IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA CARTER MCREYNOLDS, et al.,	*	
	*	
Plaintiffs,	*	
v.	*	Civil Action No. 1: 01-CV-00510 (ESH)
SODEXHO MARRIOTT SERVICES, INC.,	*	Judge Ellen Segal Huvelle
Defendant.	*	

* * * * * * * * * * * * * * * * *

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AS TO CLASSWIDE LIABILITY

Defendant Sodexho Marriott, Inc. ("Sodexho"), by its undersigned counsel, respectfully moves this Honorable Court for summary judgment as to all claims asserted by Plaintiffs as a class, including their claims for relief arising under Title VII and 42 U.S.C. § 1981 under disparate treatment and disparate impact theories. In support of this motion, Sodexho hereby incorporates by reference the grounds, points and authorities set forth in the accompanying Memorandum in Support.

WHEREFORE Sodexho respectfully requests that this Honorable Court

a. Grant an order of summary judgment in favor of Sodexho and against Plaintiffs as to all counts of Plaintiffs' Complaint and as to all claims set forth therein;

b. Enter a judgment in favor of Sodexho and against Plaintiffs as to all counts of Plaintiffs' Complaint and as to all claims set forth therein;

c. Dismiss the Complaint with prejudice;

d. Award Sodexho its costs and fees as permitted by applicable law; and

e. Provide such further relief as the nature of this cause may require.

Respectfully submitted,

/s/

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April 1, 2004

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO CLASSWIDE LIABILITY

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO CLASSWIDE LIABILITY

Defendant Sodexho Marriott Services, Inc. ("Sodexho") respectfully moves for summary judgment as to classwide liability. As the Court has already gained extensive familiarity with many of the pertinent issues through the briefing for class certification, this Memorandum does not reiterate the basic facts already presented to the Court. Instead, Sodexho incorporates by reference its prior papers filed in opposition to certification. See Lewis v. Booz-Allen & Hamilton, Inc., 150 F. Supp. 2d 81, 90 (D.D.C. 2001).

INTRODUCTION

In granting class certification, the Court emphasized that, at the summary judgment stage, it would review Plaintiffs' evidence more rigorously. See McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 444 n.26 (D.D.C. 2002). At this stage in the proceedings, the test is much more stringent: whether Plaintiffs have met their heavy burden of demonstrating a nationwide pattern or practice of pervasive race discrimination in promotions throughout Sodexho. With the completion of discovery, the undisputed facts demonstrate that Plaintiffs fail to meet that essential burden because their statistical evidence indicates, at most, promotion disparities in only a small handful of Sodexho regions. Moreover, even if those limited pockets of disparities were credited by the Court as significant, further statistical analysis demonstrates conclusively that these few disparities result from the job-related education and prior experience of the employees, not their race. These and other grounds entitle Sodexho to summary judgment.

First, Plaintiffs have wholly failed to proffer evidence supporting their claim that Sodexho has a company-wide pattern or practice of race discrimination in promotions. Instead, even the badly flawed analysis of their own expert, Dr. Bernard Siskin, demonstrates that any

statistical disparity in promotions at Sodexho is localized and discrete: statistically significant findings of adverse impact occurred in ***only 9 of Sodexho's approximately 155 Regional Vice President ("RVP") regions***. This evidence is critical, because the regions are functionally and independently responsible for the vast majority of the promotion decisions at issue. Similarly, the anecdotal allegations of Plaintiffs are confined to a small handful of RVP regions and thus do not even remotely indicate a nationwide pattern and practice of discrimination. Such isolated instances of alleged discrimination do not constitute proof sufficient to satisfy the Teamsters requirement that the allegedly discriminatory pattern or practice be the defendant's "standard operating procedure." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

Second, Plaintiffs' slim evidence of isolated statistical disparities has been proven to be entirely unrelated to race. Following the Court's certification decision, Sodexho gathered data reflecting the education, prior experience, and other job-related factors affecting promotion decisions for its salaried exempt employees. Using Dr. Siskin's definitions of the employee movements that constitute a promotion (as well as Sodexho's definition of a promotion), Sodexho expert Dr. Joan Haworth performed analyses that controlled for education, prior experience, and other essential variables for a promotion study. In each of these studies, Dr. Haworth determined that African American managers did ***not*** have a statistically significant lower odds of being promoted. Further, Dr. Haworth performed alternate pools analyses and found that overall there was no difference in the number of promotions received by race. These findings were consistent for each of Sodexho's 155 RVP regions. This clear proof that the Plaintiffs' adverse statistics result from factors unrelated to race entitles Sodexho to summary

judgment.[1] See Koger v. Reno, 98 F.3d 631, 637-39 (D.C. Cir. 1996); Valentino v. United States Postal Serv., 674 F.2d 56, 71 (D.C. Cir. 1981).

Third, Plaintiffs' claims for disparate impact also fail. It is well settled that no such claims are available under 42 U.S.C. § 1981. General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 390-91 (1980); Mitchell v. DCX, Inc., 274 F. Supp. 2d 33, 45 (D.D.C. 2003). As for their Title VII claims, Plaintiffs do not even try to demonstrate statistically that any particular promotion practice caused a disparity in promotions for African Americans. Under equally settled law, that is a fatal flaw in their disparate impact claim. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656-57 (1989); Koger, 98 F.3d at 639-40; 42 U.S.C. §2000e-2(k).

In sum, Plaintiffs' evidence falls far short of establishing a pattern or practice of race discrimination or disparate impact resulting from a specific company-wide policy. By revealing that Plaintiffs' statistics demonstrate only very small pockets of statistically significant adverse disparities, and that a properly tailored regression analysis of these promotion decisions does not reveal regions with any statistically significant racial disparities, even under Plaintiffs' flawed methodology of defining a promotion, Sodexho has demonstrated its entitlement to summary judgment. If Plaintiffs' fatally flawed promotion analyses are allowed to overcome this proof to create a false image of nationwide discrimination, the Teamsters safeguards for "pattern or practice" class actions effectively will be gutted.

[1] As discussed below and in an accompanying motion to strike Dr. Siskin's opinions, which Sodexho incorporates by reference, Dr. Siskin attempted in his September and December 2003 reports to address these deficiencies by analyzing Dr. Haworth's regression analysis. His belated effort contains fundamental statistical errors. When those errors are corrected, Dr. Siskin's analyses demonstrate no statistically significant adverse impact in any of Sodexho's regions.

STATEMENT OF UNDISPUTED FACTS

Sodexho is one of the largest employers in North America, during the Class Period (March 27, 1998 to July 1, 2001) employing approximately 2,369 salaried exempt African American managers.[2] Its operations are divided among six corporate divisions (headquarters plus five operating divisions), and approximately 155 regions (headed generally by Regional Vice Presidents). Nearly all of the promotion decisions at issue in this case (95%) were made at or below the RVP regions within the five operating divisions. (Ex. 1, Haworth 07/03 Rep. at 70, Table 21). Sodexho's regions and divisions operate independently and have broad autonomy from the corporate headquarters in budgeting, strategic planning, sales, and marketing, typically maintaining their own staff in each of those areas. Id. at 36-37 ¶ 63 (quoting Hamman 4/14/03 Dep. Tr. 151); Ex. 2, T. Schuldt Decl. at ¶¶ 42-43; Ex. 3, G. Bateman Decl. at ¶¶ 19-21; Ex. 4, J. Williamson Decl. at ¶¶ 33-35; Ex. 5, G. Koenig Decl. at ¶¶ 20-22. Only a small proportion of promotion decisions were made above the RVP level. (Ex. 1, Haworth 07/03 Rep. at 70).

Sodexho has a ***higher*** representation of African Americans in salaried exempt positions than is represented in the relevant occupations or EEO categories. (Ex. 1, Haworth 07/03 Rep. at 32). Four of Sodexho's six divisions had *higher* statistically significant African American representation than the labor market African American availability, and *none* had lower representation than availability. Id. at 32. Similar results are found even at Sodexho's higher pay bands. Id.

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[2] This is the number that arises from applying the Court's certification order. Plaintiffs have not made any allegations regarding an entity, Wood Dining Services (a food service corporation with over 12,800 employees), that Sodexho acquired on June 21, 2001, a day before the promotion cut-off. Similarly, although the Court made reference to Sodexho's Canada division in its certification decision, McReynolds, 208 F.R.D. at 445 n. 30, Sodexho assumes that the Canada division is not part of the class. Plaintiffs did not seek its inclusion in their certification petition, and, in any event, Title VII does not apply to Canadian employees who work for Sodexho (see 42 U.S.C. § 2000e(f)). Plaintiffs have not identified a single African-American salaried exempt manager who is a United States citizen and worked in the Canada division, and Plaintiffs have never sought nor analyzed any promotion data relating to that division.

Indeed, the pattern of the named Plaintiffs' unsuccessful applications for positions shows anything but a homogenous, pervasive practice of discrimination. During the Class Period, they applied for 57 vacant positions (excluding those that were never filled or were filled by other African Americans). Those 57 applications were for positions in no more than 23 (of the approximately 155) RVP regions. In fact, in only ten (6%) of the RVP regions did the named Plaintiffs apply more than once. Nearly half (47%) of the applications were for positions in just two RVP regions, one of which (no. 324) was found by Dr. Siskin to have had statistically significant ***positive*** promotion results for class members. Moreover, of the 84 positions sought by named Plaintiffs where a candidate ultimately was selected, 26 (31%) were filled by African Americans. (Ex. 6, P. Bridger Decl. ¶ 17-18).

Plaintiffs' statistics show that any regions at Sodexho with statistically significant adverse results are localized and discrete, limited to only a handful of RVP regions. Data produced by the promotion analysis of Plaintiffs' expert, Dr. Bernard Siskin, show that at most ***only 9 of Sodexho's approximately 155 geographical RVP regions*** (fewer than 6%) had statistically significant disparities in promotions of African Americans. (Ex. 7, Haworth 03/05/02 ("Haworth II") Decl. at 2 ¶ 4 & at 4, Ex. 8, Haworth 10/1 Rep. at 56). The data for the Health Care Services region (Region 324) where many named plaintiffs were located and where many of their anecdotes allegedly arose, show statistically significant ***positive*** results. (Ex. 9, Haworth 01/15/02 ("Haworth I") Decl. at 2). Conversely, even using Dr. Siskin's methodology, only one named Plaintiff, Dwain Richardson, applied to a position in an RVP region with statistically significant disparities. (Ex. 8, Haworth 10/01 Rep. at 4). Yet Dr. Siskin performed no independent investigation of the significance of regional variations and instead relied on ***counsel's*** instruction that he should ***assume*** a nationwide problem. (Ex. 10, Siskin I Tr. 10-11).

Plaintiffs' alleged anecdotal evidence of racial comments – which Sodexho accepts solely for purposes of this motion – similarly does not show a pervasive nationwide pattern. Although more than 25,000 Caucasian managers have worked for Sodexho or MMS from 1995 to 2003, named Plaintiffs and active class members claim have identified just 24 Sodexho managers that they allegedly heard make a racial comment. (Ex. 11, Biermann Decl. at ¶ 2). The relatively few managers alleged to expressed racial insensitivities cannot be overlooked when the Plaintiffs must prove that discrimination pervades virtually every corner of the Company. On this latter point, it is notable that these alleged comments, some of which go back more than ten years, occurred in no more than fifteen of Sodexho's 155 RVP areas, and of these fifteen regions, only two contained more than one person alleged to have make a racially derogatory comment. Id.

After the Court's certification decision, Sodexho collected data from its employee personnel files so that education, prior experience, licensing and other major variables could be evaluated in Dr. Haworth's promotion analyses to determine whether these factors account for Dr. Siskin's limited findings of promotion disparities. Using Dr. Siskin's definition of promotions but controlling for education, prior industry/occupation, licensing and memberships, tenure, and other critical variables that were not included in Plaintiffs' promotion analyses submitted in support of certification, Dr. Haworth found ***no statistically significant difference in the odds of being promoted that was adverse to African Americans***. (Ex. 1, Haworth 07/03 Rep. at 88-96 ¶¶ 149-69). In other words, the objective factors omitted from Dr. Siskin's promotion analyses accounted for ***all*** of his findings of statistically significant racial disparities in promotions. Id. Indeed, for upper level jobs, African Americans had a statistically ***greater*** (odds of 1.77 to 1) chance of promotion than did whites. Id. at 95, Table 25.

These results were remarkably consistent. Dr. Haworth found ***no*** statistically significant racial disparities using either Sodexho's definition of promotion or those of Dr. Siskin. (Ex. 12, Haworth 10/03 Rep. at 12 ¶36-37). Indeed, using Dr. Siskin's pool of 5,116 promotions, an African American salaried exempt employee had virtually equal odds of being promoted as a white counterpart. Id. at 12 ¶ 38. These findings were consistent with other statistical analyses performed by Dr. Haworth, all of which found minimal or no statistically significant adverse results without the regression refinements, and no such adverse results when the job-related factors were included. See id. at 11 ¶ 33.

The statistical evidence is not the only area where Plaintiffs' proof falls far short. Contrary to Plaintiffs' claim that Sodexho utilizes a wholly unstructured, subjective system of promotions and that a promotions analysis of those decisions therefore should not consider education, prior experience, or other factors, Plaintiffs have admitted that objective measures and procedures were utilized and considered in promotions decisions. See Ex. 13, Murray Tr. 35-37; Ex. 14, Mitchell Tr. 36-38; Ex. 15, McReynolds Tr. 353; Ex. 16, MCMS posting policy (one-year seniority requirement); Ex. 17, MCMS policy, rev'd 10/97 at 3, ¶ 4(C) (requiring applicant to have performance evaluation ratings on HR-prepared forms at a "3" (acceptable) numerical level or higher, without any warnings in the previous twelve months), & 2, ¶ 3(C) ("No one will be permitted to apply for a vacancy unless they meet the minimum requirements as specified in each Job Profile for the position, and they meet the criteria set forth in paragraph 4C below").

Numerous class members were asked questions on these issues at deposition, and the vast majority acknowledged that such factors were indeed considered in promotion decisions. See e.g., Ex. 18, Smart Tr. 48-49 (discussing an interview in which he was asked about his resume, work experience, and education); Ex. 20 Snell Tr. 81-82; 289; 349 (discussing various interviews

in he was asked about his resume, work experience, and education).[3] Named Plaintiffs testified similarly.[4]

More than 500 job descriptions were used during the class period (Ex. 28, Siskin II Tr. 286), and these provided additional standards. Plaintiff Lisa Mitchell, a former General Manager, testified that Sodexho distributes job descriptions for numerous management positions, which are then modified by the various units themselves "due to the nature of the differences and the diverse nature of the units we were in that additional items were added or attached so as to clarify to some people, their jobs." (Ex. 29, Mitchell Tr. 46-50, 51-52). The widespread use of such standards not only undermines Plaintiffs' statistical analyses but also speaks directly as to Plaintiffs' core allegation of a nationwide standardless and unstructured system of promotions.

Plaintiffs also have failed to adduce evidence supporting their allegation that none of Sodexho's divisions and regions had policies in effect regarding the promotion process. Again, the record is sharply to the contrary. Shortly after the Marriott-Sodexho merger, Sodexho put into place a written plan for filling vacancies detailing the steps in the process, the responsible party, and the information to be provided by the decisionmaker at each step in the process. Divisions either adopted it or replaced it with their own comparable plans. (Ex. 30; Ex. 31, T. King Decl. at ¶ 2; Ex. 32, D. Barton Decl. at ¶ 2; Ex. 33, P. Gerard Decl. at ¶ 2; Ex. 34, R. Budney Decl. at ¶ 2; Ex. 35 and Ex. 36). As a result, promotion decisions typically had concrete and common processes, including screening by local Human Resources staff; interview

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[3] A combined set of such testimony by 23 class members is appended as Exhibit 20.

[4] For instance, Plaintiff Ezzie Henry Murray testified that her supervisor developed objective criteria concerning the duties and responsibilities of management positions and that, for example, "if I'm hiring for a management position, I ask them how many years of management have you had. If they say zero, that screened them out." (Ex. 21, Murray I Tr. 86-88, 56). Accord, Ex. 22, Hardy Tr. at 76-77 (testifying that Sodexho considered management experience and tenure in the industry); Ex. 23, Moss Tr. at 75-76 (testifying that education and supervisory experience are examined in making promotion decisions to salaried positions); Ex. 24, McReynolds I Tr. at 114–20, 126-28; Ex. 25, Richardson Tr. at 151–52; Ex. 26, McNish I Tr. at 132-33; Ex. 27, Morris Tr. at 89, 113-15.

questions, which often were prepared by Human Resources staff, widespread use of interview panels; and written scoring matrices and scales. Id.; Ex. 32, D. Barton Decl. at ¶¶ 2, 3-5; Ex. 34, R. Budney Decl. at ¶¶ 2, 3; Ex. 37, R. Walker Decl. at ¶¶ 2-5; Ex. 38, R. Allen Decl. at ¶¶ 5-9, 11.

Dr. Siskin did not separately analyze these systems. He did not conduct, for instance, a separate analysis of the MCMS job posting system inherited from Marriott International or its replacement, the Career Center. Dr. Haworth, by contrast, did assess those systems, and her results show that, even in the MCMS system, African Americans posted in a proportion roughly equivalent to their representation among the Sodexho applicants and were selected in a neutral manner. The Career Center data similarly show no statistically significant adverse results for African Americans. See Ex. 8, Haworth 10/01 Rep. at ¶¶ 104-08, 142-43 & Tables 20, 21; Ex. 1, Haworth 07/03 Rep. at 96-100 ¶¶ 170-75 & Tables 26-28; Ex. 12, Haworth 10/03 Rep. at 14 ¶ 45.

Dr. Siskin's analyses do not address and thus do not support Plaintiffs' core theory that Sodexho's promotion system was standardless and wholly lacking in structure or procedures. That theory is nothing more than an unproven hypothesis belied by extensive evidence to the contrary, much of it admitted by Plaintiffs themselves.

ARGUMENT

I. Plaintiffs Have Failed to Adduce Evidence of a Legally Cognizable Pattern or Practice of Race Discrimination in Promotions.

A. Plaintiffs Carry An Extremely Heavy Burden Of Proof In Disparate Treatment Pattern Or Practice Class Action Cases.

The issues at the summary judgment stage of a pattern or practice class action differ from those decided at the class certification stage. As the Court stated recently, "'[d]uring the first

stage of a pattern-or-practice case, ... a summary judgment motion (whether filed by plaintiffs or defendants) must focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant limitations period.'" Contreras v. Ridge, __ F. Supp. 2d __, 2004 WL 360283, at *7 (D.D.C. Feb. 24, 2004) (quoting Thiessen v. GE. Capital Corp., 267 F.3d 1095, 1109 (10th Cir. 2001)).

The Supreme Court has set a high threshold for pattern or practice claims. To establish a pattern or practice of discrimination, plaintiffs must prove that discrimination "was the company's standard operating procedure[.]" Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). Under the Teamsters standard, Plaintiffs must prove that Sodexho intentionally discriminated "regularly and purposely" in a "repeated" and "routine" fashion, such that Sodexho "practiced racial discrimination throughout all or a significant part of its system[.]" Id. at 335, 336 n.16. Accord, Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 875-76 (1984) (agreeing that claim of "pervasive pattern of racial discrimination" satisfied Teamsters). This standard applies to claims under 42 U.S.C. § 1981. Berger v. Iron Workers Reinf'd Rodmen Local 201, 843 F.2d 1395, 1412 n.7 (D.C. Cir. 1988).

To demonstrate a pattern or practice of discrimination, there must be "significant evidence" or "substantial proof" that the employer routinely and regularly discriminated. King v. Gen. Elec. Co., 960 F.2d 617, 624 (7th Cir. 1992). Under this test, "the crux of plaintiffs' pattern-or-practice claim arguably is that [race] bias was so pervasive … that the … executives knew that, if a decentralized decisionmaking process was used …, then the individual line managers would exercise their discretion by" discrimination against African Americans. Sperling, 924 F. Supp. at 1360. The Supreme Court has emphasized that Plaintiffs' burden is a heavy one: to show that illegal discrimination was so pervasive that Sodexho's nationwide

decisionmaking was "rotten to the core." Cooper, 467 U.S. at 880. Lesser proof is insufficient. See In re W. Dist. Xerox Litig., 850 F. Supp. 1079, 1085 (W.D.N.Y. 1994) ("[T]he burden of establishing a pattern or practice of discrimination is not an easy one to carry."); EEOC v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1382 (W.D.N.C. 1981) ("The plaintiff in a pattern and practice case carries a much higher burden than in [an individual] disparate treatment case."). Thus, "a class plaintiff's attempt to prove the existence of a company-wide policy, or even a consistent pattern within a given department, may fail even though discrimination against one or two individuals has been proved." Cooper, 467 U.S. at 878.

Specifically, plaintiffs must present *both* strong statistical evidence of the alleged pattern or practice and a substantial proportion of individual cases of discrimination causally connected to the alleged pattern or practice. See Segar v. Smith, 738 F.2d 1240, 1265-66 (D.C. Cir. 1984); EEOC v. W. Elec. Co., 713 F.2d 1011, 1019 (4th Cir. 1983).

A defendant may defeat a pattern or practice claim "by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant," Teamsters, 431 U.S. at 360, or by providing a "nondiscriminatory explanation for the apparently discriminatory result," id. at 360 n.46. This may be done by disqualifying plaintiffs' proof under Daubert, as Sodexho does in its motion to strike Dr. Siskin's reports, or by direct rebuttal. See Teamsters, 431 U.S. at 339. Statistical evidence must indicate a "long-lasting and gross" disparity before the trier of fact may infer that the disparity between the defendant's workforce and the relevant labor market was due to a pattern or practice of intentional discrimination. Id. at 339 n.20. See also Bilingual Bicultural Coal. v. F.C.C., 595 F.2d 621, 625 n.7 (D.C. Cir. 1978) (cautioning that "the manipulability of statistics" makes "clear guidelines … essential" in Title VII cases). If a

statistical proffer is inadequate or disproven by defendant's statistics, the court should grant summary judgment as a matter of law.

B. Summary Judgment Is Appropriate Where Plaintiffs Fail To Proffer Significant Evidence Of A Company-Wide Pattern Or Practice Of Discrimination.

By definition, an actionable "pattern or practice" must result in discrimination in all or at least a substantial majority of the units of a company that used the complained-of employment practice. See, e.g., Teamsters, 431 U.S. at 336 n.16 (pattern or practice claim means that defendant "practiced racial discrimination throughout all or a significant part of its system" or otherwise "regularly or routinely" discriminated); Cooper, 467 U.S. at 878 (referring to pattern or practice as a "company-wide policy, or even a consistent practice within a given department"); EEOC v. Mitsubishi Motor Mfg., Inc., 990 F. Supp. 1059, 1075 (C.D. Ill. 1998). Episodic or isolated instances of discrimination do not suffice. See Cooper, 467 U.S. at 876.

Numerous courts have therefore granted summary judgment or JMOL on pattern-or-practice claims where plaintiffs' evidence consist of much more significant evidence of disparities than the extremely episodic and isolated disparities found under Dr. Siskin's analysis. In one leading case, EEOC v. W. Elec. Co., 713 F.2d 1011, 1016-19 (4th Cir. 1983), for instance, the Fourth Circuit reversed a court's finding of pattern-or-practice discrimination where the EEOC had alleged discrimination across five distinct geographic areas but presented statistical proof of statistically significant disparities in only two or three of those areas, i.e., 40 or 60%. Id. at 1019. Despite the evidence of problems in close to or more than half of the areas in question, the Fourth Circuit held that, as a matter of law, these occurrences were insufficient to establish a pattern and practice of discrimination for the entire region at issue in the lawsuit and reversed the district court's finding to the contrary. Id.

Other pattern-or-practice cases have met the same result of summary judgment or JMOL for the defendant due to legally insufficient evidence. For example, in EEOC v. Fed. Res. Bank of Richmond, 698 F.2d 633, 661-62 (4th Cir. 1983), rev'd on other grounds, 467 U.S. 867 (1984), the court exhaustively reviewed the statistical evidence to conclude that "the District Court was in clear error in accepting the opinion of plaintiffs' expert on statistical significance when that opinion rested on such skewed analyses and which disregarded the far more reliable tables, …which demonstrated no basis for a finding of statistical significance, much less legal significance."

In EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999), the Eighth Circuit determined that a relatively insignificant statistical impact overall on the protected class, in that case a reduction in representation from 14.7% to 13.6% of the workforce, was legally insufficient to "establish a prima facie case of pattern-or-practice age discrimination." Id. at 952. While anecdotal evidence was proffered, the court concluded that it "demonstrate[d], at most, isolated discriminatory acts on the part of certain managers, rather than McDonnell Douglas's 'standard operating procedure[].'" Id. (quoting Teamsters, 431 U.S. at 336). The court therefore affirmed a grant of summary judgment because neither the statistical analysis nor the anecdotal evidence provided sufficient evidence "from which a reasonable jury could conclude that McDonnell Douglas engaged in a pattern or practice of age discrimination." Id. at 952-53.

In King v. Gen. Elec. Co., 960 F.2d 617, 624 (7th Cir. 1992), the Seventh Circuit vacated a pattern-or-practice jury verdict where the plaintiffs' statistical showing was insufficient to "support the jury's finding that a company-wide pattern of discrimination existed" during the class period because it addressed only two of the three years in question. King, 960 F.2d at 626.

As in the McDonnell Douglas case, the anecdotal evidence of discrimination fell short of the amount sufficient to support a finding of a pattern or practice of discrimination. Id. at 627.

Courts have rejected pattern-or-practice claims when the alleged incidence of statistically significant results was much higher than in this case. In Hill v. AMOCO Oil Co., No. 97 C 7501, 2003 WL 262424, at *6 (N.D. Ill. Jan. 27, 2003), for instance, plaintiffs offered evidence of alleged discrimination at only 10 of 33 (30.3%) Amoco owned-and-operated stations in Chicago-area counties at the end of 1995, and only 10 of 71 (14.1%) company-owned stores by the end of 2001 (after the class had been certified). That low proportion, the court held, "is simply not a sufficient basis for a reasonable trier of fact to conclude that discrimination was Amoco's standard operating procedure throughout its corporate owned-and-operated gas stations in the Chicagoland counties." The court therefore granted defendant summary judgment based on a pattern-or-practice claim of discrimination. Indeed, the frequency of statistically determined potential discrimination exceeded that alleged in this case – 30% of the total pool of facilities, as opposed to at most only 6% of RVP areas under Plaintiffs' methodology.

Similarly, in Morgan v. United Parcel Serv., Inc., 143 F. Supp. 2d 1143 (E.D. Mo. 2000), the district court granted summary judgment after having certified the class. In that case, the court expressly concluded that "plaintiffs' assertion that the pattern of promotions among districts shows racial discrimination in ***some*** districts does ***not*** tend to show discrimination on a national level." Id. at 1148 (emphasis added). To the contrary, the court acknowledged that such limited proof may "undercut plaintiffs' proof of the existence of a standard operating procedure." Id. As in the Hill case, the proportion of allegedly adverse districts (either 35 of 90 (39%) or 45 of 90 (50%), id., is far greater than the claimed proportion in this case (6%).

As one district court recently stated in an analogous circumstance (decertification):

> 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 that it would be unjust to proceed to judgment regarding the rights of women who do not share this common issue of fact.

Carpenter v. Boeing Co., Case No. 02-1019-WEB, slip op. at 7 (D. Kan. Feb. 24, 2004) (Ex. 39); see also id. at 3 (citing data by Dr. Siskin showing that only 7 of 25 job groups had disparities).

Conversely, only one case known to Sodexho has even considered statistical findings nearly as scant as those here. In Lewis v. NLRB, 750 F.2d 1266, 1276 n.17 (5th Cir. 1985), the Fifth Circuit considered evidence where only a single statistically significant disparity was found out of eleven GS levels where discrimination had allegedly occurred. The pattern-or-practice claim based on that finding of 9% was dismissed out-of-hand by the Fifth Circuit, which simply noted that "[t]his one exception by no means commands an inference of discrimination in the NLRB promotional process as a whole." Id. Here, where the proportion of statistically significant adverse results is smaller than in Lewis, the proffered evidence of discrimination is even less probative.

Thus, ample authority holds that evidence of statistically significant shortfalls in only a tiny fraction of Sodexho's decisionmaking regions, and anecdotal evidence that similarly is limited to individual isolated occurrences, falls far short of the Teamsters standard and entitles a defendant to summary judgment as a matter of law.

C. Plaintiffs Have Failed To Offer Statistically Significant Evidence Or Probative Anecdotal Proof Of A Nationwide Pattern Or Practice Of Discrimination In Promotions.

The undisputed material facts in this case readily demonstrate that Plaintiffs have failed to proffer the significant and substantial evidence required by Teamsters. As shown below, the

undisputed evidence shows far less of a "pattern" of statistically significant negative results than in cases where summary judgment was granted. Similarly, Plaintiffs' anecdotal evidence fails to go beyond isolated incidents, many of which are concentrated in small pockets of the company. Compared to cases in which summary judgment was granted to defendants based on evidence of much more extensive problems than suggested here, Plaintiffs have utterly failed to meet their heavy burden under Teamsters of demonstrating a ***nationwide*** pattern or practice of discrimination.

1. Plaintiffs' Statistical Evidence Is Legally Insufficient To Demonstrate A Pattern Or Practice Of Discrimination In Promotions Because It Shows, At Most, Only Isolated Pockets Of Statistically Significant Shortfalls.

Plaintiffs do not come close to meeting their heavy burden under Teamsters to demonstrate a pattern or practice of discrimination. Their own methodology and statistical data, as collected by Dr. Siskin, show that at most only 9 of Sodexho's approximately 155 geographical RVP regions (fewer than 6%) had statistically significant disparities in promotions of African American managers. (Ex. 7, Haworth II Decl. at 2 ¶ 4 & at 4). In fact, the data for the Health Care Services region where many named plaintiffs were located, and where many asserted anecdotes occurred, show statistically significant ***positive*** promotion results. (Ex. 9, Haworth I Decl. at 2).[5]

Such stark evidence emerging from Plaintiffs' own expert's information puts this case into a unique category. There is no case known to Sodexho in which a pattern-or-practice of race

[5] Notably, when Dr. Haworth assessed the data under her methodology, she found that at most only two or three RVP regions out of approximately 155 had statistically significant adverse results for African Americans (i.e., less that 2% of all RVP regions and accounting for only 2.5% of all promotions studied). These were counterbalanced by two RVP regions that have statistically significant positive results. (Ex. 8, Haworth 10/01 Rep. at 55-56 ¶¶ 84-85 & Table 12). Even these results later improved to ***no regions*** with statistically significant adverse results when Dr. Haworth considered variables such as education and prior experience.

discrimination was found where as many as ***94%*** of the company's principal decisionmaking units were found by plaintiffs' own evidence not to have had statistically significant racial disparities. Indeed, as shown above, courts require that discrimination be proven in all or at least a large number of facilities.

Even the named Plaintiffs' individual claims conflict with the data produced by Dr. Siskin. When the locations where the named Plaintiffs worked and sought promotions are examined, a wide gulf emerges between the actual data and their claims. They worked and applied for other positions in only a few of the approximately 155 RVP regions, with the greatest number in one particular mid-Atlantic region (324) that, according to Dr. Siskin's promotion methodology, show ***more*** African American promotions than predicted despite their anecdotal allegations to the contrary. Only one named Plaintiff ever applied to one of the nine RVP regions identified by Dr. Siskin's data. (Ex. 8, Haworth 10/01 Rep. at 4). Indeed, of the 84 positions sought by named Plaintiffs in the Class Period where a candidate ultimately was selected, 26 (31%) were filled by African Americans. (Ex. 6, Bridger Decl. at ¶¶ 17-18). This confirms Plaintiffs' failure to demonstrate a company-wide pattern or practice of discrimination.

Rather than dispute this evidence, Plaintiffs contend that a national class may be presumed to exist simply because salaried exempt employees technically could apply for all positions across division and region. That argument is badly flawed. It is undisputed that decisionmaking at Sodexho largely occurred at or below the regional level. If ***94%*** of the decisionmaking units have no statistical evidence of possible discrimination, as their own expert's data reveal, Plaintiffs must do much more than hypothesize that the entire class of Plaintiffs experienced pervasive discrimination simply because class members could have applied for positions at the few allegedly offending locations. Otherwise, under Plaintiffs'

aggregation logic, the mere existence of a nationwide posting system could transform automatically the existence of statistically significant racial disparities at one location into a nationwide pattern or practice of discrimination. This would effectively gut the Teamsters principle that, to infer a "regular or standard operating procedure" of bias, the discrimination must occur throughout all or a very significant portion of the company. See Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 279 (4th Cir.1980) (plaintiffs must demonstrate that inter-facility transfers are "the ordinary, as distinguished from possible, practice").

In any event, Plaintiffs' theory is just that – a theory without a valid factual foundation. During the Class Period, only 4% of all salaried exempt employees changed division and approximately 15% changed region within their division. (Ex. 1, Haworth 07/03 Rep. at 36 ¶ 63). Similarly, only 6% of all promotions resulted in a move to a new position outside of division, and 79% of all promoted employees remained in their own region. Id. at 59 ¶ 106. Named Plaintiffs experienced similar patterns. (Ex. 9, Haworth 01/02 Decl. at 2). Thus, the labor pool is anything but the fluid, highly transient population hypothesized by Plaintiffs. Dr. Siskin's assumption contrary to Sodexho's actual practices is not credible. United States v. City of Miami, 115 F.3d 870, 873 (11th Cir. 1997) (expert testimony should be excluded as a matter of law when the expert utilizes a "method not used by the decisionmaker").

Plaintiffs offer no evidence to the contrary. Dr Siskin performed no independent investigation of this issue and instead relied on counsel's instruction that he should aggregate data on a nationwide basis. (Ex. 40, Siskin I Tr. 10-11, 14, 82-83).

Thus, Plaintiffs' claim of a nationwide pattern or practice of discrimination devolves to the slim evidence of significant disparities in only a handful of Sodexho's 155 regions. Given that Plaintiffs cannot cite a single case in which nationwide pattern or practice liability was

permitted based upon such isolated occurrences, Plaintiffs have failed to establish proof of regular and purposeful discrimination under Teamsters.

2. Plaintiffs' Anecdotes And Individual Claims Are Legally Insufficient To Show A Company-Wide Pattern Or Practice Over The Class Period.

To demonstrate anecdotal proof that supports of a claim of a nationwide pattern or practice of discrimination, Plaintiffs must do much more than assemble a handful of unconnected anecdotes. Rather, Plaintiffs must assemble anecdotal proof that speaks to the legal issue at hand: demonstrating a nationwide pattern or practice as required by Teamsters. Plaintiffs fall far short of that test, as their anecdotes are concentrated by region and, in many cases, fall outside of the Class Period set forth by the Court.

The Fifth Circuit has explained in detail the requirement that Plaintiffs demonstrate a clear nexus between their anecdotes and their pattern-or-practice claim:

> Thus, to show relevancy, Trial Plaintiffs had to show that the proffered anecdotal witnesses were sufficiently similar to themselves so that the witnesses' testimony would have a tendency to show "standard [discriminatory] operating procedure" and a "regular rather than unusual practice" of discrimination.
>
> Testimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated to relate to this threshold issue. Because of their dissimilarity to the Trial Plaintiffs, instead of providing testimony of a company-wide pattern or practice, the excluded anecdotal witnesses' testimony would simply have been evidence of "sporadic and isolated" occurrences. Because the witnesses were not relevant to the Trial Plaintiffs'' burden, we find no abuse of discretion in their exclusion.

Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1221 (5th Cir. 1995) (quoting Teamsters, 431 U.S. at 336). That analysis applies here directly.

Plaintiffs' individual claims and anecdotal accounts do not address nationwide issues. As previously discussed, named Plaintiffs challenge Sodexho's failure to promote them to positions

in only 23 of Sodexho's approximately 155 RVP regions (just 15%). (Ex. 6, Bridger Decl. at ¶ 17). They applied to less than 8% (12 of 155) of the RVP regions more than once. (Id. at ¶ 18). Nearly half (49%) of their applications were made to just ***two*** RVPs, one of which (Health Care 324) was found by Dr. Siskin to have statistically significant ***positive*** findings for Plaintiffs. (Id.; Haworth I at Decl. at 2). Similarly, Plaintiffs' core allegation that African Americans are denied promotions to "above the unit" positions is not even remotely borne out by their experiences. During the Class Period, the thirty named Plaintiffs and active class members sought fourteen "above the unit" positions that actually were filled. Almost 30% of those upper level positions (4 of 14) were filled with African Americans, hardly a glass ceiling. See Ex. 6, Bridger Decl. at ¶ 20.

Likewise, Plaintiffs' alleged evidence of racial comments – even if true – does not show a pervasive nationwide pattern of promotion discrimination. Although more than 25,000 Caucasian managers have worked for Sodexho or MMS from 1995 to 2003, the thirty named Plaintiffs and active class members in this case could identify at deposition only 24 Sodexho managers whom they allegedly heard make a racially derogatory comment, and some of the comments were alleged to have been made in the 1980's. See Ex. 11, Biermann Decl. at ¶ 2; Ex. 6, Bridger Decl. at ¶ 18. These alleged comments occurred in no more than fifteen of Sodexho's 155 RVP areas, and of these fifteen regions, only two contained more than one person alleged to have made a racially derogatory comment. See Ex. 11, Biermann Decl. at ¶ 2. Moreover, most of the anecdotal accounts cited in the Complaint are old, referring to alleged incidents outside of the Class Period. For example, six of the 25 allegations of racial slurs by former employees occurred between seven and fifteen years ago; thirteen others are directed at one individual who is no longer employed at Sodexho, and another three are directed at a former

employee. (Ex. 41, Biermann Rep. at 42 ¶ 86). Similarly, for allegations of racial slurs by current employees, eight occurred between seven and twenty-one years ago, and only one individual is alleged to have made multiple comments, both of which are alleged to have occurred over seventeen years ago. Id. at ¶ 87. Many originate in the same Health Care Services RVP region where Dr. Siskin's analytical outputs showed positive results.

This relatively meager evidence therefore provides scant support of a company-wide pattern or practice of discrimination. If anything, the tight concentration of adverse claims into a handful of RVP regions supports the other evidence that any pockets of statistically significant adverse results at Sodexho at most are highly localized and uncharacteristic of promotion patterns for African American salaried exempt employees in the rest of the corporation.

3. Sodexho's Uncontroverted Evidence Confirms That There Is No Company-Wide Pattern Of Discrimination In Promotions.

a. When Controlled For "Major Factors" Such As Education And Prior Experience, The Statistical Evidence Does Not Demonstrate Significant Disparities In Promotions For African Americans.

It is well settled in the D.C. Circuit that an analysis is fatally flawed if it does not consider "major factors" that may account for disparities. See Coward v. ADT Security Sys., Inc., 140 F.3d 271, 274 (D.C. Cir. 1998) (Supreme Court decision in "*Bazemore* [does not] require acceptance of regressions from which ***clearly major variables have been omitted – such as education and prior work experience***") & 275 (regression analysis was "flawed as a matter of law" because it "failed to account for job title or include any other variable representing the type of work performed") (deletions and text bracketed in original) (emphasis added) (quoting Koger v. Reno, 98 F.3d 631, 637 (D.C. Cir. 1996)). In Valentino v. United States Postal Serv., 674 F.2d 56, 71 (D.C. Cir. 1981), then-Judge Ruth Bader Ginsburg made clear that such a major

defect defeats the plaintiff's prima facie case: "When it is clear that qualification … is a prime factor in the selection process, a Title VII plaintiff cannot shy away from that factor in developing her prima facie case. … Because [plaintiff's] regression model ignores information central to understanding the causal relationships at issue, the district court could not accept [it] as adequate to raise an inference" that discrimination caused the alleged disparities in employment conditions." See also Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 206-07 (D.C. Cir. 1997) ("plaintiffs did not make out a *prima facie* statistical case of a pattern or practice of discrimination" where the "plaintiffs' expert did not consider the relevant qualifications of those passed over or approved for promotion"), denial of costs vacated on reh'g, No. 96-7242, 1998 WL 1988451 (D.C. Cir. Feb 25, 1998).

It is equally well settled that regression analyses proffered by a defendant will preclude a finding of a pattern or practice of discrimination if they conclusively demonstrate nondiscriminatory explanations for perceived racial disparities. Thus, where a plaintiff's proof fails to consider significant factors, a defendant may defeat that proof by "introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion." Palmer v. Shultz, 815 F.2d 84, 101 (D.C. Cir. 1987). That is especially the case for professional and higher-level managerial occupations, like those at issue here, which include education, experience, and individual qualifications: "Qualifications … figure prominently in the representative's threshold case on behalf of a class when professional and management positions are at issue." Valentino, 674 F.2d at 67.

These principles entitle Sodexho to summary judgment on two separate grounds.

First, as set forth in detail in Sodexho's accompanying motion to strike, which is incorporated by reference, Dr. Siskin's promotion analyses fail to meet the requirements of

Koger and Bazemore that he assess for basic factors entering the promotion analysis. Just as Dr. Siskin's definitions of a promotion have been inconsistent and ever changing, so have his various analyses proffered in support of Plaintiffs' case. The only common theme that emerges is Dr. Siskin's consistent omission of "major factors" as recognized in Koger and Bazemore for which data were available to him. Table 6 of Dr. Haworth's Declaration (Ex. 46, Haworth III Decl.) tracks Dr. Siskin's many analyses, as well as the variables a) claimed to be included; b) actually included; and c) omitted, despite the availability of data.

In his early analyses (October and November 2001), Dr. Siskin ignored Sodexho's decentralized structure by failing to account for regions and districts and, as he would continue to do, he completely failed to distinguish between exempt and non-exempt seniority, to consider education, and to recognize any experience at Sodexho.

In his next series of analyses (September 2003), Dr. Siskin, among other flaws, repeated his faulty seniority variable, continued to ignore pertinent Sodexho experience, as well as unit size, which directly impacts promotion opportunity. In his regression (logit) analyses, Dr. Siskin for the first time did begin to take into account some education and experience data, but, as shown below, he made such fundamental mistakes that those analyses have no probative weight. Moreover, Dr. Siskin again omitted data (region) reflecting Sodexho's decentralized structure and ignored applicable license requirements and unit size.

Dr. Siskin's December 2003 report capped his analytical omissions. Again, fundamental mistakes made his attempts to consider education and experience wholly useless. Moreover, in virtually all of the analyses in that report, he failed to account for seniority. Even in his final analyses, Dr. Siskin ignored education, license, industry experience, and unit characteristics.

Thus, although Dr. Siskin issued four reports in an on-going effort to cure the many defects of his analyses, at the end of the day, the fundamental problems with his approach remain.

This clear pattern of omitting obviously critical variables, despite the availability of source data, demonstrates conclusively the fundamental inadequacy of Dr. Siskin's work and its failure to sustain Plaintiffs' burden at summary judgment. For these and other reasons, Dr. Siskin's reports fail to meet the standards set forth in Daubert and should be stricken. But, even if they are not stricken, Dr. Siskin's analyses do not survive the rigorous scrutiny that the Court indicated applies at the summary judgment stage. See, e.g., Diehl v. Xerox Corp., 933 F. Supp. 1157, 1167-70 (W.D.N.Y. 1996) (errors in expert's statistical analysis were insufficient to be stricken under Daubert but nonetheless did not demonstrate prima facie case of discrimination and therefore warranted summary judgment for defendant).

Second, Sodexho has gone beyond proving the deficiencies of Plaintiffs' regression analyses. Since the certification decision, Sodexho laboriously and carefully collected education and prior experience data from its personnel files for thousands of managers. That information was made available to Dr. Siskin, who declined to consider it until Sodexho expert Dr. Haworth[6] evaluated the data and determined that objective factors omitted from Dr. Siskin's promotion analyses accounted for his findings of significant racial disparities. (Ex. 1, Haworth 07/03 Rep. at 88-96 ¶¶ 149-169).

Dr. Haworth found that, when controlling for education, job experience, prior industry, licensing and memberships, tenure (so that internal experience would receive its appropriate weight), division and region, and grade/band (to account for the employee's relative level of

[6] Dr. Haworth's credentials were discussed previously in Sodexho's memoranda in opposition to class certification. Here, Sodexho simply wishes to remind the Court that Dr. Haworth serves as the Court-appointed neutral expert in the longstanding Amtrak Title VII class action litigation in this Court (Thornton v. Amtrak and McLaurin v. Amtrak).

responsibility),[7] ***no statistically significant patterns emerged that were adverse to African Americans***. This finding held true whether all employees were grouped together, or examined in only the lower or higher pay bands/grades, respectively, or examined by division. (Ex. 1, Haworth 07/03 Rep. at 94-95 ¶ 167). For upper level jobs, African Americans had a ***greater*** (odds of 1.77 to 1) chance of promotion. Id. at 95, Table 25.[8]

These findings entitle Sodexho to summary judgment. When a defendant conducts its own regression analysis that measures key variables that plaintiffs' expert had omitted, and where that refined regression demonstrates only statistically insignificant racial disparities, the defendant has more than met its burden of disproving a pattern or practice of discrimination under Teamsters. See Coleman v. Exxon Chem. Corp., 162 F. Supp. 2d 593, 621 (S.D. Tex. 2001); Morgan v. U.P.S., 143 F. Supp. 2d at 1151-52.

Lest there be any doubt regarding the reliability of these findings, Dr. Haworth found ***no*** statistically significant racial disparities regardless of whether she used Sodexho's definition of promotion or that of Dr. Siskin. (Ex. 12, Haworth 10/03 Rep. at 12 ¶ 36). In addition, after making a correction for factors that Dr. Siskin had inadvertently omitted in his September 2003 rebuttal report model that included education and experience, Dr. Haworth found that, using the Sodexho definition of promotion and the definitions of promotions used at that time by Dr.

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[7] Dr. Haworth directed the gathering of this information from personnel folders, applications for posted positions, and succession planning documents for a stratified sample of Sodexho employees randomly selected across division, salary, grade band ranges, and race groups. See Ex. 1, Haworth 07/03 Rep. at 88 ¶ 150 & n.47. Data were collected for approximately 4,000 of approximately 20,500 salaried exempt employees; of these, approximately 3,800 were African American or white (out of a total of approximately 19,000 African American and white salaried exempt employees). Id. at 89 n.48. This sample size was large enough that, without stratification, the sampling error rate was less than 1.5%. Id. at 89 ¶ 150.

[8] For education, Dr. Haworth considered both the highest level of education achieved and the field of study. (Ex. 1, Haworth 07/03 Rep. at 90 ¶ 155). For job experience, separate measures of experience were created for each of the more than 500 occupations defined by the Census Bureau with additional categories to distinguish Sodexho's unique jobs, capturing experience at all prior positions, as well as the nature of the industry of employment. Id. at 91 ¶¶ 156-57. Certification and licensing information was gathered. Id. at 91-92 ¶¶ 158-59. Tenure at Sodexho was measured by distinguishing between seniority in salaried exempt and hourly jobs. Id. at 92 ¶ 160.

Siskin (6,984, 3,825, and 5,116 promotions, respectively), ***no*** statistically significant differences resulted for African Americans. Id. at 12 ¶ 38. Indeed, using Dr. Siskin's most recent definition of promotions, the addition of controls resulted in almost equal odds of promotion for an African American compared to a white counterpart. See id. at 11 ¶ 33.

Dr. Haworth obtained similar results when she controlled for career paths and unit metrics data. Sodexho salaried exempt employees often move laterally, from smaller to larger units but at the same level, to position themselves for subsequent vertical moves in the larger unit after gaining broader experience. See Ex. 42, Siskin II Tr. at 245. When that experience is controlled, no statistically significant patterns emerge. (Ex. 12, Haworth 10/03 Rep. at ¶ 38 & Table 3).

These findings are not plausibly controverted. For instance, Dr. Siskin ***twice*** tried to emulate Dr. Haworth's results. Each time, he made crucial errors that, when corrected by Dr. Haworth after discovering them in back-up information, resulted in ***no*** statistically significant racial disparities.

First, Dr. Siskin issued a report in September 2003 (his fourth), which purported to perform analyses showing that education, prior experience, and the other variables, did not affect the racial disparity in the odds of being promoted. (Ex. 43, Siskin 09/03 Rep. at 16). In fact, the report failed to do this in several critical respects: it did not include district (even though it claimed to have done so, see id. at 17, lines 1-4); omitted region for three of the four lines of data reported (despite asserting that region was said to have been included, see id. at lines 2-4), and neglected to consider year for the one line that considered region (despite an assertion to the contrary, see id. at line 1). Dr. Siskin admits that these variables were not included. (Ex. 44, Siskin II Tr. 382-99). Dr. Haworth documented these omissions and found that, when the

missing variables and education and experience were included, the racial discrepancies that Dr. Siskin claimed to have found disappeared. See Ex. 12, Haworth 10/03 Rep. at 9 ¶¶ 27-28; 11-12 ¶¶ 35-39).

Similarly, in a fifth report filed in December 2003, Dr. Siskin again attempted to assess education, prior experience, and other factors analyzed by Dr. Haworth, once more purportedly using the same analysis that she had done but adding current occupation. (Ex. 45, Siskin 12/03 Rep. at 8, Tables 8R & 9R). In fact, Dr. Siskin's report did not emulate Dr. Haworth's analysis as it had claimed. In one table, he omitted a number of the individuals for whom he had data, and did not properly consider that these individuals formed a part of the sample being analyzed and thus represented multiple observations in the analysis. This mistake resulted in an invalid analysis. (Ex. 46, Haworth III Decl. at ¶¶ 7-8, Tables 5 & 6 (discussing Tables 8R & 9R). He also failed to consider important factors such as education and seniority in some models and licenses and industry effects in most all models.[9] Id. at ¶¶ 4-5. At deposition, he acknowledged that he had not included these factors and indicated that he needed to consider his failure to weight for the omitted "observations." (Ex. 47, Siskin II Tr. 45-53, 401-02, 406-13, 425). Nevertheless, to date he has not offered any correction. See id. at 53. The silence is telling. When Dr. Haworth applied the appropriate weighting and added the missing variables and current occupation, the racial disparities ***disappeared*** for each of Dr. Siskin's analyses. (Ex. 46, Haworth III Decl. at ¶ 6, Table 4).

Moreover, there is ample basis to conclude that education, prior experience, and other credentials evaluated in Dr. Haworth's refined regression analysis match Sodexho practices. Contrary to Plaintiffs' claim that Sodexho utilized a wholly unstructured, subjective system of

promotions that did not consider education, prior experience, or other factors in promotions decisions, Plaintiffs have admitted that objective measures and procedures were utilized and considered in such decisions. See Ex. 13, Murray Tr. 35-37; Ex. 14, Mitchell Tr. 36-38; Ex. 15, McReynolds Tr. 353; see also Ex. 16, MCMS posting policy (one-year seniority requirement); Ex. 17, MCMS policy, rev'd 10/97 at 3, ¶ 4(C) (requiring applicant to have performance evaluation ratings on HR-prepared forms at a "3" (acceptable) numerical level or higher, without any warnings in the previous twelve months), & 2, ¶ 3(C) ("No one will be permitted to apply for a vacancy unless they meet the minimum requirements as specified in each Job Profile for the position, and they meet the criteria set forth in paragraph 4C below"). As previously discussed, named Plaintiffs and other class members consistently affirmed in deposition that such factors were indeed considered.

Sodexho job descriptions also often required standards. See Ex. 48 (representative sampling of job descriptions). For example, the job description for Food Service Director, St. Luke's Quakertown Hospital, required a 4-year college degree or comparable experience, knowledge of JCAHO standards, state and local health inspections, various local food programs and cites, etc. Id. The job description for Food Service Director at Martinsville Hospital required a bachelor's degree in Hotel, Restaurant or Institutional Management, or equivalent experience and operations experience at the managerial/supervisory level and indicated a preference for individuals with a Certified Dietary Manager degree. Similarly, the Doylestown Hospital Chief Clinical Dietician job description required a B.S. in Nutrition (with an M.S. preferred), a minimum of five years experience in food service management and clinical services, and noted that the applicant must be a Registered Dietitian. Id. The widespread use of

[9] In the other table, Dr. Siskin considered the "probability" of promotion from the current job/MMR and division, as opposed to the actual current job/MRR and division that he claimed to have included – and also failed to

such standards not only justifies Dr. Haworth's statistical analyses but also flatly contradicts Plaintiffs' core allegation of a nationwide standardless and unstructured system of promotions.

The impact of these refined regression analyses cannot be understated. Plaintiffs have advanced a theory of company-wide intentional race discrimination stretching across thousands of separate units, hundreds of separate regions and districts, and six separate corporate divisions without any unifying thread except one: promotion analyses data that purportedly show that this decentralized structure has allowed racial disparities in promotions to occur nationwide. From this single fact, Plaintiffs seek to infer the existence of pervasive discrimination based upon Dr. Siskin's finding of only 100 to 180 fewer promotions of African Americans during the Class Period (March 21, 1998 to July 1, 2001) than would be expected in a universe of more than 5,000 promotion decisions made during that period. Common sense alone suggests that these numbers are quite small for a company Sodexho's size. But Dr. Haworth's refined analysis of promotional outcomes punctures any remaining basis for finding pervasive discrimination. Education, occupational status and history, licensing and certification, tenure, and division/region status, not race, account for the differences found by Dr. Siskin.

Sodexho therefore has met its burden of "introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion." Palmer v. Shultz, 815 F.2d at 101. Where a defendant conducts its own regression analysis that measures key variables that plaintiffs' expert had omitted, and where that refined regression demonstrates only statistically insignificant racial disparities, the defendant has more than met its burden of disproving a pattern or practice of discrimination under Teamsters. and entitle it to summary judgment.

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consider the grade or band that an employee was in, as well as other important factors. Id. at ¶ 6, n.10, Table 4.

b. Dr. Haworth's Other Analyses Confirm The Lack Of Significant Racial Disparities In Promotions Of African Americans.

i. Sodexho's Management-Level Representation Of African Americans Exceeds Labor Market Availability.

The basic composition of Sodexho's managerial-level workforce does not reflect the discrimination claimed by Plaintiffs. According to uncontroverted evidence, Sodexho has a ***higher*** representation of African American employees in salaried exempt positions than is represented in the relevant occupations or EEO categories. The statistics in this regard are remarkably consistent: four of Sodexho's six divisions had *higher* African American representation than the relevant labor market African American availability, and *none* had statistically significant representation lower than availability. Id. Even at Sodexho's higher pay bands, there was no statistically significant adverse difference between the representation of African Americans at Sodexho and in the labor market, id., notwithstanding Plaintiffs' charge that African American employees face discrimination in trying to move to higher pay level positions and have been segregated in lower level positions that have little potential for upward mobility.

These representation statistics are directly relevant to the question of whether Plaintiffs' statistics imply a pattern or practice of intentional discrimination. See, e.g., Teamsters, 431 U.S. at 340 n.20. If significant disparities are probative of discrimination, the converse is true as well. Sodexho's success in achieving African American managerial representation at levels equal to or in excess of the qualified labor pool is significant proof of an absence of discrimination.

The availability statistics are matched by the extensive and uncontroverted record of Sodexho's affirmative action successes:

- Since the merger, Sodexho's employment practices have been reviewed on-site numerous times (at least nineteen) by the U.S. Dept. of Labor's OFCCP, which specifically examines subject corporations for evidence of systematic discrimination, and they have repeatedly received a clean bill of health. See Ex. 41, Biermann Rep. at 40-42 ¶¶ 81-83. Not only was there no finding of discrimination, or even a preliminary finding that would have called for a rebuttal, in fourteen of the nineteen audits the OFCCP found no violations at all, not even of a technical nature. Id. at 42 ¶ 82. The five violations were minor technical matters that did not require formal conciliation, such as a failure to list all job vacancies with the U.S. Employment Service (two audits); inadvertent errors in data entries (two audits), and minor modifications of Sodexho's utilization analysis and policy statement (one audit). Id.

- According to Leonard Biermann, former Deputy Director of the OFCCP, these findings are substantially more favorable than those OFCCP generally makes; it usually finds serious violations requiring conciliation in 43% of its audits; Sodexho had none. Id. at 42 ¶ 43.

- Sodexho has never had any judicial or administrative findings of race discrimination with regard to salaried exempt workers. Id. at 43 ¶ 44.

- The OFCCP's comprehensive Corporate Management Review of Sodexho's headquarters, assessing many of the same promotional results attacked by Plaintiffs, found no evidence of discrimination. Id. at 40 ¶¶ 79-80. According to Mr. Biermann, whose vast experience at the OFCCP provide a unique vantage of expertise, this result "was ***considerably better than most contractors experience***. Because the agency searches diligently for discrimination, often at least preliminary findings of serious violations are alleged, which results [at least] in a conciliation agreement" or litigation. Id. at ¶ 80 (emphasis added).

These successes weigh heavily against Plaintiffs' claim that discrimination was the standard operating procedure at Sodexho. In light of the lack of statistical and anecdotal evidence of a nationwide problem, they demonstrate conclusively Sodexho's commitment to diversity.

ii. Sodexho's Job Posting Systems Did Not Result In Statistically Significant Instances Of Discrimination.

Even though the alleged inadequacies of Sodexho's job posting systems figure heavily in Plaintiffs' claims of discrimination, Dr. Siskin did not conduct any separate analyses of the MCMS system and its replacement, the Career Center, but rather combined them inappropriately

and later largely ignored corrected data. Dr. Haworth did assess those systems, however, and her uncontroverted data show that even in MCMS, African Americans posted in a proportion roughly equivalent to their representation at Sodexho, with no statistically significant difference in the number of promotions between African Americans and whites. Career Center data similarly show no adverse impact for African Americans in the award of promotions. See Ex. 8, Haworth 10/01 Rep. at 82-84 ¶¶ 104-08 & Tables 20, 21; 101-02 ¶¶ 142-43; Ex. 1, Haworth 07/03 Rep. at 96-100 ¶¶ 170-75 & Tables 26-28; Ex. 12, Haworth 10/03 Rep. at 14 ¶ 45).[10]

These statistics confirm the opinion of Sodexho expert Leonard J. Biermann, who spent thirty years at the U.S. Department of Labor's Office of Federal Contract Compliance ("OFCCP") from its inception in 1965 until his retirement in 1994, often serving as Acting Director. (Ex. 41, Biermann Rep. at 1-2 ¶¶ 1-5). Based on his long experience of evaluating corporate personnel systems for possible discrimination, Mr. Biermann determined that MCMS "met or exceeded then prevailing standards for the advertisement of management vacancies." Id. at 8 ¶ 17(a). For Career Center, Mr. Biermann concluded "that it is a highly structured, controlled, and monitored system" that "exceeds the programs in place at any time of the numerous government contractor corporations I have reviewed" and "is clearly a standard of excellence regarding management/salaried job postings." Id. at ¶ 17(b). Finally, Mr. Biermann rejected Plaintiffs' contention that failure to post for all open positions invites, if not facilitates, discrimination. He knows of "no U.S. company that posts all open positions," and concluded that "[t]he level of job posting at Sodexho … exceeded that of any other very large company that

[10] Dr. Siskin's objections to this analysis (Sept. 2003 Rep. at 2), are not significant. His analysis of the posting systems (Table 5) improperly combined both MCMS and Career Center even though they are separate systems (and he produced backup information permitting such separation). Even after Dr. Haworth discovered Dr. Siskin's error, he did not correct the mistake, except for an acknowledgement in his Sept. 2003 report that he had combined the data. See Ex. 12 Haworth 10/03 Rep. at 13 ¶¶ 44.

[he could] recall observing during [his] career of reviewing corporate selection policies." Id. at 18 ¶ 42. Given Mr. Biermann's unique vantage, his opinion carries particular weight.

iii. Dr. Haworth's Findings Are Supported By Three Separate Promotion Analyses.

Using a proper pool of promotions, Dr. Haworth conducted several promotion analyses that found no statistically significant evidence of racial disparities.

First, to assess the flow of employees from or to a grade or location as they received promotions, Dr. Haworth conducted both an unweighted and a weighted feeder pool analysis. In the former analysis, which compares the upward movement of employees from a similar grade and organization, Dr. Haworth found that, when controlling for the time period of the promotion, salary band and organization, only ***two*** RVP regions had statistically significant adverse results, both in Corporate Services (accounting for 2.6% of all promotions), which were balanced by two RVP regions in Health Care Services with statistically significant positive findings. (Ex. 1, Haworth 07/03 Rep. at 67-68 ¶¶ 118-19.[11]

In her weighted feeder pool analysis, which examines the paths taken by employees to reach their current positions (id. at 72-77 ¶¶ 124-31), Dr. Haworth similarly found that African Americans had no statistically significant disparity in promotions except among two RVP regions, which were balanced by two statistically significant positive RVP regions. Id. at 73-74 ¶ 128.

Finally, when objective factors (e.g., education and experience, including occupational history) omitted in the Siskin analysis were added to her promotion analyses, using regression

[11] Dr. Haworth also found that the division with the most promotions (and, conspicuously, the most named Plaintiffs), Health Care Services, had positive promotion results. Haworth 07/03 Rep. at 67 ¶ 118. Similar findings were achieved when promotions were assessed for division, grade or salary band: upper level grades/bands had only a 1-person shortfall. ***No shortfall*** was found for African Americans moving from lower to upper levels. Id. at 69-72 ¶¶ 120-22.

analysis, ***no*** divisions and ***no*** groupings of salary grade/bands showed statistically significant adverse patterns of discrimination. Id.. at 88-96 ¶¶ 149-69. See also Ex. 46, Haworth III Decl. at 5-6 & Table 5 (using what he termed a "recurring operating curve" that measures reliability of the regression model, see Ex. 47, Siskin II Tr. 53-54, the data have a better "fit" to her model than it does to Dr. Siskin's regression models).

c. Sodexho's Decentralized Decision-Making Process Is Not A Sufficient Basis For Finding That Sodexho Engaged In A Pattern Or Practice Of Discrimination.

Plaintiffs' pattern-or-practice claim fails at another fundamental level: Plaintiffs have not adduced evidence of a policy or other nationwide practice from which discrimination could be inferred. It is not sufficient to sustain Plaintiffs' burden of proving discriminatory pattern or practice to merely allege that decisionmaking was decentralized and subjective, and then assert evidence of racial disparities as proof of the impact of that practice:

> ***Plaintiffs have not identified any company-wide policy or practice that caused the alleged salary disparities*** …. Without an identifiable policy or practice, there is nothing for the Court to enjoin for the protection of the class as a whole. ***Plaintiffs cannot glaze over the issue by arguing that "excessive subjectivity" is the discriminatory policy or practice.*** "Excessive subjectivity"' is a criticism. It is not an actual company-wide policy or practice.

Grosz v. Boeing Co., Case No. SACV 02-0071 CJC (Oct. 27, 2003) (min. order at 1-2) (Ex. 49 hereto) (emphasis added).

Thus, the mere fact that Sodexho did not utilize a highly centralized, fully "objective" promotion system does not, by itself, constitute a pattern or practice of discrimination. As one court stated, "The defect with plaintiffs' pattern-or-practice claim in this case is that plaintiffs have not asserted that *unlawful discrimination* was Roche's standard operating procedure. Rather, plaintiffs assert that 'Roche's ad hoc employee evaluation system' was the standard

operating procedure and that this procedure happened to result in both conscious and unconscious age discrimination." Sperling v. Hoffman-La Roche, Inc., 924 F. Supp. 1346, 1361 (D.N.J. 1996) (emphasis in original). There is no suggestion here that Sodexho "gave managers the discretion" to make promotion decisions "only as a ruse to conceal a systematic, discriminatory policy." Id. at 1364.

The statements in Grosz apply here squarely, and then some. The more complete factual record developed after discovery makes clear that the Court's earlier acceptance of allegations in the Complaint that promotions at Sodexho were "entirely subjective" because decisionmakers had broad discretion, see McReynolds, 208 F.R.D. at 442, needs to be revisited. Plaintiffs have failed to provide any evidence that objective factors were routinely and regularly jettisoned by all decisionmakers pursuant to a corporate policy allowing "entirely subjective" hiring decisions. Many class members have attested to the variety of objective and structured procedures used in making promotion selection decisions during the class period. See Exs. 13-15; 20-27. These class members also readily acknowledged the use of objective factors, including education and experience, in making selection decisions. Id.

These various processes defeat a claim by Plaintiffs that entirely subjective decision-making occurred during the class period, and preclude a finding that a common policy of discrimination, as required by applicable precedent, existed. Absent such a finding, no pattern and practice, standard operating procedure, or specific employment practice as required by the 1991 Civil Rights Act can be established. Moreover, under Gen. Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 159 n.15 (1982), these selection procedures suggest, in conjunction with the pending decertification motion, that the Court should revisit its interpretation of fn.15, as applied in this case. Even if such a claim were sufficient to satisfy Plaintiffs' initial burden of proof at

the certification stage, under the more rigorous standard applicable at summary judgment, it should be rejected as contrary to Teamsters and Falcon.[12]

II. Plaintiffs Have Failed to Adduce Evidence of a Legally Cognizable Claim of a Neutral Policy that Had a Disparate Impact on the Promotion of Plaintiffs.

A. General Legal Standards For Disparate Impact Claims.

1. Disparate Impact Claims Require Clear Proof That A Particular Facially Neutral Policy Caused The Alleged Disparities.

As this Court stated, a "'disparate impact' claim alleges that the defendant based an employment decision on a criterion that although 'facially neutral' nevertheless impermissibly disadvantaged individuals of one [race] more than the other." McReynolds, 208 F.R.D. at 440 (quoting Palmer, 815 F.2d at 90). The rules for such claims are strictly enforced.

First, it is well settled that no such claims are available under 42 U.S.C. § 1981. General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 390-91 (1980); Mitchell v. DCX, Inc., 274 F. Supp. 2d 33, 45 (D.D.C. 2003) (plaintiffs may not recover under § 1981 for disparate impact, as that statute requires proof of intentional discrimination). Thus, Sodexho is entitled to summary judgment on Plaintiffs' § 1981 disparate impact claim.

As for Plaintiffs' Title VII claim, to establish disparate impact, Plaintiffs must satisfy the rigorous standard set forth in the Civil Rights Act of 1991:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if – (i) a complaining party demonstrates that a respondent uses a ***particular*** employment practice that *causes* a disparate impact on the basis of race.

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[12] This point is consistent with the D.C. Circuit's decisions in Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994) and Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987). Hartman remanded to the district court because, while plaintiffs' "statistics may have demonstrated that discrimination … was afoot, nothing … permit[ted] the additional inference that class members suffered a *common* injury." 19 F.3d at 1472 (emphasis in original). Citing Wagner, it emphasized that plaintiffs must make a sufficient showing "to permit the court to infer that members of the class suffered from ***a common policy of discrimination*** that ***pervaded all of the employer's challenged employment decisions***. Id. (emphasis added). Plaintiffs have not come close to meeting that burden.

> (B)(i) With respect to demonstrating that the particular employment practices causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that ***each particular challenged employment practice causes a disparate impact***, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1) (emphasis added). This particularity requirement is widely enforced. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O'Connor J., plurality op.) (plaintiff's prima facie case "must begin by identifying the ***specific employment practice*** that is challenged" and then produce statistical proof "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for … promotions because of their membership in a protected group") (emphasis added). Moreover, Justice O'Connor further emphasized that, "[e]specially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the ***plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities***." Id. (emphasis added).

One year later, a majority of the Court adopted these statements, adding that Plaintiffs must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking … specifically showing that each challenged practice has a significantly disparate impact on employment practices for whites and nonwhites." Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656-57 (1989). Accord, Koger v. Reno, 98 F.3d at 638; Munoz v. Orr, 200 F.3d 291, 304 (5th Cir. 2000) ("it is a matter of settled law that a disparate impact class action is not the proper mechanism with which to attack the cumulative effects of an employer's practices"). Plaintiffs' proof of this causal link must be "significant" or "substantial." Batson v. Powell, 912 F. Supp. 565, 572 (D.D.C. 1996) ("Without a significant

statistical showing, no inference of disparate impact is warranted.").

As shown below, Plaintiffs have failed to meet their basic burden of identifying and isolating a particular policy that specifically caused significant racial disparities.

2. Summary Judgment Is Proper Where Plaintiffs Fail To Identify And Isolate A Particular Policy That Causes Significant Racial Disparities.

Numerous cases have rejected disparate impact claims at the summary judgment stage due to Plaintiffs' failure to identify a specific selection criterion or process that causes a disparate impact. In Koger v. Reno, for instance, the D.C. Circuit specifically held that, while plaintiffs had demonstrated statistically significant disparities, they had failed to establish a causal link between those disparities and "the relevant portions of the promotion package in practice" such that the allegedly offending practices "decreased the probability of promotion (even holding all factors constant)."); see Koger, 98 F.3d at 639-40 (refusing "to dispense with a causation requirement"). See also Munoz v. Orr, 200 F.3d at 299 ("[p]laintiffs must identify the specific practices [that they allege] as being responsible for observed disparities, and must conduct a systemic analysis of those practices in order to establish their case"); Smith v. Xerox Corp., 196 F.3d 358, 367 (2d Cir. 1999) (prima facie claim should be rejected if plaintiff cannot prove that specific elements of hiring process had a significant adverse impact on racial minority applicants); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1367 (5th Cir. 1992) ("Absent a 'systematic analysis of the racial effects of all promotional criteria for each rank'" that shows "the specific effect that each had on Black promotions," plaintiff "cannot establish a prima facie case of disparate impact"). The same principle holds where plaintiffs' statistical proof is insufficient to demonstrate causation by a specified employment practice. See Munoz v. Orr, 200 F.3d at 300; Khan v. Maryland, 903 F. Supp. 881, 888 (D. Md. 1995).

As discussed below, Plaintiffs cannot meet this standard. Their proof fails to demonstrate

a causal nexus between any specific employment practice and the alleged statistical disparities.

B. Plaintiffs Have Failed To Adduce Statistically Significant Evidence That Any Specific Employment Practice By Sodexho Caused A Disparate Impact On Promotions Of Plaintiffs.

Plaintiffs have virtually no evidence in support of their disparate impact claim. The sole systemic evidence of specifically discriminatory policies or practices at Sodexho is provided by Plaintiffs' industrial psychologist expert, Dr. Erich Prien. He opined, based entirely on Plaintiffs' second-hand accounts, that "Sodexho's system is casual and undisciplined, there is no systematic plan and procedure, and each manager was making decisions as he or she saw fit." (Ex. 50, Prien 9/03 Reb. Rep. at 5). He generally identifies six alleged specific deficiencies in Sodexho's "promotion selection system" that, he asserts, make the system discriminatory per se: (1) flaws in Sodexho's posting systems; (2) lack of assessment procedures; (3) lack of job analyses; (4) use of subjectivity in selection; (5) lack of documentation of selection decisions; and (6) lack of racially diverse decisionmakers. Dr. Prien cites no hard evidence in support, and for good reason. Far from an ***absence*** of processes, Sodexho's promotion "system" was marked by a ***variety*** of processes.

To cite but one example, shortly after the Marriott-Sodexho merger, Sodexho put into place a written plan for filling vacancies detailing the steps in the process, the responsible party, and the information to be provided by the decisionmaker at each step in the process. Divisions either adopted it or replaced it with their own comparable plans. (Exs. 51-53; Ex. 37, R. Walker Decl. at ¶¶ 2-5). As a result, promotion decisions typically did have concrete and common processes, including screening by local Human Resources staff; interview questions, which often were prepared by Human Resources staff, widespread use of interview panels; and written scoring matrices and scales Id.; Ex. 32, D. Barton Decl. at ¶¶ 2, 3-5; Ex. 34, R. Budney Decl. at

¶¶ 2-3; Ex. 38, R. Allen Decl. at ¶¶ 5-9 (and form documents attached thereto). These plans set forth screening processes whereby candidates for promotion below the G.M. level were screened by local division Human Resources staff and referred to the unit G.M., who normally would conduct a technical interview armed with recommended interview questions prepared by local division H.R. staff. (Ex. 54, G. Wilson Decl. at ¶ 6; Ex. 58, K. Fricker Decl. at ¶ 2 and.[13]

Many interviews similarly had structure and common procedures. For above-unit promotions, candidates frequently were interviewed by panels comprised of regional managers and local division H.R. staff using a standard set of questions prepared by H.R. Id.; see also Ex. 37, R. Walker Decl. at ¶ 5 (School Services); Ex. 33, P. Gerard Decl. at ¶ 4. When these processes were used, interviewers usually rated the candidates independently, using scoring matrices and interpretative guides, and then typically met as a group to discuss the candidates, again with Human Resources participation. Id.; Ex. 31, T. King Decl. at ¶ 5; Ex. 38, R. Allen Decl. at ¶ 8-11. The interview questions for G.M.-level and higher positions for Corporate Services and Health Care Services were based upon job analyses or management competency models. (Exs. 55-56; Ex. 58, K. Fricker Decl. (attaching GM, DM and VP interview guides from Health Care western region); Ex. 68, Recruitment Coordinator Manual; Ex. 32, D. Barton Decl. (attached technical questions)).

[13] Moreover, many hiring managers relied on H.R. departments for assistance, e.g., by actively developing internal and external recruitment strategies for the position, and by considering underutilization and steps needed to develop diverse applicant pools, such as college recruiting, web searches, and recruitment of employees of competitors. (Ex. 59, K. Biaggi Decl. at ¶5). Thus, local division H.R. staff, not hiring managers, did most screening, typically using a division-specific structured screening form to rate candidates on a set of defined competencies. (See, e.g., Ex. 37, R. Walker Decl. at ¶ 3; Ex. 32 D. Barton Decl. at ¶ 6; Ex. 60 (HR Interview Form and Candidate Evaluation Form); Ex. 62 (Employment Interview Assessment)).

In many cases, Sodexho had structured interview materials,[14] which often were reinforced by standardized rating matrices and scales that provided further structure and consistency by weighting various categories of competencies. Ex. 32, D. Barton Decl. at ¶4; Ex. 31, T. King Decl. (and documents attached thereto); Ex. 61 (DM Candidate Rating Form); Ex. 38, R. Allen Decl. (and documents attached thereto). Hiring managers typically used these scores in their selection decisions. Ex. 32, D. Barton Decl. at ¶ 5; Ex. 37, R. Walker Decl. at ¶ 5; Ex. 33, P. Gerard Decl. at ¶ 5. Moreover, some mandatory prerequisites existed: a satisfactory evaluation and at least one-year tenure in the current position, as well as the detailed, specific, and mixed objective and subjective factors set forth in job descriptions.

Moreover, as previously stated, more than 500 job descriptions were used during the class period (Ex. 28, Siskin II Tr. 286), and plaintiff Lisa Mitchell, a former General Manager, testified that Sodexho distributes job descriptions for numerous management positions, which are then modified by the various units themselves "due to the nature of the differences and the diverse nature of the units we were in that additional items were added or attached so as to clarify to some people, their jobs." (Ex. 64, Mitchell Tr. 46-50, 51-52).

Dr. Siskin did not separately analyze the MCMS or Career Center job posting systems. Dr. Haworth, on the other hand, did assess those systems, and she found that African Americans used MCMS at roughly the same proportion as their representation among the Sodexho applicants. For both systems, African Americans did not experience statistically significant

[14] Some divisions used structured interviews for screening developed independently by Gallup, an external contractor, while Corporate Services required screening by Human Resources and the hiring manager for all positions above GM. using a "written interview" instrument. See Ex. 55. Financial Services had a policy of interviewing all qualified internal candidates and using H.R. Staff to screen all external candidates. (Ex. 38, Allen Decl. at ¶ 6).

adverse results regarding the selection of candidates.[15] See Ex. 8, Haworth 10/01 Rep. at ¶¶ 104-08, 142-43 & Tables 20, 21; Ex. 1, Haworth 07/03 Rep. at 96-100 ¶¶ 170-75 & Tables 26-28; Ex. 12, Haworth 10/03 Rep. at 14 ¶ 46. Although Dr. Siskin questions Dr. Haworth's use of that data, the fact remains that his analyses do not address and thus do not support Plaintiffs' core theory that Sodexho's promotion system was standardless and wholly lacking in structure or procedures. That theory is nothing more than an unproven hypothesis belied by extensive evidence to the contrary, much of it admitted by Plaintiffs themselves.[16]

Even if Dr. Prien's charges had factual merit, Plaintiffs have not assessed whether these alleged deficiencies or some other factor caused any significant racial disparities in promotions. For example, his complaint that hiring criteria were not formally validated according to job-related functions merely sets forth a perceived weakness in the system that makes discrimination possible. It does not demonstrate discriminatory consequences. Absent statistical proof of disparate effect, his assumption that these ***caused*** discrimination, see Ex. 67, Prien I Tr. at 181-86, is sheer speculation, nothing more. See Bullington v. Air Force, 186 F.3d 1314, 1312 (10th Cir. 1999) (plaintiffs must "not merely show circumstances raising an inference of disparate impact but must demonstrate the discriminatory impact at issue"); Sperling, 924 F. Supp. at 1380-81 (while "[i]t would be reasonable for a jury to infer that, if a manager has a great deal of

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[15] The failure to assess the Career Center is telling. The web-based interactive Career Center system, launched in June 2000, had a policy calling for *all* selection decisions to be reviewed by the division's Human Resources department and for disagreements over the appropriate selected candidate to be decided at the next higher level of Operations/Staff and Human Resources. (Ex. 66, Career Center User's Guide at 4, Policy 5). This, in other words, was exactly the type of centralized job posting system that Plaintiffs had sought.

[16] In its certification decision, the Court pointed to deposition testimony by William Anstee, a Sodexho 30(b)(6) witness, representing one of the six divisions, stating that there was no company guidelines or fixed criteria that managers had to follow in making their decisions. See McReynolds, 208 F.R.D. at 432-33 (quoting Anstee Tr. 182-83)). In fact, Anstee was describing the *ability* of managers to disregard the policies or guidelines – not that the managers actually did so on a routine and pervasive basis. See id. ("there's no company guidelines or fixed criteria or anything that ***they have to follow*** in making decisions") (emphasis added). That is a far cry from testimony saying that no objective standards existed or that any such standards that might exist were regularly and routinely disregarded by the hiring managers.

discretion in determining which employees are to be fired, then that manager had the opportunity to exercise his discretion in a discriminatory fashion[,]" this "alone des not constitute a pattern or practice of discrimination").

As for his factual criticisms, to put it charitably, Dr. Prien's opinions are wholly unreliable. The ***only*** people Dr. Prien interviewed in order to reach his opinions were Plaintiffs' attorneys. (Ex. 67, Prien I Tr. 16, 18-21, 63, 136, 141-44, 167-69, 174-75, 179-81, 185). As a result, his report consists of superficial charges that lack any substance.[17] This is hardly the sort of "significant showing" of a common policy of discrimination that pervaded all of the employer's challenged employment decisions required by the D.C. Circuit in Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994) to establish disparate impact. The evidence that managers, ***on a company-wide basis***, were free to promote whomever they wanted, on whatever basis they elected, and with as much freedom to disregard company policies as to minimum requirements and job needs as they wished, is wholly lacking. Plaintiffs' blunderbuss criticism of Sodexho's promotion practices is too vague and unconnected to a carefully refined statistical analysis of specific employment practices to support a disparate impact claim.

In Carpenter v. Boeing Co., Case No. 02-1019-WEB, slip op. at 22 (D. Kan. Feb. 24, 2004), a district court recently reached a similar conclusion. There, Dr. Siskin admitted that he could not establish that the statistically significant disparities that he had found were caused by subjective discretion on the part of managers, as his analysis did not allow him to rule out other equally plausible explanations. The court therefore held that plaintiffs had failed "to show that

[17] For example, Dr. Prien castigates Sodexho for its "lax and corruptible" postings process even though he admits that he has ***no*** expertise with job posting systems and could not relate the most basic information as to its operation. Id. at 46-47, 64, 105, 44-45, 90-91, 117-20, 127-31, 135-36. Indeed, Dr. Prien was remarkably ignorant regarding the web-based Career Center posting system, which came on-line in June 2000. Although he claimed to be familiar with it and addressed it in his report, he described it as "appl[ying] after decisions have been made and for the training and development of employees in the system," i.e., a training program, not a posting system that superceded MCMS. Id. at 128. See also id. at 119, 129-30; compare with Prien Rep. ¶ 9.

the identified employment practice, subjective discretion on the part of managers, caused any disparate impact." Id. That finding certainly applies here.

In sum, Plaintiffs offer no credible evidence to support their conclusion that Sodexho's promotion systems were wholly subjective and discretionary, a "Wild West" system in which managers hired and promoted according to their unfettered whims and caprices, let alone demonstrate any disparate impact arising from any such specific practices. Although individual plaintiffs and a few other witnesses have anecdotal allegations to that effect, those accounts reflect claims in only a tiny handful of Sodexho operations (which, tellingly, concentrate primarily in one of the RVP regions where their data demonstrate statistically significant positive results for African Americans, belying Plaintiffs' claim that decentralization is discriminatory per se). Plaintiffs were required to demonstrate that a specific companywide policy of subjectivity and decentralization resulted in statistically significant adverse results for African American promotions. They failed to do so, and Sodexho is therefore entitled to summary judgment on their claim of disparate impact.

CONCLUSION

Plaintiffs have failed to meet their heavy burden of demonstrating a nationwide pattern or practice of discrimination at Sodexho. Similarly, Plaintiffs have failed to identify any specific employment practice or policy at Sodexho that allegedly caused the statistically significant results reported by their expert. For those and the other foregoing reasons discussed above, Sodexho is entitled to summary judgment as to Plaintiffs' claims of disparate treatment and as to their claims of disparate impact.

Respectfully submitted,

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