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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

DERRICK SATCHELL, KALINI  
 BOYKIN, VALERIE BROWN, RICK  
 GONZALES, CYNTHIA GUERRERO,  
 RACHEL HUTCHINS, TYRONE  
 MERRITT, KELVIN SMITH, SR., and  
 KEN STEVENSON, on behalf of  
 themselves and all others similarly situated,

Plaintiffs,

v.

FEDEX EXPRESS, a Delaware  
 corporation,

Defendant.

Case No. C 03-2659 SI; C 03-2878 SI

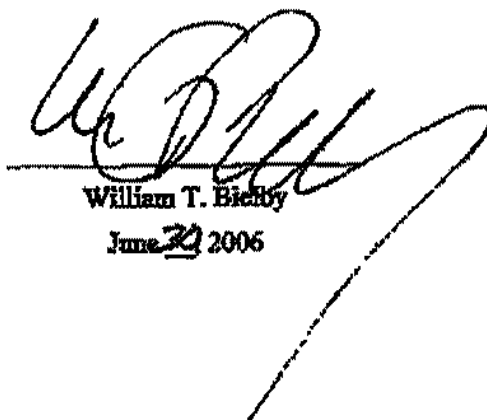
**EXPERT REPORT OF  
WILLIAM T. BIELBY, PH.D.**

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*Derrick Satchell, et al. v. FedEx Express*

**William T. Bielby, Ph.D.**

**June 2006**



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**EXPERT REPORT OF WILLIAM T. BIELBY**

*Derrick Satchell, et al. v. FedEx Express*

June 2006

**ASSIGNMENT, QUALIFICATIONS, AND MATERIALS REVIEWED**

1. I have been retained by the law firm of Lief, Cabraser, Heimann & Bernstein, counsel for plaintiffs in *Derrick Satchell, et al. v. FedEx Express*. I have been asked to review testimony and materials describing the personnel policies and practices at the Western Region of FedEx Express ("FedEx") pertaining to compensation, promotion, performance reviews, discipline, and equal employment opportunity (EEO), and to assess whether they create barriers to career advancement and fair compensation for the company's African American and Hispanic hourly employees and African American Operations Managers employed in Domestic Ground Operations ("DGO") and Air Ground Freight Services ("AGFS"). Unless noted otherwise, when I use the term "FedEx" below, I am referring to DGO and AGFS functional divisions within the company's Western Region.

2. I have testified as an expert witness in both California Superior Court and federal court on cases involving workplace discrimination. A list of cases in which I have been identified as an expert or have given expert testimony since 2001 is attached as Exhibit A.

3. I received a Ph.D. in Sociology from the University of Wisconsin--Madison in 1976. I also have a B.S. in Electrical Engineering and a M.A. in Social Sciences from the

University of Illinois. I am Professor of Sociology at the University of Pennsylvania, where I am also affiliated with the Population Studies Center. Prior to that, I served for twenty-seven years as a faculty member in the Department of Sociology at the University of California, Santa Barbara (UCSB), where I chaired my department from 1992 to 1998. At UCSB I was also affiliated with UCSB's Department of Statistics and Applied Probability. I am a past President of the American Sociological Association.

4. I have taught courses on employment discrimination at both the undergraduate and graduate levels at UCSB, at the University of California Washington Center in the District of Columbia, and at Northwestern University. Among my former positions are Visiting Professor of Management at UCLA, Fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford, Visiting Distinguished John D. MacArthur Professor of Sociology at Northwestern University, and Visiting Scholar at the American Bar Foundation. Since joining the faculty of the University of Pennsylvania I have taught graduate level courses on statistics and research methods in the social sciences. In addition to courses on discrimination, research methods, and statistics, I have taught graduate and undergraduate courses on organizational behavior, labor markets, and social inequality. I also specialize in research in each of these areas. Over the past twenty years, much of my research has focused on issues of workplace discrimination and on organizational policies and practices more generally. My research on these topics has been supported by four grants from the National Science Foundation, and it has been published in leading peer-reviewed social science research journals. My Curriculum Vitae is attached as Exhibit B.

5. I have received national awards from three different professional associations for my research on gender, labor markets, social psychological aspects of work, and organizational personnel practices. I have served on numerous panels, advisory committees, and professional workshops on topics relating to workplace discrimination, organizational personnel policies and practices, and research methodology. I have served as an advisor, consultant, or reviewer for the following organizations and agencies: the U.S. Bureau of the Census, the U.S. Department of Justice, the U.S. Department of Labor, the Equal Employment Opportunity Commission, the National Science Foundation, the National Institute of Mental Health, the National Academy of Sciences, the University of Michigan's Institute for Social Research, Stanford University, the Writers' Guild of America, West and the Bar Association of San Francisco. I have also served on the editorial boards of leading social science journals, and I regularly review manuscripts for scientific journals on topics relating to organizational behavior, employment discrimination, and research methodology. I have been elected to several offices in the American Sociological Association. I served for three years on the ASA Council, the organization's governing body in addition to serving as the Association's President in 2003.

6. I have reviewed the 30(b)(6) deposition testimony of FedEx executives and managers designated by the company to testify about personnel policies and practices as well as the exhibits that accompany the deposition transcripts. The exhibits include written policies, manuals, forms, reports, and correspondence pertaining to the company's human resources system. I was also supplied with a copy of the company's People Manual, dated October 2003, the "People Best Practices" manuals for DGO and AGFS,

and documents, forms, validation studies, and related memos, correspondence, and reports related to the company's policy and practice for conducting performance reviews. A list of documents that were supplied to me by plaintiffs' counsel, apart from those that were marked as deposition exhibits, appears in Exhibit C.

7. I also reviewed the deposition testimony of "fact" witnesses who have testified about the company's policies and practices regarding compensation, promotion, performance reviews, discipline, and equal employment opportunity. A complete list of depositions I have received is listed in Exhibit D. The list includes the deposition testimony given by two individuals in *Jerome Rogers, et al. v. FedEx Express, et al.*: Heather McKnight, Human Resources Manager; and Darrell Kato, Managing Director in the Coastal Region, DGO. It also includes the deposition testimony given by Michael Snyder, former Managing Director, for the Southern California District of DGO and former Vice President for Eastern United States, now retired, as well as excerpts from the deposition testimony he gave in *Pettaway-Vint v. Federal Express*. I also reviewed the statistical reports submitted in 2004 by Dr. Richard Drogin for plaintiffs and by Dr. Mary Baker for FedEx as well as the report submitted by Dr. Drogin this month.

8. I have also relied upon academic articles, chapters, and books written by social scientists and management scholars, and they are cited in the footnotes to this report. Social science research conducted across many decades has generated considerable knowledge about what generates and sustains workplace inequalities. That same research, either directly or by implication, points to the kinds of workplace policies and practices that are likely to minimize bias. The relevant research has applied multiple methodologies in a variety of contexts, including experiments in controlled laboratory settings;

ethnographies and case studies in "real world" organizations both large and small, public and private, and in a range of industries; surveys done with representative samples of workers and employers; and historical studies based on archival materials from the United States and abroad. Thus, the scientific evidence about bias, discrimination, and the structure and dynamics of race in organizations that I rely upon has substantial external validity and provides a sound basis for analyzing FedEx's policies and practices. My method is to look at distinctive features of the organization's policies and practices and to evaluate them against what social science research shows to be factors that create and sustain bias and those that minimize bias. In litigation contexts, this method of analysis is known as "social framework analysis."<sup>1</sup>

#### **SUMMARY OF FINDINGS**

9. I have concluded that the personnel system at FedEx is uniform, centralized, and in many ways highly formalized and standardized. It also has discretionary features, and due to inadequate monitoring and accountability, these features are vulnerable to bias against African American and Hispanic employees. Statistical analyses of how discretion is exercised in the FedEx personnel system demonstrate that it has an adverse impact on minority employees, consistent with a large body of research by social scientists and management scholars on the sources of workplace racial bias. The basis for these conclusions is explained below.

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<sup>1</sup> See E. Borgida, C. Hunt, and A. Kim, "Research in Sex Discrimination Litigation," *Journal of Law and Policy*, Vol. 13, 2005, p. 613-628; D. L. Faigman and J. Monahan, "Psychological Evidence at the Dawn of the Law's Scientific Age," *Annual Review of Psychology*, Vol. 56, 2005, p. 631-659; J. Monahan

## OVERVIEW OF THE FEDEX PERSONNEL SYSTEM

10. As in many large, centralized organizations, the FedEx personnel system is in many ways highly formalized and standardized.<sup>2</sup> Centrally developed human resources policies, specified in the People Manual, "best practices" manuals, and other documents apply uniformly throughout the Western Region.<sup>3</sup> Regional, District, and local managers are not authorized to modify the companywide human resources policies.<sup>4</sup> Human Resources policies are coordinated centrally by a corporate Human Resources Division that functions as a service organization to all other divisions.<sup>5</sup>

11. Selection into permanent hourly positions is governed by the FedEx-wide, computerized Job Change Application Tracking System (JCATS). Openings are posted on JCATS, and the system is used both by employees to apply for openings and by hiring managers to make their selections.<sup>6</sup> For first-level management jobs, the ASPIRE system is administered throughout FedEx by the Human Resources Development Department.<sup>7</sup>

12. A centralized compensation function within Human Resources sets pay ranges for each pay grade for both salaried and hourly employees. The compensation of

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and L. Walker, *Social Science in Law: Cases and Materials*, Fourth Edition, Foundation Press, 1998, Chapter Five, "Social Science Used to Provide Context."

<sup>2</sup>A. L. Kalleberg, D. Knoke, P. V. Marsden, and J. L. Spaeth, *Organizations in America: Analyzing Their Structures and Human Resource Practices*, Sage Publications, 1996.

<sup>3</sup>McQueen depo., p. 91-92.

<sup>4</sup>McQueen depo., p. 29-61, 75-93, 109-114; Davis depo., p. 43; Powell depo., p. 57-58; Rhea depo., p. 19-28; Speroff depo., Vol. I, p. 235-6, Vol. II, p. 28-29, 45-101; Fifer depo., p. 11-14.

<sup>5</sup>McQueen depo., p. 40.

<sup>6</sup>Williamson depo., p. 11-53; Speroff depo., Vol. I, p. 53-61.

nearly all hourly employees is governed by the uniform "merit hourly" pay plan.<sup>8</sup>

Uniform policies also govern the two components of salaried employees' pay: market level differentials based on geographical differences in prevailing pay rates; and annual performance-based merit increases.<sup>9</sup> Uniform policies also govern the pay raises associated with promotions within hourly and salaried ranks and with promotions from hourly to salaried ranks.<sup>10</sup>

13. A central Human Resource Analysis department within Human Resources is responsible for developing the performance assessment instruments used for the annual evaluations of permanent hourly and salaried employees.<sup>11</sup> Performance reviews have a substantial impact on both promotion and compensation. For example, a rating of at least 5 (on a 7-point scale) is required in order to be eligible to apply for an open hourly position in the JCATS system. In addition, internal applicants for promotion into hourly jobs are ranked into two "priority" categories, with first-priority consideration going to employees within the job classification group, and second-priority consideration going to those outside the job classification group. Within priority categories, applicants are ranked by "credit equivalency value" (CEV), which is computed as months of continuous service (discounted 50% for part-time employees) multiplied by the total of the last two

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<sup>7</sup>Speroff depo., Vol. I, p. 176-177; Brooks depo., p. 11-26.

<sup>8</sup>Rhea depo., p. 101-102; Powell depo., p. 21-56, 94-99. The exception is the pay category of aircraft maintenance employees whose compensation is governed by the "step progression" policy. They are not part of the certified class in this litigation.

<sup>9</sup>Davis depo., p. 18-19, 34-36, 43-46, 49-50.

<sup>10</sup>Davis depo., p. 19-42, 45-48; Powell depo., p. 44-46.

performance ratings. CEV is considered the main factor governing selection within priority groups, so among equally experienced candidates, performance ratings will often be the determining factor in selections.<sup>12</sup> Similarly, an applicant for promotion into management under the ASPIRE policy is required to have a score of at least 2.5 (on a 4-point scale) on his or her most recent performance rating, and performance ratings are one factor in the "matrix grid" rankings that are used to select which individuals are to be interviewed for a salaried position.<sup>13</sup>

14. Performance reviews affect compensation both indirectly and directly. First, as noted above, performance ratings have a strong impact on the chances of being considered and selected for a promotion, and a move into a higher pay grade increases and employee's compensation.<sup>14</sup> Second, annual merit increases are linked directly to performance review scores for both salaried and hourly employees.<sup>15</sup>

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<sup>11</sup>Hayward depo., p. 56, 73-74. Merit hourly employees are reviewed every six months for the first year they are in a new job (Hayward depo., p. 128).

<sup>12</sup>Williamson depo., p. 52; Hesser depo., p. 60-66; Speroff depo., Vol. I, p. 53-61; Hayward depo., p. 85-86; 2003 People Manual, Section 4-5 (BATES PM1003P179-180). Mr. Speroff testified (Vol. I, p. 53): "At the closing of the process, the computer generates a mathematical computation, and they come up with CEVs, and people are ranked by CEVs, and the top person is the one that is offered the position."

<sup>13</sup>Speroff depo., Vol. I, p. 193-195.

<sup>14</sup>Moreover, policy for promotions of merit hourly employees is to award a 2% per pay grade percentage increase over pay in the previous job (up to a 6% limit, subject to other restrictions; Powell depo., p. 99-100). Accordingly, a low performance rating in any given merit cycle lowers the base for percentage increases associated with future promotions.

<sup>15</sup>Davis depo., p. 39, 46-47; Powell depo., p. 56, 75, 83, 94-95; Hayward depo., p. 81-2.

**VULNERABILITY TO BIAS IN THE PERFORMANCE REVIEW PROCESS  
CAN RESULT IN SUBSTANTIAL BARRIERS TO CAREER ADVANCEMENT  
FOR AFRICAN AMERICAN AND HISPANIC EMPLOYEES**

15. Because the FedEx personnel system creates such a strong link between performance review ratings and both promotion and compensation, any racial bias in those ratings will have a significant impact on the career trajectories of minority employees. Social scientists describe these kinds of reward systems as systems of *cumulative advantage*. In a cumulative advantage system, factors that result in even small disparities between individuals early in their careers have a cumulative impact and generate growing disparities over time.<sup>16</sup> The materials I have reviewed indicate that discretionary aspects of the performance review system make it vulnerable to bias, and that the company's policies and practices for monitoring the implementation of its policies regarding performance review, promotion, and compensation are inadequate for minimizing racial bias. Below, I first summarize research literature that explains why performance review systems can be vulnerable to bias, and then I explain why FedEx's policy and practice is inadequate for minimizing that vulnerability and is likely to lead to cumulative disadvantage faced by African American and Hispanic employees over the course of their careers.

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<sup>16</sup>The first cumulative advantage models were developed to explain differences in the career trajectories of scientists, including gender disparities in scientists' careers. See, for example, P. D. Allison, J. S. Long, and T. K. Krauze, "Cumulative Advantage and Inequality in Science," *American Sociological Review*, Vol. 47, 1982, p. 596-606; S. M. Clark, and M. Corcoran, "Perspectives in the Professional Socialization of Women Faculty: A Case of Accumulative Disadvantage?" *Journal of Higher Education*, Vol. 57, 1986, p. 20-43; R. K. Merton, "The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property," *Isis* Vol. 79, 1988, p. 606-623; and W. T. Bielby, "Sex Differences in Careers: Is Science a Special Case?" p. 171-187 in *The Outer Circle: Women in the Scientific Community*, edited by H. Zuckerman, J. R. Cole, and J. T. Bruer, Norton, 1991. For its application more broadly, see A.

16. There is ample reason to closely scrutinize any performance review system for potential racial bias. A large body of social science research, including many studies conducted in organizational settings, show that African Americans tend to receive lower performance evaluations than do whites. For example, a 1985 article by Kraiger and Ford performed a meta-analysis of 84 studies with a total of over 20,000 ratees, including 64 field studies and 10 experimental studies of white raters rating a total of 17,159 African American and white ratees.<sup>17</sup> Meta-analysis is a method for quantitatively aggregating results across studies in order to obtain a more precise estimate of the size and reliability of effects than can be obtained from any single study.<sup>18</sup> In addition, a meta-analysis of studies conducted across a variety of settings contributes to establishing the external validity of the research. Kraiger and Ford's meta-analysis found that African Americans, on average, received significantly lower evaluations than did whites. They also found evidence suggesting that white raters give significantly higher ratings to whites than to African Americans; and (2) that African American raters give significantly higher ratings to African Americans than do whites.<sup>19</sup>

17. A subsequent meta-analysis published by Martocchio and Whitener in *Human Relations* in 1992 replicates Ford *et al.*'s finding regarding racial differences in

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M. O'Rand, "The Cumulative Stratification of the Life Course," p. 188-207 in *Handbook of Aging and the Social Sciences* (4th ed.), edited by R. H. Binstock, L. K. George, et al. Academic Press, 1996.

<sup>17</sup>K. Kraiger and J. K. Ford, "A Meta-Analysis of Race Effects in Performance Ratings," *Journal of Applied Psychology*, Vol. 70, 1985, p. 56-65.

<sup>18</sup>J. E. Hunter and F. L. Schmidt, *Methods of Meta-analysis: Correcting Error and Bias in Research Findings*, Sage Publications, 1990.

<sup>19</sup>The research on in-group favoritism in performance ratings as it applies to minorities is limited because most datasets contain relatively few instances of minority raters completing ratings of both minority and white ratees and minority ratees being rated by both minority and white raters.

performance measures.<sup>20</sup> The Martocchio and Whitener meta-analysis focused specifically on field studies of performance assessment conducted in private sector firms.<sup>21</sup> The results of their analysis of ten field studies also indicated that race effects were larger on subjective than on objective measures of performance.<sup>22</sup> In an article published in 2003, Roth *et al.* replicated Kraiger and Ford's research on a larger sample of studies, and they found that overall, racial differences in performance ratings between African Americans and whites were comparable to those in the 1985 meta-analysis. However, unlike earlier studies, they found that racial disparities on objective assessments could be as large or larger than those for subjective assessments.<sup>23</sup> The Roth *et al.* research is also the first large-scale meta-analysis of disparities between whites and Hispanics, and they found that Hispanics tend to be rated lower than whites, although the disparities are generally not as large as those between African Americans and whites.

18. Numerous other studies conducted in organizational settings and published in leading refereed journals report similar findings or racial disparities in performance ratings. For example, Jeffrey Greenhaus and colleagues studied the career experiences of a matched sample of 373 African American and 455 white managers in three companies

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<sup>20</sup>J. J. Martocchio and E. M. Whitener, "Fairness in Personnel Selection: A Meta-Analysis and Policy Implications," *Human Relations*, Vol. 45, 1992, p. 489-506.

<sup>21</sup>Martocchio and Whitener, *op cit.*, p. 494.

<sup>22</sup>Martocchio and Whitener, *op cit.*, p. 500.

<sup>23</sup>P. L. Roth, A. I. Huffcutt, and P. Bobko, "Ethnic Group Differences in Measures of Job Performance: A New Meta-Analysis," *Journal of Applied Psychology*, Vol. 88, p. 694-706.

in the communications, banking, and electronics industry.<sup>24</sup> The African American and white managers included in their study were similar in age, organizational tenure, job function, and organizational level.<sup>25</sup> Their 1991 article in the *Academy of Management Journal* reports that supervisors rate the performance and promotion potential of African American managers significantly lower than whites, findings the authors describe as "remarkably consistent with the results of Kraiger and Ford's (1985) meta analysis."<sup>26</sup> Compared to white managers, African American managers scored lower on a scale of "corporate fit," expressing higher levels of isolation and lower levels of acceptance within the organization. African American managers reported lower career satisfaction and were more likely to report that their careers had reached a plateau, compared to white managers with similar performance evaluations. A second article published in 1993 in *Organizational Behavior and Human Decision Processes* explored the attributions supervisors made about the reasons for the successful performance of African American and white managers. Their findings were consistent with laboratory studies on this topic: compared to white managers, successful performance by African American managers

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<sup>24</sup>J. H. Greenhaus, S. Parasuraman, and W. W. Wormley, "Effects of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes," *Academy of Management Journal*, Vol. 33, 1990, p. 64-86; J. H. Greenhaus and S. Parasuraman, "Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects," *Organizational Behavior and Human Decision Processes*, Vol. 55, 1991, p. 273-297.

<sup>25</sup>Greenhaus *et al.*, *op cit.*, p. 81; Greenhaus and Parasuraman, *op cit.*, p. 280-281.

<sup>26</sup>Greenhaus *et al.*, *op cit.*, p. 79.

was less likely to be attributed to ability or effort and more likely to be attributed to help from others.<sup>27</sup>

19. The findings of Greenhaus *et al.* regarding race differences in assessment of promotion potential were replicated in a study by Jacqueline Landau of 682 managerial and professional employees of a Fortune 500 company who had been rated at least "above average" in performance.<sup>28</sup> The study, published in 1995 in the *Journal of Organizational Behavior*, examined the impact of race on supervisors' assessments of promotion potential as recorded in company records from the annual performance appraisal process.<sup>29</sup> Landau found that African American managers and professionals were rated lower in promotion potential than whites of comparable age, education, organizational tenure, salary grade, job type, and satisfaction with career support.<sup>30</sup>

20. Other studies and reviews suggest that in many organizational settings, performance reviews by supervisors are not subject to racial bias. For example, in a 1994 review article in the *Annual Review of Psychology*, Landy, Shankster, and Kohler state (p. 282-3) that "the field has been moving inexorably toward the final conclusion that *well-developed rating procedures accompanied by training of the raters* will produce ratings that are minimally biased by demographic characteristics of raters or ratees" (emphasis

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<sup>27</sup>Greenhaus and Parasuraman, *op cit.*, p. 285-288. For experimental evidence of race bias in attributions of the causes of successful performance, see K. L. Yarkin, J. P. Town, and B. S. Wallston, "Blacks and Women Must Try Harder: Stimulus Persons' Race and Sex Attributions of Causality," *Personality and Social Psychology Bulletin*, Vol. 8, 1982, p. 21-24.

<sup>28</sup>Jacqueline Landau, "The Relationship of Race and Gender to Managers' Ratings of Promotion Potential," *Journal of Organizational Behavior*, Vol. 16, 1995, p. 391-400.

<sup>29</sup>Landau, *op cit.*, p. 394.

<sup>30</sup>Landau, *op cit.*, p. 395-396.

added).<sup>31</sup> In a book published that same year, Latham and Wexley (p. 152) assert that "when the appraiser uses behaviorally based appraisal scales, ratee characteristics, such as age, race, and sex, have a negligible effect on the resulting performance appraisal" (emphasis added).<sup>32</sup> The conclusions of Landy et al. and of Latham and Wexley are not inconsistent with the research cited above. It is indeed the case that appropriately designed performance appraisal systems, carefully implemented and monitored, can be free of bias.

21. A large body of social science research shows that personnel decisions such as decisions about promotion selections and performance assessment are vulnerable to stereotyping and bias when they are based on the arbitrary or discretionary use of subjective criteria. Moreover, assessments based on objective factors can be influenced by stereotypes when decision-makers have substantial discretion in deciding how to weigh those factors. A stereotype is a set of beliefs that links personal traits of individuals to specific social groups.<sup>33</sup> The association of such traits as "assertive" and "rational"

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<sup>31</sup>F. J. Landy, L. J. Shankster, and S. S. Kohler, "Personnel Selection and Placement," *Annual Review of Psychology*, Vol. 45, 1994, p. 261-296.

<sup>32</sup>G. P. Latham and K. N. Wexley, *Increasing Productivity Through Performance Appraisal*, Addison Wesley, 1994.

<sup>33</sup>S. T. Fiske, A. J. C. Cuddy, P. Glick, and J. Xu, "A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition," *Journal of Personality and Social Psychology*, Vol. 82, 2002, p. 878-902; N. E. Evans, and R. B. Tyler, "Racial Stereotypes: The Contents of Their Cognitive Representations," *Journal of Experimental Social Psychology*, Vol. 22, 1986, p. 22-37; P. G. Devine and A. J. Elliot, "Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited," *Personality and Social Psychology Bulletin*, " Vol. 21, 1995, p. 1139-1150; J. F. Dovidio, J. C. Bringham, B. T. Johnson, and S. L. Gaertner, "Stereotyping, Prejudice, and Discrimination: Another Look," p. 276-319 in *Stereotypes and Stereotyping*, edited by C. N. MacRae, C. Stangor, and M. Hewstone, Guilford Press, 1996; D. F. Mackie, D. L. Hamilton, J. Susskind, and F. Roselli, "Social Psychological Foundations of Stereotype Formation," p. 41-78 in *Stereotypes and Stereotyping*, edited by C. N. MacRae, C. Stangor, and M. Hewstone, Guilford Press, 1996; K. H. Karim, "The Historical Resilience of Primary Stereotypes: Core Images of the Muslim Other," p. 153-182 in *The Language and Politics of Exclusion: Others in Discourse*, edited by S. H. Riggins, Sage Publications, 1997.

with the category male, "nurturing" and "emotional" with the category female, "violent" and "hostile" with the category African American, and "gang-banger" and "macho" with Latino, are examples of stereotypes. When stereotypes such as these are allowed to influence social judgments, decisions about members of minority groups will be based on general beliefs about the behaviors, traits, and qualities associated with their gender or race/ethnicity instead of the actual traits of the individuals being judged.<sup>34</sup>

22. Research studies show that the effects of stereotypes, in-group favoritism and out-group bias on evaluative judgments such as those involved in hiring, job assignment, promotion, assessments of skills and qualifications, and compensation can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal employment opportunity. For example, research studies show that the effects of stereotypes and outgroup bias on

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<sup>34</sup>C. O. Word, M. P. Zanna, and J. Cooper, "The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction," *Journal of Experimental Social Psychology*, Vol. 10, 1974, p. 109-120; Devins and Elliot, *op cit.*; P. O. Devine, "Stereotypes and Prejudice: Their Automatic and Controlled Components," *Journal of Personality and Social Psychology*, Vol. 56, 1989; J. F. Dovidio and S. L. Gaertner, "Stereotypes and Evaluative Intergroup Bias," p. 167-193 in *Affect, Cognition, and Stereotyping*, edited by D. M. Mackie and D. L. Hamilton, Academic Press, 1993. For articles and chapters providing reviews of relevant research, see American Psychological Association, "In the Supreme Court of the United States: Price Waterhouse v. Ann B. Hopkins: Amicus Curiae Brief for The American Psychological Association," *American Psychologist*, Vol. 46, 1991, p. 1061-1070. Also see D. M. Messick and D. Mackie, "Intergroup Relations," *Annual Review of Psychology*, Vol. 40, 1989, p. 49-50; V. F. Nieva and B. A. Gutek, "Sex Effects on Evaluation," *Academy of Management Review*, Vol. 5, 1980, p. 267-275 (especially pages 270-274); D. N. Bersoff, "In the Supreme Court of the United States: Clara Watson v. Fort Worth Bank & Trust, Amicus Curiae Brief for the American Psychological Association" (reprinted in *American Psychologist*, Vol. 43, 1988, p. 1019-1028); S. T. Fiske and S. E. Taylor, *Social Cognition*, Addison-Wesley, 1984 (especially Chapter 9, "Social Inference"); L. H. Krieger, "The Contents of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," *Stanford Law Review*, Vol. 47, 1995, p. 1161-248; B. F. Reskin, *The Realities of Affirmative Action in Employment*, American Sociological Association, 1998; M. B. Brewer and R. J. Brown, "Intergroup Relations," p. 554-594 in *Handbook of Social Psychology*, Vol. 2 (4th ed.), edited by D. T. Gilbert, S. T. Fiske, and G. Lindzey, Oxford, 1998; W. T. Bielby, "Minimizing Workplace Gender and Racial Bias," *Contemporary Sociology*, Vol. 29, 2000, p. 120-129.

selection decisions can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal opportunity.<sup>35</sup>

23. Conversely, social science research demonstrates that substantial discretion in assessing and weighing evaluative criteria invites bias. In a highly discretionary system with limited monitoring, even objective factors can be evaluated in a way that leads towards favoritism to the majority group and discrimination against minorities. For example, social psychologists Samuel Gaertner and John Dovidio have conducted research showing that when white evaluators have discretion in how to weigh evaluative criteria, they tend to do so selectively, in a way that biases outcomes in favor of white ratees. In one part of their study, participants were told they were assisting a university in making admission decisions, and they were given information on factors such as test

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<sup>35</sup>S. T. Fiske, M. Lin, and S. L. Neuberg, "The Continuum Model: Ten Years Later," p. 231-54 in *Dual Process Theories in Social Psychology*, edited by S. Chaiken and Y. Trope, Guilford Press, 1999; T. E. Nelson, M. Acker and M. Manis, "Irrepressible Stereotypes," *Journal of Experimental Social Psychology*, Vol. 32, 1996, p. 13-38; J. L. Eberhardt and S. T. Fiske, "Motivating Individuals to Change: What Is a Target to Do?" p. 369-415 in *Stereotypes and Stereotyping*, edited by C. N. MacRae, C. Stangor, and M. Hewstone, Guilford Press, 1996; A. M. Konrad and F. Linnehan, "Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?" *Academy of Management Journal*, Vol. 38, 1995, p. 787-829; T. F. Pettigrew and J. Martin, "Shaping the Organizational Context for Black American Inclusion," *Journal of Social Issues*, Vol. 43, 1987, p. 41-78; G. R. Salancik and J. Pfeffer, "Uncertainty, Secrecy, and the Choice of Similar Others," *Social Psychology*, Vol. 41, 1978, p. 246-55; C. T. Schreiber, K. F. Price, and A. Morrison, "Workforce Diversity and the Glass Ceiling: Practices, Barriers, Possibilities," *Human Resource Planning*, Vol. 16, 1993, p. 51-69; P. E. Tetlock, "Accountability: The Neglected Social Context of Judgment and Choice," p. 297-332 in *Research in Organizational Behavior*, Vol. 7, edited by L. L. Cummings and B. M. Staw, Jai Press, 1985; P. E. Tetlock and J. I. Kim, "Accountability and Judgment Processes in a Personality Prediction Task," *Journal of Personality and Social Psychology*, Vol. 52, 1987, p. 700-709; P. E. Tetlock, "The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model," *Advances in Experimental Social Psychology*, Vol. 25, 1992, p. 331-376. To see how human resource professionals apply these principles in the design of personnel systems, see R. D. Gatewood and H. S. Field, *Human Resource Selection*, Fifth Edition, Dryden Press, 2001; and H. G. Heneman, III, R. L. Heneman, and T. A. Judge *Staffing Organizations*, Third Edition, Mendota House and Richard D. Irwin, 1999.

scores and high school grades for (hypothetical) African American and white applicants. When applicants were strong on one dimension and weak on the other, raters tended to give the stronger dimension a greater weight for white applicants and the weaker one a greater weight for African American applicants.<sup>36</sup> In other words, they exercised their discretion in a way that ensured that whites would rank on top. The authors summarize their findings as follows:

White college participants (whom, relative to the general population may be regarded as generally moderate to low prejudiced...), give White candidates the "benefit of the doubt," a benefit they do not extend to Blacks.<sup>37</sup>

24. In a study of gender bias with a similar experimental design, Eric Uhlmann and Geoffrey Cohen found that when given discretion on defining and weighing qualifications, evaluators redefined criteria of success so that men were assigned to stereotypically male jobs and females were assigned to stereotypically female jobs.<sup>38</sup> They concluded (p. 474) that "even without ambiguity in applicants' credentials, the criteria used to assess merit can be defined flexibly in a manner congenial to the idiosyncratic strengths of applicants who belong to desired groups." By acting in this

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<sup>36</sup>G. Hodson, G., J. F. Dovidio and S. L. Gaertner, "Processes in Racial Discrimination: Differential Weighting of Conflicting Information," *Personality and Social Psychology Bulletin*, Vol. 28, 2002, p. 460-471.

<sup>37</sup>S. L. Gaertner, J. F. Dovidio, J. Nier, G. Hodson, and M. A. Houlette, "Aversive Racism: Bias Without Intention," p. 377-393 in *Handbook on Employment Discrimination Research: Rights and Realities*, edited by R. L. Nelson and L. B. Neilson, Kluwer Academic Press, 2005 (internal citation omitted, quotation on p. 384); G. Hodson, J. F. Dovidio, and S. L. Gaertner, "Processes in Racial Discrimination: Differential Weighting of Conflicting Information," *Personality and Social Psychology Bulletin*, Vol. 28, 2002, p. 460-471.

<sup>38</sup>E. L. Uhlmann and G. L. Cohen, "Constructed Criteria: Redefining Merit to Justify Discrimination," *Psychological Science*, Vol. 16, 2005, p. 474-480.

way, decision-makers can justify biased decisions by appealing to seemingly "objective" criteria. In their words (p. 479):

Bias in the construction of job criteria allows evaluators both to discriminate and to maintain a personal illusion of objectivity. Although gender stereotypes encourage discrimination, egalitarian norms compel making hiring decisions on the basis of applicants' merit rather than their group membership. These conflicting pressures can be reconciled by defining and redefining merit in a manner that justifies discrimination.<sup>39</sup>

Although theirs is a study of gender bias, Uhlmann and Cohen conclude their study by linking it to the research of Gaertner and Dovidio described above, noting (p. 479) that it "dovetails with work on aversive racism in suggesting that prejudice often expresses itself in rationalizable ways..." In sum, this body of research demonstrates that discretion in the definition and weighing of evaluative criteria, even with regard to ostensibly objective criteria, contributes to bias, and it often does so in a way that allows decision-makers to justify to themselves and to others that their actions are fair and nondiscriminatory.

25. Formal written policies alone, such as specific guidance on assessing and weighing evaluative criteria, are not sufficient to minimize bias. Passive organizational approaches to the prevention of discrimination that take action only after an incident is brought to the attention of management are often ineffective. A written antidiscrimination policy that is simply reactive, responding to complaints, and lacking effective accountability, is often a symbolic exercise in "going through the motions," with little substantive impact on creating organizational policy and practice that is free of bias.<sup>40</sup>

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<sup>39</sup>Also see M. I. Norton, J. A. Vandello, and J. M. Darley, "Casuistry and Social Category Bias," *Journal of Personality and Social Psychology*, Vol. 87, 2004, p. 817-831.

<sup>40</sup>L. B. Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *American Journal of Sociology*, Vol. 97, 1992, p. 1531-1576; L. B. Edelman, S. Patterson, E.

Sociologist and legal scholar Lauren Edelman, the leading expert on this topic, summarizes the findings of fifteen years of research on organizational responses to EEO as follows:

Because it is generally the form rather than the substance of compliance that attains an institutionalized status, there is variation in how enthusiastically management, as well as the personnel who staff compliance structures, embraces legal ideals. In some cases, structures have both symbolic and substantive significance -- their form signals attention to legal ideals and they operate to enhance the workplace status and conditions of legally protected employees. In other cases, however, the structures fit the law in form but lack substantive effect. Organizations may strategically seek to create compliance structures merely as symbolic gestures by "decoupling" those structures from core organizational activities. Organizations may, for example, create affirmative action officer positions but give the officer little or no autonomy or authority or create grievance procedures that are hard to access and known to provide little relief.<sup>41</sup>

26. The most effective approaches rely on proactive policies and practices, including recurring and mandatory training of managers and supervisors, and systematic and consistent monitoring of outcomes of personnel decisions.<sup>42</sup>

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Chambliss, and H. S. Erlanger, "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma," *Law and Policy*, Vol. 13, 1991, p. 73-97; L. B. Edelman, H. S. Erlanger, and J. Lande, "Employers' Handling of Discrimination Complaints: The Transformation of Rights in the Workplace," *Law & Society Review*, Vol. 27, 1993, p. 497-534; L. B. Edelman, Lauren B. and S. Petterson, "Symbols and Substance in Organizational Response to Civil Rights Law," in *Research in Social Stratification and Mobility*, 1999; J. S. Leonard, "Women and Affirmative Action," *Journal of Economic Perspectives*, Vol. 3, 1989, p. 61-75. Also see J. S. Leonard, *Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers*, Report prepared for the U. S. Department of Labor, Glass Ceiling Commission, April 1994.

<sup>41</sup>L. B. Edelman, "Law at Work: The Endogenous Construction of Civil Rights," p. 337-352 in *Handbook on Employment Discrimination Research: Rights and Realities*, edited by R. L. Nelson and L. B. Neilson, Kluwer Academic Press, 2005 (internal citation omitted, quotation on p. 345-346). Also see K. D. Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," *Washington University Law Quarterly*, Vol. 81, p. 487-544. On the general issue of decoupling of organizational functions, see D. J. Orton and K. E. Weick, "Loosely Coupled Systems: A Reconceptualization," *Academy of Management Review*, Vol. 15, p. 203-223.

<sup>42</sup>For a review of monitoring and accountability as strategies for ensuring equal employment opportunity, see Bielby, 2000, *op cit.*; also see S. Sturm, "Second Generation Employment Discrimination: A Structural Approach," *Columbia Law Review*, Vol. 101, 2001, p. 458-568; B. F. Reskin, "Including Mechanisms in Our Models of Ascriptive Inequality," *American Sociological Review*, Vol. 68, 2003, p. 1-21 (see, especially, p. 12-14); and A. Kalev, F. Dobbin, and E. Kelly, "Best Practices or Best Guesses?"

27. Effective accountability also requires explicit evaluation of managers and supervisors on their contributions to an organization's equal opportunity goals. Nearly all medium- to large-scale organizations have a written antidiscrimination policy, and many have a written policy stating that implementing the objectives of the Affirmative Action Plan is the responsibility of every employee. However, such policies are merely symbolic unless they also delineate explicit duties and responsibilities relating to equal opportunity in each manager's or supervisor's job description, which can then be related to specific evaluative dimensions in the performance reviews of those employees. In short, in the area of EEO as well as other aspects of human resources, "what gets measured gets done."<sup>43</sup>

#### **DEFICIENCIES IN THE FEDEX PERSONNEL SYSTEM FOR MINIMIZING BIAS**

28. A number of FedEx's policies are based on sound principles of human resource management. For example, it is the company's stated claim that selection criteria are to be limited to job-relevant factors, based on systematic job analyses with input from subject matter experts.<sup>44</sup> It is company policy that any manager who conducts

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Diversity Management and the Reduction of Inequality," Paper Presented at the Meeting on Social Scientific Perspectives on Employment Discrimination in Organizations," Center for Advanced Study in the Behavioral Sciences, Stanford, CA, November 2005. For an example of policies and practices used by human resources professionals for establishing effective monitoring and accountability, see D. Kennedy, *Accountability: Establishing Shared Ownership*, Berrett-Koehler Communications, 2000.

<sup>43</sup>M. Giovannini, "What Gets Measured Gets Done: Achieving Results Through Diversity and Inclusion," *Journal for Quality and Participation*, Vol. 27, 2004, p. 21-27; S. Kerr, "On the Folly of Rewarding A, While Hoping for B," *Academy of Management Journal*, Vol. 18, 1975, p. 769-783; Bielby, 2000, *op cit*.

<sup>44</sup>See, e.g. Hater depo., Vol. II, p. 169-170, 291-293; Brooks depo., p. 152-153.

interviews as part of the ASPIRE selection processes for promotion into management is to be trained in behavioral interview techniques (interviews are used in only a limited number of promotions into hourly positions).<sup>45</sup> In addition, employee perceptions of managerial performance and workplace climate are assessed via the Survey Feedback Action (SFA) program, and that information is used in making selection decisions about promotions.<sup>46</sup> The MGRAAP system provides a mechanism for underutilization information from the companies Affirmative Action Plans to be communicated to managers who are filling job openings.<sup>47</sup>

29. However, the system has significant deficiencies as well. Perhaps the most pervasive is the almost complete absence of any monitoring of racial disparities or disparate impact in personnel outcomes, apart from the utilization analyses provided by an outside vendor that supplies analyses for the Affirmative Action Plans. Most importantly, there is no monitoring of racial disparities and adverse impact of performance reviews,<sup>48</sup> despite the large body of scientific and management studies demonstrating that this is an area of human resources systems that can be especially vulnerable to bias, and despite the fact that the data for conducting such an analysis is readily available to the human resources professionals responsible for the effectiveness of performance assessment. Nor have those professionals at FedEx undertaken efforts to

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<sup>45</sup>Speroff depo., Vol. I, p. 203-209, 233-234; Buchanan depo., p. 102-106, 112-115.

<sup>46</sup>Speroff depo., Vol. I, p. 193-194; Hayward depo., p. 60-61.

<sup>47</sup>Collins depo., p. 41-42; Buchanan depo., p. 97-98.

<sup>48</sup>Hayward depo., p. 50-51; also see Brooks depo., p. 25.

analyze how performance reviews affect other employment decisions such as promotion and compensation.<sup>49</sup>

30. While the company's human resources professionals devote considerable effort to assessing the "content validity" of selection criteria and performance dimensions, those exercises only address the relationship between job knowledge, skills, and aptitudes and the policies as they exist on paper. Very little effort is devoted to monitoring how performance assessment and selection tools are actually applied in practice. For example, Dr. Hayward testified that management has access to and monitors reports on whether performance reviews are being conducted according to the planned schedule of deadlines, but she was aware of no requirement that management monitor how reviews are conducted in practice. She testified that higher level managers have access to all completed reviews which they can use "to audit at any point they see fit," but as the person responsible for the effectiveness of performance reviews, she had never seen one done.<sup>50</sup>

31. While guidelines for ratings of performance dimensions appear on performance review forms, Dr. Hayward was not aware of any company policy or practice to ensure that they are in fact applied consistently. She testified: (1) that there is no specific policy outlining how to make a rating; (2) that judgments about the weights to be assigned to individual components of a performance dimension in order to obtain an

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<sup>49</sup>Hayward depo., p. 92-93.

<sup>50</sup>Hayward depo., p. 144-146. Mr. Perry, a Senior Manager at the Oakland hub, testified that he does "random audits" of how his managers conduct performance reviews (Perry depo., p. 110-111). However, Mr. Perry, who testified that he personally refers to no written documents when he conducts a

overall rating for that dimension are left to the discretion of individual managers; and (3) that the company took no efforts to monitor whether managers were taking into consideration factors other than those specified in the written guidelines.<sup>51</sup>

32. Prior to the implementation of the online performance review process sometime between 2000 and 2002, managers were delegated discretion for determining weights assigned to each dimension of an overall performance rating for hourly employees in some if not all job classifications.<sup>52</sup> Similarly, in performance ratings for managerial employees, weighing of subcomponents of dimensions such as "judgment and decision making" is left to the discretion of the individual doing the assessment.<sup>53</sup>

33. Dr. Hayward, the professional responsible for the effectiveness of performance reviews, was aware of no company-mandated training on how to apply the written guidelines, although she had "anecdotal evidence" that some training was done on-the-job by peers.<sup>54</sup> Other testimony indicates that managers are exposed to some training about performance reviews, but that this occurs mainly when they first become managers and sporadically after that, and that it primarily involves an overview of how to fill out forms, and disseminating information about various resources related to conducting performance reviews.<sup>55</sup> In contrast, management scholars explain: (1) that

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performance review, also testified that he was unaware of his manager (Managing Director Robin Van Galder) auditing any management performance reviews (Perry depo., p. 111, 171-172).

<sup>51</sup>Hayward depo., p. 181-183, 203-207.

<sup>52</sup>Hayward depo., p. 154-161; Miller depo., p. 194-197.

<sup>53</sup>Deberry depo., p. 91-92; Perry depo., p. 127-131, 148-143.

<sup>54</sup>Hayward depo., p. 180-181

<sup>55</sup>Buchanan depo., p. 157-164; Perry depo., p. 142-143, 147-149, 156, 160-170, 175-176.

effective training on conducting fair and effective performance reviews requires hands-on rating exercises with instructor feedback, rather than overviews lasting no more than a few hours; (2) that training needs to be repeated at regular intervals, not just when a new system is introduced; and (3) that training needs to be tied to a policy of holding raters accountable for how they perform the task, with real consequences for inadequate performance.<sup>56</sup>

34. FedEx policy and practice regarding promotion, compensation, and discipline is similar to that regarding performance reviews: no analysis of racial disparities or disparate impact; and little monitoring of how policy is implemented. Danny Rhea, Managing Director for Global Compensation, testified that the company has not done any studies of compensation disparities by race.<sup>57</sup> Similarly, Managing Director Robert Speroff, designated by the company to testify about promotion policy and practice, was not aware of any studies done of promotion disparities by race.<sup>58</sup> Dr. David Brooks, who participated in the development and implementation of the ASPIRE process for promotion into management, testified that there have been no disparate impact studies of that process or of any of its components.<sup>59</sup> Shannon Brown, the Vice President for Human Resource Services and the company's top diversity officer, testified that during the past four years, he saw only one written document addressing the representation of

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<sup>56</sup>M. A. Hauenstein, "Training Raters to Increase the Accuracy of Appraisals and the Usefulness of Feedback," pp. 404-442 in *Performance Appraisal: State of the Art in Practice*, edited by J. W. Sither, Jossey-Bass, 1998.

<sup>57</sup>Rhea depo., p. 69-70; also see Hayward depo., p. 83.

<sup>58</sup>Speroff depo., Vol. I, p. 49.

African Americans in management, and that was a one-page document prepared in early 2004.

35. In his role as Vice President of Human Resource Services and Chief Diversity Officer, Mr. Brown has never asked anyone to conduct an analysis of the representation of African Americans or Hispanics in management at FedEx.<sup>60</sup> Mr. Brown testified that he had never spoken to his supervisor, the Executive Vice President of Human Resources, about minority representation in management at Fed Ex, nor could he recall ever speaking the company's top executives (CEOs of FedEx Express and FedEx Corporation) about that topic.<sup>61</sup> In his role as Chief Diversity Officer, Mr. Brown had never set any diversity goals for the company, and he had never directed anyone to prepare an analysis of the effectiveness of the company's diversity programs.<sup>62</sup> Similarly, Senior Human Resources Representative Anita Collins, who assists in the preparation of the company's affirmative action plans, testified that she has never been asked to conduct and has never prepared

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<sup>59</sup>Brooks depo., p. 107-108, 129-131. Nor has there been any study of the racial composition of the interview panels that make selection decisions (Brooks depo., p. 71-72).

<sup>60</sup>Brown depo., p. 50-57. Mr. Brown also testified (p. 27, 50-54) that the company's Officer Diversity Council, which is charged with taking "proactive efforts" in the area of diversity, conducts no studies or analyses of minority representation in management, apart from one requested by the FedEx legal department in early 2004. Mr. Brown could provide no reason for his failure to ask for any written analysis of this issue (Brown depo., p. 63-64). Ms. Anita Collins, the Senior Human Resources Representative responsible for Affirmative Action Plans (AAPs) in the Western and Southwestern regions, testified that apart from the studies done by the outside vendor for the AAPs, there are no annual analyses of minority representation in any job category at FedEx (Collins depo., p. 32-37, 69-70).

<sup>61</sup>Brown depo., p. 10, 57-59.

<sup>62</sup>Brown depo., p. 59, 70. Nor had Mr. Brown ever seen a written analysis of the effectiveness of the company's diversity programs (Brown depo., p. 70-71). Mr. Brown testified (p. 60-61) that the only written description of goals related to diversity is a one paragraph mission statement on diversity. Mr. Brown also testified (p. 16) that he had no job duties directly relating to affirmative action.

any written analysis of the effectiveness of the company's affirmative action plans.<sup>63</sup>

Catherine Banks, the company's Manager of Human Resources Compliance, gave similar testimony.<sup>64</sup>

36. According to Mr. Brown, there is no written process for monitoring diversity at FedEx.<sup>65</sup> Compliance Manager Banks, the individual designated by the company to testify about EEO policies, stated that she was unaware of any proactive system in place at FedEx to ensure that the company was in compliance with its equal opportunity policy.<sup>66</sup> And while managers are provided with information on underutilization in making selection decisions (see above at paragraph 28), deposition testimony of managers who make those decisions is inconsistent regarding whether they actually do so in any consistent and significant manner.<sup>67</sup>

37. The company's Equal Employment Opportunity Policy States:

The FedEx Express Equal Employment Opportunity and Affirmative Action Programs (EEO/AAP) work in conjunction with each other to ensure compliance with government regulations with regard to both.<sup>68</sup>

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<sup>63</sup>Collins depo., p. 43-45.

<sup>64</sup>Banks depo., p. 32-33.

<sup>65</sup>Brown depo., p. 71. Although the company has "Best Practices" manuals that are distributed throughout the company, there is no best practices document on the topic of diversity (Brown depo., p. 71-72).

<sup>66</sup>Banks depo., p. 35.

<sup>67</sup>See, for example, Six depo., p. 151-153; Presnoples depo., p. 110-120; W. Delgado depo., p. 155; Suazo depo., p. 155-163.

<sup>68</sup>2003 People Manual, Section 4-55, p. 227 (BATES PM1003P227).

When Human Resources Compliance Manager Banks, testifying on behalf of the company about its EEO policies, was asked how these two programs work in conjunction with each other to ensure compliance, Ms. Banks answered that she did not know.<sup>69</sup>

38. Although promotions into hourly positions are normally supposed to be based on priority group status and CEV scores, company policy allows for departures from selections based on CEV rankings.<sup>70</sup> Statistics compiled by Dr. Drogin indicate that promotion decisions that depart from rankings based on priority group and CEV scores are common, as many as 20,000 instances from January 1997 through January 2006 (Drogin 2006 Expert Report, paragraphs 50 and 51). In addition, a manager can withhold approval for an employee who has applied to move to a position in a different job group if that employee has any "performance deficiencies that are related to the desired position."<sup>71</sup> However, there are few guidelines for managers regarding what constitutes a job-related performance deficiency, and managers are not required to make a written record of whether they are withholding approval because of a performance deficiency or for some other reason.<sup>72</sup>

39. Mr. Speroff testified that he was aware of no proactive monitoring of managers' compliance with promotion policies. According to him, there is no direct assessment of managers' compliance with promotion policies as part of their regular

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<sup>69</sup>Banks depo., p. 18-19.

<sup>70</sup> Speroff depo., Vol. I, p. 78-80; Perry depo., p. 96-97; Hesser depo., p. 60-62, 122-123; Williamson depo., p. 54-55; Buchanan depo., p. 131-132.

<sup>71</sup>2003 People Manual, Section 4-5, p. 181, Table 1 and Table 2 (BATES PM1003P181).

<sup>72</sup>Speroff depo., Vol. I, p. 70-71, 101-102; Vandeberg depo., p. 53-55.

performance reviews, and the *only* way departures from policy would be detected is if a promotion candidate filed a complaint under the company's Guaranteed Fair Treatment (GFT) dispute resolution process.<sup>73</sup> Business Systems Analyst Vickie Williamson testified that the JCAT system is not structured to notify Human Resources or the selected candidate's current manager about selections for hourly promotions that depart from the CEV rankings. She also testified that there is no tracking system of any sort in place to monitor or track the extent to which hiring managers are selecting candidates with the highest CEV.<sup>74</sup> Senior Human Resources Representative Anita Collins testified that apart from impact ratio analyses required by government agencies, the company does no written analyses of racial disparities in promotion rates.<sup>75</sup>

40. Mr. Speroff gave similar testimony regarding monitoring of the company's discipline policies. According to him, the GFT process is the only mechanism for monitoring whether managers are complying with policy in their handling of disciplinary suspensions or suspensions with pay pending investigations.<sup>76</sup>

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<sup>73</sup>Speroff depo., Vol. I, p. 39-40, 47-49, 71-72, 101-102, 120-121, 134-137; Speroff depo., Vol. II, p. 46-47. Also see Hesser depo., p. 102-104. According to Shannon Brown, the GFT process is designed for complaints regarding selection, performance, and discipline and is not designed for resolving complaints about race discrimination. A separate internal EEO complaint process is used for complaints about racial discrimination (Brown depo., p. 101-104; Banks depo., p. 37-38).

<sup>74</sup>Williamson depo., p. 122-124.

<sup>75</sup>Collins depo., p. 38-41.

<sup>76</sup>Speroff depo., Vol. II, p. 164-165, 181-182. In contrast, the policy regarding terminations is more proactive. It is company policy that three notifications of a disciplinary deficiency (warning letter or performance reminder) "normally results in termination." However, the registration of the third deficiency automatically triggers a full review of the employee's entire work history at FedEx, and written policy specifies that "management is responsible for thoroughly reviewing an employee's disciplinary record with the Company and exercising judgment in determining appropriate action" (Policy 2-5, p. 54 of the October, 2003 People Manual; Speroff depo., Vol. II, p. 194-197). That is, with three active disciplinary actions, Human Resources is required to approve a manager's decision not to terminate (Speroff depo., Vol. II, p. 197-198). Mr. Speroff was asked: "Is there any reason that FedEx does not use this type of prompting or

41. Besides being a reactive form of accountability, FedEx's practice of relying on complaints as a monitoring mechanism is especially ineffective, since the company does not do any tabulations or analysis of outcomes of employee complaints and disparities by race.<sup>77</sup> It also provides no accountability for personnel actions involving casual employees, since they are not covered by the GFT process. Those employees are especially disadvantaged, since they do not receive performance reviews, they are ineligible for merit raises, they do not have access to the JCATS system, and there is no policy for considering their experience with the company as a factor in considering them for permanent hourly positions.<sup>78</sup> Nothing in FedEx policy prohibits managers for using a "tap on the shoulder" system for inviting casual employees to apply for open permanent hourly positions.<sup>79</sup>

42. In sum, in the area of equal employment opportunity at FedEx, the management principle of "what gets measured gets done" appears to have been replaced with one of "out of sight, out of mind," or, perhaps, "don't ask, don't tell." The company allows discretion to be exercised in key areas of personnel decision-making without monitoring the process or assessing its impact on equal employment opportunity. Top executives responsible equal employment opportunity, affirmative action, and diversity are uninformed about the impact of company policies in these areas. Those who oversee

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alert mechanism to ensure compliance with FedEx's policies in cases where discipline is being issued and the employee is adversely impacted?" His response (p. 198) was: "I can't think of any."

<sup>77</sup>Brown depo., p. 88-90, 92-94; Rouzan depo., p. 15-16; Banks depo., p. 73-74; Dandridge depo., p. 25-26; Brooks depo., p. 23-24.

<sup>78</sup>Huffer depo., p. 11-12, 32-35, 53-56, 79-82; Presnoples depo., p. 124-131; Williamson depo., p. 12; Buchanan depo., p. 132-134.

<sup>79</sup>Presnoples depo., p. 130.

and implement policies and practices regarding performance assessment, promotion, compensation, and discipline eschew analysis of racial disparities. Instead, it appears that they simply assume that the human resources system is free of bias, with no factual basis for that assumption.

**THE EXERCISE OF DISCRETION IN FEDEX'S HUMAN RESOURCE SYSTEM  
HAS AN ADVERSE IMPACT ON MINORITIES**

43. Above, I summarized research by social scientists and management professionals indicating that the exercise of discretion in a human resources system can have an adverse impact on minorities. Data available from the FedEx personnel system allow for several tests of whether the exercise of discretion at the company works to the disadvantage of minority employees. Plaintiffs' statistical expert, Dr. Richard Drogin, has performed several tests of this conjecture, and each supports the conclusion that discretionary aspects of the personnel system disadvantage minority employees relative to whites.

44. In the first study, Dr. Drogin studied exceptions to the requirement that to be eligible to apply for an hourly position in the JCATS system, an employee: (1) should not have a disciplinary deficiency (disciplinary warning within twelve months or disciplinary reminder within six months); (2) have met the minimum required time in job; and (3) have a performance rating of at least 5.0. (Policy allows local managers, at their own discretion, to waive the disciplinary exclusion if they determine that the disciplinary

action is for infractions unrelated to the requirements of the posted job.<sup>80</sup>) Dr. Drogin found that over two thirds of whites (68%) who sought to apply despite failing to meet at least one of the requirements were indeed approved to apply for an open position, compared to 61% for African Americans and 62% for Hispanics. Conversely, among those seeking to apply who met all three requirements, 15% of whites were denied approval, compared to 21% of African Americans and 19% of Hispanics.<sup>81</sup>

45. Second, Dr. Drogin analyzed the incidence of departure from policy requiring that those in priority job group 1 be eligible for promotion into open positions ahead of those in priority job group 2 and specifying that selections within job groups be made according to CEV ranking. Dr. Drogin referred to an applicant as receiving a "passover" if he or she is in job group 2 and is selected instead of an applicant in job group 1 or is selected with a CEV score lower than a non-selected applicant in the same priority group. Dr. Drogin's analysis shows that whites were significantly more likely to receive these "passover" promotions than either African Americans or Hispanics.<sup>82</sup>

46. Finally, Dr. Drogin's analysis of racial disparities in performance ratings of hourly employees shows that disparities tend to be greater for years 1997 through 2001

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<sup>80</sup>Speroff depo., Vol. I, p. 125-127, 220-221; Fifer depo., p. 43-48; McDonald depo., p. 86-87. Managers also exercise some discretion in deciding whether to discipline employees over minor infractions of policies such as those pertaining to punctuality; see, e.g., McDonald depo., p. 101-105 and Rey depo., p. 178-186.

<sup>81</sup>2006 Drogin Report, paragraphs 47-49, Tables 17a and 17b. Dr. Drogin obtains similar results when he controls for having passed the Basic Skills Test (paragraph 55, Table 20).

<sup>82</sup>2006 Drogin Report, paragraphs 50-51, Table 18. Dr. Drogin obtains similar results when he controls for having passed the Basic Skills Test (paragraph 56, Table 21).

compared to more recent years.<sup>83</sup> As noted above at paragraph 32, in the years prior to the implementation of the online system, managers had discretion regarding the weighting of performance dimensions. The greater disparity in performance ratings during those years is consistent with the hypothesis that discretion was exercised in a manner that was disadvantageous to African American and Hispanic hourly employees. However, because the company has yet to produce accurate information on the timing of changes to the performance rating system, a precise assessment of this hypothesis is not possible with the available data.

47. In short, social science research demonstrates that the exercise of discretion in personnel systems in the absence of adequate monitoring is vulnerable to bias against minorities, and Dr. Drogin's findings demonstrate that this phenomenon was indeed present at FedEx. It is reasonable to assume that other discretionary and unmonitored aspects of the personnel system for which there is no quantitative data are similarly biased against minority employees.

#### **NOT ALL RACIAL BIAS AT FEDEX IS SUBTLE**

48. There is testimony in the record that high-level FedEx managers have used racial slurs in referring to African Americans and created a climate that has been hostile to minorities. Michael Snyder, who was Vice President for the United States Eastern Region, testified that at the time Theodore "Ted" Weise was Vice President of Ground Operations, Weise (who eventually became CEO of FedEx) used racial slurs on multiple

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<sup>83</sup>2006 Drogin Report, Tables 30a and 30b.

occasions, and that Weise inappropriately instructed Snyder to tell "the fucking nigger with the beard" (an African American manager working for Snyder) to shave his beard. Snyder was warned by Michael Figors, at the time Managing Director of Southern California (and who subsequently became Vice President of AGFS Western Region) not to challenge Weise on the matter and to carry out his directive.<sup>84</sup> In placing the incident with Weise in context, David Rebholz, at the time a regional Vice President (and currently Executive Vice President, Operations and Systems Support), counseled Snyder that he needed to understand that the company had a "southern mentality" and that he would have to accept it or risk being an outsider.<sup>85</sup> Snyder also testified that Rebholz chastised him for being a "nigger lover" as evidenced by Snyder's concern about racial issues.<sup>86</sup>

49. Snyder testified that at the time he began his position as Managing Director at the Three Rivers District in Pennsylvania, David Rebholz, at the time Vice President of the Central Region, gave him an orientation about his peers and referred to one of the other Directors as a "a militant nigger with a chip on his shoulder."<sup>87</sup> Snyder also testified about racial hostility and slurs expressed by Timothy Wertner, who at the time was a FedEx Operations Manager (and later became Managing Director of the Los Angeles Empire District).<sup>88</sup>

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<sup>84</sup>Snyder depo., p. 20-28.

<sup>85</sup>Snyder depo., p. 47-48; Snyder *Pettaway-Vint v. FedEx* depo., p. 56. Mr. Snyder recalled that these comments were made in 1992 or 1993 (Snyder *Pettaway-Vint v. FedEx* depo., p. 70-71).

<sup>86</sup>Snyder depo., p. 47-48.

<sup>87</sup>Snyder depo., p. 39-42; Snyder *Pettaway-Vint v. FedEx* depo., p. 52-53.

<sup>88</sup>Snyder depo., p. 20-23, 26-31, 35-36, 50-51; Snyder *Pettaway-Vint v. FedEx* depo., p. 58-59, 72, 86.

50. Snyder left the company in 1998, but his testimony about the attitudes of top executives is relevant to the climate of FedEx during the years that followed. Social science research shows that organizational policies, practices, and the taken-for-granted understandings that are part of a company's culture, once in place, become institutionalized and rarely change in the absence of any substantial change in a firm's business, technical, or legal environment.<sup>89</sup> The climate described by Mr. Snyder also provides a context for the testimony of Janet Haynes, a former Operations Manager employed in Anchorage, Alaska. Haynes, who is African American, testified that she was often instructed to issue discipline to minority employees by white managers, who felt that doing so would reduce the credibility of any charges of racial discrimination.<sup>90</sup>

51. Most of the social science and management scholarship that I have relied upon and summarized above addresses subtle forms of discrimination, such as

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<sup>89</sup>L. Stinchcombe, "Social Structure and Organizations," p. 142-93 in *Handbook of Organizations*, edited by J. G. March, Rand McNally, 1965; M. T. Hannan and J. H. Freeman, "Structural Inertia and Organizational Change," *American Sociological Review*, Vol. 43, 1984, p. 143-164; J. N. Baron, "Organizational Evidence of Ascription in Labor Markets," in *New Approaches to Economic and Social Analyses of Discrimination*, edited by R. Cornwall and P. Wunnava, Praeger, 1991. The concept of organizational inertia has been applied in scientific studies conducted in a wide range of industrial settings. For reviews, see S. Kaplan and R. Henderson, "Inertia and Incentives: Bridging Organizational Economics and Organizational Theory," *Organization Science: A Journal of the Institute of Management Sciences*, Vol. 16, 2005, p. 509-521; and C. Gresov, H. A. Haveman, and T. A. Oliva, "Organizational Design, Inertia, and the Dynamics of Competitive Response," *Organization Science: A Journal of the Institute of Management Sciences*, Vol. 4, 1993, p. 181-208. Also see, for example, J. Riggema and M. H. Smith, "Organizational Change in the Shipping Industry: Issues in the Transformation of Basic Assumptions," *Human Relations*, Vol. 36, 1983, p. 765-790; E. Abrahamson and C. J. Fornbrun, "Macrocultures: Determinants and Consequences," *Academy of Management Review*, Vol. 19, 1994, p. 728-755; L. Gardenswartz and A. Rowe, "Diversity Management: Practical Application in a Health Care Organization," *Frontiers of Health Services Management*, Vol. 11, 1994, p. 36-40; G. T. Fairhurst, S. Green, and J. Courtright, "Inertial Forces and the Implementation of a Socio-technical Systems Approach: A Communication Study," *Organization Science*, Vol. 6, 1995, p. 168-185; C. Doucouliagos, "Conformity, Replication of Design and Business Niches," *Journal of Economic Behavior & Organization*, Vol. 30, 1996, p. 45-62; and M. Ruef, "Assessing Organizational Fitness on a Dynamic Landscape: An Empirical Test of the Relative Inertia Thesis," *Strategic Management Journal*, Vol. 18, 1997, p. 837-853.

<sup>90</sup>Haynes depo., p. 151-153, 197-221.

stereotyping, a cognitive process that under certain circumstances can influence anyone's perceptions and decision-making, regardless of their personal prejudices towards minority groups. However, blatant racism has not disappeared, and Mr. Snyder's testimony suggests that it has been a reality in middle-level and high-level management ranks at FedEx. Overt prejudice among managers undermines equal opportunity by contributing to an environment that is hostile toward persons of color, and it signals a lack of management commitment to equal employment opportunity, and commitment is considered a key element of effective policies for minimizing bias.<sup>91</sup>

## CONCLUSION

52. I have concluded that the personnel system at FedEx is uniform, centralized, and in any ways highly formalized and standardized. It also has discretionary features, and due to inadequate monitoring and accountability, these features are vulnerable to bias against African American and Hispanic employees. Statistical analyses of how discretion is exercised in the FedEx personnel system demonstrate that it has an adverse impact on minority employees, consistent with a large body of research by social scientists and management scholars on the sources of workplace racial bias. FedEx has taken a passive and reactive approach to equal employment opportunity, and its efforts at minimizing the potential for bias in decisions regarding performance assessment, pay, and promotion have been ineffective.

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<sup>91</sup>Konrad and Linneman, *op cit.*; Bielby, 2000, *op cit.*

Exhibit B

**EXPERT REBUTTAL REPORT OF WILLIAM T. BIELBY**

*Derrick Satchell, et al. v. FedEx Express*

September 1, 2006

1. My name is William T. Bielby. I am a Professor in the Department of Sociology at the University of Pennsylvania. I have been retained by the law firm of Lieff, Cabraser, Heimann & Bernstein, counsel for plaintiffs in *Derrick Satchell, et al. v. FedEx Express*. I have previously authored two Reports concerning *Derrick Satchell, et al. v. FedEx Express*, one in September 2004, submitted by plaintiffs in support of class certification ("Bielby-1"), and another in June 2006 ("Bielby-2"). I have been asked by plaintiffs' counsel to respond to the expert report of Dr. Philip Tetlock ("Tetlock Report") submitted in June 2006 and to comment on aspects of the analysis in Dr. Mary Baker's June 2006 expert report ("Baker Report") that relate to her characterization of certain features of the FedEx personnel system as "objective" versus "subjective" and her analysis of discipline. Dr. Tetlock and Dr. Baker are experts retained by the defendant.

2. Since submitting Bielby-2 on June 30, 2006, I have been provided with the deposition transcripts and documents listed in Appendix A. I have also received all of the expert reports submitted by plaintiffs' and defendant's experts in June 2006.

**SUMMARY OF MY PRIOR REPORTS IN *SACHELL, ET AL. V. FEDEX***

3. In Bielby-1, I described the structure of the Western Region of FedEx Express ("FedEx") personnel system and features of the company's policies and practices for making decisions about compensation, promotions, and performance assessment and for addressing equal employment opportunity (EEO). I also summarized the substantial

forum and address them with empirical research. Tetlock's criticisms of the field have been aired in a scientific forum, the journal *Psychological Inquiry*, and the leading researchers in the field have provided detailed responses in the same issue of the journal.<sup>11</sup> When debate focuses on scientific issues it provides the impetus for further empirical research, which moves the field forward. In contrast, simply labeling research as "controversial" and making attributions about the personal values and political attitudes of those who contribute to it impedes rather than advances scientific research.

15. Interestingly, the specific scholarship Tetlock criticizes in *Psychological Inquiry*, the "implicit association test" developed by Anthony Greenwald of the University of Washington and Mahzarin Banaji of Harvard University, is not work I cite in my report, yet, Tetlock devotes ten paragraphs of his expert report to repeating the attack on this line of research.<sup>12</sup> In contrast to his critique published in *Psychological Inquiry*, in the context of this litigation Tetlock embellishes his criticisms with provocative labels and attacks on the alleged politics and motives of those with whom he disagrees.<sup>13</sup>

<sup>11</sup>H.R. Arkes and P. E. Tetlock, "Attributes of Implicit Prejudice, or 'Would Jesse Jackson 'Fail' the Implicit Association Test?," *Psychological Inquiry*, Vol. 15, 2004, p. 257-278; M. R. Banaji, B. A. Nosek, and A. G. Greenwald, "No Place for Nostalgia in Science: A Response to Arkes and Tetlock," *Psychological Inquiry*, Vol. 15, 2004, p. 279-310. Regarding criticisms of the "response latency" methodology used in implicit bias research, social psychologist Eugene Borgida and colleagues wrote:

However, given the firm grounding of methodologies in cognitive psychology as well as consistency of response patterns found across numerous studies, there is no serious question within the psychological community about whether response latency methodologies are a useful means of studying stereotyping.

J. S. Hunt, E. Borgida, K. M. Kelley, and D. Burgess, "Gender Stereotyping: Scientific Status," pp. 384-426 in *Modern Scientific Evidence: The Law and Science of Expert Testimony*, edited by D. Faigman, D. H. Kaye, M. J. Sacks, and J. Sanders, West Publishing Co., 2002, quotation from p. 390.

<sup>12</sup>Tetlock Report, p. 14-19, paragraph 24-33. Tetlock's attack on the scholarship based on the implicit association test is almost identical to the one that appears in his report submitted in *Nelson v. Wal-Mart*.

<sup>13</sup>Tetlock's attack on the research of Greenwald, Banaji, and their collaborators has also appeared on the opinion page of the *Wall Street Journal*. See A. Wax and P. E. Tetlock, "We're All Racists at Heart," *Wall Street Journal*, December 1, 2005, p. A16.