**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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| **KAREN YAPP, RODNEY C. GRADY, MOLLIE JONES, and CYNTHIA BYAS,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. 4:02-cv-615 SNL** |
| **UNION PACIFIC RAILROAD COMPANY,** | ) | |
| **Defendant.** | ) | |

**ORDER**

This is before the Court on Defendant Union Pacific Railroad's Motion for Summary Judgment (No. 153) as to Plaintiffs Karen Yapp and Mollie Jones. Plaintiffs filed claims of race discrimination under state and federal law against their employer, Union Pacific. In this suit, Plaintiffs, who are both African-American, claim that they were discriminatorily denied promotions to Project Engineer vacancies because of their race. Plaintiffs seek damages under theories of disparate impact and disparate treatment race discrimination.

**SUMMARY JUDGMENT STANDARD**

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise

genuine issues of material fact." *City of Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed. R. Civ. P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). The burden is on the moving party. *City of Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion, and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976). With these principles in mind, the Court will recite the background of the case.

## PROCEDURAL BACKGROUND

Six plaintiffs filed suit on April 29, 2002 against Union Pacific, and subsequently filed their Amended Complaint on June 4, 2002. The Amended Complaint alleges racial discrimination by Union Pacific in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5 *et seq*., the Civil Rights Act of 1991, 42 U.S.C. § 1981, and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.010 *et seq*. These plaintiffs attempted to certify a class seeking, *inter alia*, declaratory and injunctive relief for alleged systemic racial discrimination in Union Pacific's employee selection, training and compensation policies, practices and procedures.

In August of 2003, four of the six plaintiffs (two current Union Pacific employees, Karen Yapp and Cynthia Byas, and two former Union Pacific employees, Mollie Jones and Rodney Grady) sought certification of a class of African-Americans, who, from July 18, 2000 to the present, were adversely impacted by one or more aspects of Union Pacific's policies, practices and procedures related to selections for non-agreement job vacancies.[1] The Court denied the Motion for Class Certification on August 5, 2005, and separated the cause of action into three cases: Yapp and Jones' action remained combined, and Byas and Grady's actions were to be tried singly. The final two plaintiffs voluntarily dismissed their claims by stipulation.

The remaining plaintiffs sought leave to file a Second Amended Complaint, stating yet another class action claim. The Court denied their request. They have not attempted to file an amended

[1]Non-agreement employees are those who are not party to a collective bargaining agreement and who are salaried. Agreement employees are subject to a collective bargaining agreement.

complaint stating their individual claims. In July of 2006, Union Pacific filed three motions for summary judgment and a motion to strike Plaintiffs' expert witness. The case was stayed through November, while the parties engaged in mediation.

In an Order dated February 15, 2007, the Court denied Union Pacific's Motion to Strike the testimony of Dr. Bradley, Plaintiffs' expert witness. The Court had expressed reservations as to the propriety of Dr. Bradley's report during its denial of class certification, but thought it premature to determine the report's admissibility. The Court had assumed that Dr. Bradley would alter his previous analysis to correspond with an individual's disparate impact claim. After reviewing the evidence and arguments produced in opposition to this summary judgment motion, it seems the Court was mistaken. Dr. Bradley has not revised his expert evidence and argument to comport with a non-class action lawsuit. Accordingly, Union Pacific's motion to strike was not premature. Any further hearings on the admissibility of Dr. Bradley's report would be superfluous. Given the timing, a review of Dr. Bradley's report would not unduly prejudice the parties.[2] The Court will consider the admissibility of Dr. Bradley's report in conjunction with its review of this summary judgment motion.

## FACTUAL BACKGROUND

Karen Yapp has been employed by Union Pacific since March of 1995. Currently, she is employed as a Project Engineer in the Operations Support Group ("OSG") section of Union Pacific's Information Technologies ("IT") Department. Mollie Jones was employed by Union Pacific from

[2]The Motion to Strike and the Motions for Summary Judgment were all filed in July of 2006, and the Motion to Strike was denied on February 15, 2007. No further motions have been filed since that date.

January of 1996 through June of 2001. When this cause of action accrued, both Yapp and Jones were Computer Schedulers in the IT Department who handled "mainframe operations." They were both seeking promotions to the position of Project Engineer within the OSG.

The OSG section of the IT Department monitors the daily operations of the company's "distributed computing" network. The skill set required for distributed computing differs significantly from that required for mainframe operations. Mainframe operations involve running batch computer jobs and monitoring mainframe computer systems, whereas distributed computer systems involve the computer networks that connect Union Pacific's workstations and computers. At all times relevant to this litigation, neither Yapp nor Jones had distributed computing experience.

At an unspecified date during the autumn of 1999, Plaintiffs indicated that they were interested in obtaining OSG Project Engineer positions on employee interest forms. They did not receive this promotion.[3] Plaintiffs applied for a second promotion to an OSG Project Engineer position in August of 2000. They were interviewed by Ladonna Christ, a Caucasian woman, and Engus Carter, an African-American man. According to the vacancy notice, the following skills and accomplishments were required: a Bachelor's Degree in Engineering, Computer Science, Math, or equivalent experience; strong knowledge base in UNIX, NET, or Netware; working knowledge of backup applications such as Veritas, Network Systems, and ArtServe; and working knowledge of IAN/WAS networking and dial-in access. Although not required, Union Pacific preferred an applicant with experience with Tivoli/Expert Advisor, client and server troubleshooting in web

[3]As described below, Plaintiffs' assertion of this claim is quite irregular. Plaintiffs' memoranda and factual assertions provide little information on this claim.

technologies, mainframes, communications, and server applications. In her testimony, Christ stated that she was looking for an applicant with distributed computing experience. Yapp and Jones did not receive the promotion, purportedly because they lacked this experience. In addition, Christ stated that Yapp was not a team player, and gave her low scores for potential, background, and career goals. This was contrary to a letter of recommendation penned several months earlier by Yapp's supervisor, stating that Yapp was a "team player" who had "consistent interest in learning new skills" with a "very strong educational background." Christ and Carter gave Jones low scores in all categories, finding Jones unmotivated. Five months prior to the interview, Jones received a letter of recommendation from two supervisors who were "impressed by her desire to do a good job and learn."

Timothy Hayes, a Caucasian man, was selected for the position instead. Hayes did not have "hands on" distributed computing experience, but claimed to have gained experience with distributed computing operations, including knowledge of UNIX, IT, and Novell servers. Hayes did not list distributed computing experience on his 1999 employee interest form or resume. Four evaluations of Hayes conducted in 1999 state that Hayes did not have distributed computing experience. When Hayes was selected for the promotion, he had yet to complete his Bachelor's Degree. However, Yapp had a Masters in Business Administration and Jones had a dual Bachelor's degree in Computer Science and Mathematics. Plaintiffs had training with (but not experience in) certain distributed computing systems.

Plaintiffs applied for a third Project Engineer vacancy in January of 2001. Clyde Dumstorff was the hiring manager. Dumstorff stated that he did not interview the Plaintiffs because their

qualifications and skills remained unchanged since the last interview, and therefore they did not have sufficient experience. He selected three individuals for promotion, one of whom was African-American. Two of those chosen had been performing temporary assignments in the OSG for one month prior to their selection. After the 2001 denial of promotion, Dumstorff arranged for Yapp and Jones to receive on the job training to provide them with experience in distributive computing. Yapp completed the training and was promoted to a Project Engineer position in July of 2001. Jones voluntarily resigned in May of 2001 before completing the training.

## DISCUSSION

Union Pacific argues that it is entitled to summary judgment because Yapp and Jones failed to establish that they were treated less favorably than similarly situated white employees, cannot show that Union Pacific's stated reasoning for the promotion decision was pre-textutal, and cannot establish disparate impact race discrimination. In addition, Union Pacific argues that Plaintiffs cannot assert any claims surrounding the 1999 denial of promotion, and seeks to exclude some of Plaintiffs' evidence. For the reasons stated below, the Court will grant summary judgment as to the 2000 disparate treatment claim and on the disparate impact claim

### I. Admissibility of the Evidence

Union Pacific argues that much of Plaintiffs' documentary evidence cannot be considered by the Court because the documents are not authenticated by and/or attached to an affidavit, in accordance with Federal Rules of Civil Procedure 56(c) and (e). Because of this failure, Union

Pacific requests that the Court give no weight to the submitted documents. The documents in question are:

Exhibit 90: List of applicants for the August of 2000 Project Engineer position
Exhibit 91: Timothy Hayes' Employee Interest form
Exhibit 92: Timothy Hayes' interview evaluation
Exhibit 93: Timothy Hayes' interview evaluation
Exhibit 94: Organizational chart of Union Pacific's Data Centers division
Exhibit 95: Organizational chart of Union Pacific's Data Centers division
Exhibit 96: Timothy Hayes' resume.

Plaintiffs argue that the documents were produced by Union Pacific during discovery and would be admissible at trial as business records. This argument is buttressed by the fact that each document is bates stamped by Union Pacific. Union Pacific does not dispute the authenticity of the documents or their status as business records.

As a general rule, "[t]o be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence .... Documents which do not meet those requirements cannot be considered." *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 625 n. 20 (8th Cir. 2000), *quoted by*, *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005). Courts have allowed exceptions to this rule for unauthenticated documents produced through discovery if they were "sufficiently reliable." *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 738 n. 2 (8th Cir. 1982). Documents produced in the ordinary course of business have a "prima facie aura of reliability" and can be considered, even if not properly authenticated under Rule 56. *Schibursky v. Int'l Bus. Machines Corp.*, 820 F. Supp. 1169, 1175 (D. Minn. 1993).

Plaintiffs' counsel submitted an affidavit, stating that the documents in question are business records produced by Union Pacific during discovery.[4] As this statement is unchallenged, the Court determines that the documents are authentic business records that were created during the ordinary course of business. These documents would be admissible at trial, and there is no cause to exclude them from the summary judgment record. *See Buttice v. G.D. Searle & Co.*, 938 F. Supp. 561, 566 (E.D. Mo. 1996). The Court will consider all documents submitted by the parties.

## II. 1999 Claims

Initially, Plaintiffs attempted to file a class action discrimination suit. Plaintiffs' 1999 claims were temporally outside of the class period, and were not part of the litigation. The Court denied certification of the class, and Plaintiffs are now asserting personal claims that were not encompassed in the class action. However, Plaintiffs never filed an amended complaint defining the exact nature of their individual claims. This left Union Pacific unaware of Plaintiffs' intention to pursue claims from a 1999 Project Engineer vacancy until Plaintiffs filed their opposition to summary judgment, stating: "[Union Pacific] did not move for summary judgment on [Plaintiffs'] claims that they were discriminatorily denied OSG Project Engineer positions in the autumn of 1999." In its reply memorandum, Union Pacific argues for the dismissal of the 1999 claims on various grounds.

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[4]Union Pacific cites *Exeter Bancorporation, Inc. v. Kemper Securities Group, Inc.*, 58 F.3d 1306 (8th Cir. 1995), and *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990), for the premise that affidavits by attorneys do not create a genuine issue of material fact, and must be based on personal knowledge to comply with Rule 56(e). However, Plaintiffs' counsel is attesting to the source of the documents, which he has personal knowledge of. Because Union Pacific does not argue that these documents are not its own business records, there is no dispute as to their authenticity. Therefore, the affidavit by counsel is sufficient for these purposes.

Given the surprise surrounding this claim and the procedural history of this case, the Court is unsure as to whether the 1999 claims are properly before it. The question of Plaintiffs' ability to assert these claims requires further briefing, and this issue will be better addressed in a separate motion. The pending summary judgment order is only issued as to the disparate impact and 2000 and 2001 disparate treatment claims asserted by Plaintiffs. The question of whether the 1999 claims are properly before the Court, and the concomitant issue as to whether Plaintiffs' 1999 claims can survive summary judgment, is a matter to be taken up by the parties at a later date.

## III. Disparate Treatment

Union Pacific argues that the Plaintiffs' claims of race discrimination must be dismissed for failure to state a prima facie cause of action and failure to establish pretext. A plaintiff in a discrimination case can proceed in one of two ways. *Stacks v. S.W. Bell Yellow Pages*, 996 F.2d 200 (8th Cir. 1993); *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). When a plaintiff produces direct evidence, such as statements by decision-makers, clearly showing that race, sex, or age was a motivating factor in the employment decision, or at least significant circumstantial evidence showing a specific link between the discriminatory animus and the challenged employment decision, the burden-shifting standards established by *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989), apply. *Stacks*, 996 F.2d. at 201 n. 1; *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). In the absence of such evidence, the guidelines set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), are applicable. *Baucom v. Holiday Cos.*, 428 F.3d 764, 766 (8th Cir. 2005). Since there is no direct evidence or

specific circumstantial evidence of discrimination, the Court will analyze Plaintiffs' discrimination claims under the *McDonnell Douglas* standard.

*McDonnell Douglas* sets forth a three-part analysis for Title VII claims. A plaintiff must first establish a prima facie claim of discrimination by a preponderance of the evidence. If the plaintiff successfully establishes this, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant employer meets this burden of production, the plaintiff employee must show that the articulated reasons for the challenged employment action are pretextual and that the illegitimate criterion was the motivating reason. At all times the plaintiff employee possesses the ultimate burden of proving to the Court that he was the victim of discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Ghane v. West*, 148 F.3d 979, 981 (8th Cir.1998); *McCullough v. Real Foods*, 140 F.3d 1123, 1126-27 (8th Cir. 1998); *Rose-Maston v. NME Hosps. Inc.*, 133 F.3d 1104, 1107-08 (8th Cir. 1998); *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996); *Ruby v. Springfield R-12 Pub. Sch. Dist.*, 76 F.3d 909, 911-12 (8th Cir. 1996); *Favors v. Fisher*, 13 F.3d 1235, 1237-38 (8th Cir. 1994). *See also*, *Carter v. St. Louis Univ.*, 167 F.3d 398, 401 (8th Cir. 1999).

To establish a prima facie case of discrimination, Plaintiffs must produce sufficient evidence to support an inference that they were not promoted for discriminatory reasons. The threshold of proof required in establishing a prima facie case is "minimal." *Pope v. ESA Servs. Inc.*, 406 F.3d 1001, 1007 (8th Cir. 2005); *Turner v. Honeywell Fed. Mfg. & Techs., L.L.C.*, 336 F.3d 716, 720 (8th Cir. 2003); *Johnson v. Ark. State Police*, 10 F.3d 547, 551 (8th Cir. 1993). Plaintiffs must show that (1) they are members of a protected group; (2) they applied for and were qualified for promotions;

(3) they did not receive the promotions; and (4) the positions were filled by candidates outside of the protected class. *Tatum v. City of Berkeley*, 408 F.3d 543, 553 (8th Cir. 2005); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Tolen v. Ashcroft*, 377 F.3d 879, 882 (8th Cir. 2004); *Turner v. Honeywell Fed. Mfg. & Techs., LLC*, 336 F.3d 716, 720 (8th Cir. 2003).

It is undisputed that Plaintiffs are African-American individuals who applied for and were denied promotions in August of 2000 and January of 2001. Three of the open positions were filled by white candidates, and the fourth was filled by a black candidate. Finally, there is sufficient evidence to establish that Plaintiffs had the minimum qualifications for the positions. Therefore, Plaintiffs made a prima facie showing, and the burden shifts to Union Pacific to establish a legitimate reason for the employment decision.

"The burden to articulate a nondiscriminatory justification is not onerous, and the explanation need not be demonstrated by a preponderance of the evidence." *Floyd v. State of Missouri Dep't of Soc. Servs.,* 188 F.3d 932, 936 (8th Cir. 1999). Union Pacific states that the Plaintiffs did not receive the promotions because they lacked distributed computing experience. This explanation is sufficient, shifting the burden to Plaintiffs to show that Union Pacific's proffered reasons for the promotion decisions were pretextual and that an illegitimate criterion was the true motivator. *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1007 (8th Cir. 2005).

As to the August of 2000 promotion decision, Plaintiffs argue that Union Pacific's proffered reason is mere pretext because Tim Hayes did not have distributed computing experience, and Plaintiffs had the distributed computing knowledge (but not the experience) necessary for the

promotion. In addition, Plaintiffs had training in UNIX and achieved a higher level of education than Hayes. Upon review of the evidence, there is a clear dispute as to whether Hayes had distributed computing experience. Through affidavit, Hayes claims that he had "close ties with distributed operations," which gave him a "thorough understanding" of certain distributed operations systems. Ladonna Christ, one of the interviewers, claims that Hayes may not have had "hands on" experience with distributed operations systems but, his prior position allowed him to gain "significant knowledge and experience" with relevant computer programs. However, Hayes did not list distributing computing as an area of expertise on his employee interest form, his resume does not demonstrate that he had this experience, and four employer evaluations state that Hayes did not have distributed computing experience.

Given the evidentiary dispute, the Court finds summary judgment to be improper on the 2000 promotion decision. It is unclear whether Hayes had distributed computing experience and whether he was more qualified than the Plaintiffs. The resolution of these facts would determine whether or not Union Pacific's proffered reasons for the employment decision could be viewed as pretextual. Thus, there is a genuine issue of fact as to whether the failure to promote was discriminatory.

As to the January of 2001 promotion decision, Union Pacific presents a significant amount of evidence to support its position. One of the three employees selected for promotion was African-American. In addition, Dumstorff arranged for Plaintiffs to receive on-the-job training after the promotion decision. Jones resigned before completing her training, but Yapp completed the training program and was subsequently promoted to a Project Engineer position. Despite Union Pacific's showing, Plaintiffs proffered no evidence of their own, only arguing that Union Pacific did not present

documentary evidence to show that the promoted employees had distributed computing experience.

Plaintiffs have the burden to establish that Union Pacific's proffered reason was a mere pretext for unlawful discrimination. They can avoid summary judgment "only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [race] was a determinative factor in the adverse employment decision." *Carter v. St. Louis Univ.*, 167 F.3d 398, 401 (8th Cir. 1999). The evidence presented must "create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff." *Id.* Plaintiffs have not shown that a genuine issue of material fact exists, nor have they shown that the proffered reasons were pretextual. They have created no inference that race was a determinative factor in the promotion decision. Accordingly, Union Pacific is entitled to summary judgment on Plaintiffs' claims stemming from the 2001 denial of promotion.

## IV. Disparate Impact

To state a prima facie claim for disparate impact discrimination, a plaintiff need not prove that she was the victim of intentional discrimination. Instead, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). "To establish a prima facie case for disparate impact, the plaintiff must show: (1) an identifiable, facially-neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal

connection between the two." *Mems v. City of St. Paul, Dep't of Fire & Safety Servs.*, 224 F.3d 735, 740 (8th Cir. 2000). If the plaintiff does this, the burden shifts to the defendant to produce evidence that demonstrates a "legitimate business reason for the challenged practice." *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 953 (8th Cir. 2001). The burden then returns to the plaintiff, who "may still prevail by demonstrating that a comparably effective alternative practice would produce a significantly smaller adverse impact on the protected class." *Id.* at 954.

*A. Personnel Policy or Practice*

The first element of a prima facie case requires that a plaintiff identify a personnel policy or practice. In this case, Plaintiffs argue that Union Pacific's widespread subjectivity in its selection process for nonagreement vacancies caused the discriminatory impact. In certain situations, subjective employment practices may give rise to a claim of discrimination. *Watson* describes a plaintiff's burden as follows:

> The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been 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.

*Watson*, 487 U.S. at 994-95. Yapp and Jones isolated three specific elements of Union Pacific's selection process:

(a) Union Pacific's decision to authorize hiring managers to select candidates to be interviewed for vacant, non-agreement positions from those applicants who are minimally qualified;
(b) Union Pacific's decision to authorize hiring managers to select candidates from those applicants who were interviewed for placement in vacant, non-agreement positions; and

(c) Union Pacific's decision to authorize hiring managers to use unfettered, subjective decisionmaking to select applicants for vacant non-agreement positions, a common practice which links the previous three [*sic*] components.

The Court will assume, without finding, that this is sufficient to satisfy the first element. *See Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Jenkins v. Wal-Mart Stores, Inc.*, 910 F. Supp. 1399, 1424-25 (N.D. Iowa 1995). However, "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson*, 487 U.S. at 990. Plaintiffs must use statistical evidence to establish a disparate impact on the protected class, and link the challenged practice to that impact.

*B. Statistical Evidence*

Plaintiffs presented evidence from an expert witness, Dr. Edwin L. Bradley, who made two separate statistical analyses of non-agreement jobs: Union Pacific's employee information from 1996 to 2002, and Union Pacific's employee information from 2000 to 2002.[5] Dr. Bradley stated that the posting of vacancies in non-agreement jobs represented a pool, and conducted a "multiple pool analysis." Anything less than an 80% adverse impact ratio was considered adverse, and a ratio above 80% could still reflect an adverse impact if other statistical terms were significant. He concluded that Union Pacific's selection procedure had an adverse impact on African-American employees.

[5]In his deposition, Dr. Bradley stated that his analysis of the 1996 to 2002 data did not include certain minimum qualification disposition codes. "[T]o make [his] analysis complete," he included those codes while analyzing the 2000 to 2002 data set. Dr. Bradley testified that the inclusion of these codes had little effect on his results.

In his 1996 to 2002 analysis, Dr. Bradley determined that 381 African-Americans should have been promoted to vacant non-agreement positions, however only 258 received promotions. This meant that there were 123 less African-American employees promoted than expected, constituting a difference of 8.05 standard deviations and an adverse impact ratio of 65.7%. Dr. Bradley divided this general analysis into two parts: an analysis of African-Americans interviewed for non-agreement positions, and an analysis of African-American interviewees selected for non-agreement positions.[6] He determined that 152 fewer African-Americans were interviewed than expected. Out of those interviewed, 57 fewer African-Americans were selected for promotions than expected. The former resulted in a standard deviation of 7.17 and an adverse impact ratio of 89.1%, the later in a standard deviation of 5.07 and an adverse impact ratio of 80.7%. In the 2000 to 2002 analysis, Dr. Bradley determined that 30 fewer African-Americans were promoted than expected, resulting in a standard deviation of 3.64 and an adverse impact ratio of 67.7%. 37 fewer African-Americans were interviewed than expected, and out of those interviewed, 10 fewer African-Americans were selected for promotions than expected. The former resulted in a standard deviation of 3.52 and an adverse impact ratio of 86.9%, the later resulted in a standard deviation of 1.77 and an adverse impact ratio of 86.5%.

A plain reading of Dr. Bradley's analyses evidence a statistically significant disparity in the expected and the actual number of African-American employees promoted within Union Pacific. *See Castenada v. Partida*, 430 U.S. 482, 496 (1977), *quoted in*, *Emanuel v. Marsh*, 897 F.2d 1435, 1441 (8th Cir. 1990) ("if the difference between the expected value and the observed number is greater

[6]According to Dr. Bradley's analysis, the adverse impact ratio on interviewees is "tainted." Because fewer African-Americans were selected to be interviewed, the pool of African-American interviewees was artificially small.

than two or three standard deviations," the statistical disparities are significant). But that does not end the Court's analysis. Union Pacific has objected steadily to the propriety of Dr. Bradley's methods and findings, arguing that Dr. Bradley's analysis does not properly consider minimum qualifications, that he examined the promotion practices of Union Pacific as a whole, as opposed to the relevant division, and that the analysis was unable to determine whether the promotion decision was based on objective or subjective criteria.

Federal Rule of Evidence 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. In order to be admissible under this Rule, the "subject of an expert's testimony must be 'scientific ... knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Id.* at 590.

*Daubert* provided a number of factors for courts to apply in determining the relevance and reliability of expert testimony including, but not limited to, "(1) whether the theory or technique 'can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known or potential rate of error'; and (4) whether the theory has been generally accepted." *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 687 (8th Cir. 2001) (citations omitted).

Later cases have developed "additional factors such as: whether the expertise was developed for litigation or naturally flowed from the expert's research; whether the proposed expert ruled out other alternative explanations; and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case." *Id.* Despite the numerous factors available to courts for determination of the admissibility of expert testimony, "the polestar, however, must always be scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Jarequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1082 (8th Cir. 1999). The "proponent of the expert testimony must prove its admissibility by a preponderance of the evidence." *Lauzon*, 270 F.3d at 686.

Although Dr. Bradley did consider minimum qualifications in his analysis, not all factors were represented. Dr. Bradley assumed that all persons analyzed had minimal qualifications, but he could not be certain of this. Unless the qualifications were coded in the computer system, his analysis could not determine whether the applicant was qualified for a particular position. For example, if the computer system contained educational or experience requirements in words as opposed to numerical codes, Dr. Bradley's statistical analysis did not register or apply the requirements. In addition, Union Pacific called into question Dr. Bradley's understanding of the coding system, and thus his proper usage of it. Union Pacific argues that these flaws render the entire analysis irrelevant. However, this case is distinguishable from those cited by Union Pacific, because Dr. Bradley did distinguish between qualified and unqualified employees. *See e.g. Morgan v. United Parcel Serv. of Am.*, 380 F.3d 459 (8th Cir. 2004) (where plaintiff did not determine whether employees were qualified for the positions, the statistical analysis was insufficient to establish disparate impact). Alone, these flaws would be

insufficient to render the analysis inadmissible, but there are more significant problems with Dr. Bradley's analysis.

When conducting a statistical analysis, the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (alterations in original)). Where, as in this case, hiring decisions are made from within a division, the employees within that division represent the applicable pool of qualified applicants for promotion. *Emanuel v. Marsh*, 897 F.2d 1435, 1440 (8th Cir. 1990) (district court's reliance on company-wide statistics, as opposed to the relevant labor pool, was reversible error); *see also See Mems v. City of St. Paul, Dep't of Fire & Safety Servs.*, 224 F.3d 735, 740-41 (8th Cir. 2000) (discussing the grouping of similarly situated or similarly affected minorities where there were insufficient numbers to engage in a statistical analysis). But Dr. Bradley did not analyze whether there was a statistical disparity in the IT Division. Instead, his analysis examined all railroad departments at Union Pacific as a whole. Dr. Bradley stated that he chose not to break down the statistics at a department level because some of the departments had less than 20 promotion selections from the year 2000 to 2002. Neither Dr. Bradley's report nor Plaintiffs' memoranda state whether the IT Division was one of the departments with a limited number of promotion decisions.[7]

[7]Dr. Bradley's report was prepared in preparation for a class action certification hearing, seeking to bring suit on behalf of all Union Pacific employees. Thus, it is expected that his report would not separate out the claims of specific plaintiffs. After class certification was denied, Plaintiffs did not file an amended complaint stating their individual claims and did not alter their expert reports to conform to an individual suit. This has put the Court in the unfortunate position of reviewing the propriety of Plaintiffs' claims based on arguments and evidence presented during an attempt to certify a class. The figures presented by Plaintiffs, although possibly relevant to a

Most importantly, Dr. Bradley indicated that he may not have used a valid scientific reason for selecting his underlying data. Dr. Bradley assumed that there was sufficient similarity in each department as to hiring and promotion, and made no distinction between the various departments at Union Pacific. However, he did not determine whether all non-agreement positions were filled using a common method of recruitment and posting, and conducted no scientific surveys or employee interviews to verify his assumptions. Instead, he presupposed that there was a single promotion procedure used across all departments that would allow for an aggregate analysis. Plaintiffs have presented no evidence to the Court showing that the grouping of divisions is a proper method to analyze the disparate impact claim, nor have they shown that the methodology underlying Dr. Bradley's report is scientifically sound.

In summary, Dr. Bradley's report is insufficient. He made no distinction between departments, he did not conduct a thorough inquiry into minimal qualifications, and he ultimately conceded that he may not have used a valid scientific reason for selecting the underlying data. In addition, Dr. Bradley agreed that his statistics did not involve the study of corporate personnel decision-making, and he did not examine why interviews are granted or why employees are promoted. Given the significant problems with Dr. Bradley's report, its basis and findings are not scientifically sound. Plaintiffs' expert evidence is inadmissible. However, even if Dr. Bradley's report was sufficiently reliable to constitute admissible evidence, Plaintiffs failed to establish causation.

*C. Casual Connection*

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class action, are not proper for an individual suit.

To establish causation, a plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994. Plaintiffs must show that "[w]hen the proper labor market is considered, the statistical evidence is sufficient to raise an inference of discrimination." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 564 (8th Cir. 1982). To be legally sufficient, statistical evidence "must show a disparity of treatment, eliminate the most common nondiscriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination." *Hervey v. Little Rock*, 787 F.2d 1223, 1228 (8th Cir.1986) (quotation omitted). From the evidence presented before the Court, Plaintiffs have not established causation.

Dr. Bradley concluded that even though more African-Americans should have been hired for vacancies, he could not explain why they were not indeed hired for such vacancies. In other words, he could not point to a policy, practice, or procedure to explain this occurrence. He failed to eliminate common non-discriminatory reasons for the disparities, and was unable to state whether the basis for the promotion decisions made at Union Pacific was subjective or objective. Thus, Dr. Bradley's analysis made no findings as to causation. Furthermore, during the evidentiary hearing for class certification, Plaintiffs presented no evidence or testimony showing that subjective considerations played any role in their non-selection. In the same hearing Union Pacific presented evidence that objective considerations played a role in each Plaintiff's non-selection. Accordingly, Plaintiffs have presented no evidence or substantive argument establishing a link between the subjectivity in promotion practices and the disparate impact.

## CONCLUSION

Plaintiffs Karen Yapp and Mollie Jones have made a sufficient showing to survive summary judgment as to their 2000 disparate treatment claims. However, Plaintiffs have failed to establish a lack of pretext as to the 2001 disparate treatment claim, and have failed to state a prima facie cause of action for disparate impact discrimination. The propriety of Plaintiff's 1999 disparate treatment claims remains undecided.

Accordingly,

**IT IS HEREBY ORDERED** that Defendant Union Pacific Railroad's Motion for Summary Judgment (No. 151) as to Plaintiffs Karen Yapp and Mollie Jones is **GRANTED** in part and **DENIED** in part.

**IT IS FURTHER ORDERED** that Plaintiffs Karen Yapp and Mollie Jones' claims of disparate treatment discrimination are **DISMISSED** in part, in accordance with this Order.

**IT IS FURTHER ORDERED** that Plaintiffs Karen Yapp and Mollie Jones' claims for disparate impact discrimination are **DISMISSED**.

Dated this 29th day of March, 2007.

Stephen T. Limbaugh

SENIOR UNITED STATES DISTRICT JUDGE