IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendant.	§ § § § § § § § § §	Civil Action No. 9:97 CV 063 (COBB)

PLAINTIFFS' OPPOSITION TO DEFENDANT LUFKIN INDUSTRIES' MOTION FOR JUDGMENT ON PARTIAL PROPOSED FINDINGS

I. INTRODUCTION

On October 11, 2004, ten months after Plaintiffs rested and the day before Defendant Lufkin Industries, Inc. ("Lufkin") was to begin its case in chief, it filed a Motion for Judgment on Partial Proposed Findings pursuant to Federal Rule of Civil Procedure 54(c),[1] seeking to dismiss all of Plaintiffs' claims on various grounds and attacking the sufficiency of the evidence Plaintiffs presented in their case in chief, specifically whether Plaintiffs established a prima facie case on their disparate impact claims. The Court declined to render any judgment until after the close of all evidence. The Court, now having heard all of the evidence, should enter findings of facts and conclusions of law on Plaintiffs' claims pursuant to Rule 54(a) and find that Plaintiffs have sustained their burden in establishing a violation of Title VII under a disparate impact theory of discrimination with respect to subjective decision making practices affecting initial assignments, promotions of hourly and salaried employees and compensation. In considering Lufkin's motion, the Court should review the record in its entirety. See Lindsey v. Prive Corp., 987 F.2d 324, 327 n.13 (5th Cir. 1993) ("After a trial on the merits, disputes about the prima facie case fall away and we need only resolve the question whether there was sufficient evidence of unlawful discrimination.") Accordingly, the Court should consider this Opposition together with the more detailed Proposed Findings of Fact and Conclusions of Law that Plaintiffs are filing simultaneously with this Opposition.

---

[1] Federal Rule of Civil Procedure 52(c) provides that:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by Proposed Findings of fact and conclusions of law as required by subdivision (a) of this rule.

(Emphasis added)

II. LEGAL STANDARD

In a disparate impact case, plaintiffs must show that an employment practice which appears fair in form is discriminatory in practice. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). "[T]he necessary premise of the disparate impact approach is that some employment practice, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 987 (1985).

Plaintiffs establish a prima facie case of disparate impact by (1) identifying the specific employment practices being challenged, (2) establishing the disparate impact of the practices on the protected group, and (3) demonstrating that the disparity is the result of one or more of the employment practices identified. See Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 656-57 (1989); Stender v. Lucky Stores, Inc., 803 F. Supp. at 320; see also 42 U.S.C. § 2000e-2(k)(l)(A)(i).

Although plaintiffs are required to show that each challenged employment practice "causes" a disparate impact, where plaintiffs demonstrate that the elements of an employer's decision making process are not capable of separation for analysis, the entire decision making process may be analyzed as a single employment practice. 42 U.S.C. § 2000e-2(k)(l)(B)(i); McClain v. Lufkin Industries, Inc., 187 F.R.D. 267, 273 (E.D. Tex. 1999); see Munoz v. Orr, 200 F.3d 291, 304 (5th Cir. 2000) ("where a promotion system uses tightly integrated and overlapping criteria, it may be difficult as a practical matter for plaintiffs to isolate the particular step responsible for observed discrimination."); Malave v. Potter, 320 F.3d 321, 327 (2d Cir. 2003) (same); Bannister v. Dal-Tile Int'l, Inc., 2003 WL 21145739, *2 (N.D. Tex. 2003) (same); Stender, 803 F. Supp. at 335 (same).

Subjective practices are properly challenged under the disparate impact theory. See Watson, 487 U.S. at 990 (recognizing a subjective decision making system in promotion as the specific employment practice challenged under disparate impact theory); McClain, 187 F.R.D. at 272 (stating that plaintiffs may base a disparate impact claim on subjective employment

procedures); Richardson v. Byrd, 709 F.2d 1016, 1022 (5th Cir. 1983) (finding the allegation that "promotions and transfers were determined by the supervisors, almost all of whom were male, based largely on subjective factors" was not an overly broad discrimination claim, but rather, a specific employment practice.); Stender, 803 F. Supp. at 335 (finding defendant's "ambiguous and subjective" decision making in promotion, placement and training the specific employment practice challenged under disparate impact theory).

Where a selection system combines both "subjective" and "objective" criteria, the system is "considered subjective in nature." Watson, 487 U.S. at 989; accord Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 572 (6th Cir. 2004)

Courts have found that the causal element is satisfied with respect to discretionary and subjective employment decision making practices where an employer lacks objective criteria or guidelines for making those decisions, and leaves the decision making to the discretion of members of the majority group. See Stender, 803 F. Supp. at 320-21 (gathering cases). While such a practice does not, by itself, necessarily raise an inference of discrimination, the Supreme Court has found that where evidence of such discretionary and subjective decision making is supplemented by evidence that subconscious stereotypes and prejudice operate in a vacuum created by the absence of objective, validated criteria, causation can be found. Watson, 497 U.S. at 990; Stender, 803 F. Supp. at 321; Butler v. Home Depot, Inc., 1997 U.S. Dist. LEXIS 16296, *49 (N.D. Cal. 1997).

Once Plaintiffs establish a prima facie case of disparate impact, the burden shifts to the employer to show that the challenged employment practice is job related for the position(s) in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i); see EEOC v. Premier Operator Services, Inc., 113 F. Supp. 2d 1066, 1075 (N.D. Tex. 2000). Under Griggs, in order to prove business necessity, an employer must show that its selection criteria bears "a manifest relationship to the employment in question." Griggs, 401 U.S. at 432; Stender, 803 F. Supp. at 321 & n. 20.

If an employer successfully mounts a business necessity defense, a plaintiff may overcome that defense by demonstrating the existence of an alternative employment practice which serves the employer's business necessity without causing the adverse impact, and which the employer had refused to adopt, 42 U.S.C. § 2000(e)(k)(1)(B)(ii); see also, Premier, 113 F. Supp. 2d at 1075; Stender, 803 F. Supp. 322.

III. ARGUMENT

A. Lufkin's Request for Judgment on Claims Not Raised in the Pre-Trial Order is Not Necessary and, as to Plaintiffs' Training Claim Should be Denied.

As a threshold matter, Lufkin argues that the Court should dismiss all claims of discrimination alleged in the Second Amended Complaint for which Plaintiffs presented no statistical or anecdotal evidence at trial. See Motion for Judgment at 2-3. Lufkin's reference to claims raised in the Second Amended Complaint is misplaced. Federal Rule of Civil Procedure 16(e) provides that the Pretrial Order "shall control the subsequent course of the action unless modified by a subsequent order." The Joint Pretrial Order, filed on September 30, 2003, states that Plaintiffs "allege that Lufkin discriminates based on race with respect to initial job assignments; training; promotions; compensation, and other terms and conditions of employment." Joint Final Pretrial Order at ¶ C. Accordingly, those claims Plaintiffs alleged in the Second Amended Complaint that were not identified in the Pretrial Order nor litigated at trial (i.e., hiring, evaluations, demotions, discipline, layoffs, recalls and terminations) are moot and have been eliminated from the proceedings, Hullman v. Board of Trustees of Pratt Community College, 950 F.2d 665, 668 (10th Cir.1991)("issues not preserved in the pretrial order ... [are] eliminated from the action."), and Lufkin's motion for "judgment" on these claims is unnecessary.

With regard to the claims alleged in the Pretrial Order, Plaintiffs presented statistical evidence demonstrating significant disparities in initial job assignments, promotions of hourly and salaried employees and compensation, together with evidence of Lufkin's subjective decision making system. See Plaintiffs' Proposed Findings of Fact and Conclusions of Law

("Proposed Findings" or "Proposed Conclusions") 64-202.[2] Plaintiffs' inability to present statistical evidence of the impact of Lufkin's training decisions on African American employees was due to Lufkin's failure to maintain records regarding employee training, (see Proposed Findings 140), and because most training at Lufkin is informal and "on-the-job." See Proposed Findings 137. Plaintiffs did, however, present evidence regarding the subjective manner in which Lufkin managers, the overwhelming majority of whom are white, select employees for training, the lack of written guidelines governing managers' allocation of training, the lack of oversight to ensure that managers allocate training on a non-discriminatory basis and the interrelationship between training and promotions. See Proposed Findings at 138-144. This evidence is relevant to the Court's determination of whether Lufkin exercises subjective decision making with regard to promotions, because as the Court found in its Order certifying the class, "[m]ost promotions relate to specialized tasks; insofar as one individual gains higher qualifications than another it is due to discriminatorily selective, informal, on-the-job training." McClain, 187 F.R.D. at 276.

Accordingly, Plaintiffs request that the Court reject as unnecessary Lufkin's Motion for Judgment on claims not alleged in the Pretrial Order. As to the training issue, the adverse effects on African Americans of Lufkin's discrimination in providing training opportunities is reflected in the statistical disparities in promotions, since training is used (in a discretionary and discriminatory fashion) by managers to qualify or groom favored employees for promotion, see Proposed Findings 137-144. Lufkin's Motion for Judgment on Plaintiffs' training claim therefore, is both unnecessary and inappropriate, and it should be denied.

[2] Plaintiffs' Proposed Findings and Conclusions exhaustively detail the evidence presented at trial and legal authorities which supports Plaintiffs' disparate impact claims and further refutes Lufkin's Motion for Judgment. Accordingly, in responding to Lufkin's Motion for Judgment, Plaintiffs refer to, and such references incorporate, Plaintiffs' Proposed Findings and Conclusions and the record evidence and legal authorities cited therein, as if fully re-written herein.

B. Plaintiffs Have Presented Ample Evidence to Support their Disparate Impact Claim with Regard to Initial Assignments and Lufkin Has Failed to Rebut this Evidence.

Lufkin argues that Plaintiffs' initial assignment claim should be dismissed on four grounds: (1) "no class member testified that he has been 'channeled' into the Foundry;" (2) "there is no evidence that any of the class representatives filed an EEOC charge complaining about their initial assignment;" (3) "Plaintiffs have failed to identify or isolate a specific employment practice that results in Blacks being 'channeled' into the Foundry;" and (4) "Dr. Drogin's initial assignment model is fatally flawed because he fails to analyze the actual applicant pools for each job." Each of these contentions is without merit and is fully rebutted by the trial record and applicable law.

1. Plaintiffs Have Met Their Burden Of Identifying The Employment Practices Being Challenged.

In arguing that Plaintiffs have not proven their claim of disparate impact with regard to initial assignments because "no class member testified that he has been 'channeled' into the Foundry," Lufkin misconstrues the nature of the disparate impact theory of liability and Plaintiffs' prima facie burden. As discussed above, to establish a prima facie case Plaintiffs must identify the causes of the disparate impact and demonstrate their effects. McClain, 187 F.R.D. at 272.

Plaintiffs demonstrated that a broad array of Lufkin's employment practices rest on subjective decision making and these practices are inextricably intertwined so as to be incapable of separation for analyses. With respect to Lufkin's initial assignment of entry level new hirees, the evidence established that Viron Barbay, Lufkin's Human Resources (HR) Representative, by his own estimate, has been responsible for "approximately 95%" of all hiring of entry level employees through the Texas Workforce Commission (TWC) during the class period. Mr. Barbay lacks any formal education or professional training in HR practices. Lufkin affords Mr. Barbay considerable discretion in making hiring and assignment decisions affecting entry level

employees. He is unguided by written objective criteria or procedures. His decisions are not subject to oversight or analysis. See Proposed Findings 72-73.

Plaintiffs presented uncontroverted testimony that Mr. Barbay has made remarks during the period covered by this case that evidence subconscious racial stereotypes. See Proposed Findings 47, 61(a), 216-217. Plaintiffs also introduced expert testimony that in the absence of a formal system to assure that personnel selections, evaluations and decisions are based on objective, job-related criteria and measurements, decision makers are likely to judge individual African American employees on the basis of their stereotypical beliefs of African Americans as a group. See Proposed Findings 385-387.

The evidence also demonstrates that during the period covered by this lawsuit, the United States Office of Federal Contract Compliance Programs ("OFCCP") on two separate occasions, made specific and detailed findings that Lufkin's hiring and placement practices resulted in minorities being channeled into less desirable work locations at Lufkin, notably its Foundry, and underrepresented in the Machinist Helper position in Lufkin's Oilfield and Power Transmission Division,[3] and that Lufkin did not materially change its hiring and placement practices after these discrimination findings. See Proposed Findings 208-209. The evidence further shows that Lufkin does not routinely analyze the results of its hiring and initial assignment practices despite its legal obligation to do so under the Uniform Guidelines on Employee Selection Procedures

[3] These administrative agency findings are admissible and probative. See Proposed Conclusions 458-460.

("Uniform Guidelines"). 29 C.F.R. § 1607.3.A (1985).[4] See Proposed Finding 66; Conclusions 468-469.

Plaintiffs' statistical expert Dr. Richard Drogin, testified that he found that 51.8% of all African Americans (as well as 73.3% of Hispanics), compared to 24.3% of all whites hired by Lufkin into entry level jobs were initially assigned to (e.g., hired into) the Foundry Division for a highly statistically statistical disparity of 8.94 standard deviations, reflecting a result that would occur by random fluctuation alone one time in 100 trillion.[5] See Proposed Finding 277.

Moreover, Lufkin's own applicant tracking data – which was produced to Plaintiffs only after the Court order Lufkin to produce it for the third time, see Proposed Finding 245 -- shows that African Americans are under-assigned to entry level jobs in non-Foundry divisions at a rate that would occur by chance less than one time in a million. See Proposed Findings 286-287.

The evidence presented at trial directly contradicts Lufkin's contention, made in its Motion for Judgment and at trial, that it only hires applicants for the job for which that individual was referred by the TWC.[6] This evidence includes summaries of TWC work orders showing scores of "crossovers," i.e., individuals referred by the TWC to Lufkin for entry level jobs in one

[4] The Uniform Guidelines prohibit "[t]he use of any selection procedure which has an adverse impact on … members of any race … unless the procedure has been validated in accordance with these guidelines" and require an employer to make "a reasonable effort to become aware of . . . alternative procedures" with less adverse impact, and that where the use "is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it. …" Id. at 1607.3.B.). "Selection procedures" are broadly defined to include "informal or casual interviews, probationary periods, and work experience requirements." Id. at § 1607.16(Q).

[5] This evidence was not credibly refuted by Lufkin whose own expert did not perform an initial assignment analysis, but instead, a hiring analysis, irrelevant to this case in which there is no claim of hiring discrimination. See Joint Pretrial Order at ¶ C

[6] Lufkin's attempt to characterize Tami Poulan's testimony as supporting its assertion that before 2000, the TWC might have mixed applicants for more than one entry level position on the same work order, Motion for Judgment at 6, is disingenuous; Ms. Poulan's ultimate testimony on this point was just the opposition. See Proposed Finding 81.

department and hired and assigned by Lufkin to another department,[7] and the admission of Lufkin's own counsel that hires for specific entry-level jobs are often made from requisitions for some other entry-level job. See Proposed Findings 108-114, 129-132.

The evidence also refutes Lufkin's assertion that its "minimum criteria" for entry level jobs are "clear," and "objective" see Motion for Judgment at 3, 12, are consistently applied or explain the racial disparities in initial assignments, since there is there is no showing that African Americans hired by Lufkin have less education than whites hired. See Proposed Finding 107.

In its Motion for Judgment, Lufkin, citing the trial testimony of class member Calvin Deason, claims that no class member testified that he was channeled to the Foundry, thus implying that Plaintiffs are required to establish that Lufkin intentionally channeled African Americans to the Foundry. However, proving discriminatory intent is not an element of Plaintiffs' disparate impact case. Stender, 803 F. Supp. at 320 ("A disparate impact plaintiff, unlike a plaintiff proceeding under the disparate treatment theory, may prevail without proof of

[7] Lufkin states that "it bears noting" that Plaintiffs' statistical expert "did not analyze TWC's records to see if they revealed a statistically significant impact on blacks as to where they ended up at Lufkin." Motion for Judgment at 6. However, Lufkin misses the point, which is that the significance of the discrepancies found between the TWC work orders and actual job assignment information in Lufkin's personnel database discredits the reliability of (1) Lufkin's claim that it exercises no discretion in the hiring process and only hires applicants for the specific jobs for which they are referred by the TWC, (2) Lufkin's applicant tracking data, which Lufkin's statistical expert Dr. Baker, used for her analysis, and (3) Lufkin's requisition forms, which Lufkin claims record the job for which an applicant was referred by the TWC, but, instead appear only to document the job for which an applicant was actually hired, and not necessarily the job for which he applied or was referred. See Proposed Findings 118-132. Moreover, Dr. Drogin testified that he restricted his analyses of the TWC work orders only to applicants who appeared on one TWC work order to insure that the individuals were, in fact, hired for a job that was different than the job for which they were referred by TWC. Because some applicants appear on more than one TWC work order, and it is not possible to determine for which jobs they were considered by Lufkin, analysis of the TWC work orders would not be probative. As Lufkin's counsel advised the OFCCP, "hires cannot be related directly to the applicant flow with respect to any specific entry-level job simply because the number of applicants truly considered is not known." See Proposed Finding 299.

intentional discrimination by proving that employment practices that are fair in form are discriminatory in practice."), citing Griggs, 401 U.S. at 431.[8]

Likewise, Lufkin argues that Plaintiffs introduced no evidence "that Lufkin's own requisition records were inaccurate or had been tampered with," Motion for Judgment at 6, further suggesting an erroneously belief that Plaintiffs must present evidence of intentional discrimination. While Plaintiffs have no such burden, the evidence presented at trial nevertheless includes facts from which the Court can draw inferences about the credibility of Lufkin's witnesses who testified about how Lufkin's requisition records were prepared and maintained and how information from these documents was entered into Lufkin's applicant tracking system. See Proposed Findings 117-132. Specifically, Plaintiffs introduced evidence of discrepancies between Lufkin's requisition forms and other documents pertaining to the same individuals whose names appear on the forms that show that applicants who were referred by the TWC for one job and whose application forms confirmed that they applied for that job were

[8] Lufkin's contention that Mr. Deason's testimony supports the "objectivity" of its hiring and placement practices is flawed. To the contrary, Mr. Deason's experience illustrates the inherently subjective nature of the practices. Even on the basis of the inconclusive "minimum requirements" Lufkin contends that it has, Mr. Deason was well qualified for work in any Lufkin Division, yet was assigned to the Foundry. See Proposed Finding 46. In interviewing Mr. Deason, Mr. Barbay, who has no written procedures and no formal training, failed to obtain information about Mr. Deason's prior work experience and education that was not on the application form, but should have been obtained in a competent job applicant interview. Although Mr. Deason wrote "Chipper/Grinder" on his application form, Plaintiffs presented evidence showing that Lufkin often hires applicants for jobs other than those listed on their application forms and that Mr. Barbay exercises discretion in advising applicants of what job to write to list on the application form, including suggesting that applicants change the job originally written on the form. See Proposed Finding 112. Lufkin's contention that Mr. Deason's prior foundry work experience "explain[s] why the TWC computer would have identified [Mr.] Deason as a candidate for a Foundry job at Lufkin," Motion for Judgment at 4, cannot be squared with other evidence regarding class member Jerry Mullins, a high school graduate, like Mr. Deason, whose last employment before applying to Lufkin was as a grinder in a foundry. Mr. Mullins' name appears on a TWC work order for "assembler work" in the Trailer Division and his application form states that he applied for the position of "Trailer Helper." Nevertheless, Lufkin assigned Mr. Mullins to the Foundry Division as a General Foundryman. See Proposed Finding 111.

listed on Lufkin requisition forms records for another job. Id. At a minimum this evidence confirms that Lufkin often hires and assigns applicants for one job to another job. Id.

Therefore, based on the evidence summarized above and in the more detailed Proposed Findings and Conclusions, the Court should reject Lufkin's motion and find for Plaintiffs on their initial assignment claim. As this Court Has Previously Found, the EEOC Charge Filed by Plaintiff Sylvester McClain Supports the Class' Initial Assignment Claim.

2. As this Court has Previously Found, the EEOC Charge Filed by Plaintiff Sylvester McClain Supports the Class' Initial Assignment Claim.

Lufkin also seeks judgment on Plaintiffs' initial assignment claim on the ground that there "is no evidence that any of the Class Representatives filed an EEOC charge complaining about their initial assignment" and that Plaintiff Sylvester McClain's EEOC charge is inadequate to support Plaintiffs' initial assignment claim. See Motion for Judgment at 6. Lufkin made this identical argument in its Motion for Partial Summary Judgment, which it filed on September 29, 2003 (see Dkt. #263), and the Court denied on October 30, 2003. See Dkt. #309. In that motion, Lufkin argued that Plaintiffs' initial assignment claim falls outside the scope of the Named Plaintiffs' charges of discrimination ("EEOC charge") filed with the Equal Employment Opportunity Commission ("EEOC"). Furthermore, Lufkin has repeatedly raised similar arguments regarding the sufficiency of Mr. McClain's charge to support the class claims, in addition to its Motion for Partial Summary Judgment.[9]

[9] See Defendant's Motion to Dismiss Class Action Claims, filed June 6, 1997, (Dkt. #9) at 16 ("The complaints in [Mr. McClain's] EEOC charge fail to track the principal claims of the putative class, namely that Lufkin Industries discriminated in hiring and promoting black employees."); Defendant's Response to Plaintiffs' Motion for Class Certification, filed December 1, 1997, (Dkt. #32) at 23 ("The complaints in [Mr. McClain's] EEOC charge fail to track the principal claims of the putative class, namely that Lufkin Industries discriminated in hiring, terminating and promoting black employees."); Defendant's Petition For Permission to Appeal Order Granting Class Certification, filed April 13, 1999, at 25 ("McClain's complaint [to the EEOC] focuses on one thing: the decision to eliminate the single quality assurance manager position in the trailer division. Hence, Mr. McClain's charge will not support the class which has been certified.")

Lufkin's argument was implicitly, if not explicitly, rejected when the Court certified the class in this case and again most recently, when the Court denied Lufkin's Motion for Partial Summary Judgment. The doctrine of law of the case bars Lufkin from relitigating the issue before this Court.

Under the "law of the case" doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. Knotts v. U.S., 893 F.2d 758, 761 (5th Cir. 1990); Thyssen Steel Co. v. M/V Kavo Yerakas, 911 F. Supp. 263, 268 (S.D. Tex. 1996). Issues decided either explicitly or by necessary inference constitute the law of the case. See Knotts, 893 F.2d at 761; Thyssen, 911 F. Supp. at 268. Accordingly, the Court's prior determination on the same issue which Lufkin now raises again is subject to the law of the case doctrine and must be followed unless the court is presented with substantially additional or different evidence, controlling authority has since made a contrary decision of the law applicable to the particular issue, or the prior decision was clearly erroneous and would work a manifest injustice. See Paul v. U.S., 734 F.2d 1064, 1065 (5th Cir. 1984).

Lufkin's Motion for Judgment satisfies none of these requirements. In fact, Lufkin's arguments in its Motion for Judgment are identical to those in its Motion for Partial Summary Judgment; Lufkin does not even attempt to explain why the Court should reconsider its earlier rulings. Accordingly, law of the case should prevent Lufkin from again arguing that Mr. McClain's EEOC charge does not support the class claims.[10]

[10] Rule 11 states in pertinent part: By presenting to the court ... a pleading ... an attorney ... is certifying that to the best of [his] knowledge, information and belief, formed after an inquiry reasonable under the circumstances, ... it is not being presented for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation [and] the claims ... are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. ...." Additionally, 28 U.S.C. § 1927, recognizes that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Browning v. Kramer, 931 F.2d 340, 344 (5th Cir. 1991) citing In re Hunt, 754 F.2d 1290, 1294 (5th Cir.1985).

In any event, Plaintiffs have thoroughly briefed the factual and legal arguments Lufkin raises regarding the sufficiency of Mr. McClain's Charge to support the class' initial assignment claim and Mr. McClain's standing to raise discrimination claims on behalf of others in their Opposition and Sur-Reply to Defendant's Motion for Partial Summary Judgment, see Dkt.# 269 and Dkt. # 276, which Plaintiffs incorporate fully herein by reference. For all of the reasons stated therein the Court should deny Lufkin's motion to dismiss the initial assignment claim on the ground that it is beyond the scope of Mr. McClain's EEOC Charge.

3. Plaintiffs Have Established that Lufkin's Channeling of African Americans into the Foundry is a Result of Lufkin's System of Subjective Decision Making that is Incapable of Separation for Analysis.

Lufkin claims that Plaintiffs have not shown why Lufkin's initial assignment practices cannot be separately analyzed.[11] Id. at 12. Specifically, Lufkin contends that the TWC-developed applicant pools, Lufkin's minimum criteria and "completion of an application form" are identifiable components that can be separately analyzed. However, Plaintiffs do not challenge these specific components, but rather Lufkin's subjective decision making system, in which these components are interwoven.[12]

(continued …)
There can be little question that in filing its Motion for Partial Summary Judgment, which was rejected by the Court, and now its Motion for Judgment seeking dismissal of Plaintiff's initial assignment claim on the same ground raised in the earlier motion and without benefit of any new factual or legal support for the present motion, Lufkin and its counsel have increased the costs of this litigation, by requiring the time and resources of Plaintiffs' counsel and the Court to respond to the motions.

[11] As Lufkin concedes, where plaintiffs demonstrate that the elements of an employer's decision making process are not capable of separation for analysis, the entire decision making process may be analyzed as a single employment practice. 42 U.S.C. § 2000e-2(k)(l)(B)(i); see McClain, 187 F.R.D. 267, 272-73; Bannister v. Dal-Tile Int'l, Inc., 2003 WL 21145739, *2 (N.D. Tex. 2003); Stender, 803 F. Supp. at 335; Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1264 (N.D. Cal. 1997).

[12] Lufkin's reliance on Stout v. Potter, 276 F.3d 1118 (9th Cir. 2002) is misplaced. In that case, unlike here, the plaintiffs did "not argue that the various elements of the screening process cannot be isolated for analysis." Id. at 1124.

As discussed above, there is substantial evidence demonstrating that Lufkin often hires entry level applicants for jobs other than those jobs for which they apply or are referred by the TWC. Therefore, the TWC applicant pools are unreliable indicators of the applicants Lufkin actually considers for specific entry level positions. Moreover, limiting analysis to the Foundry "applicant pools" – as Lufkin's expert Dr. Baker did – fails to account for the fact that African Americans are significantly under-assigned to entry level jobs in non-Foundry divisions, and accordingly, not Lufkin's argument is neither responsive nor probative on the initial assignment issue in this case. See McClain, 187 F.R.D. at 273 ("Plaintiffs assert (and their statistics support), that African-Americans are over represented in difficult and unpleasant jobs, and under represented in less strenuous positions. This channeling process is not guided by any objective standards or procedures of reviewing them.") (emphasis added). See Proposed Conclusions 288-289.

Similarly, with respect to Lufkin's assertion that its minimum requirements should be separately analyzed, while there was some dispute about the minimum requirements for Lufkin entry level positions, particularly educational requirements,[13] the deposition testimony of Lufkin's original Rule 30(b)(6) designee, Mr. Perez, documentary evidence introduced at trial, and the education levels of those actually hired and assigned into Lufkin entry level positions combine to establish that the minimum qualifications for these positions are the same, regardless of division, and do not explain the disparities in African American assignments to the Foundry.[14]

[13] The historical and current evidence, taken as a whole refutes Lufkin's contention that it "requires" a "GED or better" for entry level positions in its Oilfield and Power Transmission Divisions, and shows only that the "GED or better" requirements has been, at times, a preferred but not mandatory requirement for entry level positions in Lufkin's Oilfield and Power Transmission Divisions. See Proposed Findings 95-103.

[14] Evidence was culled from TWC work orders reveals that there is no difference in the education levels among applicants hired for any of Lufkin's divisions. There is no way to measure the impact on African Americans of Lufkin's educational requirement from Lufkin's personnel databases because information about an employee's education is only randomly entered into the database. See Proposed Finding 280.

See Proposed Findings 105-107. This was confirmed by Lufkin's counsel Mr. Smither, who admitted to the OFCCP that "applicants for the Machinist Helper, Laborer and Helper jobs were placed in the same common applicant pool regardless of job preference. … Because the jobs in question were entry-level jobs requiring little education, and no experience or training. It was impossible to determine differences between the qualifications of protected versus non-protected group applicants." See Proposed Finding 302, see also n. 14. The evidence also shows that application of Lufkin's educational requirement did not explain the disparities in African American assignments to the Foundry. See Proposed Finding 107. Indeed, Lufkin conceded that it knows of no objective minimum requirements that have an adverse impact on African Americans and thus, any disparities are a function of the subjective components of Lufkin's hiring and initial assignment process.[15] See Proposed Finding 90.

In any event, analysis of any of Lufkin's alleged minimum requirements, including educational requirements, is not possible since Lufkin acknowledges that it does not collect that information in any format by which it could be analyzed and admits that it does not analyze its minimum requirements for adverse impact despite its legal obligation to do so under the Uniform. See Proposed Finding 105; Proposed Conclusions 468-469.

Lastly, Lufkin's assertion that its "requirement that each employee complete an application" is capable of separate analysis, while not entirely clear, appears to suggest a comparison between applicants and those who are actually hired, which if so, would be comparable to the TWC pool analysis, Lufkin also suggests that is as explained above, irrelevant in a case challenging initial job assignment, not hiring. See Proposed Findings 288-289; Proposed Conclusion 479.

[15] Where a selection system combines both "subjective" and "objective" criteria, the system is "considered subjective in nature." Watson, 487 U.S. at 989.

For all of the reasons discussed above and in the detailed Proposed Findings and Conclusions, the Court should reject Lufkin's argument that the challenged subjective decision making practice is capable of separation for analysis.

4. Dr. Drogin's Initial Assignment Model is Appropriate Where, as Here, there is Substantial Evidence that the "Applicant Pool" Data is Unreliable

Lufkin argues that Dr. Drogin's model for analyzing initial assignments has three major flaws: (1) he does not account for the actual pool for each entry-level position, (2) his principal analysis does not control for time; and (3) he does not distinguish between qualified and non-qualified applicants. Dr. Drogin more than adequately addressed and refuted these points in his written reports and testimony.

In order to determine if African American entry level hires are disproportionately placed in the Foundry department Dr. Drogin analyzed the initial departmental assignment of all individuals hired by Lufkin for entry level production jobs during the liability period, comparing African American versus white, and African American versus non-African American, entry level hires into each production. See Proposed Finding 275. Dr. Drogin did not use actual applicant pool data for his initial assignment analysis because of the substantial evidence that the purported pools were not an accurate or reliable reflection of the applicants considered for the positions in question.[16] See Proposed Findings 298-304. Moreover, because the issue Dr. Drogin was studying was initial assignments, not hiring, it was important to compare the assignments of all entry level employees to all divisions and not just the Foundry.[17] See Proposed Finding 291. Accordingly, under the circumstances of this case, Dr. Drogin's analysis was proper.

---

[16] EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991), which Lufkin cites, is irrelevant to the issues in this case since that case challenged the employer's hiring practices, and not as here, initial assignments of applicants actually hired.

[17] Trevino v. Holly Sugar Corp., 811 F.2d 896 (5th Cir. 1987) is inapposite; there the court noted that ""Plaintiffs do not claim that defendants have discriminated in their application of the bidding process itself, which is based primarily on seniority." Id. (emphasis added). Here, Plaintiffs claim that Lufkin's subjective decision making system infects the bidding process, which is not governed solely by seniority but multiple discretionary criteria and procedures.

Lufkin's criticism that Dr. Drogin did not control for "time" disregards the evidence Plaintiffs presented regarding further refined analyses Dr. Drogin conducted comparing new hires with the same start date, and the same week of hire, specifically to test the theoretically possible – although highly improbable – hypothesis that an explanation for the racial assignment patterns he found was that TWC disproportionately referred African American candidates to Lufkin on days or during weeks when only Foundry department jobs were available. See Proposed Findings 281-283. The analyses, even with these restrictions, still yielded statistically significant disparities in the assignment of African Americans to the Foundry of 5.65 and 5.94 standard deviations, respectively. See Proposed Findings 281-282. Thus, Lufkin's criticism is groundless.

Likewise, Lufkin's criticism that Dr Drogin did not control for qualifications is unwarranted and also was addressed at trial. While Dr. Baker initially asserted that differences in educational levels among applicants might provide a non-racial explanation, and criticized Dr. Drogin for not considering such qualification factors, she ultimately admitted that she had no data suggesting that African American hirees had a lower educational level. See Proposed

---

(continued …)
Julien v. Scott, 1998 U.S. Distr. LEXIS 11043 (C.D. Cal. July 17, 1998), aff'd, 189 F.3d 473 (9th Cir. 1999) likewise is not helpful to Lufkin's position. In that case, the court noted, in granting the employer's motion for summary judgment, that the exam in question was given to everyone and there was evidence that the test did not exclude applicants because of race. Here, Lufkin's alleged "eligibility" criteria are discretionarily administered and there are no records of the results of application of any of the many criteria by race. Similarly, in Williams v. Am. St. Gobain Corp., 447 F. 26 561 (10th Cir. 1971) (the court's holding was premised on its finding that not withstandings its employment practice a disparate impact on African American workers, the employer had sufficiently demonstrated a legitimate business justification for the practice. Here, Lufkin has not proffered any credible and non-pretextual business necessity justification for its subjective decision making system and in fact, the evidence demonstrates jus the opposite. See Proposed Conclusions 506-509. Finally, in E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1277 n. 13 (11th Cir. 2000), the court noted that "[b]ecause we conclude infra that the district court erred in finding that the EEOC established disparate impact discrimination, even if we accept the alternative labor pool data, we need not address whether the alternative labor pool selected by the district court was comprised of "qualified" potential applicants. Thus, the court never addressed the point for which Lufkin cites the case.

Findings 280, 304-306. Dr. Baker's hypothetical explanation was further refuted by evidence showing that on average, African Americans hired by Lufkin during the liability period had as high an educational attainment level as whites hired.[18]

Consequently, Lufkin's criticisms of Dr. Drogin's model are without merit and, in any event insufficient, since Lufkin has not shown that any further refinements of the statistical analyses controlling for time or qualifications would change the result. Where a party challenges statistical data as flawed, that party bears the burden of showing that the errors or omissions in the data are likely to change the result. Vuyanich v. Republic Nat. Bank of Dallas, 505 F. Supp. 224, 255 (N.D. Tex. 1980), judgment vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984); B. Lindemann & P. Grossman, Employment Discrimination Law at 103-106 (3d ed. 1996) ("Employment Discrimination Law") (collecting cases).

For all of the reasons discussed above and in the Proposed Findings and Conclusions, the Court should reject Lufkin's argument that Dr. Drogin's initial assignment analysis is flawed and credit Dr. Drogin's statistical findings.

C. Plaintiffs Have Presented Ample Evidence to Support their Disparate Impact Claim with Regard to Promotions of Hourly Employees, Which Lufkin has not Credibly Rebutted.

Lufkin argues that Plaintiffs' hourly promotion claim should be dismissed, because: (1) "no class member testified that he has was denied a promotion because of his race; (2) "Plaintiffs have failed to identify or isolate a specific employment practice that results in Blacks receiving fewer hourly promotions;" and (3) "Dr. Drogin's promotion analysis is fatally flawed because he fails to analyze the actual applicant bid sheet documents and relies instead on an artificially constructed pool that does not reflect Lufkin's practices." Each of these contentions is without merit and fully rebutted by the record evidence and applicable law.

[18] Specifically, 91% of African American hirees to all departments, and 90.3% of African Americans hired into the Foundry, had a GED, were high school graduates, or had post-high school education, compared to 90% and 85.3%, respectively, of whites in the same categories. See Proposed Finding 306.

a. Plaintiffs Met Their Burden of Identifying the Challenged Employment Practice.

Lufkin claims that Plaintiffs did not identify through the testimony of any class member the challenged hourly promotion practices. Evidence of the challenged practice does not have to be introduced through the testimony of class members, particularly in a case alleging disparate impact. Additionally, however, the specific employment practice Plaintiffs challenge as discriminatory is Lufkin's policy of delegating personnel decision making to managers who make such decisions based on arbitrary, subjective, ambiguous and unvalidated criteria. One of the areas Plaintiffs challenge application of this practice is with respect to promotions. Plaintiffs presented substantial evidence of the subjective nature of Lufkin's hourly promotion process, which included the discretionary provisions of the Collective Bargaining Agreement, such as the ability clause, ten day rule, and unrestricted authority of managers to fill positions from sources other than the bid lists, all of which combine to obliterate the seniority provision. See Proposed Findings 41, 65, 145-168. Additionally, the evidence shows that the seniority provision is further undermined by Lufkin's purported unwritten "eligibility criteria," which are not expressly authorized by the CBA, have not been validated nor analyzed for adverse impact, and are implemented and enforced at the discretion of managers, unguided by written procedures. See Proposed Findings 169-179. Testimony from Lufkin managers demonstrated that they retain discretion to interview bidders who bid on jobs and in this way, influence their decisions to accept or decline a job. See Proposed Finding 155. Additionally, it is undisputed that Lufkin does not post numerous hourly jobs, but fills these jobs through manager selections that are unguided by written objective criteria or procedures and not subject to review or assessment for adverse impact. See Proposed Findings 186-190.

For all of the reasons discussed above and in the more detailed Proposed Findings and Conclusions, the Court reject should reject Lufkin's contention that Plaintiffs have not adequately or specifically identified the challenged practice supporting their hourly employee promotion claim.

b. Plaintiffs Have Established that Lufkin's Discriminatory Promotion of Hourly Employees is a Result of Lufkin's System of Subjective Decision Making that is Incapable of Separation for Analysis.

Lufkin contends that components of its hourly promotion process can and should be separately analyzed, and it maintains that Plaintiffs failure to do so is fatal to their disparate impact claim. Specifically, Lufkin asserts that Plaintiffs should have analyzed the bid databases which were created by Lufkin's counsel for this litigation. See Motion for Judgment at 18-19. This assertion, of course, ignores the considerable evidence that these databases are incomplete, unreliable and the underlying paper records used to create them suspect because they include non-contemporaneous handwritten notations on them for which there is conflicting or no racially neutral explanation. See Proposed Findings 244,-253, 312-320.

Lufkin additionally identifies eight "components" of its hourly promotion process that it claims are capable of separate analysis. See Motion for Judgment at 19.[19] However, the evidence shows these components are interwoven with and part and parcel of Lufkin's subjective decision making system. These components do not operate separately nor uninfluenced by Lufkin's subjective decision making.

An example that illustrates the interaction of these components and Lufkin's subjective decision making was presented by the testimony of class member Calvin Deason and documents pertaining to his bid for a storekeeper position. At the time of the bid, Mr. Deason was in a Chipper Grinder/Finisher position in the Foundry. Mr. Deason had prior storekeeper experience. Lufkin, however, awarded the job to a white employee, Jeremy Brister, who had not bid on the job and, in fact, was ineligible to bid on the job because he was a new employee and had not yet completed the 90-day probationary period required before an employee could bid on a higher

[19] These components are Lufkin's so-called "rules" regarding demotions, lateral moves, plant rule violations, shift preference and attendance, the fact that one has to bid and can decline a posted job, and the paper and pencil and other tests Lufkin administers.

level job. Mr. Brister, however, was a friend of the manager who selected him for the storekeeper position. See Proposed Finding 70.

In response to Mr. Deason's grievance challenging the award of the job to Mr. Brister, Lufkin responded by claiming that Mr. Deason was ineligible for the storekeeper position because it represented a "demotion" for him, and thus was contrary to Lufkin's alleged "rule" regarding demotion, despite the fact that contemporaneous documentation noted that "[i]t has been [Lufkin's] practice to review these requests [i.e. bids on jobs paying a lower rate] on an individual basis," and, according to the trial testimony of Lufkin manager Steve Reynolds, managers retain the discretion to award jobs with lower rates of pay to employees.

Lufkin also justified its selection of the less senior, ineligible and non-bidder Mr. Brister on the ground that under the CBA, Lufkin "retains the right to promote from sources other than the bid list," and further claimed that none of the applicants who bid for the storekeeper job met the "minimum desired criteria" for the job – despite the fact that there was no job description or written minimum criteria for the position and Mr. Deason had prior storekeeper experience.[20]

Thus, separate analysis of the "components" Lufkin identifies is not possible and would not be probative because they are not independent factors and are inextricably linked to Lufkin's

[20] In Mr. Deason's case, Lufkin refused to award Mr. Deason the Storekeeper position awarded to Mr. Brister, but eventually agreed to award the next available Storekeeper position to Mr. Deason. Lufkin also agreed to pay Mr. Deason the top rate of the Storekeeper classification. Pursuant to that agreement, two years after Mr. Deason filed his grievance, Lufkin awarded him a Storekeeper position. However, four months later, Lufkin arbitrarily and unilaterally reduced his rate of pay by more than $2.00 an hour, well below the top rate for the Storekeeper position. Because he could not afford the reduction in pay, Mr. Deason was forced to return to the Chipper/Grinder/Finisher job, where he remains currently. See Proposed Findings 46, 70(d).

subjective decision making.[21] See Proposed Findings 137-190; Proposed Conclusions 489-494. In any event, even if separate analysis of one or more of these components was probative or appropriate, it would not be possible since Lufkin does not collect data on the results of the application of any of these factors, notwithstanding its legal obligation to do so under the Uniform Guidelines. Thus, there is no or incomplete data regarding these "components" to analyze. See Proposed Findings 66, 140, 157, 162, 168, 173, 178, 183-184.

Lufkin also contends that Plaintiffs could have analyzed "the use of seniority." Plaintiffs did analyze the use of seniority and the analysis showed that seniority is not regularly followed at all, in fact the senior bidder is bypassed as frequently as selected. This showing that managers routinely find ways to overrule seniority confirms that promotional decision-making is subjective and discretionary, not the result of application of objective standards. See Proposed Findings 137-190. As already discussed, a myriad of subjective practices and criteria, including discretionary provisions of the CBA and the so-called "eligibility" criteria that operate without regard to seniority, have compromised the effect of "seniority" in the promotion process for

[21] Specifically, Lufkin's so-called "rules" on demotions, lateral moves, plant rule violations, and attendance, are all unwritten and subject to manager discretion. See Proposed Findings 171-177. Likewise, analysis of "bidders," that is only those individuals who actually bid on jobs, as Lufkin suggests in its motion, fails to account for the deterring effect of other components of Lufkin's subjective decision making system, such as discriminatory training, use of the ability clause, and as illustrated above, managers' selection of individuals from sources other than the bid list. See Proposed Findings 137, 152-168. Similarly, the paper and pencil and other tests Lufkin administers have not been professionally designed or validated and are subjectively administered and scored. See Proposed Findings 180-185. Analysis of which employees "declined" positions would not be either probative or reliable, because of manager discretion to influence the outcome through encouragement or discouragement of the bidder. See Proposed Finding 164. Additionally, none of these "rules" are authorized by the CBA, and there is evidence that the unions disagree with the company's interpretation of the CBA as reflected in these "rules," because they undermine the seniority provision. See Proposed Finding 174.

Lufkin's hourly employees.[22] Furthermore, because the bid sheets are incomplete and suspect, there is no reliable source of information to analyze promotions by "seniority.[23]

For all of the reasons discussed above, and in the detailed Proposed Findings and conclusions, Plaintiffs request that the Court reject Lufkin's argument that the challenged employment practice is capable of separation for analysis.

c. Dr. Drogin's Promotion Model is Appropriate Where, as Here, there is Substantial Evidence that the "Applicant Pool" Data is Unreliable.

Lufkin criticizes Dr. Drogin's hourly promotion analysis on two grounds: (1) he did not use actual bid data, but instead, used proxy feeder pools (which Lufkin mischaracterizes as "artificial," even though its own expert Dr. Baker, acknowledged that proxy pools are appropriate in situations where applicant pool data are unavailable or unreliable and used the same methodology to analyze promotion for which no bid sheets were available)[24] and (2) Dr. Drogin did not control for Lufkin's so-called "eligibility' criteria.

---

[22] Lufkin's reference to the "Congressional immunity afforded bona fide seniority systems insulates such systems, even though they may have a disparate impact," is of no moment here, because Plaintiffs do not challenge Lufkin's seniority system, but rather Lufkin's exercise of the substantial discretion the CBA yields to management. Moreover, Lufkin's attempt to defend the seniority rights of its workers is ironic when the multiple ways Lufkin has diluted the effect of seniority in its decision making are considered. In fact, the bid database Lufkin's counsel created for the litigation revealed that bids were awarded to the senior bidder only half the time. See Proposed Finding 329.

[23] Dr. Drogin's promotion analysis did control for seniority. See Proposed Finding 309. Conversely, Dr. Baker's bid sheet analysis is analysis failed to take seniority into account. However, the data Dr. Baker relied on showed that in roughly only half the time was the position awarded to the senior bidder, further supporting Plaintiffs' contention that hourly promotion decisions are in fact, not guided by objective criteria, but by the subjective components of the promotion process. See McClain, 187 F.R.D. at 276.

[24] The availability pools determined by Dr. Drogin were based on the number of African American and white employees who were similarly situated to the successful bidders. Dr. Drogin determined which individuals were similarly situated to persons actually promoted by considering the job and department promotees were in prior to their promotion and their level of seniority, and then identified other employees in the work force who had also held that same job and were in the same department.

Dr. Drogin determined that use of the bid data was inappropriate for several reasons: (1) his observation that a large number of the postings were missing from the bid databases that Lufkin's counsel created for Dr. Baker's analysis; (2) "unexplained discrepancies between different paper records purportedly documenting the same posting, bid and selection events;" (3) the reliability and credibility of the bid databases used by Dr. Baker which had been created by defense counsel and not checked by Lufkin's outside expert; (4) class members' allegations that they are discouraged from entering their names on bid lists, even when they are qualified, and that they are sometimes discouraged from actually accepting promotions they have been awarded; (5) and this Court finding that Lufkin's bidding system is not administered in a non-discriminatory way. McClain, 187 F.R.D. at 273-74.[25] See Proposed Findings 311-322.

It is well recognized that where actual applicant flow data is inadequate or unavailable, other measures of applicant flow--including but not limited to "feeder pools"--are deemed acceptable so long as they are used in a reliable manner. See R. Paetzold and S. Willborn, The Statistics of Discrimination Using Statistical Evidence in Discrimination Cases, §§ 4.02--4.04 (Oct. 2002) ("Statistics of Discrimination"), quoted in Dukes v. Wal-Mart Stores, 222 F.R.D. 137, 163 (N.D. Cal. 2004) (where the court accepted proxy feeder pools based on historical movement patterns where limited actual applicant flow data exists); see Stender, 803 F. Supp. at 295-96, 333-34 (accepting same methodology where defendant's bid data was incomplete).[26]

[25] It is impossible to accurately identify who was on the bid lists and to determine the availability pool of bidders for promotions by the bid list method, where no bid list corresponding to the promotions is retained. Therefore, it is not possible to know whether inclusion of the bid sheets and availability pool data from those promotions would have changed the results or conclusion of an analysis based on bid sheets. Accordingly, the applicant flow (or bid) method of analysis could not properly be used to analyze all of Lufkin's promotions.

[26] The proxy pools approved by the courts in Dukes and Stender were developed using the same methodology Dr. Drogin used in this case, and were, in fact, developed by Dr. Drogin who was retained as plaintiffs' expert in both of these cases. In both Dukes and Stender, the employers' statistical experts criticized Dr. Drogin's use of proxy pools. In both cases, the employers' experts were employed by the same firm as Dr. Baker, Lufkin's statistical expert. See Dukes, 222 F.R.D. at 155, 163 n. 37.

Dr. Drogin's use of proxy feeder pools for his hourly promotion analysis, under the circumstances of this case, was entirely reasonable. See Proposed Conclusion 478.

Lufkin also criticizes Dr. Drogin for not considering or controlling for the "non-discriminatory factors that qualify or disqualify employees for promotions such as bidding, departmental seniority, disciplinary warnings, excessive absence, and eligibility tests." Motion for Judgment at 21. However, as discussed above, Lufkin fails to "maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race," as it is expressly required to do under the Uniform Guidelines. See Proposed Findings 66, 140, 157, 162, 168, 173, 178, 183-184. Accordingly, because Lufkin has not complied with its obligation to analyze these factors for adverse impact, it has no basis to claim, as it does in its motion, that they are "non-discriminatory." Furthermore, the Court may draw an inference that the records would have contained evidence unfavorable to the employer. See Proposed Conclusions 468-473, 568.

Lufkin's criticism that the availability pool method used by Dr. Drogin did not produce results, for particular promotions, that are the same as the availability lists based on bid lists purportedly maintained by Lufkin and purportedly summarized in the bid databases created by Lufkin's counsel does not undercut the methodology Dr. Drogin used, which is the same methodology Dr. Baker used in creating her proxy pools, and it thus is clear that if it is assumed that Dr. Drogin's use of proxy or availability pools was appropriate, the method he used to create those pools was appropriate. See Proposed Finding 338; Proposed Conclusions 478.

Accordingly, for all of the reasons discussed above and in the more detailed Proposed Findings and Conclusions, Court should reject Lufkin's argument that Dr. Drogin's hourly promotion analysis is flawed and credit Dr. Drogin's findings.

D. Plaintiffs Have Presented Ample Evidence to Support their Disparate Impact Claim with Regard to Promotions of Salaried Employees Which Lufkin has not Credibly Rebutted.

Lufkin contends that Plaintiffs failed to produce anecdotal evidence from class members in support of their salaried promotion claim. **See Motion for Judgment at __,** ("no class member testified that he was denied a salaried promotion"). As discussed above, such anecdotal evidence is neither required nor necessary for Plaintiffs to meet their prima facie burden. Here, Plaintiffs have identified the challenged practice – Lufkin's subjective decision system – and presented statistical evidence of disparities. This satisfies Plaintiffs' burden.

The evidence presented at trial shows that Lufkin's salaried promotion decisions are subjective and allow unconscious stereotypes and other improper considerations to enter into the decision making process. This evidence includes testimony and other evidence demonstrating that (1) managers have complete discretion in deciding which employees to promote into salaried positions; (2) selections for salaried promotions are made through subjectively determined and unstructured interviews, and using job descriptions that are not professionally developed nor based on an analysis of the specific jobs in question to determine the knowledge, skills and abilities related to successful performance in the particular job, but instead prepared by Viron Barbay and an English Professor who "knows nothing" about the jobs at Lufkin, both of whom are untrained in the development of valid, job-related job descriptions; (3) managers use highly subjective criteria, such as "strongest desire for the job," "superior mechanical ability," "strong sense of urgency on repairs," and "self-confidence;" (4) Lufkin does not collect and analyze the results of any of its salaried promotion employee selection procedures for adverse impact, despite its legal obligation to do so; and (5) managers are not held accountable for their promotion decisions or in any way evaluated on their performance with regard to equal employment opportunities. See Proposed Findings 64-202. Such evidence amply supports Plaintiffs' claim. See Proposed Conclusions 489-494.

Lufkin also seeks dismissal of Plaintiffs' salaried promotion claim on the ground that, despite Dr. Drogin's finding that "[t]here is a statistically significant shortfall in promotions of

blacks into salary jobs in EEO categories 1-5," and that the Z-value for this disparity is –2.02, Plaintiffs' statistical evidence is not legally significant.

As this Court has previously held in this case, "[t]here are no bright-line rules regarding what degree of statistical disparity is necessary to support a disparate impact claim. Traditionally, the statistics must show a "gross disparity" in how the different races are affected. … A deviation greater than three standard deviations is sufficient to support a prima facie case." See McClain, 187 F.R.D. at 276. Other courts also have rejected arguments of strict legal benchmarks requiring a particular standard deviation to demonstrate that data has statistical significance. See Rendon v. AT & T Technologies, 883 F.2d 388, 397-98 (5th Cir.1989) Moreover, "[w]hether a given [test result] should be regarded as statistically significant must be determined on a case by case basis since the value signifying statistical significance is dependent upon sample size." Overton v. City of Austin, 871 F.2d 529, 544 (5th Cir.1989) (Jones, J., concurring).

The courts have recognized that it is the convention of statisticians to recognize that a disparity of 1.96 or more standard deviations from expected values establishes statistical significance. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952 (D.D.C. 1980), aff'd, 702 F.2d 221 (D.C. Cir. 1981); Vuyanich v. Republic Nat. Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980), judgment vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984). Statistical disparities falling just short of the traditional standard of 2 may nonetheless be meaningful since consistent shortfalls in every category are probative of a pattern of discrimination, especially when other evidence confirms an allegation of discrimination. See e.g., EEOC v. American Nat'l Bank, 652 F.2d 1176, 1195 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982) (rejecting employer's argument that the plaintiff's statistics were not probative unless they exceeded two or three standard deviations, holding that "well short of three standard deviations, the probability levels for chance as explanation have already dropped far below the point at which courts of law – concerned with proof by the 'greater weight' or 'preponderance' would presumably have discarded the

hypothesis of chance."); see also Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362, 363 (7th Cir. 2001)("the 5 percent test ["that is, the coefficient of the relevant correlation is at least two standards deviations away from zero"] is arbitrary. … It is for the judge to say, on the basis of a trained statistician, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of a judge or jury.")

In this case there are compelling reasons to conclude that Dr. Drogin's finding is statistically and legally significant. First, the disparity is in excess of the significance level conventionally recognized by statisticians. Additionally, the finding of disparity in salaried promotions coupled with similar findings of disparities in initial assignments and hourly promotions, demonstrates a consistent pattern of discrimination. Likewise, evidence of a high degree of discrimination in initial assignments and hourly promotions makes it more likely than not that the lower – but still statistically significant – disparities found with respect to salaried promotions, support a finding of discrimination in salaried promotions. See McClain 187 F.R.D. at 274 ("Discrimination in hiring and advancement, even at the lower levels of the hierarchy, has a rippling effect upwards through that hierarchy.")

Thus, for all of the reasons discussed above and in the more detailed Proposed Findings and Conclusions, the Court should find for Plaintiffs on their salaried promotion claim.

E. Plaintiffs Have Introduced Sufficient Evidence to Demonstrate the Adverse Impact of Lufkin's Discriminatory Initial Assignment and Promotion Practices on African American Employees' Compensation, Which Lufkin Has Not Credibly Rebutted.

Lufkin contends that Plaintiffs' compensation analysis is flawed because Dr. Drogin failed to control for job classification as an independent variable in his regression analysis, and therefore, the Court should dismiss Plaintiffs' compensation claim. As Dr. Drogin explained in his Report and testimony, he did not control for job classification in his analysis because, in light of Plaintiffs' discriminatory initial assignment and promotion claims, the job an individual held could be affected by the discrimination, or a "tainted variable." See Proposed Findings 361-363.

Plaintiffs presented evidence that controlling for job classification removes from consideration the one compensation issue that is present in this case as framed by the Court's orders and Plaintiffs' allegations – whether Lufkin's discriminatory practices of initial assignment and promotions result in African Americans being disproportionately limited to lower-paying jobs than similarly situated whites. Id. Conversely, including job classification in the analysis introduces a tainted variable. "A variable can be considered 'tainted' if (1) the variable, although perhaps related to productivity or worth, may reflect a qualification that has been denied to a protected group by the employer's discrimination. …" 2 Employment Discrimination Law at 1699.

Tainted variables should be excluded from the analysis because the tainted variable may itself represent some of the discrimination against the protected class, so that the variable's inclusion in the analysis will result in an underestimation of the degree of discrimination. See Statistics of Discrimination § 6.13; see also Coward v. ADT Security Systems, Inc., 140 F.3d 271, 274 (D.C. Cir. 1998) ("Depending on the theory of the case, some variables may be entirely unsuitable. Where plaintiffs allege discriminatory promotion practices, for example, this court considers inclusion of grade variables 'inappropriate' because an employee's grade may itself reflect discrimination.").

A compensation analysis that controls for job classification addresses an issue – whether African Americans are paid less than whites who hold the same job classification – that is not an issue raised in this case. Here, where Plaintiffs contend and have shown that Lufkin's initial assignment and promotion practices have adversely impacted African Americans, it is inappropriate and prejudicial to control for job held in an analysis of compensation. Accordingly, Dr. Drogin's compensation analysis is appropriate and necessary under the circumstances of this case. See Proposed Conclusions 479(e), 480-482.

Therefore, for all of the reasons discussed above and in the more detailed Proposed Findings and Conclusions, the Court should reject Lufkin's motion and find for Plaintiffs on their compensation claim.

IV. CONCLUSION

Plaintiffs have presented compelling evidence to support their disparate impact claims and Lufkin has failed to credibly rebut that evidence. Therefore, for all of the reasons discussed above and in the Proposed Findings and Conclusions filed simultaneously with this Opposition, Plaintiffs respectfully request that the Court deny Lufkin's Motion for Judgment and find for Plaintiffs on each of their disparate impact claims.

Dated: November 30, 2004

Respectfully submitted,

By: /S/

Teresa Demchak, CA Bar No. 123989
Morris J. Baller, CA Bar No. 048928
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612-3534
(510) 763-9800

Timothy Garrigan, TX Bar No. 07703600
Stuckey, Garrigan & Castetter Law Offices
2803 North Street
Nacogdoches, TX 75963-1902
(936) 560-6020

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

Douglas Hamel
Christopher V. Bacon
Michelle Mahony
Vinson & Elkins
2806 First City Tower, 1001 Fannin Street
Houston, TX 77002-6760

on this 30th day of November, 2004.

/S/
Teresa Demchak