IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CARPENTER, et al., Plaintiffs,	)	
v.	)	Case No. 02-1019-WEB
THE BOEING COMPANY, Defendant.	)	

MEMORANDUM AND ORDER

Defendant again moves for summary judgment or, in the alternative, to decertify the Class. (Doc. 325.) A hearing would not be of assistance to the Court in making this determination. Plaintiffs' counsel moves to withdraw as counsel for the individual claims of Plaintiffs Mary Dean, Faith Bridgewater, and Verlene Maholmes, and also to sever them from this action. (Doc. 357.)

I. DECERTIFICATION

In its order of April 25, 2003 (Doc. 231) (Certification Order), the Court ruled on Defendant's first motion for summary judgment before considering Plaintiffs' motion to certify the Class. *Cf*. 5 Moore's Federal Practice, § 23.61[7], 23-29 (3rd ed. 2003) ("[A] district court may, in proper circumstances, rule on a dispositive motion before ruling on class certification."). Here, however, because any ruling on summary judgment will affect the rights of the Class, the Court will first consider whether the existing Class remains viable. *See* Fed.R.Civ.P. 23(c)(1) ("An order under this subdivision . . . may be altered or amended before the decision on the merits."); *In Re Integra Realty Resources, Inc.*, 345 F.3d 1246, 1261 (10th Cir.2004) ("[A] trial court over seeing a class action retains the ability to monitor the appropriateness

of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment.").

The Plaintiffs' protest this reexamination, but the Court is in a different position now than it was before merits discovery. As set out in the Certification Order at 26, while the Court may not decide the merits on class certification, it may "probe behind the pleadings and consider the proof necessary to establish class-wide discrimination." Since discovery is complete and a proposed pretrial order has been submitted, a closer consideration of the proof will not unfairly advantage either side. *See* 5 Moore's, § 23.61[5], 23-284, 23-285 ("To the extent that a court may consider aspects of the merits under *Eisen*, the courts should wait until there has been adequate time for discovery to flesh out what those merits are."). Certainly, "the Court will not attempt to balance [the conclusion of Plaintiff's statistician] against the finds of Defendant's expert," Certification Order, at 28, but the Plaintiffs must still show that the requirements of Rule 23(a) are met. *See In Re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 135 (2nd Cir.2001), *cert. denied* 536 U.S. 917 (2002).

A. Facts[1]

The Court certified a Class for Plaintiff's Title VII claims on salaried compensation, salaried promotions, hourly promotions, and hourly overtime, all under a disparate impact theory. The Court set the beginning of the limitation period at April 2, 1999.

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[1]The Court's findings are based on Defendant's statement of facts or, as noted, on the documents attached in support of Defendant's memorandum. (Docs. 328-29.) With some exceptions not at issue here, Plaintiffs do not directly dispute Defendant's statement of facts. *See* Plaintiffs' Supplemental Memorandum, at 2. (Doc. 351.) Plaintiffs do provide many additional facts, which the Court will reference here and more fully discuss when considering summary judgment.

Plaintiff's statistician, Bernard Siskin, Ph.D., submitted his report on November 24, 2003. Dr. Siskin acknowledged that a statistical disparity less than 2 units of standard deviation may be caused by random chance. Disparities greater than 2 units of standard deviation are attributable either to illegal discrimination or to valid factors which are not considered by the statistical model.

With regard to the salaries of managers, Dr. Siskin concluded there were not enough female managers in the shared services site[2] to analyze. The salaries for female managers in the military site had a standard deviation of 1.41 units on April 2, 1999, with the standard deviation remaining below 2.0 units thereafter, only once rising above 1.0. The standard deviation for female managers in the commercial airplane site on April 2, 1999, was 3.03 units, but of the three levels of managers analyzed, only one level exceeded a standard deviation of 2.0 units. After April 1999, the standard deviation for the commercial airplane site remained at less than 2.0 units. The disparity for March 2001 was in favor of women, and the disparity in favor of men remained below .25 unit of standard deviations thereafter. *See* Memo. in Support, Exh. 1, Table 10.

With regard to the salaries of non-managers, Dr. Siskin found statistically significant standard deviations in seven of the 25 job aggregations groups[3] on April 2, 1999. Of the 59 women working at the shared services site on April 2, 1999, none worked in a job aggregation group with a statistically significant deviation. Memo. In Support, Exh. C-4, Table 14. Of the 226 women working in the military site on April 2, 1999, 150 worked in a job aggregation group for which there was no statistically significant disparity.

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[2]There are three "sites": shared services, military, and commercial airplanes.

[3]Job aggregations groups place employees in broad functional areas such as "Communication" or "Flight." The job aggregation groups are spread among the three sites, with 25 job aggregation groups over the three sites combined.

Memo. In Support, Exh. C-4, Table 16. Of the 1,411 women working at the commercial airplane site on April 2, 1999, 907 were in job aggregation groups for which there was no statistically significant disparity. After March 2001, the units of standard deviations in the shared services and commercial airplanes groups were less than .5 in favor of men, or were in favor of women. Memo. in Support, Exh. 5, Table 17. The data from the military site was in favor of women in March 2000, then in favor of men again but to a statistically insignificant level except for March 2002, and then below 2.0 again for the last data available to Dr. Siskin. *Id*. In other words, after March 2001 the job aggregation groups were almost equally likely to favor men and women.

With regard to the promotion of salaried workers, Dr. Siskin found no statistical evidence that women as a class were disadvantaged in promotions from positions which are exempt from overtime to other exempt positions. There were 261 such promotions from 1999 to 2003. Memo. In Support, Exh. C-10, Table 31. Without controlling for differences in education and the existing gender differences between certain job families, promotions from non-exempt to exempt positions were statistically advantageous to men in 1999 and 2000, and statistically advantageous to women in 2003, with the years 2001 and 2002 showing an advantage to women but below 2 units of standard deviation. Memo in Support, Exh. C-7, Table 28. When controlling for education, the disadvantage to men becomes statistically insignificant in 1999, and the advantage to women in 2001 -2003 increased, but with still only 2003 remaining statistically significant. Memo. in Support, Exh. C-8, Table 29. When controlling for both education and job family, there is no statistically significant result for any year, with the disparity in favor of women for 2001 - 2003 remaining in place.

Hourly promotions fall into three categories, described by Plaintiffs' human resource expert Rick

L. Nicholson as laid off employees (Category A), in-line promotions (Category B), and promotions from an open, competitive process (Category C). Declaration in Support, at 10. (Doc. 347.) Plaintiffs do not challenge the promotions for Categories A or B. Plaintiffs' challenge the Category C promotions, but no year in the limitation period shows a statistically significant disadvantage to women. After 2001, Dr. Siskin found no pattern, significant or not, adverse to women. Nicholson also found no problems with Defendant's hourly promotion process.

Finally, for hourly overtime Dr. Siskin found that women were less likely to work overtime at a statistically significant level over the entire limitation period. Dr. Siskin did not control for the requirements under the Collective Bargaining Agreements (CBAs) which give the employee working at a certain position during the week the first opportunity to work overtime at that position. Dr. Siskin also did not determine the rate at which women are offered overtime compared to men, or the rate at which women decline overtime compared to men.

B. Analysis

Dr. Siskin's statistical analysis obviously places into question the viability of the Class.

1. Commonality

In the Certification Order at 24, the Court found Defendant had, "different policies at place in different parts of Defendant's operations at different times, all of which affected class members in different ways depending on whether they were, for example, unionized hourly workers or non-union salaried supervisors." This did not initially defeat commonality because the Class members, all women who worked or were working at Defendant's Wichita operations, faced a common question of fact – "whether these members were disparately impacted by Defendant's facially neutral policies . . . ." *Id.*, at 27. The Class

was bound together under Plaintiffs' theory of an overarching good-old-boys network operating through the subjective discretion of managers. As the Tenth Circuit has long recognized, subjective discretion may lead to illegal disparate impact. *See Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1243 (10th Cir. 1991)("[A]n employer's use of subjective criteria in making employment decisions is susceptible to challenge under disparate impact principles," quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 648, 109 S.Ct. 2115, 2120, 104 L.Ed.2d 733 (1989)); *Hawkins v. Bounds*, 752 F.2d 500, 503 (10th Cir.1985)("Under the established law in this circuit, impact analysis is proper when a plaintiff claims that the use of subjective employment practices has an adverse effect on a protected group."); *Lasso v. Woodmen of the World Ins. Co., Inc.*, 741 F.2d 1241, 1244 n. 1 (10th Cir. 1984) ("While intentional discrimination need not be shown in disparate impact cases, intent is not irrelevant . . . 'the plaintiff may prevail if he shows that the employer was using the practice as a mere pretext for discrimination,'" quoting *Connecticut v. Teal*, 457 U.S. 440, 447, 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982)); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) ("Frequently these general policies involve subjective standards under which the guise of which discrimination can more easily be practiced."). *See also, Raytheon Co. v. Hernandez*, ___ U.S. ___, 124 S.Ct. 513, 519, 157 L.Ed.2d 357 (2003) (stating that *Wards Cove* is superseded by 42 U.S.C. § 2000e-2(k) on grounds other than proof of disparate impact without proof of intent).

In the Certification Order at 28, the Court noted Dr. Siskin's initial finding that, "the disparities adverse to female employees are statistically significant." These results were preliminary, however, and Dr. Siskin had not yet performed his calculations from the limitation date of April 2, 1999. As the Court's recitation of the facts show, Dr. Siskin's final numbers, calculated from April 2, 1999, do not present a

question of fact whether women *as a group* were and are disparately impacted by Defendant's facially neutral policies. *Cf. Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 292 (2nd Cir.1999) ("Where the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact.").

The Plaintiffs' evidence, both statistical and anecdotal, shows pockets of disparate impact, but Plaintiffs' evidence also shows significant segments of Defendant's operations in which no statistically significant disparities exist, or where the advantage is to female employees. The Court concludes it would be unjust to proceed to judgment regarding the rights of women who do not share this common question of fact.

For similar reasons, the Court finds there is no longer a common question of law. The Plaintiffs' initial showing was sufficient to raise a question whether the Class suffered disparate impact in violation of Title VII, but after merits discovery there is not a class-wide question regarding, "a particular employment practice that causes a disparate impact on the basis of . . . sex . . ." 42 U.S.C. § 2000e-2(K)(1)(A)(i).

Because a rigorous analysis of the facts shows no common question of fact or law regarding Plaintiffs' disparate impact claim, the Class as certified cannot be maintained.

2. Typicality

The typicality analysis is similar. *Cf. Stambaugh v. Kansas Dept. of Corrections*, 151 F.R.D. 664, 677 (D.Kan. 1993). Even taking at face value the Plaintiffs' anecdotal evidence, the statistical evidence shows that significant numbers of women dispersed among the various segments of Defendant's operations have not faced such difficulties, at least within the limitation period. As the Court held in the

Certification Order at 29, typicality "requires more than conclusory allegations that proposed class members suffered discrimination." With no statistical evidence of disparate impact in areas such as exempt-to-exempt salaried promotions and hourly promotions, and statistically insignificant differences in salary for most of the managers and in most of the job aggregation groups, the Court finds the gap between the Plaintiffs' alleged harms and those of the Class is too great to sustain the Class as certified.

3. Plaintiffs' arguments in response

Plaintiffs argue Dr. Siskin's analysis shows a class-wide disparate impact in spite of the statistically insignificant findings. Plaintiffs also contend that Defendant's own statistics show a class-wide impact.

a. Dr. Siskin's analysis

Plaintiffs first note that statistical significant is not the same as legal significance.[4] The Court agrees, but as set out in the Certification Order at 25, the Court must conduct a rigorous analysis to determine

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[4]The cases cited by Plaintiffs, such as *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir.1981), contain thorough discussions of statistical proof as it relates to proof of discrimination. *See* Memo in Opp., at 40-43. The Tenth Circuit has cited *American Nat'l Bank* in holding, "statistics that are insignificant to the social scientist may well be relevant to the a court." *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1269 (10th Cir.1988). For example, at a standard deviation of 2 units (1.96 units more precisely), "it would be concluded that there was a one-in-twenty chance that the raw disparity resulted solely through random distribution." *Maddox v. Claytor*, 764 F.2d 1539, 1552 n. 13 (11th Cir.1985). In a civil case, of course, facts need not be proven to a one-in-twenty chance of error. On the other hand, the cases cited by Plaintiff do not identify how far below a standard deviation 2.0 units the results may go and still be significant as a matter of law, if not of statistical science. In fact, one of the cases cited by Plaintiffs holds that a standard deviation of less than 1.0 or slightly more than 1.0 does not in itself show disparate impact. *See Rivera v. City of Wichita Falls*, 665 F.2d 531, 545 n. 22 (5th Cir.1982), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Many of Dr. Siskin's results, even when adverse to women, are in this range. The bottom line is that statistics are not magic formulae which relieve the Court of its duty to consider all the evidence. *See Pitre*, 843 F.2d at 1268 ("'[A]ll of the evidence, statistical and non-statistical, tending to establish a prima facie case, should [be] assessed on a cumulative basis.' *American Nat'l Bank*, 652 F.2d at 1189.").

whether a proposed class fits the Rule 23(a) prerequisites. The question turns on intensely practical considerations, most of which are purely factual or fact intensive. *Id.*, at 26. In this case, the best evidence of the distribution of the disparate impact allegedly suffered by the Class is the statistical evidence. Considering Dr. Siskin's results in combination with the rest of the record, particularly evidence of the varied nature of Defendant's Wichita operations, the Plaintiffs have not shown to the Court's satisfaction that the disparate impact they allege occurred on a class-wide basis.

Next, Plaintiffs vigorously contends that Defendant has fragmented the statistical data into small groups to hide the degree of the disparity. Dr. Siskin explains that small groups of employees may not display statistically significant disparities even though, when aggregated, the data would show statistically significant disparities among the employees as a whole. The Court understands this fact, but the insight does not change the Rule 23 analysis. The issue on class certification is less aggregation than distribution. Because the alleged disparate impact is not sufficiently dispersed throughout the Class, and because significant groupings of employees do not suffer any impact at all, the alleged illegality does not present a common question of fact or law, and employees who allegedly suffer the illegality are not typical of the Class.

Moreover, the Court also finds no evidence that the Defendant somehow gerrymandered the groupings to isolate adversely impacted employees. The sites and job aggregation groups at issue are found in Defendant's actual operations and, in contrast to cases cited by Plaintiffs, Plaintiffs' own expert used these same categories in generating his report. *Compare Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir.1983)(defendant's expert disaggregated the data); *Shafer v. Commander, Army & Air Force Exch. Serv.*, 667 F.Supp. 414, 425 (N.D.Tex. 1985) (same).

Plaintiffs also complain that Defendant ignores the data from before the liability period. The Court stated in its order filed November 26, 2003, that "Plaintiffs may still use prior discrete acts as background evidence in support of a *timely claim* . . . ." Memo. and Order, at 10-11 (emphasis supplied). (Doc. 313.) In other words, the focus remains on the timely claims, and it is there that the Court must find commonality and typicality under Rule 23. Claims for which the Court has already granted summary judgment to the Defendant cannot provide a common question of fact or law if the timely claims do not.[5]

Plaintiffs similarly argue that Defendant cannot avoid liability by reducing the disparate impact after the complaint was filed, thereby mooting the action. This action, filed in 2002, is not moot because Defendant modified its procedures under a 1999 settlement with the federal government or, as Plaintiffs' allege, because of the *Beck v. Boeing Co.* suit filed in 2000. Questions remain, such as the adequacy of any modifications and the propriety of equitable remedies such as back pay. The question now is class certification, however, and because Defendant is only liable for Title VII violations occurring after April 2, 1999, the common questions of fact or law must be based on events after that date. Certainly a party cannot defeat class certification by having, "'a last minute change of heart,'" *Gonzales v. Police Dept., City of San Jose, CA.*, 901 F.2d 758, 762 (9th Cir.1990), quoting *Jenkins v. United Gas Corp.*, 400

[5]Dr. Siskin states in his report that the statistically significant disparities against females before April 2, 1999, create a "burden of proof" which is not overcome by the subsequent data. Declaration in Opposition, at 12-14. (Doc. 346.) This contention, which Dr. Siskin does not adequately explain or support through citations to the literature, shades into an opinion of law. That point aside, Dr. Siskin's own data from the limitation period shows some disparities in favor of women and many disparities in favor of men of such low statistical significance that the Court cannot consider them to favor either men or women. Therefore, the Court finds that the statistically significant impacts shown prior to April 2, 1999, do not transform the data from within the limitation period into evidence of commonality and typicality.

F.2d 28, 33 (5th Cir.1968), but cases such as *Gonzales* deal with injunctive relief, not class certification. In this case the final data from within the limitation period, which extends more than two and a half years before the filing of this suit, does not support the continued certification of the Class.

b. Defendant's statistics

Plaintiffs's statement of disputed material facts sets out Defendant's own internal statistics as proof of class-wide disparate impact. Most of these are from before April 2, 1999, however. Internal studies from later in 1999 match Dr. Siskin's analysis: a few statistically significant disparities in favor of men, more disparities in favor of men below 2.0 units of standard deviation, and some disparities in favor of women.[6] Defendant's internal statistics do not change the Court's holding that the Class as presently constituted may not be maintained.

C. Conclusion

The Court must modify its previous certification in light of the merits discovery. The Court certified two subclasses for Title VII disparate impact violations occurring after April 2, 1999: 1) all non-executive salaried female employees, excluding engineers, who were or are employed at Defendant's Kansas facilities who have been or continue to be discriminated against on the basis of gender in compensation and promotions, and 2) all hourly female employees covered by collective bargaining agreements with the International Association of Machinists and Aerospace Workers (IAM) who were or are employed at

[6]Plaintiffs allege that Defendant's "internal consultants" reported severe disparities in 1999 (Plaintiffs' Memo. in Opp., at 8, ¶ 14), but Plaintiffs do not include a citation to the record as required by D.Kan.R. 56.1(b)(2). The Court, therefore, will ignore the allegation. *See Pyles v. Boeing Co.*, 2002 WL 318998193 (D.Kan. 2002) (additional facts not supported by citations to the record will be ignored).

Defendant's Kansas facilities who have been or continue to be discriminated against on the basis of gender in the assignment of overtime or in promotion. For the reasons stated above, the Court decertifies all of Subclass 1, and Subclass 2 as to discrimination in promotions. This leaves the hourly overtime claims and a revised definition of the Class for its disparate impact claims:

> All hourly female employees covered by collective bargaining agreements with the IAM who were or are employed at Defendant's Kansas facilities at any time from April 2, 1999, to the present and who have been, or continue to be, discriminated against on the basis of gender in the assignment of overtime.

In its Certification Order at 5, the Court found that Plaintiffs Bridgewater, Chapman, Dean, Maholmes, Phillips, and Wilcynski are or were represented by the IAM. Bridgewater, Dean, and Maholmes have been removed as Class Representatives, leaving Chapman, Phillips and Wilcynski with standing to sue on the Class claims. *See id.*, at 17.

II. SUMMARY JUDGMENT

Defendant argues Plaintiffs have not made out a prima facie case for failing to identify specifically the hourly overtime policy or practice alleged to cause a disparate impact, for failing to show a disparate impact, and for failing to show a causal connection between the identified policy or practice and the alleged disparate impact.

A. Standards

The Court set out the standards for disparate impact and summary judgment in its Certification Order. In addition, the Tenth Circuit has instructed as follows:

> A disparate impact claim involves employment practices that are "fair in form, but discriminatory in operations." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). A disparate

> impact claim differs from a disparate treatment claim in that it does not require a showing of discriminatory intent. *See Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir.1991). Instead, a plaintiff may establish a *prima facie* case of disparate impact discrimination by showing that a "specific identifiable employment practice or policy caused a significant disparate impact on a protected group." *Id.*; 42 U.S.C. § 2000e-2(k)(1)(A)(i). This *prima facie* case, in many respects, is more rigorous than in a disparate treatment case because a plaintiff must not merely show circumstances raising an inference of discriminatory impact but must demonstrate the discriminatory impact at issue. *See Regner v. City of Chicago*, 789 F.2d 534, 537 (7th Cir.1986) (internal quotation marks and citation omitted).
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> Summary judgment is appropriate if the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1312-13 (10th Cir.1999), implicitly overruled on other grounds as recognized by *Boyer v. Cordant Technologies*, 316 F.3d 1137, 1140 (10th Cir. 2003).

B. Uncontroverted facts[7]

In addition to the facts set out for its Rule 23 analysis, the Court finds that the following facts are

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[7]These facts are taken from Plaintiff's statement of additional facts, which Defendant accepted as uncontroverted for purposes of this motion. *See* Reply Memo., at 4. After accepting the Plaintiffs' statement, however, later in the same brief Defendant then disputed many of the same facts. *See, e.g., id.* at 13 ("Plaintiffs statement that the overtime provisions in the Collective Bargaining Agreement . . . give[s] managers no guidance on how to choose among eligible employees for overtime wholly ignores the language of the CBAs and the undisputed testimony . . . ."; "[Defendant] also disputes [P]laintiffs' assertion that the Seattle District Director of the EEOC reviewed the Seattle CBA's overtime provisions."). Under local rules, a reply brief must, like a response brief, open with a concise statement "as to which the party contends a genuine issue exists." D.Kan.R. 56.1(b)(1) & (c). In addition, the statement of facts in dispute "shall be numbered by paragraph . . . ." *Id.* Defendant failed to follow these rules. As the parties know, the Court has already by order emphasized the importance of the local rules. The Court will not order a supplemental brief in this instance because Defendant has stated its position with adequate citations, albeit in an unnecessarily confusing manner. The parties' failure to follow routine summary judgment practices is unaccountable.

uncontroverted for the purposes of summary judgment. Between April 2, 1999, and December 31, 2001, disparities in overtime adverse to women ranged between a low of 17.06 standard deviations and a high of 38.03 standard deviations. For the last period for which Dr. Siskin has analyzed data, ending June 20, 2002, the disparities were 10.23 standard deviations for weekday overtime and 7.95 standard deviations for weekend overtime.

Class Representative and other Class Members testify that despite repeated requests, they were given less overtime opportunities than similarly situated males. Class Member Hattie Irving testified that managers have discretion with regard to the assignment of overtime. She also stated that she worked 1.7 hours of overtime, compared to the hundreds of overtime hours worked by male co-workers, during the years 1999 through 2002. Class Representative Chapman testified that, from 1999 to October 2001, she received little overtime compared to her male counterparts.

C. Analysis

1. Particular practices

In the Certification Order at 5, the Court found that the IAM CBAs required Defendant to administer the terms and conditions of employment without regard to gender except where gender may constitute a bona fide occupational qualification. Plaintiffs' class claim under § 301 of the Labor Management Relations Act failed, however, because Plaintiffs did not use the grievance and arbitration procedures provided by the CBAs. *See id.*, at 17-19.

In defending their Title VII claim, Plaintiffs argue that Defendant, "supplies no guidance to managers on how to choose among eligible employees, and there are no centralized rules for how to choose among equally eligible male and female employees." Memo. in Opp., at 23, ¶ 75. Therefore, Plaintiffs contend,

"managers exercise complete discretion to choose from all employees who work in the area where overtime is required and want to work overtime." *Id.*

To evaluate Plaintiffs' allegation that managers have no guidance, that there are no centralized rules, and that managers exercise complete discretion, the Court sets out the CBA provisions in full.

The 1995 CBA stated:[8]

> 6.10(a) The [Defendant] will first attempt to meet its overtime requirements on a voluntary basis from among employees who normally perform the particular work activity on a straight time basis; however, in cases of selective overtime new hires or rehires may be excluded for the first fifteen (15) calendar days of their employment. In the event there are insufficient volunteers to meet the requirement, the supervisor may designate and require the necessary number of employees to work the overtime.
> (b)(1) The normal practice for the advance scheduling of overtime within the shop and shift will be to:
> (a) First, ask the employee regularly assigned to either the machine, job, crew or position providing the employee is in attendance when the overtime is being assigned, provided, however, that the [Defendant] may designate that employee to work the overtime before proceeding to 6.10(b)(1)(b).
> (b) Then, ask other qualified employees in the same job classification who are in attendance when the overtime is being assigned.
> (c) If sufficient volunteers are not obtained, the [Defendant] may designate any employee to satisfy remaining requirements.
> (2) Management may exclude an employee from overtime, even if the employee is in attendance when the overtime is being assigned, if:
> (a) The employee has been absent during the week, except for sick leave, jury duty, witness service, bereavement leave, military leave, authorized Union business, previously scheduled vacation or absence due to industrial injury or illness.
> (b) An employee is asked to work overtime (Saturday and/or Sunday) and is subsequently absent due to illness or bereavement leave on the

[8]Plaintiff did not attach the complete CBAs to its response in opposition to summary judgment. The quoted material is from the Plaintiffs' exhibit in support of class certification.

> workday preceding the overtime day.
> (c) Two (2) consecutive weekends have been worked by the employee.
> (d) One hundred forty-four (144) overtime hours have been worked in the budget quarter.
> (e) Eight (8) overtime hours have been worked on the Saturday or the Sunday.
> (f) An employee's schedule performance or work quality is currently documented as being deficient.
> (3) If the whole shift of a shop/functional area/crew or position is scheduled to work a six (6) or seven (7) day week, all employees in the shop/functional area/crew or position will be required to report for weekend work regardless of whether or not they were absent during the week, except when an employee has previously scheduled the use of vacation, bereavement leave or military leave on Friday preceding the weekend, or unless (2)(c), (2)(d) or (2)(e) of this 6.10(b) apply.

Decl. In Support of Plaintiff's Motion for Class Certification, Vol. 1, exh. 26A, at 30-31 (Doc. 140.)

The 1995 CBA also contained the following "Letter of Understanding No. 12":

> It is understood that the authority of the [Defendant] to require overtime work, established by Section 6.10 of the [CBA], is necessary for business planning and meeting operational objectives. The parties recognize, however, that the exercise of this authority may affect employee productivity.
> Accordingly, the [Defendant] and [IAM] agree, subject to the exceptions noted below, that the authority conferred by Section 6.10 of the [CBA] shall hereafter be limited as follows. No employee shall be required, and need not be permitted, to work overtime in excess of the following limits:
> a. Quarterly Limit
> – The limit shall be one hundred forty-four (144) overtime hours in any budget quarter;
> b. Weekend Limit
> – The limit shall be two (2) consecutive weekends;
> – Employees who have worked two (2) consecutive weekends may volunteer to work overtime on the following weekend;
> - Overtime work on either a Saturday or a Sunday shall be eight (8) hours.
> c. Holidays
> – All overtime on a holiday as set forth in Section 7.1 of the [CBA] or on the weekend which immediately precedes a Monday holiday or

> immediately follows a Friday holiday shall be voluntary.
> All overtime in excess of the above limits shall be strictly on a voluntary basis and no employee shall suffer retribution for his refusal or failure to volunteer. An employee may be required to perform overtime work beyond the above limits where necessary for delivery of an airplane which is on the field, for customer-requested emergency repair of delivered products, or for Government . . . rated orders. In addition, an employee may be required to perform overtime on a holiday or on the weekend which immediately precedes a Monday holiday or immediately follows a Friday holiday where necessary for facilities maintenance.
> The [Defendant] will brief the [IAM] semi-annually of its anticipated program scheduling and its forecasted overtime requirements.

Id., at 118.

Finally, the 1995 CBA included the following "letter of understanding No 17":

> The [Defendant] and the [IAM] agree that Section 6.10(b) of their [CBA] shall be administered as follows:
> 1. With respect to Section 6.10(b)(1), the [Defendant's] practice is to seek volunteers for the advance scheduling of overtime within the shop and shift. However, the parties agree that an exception may be made for certain assignments where the employee regularly assigned to either the job, crew or position is the appropriate individual to perform the work of the overtime call-out. Therefore, the parties agree that in order to insure that the employee regularly assigned to either the job, crew or position is designated to work the overtime pursuant to Section 6.10(b)(1)(a) only when he is the appropriate individual, such designation may be made only if it is approved by the superintendent or his delegate, the delegate being at least only level above the employee's immediate supervisor.
> 2. With respect to Section 6.10(b)(2)(f), the parties agree that the reference to deficient schedule performance or work quality being "currently documented" shall mean a Corrective Action Memo. In order to be used under Section 6.10(b)(2)(f), a Corrective Action Memo must state the period, not to exceed ninety (90) days, it will remain in effect and may serve as a basis for exclusion from overtime consideration only during that period.

Id., at 123.

The 1999 CBA provisions are substantially similar.

Clearly, then, the managers had substantial guidance from centralized rules set out in the CBAs. The managers did not have complete discretion under the agreement between Defendant and the union to which the Class Members belong or belonged. Therefore Plaintiffs, to make out their prima facie case, must locate the particular practice of subjective decision making within the residual discretion allowed to Defendant's managers. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i); *Chavez v. Coors Brewing Co.*, 1999 WL 162606, *4 n.1 (10th Cir.1999) (§ 2000e-2(k)(1)(B)(i) codifies principle of *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988), that plaintiff must isolate specific employment practice at issue when employer combined subjective and objective standards).

Given the standard applied on summary judgment, the Court concludes that Plaintiffs make this showing. Plaintiffs provide anecdotal evidence that the managers had discretion to favor male over female employees. In addition, Plaintiffs' expert Nicholson claims Defendant's policies do not assure that women who volunteer for overtime obtain it on a rotating basis.[9] The issue is a close one, but the Plaintiffs' contention of a good-old-boy network operating through subjective decision making, when combined this Circuit's treatment of subjectivity in disparate impact cases, is sufficiently particular.

2. Disparate impact

The "traditional disparate impact claim" involves "a comparison of the statistical impact . . . on the class allegedly harmed . . . relative to a relevant comparison group." *Villanueva v. Carere*, 85 F.3d 481, 487 (10th Cir.1996). "[A]ny statistical analysis must involve the appropriate comparables . . . and must cross a 'threshold of reliability before it can establish even a prima facie case of disparate

[9]This is distinct from a showing of actual disparate impact, or from a showing that the subjective discretion caused such disparate impact.

impact.'" *Ortega*, 943 F.2d at 1243, quoting *Allen v. Seidman*, 881 F2d 375, 378 (7th Cir. 1989). The reliability determination depends on the facts and circumstances of each case. *Bullington v. United Air Lines*, 186 F.3d 1314 (10th Cir.1999).

Ortega and *Bullington*, cited by both parties, demonstrate the importance of making the comparison with the relevant group. In *Ortega*, the plaintiffs urged the Tenth Circuit to compare the rehire rates of all employees who were laid off from a certain plant. 943 F.2d at 1245. The panel, however, held it, "error to simply compare the raw statistics showing that a higher percentage of men were rehired than women." *Id.* The panel stated that because "men were qualified for and sought out jobs requiring heavy lifting . . . ," and the "women, by contrast, removed themselves from consideration for those jobs because of their expressed preference for work that did not require heavy lifting," the higher rehire rates for men did not show disparate impact. *Id.* In *Bullington*, the panel approved a comparison group of, "persons who interviewed for . . . and . . . received a passing score on the interview." 186 F.3d at 1314. The statistical comparison was probative because the comparison group, "was appropriately limited to persons who sought out and were at least minimally qualified for the position . . ." *Id.* In contrast, a comparison group which includes persons who did not seek the at-issue jobs is too broad. *See id.*, citing *Wards Cove*, 490 U.S. at 651.

Here, Dr. Siskin's procedure was to take, "similarly situated employees and then compare various measures for males and females in the similarly situated cohort." Decl. in Opp., at 22. (Doc. 346.) Dr. Siskin defined "similarly situated" employees for weekday overtime as: "[w]orked that day and are in the same job, grade, budget code and shift." *Id*. at 23. Similarly situated employees for weekend overtime were defined as: "[w]orked Friday and are in the same job, grade, budget code and shift."

The Court finds that Dr. Siskin's analysis does not cross the reliability threshold for two independent reasons. First, the CBAs essentially defined who was "qualified" to perform overtime, but Dr. Siskin did not adequately control for these qualifications. For example, under the CBAs managers must normally offer overtime to employees who are present on the day of assignment, and Defendant alleges that the assignments for weekend overtime are typically made by Thursdays. *See* Defendant's Memo. in Opp. to Class Cert., 31-32. Plaintiffs do not argue otherwise. *See* Plaintiffs' Reply in Supp. of Class Cert., at 11-14. Dr. Siskin, however, considered only whether an employee had been present on Fridays. For another example, under the CBAs overtime is normally offered to an employee in the same shop and shift who is regularly assigned to the same machine, job, crew or position. Dr. Siskin did not control for the same shop, machine, crew or position, and he added grade and budget code a controls. No doubt data for grade and budget code was more available than for shop, machine, crew or position, but that is not how the CBAs operated. There were also numerous exceptions under which an otherwise eligible employee could be excluded from overtime, such as for missing work during the week or having a documented deficiency, but Dr. Siskin does not control for these exceptions.

Second, Dr. Siskin did not control for the rate at which female employees actually sought overtime. As both *Ortega* and *Bullington* show, this is a valid consideration when assessing the comparison group used by a statistician. Dr. Siskin conducted an essentially bottom-line analysis – a showing of gender imbalance compared with the population of female employees generally,[10] not an imbalance compared with qualified women who also sought overtime. *Cf. Chavez,* 1999 WL 162606 at * 4 ("a [T]itle VII plaintiff

[10]With some controls, as outlined above.

does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial imbalance in the work force," quoting *Wards Cove*, 490 U.S. at 657).

After Defendant raised these points in moving for summary judgment, Plaintiffs offered a specific response from Dr. Siskin:

> [Defendant] believes that some of the alleged administrative practices not reflected in my model explain those gender based differences in overtime. Moreover, [Defendant] alleges that women may simply not want to work overtime as men do. An equally plausible explanation would be that sex stereotyping by decision makers assumes without verification that women do not want to work overtime. Then, the common practice causing the disparity would be that the decision makers take actions based on this stereotypical belief . . . .

Declaration in Opposition to Summary Judgment, at 24:

If it is equally plausible that "administrative practices" (the CBAs) and the rate at which women seek overtime caused the bottom-line disparities, as opposed to the subjective decision making urged by Plaintiffs, the Plaintiffs have not made a prima facie showing. Plaintiffs "must not merely show circumstances raising an inference of discriminatory impact but must demonstrate the discriminatory impact at issue." *Bullington*, 186 F.3d at 1312. A statistical analysis which fails to control for equally plausible non-discriminatory factors overstates the comparison group and, under the facts of this case, cannot raise a question of fact for trial regarding discriminatory impact.

Other than Dr. Siskin's studies, Plaintiffs cite three declarations. *See* Memo. in Opp., at 11. Class Representative Sandy Wilcynski states she was qualified to work overtime, but that when she volunteered she was assigned much less overtime than similarly qualified men. Wilcynski does admit that she was subject to a Corrective Action Memo, which was later retracted. Under the CBAs as set out above, an

Corrective Action Memo may be a basis to deny overtime to an employee for up to 90 days, but Wilcynski does not state how long her work was thus documented as being deficient. Class Representative Charlene Chapman states that she was employed as a Grade 3 parts finisher in the Heat Treat Shop. She was not trained to operate the ovens and did not operate them, as did the Grade 4 or 6 employees. Chapman states she received less overtime than the men who were Grade 4 or 6 employees. Finally, Class Member Hattie Irving, also a Grade 3 parts finisher in the Heat Treat Shop, states that she received less overtime than men who were Grade 4 or 6 employees.

Whether or not Wilcynski, Chapman, and Irving have individual claims, their declarations point up the danger of making bottom-line comparisons without considering all the factors set out under the CBAs. This anecdotal evidence, when considered together with the statistical analysis and the rest of the record, falls short of the required prima facie showing as a matter of law.

3. Causation

For similar reasons the Court finds that Plaintiffs fail to show that the identified employment practice, subjective discretion on the part of managers, caused any disparate impact. Dr. Siskin states that there were equally plausible explanations, but he cannot rule them out because his statistical analysis did not control for them. The anecdotal evidence is nearly as equivocal, and of course they are not class-wide.

Dr. Siskin concludes by stating: "I assume that if [Defendant] has data to support the notion that administrative practices or differences in interest by gender explain these disparities, [Defendant] will present statistical analysis demonstrating that these factors explain the disparity." Decl. in Opp., at 24. The facts and reasonable inferences therefrom are construed in the light most favorable to Plaintiffs on summary

judgment, but the burden of making the initial prima facie showing rests on them, not Defendant. *See Bullington*, 186 F.3d at 1313 ("to survive summary judgment, the nonmoving party may not rest on the allegations or denials of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial."). Speculation over the Defendant's ability to disprove the Plaintiffs' allegations does not create a genuine issue for trial.

The Court grants summary judgment to Defendant on the Title VII claims of the Class.

III. WITHDRAWAL AND SEVERANCE

Plaintiffs' counsel moves to withdraw as counsel for the individual claims of Plaintiffs Mary Dean, Faith Bridgewater, and Verlene Maholmes, and to sever them from this action. Dean, Bridgewater, and Maholmes respond with a pro se filing asking the Court to grant the withdrawal but not the severance. (Doc. 361.)

The Court sees the wisdom in ending both the attorney-client relationship between Plaintiffs' counsel and Dean, Bridgewater, and Maholmes, and the co-party relationship between Dean, Bridgewater, Maholmes, and the remaining nine Plaintiffs. As long as long as Dean, Bridgewater, and Maholmes bear obvious antipathy against Plaintiffs' counsel and, to a lesser extent, the remaining nine Plaintiffs, the course will not be smooth.

Nevertheless, Plaintiffs' counsel brought this complex suit on behalf of Dean, Bridgewater, Maholmes, and the rest of the Plaintiffs. The filings are numerous, the evidentiary submissions are extensive, and the procedural questions are complex. Consider, to take one example, the limitation issues raised by the proposed severance. The Court finds that Dean, Bridgewater, and Maholmes are in a poor position to protect their interests regarding refiling, not to mention the other complexities of this case.

The Court does not suggest that severance is beyond the Court's discretion. The Court, however, will not consider severance unless and until the interests of Dean, Bridgewater, and Maholmes are protected by separate counsel. The Court is also unwilling to grant the withdrawal but leave Dean, Bridgewater, and Maholmes as pro se litigants in the midst of the remaining nine Plaintiffs, all still represented by Plaintiffs counsel. The Plaintiffs claims are, to a greater or lesser extent, intertwined. In the Court's opinion this would lead to more difficulties than those caused thus far by the deteriorated attorney-client relationship.

Therefore, as long as Dean, Bridgewater, and Maholmes voluntarily remain parties in this action, or until they retain new counsel, Plaintiffs' counsel will remain counsel of record for them. The Court will consider the motion for severance if and when Dean, Bridgewater, and Maholmes retain new counsel.

IT IS THEREFORE ORDERED that Defendant's motion for summary judgment or, in the alternative, to decertify (Doc. 325) is GRANTED as set out in this Memorandum and Order, and that the motion of Plaintiffs' counsel to withdraw and for severance (Doc. 357) is DENIED.

The status hearing currently set for March 23, 2004, at 1:30 p.m., is moved to March 17, 2004, at 10:00 a.m.

SO ORDERED this 24th day of February, 2004.

s/ Wesley E. Brown
Wesley E. Brown, Senior U.S. District Judge