SCANNED

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**LUFKIN DIVISION**

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| **SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,** | § | |
| ***Plaintiffs,*** | § | **CIVIL ACTION NO. 9:97-CV-063** |
| vs. | § | |
| | § | **JUDGE COBB** |
| **LUFKIN INDUSTRIES,** | § | |
| ***Defendant.*** | § | |

U.S. DISTRICT COURT EASTERN DISTRICT OF TEXAS
SEP 05 2003
DAVID J. MALAND, CLERK
BY DEPUTY

**DEFENDANT LUFKIN INDUSTRIES' MOTION FOR SUMMARY JUDGMENT**

Defendant Lufkin Industries, Inc. ("Lufkin") respectfully moves for summary judgment.

Plaintiffs have effectively abandoned their claims with respect to evaluations, training, demotions, layoff, recalls, and rehires of hourly employees in Angelina County; all claims as to hourly employees outside Angelina County; and all claims as to salaried employees.[1] Plaintiffs offer no proof of a statistically significant disparity adverse to black employees with respect to these employment practices and employees. *See Morin v. Caire*, 77 F.3d 116, 121 n.17 (5th Cir. 1996) (explaining that plaintiffs can "abandon[] . . . claims for want of proof."); *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000) (requiring disparate impact plaintiff to "conduct a systemic analysis" of the challenged employment practice in order to prove claim), *cert. denied*, 531 U.S. 812 (2000).

Notwithstanding the breadth of their Second Amended Supplemental Complaint, Plaintiffs' statistical expert's conclusions are limited to three discrete employment processes: (i) initial assignment of entry level hourly employees, (ii) promotions and advancement for hourly jobs, and (iii)

1 Report of Richard Drogin, attached as Exhibit 2, and Plaintiffs' Supplemental Responses and Objections to Lufkin's First Set of Interrogatories Nos. 1 and 2, attached as Exhibit 1. Plaintiffs' evidence in support of their disparate impact claims consists of (1) the report of their statistical expert, Richard Drogin, and (2) the report of their industrial-organizational psychology expert, Richard Martell, and the information, data, and documents on which Dr. Drogin and Dr. Martell rely for their respective analysis and conclusions. (*Id.* at No. 2). At the close of discovery, August 15, Plaintiffs did not intend to rely on anecdotal testimony to prove their disparate impact claims, although they state in their most recent discovery responses served September 2 that they may present certain anecdotal testimony, consisting primarily of the employment experience of at least 31 class members. (*Id.*).

237

pay rates of hourly employees. (Ex. 2, Drogin Report; *see also* Ex. 3, Hamel Affidavit). Specifically, Plaintiffs' expert in statistics offers his opinion that the only statistically significant disparities affecting Plaintiffs are a claimed over-assignment to the entry level position of General Foundryman; an under-representation in promotion from EEO categories 6 (craftsmen), 7 (semi-skilled), and 8 (unskilled); and a shortfall in average compensation in EEO categories 6, 7, and 8. (*Id.*).

Dr. Drogin's inferential statistical analysis is nothing more than

- comparisons of all persons hired in entry-level positions, and hired in entry-level positions on the same day, without regard to applicants for those positions not hired, what positions the individuals applied for, or the minimum qualifications required for the position;
- comparisons of persons promoted in hourly positions in EEO categories 6-8 using applicant pools Dr. Drogin constructs without regard to Lufkin's seniority system, the actual bid sheets, or objective eligibility criteria;
- a regression analysis of hourly pay rates in EEO categories 6-8 without controlling for the job classification in which the employee works.

Plaintiffs' initial assignment allegations do not state a claim because they were not in either EEOC charge on which this case is predicated. More significantly, because Dr. Drogin[2] does not even attempt to account for discrete, objective employment practices used by Lufkin (such as departmental seniority, written tests, and a high school diploma or G.E.D. minimum qualification requirement), or to use proper comparisons, Dr. Drogin's analysis will not sustain Plaintiffs' case. Without competent statistical evidence that a particular employment practice significantly adversely affects black employees, Plaintiffs' disparate impact claims fail and their complaint must be dismissed.

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[2] Plaintiffs now rely exclusively on Richard Drogin for statistical opinions. Sandra McCune is not designated as an expert. Dr. McCune, whose report was accepted by the Court in the class certification hearing, was later criticized in *Vance v. City of Nacogdoches*, 198 F. Supp. 2d 858, 860 (E.D. Tex. 2002).

## STATEMENT OF MATERIAL FACTS[3]

### I. SUMMARY OF LUFKIN'S INITIAL EMPLOYMENT, PROMOTION, AND COMPENSATION PROCESS FOR HOURLY EMPLOYEES

#### A. An Employee's Initial Assignment is Pre-Determined By a Job Requisition.

Each of Lufkin's four manufacturing divisions has an entry-level hourly job classification. In the Foundry and Trailer divisions, the minimum qualifications for entry level are (i) prior labor experience, (ii) no termination for cause within two years, (iii) no termination for absenteeism within one year, and (iv) no gaps in work history for more than six months. (Ex. 4, Barbay at 64-65; Ex. 5, Poulan at 21).[4] For Power Transmission and Oilfield, a high school diploma or GED is also required for an entry level position. (Barbay at 65; Poulan at 55). All entry-level hourly employees are hired through the Texas Workforce Commission. (Barbay at 46-48).

The process is simple and objective. A Lufkin job requisition listing job title, shift and supervisor, is submitted by the hiring division to Human Resources. Each requisition is specific to a particular job classification and division. A copy of a Lufkin requisition form is attached as Exhibit 6 to this Motion.

Each job requisition is assigned an internal requisition number, and an interview request is submitted to the local Texas Workforce Commission ("TWC"). (Barbay at 49-50). Lufkin advises the TWC of the available job classification and division. (*Id.*; Poulan at 10). Lufkin has provided in writing to the TWC the minimum requirements for the entry-level job classification in each of its manufacturing divisions. (Barbay at 52-53; Poulan 21-22, Ex. 4-8).

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[3] Attached as Exhibit 3 is the Affidavit of Douglas Hamel, verifying the cited deposition excerpts. References to testimony in depositions upon oral examination will be cited initially as Ex. __, [Deponent's Last Name] [Deposition Date (if more than one)] at [Page]. Subsequent cites to the deponent's deposition testimony will be cited as [Deponent's Last Name] [Deposition Date (if more than one)] at [Page], omitting the Exhibit number. Excerpts from cited depositions upon oral examination are included in the exhibits attached to this motion and specifically identified by deponent and deposition date in the accompanying table of contents.

[4] Mr. Barbay is responsible for the hiring of entry-level, hourly employees. (Barbay Depo. at 233). Ms. Poulan, Workforce Development Specialist, is the primary contact for Lufkin Industries at the TWC. (*Id.* at 4-5).

The TWC enters the information in its computer system and runs a search to match customers already entered in their database[5] with the available position. (Poulan at 23-24).

From the computer match list, the TWC calls customers and advises them of the specific job available. (Poulan at 24-25). For example, if the customer's name is generated for a general foundryman position, the TWC representative advises the customer that there is a general foundryman position available. (*Id.*). The TWC representative also goes over the customer's work experience to make sure he or she meets the minimum qualifications. (*Id.* at 25). If the customer is interested in the available job for which he or she was called and meets the minimum qualifications, he or she is referred for the job and set up to interview for that job. (*Id.*).

When applicants arrive at the TWC, they are given a Lufkin application. (Poulan at 30-31). Interviews are conducted in the order that the applications are returned to the TWC receptionist. (*Id.*; Barbay at 88-89). The interviewer confirms the applicant is applying for the position for which the TWC called him or her to interview (Barbay at 86-87), and discusses whether the candidate indeed meets Lufkin's minimum job requirements. (Barbay at 57-59). The job requisition number and disposition of each candidate interviewed is noted at the bottom of the interviewee's application form, and is entered in Lufkin's employee database. (*Id.* at 58, 59-60).

Applicants are hired for the position and division for which they apply. (*Id.* at 90). At no point does anyone from Lufkin decide which division or job an employee will be assigned once he or she is hired; this is "pre-determined by [the original job] requisition" before any interview ever takes place. (*Id.* at 93).

**B. Lufkin's Hourly Promotion Process is by Union Contract.**

Lufkin's promotion process for hourly employees in each of its four manufacturing divisions is rigidly and objectively defined by the procedures in the Union Contract. (Ex. 7, Havard Declaration;

5 Individuals seeking employment, "customers," provide TWC with biographical information, work experience, and the type work preferred. (Poulan at 15-17).

Ex. 8, Agreement by and between Lufkin Industries, Inc. and A.F.L.-C.I.O. (hereinafter ("Union Contract"), Arts. 22 & 25 & Letters of Stipulation).[6] First, and by far most common, are posted positions. (*Id.*). Promotions to posted positions are filled pursuant to the job bid and posting procedure in the Union Contract. (*Id.*). A limited number of positions are not posted. These positions are defined in the Union Contract or are part of a defined career path or line of progression agreed to by the company and the unions. (*See*, *e.g.*, *id.* at pp. 59, 62, 72-77). The failure to receive a promotion to a posted or non-posted position is subject to the Union Contract's grievance and arbitration procedure. (*Id.* at Art. 9).

1. <u>Posted Positions Are Awarded to the Most Senior Eligible Bidder.</u>

*a. Departmental Seniority*

The procedure for awarding posted promotions is well-defined. Vacant positions are posted. (Union Contract, Art. 25). Any employee may sign the job posting. At the end of the posting period, promotions are awarded to eligible bidders from the job bid list based on "departmental seniority." (*Id.* & Art. 22).

Steve Reynolds, Foundry Manufacturing Manager, and Richard Gilley, Trailer Manufacturing Manager, testified that from the group of eligible bidders, the seniority roster alone controls who receives the promotion. (Ex. 10, Reynolds at 192-93; Ex. 11, Gilley at 158-59). David Jinkins, Power Transmission Plant Superintendent, similarly explained that jobs in the Power Transmission Division are always given to the senior qualified bidder, subject to the bidder's right to demonstrate his or her ability to perform the job during a reasonable trial period. (Ex. 12, Jinkins at 114-15, 118-19). Finally, in the Oilfield division, Larry Long, Oilfield Manufacturing Manager, testified that if the senior person does not get the job, it is normally because he or she declined the position. (Ex. 13, Long at 103).

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[6] All references in this section are to the collective bargaining agreement in effect between October 1999 and October 2002.

Plaintiffs' Class Representatives generally agree. Walter Butler, a 20+ year union steward, testified that he thought 80 to 90 percent of all promotions in the hourly work force in the Trailer Division were done by departmental seniority. (Ex. 14, Butler at 45, 171). Florine Thompson testified that in her view, 90% of promotions in the hourly workforce in the Trailer division were done by seniority. (Ex. 15, Thompson at 199-201.) Earl Potts, a 12+ year Lufkin employee in the Power Transmission and Oilfield divisions, testified that it was his experience that Lufkin awarded jobs by seniority in hourly jobs. (Ex. 16, Potts at 23, 49, 56-57). Leroy Garner, a 35+ year Lufkin employee in the Power Transmission machine shop and former union steward, testified that he could not recall a single instance in the last ten years where someone with more seniority did not get a job after signing a bid sheet. (Ex. 17, Garner at 148, 152-53). Clarence Owens, a veteran employee of both the Oilfield and Power Transmission Divisions, testified that it was also his understanding that most job promotions in the bargaining unit are awarded by seniority. (Ex. 18, Owens Depo. at 33-34, 82).

*b. Eligibility Criteria*

There are only limited situations in which a posted promotion does not go to the most senior employee (assuming, of course, that the most senior employee accepts the position when offered). For example, a bidder is not eligible if the posted position is not a promotion for the employee. Hourly employees, even those with many years of seniority, do not have the right to be considered for a demotion or a lateral move except in the case of shift preferences or as otherwise allowed by the Union Contract.[7] (Long at 93; Jinkins at 108; Gilley at 162-63; Reynolds at 153). In some instances, a move from a non-preferred shift to a preferred shift is considered a promotion by the union, even if the employee retains the same job classification.[8] (Long at 94-95).

[7] A promotion occurs if the top pay for the job bid (i) is higher than the top pay for the job the bidder currently holds; (ii) the posted job is for a trainee position and the posted job being trained has a top pay higher than the top pay for the job the bidder currently holds; (iii) the bid is for a Class B position and the Class A positions' top pay is higher than the top pay for the job the bidder currently holds. (Long at 93-94; Jinkins at 108-09; Gilley at 162-63).

[8] Lufkin and the Machinist union have entered into a Letter of Stipulation that defines the procedure for moving from 2nd or 3rd shift to 1st shift. (Union Contract, p. 71). Pursuant to this Letter of Stipulation, an employee must have

In the Foundry and Oilfield divisions, satisfactory attendance is required before an employee may receive a promotion. (Reynolds at 153, 184-87; Long at 96). Satisfactory attendance is determined by the Attendance Program, Exhibit B to the Union Contract. (*Id.* & Exhibit B to Union Contract). Attendance records on all employees are maintained in Lufkin's attendance database. (Ex. 9, Conway Declaration). Foundry employees are likewise ineligible for promotion if they have been issued a formal disciplinary warning for a plant rule violation in the six month period preceding the job posting. (Reynolds at 153.). A copy of the warning is kept by the Foundry, sent to the union, and placed in the employee's personnel file. (*Id.* at 163-64).

Finally, the Company may require an employee to possess a present ability to perform the requirements of the position to be eligible for the promotion. (Union Contract, Art. 22). Ability, however, is sparingly used in making promotion decisions and is reserved for highly skilled or specialized positions. David Jinkins, Power Transmission Plant Superintendent, testified that he could not recall a specific instance in more than 15 years as a supervisor, manager, and superintendent, when an employee had been disqualified because of ability without at least being allowed to try out the job for a reasonable period of time to see if he or she could perform the work. (Jinkins at 114-15). According to Mr. Jinkins, the only time he could recall using ability at all was in layoffs. (*Id.*). In the Foundry division, Mr. Reynolds estimated that the senior employee is going to get the job 99% of the time. (Reynolds at 133). Larry Long, Oilfield Manufacturing Manager, testified that when the ability clause is applied in his division, it is because of a clear difference in skill, not just performance level: "It's clearly a skill that takes a long time to accumulate that sets them apart and is a true ability over someone else." (Long at 104-05). In the Trailer division, Mr. Gilley testified that where there is a test, ability is determined strictly through testing; where there is no test, the most senior employee is given the job and allowed to demonstrate his or her ability to perform the required tasks. (Gilley at 234-37).

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two years on nights or have earned two "by-passes" before he or she can move to first shift. This is also an eligibility criterion. (Long at 97-98). There are certain other narrowly defined exceptions (Union Contract, Letter of Stipulation, p. 71).

To the extent ability is used, the testimony and evidence conclusively demonstrate that this is almost always an objective determination. Present ability is most commonly measured by a written or demonstrative test. (*See* Reynolds at 108, 192-93; Gilley at 136, 137-47). The process is simple and objective: if an employee successfully passes the applicable written or demonstrative test, he or she is considered to have demonstrated the ability to perform the posted position and the position will go to the most senior employee among all those that have signed the bid sheet and passed the test. (Reynolds at 193; Gilley at 158-59).[9]

Copies of the tests used in each of Lufkin's divisions are attached as Exhibit 19 to this Motion. (*See also* Ex. 7, Havard Declaration).

An employee will also be deemed to have the present ability to perform the job if he or she previously held the posted position. (Gilley at 238; Reynolds at 132-33). Similarly, ability may be demonstrated by successfully performing the Class B classification for the posted Class A promotion. (Gilley at 115-16, 148-49; Reynolds at 132-33). For example, in the Trailer division, an employee must have held the Machine Operator Class B classification in order to be promoted to Machine Operator Class A. (Gilley at 148-49). Finally, ability may be demonstrated by holding the same classification at another company. (Reynolds at 132-33).

2. <u>Non-Posted Promotions Are Awarded in Career Paths or Lines of Progression.</u>

Non-posted positions consist of two types: (i) entry level jobs; or (ii) jobs associated with a recognized career path or line of progression. (Union Contract, pp. 72-77; Long at 44-45; Jinkins at 103-06; Gilley at 141-42, 149-50; Reynolds at 156-57).

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9 Tests are most prevalent in the Foundry and Trailer divisions and in the maintenance classifications, such as electrician or maintenance mechanic. (*Id.*). Mr. Reynolds, the Foundry Manufacturing Manager, estimated that approximately 25% of the jobs in the Foundry division have some sort of testing requirement. (Reynolds at 192). Mr. Gilley testified that the Trailer division also requires a written or demonstrative test for promotion to various jobs. (Gilley at 137-47). For example, to be promoted to a welding position, an employee must first pass a welding test, requiring the employee to demonstrate the ability to weld. (*Id.*).

Jobs associated with a recognized career path or line of progression are defined by the Union Contract or by agreement between Lufkin and the unions. For example, the Union Contract defines an Assembly career path within the Machine Shop department. (Union Contract, pp. 72-73). The Assembly career path is progressive with only the entry level job, Class II Assembler, being posted. (*Id.*). Progression through the remaining classifications is non-competitive, with jobs being awarded based on an individual demonstrating the ability to competently perform the job at the next level. (Jinkins at 104-05; Gilley at 185). The only applicable criteria is whether an individual can objectively perform the skills associated with the higher-level job, *e.g.*, "demonstrated ability." (*Id.*; Union Contract, pp. 72-77). In other words, promotion to these jobs is determined by the individual and is not a matter of selecting a candidate from a group of employees with similar characteristics. (*See, e.g.*, Ex. 20, Various Specialist and Certified Job Classifications).

**C. Hourly Employee Pay Rates and Raises Are Defined in the Union Contract.**

Pay rates for hourly employees are determined by the Union Contract, which lists the negotiated rates and premiums. (Union Contract, Exhibit A, Art. 18 & p. 71). The Union Contract also determines the timing of raises for hourly employees. Every hourly employee "shall be" granted a raise of at least twenty-five cents every six-month period, based on satisfactory performance until such employee reaches the top of the rate range for the job classification in which they are employed. (Union Contract, Art. 13).[10]

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[10] "Satisfactory performance" has been defined over time through certain supplemental stipulations and agreements with the unions. For example, Lufkin and the GMP have agreed in writing that for purposes of Article 13 raises, satisfactory performance requires satisfactory attendance at or above the +1 level for absence and a +0 for tardy/early out occurrences. (Ex. 21, Supplemental Agreement between Lufkin and GMP #429; Ex. 7, Havard Declaration). Other divisions, including Oilfield and Trailer, also look at attendance in awarding raises. (Long at 122; Gilley at 209-12). If an employee does not receive an Article 13 wage increase, he or she may grieve the action through the unions' grievance procedure. (Union Contract, Art. 9).

## ARGUMENT

### I. Plaintiffs Fail to State a Claim Regarding Initial Assignment.

The class claims proceed solely on the basis of McClain's and Thomas' EEOC charges. While it is well settled that class members may "piggyback" on the named plaintiff's charges, to enjoy the benefits of the "single filing rule," class members must be similarly situated to those persons actually filing the EEOC charge. *See Bettcher v. Brown Schs., Inc.*, 262 F.3d 492, 494 (5th Cir. 2001); *Allen v. United States Steel Corp.*, 665 F.2d 689, 695 (5th Cir. 1982) ("[I]n a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement.").

Here, neither McClain nor Thomas charged that Lufkin had discriminatory hiring or initial assignment practices. Sylvester McClain's August 12, 1996 EEOC charge alleged that "[s]ince January of 1995 and continuing, I have been subjected to different terms and conditions of employment by being denied comparable training, access to supplies and equipment needed to do a satisfactry [sic] job; given unsatisfactory evaluations." (Ex. 22, McClain EEOC Documents). In particular, McClain charged that he was discriminatorily demoted from Quality Manager to Inspector on January 6, 1996. (*Id.*). Additionally, although not stated in his charge, McClain's Intake Questionnaire, Information Sheet, and memoranda written on January 8, 1996 and January 29, 1995, alleged "low pay." (*Id.*). Notably missing from all of McClain's correspondence with the EEOC is any discussion or complaint about hiring or initial assignment.

Buford Thomas' February 24, 1997 EEOC charge and allegations are no different. (Ex. 23 Thomas EEOC Documents). In his charge, Thomas alleged constructive discharge, denial of promotional and training opportunities, and being "required to not only do my own work, but also that of my white colleagues." (*Id.*). Like McClain, Thomas makes no complaint of discrimination in hiring or initial assignment.

Furthermore, both McClain and Thomas would have been statutorily time-barred from asserting hiring or initial assignment claims at the time of their charges. *See Huckabay v. Moore,* 142 F.3d 233, 238 (5th Cir. 1998). At the time of their charges, more than 15 years had passed since Thomas' hiring and initial assignment to Power Transmission, and more than 20 years had passed since McClain's hiring and initial assignment to Oilfield. (Ex. 22, 23).

The only issues that may be brought in this action by class members "piggybacking" on McClain's and Thomas's EEOC charges are those practices properly asserted by McClain and Thomas in their EEOC charges and reasserted in the complaint. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). As McClain and Thomas did not assert – and could not have properly asserted – hiring or initial assignment claims, these issues may not be considered in this action. *Id; see also Allen,* 665 F.2d at 696 ("[P]laintiffs ... who have not themselves filed timely EEOC complaints, cannot rely upon the EEOC complaint of another, when the latter complaint itself is not timely as to the filing party's own individual claims.").

Nor is Plaintiffs' initial assignment claim saved by the reasonable expectation rule announced in *Sanchez v. Standard Brand, Inc.*, 431 F.2d 455 (5th Cir. 1970), which addresses the scope of judicial complaints brought by an individual who filed a timely EEOC charge. In such cases, the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge. (*Id.*) The reasonable expectation rule requires that the scope of allegations made in a judicial complaint be "like or related" to allegations made in the EEOC charge. (*Id.*) Plaintiffs may not bootstrap a proper claim, however, simply through the intervention of class representatives. Unless the other class representatives filed charges with the EEOC, they and other class members must proceed "within the periphery of the issues which [the named plaintiffs] could assert." *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1201 (5th Cir. 1984) (citing *Oatis*, 398 F.2d at 499). Because McClain and Thomas did not file a charge asserting an initial assignment claim and any such charge would have been untimely as to McClain and Thomas, it is not a claim which they "could assert," and neither can the class.

It is also beyond cavil that Thomas' and McClain's charges would not reasonably be expected to initiate an investigation of hiring and initial assignment in Lufkin's Foundry. Since Thomas and McClain were hired and assigned to divisions other than Foundry, there would have been no basis to investigate a claim that black entry-level employees are relegated to the Foundry division. Nor is there any basis to suggest that the EEOC would have investigated employment and assignment decisions that accrued 15 and 20 years, respectively, before the changes were filed. Thomas, who was initially hired in Power Transmission, makes no mention of the Foundry in his charge. McClain, who was initially hired in Oilfield and, when rehired in 1972, assigned to the Trailer division, specifies that the organization charged is "Lufkin Industries/Trailer Division." (Ex. 24, McClain at 18 (July 18, 2003); Ex. 22, Intake Questionnaire).

The McClain and Thomas charges will not support failure-to-hire and initial assignment claims. *See, e.g., Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983) (holding that district court did not err in denying class certification on initial job assignment/hiring claims because EEOC charge only alleged discrimination in promotions, unspecified terms and conditions of employment, harassment, and union representation); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (affirming district court's dismissal of hiring claim as a matter of law because EEOC charge only alleged "disparate disciplinary treatment"); *Hyatt v. CNG Producing Co.*, No. 91-4654 §G, 1992 U.S. Dist. LEXIS 17017, at **12-13 (E.D. La. Oct. 28, 1992) (dismissing as a matter of law discriminatory job assignment claim because EEOC charge alleged only discriminatory discharge); *Gustafson, Inc. v. Bunch*, No. 3:97-CV-2102-D, 83 Fair Empl. Prac. Cas. (BNA) 375, 1999 U.S. Dist. LEXIS 7107, at **21-22 (N.D. Tex. May 7, 1999) (dismissing as a matter of law claim that employer "unlawfully discriminated by failing to hire [the plaintiff] for other jobs" because EEOC charges alleged only "discrimination arising from Gustafson's decision not to hire him for the Northeast Territory TSR position" and retaliation); *Simmons v. Iberville Operating Co.*, No. 89-3483, 1990 U.S. Dist. LEXIS 1336, at **10-12 (E.D. La. Feb. 2, 1990) (dismissing as a matter of law claims regarding "discrimination resulting from allegedly segregated job classifications, job assignments, [and] refusals to hire" because EEOC charges only alleged discriminatory demotion, harassment, suspension, and retaliatory discharge).[11] *Cf. Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 884 (5th Cir. 1988) (discussing possible Rule 11 sanctions based on plaintiffs' counsel's "expansion of the judicial complaint beyond the EEOC complaint," in that the EEOC charges alleged discriminatory layoff but the complaint included "shotgun allegations" such as hiring, promotion, and on-the-job treatment claims).

In sum, because McClain and Thomas did not make, and could not have made, timely hiring or initial assignment claims in their EEOC charges, Plaintiffs' initial assignment claims must be dismissed as a matter of law.

## II. Plaintiffs Have Not Established a Prima Facie Case Because They Cannot Identify a Specific Practice That Has a Disparate Impact on Black Employees.

Title VII requires, in pertinent part:

> 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 . . .

42 U.S.C. §2000e-2(k)(1)(A)(i) (emphasis added).

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11 *See also Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184, 1187 (D. Md. 1977) (granting employer's motion to dismiss as a matter of law "recruitment, job classification, hiring, [and] assignment" claims because EEOC charge only alleged discrimination in wages, benefits, and terms and conditions of employment); *Jackson v. Ohio Bell Tel. Co.*, 555 F. Supp. 80, 83 (S.D. Ohio 1982) (dismissing as a matter of law job assignment claim because EEOC charge only alleged discrimination in termination and discipline); *Grant v. Morgan Guar. Trust Co. of NY*, 548 F. Supp. 1189, 1191-92 (S.D.N.Y 1982) (dismissing as a matter of law assignment claim because EEOC charge only alleged failure-to-promote); *Combs v. C.A.R.E., Inc.*, 617 F. Supp. 1011, 1011-13 (E.D. Ark. 1985) (dismissing as a matter of law hiring and placement claims because EEOC charge only alleged discriminatory discharge); *Harris v. Caterpillar Tractor Co.*, No. S-Civ.-78-3037, 1978 U.S. Dist. LEXIS 16232, at **2-4 (S.D. Ill. Aug. 1, 1978) (same); *Plaisance v. Travelers Ins. Co.*, 880 F. Supp. 798, 805-07 (N.D. Ga. 1994) (dismissing job assignment claim as a matter of law because EEOC charge only alleged failure-to-promote and retaliation), *aff'd*, 56 F.3d 1391 (11th Cir. 1995), *cert. denied*, 516 U.S. 931 (1996).

To establish a prima facie claim of disparate impact discrimination, a plaintiff must (1) identify the challenged facially neutral employment practice or policy, and pinpoint the defendant's use of it; (2) demonstrate a disparate impact on a group that falls within the protective ambit of Title VII; and (3) demonstrate a causal relationship between the identified practice and the disparate impact. *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 (5th Cir. 1999) (emphasis added). Plaintiffs must conduct a systematic analysis of the challenged employment practices in order to establish their case. *Munoz,* 200 F.3d at 299.

Throughout the multi-year history of this case, Plaintiffs have yet to identify any particular employment practice alleged to have a disparate impact on Lufkin's black employees. Instead, Plaintiffs frame their case only with the overarching allegation that "unfettered subjective decision making by a nearly all white management staff has had an unlawful disparate impact on plaintiffs and the class in violation of Title VII." (Ex. 1, Plaintiff's Supplemental Responses and Objections to Defendant Lufkin Industries' First Set of Interrogatories No. 1.) Their argument and analysis has consistently focused on employment processes as a whole, *i.e.*, as a single decision-making process, with the intent of making a *prima facie* case out of alleged "bottom line" racial imbalances in Lufkin's workforce.[12]

Notwithstanding Plaintiffs' artful pleading, the disparate impact plaintiff must provide evidence isolating and identifying the specific facially-neutral employment practice that is allegedly responsible for observed statistical disparities. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989); *Johnson v. Uncle Ben's*, 965 F.2d 1363, 1367 (5th Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994); *Munoz*, 200 F.3d at 304.

Plaintiffs are <u>required</u> to analyze the data available to isolate disparate impact in particular employment practices. *See Powers v. Ala. Dep't of Educ.*, 854 F.2d 1285, 1298 (11th Cir. 1988)

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[12] Without reference to any discriminatory practice or event, and without reference to demographic trends, Dr. Drogin's "Descriptive Statistics" reports that black employees at Lufkin are employed in the lower EEO categories and earn less, on average, than white employees.

("[P]laintiffs failed to raise a sufficient challenge to ... the use of the service ratings, and the evaluation of an applicant's training and experience. With regard to these practices, applicant statistics were available, and the plaintiffs should have employed them."), *cert. denied*, 490 U.S. 1107 (1989); *Diehl v. Xerox Corp.*, 933 F. Supp. 1157, 1167 (W.D.N.Y. 1996) (dismissing disparate impact case, in part because plaintiffs' expert "refused to consider the skills assessments ... because she deemed that data to be incomplete and inherently inaccurate."); *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 748 (9th Cir. 2003) (affirming summary judgment for employer in part because plaintiff's expert had access to data that would likely have provided some non-discriminatory explanation for the disparity, but did not use the data); *Sheehan v. Daily Racing Form*, 104 F.3d 940, 942 (7th Cir. 1997) (affirming summary judgment for employer, in part because of plaintiff's failure to consider available data on job classification and familiarity with computers as explanations for any disparity), *cert. denied*, 521 U.S. 1104 (1997); *Ottaviani v. State Univ. of New York at New Paltz*, 875 F.2d 365, 374 (2d Cir. 1989) (affirming district court's criticism of plaintiffs' analysis due to failure to use available data on non-discriminatory factors such as rank and prior positions held), *cert. denied*, 493 U.S. 1021 (1990); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 349-50 (7th Cir. 1988) (criticizing the EEOC for not analyzing data made available by the employer on non-discriminatory factors that may have explained the disparity); *Stallings v. Container Corp. of Am.*, 75 F.R.D. 511, 519-20 (D. Del. 1977) (holding that plaintiffs' promotions disparate impact analysis was flawed because "it ignore[d] other relevant [and available] data").

The Civil Rights Act of 1991 created the <u>only</u> exception to the "particularity" requirement. *See, e.g.*, *Johnson*, 965 F.2d at 1372 (explaining that, other than adding this exception, the 1991 Civil Rights Act did not alter *Wards Cove's* "particularity" requirement.).

> [I]f 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)(B)(i).[13]

Contrary to Plaintiffs' view of the exception, the use of subjectivity[14] in a decision-making process clearly does not render that process "incapable of separation for analysis." *See Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 225-26 (M.D. Tenn. 1996) ("*Watson* and *Wards Cove* require that the plaintiff show more than just the use of subjective criteria in decisionmaking and statistical disparities in the employer's work force" in order to prevail on a disparate impact claim); *Kulkarni v. City Univ. of New York*, No. 01 CIV. 10628 (DLC), 2002 WL 1969676, 2002 U.S. Dist. LEXIS 15855, at **3-4 (S.D.N.Y. Aug. 26, 2002) ("To the extent that Kulkarni is complaining about . . . those officers who implement facially neutral employment practices and the decisions made by those officers in the course of implementing the practices, that complaint is not a disparate impact claim addressed to an identified employment practice."). In fact, the plurality in *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977 (1988), specifically noted that if plaintiffs were allowed to broadly allege "subjective decisionmaking" as a specific employment practice, this would unacceptably "increase the risk that employers would be given incentives to adopt quotas or to engage in preferential treatment" contrary to Congress' intent as expressed in 42 U.S.C. § 2000e-2(j).

> First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been

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[13] The Interpretive Memorandum accompanying the 1991 Act adds guidance as to the degree plaintiffs must "particularize" an employer practice:

> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular functionally-integrated practices may be analyzed as one employment practice.

137 Cong. Rec. § 15276 (daily ed. Oct. 25, 1991) (emphasis added). The memorandum provides the example of the "height and weight requirements" in *Dothard*; *i.e.*, the practice of requiring a specific height and the practice of requiring a specific weight are both components of the same criterion: strength. *Id.* Another example of this narrow exception is provided by cases that do not require plaintiffs to break down an administered test into various questions. *See, e.g.*, *Allen v. Seidman*, 881 F.2d 375, 381 (7th Cir. 1989).

[14] Subjective employment criteria are <u>not per se unlawful</u>. *Watson*, 477 U.S. at 990; *Johnson*, 965 F.2d at 1369 ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.").

> relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially 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.* at 993-94 (emphasis added).

While the Fifth Circuit has not addressed the 42 U.S.C. § 2000e-2(K)(1)(B)(i) exception specifically, the Ninth Circuit recently addressed this issue. *Stout v. Potter*, 276 F.3d 1118, 1124-25 (9th Cir. 2002). The *Stout* plaintiffs directed their disparate impact claims to "the decision-making process" or "the process by which the [screening] Panel evaluated applications," which consisted of a panel screening all applicants on the strength of their supervisor evaluations and applications, identifying the most qualified candidates, and forwarding their names as potential interviewees to a separate selection committee that made the final hiring decisions. *Id.* at 1121, 1124. The court noted that "Plaintiffs generally cannot attack an overall decision-making process in the disparate impact context, but must instead identify the particular element or practice within the process that causes an adverse impact." *Id.* at 1124. The court then explained the screening process in the context of the 42 U.S.C. § 2000e-2(K)(1)(B)(i) exception:

> The overall interview screening process included several discrete elements. Each member on the screening panel independently evaluated every applicant, measuring the applicant's supervisor evaluations and the substantive contents of the application. The application tested a candidate's proficiency on eleven validated competencies required for the AIC position. The panel members then met to compare their evaluations and discuss the applicants before collectively agreeing on the most qualified candidates. ... We doubt that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis.

*Id.* (emphasis added).

Lufkin's initial assignment, promotion, and compensation decision-making processes include several discrete practices that are easily separated for analysis. Plaintiffs' expert does not, and does not even attempt to, isolate and identify each practice– subjective or objective – that Lufkin uses in the initial assignment, promotion, and pay processes or demonstrate each such practice's impact or lack of impact on blacks at Lufkin. A Title VII plaintiff does not make out a case of disparate impact simply by showing that at the "bottom line" there is a racial imbalance in the workforce, without reference to or discussion of relevant selection practices. *Wards Cove*, 490 U.S. at 657. A proper statistical analysis is modeled on the employer's actual employment practices and systemically analyzes each practice in the decision-making system to determine any racial effects. *Johnson*, 965 F.2d at 1367.

1. <u>An employee's initial assignment at Lufkin results from a requisition, not "unfettered decision making."</u>

To begin, an employee's initial assignment at Lufkin flows naturally from the TWC's referral for a particular position. Thus, a most critical factor in an assignment process is "what position did the prospective employee apply for" at the TWC. Lufkin's statistical expert, Dr. Mary Baker, using the actual applicant pools interviewed by Lufkin at the TWC, determined that blacks were not over-assigned to General Foundryman but were, in fact, under-assigned and that the assignments were consistent with the outcome of a race-neutral selection process. (Ex. 25, Baker Report at 10-13.) In stark contrast, Dr. Drogin did not identify or analyze the impact of Lufkin's practice of selecting based on the applicants' referral from TWC, or Lufkin's practice of using the TWC in its process of filling entry-level positions. Nor did Dr. Drogin identify or analyze the impact of Lufkin's practice of using numerous criteria for entry-level positions—prior labor experience, no termination for cause within two years, no termination for absenteeism within one year, and no gaps in work history for more than six months—in reaching his conclusions. Finally, Dr. Drogin did not identify or analyze the impact of the high school diploma or GED requirement used in Power Transmission and Oilfield (but not Foundry and Trailer). (Ex. 2 at 10-12). In sum, in not accounting for various objective employment practices that clearly influence the selection and assignment of entry-level employees, Dr. Drogin has failed to isolate and quantify any disparity arising from the alleged unlawful components of Lufkin's initial assignment process.

2. Hourly promotions result from objective criteria, almost always departmental seniority.

Plaintiffs again offer no factually-grounded or rational explanation of why Lufkin's hourly promotion process is not capable of separation for analysis other than their sweeping but unsubstantiated claim that all decisions at Lufkin are based on "unfettered decision making." The Union Contract, however, establishes well-defined practices that control promotions—

(1) for most jobs (which are defined in the Union Contract), the employee must sign a bid;

(2) the bid must be a promotion;

(3) in Foundry and Oilfield, the employee must not be in the Attendance Program;

(4) in Foundry, the employee must not have a plant rule violation in the past six months;

(5) for various positions, the employee must pass a written test or demonstration of ability;

(6) the employee must have greater departmental seniority over other eligible bidders; and

(7) the successful bidder must accept the job.

Each of these non-discriminatory reasons may be identified, quantified, and easily analyzed for disparate impact. Plaintiffs had open access to employees' personnel files and data on employees' relative seniority, employees' pre-promotion salary ranges (to determine if the job would be a promotion or a demotion, which is not allowed), bid sheets (to determine which employees bid, were ineligible, or were awarded the job), employees in the attendance program (to determine which employees were ineligible for promotion because of poor attendance), and employees who had violated plant rules. (Ex. 3, Hamel Affidavit; Ex. 9, Conway Declaration). Plaintiffs' failure to quantify the disparate impact, if any, of these various practices is, again, a complete failure of proof. Had Plaintiffs considered the bid process, using actual bid data which was provided to them (rather than Dr. Drogin's "constructed" applicant pools), they would have found, as did Dr. Baker, that of 1,519 awarded bids from 1994-2003, 335 were awarded to black employees, a difference of 3 from the expected number, or less than one-quarter standard deviation. (Baker Report at 16).

Plaintiffs' promotion analysis is particularly problematic. Without careful attention to identifying particular employment practices, a disparate impact analysis may impermissibly intrude on certain practices specifically authorized by Title VII. 42 U.S.C § 2000e-2(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

The Congressional immunity afforded bona fide seniority systems insulates such systems, even though they may have a disparate impact. *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 350 (1977). Thus, any proper analysis of potential disparate impact must separate disparities arising from a bona fide seniority system from other practices. Plaintiffs concede that Lufkin's use of departmental seniority in the employment process is a bona fide seniority system. (Plaintiffs' April 11, 2003 letter to the Court re: "Collective Bargaining Agreement"). To the extent Plaintiffs have not separated out the effect of such a system—the award of jobs to bidders on the basis of departmental seniority—they have impermissibly included in their analysis disparities arising from a seniority system in direct violation of immunity afforded by 42 U.S.C. § 2000e-2(h).

3. <u>Pay rates are set by the Union Contract.</u>

Lufkin's compensation procedure for hourly employees is perhaps the simplest procedure of all to analyze. By negotiation with the unions, every job classification is assigned a specific minimum and maximum rate of pay. Every hourly employee gets a twenty-five cent per hour raise every six months, until he reaches the maximum wage, unless he has incurred specific, defined attendance occurrences or disciplinary violations. These practices are easily isolated and analyzed for statistical significance.

As with initial assignment and promotion, Plaintiffs' analysis of compensation does not attempt to account for Lufkin's practices. Dr. Drogin's regression analysis does not control for job classification, the primary determinant of hourly pay. (Ex.2 at 18). When job classification is used, as was done in Dr. Baker's analysis, there is no statistically significant difference in pay between black and white Lufkin hourly employees. (Baker report at 18-21.)

In sum, Lufkin's employment processes are capable of separation into discrete practices based on applicant referrals from TWC, seniority, eligibility factors, and job classification. By not isolating or identifying specific employment practices with a significant disparate effect, plaintiffs have no prima facie case and summary judgment for the defendant is properly granted. *Arguello v. Conoco, Inc.*, 207 F.3d 803, 813 (5th Cir. 2000) (affirming dismissal of Title II disparate impact claims under 12(b)(6) due to plaintiffs' "fail[ure] to allege that there was a specific Conoco policy which had a negative disparate effect on minority customers."); *see also Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111-12 (2d Cir. 2001) (affirming summary judgment for employer because plaintiff did not identify which specific employment practice accounted for disparate impact); *Chavez v. Coors Brewing Co.*, No. 98-1109, 1999 U.S. App. LEXIS 5300, at **10-11 (10th Cir. Mar. 25, 1999) (same); *Bannister v. Dal-Tile Int'l, Inc.*, No. Civ.A.3:02-CV-2498, 2003 U.S. Dist. LEXIS 8261, at **8-9 (N.D. Tex. May 14, 2003) (dismissing disparate impact claim under 12(b)(6) because plaintiff had "failed to identify any factor in Dal-Tile's decision-making process responsible for causing the alleged impact); *Legania v. E. Jefferson Gen. Hosp. Dist. No. 2*, No. 02-1085 § "K"(5), 2003 U.S. Dist. LEXIS 9221, at *24 (E.D. La. May 29, 2003) (granting summary judgment for employer on disparate impact claim due to plaintiff's failure "to identify specific practices as being responsible for any observed disparities"); *Patterson v. Magnolia Reg'l Health Ctr.*, No. CIV.A.1:99CV073-D-A, 2001 WL 1524419, at *3 (N.D. Miss. Apr. 3, 2001) (same); *Maniatas v. New York Hosp.-Cornell Med. Ctr.*, 58 F. Supp. 2d 221, 228 (S.D.N.Y. 1999) (same); *Joseph v. Publix Super Mkts., Inc.*, 983 F. Supp. 1431, 1444 (S.D. Fla. 1997) (same); *Kelber v. Forest Elec. Corp.*, 799 F. Supp. 326, 333 (S.D.N.Y. 1992) (same).

**III. Dr. Drogin's statistical analyses of disparate impact and causation are incomplete, unreliable, and therefore inadmissible as a matter of law.**

In considering a Rule 56(c) motion opposed by expert testimony, the trial court has broad discretion to rule on the admissibility of the expert's evidence and may inquire into the reliability and foundation of any expert's opinion. *Munoz*, 200 F.3d at 301. If the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact. *Id.*[15] The determination of reliability itself and the factors taken into account are left to the discretion of the district court consistent with its gatekeeping function under Fed. R. Evid. 702. *Id.* (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)).

The U.S. Supreme Court instructed in *Bazemore v. Friday* that statistical analyses may be "so incomplete as to be inadmissible as irrelevant." 478 U.S. 385, 400 n.10 (1986). "[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court." *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997); *United States v. Artero*, 121 F.3d 1256, 1262 (9th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998).[16] Generally,

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15 *See, e.g.*, *Bennett v. Roberts*, 295 F.3d 687, 697 (7th Cir. 2002) (affirming summary judgment for employer based on district court's proper finding that plaintiffs' statistical proof of disparate treatment was "unreliable"); *Hollander v. Am. Cyanamid Co.*, 172 F.3d 192, 202-04 (2d Cir. 1999) (affirming summary judgment for employer based on district court's proper finding that plaintiff's statistical proof of disparate treatment was inadmissible and unreliable); *Ballor v. Alcona County Rd. Comm'n*, No. 97-1413, 1998 U.S. App. LEXIS 10519, at **9-12 (6th Cir. May 20, 1998) (affirming summary judgment for employer based on district court's proper exclusion under *Daubert* of plaintiffs' statistical proof of disparate impact and treatment); *Sheehan v. Daily Racing Form*, 104 F.3d 940, 942 (7th Cir. 1997) (affirming summary judgment for employer because plaintiffs' statistical proof of disparate treatment was inadmissible under *Daubert*), *cert. denied*, 521 U.S. 1004 (1997); *O'Keefe v. Eureka X-Ray Tube Corp.*, No. 95-C-4281, 1998 U.S. Dist. LEXIS 11382, at **30-31 (N.D. Ill. 1998) (granting summary judgment for employer on disparate treatment claims and holding that plaintiffs' statistical evidence was not probative because of its failure to "take into consideration other factors that might affect the analysis, such as the positions of the various employees within the organization.").

16 *See also Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988) (holding that failure to control for other explanatory variables makes an expert's table "essentially worthless."); *Mazus v. Dep't of Transp.*, 629 F.2d 870, 875 (3d Cir. 1980), ("Statistical comparisons, if they are to have any value, must be between comparable groups and free from variables which would undermine the reasonableness of discrimination inferences to be drawn."), *cert. denied*, 449 U.S. 1126 (1981); *EEOC v. W. Elec. Co., Inc.*, 713 F.2d 1011, 1018-19 (4th Cir. 1983) ("Like any other type of circumstantial

"statistical comparisons offered in support of a disparate impact claim should be drawn as narrowly as possible to avoid effects of factors other than discriminatory practices." *Powers v. Ala. Dep't of Educ.*, 854 F.2d 1285, 1297 (11th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989). Disparate impact is not proved if factors other than race account for enough of the variance as to render any effect of race statistically insignificant. *Dicker v. Allstate Life Ins. Co.*, No. 89 C 4982, 1997 WL 182290, at *42 (N.D. Ill. Apr. 9, 1997). This is especially important in this case, because without including other explanatory and non-discriminatory factors in their analyses, Plaintiffs have not isolated their challenged employment practice or demonstrated its disparate impact on blacks.

1. Plaintiffs' Initial Assignment Analyses is Unreliable.

Dr. Drogin's analysis of initial assignments has three major flaws —he does not account for the actual pool for each entry-level position; his principal analysis does not control for time; and he does not distinguish between qualified and unqualified applicants in his pool.[17] (Ex. 2 at 10-12). First, notwithstanding Lufkin's exclusive use of TWC, Dr. Drogin ignores the pools of applicants for entry-level positions for General Foundryman provided to Lufkin by TWC. (Ex. 9, Conway Declaration).[18] Instead, Dr. Drogin's model looks only to those who were hired for any entry-level position, not those who applied for specific positions. *See EEOC v. Chicago Miniature Lamp Works,* 947 F.2d 292, 301

evidence, statistical evidence 'must not be accepted uncritically,' and because many statistical models used in discrimination cases by professional statisticians are sophisticated and complex, courts must give 'close scrutiny [to the] empirical proof' on which the models are erected. Courts should guard against the use of data which may have been 'segmented and particularized and fashioned to obtain a desired result.'").

[17] The failure to include relevant data results in flawed and unreliable disparate impact analyses. In *Powers*, 854 F.2d at 1298, the Eleventh Circuit held that the plaintiffs failed to raise a sufficient disparate impact challenge to the employer's use of service ratings and evaluation of an applicant's training and experience, because "[w]ith regard to these practices, applicant statistics were available, and the plaintiffs should have employed them." *See also Stallings*, 75 F.R.D. at 518-20 (holding that "there is no statistically significant data which indicates ... a disparate impact," in part because the analysis "ignore[d] other relevant data").

[18] Especially with regard to improper comparisons, Dr. Drogin has been criticized for conducting "naïve," "deceptive," "misleading," "inappropriate," "faulty," "erroneous[]," or "distort[ed]" statistical analyses in other employment cases. *See, e.g., Frank v. United Airlines, Inc.*, No. C-92-0692-CAL, 1997 U.S. Dist. LEXIS 4286, at *10-15 (N.D. Cal. Feb. 26, 1997) (concluding that Dr. Drogin's statistics failed to make the key comparison between those female employees granted an exception to the employer's weight requirement and those who requested exception), *rev'd in part on other grounds*, 216 F.3d 845 (9th Cir. 2000); *Maddox v. Claytor*, No. 78-2-ALB, 1983 U.S. Dist. LEXIS 12004, at *13-14, *21, *30 (M.D. Ga. Nov. 4, 1983), *aff'd*, 764 F.2d 1539, 1550-51, 1553-55 (11th Cir. 1985); *Edmonds v. S. Pac. Transp. Co.*, Nos. C-72-1270-AJZ and C-74-2140-AJZ, 1979 U.S. Dist. LEXIS 13100, at *56-58 (N.D. Cal. Apr. 11, 1979).

(7th Cir. 1991) (concluding that disparate impact findings were clearly erroneous in part because they credited statistics that did not take into account applicant preference).

Next, Dr. Drogin's principal analysis assumes that all applicants applied and were hired effective on the same day.[19] Dr. Drogin's principal analysis also fails to account for the fact that certain jobs were not available at certain times. It cannot be gainsaid that any employee was steered (as Plaintiffs suggest) into a particular job if that was the only job available and the only job for which the employee interviewed.

Finally, Dr. Drogin fails to distinguish between minimum qualifications. His model assumes that all employees were equally qualified for all divisions. At Lufkin, the Foundry and Trailer divisions do not require a high school diploma or GED, while Power Transmission and Oilfield do. Thus, Dr. Drogin has analyzed assignments to Power Transmission and Oilfield using a pool including unqualified applicants.

A proper statistical analysis is based only on the "qualified applicant pool." *Johnson*, 965 F.2d at 1369 (emphasis added). *See also Wards Cove*, 490 U.S. at 647-55 (reversing court of appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, because "the cannery work force in no way reflected 'the pool of *qualified* job applicants'"); *New York Transit Auth. v. Beazer*, 440 U.S. 568, 584-87 (1979) (rejecting plaintiffs' statistic because "a substantial portion of the persons included in it are … unqualified for othe reasons" and thus "it tells us nothing about the class of otherwise-qualified applicants an employees"); *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1524 (5th Cir. 1993) ("The specific holding ( *Wards Cove* was that statistical proof used by the Court of Appeals was an inaccurate measure statistical disparity because it did not take into account the 'qualified' versus 'unqualifi

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[19] Dr. Drogin assumes in Table 10 and paragraphs 25 and 26 that each new entry-level employee was equally li to be selected for each of the positions. This is essentially a model in which a marble colored corresponding to ra placed in a jar for every person hired over the time period, then marbles are drawn from the jar at one time to replicat assignment process.

not performing a multiple regression analysis.[22] *Id.* The Fifth Circuit affirmed, holding that the "district court acted well within its discretion in evaluating the reliability of [the expert's] evidence at the summary judgment stage" and that "taken cumulatively, the problems with [the] expert['s] evidence indicate that his expert testimony could be unreliable." *Id.*[23]

Dr. Drogin's bottom line analysis wholly fails to consider <u>any</u> of the important non-discriminatory factors that qualify or disqualify hourly employees for promotions, such as bidding, departmental seniority, disciplinary warnings, excessive absence, and eligibility tests (none of which Plaintiffs have challenged). (Ex. 2 at 12-17). For example, to be considered "qualified" for most hourly positions at Lufkin, an employee must have submitted a bid for the job in question and, for some, must pass a test. By omitting factors such as whether the employee actually bid on the job and whether the employee was eligible for promotion, Dr. Drogin's analysis falsely constructs pools of employees who do not belong in the actual applicant pool. *See, e.g., Buckner v. Cameron Iron Works, Inc.*, No. 72-H-292, 23 Fair Empl. Prac. Cas. (BNA) 1092, 23 Empl. Prac. Dec. (CCH) P30,954, 1979 U.S. Dist. LEXIS 12218, at **31-33 (S.D. Tex. May 23, 1979) (holding that there was no evidence of disparate impact in plaintiff's failure to receive a position for which he was not qualified and on which he was not able to bid).[24]

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22 As in *Munoz*, Dr. Drogin has failed to perform multiple regression analyses to control for non-discriminatory factors (and in this case, unchallenged non-discriminatory factors) which Lufkin has repeatedly identified as essential to its promotion practice. 200 F.3d at 301.

23 *See also Ross v. Univ. of Texas at San Antonio*, 139 F.3d 521, 525-26 (5th Cir. 1998) (affirming summary judgment for employer because plaintiff's expert's opinion was based upon incomplete information and did "not contain any statistical analysis that would be competent summary judgment testimony").

24 *See also Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987) (holding that no "compellingly persuasive evidence of discrimination" existed "because plaintiffs' expert failed to take into account the effects of accrued seniority, job skills, or bidding activity."); *Julien v. Scott*, No. C-961858 CAL, 1998 U.S. Dist. LEXIS 11043, at **12-14 (N.D. Cal. July 17, 1998) (granting summary judgment on disparate impact claim, in part because the statistical comparison failed to identify the "relevant applicant pool," which consisted of "the qualified 'eligible' Appraiser II's who applied for promotion."), *aff'd*, 189 F.3d 473 (9th Cir. 1999); *Williams v. Am. St. Gobain Corp.*, 447 F.2d 561, 563, 567 (10th Cir. 1971) (holding that no racially discriminatory employment practice existed where job positions were filled via bids based on the criteria of seniority, and black employees with higher seniority did not bid); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1276-77 (11th Cir. 2000) (emphasizing that relevant pool are those persons who actually applied for position, not those that were "theoretically 'available' and 'qualified'").

In fact, Dr. Drogin's promotion analysis is constructed in such a fashion as to almost guarantee that his pools have little in common with the actual bidders. Dr. Drogin's pools are constructed to include only those persons in the same job classification as the person promoted at previous year end with the same or greater seniority. As many of the class representatives testified, in most cases promotions are awarded to the senior bidder. Thus, the bid pool must have been composed of bidders with less seniority than the bidder selected—just the opposite of Dr. Drogin's construction. Dr. Drogin's construction further presumes, without foundation, that all persons in the same job classification as the person promoted would have bid on the job and possessed the requisite eligibility and qualifications for promotion. Similar assumptions by Dr. Drogin have been criticized.

*b. Dr. Drogin's Analyses Fail to Show Statistically Significant Disparities.*

Further, a prima facie case of disparate impact requires statistics to show a "gross disparity" in how the different races are treated. *McClain*, 187 F.R.D. at 276. In order to prove a "gross disparity," the plaintiffs have relied on standard deviation analyses. This Court has held that "[a] deviation greater than three standard deviations is sufficient to support a prima facie case." *McClain*, 187 F.R.D. at 276. Therefore, Drogin's findings of Z-scores under three standard deviations are insufficient to support a prima facie case of disparate impact as a matter of law. Additionally, the Fifth Circuit has stated that "it is doubtful" that there is an "ironclad rule ... that anytime there is a difference of three standard deviations between the expected and observed number a prima facie case has been made out." *Lopez v. Laborers Int'l Union Local #18*, 987 F.2d 1210, 1215 (5th Cir. 1993).[25] In *Lopez*, even though the plaintiffs had "demonstrat[ed] a disparity of three standard deviations," the court found that

[25] *See, e.g., Moore v. S.W. Bell Tel. Co.*, 593 F.2d 607, 608 (5th Cir. 1979) (sustaining district court finding of no adverse racial impact where statistical significance analysis revealed 3.93 standard deviations difference between expected and actual black pass rates, but pass rate on employment test for black applicants was 93% of that of white applicants).

"they have concocted numbers to create the requisite standard deviations ... on the basis of completely inappropriate data." *Id.* at 1214.[26]

c. *Dr. Drogin's Analyses Fail to Analyze the Challenged Promotions Practices to Show a Causal Relationship Between Them and the "Disparate Impact."*

A proper statistical analysis is modeled on the employer's actual employment practices and systematically analyzes each component of the decisionmaking system to determine any effect attributable to race. *Johnson*, 965 F.2d at 1367. In *Johnson*, similar to our case, the plaintiff alleged that the employer "allowed its supervisors to make promotion decisions subjectively and that this practice resulted in a disparity between the promotion rates of Black and white employees." 965 F.2d at 1369. The Fifth Circuit affirmed the trial court's grant of the employer's summary judgment motion on the subjectivity claim because the plaintiff had "not offered any evidence that Blacks' allegedly smaller number of promotions was causally related to this subjectivity" and that "this cannot suffice to establish a prima facie case" of disparate impact. *Id.* Therefore, because Dr. Drogin's promotion analyses fails to make the required causal connection, the analyses are inadequate as a matter of law and summary judgment for Lufkin on this issue is appropriate.[27]

3. Dr. Drogin's Pay Rate Analysis is Meaningless.

The U.S. Supreme Court has held that "[t]here may ... be some [multiple] regressions so incomplete as to be inadmissible as irrelevant." *Bazemore*, 478 U.S. at 400 n.10. A multiple

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26 *See also Coleman v. Exxon Chem. Corp.*, 162 F. Supp. 2d 593, 619-21 (S.D. Tex. 2001) (granting summary judgment for employer on disparate treatment claim in part because plaintiffs' evidence did not make proper statistical comparison; when such appropriate comparison was made, the data failed to reveal statistically significant standard deviations); *Jones v. Pepsi-Cola Metro. Bottling Co., Inc.*, 871 F. Supp. 305, 311 (E.D. Mich. 1994) (granting summary judgment for employer on race and sex disparate impact claims, holding plaintiffs' evidence not probative of disparate impact due to use of wrong statistical pool, and explaining that defense expert used proper statistical pool in analysis that showed no statistically significant standard deviations).

27 *See also Cooper v. S. Co.*, 260 F. Supp. 2d 1317, 1333-34 (N.D. Ga. 2003) (granting summary judgment for employer on disparate impact claim because plaintiff could not establish the existence of a causal nexus between the disparity and the use of manager discretion in promotion decisions); *McNairn v. Sullivan*, 929 F.2d 974, 979 (4th Cir. 1991) (affirming district court's judgment for employer on disparate impact claim and holding that requirement that plaintiffs show "that specific elements of the employer's promotion criteria had a significant disparate impact on the protected class" was "not satisfied because plaintiff [did] not attempt to show that the subjective element of HHS promotion criteria significantly affected qualified blacks' and Hispanics' chances to be promoted.").

regression analysis must account for the "major factors" thought to have an effect on salary level or it will be considered unacceptable as evidence of discrimination. *Id.*[28]

A multiple regression that ignores job classification is meaningless. In *Coward v. ADT Sec. Sys.*, 140 F.3d 271, 274-75 (D.C. Cir. 1998), the D.C. Circuit affirmed the district court's exclusion of the plaintiffs' statistical analysis based on its failure to "account for job title or any other variable representing type of work performed:"

> Applying these standards to this case, we find that the regression analysis was "so incomplete as to be inadmissible as irrelevant".... The regression analysis failed to account for job title or any other variable representing type of work performed. This omission is fatal because [plaintiffs] claim that they should be compared to employees in other job categories who perform similar work but who earn more than they. According to their own theory of the case, therefore, job title, or some other measure of type of work, serves as a "major factor" within the meaning of *Bazemore*. But because the regression analysis compares all employees in all job categories without accounting for type of work, it tells us nothing about whether employees who perform similar work are paid differently. [Plaintiffs] therefore cannot use the regression analysis to show that similarly situated white employees earn more. ... [T]he regression analysis is flawed as a matter of law....

(Citations omitted).

As in *Coward*, Dr. Drogin's compensation analysis completely fails to take the "major factor" of job classification into account and make the proper comparison: that of blacks to whites in the same job classification. (Ex. 2 at 18). Hourly pay at Lufkin is negotiated with the unions by job classification. The fact that the average black employee makes less than the average white employee means nothing unless the expert controls for job classification and, with respect to hourly employees, attendance record. Dr. Drogin did not control for any of these factors. (*Id.*). That job classification matters is evidenced by the fact that discrepancies in pay between blacks and whites dropped when Dr. Drogin focused on EEO categories instead of the entire workforce. However, even within EEO categories, there can be wide variation in the types and market value of jobs. Dr. Drogin made no

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28 *See also Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676 (4th Cir. 1996) ("*Bazemore* and common sense require that any multiple regression analysis used to determine pay disparity must include all the major factors on which pay is determined.").

effort to break down this category into sub-groups much less to conduct an analysis based on job classifications. Had Dr. Drogin taken his analysis one step further, as did Dr. Baker, and compared workers in the same position, the discrepancies would have vanished. (Baker Report at 18-21.)

Therefore, as Dr. Drogin's multiple regression analyses failed to account for the major factors that affect compensation at Lufkin, and failed to make the proper comparisons, these analyses are inadmissible as a matter of law under *Bazemore*, and summary judgment on this issue is properly granted to Lufkin.[29]

**IV. Plaintiffs' Abandoned Claims Must be Dismissed.**

Plaintiffs offer no proof of disparity with respect to any other employment practice. As a matter of law, any such claims are abandoned and must be dismissed. *See Morin v. Caire, supra.*

Respectfully submitted,

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29 *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 449-50 (affirming grant of summary judgment to employer and exclusion of plaintiff's statistical analysis based on its failure to account for the major factors of teaching and service).

## CERTIFICATE OF SERVICE

I certify that on this 5th day of September, 2003, a copy of the foregoing Defendant Lufkin Industries' Motion for Summary Judgment was forwarded to Plaintiffs by facsimile transmission (without attachments) and by Federal Express as follows: Timothy B. Garrigan, 2803 North Street, Nacogdoches, TX 75963-1902, (936) 560-9578, and Teresa Demchak, Saperstein, Goldstein, Demchak & Baller, 300 Lakeside Drive, Suite 1000, Oakland, CA 94612, (510) 835-1417.

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# EXHIBITS TO DOCUMENT #237 MOTION FOR SUMMARY JUDGMENT NOT SCANNED