that performance evaluations should not be considered adverse actions if they did not "affect []the [employee's] grade or salary," and analogized performance evaluations to lateral transfers, which are not actionable injuries unless they "affect[] the terms, conditions, or privileges of [an employee's] employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm."

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[15] See, e.g., *Deposition of Malcolm Case, November 20, 2002, at 75:5-76:5* (Hartman Decl. at pp. 98-99).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

Russell v. Principi, 257 F.3d 815, 818-19 (D.C. Cir. 2001) (internal citations omitted). Notably, the court went on to hold, in language that squarely addresses the retention ratings claims in this case, that ***the employee's alleged exposure to higher risk of layoff because of low performance rating was an "unrealized risk of a future adverse action . . . too ephemeral to constitute an adverse employment action" and support a discrimination claim under Title VII.*** Id. at 819-20 (emphasis added). See also Helgeson v. Am. Int'l Group, Inc., 44 F. Supp. 2d 1091, 1098 (S.D. Cal. 1999) ("A mere threat of termination . . . is not an adverse employment action. It had no effect on the *terms, conditions* or duration of employment.") (emphasis added); Chisholm v. Foothill Capital Corp., 3 F.Supp. 2d 925, 938 n.5 (N.D. Ill. 1998) (threat of firing is insufficient on its own to constitute an adverse employment action).

In the context of the stricter criteria governing retaliation cases, Ninth Circuit law is consistent with these principles. In Lyons v. England, 307 F.3d 1092, 1103 (9th Cir. 2002), the court held that because plaintiff did not allege (1) that his employer had relied upon his performance evaluations in making a further employment decision adverse to him, (2) that his employer had published the evaluations by making them available to other potential employers, (3) that the evaluations resulted in any meaningful change in work assignments (either in the form of relieving him of responsibilities or saddling him with additional, burdensome tasks), the evaluations themselves were not actionable as adverse employment actions. See also Kortan v. California, 5 F. Supp. 2d 843, 853 (C.D. Cal. 1998) (a negative evaluation without any concomitant demotion or reduction in responsibilities is not a cognizable adverse employment action; because the negative evaluation was never used as a basis for taking any action against the plaintiff), aff'd, 217 F.3d 1104, 1113 (9th Cir. 2000) (plaintiff "was not demoted, was not stripped of work responsibilities, was not handed

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

different or more burdensome work responsibilities, was not fired or suspended, was not denied any raises, and was not reduced in salary or any other benefit. Thus, [she] has not shown that her evaluation was discriminatory or retaliatory, or was such an 'intolerable' act *that would force an employee to quit.*").

Because the assignment of a retention rating is not an actionable event under Title VII or Section 1981, Boeing respectfully requests that plaintiffs' claims for discriminatory retention ratings be dismissed.

C. Because Plaintiffs Lack Evidence That a Specific Employment Practice Results in Adverse Impact, Their Impact Claims Fail

To establish a prima facie case of disparate impact under Title VII, plaintiffs are required to show that a *specific employment practice* had a *significant adverse impact* on the protected group *and some causal connection* between the employment practice and the alleged disparate impact. Llamas v. Butte Community College District, 238 F.3d 1123, 1127 (9th Cir. 2001) (emphasis added); accord Munoz v. Orr, 200 F.3d 291, 302-03 (5th Cir. 2000).

Plaintiffs here have presented statistics alleging disparate impact without making *any evidentiary link* to a specific Boeing employment practice or policy. Plaintiffs' expert, Dr. Siskin, was utterly unable to even posit such a connection in his deposition. Instead, he admitted that he had no idea whether the alleged compensation disparities in his statistical analysis arose from the annual compensation exercises (which plaintiffs challenge) or some other aspect of plaintiffs' employment experience. See, e.g., Siskin Dep. at 71:15-72:20 (Hartman Decl. at pp. 107-08). Plaintiffs cannot survive summary judgment simply by presenting statistics aimed at showing a disparate impact.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

D. The Court Should Dismiss Plaintiffs' Time-Barred Claims for Damages

The following statutes of limitation apply in this case: Section 1981 disparate treatment claims are barred prior to October 12, 1996;[16] Title VII disparate treatment claims are barred prior to March 4, 1999;[17] and disparate impact claims are barred prior to September 14, 2000.[18] Although these limitations periods have been clearly established by the Court for some time, plaintiffs' expert has included in his report calculations of damages that include periods outside the time frames.[19] Boeing respectfully requests that the Court dismiss any claims for damages for disparate impact prior to September 14, 2000, any claims for disparate treatment damages pursuant to Title VII prior to March 4, 1999, and any claims for disparate treatment damages pursuant to Section 1981 prior to October 12, 1996.

E. Plaintiffs Lack Statistical Support for Their Claims on Behalf of Technical Workers

Even if plaintiffs' newly aggregated statistics for their gerrymandered "race"/"national origin" group were somehow determined to be proper, those statistics still do not support plaintiffs' claims on behalf of technical workers. When viewed within the applicable time frames and through the lens of the Supreme Court's and the Ninth Circuit's guidance regarding *legally* significant statistics, the analyses of plaintiffs' own expert make clear that

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[16] Order Denying Defendant's Motion to Strike Certain Claims Under 42 U.S.C. §1981, May 24, 2001 (Dkt # 153), at 2.

[17] Order Granting in Part and Denying in Part Defendant's Motion for Partial Summary Judgment on Statute of Limitations, May 24, 2001 (Dkt # 151), at 3.

[18] Order Granting Plaintiffs' Third Request for Class Certification, May 22, 2002 (Dkt # 216), at 2, n.1.

[19] For example, on Tables ST2 and SE2 of his most recent report, Dr. Siskin calculates damages for the year *preceding* March 1, *1995*. Siskin Decl. III at Tables ST2 and SE2 (Hartman Decl. at pp. 79-80). See infra n.20, explaining the timing of Dr. Siskin's compensation studies.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

plaintiffs' claims as to technical workers are without adequate evidentiary support to defeat summary judgment.

The Supreme Court has specifically declined to state that "precise calculations of statistical significance are necessary in employing statistical proof." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 311-12 n.17 (1977); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988), (the Court has "not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination."). Instead, the Court has offered only a general guideline that "'if the difference between the expected value and the observed number is ***greater than two or three*** standard deviations,'" then the hypothesis [that no discrimination occurred] would be suspect." Hazelwood, 433 U.S. at 309 n.14 (citation omitted) (emphasis added). The Ninth Circuit has interpreted that guidance to mean that while a *social scientist* may be suspicious of standard deviations just above two or three, a different—even higher—standard applies in *court*, adding that "courts should be 'extremely cautious' of drawing any inferences from standard deviations in the range of 1 to 3." Gay v. Waiters' & Dairy Lunchmen's Union Local No. 30, 694 F.2d 531, 551 (9th Cir. 1982) (citation omitted).

1. Plaintiffs' Statistics Do Not Support a Disparate Impact Claim for Technical Workers

Summary judgment is appropriate when statistics do not support a disparate impact analysis. See Katz v. Regents of the Univ. of Cal., 229 F.3d 831, 835 (9th Cir. 2000) (affirming summary judgment dismissal where the plaintiffs were "unable to set forth a substantial statistical disparity"). Courts generally determine the "sufficiency" or "substantiality" of numerical disparities on a case-by-case basis in the context of disparate

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

impact claims, rather than establish any mathematical standard. Watson, 487 U.S. at 995; see also Clady v. County of Los Angeles, 770 F.2d 1421, 1428-29 (9th Cir. 1985).

a) Compensation

During the applicable statute of limitations for disparate impact claims—September 14, 2000 forward—plaintiffs' expert's statistics do not support their claim for disparate impact for technical workers in regard to compensation.[20] In the last two years of plaintiffs' disparate impact period, Dr. Siskin's statistics for compensation claims by technical workers do not even reach *two* standard deviations. Siskin Decl. III, Table ST1 (reflecting 1.45 standard deviations for the 2001 salary exercise[21] and 1.43 standard deviations for the 2002 salary exercise[22]) And in the remaining relevant 5.5-month period—September 14, 2000 to March 1, 2001—that is captured in Dr. Siskin's snapshot of March 1, 2001, Dr. Siskin's units of standard deviation are greater than two, but not three, and therefore *not* suspect under Supreme Court and Ninth Circuit guidelines. Id. (reflecting 2.67 standard deviations as of March 1, 2001). Without cognizable statistical proof of a pattern a disparity, plaintiffs' disparate impact claims for compensation of technical workers must fail.

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[20] To understand Dr. Siskin's compensation tables, it is crucial that the Court be aware that, at Boeing, the new salaries for engineers and technical workers take effect on March 2. Deposition of Jeffrey Janders at 44:6-13 (Hartman Decl. at p. 95). Dr. Siskin's snapshots of salaries taken on March 1 therefore generally reflect the salary in place for the *previous* year. Thus, his studies of March 1, 1996 salaries actually reflect salaries set in ***1995***, his studies of March 1, 1997 salaries actually reflect salaries set in ***1996***, and so forth. Siskin Dep. at 82:12-83-11, 84:1-20 (Hartman Decl. at pp. 109-11).

[21] This is listed by Dr. Siskin as March 1, 2002 data. See supra n.20, explaining the timing of Dr. Siskin's compensation studies.

[22] This is listed by Dr. Siskin as September 26, 2002 data. See supra n.20, explaining the timing of Dr. Siskin's compensation studies.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

b) Retention

Similarly, Dr. Siskin's studies do not show statistically significant disparities in retention ratings for technical workers in either 2001 or 2002. Siskin Decl. III, Table ST5 (reflecting 0.97 standard deviations in 2001 and 0.77 standard deviations in 2002, when controlling for year/grade/job[23]). And for the 3.5 additional relevant months—from September 14, 2000 to December 31, 2000—his analysis shows a standard deviation just reaching into the range of potential significance under applicable law. Id. (reflecting 3.24 standard deviations in 2000 when controlling for year/grade/job).[24] Again, because plaintiffs lack evidence of a pattern of significant statistical disparity within the limitations period for their claims of disparate impact in the assignment of retention ratings for technical workers, those claims should be dismissed as a matter of law.

2. Plaintiffs' Statistics Cannot Support a Finding of Intent; Plaintiffs' Claims of Disparate Treatment for Technical Workers Should Be Dismissed

In this case, plaintiffs' disparate treatment claims (although subject to different statutes of limitation than their disparate impact claims) are based primarily on the same statistical evidence as underlies their disparate impact claims. Where a disparate treatment claim rests entirely on statistical evidence, it too should be dismissed for failure of statistical evidence. Penk v. Or. State Bd. of Higher Educ., 816 F.2d 458, 464 (9th Cir. 1987).

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[23] Dr. Siskin performed his analyses of retention ratings three ways: (1) controlling for nothing; (2) controlling for grade/year; and (3) controlling for grade/year/job. Siskin Decl. III at Tables ST4, ST5, SE4 and SE5 (Hartman Decl. at pp. 83-90,) Boeing has chosen to use Dr. Siskin's third analysis, which, although fatally flawed for reasons not discussed here, is the most defensible of his three, because it considers *some* of the factors relevant to the retention process that are ignored in his other models.

[24] It is unclear from Dr. Siskin's report and from his deposition whether his conclusions are reached by looking only at employees on board during the last three months of the year or whether instead he captures ratings outside the limitations period.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

Whether brought under Title VII or 42 U.S.C. § 1981, claims of disparate treatment require proof of *intentional* discrimination. Int'l Bhd of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (proof of a discriminatory motive is critical to establish a prima facie case of discrimination in a disparate treatment case). Although statistical data may, in a proper case, be sufficient to raise a prima facie case, to do so in the Ninth Circuit, the statistics must be "stark," and the plaintiffs still bear the ultimate burden of *proving* intentional discrimination by something more than statistics.[25] As the Ninth Circuit has cautioned:

> In order to establish a prima facie case of disparate treatment based solely on statistical evidence, the plaintiff must produce statistics showing *"a clear pattern, unexplainable on grounds other than race."* "But such cases are rare." Absent a *"stark" pattern*, "impact alone is not determinative, and the [c]ourt must look to other evidence." It is vitally important, therefore, to remember that "statistically significant" results are not necessarily "legally significant" results. As the district court recognized, "the probability of random occurrence of a value is not the obverse of the probability that is the result of deliberate action." Simply put, statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer's conduct.

Gay, 694 F.2d at 552-53 (emphasis added; citations and footnotes omitted).

As the below table illustrates, in this case, plaintiffs' own expert's statistical studies for technical workers—flawed as they are—show that, in almost every year, there are no statistically significant differences ("*greater than two or three*" standard deviations) between class "Asians" and whites in terms of compensation or retention rating. Even the single value

[25] The Ninth Circuit has warned against "taking a quantitative approach to the question of inferring discriminatory intent from statistical evidence. . . . [A] purely statistical analysis would almost completely blur the distinction between 'impact' and 'intent' . . . . This would be both improper and unwise. The question whether the facts are sufficient to permit a legal inference of discriminatory intent cannot properly be reduced into a mere battle of statistics." Gay, 694 F. 2d at 552.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

that potentially *is* statistically significant in Dr. Siskin's studies (retention ratings in 2000) fails to demonstrate a "stark" or "clear" pattern, unexplainable on grounds other than race."

Claim	Year of Exercise	Units of Standard Deviation	Citation to Siskin Declaration[26]
Retention rating (disparate treatment under Section 1981)	1996	1.41	Siskin Decl. III, Table ST5 (controlling for year/grade/job)
Compensation (disparate treatment under Section 1981)	1996 listed by Dr. Siskin as March 1, 1997	2.48	Siskin Decl. III, Table ST1
Retention rating (disparate treatment under Section 1981)	1997	3.00	Siskin Decl. III, Table ST5 (controlling for year/grade/job)
Compensation (disparate treatment under section 1981)	1997 listed by Dr. Siskin as March 1, 1998	2.93	Siskin Decl. III, Table ST1
Retention rating (disparate treatment under Section 1981)	1998	1.84	Siskin Decl. III, Table ST5 (controlling for year/grade/job)
Compensation (disparate treatment under section 1981)	1998 listed by Dr. Siskin as March 1, 1999	2.93	Siskin Decl. III, Table ST1
Retention rating (disparate treatment under Section 1981 and Title VII)	1999	1.67	Siskin Decl. III, Table ST5 (controlling for year/grade/job)

[26] Hartman Decl. at pp. 58-92.

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1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

Compensation (disparate treatment under section 1981 and Title VII)	1999 listed by Dr. Siskin as March 1, 2000	2.37	Siskin Decl. III, Table ST1
Retention rating (disparate treatment under Section 1981 and Title VII)	2000	3.24	Siskin Decl. III, Table ST5 (controlling for year/grade/job)
Compensation (disparate treatment under section 1981 and Title VII)	2000 listed by Dr. Siskin as March 1, 2001	2.67	Siskin Decl. III, Table ST1
Retention rating (disparate treatment under Section 1981 and Title VII; disparate impact under Title VII)	2001	0.97	Siskin Decl. III, Table ST5 (controlling for year/grade/job)
Compensation (disparate treatment under Title VII and Section 1981)	2001 (listed by Dr. Siskin as March 1, 2002)	1.45	Siskin Decl. III, Table ST1
Retention rating (disparate treatment under Section 1981 and Title VII; disparate impact under title VII)	2002	0.77	Siskin Decl. III, Table ST5 (controlling for year/grade/job)
Compensation (disparate treatment under Title VII and Section 1981)	2002 (listed by Dr. Siskin as September 26 2002)	1.43	Siskin Decl. III, Table ST1

These variances certainly are not "stark." Only one of them even surpasses the three standard deviation mark and only slightly. Accordingly, the group of statistics should be viewed with "extreme caution." Gay, 694 F. 2d at 551. Aside from plaintiffs' statistical analyses--which are clearly inadequate—plaintiffs have no evidence to support their claims

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500

of intentional discrimination against technical workers. Accordingly, plaintiffs cannot make out a prima facie case of disparate treatment under Section 1981 or Title VII, and their claims for technical workers should therefore be dismissed as a matter of law.

III. CONCLUSION

For the foregoing reasons, Boeing respectfully requests that the Court dismiss all of plaintiffs' claims in their entirety. In the alternative, Boeing respectfully requests that the Court dismiss plaintiffs' class claims, consistent with the arguments above.

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PERKINS COIE LLP

By _____

John F. Aslin, WSBA # 1583
Jeffrey Hollingsworth, WSBA #11853
Rima Hartman, WSBA #25714
Attorneys for The Boeing Company

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 583-8888
Fax: (206) 583-8500