United States District Court, N.D. California.
Vicki BUTLER, et al., Plaintiffs,
v.
HOME DEPOT, INC., Defendant.
Teresa Frank, Katherine Toma, and Kathleen York, et al., Plaintiffs,
v.
Home Depot, Inc., Defendant.
Nos. C-94-4335 SI, C-95-2182 SI.

Aug. 29, 1997.

ORDER:

ILLSTON, J.

***1 (1) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON APPLICANT CLASS CLAIMS;**

(2) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON EMPLOYEE CLASS CLAIMS; and

(3) DENYING DEFENDANT'S MOTION FOR DECERTIFICATION

Defendant Home Depot, Inc. ("Home Depot") has filed three motions in the above-entitled matter: (1) a motion for summary judgment on the claims of female applicants; (2) a motion for summary judgment on the claims of female employees; and (3) a motion for decertification of the applicant and employee classes. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES defendant's motion for summary judgment on the applicant class claims, GRANTS IN PART and DENIES IN PART defendant's motion for summary judgment on the employee class claims, and DENIES defendant's motion for decertification.

BACKGROUND

This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and the California Fair Employment and Housing Act, Government Code §§ 12940 *et seq.* (FEHA). Plaintiffs, female employees and applicants throughout Home Depot's West Coast Division, allege gender discrimination by Home Depot in hiring, initial assignments, promotions, compensation, and training. Plaintiffs allege that discrimination has occurred both in the form of intentional discrimination and in the form of neutral employment practices which disparately impact female employees and applicants of Home Depot.

On January 25, 1996, this court certified this matter as a class action and adopted the following class definitions:

> A. All female employees of Home Depot within the geographical area of Home Depot's West Coast Division who are or were employed on or after November 5, 1992, or who are or will be employed between this date and the date of entry of judgment in this class action; and
>
> B. All female applicants who applied for employment in Home Depot stores within the geographical area of Home Depot's West Coast Division on or after November 5, 1992 and were qualified for employment in the positions of salespersons or assistant managers and who were not hired or were hired for cashier or other operations positions.

Home Depot has moved for summary judgment with respect to the claims of the classes encompassed by paragraph A ("the employee class") and paragraph B ("the applicant class") of this Court's class certification order. Home Depot contends that plaintiffs have failed to produce any evidence that members of these separate classes were discriminated against on the basis of gender and that summary judgment is warranted with respect to both the disparate treatment and disparate impact claims of class members. Home Depot has also filed a motion, in the alternative, for decertification of the applicant and employee classes.

LEGAL STANDARDS

I. Summary Judgment

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

***2** A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When the moving party will have the burden of proof on an issue at trial, the moving party must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. In contrast, a moving party who will not have the burden of proof on an issue at trial can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *Id.*

If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, " '*specific facts* showing that there is a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis added).

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence and draws all inferences in the light most favorable to the nonmoving party. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630-31 (9th Cir.1987). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. City of Niagara Falls,* 754 F.2d 49 (2nd Cir.1985); *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.,* 594 F.2d 730, 738 (9th Cir.1979). Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.,* 626 F.2d 759, 762-63 (9th Cir.1980).

II. Disparate Treatment

A plaintiff alleging disparate treatment must prove that the defendant intentionally treated the plaintiff less favorably because of race, color, religion, sex or national origin. *U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). To establish a *prima facie* case of disparate treatment, the plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Evidence of discriminatory intent may be direct, circumstantial, or inferred from statistical evidence, and all evidence that the plaintiff presents in that regard can contribute to the inference in a cumulative manner. *Green v. USX Corp.,* 896 F.2d 801, 807 (3rd Cir.), *cert. denied,* 498 U.S. 814, 111 S.Ct. 53, 112 L.Ed.2d 29 (1990); *see also McCullough v. Consolidated Rail Corp.,* 776 F.Supp. 1289, 1293 (N.D.Ill.1991).

The Supreme Court has set forth a four-prong formula by which plaintiffs may establish a *prima facie* case of intentional discrimination. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this formula, a plaintiff alleging discriminatory discharge bears the initial burden of showing that (1) the plaintiff is a member of a protected class; (2) the plaintiff applied for an advertised job opening; (3) the plaintiff was rejected despite being qualified for the position; and (4) similarly situated non-protected employees were hired or the employer sought a replacement with qualifications similar to the plaintiff's qualifications. *Id.* at 802.

***3** The *McDonnell Douglas* formula, however, is not the only means by which a plaintiff may establish a *prima facie* case of intentional discrimination. *See McDonnell Douglas,* 411 U.S. at 802 n. 13 ("[T]he specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."); *Burdine,* 450 U.S. at 253-54 n. 6 (same). In particular, plaintiffs in the class action context may make out a *prima facie* case of discrimination against individual class members by demonstrating the existence of a discriminatory hiring pattern or practice. *International Brother-*

hood of Teamsters v. United States, 431 U.S. 324, 359-60, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (citing *Franks v. Bowman Transp. Co., Inc.,* 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)).

If the plaintiff succeeds in establishing a *prima facie* case, there is a presumption that the defendant unlawfully discriminated against the plaintiff. *Burdine,* 450 U.S. at 254. That presumption shifts the burden of production to the defendant to rebut the *prima facie* case by producing evidence that the employment decision was made for legitimate, non-discriminatory reasons. *Id.* However, the plaintiff always retains the ultimate burden of persuasion. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Should the defendant produce such evidence, the plaintiff must then demonstrate that the proffered reason is a pretext for a discriminatory motive. *Burdine,* 450 U.S. at 256. The plaintiff need not submit direct evidence, but may rely on a showing that the decisions in question were more likely than not motivated by a discriminatory reason. *Aikens,* 460 U.S. at 716. The plaintiff meets the ultimate burden of persuasion if the plaintiff demonstrates that a discriminatory reason "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

III. Disparate Impact

For a disparate impact claim, the plaintiff is required to demonstrate "that [[[an employer] uses a particular employment practice that causes a disparate impact on the basis of ... sex ... and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

A *prima facie* case of disparate impact is established by showing that an employer's use of an employment practice caused unequal treatment by the employer of a protected group. *Wards Cove Packing Co. v. Antonio, Inc.,* 490 U.S. 642, 656-57, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Unlike a disparate treatment claim, the plaintiff is not required to prove discriminatory intent to establish a *prima facie* case of disparate impact. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures ... that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.,* 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

***4** Identification of a specific employment practice is not required in all instances to establish a *prima facie* claim. "[I]f the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

Subjective employment standards are also not immune to disparate impact analysis.

> [D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests.... It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.... It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.

Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994-95, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

Employers can rebut a disparate impact claim by demonstrating that the allegedly discriminatory practice is required by business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The plaintiff, in turn, can rebut this by showing that an alternative policy with lesser discriminatory effects would be as effective as the one in question. *Wards Cove,* 490 U.S. at 660-61.

IV. Class Certification

As a threshold to class certification, Rule 23(a) of the Federal Rules of Civil Procedure requires a showing of the following: (1) that the class is so numerous that joinder of all members is impracticable; (2) that there are common questions of law or fact; (3) that the representative parties' claims or defenses are typical of

the class claims or defenses; and (4) that the representative parties will fairly and adequately protect the class interests. The party moving for class certification bears the burden of showing that requirements of Rule 23(a) are satisfied. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982).

In addition to demonstrating that the Rule 23(a) requirements are met, the plaintiffs must establish one or more of the following grounds for maintaining the suit as a class action pursuant to Federal Rule of Civil Procedure 23(b): (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication.

DISCUSSION

I. Summary Judgment

Home Depot asserts that plaintiffs have failed to establish a *prima facie* case of disparate treatment or disparate impact in the hiring, initial assignment, promotion, compensation, and training of its employees. Plaintiffs, in turn, contend that their statistical, sociological, and anecdotal evidence establish a *prima facie* case of disparate treatment and disparate impact. According to plaintiffs, the evidence submitted by Home Depot in support of its motions, at most, raises genuine issues of material fact that are properly reserved for trial.

A. *Disparate Treatment*

***5** A *prima facie* showing of disparate treatment requires that the plaintiff establish intent, on the part of the employer, to discriminate. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Teamsters,* 431 U.S. at 335-336 n. 15.

1. *Hiring and Initial Assignments*

Plaintiffs contend that Home Depot intentionally discriminates in the hiring and initial assignment of its female employees. In support of this contention, plaintiffs submit statistical evidence from their experts, Drs. Marc Bendick [FN1] and Richard Drogin,[FN2] who report that the representation of women in certain entry-level positions compared to the number of qualified women in the available applicant pool is so low as to be statistically significant.

> FN1. Dr. Bendick is a labor economist. Dr. Bendick earned a Ph.D. in economics from the University of Wisconsin in 1975 and has engaged in the full-time practice of economics, specializing in labor economics and related issues, for 25 years. Bendick Rpt. at ¶ 1.

> FN2. Dr. Drogin is a statistician and statistical analyst. He earned a Ph.D. in statistics from the University of California at Berkeley in 1970. He has been employed at California State University, Hayward, since 1973, and he is presently an Emeritus Professor in the Department of Statistics. Drogin Rpt. at ¶ 1.

Dr. Bendick uses census data to calculate "standards of availability" for hiring by Home Depot into its entry-level positions.[FN3] Based on his analysis of census data, Dr. Bendick calculates that from 1992-1996, women comprised 48-49% of the qualified and available labor force for Home Depot sales associate positions and 36-39% of the qualified and available labor force for Home Depot assistant manager trainee positions. Bendick Rpt. at ¶¶ 17, 21. Plaintiffs compare this baseline of available and qualified women (i.e., 48-49% female for sales associate positions; 36-39% female for assistant manager trainee positions) with the actual numbers of women hired from 1992-1996 into these positions (i .e., 15.20% female for merchandising/sales associate hires; 6.40% female for assistant manager trainee hires).[FN4]

> FN3. A standard of availability is the representation, expressed in percentage terms, of persons from a demographic group (in this case, women) that would be expected among a group of hires if hiring and related personnel processes were conducted without adverse impact on that demographic group. Bendick Rpt. at ¶ 8.

> FN4. The statistics regarding the gender composition of Home Depot's actual hires

from 1992 to 1996 is provided by Home Depot's expert, Dr. Ali Saad. Saad Rpt., Table 17A.

Dr. Bendick also provides estimates of job availability, based on application data provided by Home Depot.[FN5] Using this application data, he estimates that women comprised 33.3% of the qualified and available work force for sales associate positions and 34.0% of the qualified and available work force for assistant manager trainee positions. Bendick Decl. ¶¶ 27, 69. Dr. Bendick compares these alternative estimates of job availability (i.e., 33.3% female for sales associate positions; 34.0% female for assistant manager trainee positions) with the gender breakdown of Home Depot's actual hires (i.e., 15.20% female for merchandising hires; 6.40% female for assistant manager trainee hires). He concludes that even if considerations of job qualification and availability are taken into account, gender disparities exist in Home Depot's hiring into merchandising and management positions that cannot be explained by chance alone. *Id.* at ¶¶ 49-55.

FN5. Dr. Bendick cautions against relying on application data provided by Home Depot, stating that:

> [I]t is not possible to use such "applicant flow" data unless the employer has systematically retained records of applications received, including the gender of applicants. It is my understanding that Home Depot did not systematically retain such records for a large portion of the period at issue. For that reason, an alternative basis for estimating availability must be found.

Bendick Rpt. at ¶ 9 (footnotes omitted). *See also* Bendick Decl. at ¶¶ 3-10. In particular, plaintiffs have filed a countermotion to defendant's summary judgment motion, in which they argue that they are entitled to a mandatory inference in their favor at trial because Home Depot has intentionally destroyed applications that would have shown under-representation of women in merchandising positions. The Court need not decide this matter for purposes of summary judgment. Plaintiffs recently filed a motion in limine, which raises this very issue. The Court will rule on plaintiffs' motion in limine after the parties have had an opportunity to fully brief the issues.

Dr. Drogin uses the same applicant pool created by Dr. Bendick for his analysis. Based on his analysis of Dr. Bendick's census data, Dr. Drogin reports statistically significant disparities in the hiring of women into salesperson positions (Z-value of 110.9), assistant manager trainee positions (Z-value of 8.2), and associate manager positions (Z-value of 2.8).[FN6] Drogin Rpt. at ¶ 31. In addition, Dr. Drogin analyzes the data of defendant's expert, Dr. Saad. Dr. Drogin performs an applicant flow analysis of hires into merchandising and operations positions, controlling for prior experience and position applied for, as measured by Dr. Saad, and skills box information, as recorded on job applications. Dr. Drogin concludes that women are significantly under-hired into merchandising positions and significantly over-hired into operations positions, compared to men with similar prior experiences and job desires. Drogin Decl. ¶¶ 6-22.

FN6. A Z-value is a measure of the disparity between an observed result and an expected result. The Z-value expresses the size of the disparity in terms of standard deviations. For instance, a Z-value of 1.96 expresses a 1 in 20 probability of the observed result occurring by chance. Drogin Rpt. at ¶¶ 20-21. The Supreme Court has held that a Z-value of 2 to 3 may be significant. *See Hazelwood School Dist. v. United States,* 433 U.S. 299, 311 n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 ("a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race").

***6** Dr. Saad, in turn, analyzes job applications provided to him by Home Depot.[FN7] He finds that overall, women were hired in greater numbers than expected, when their experience is taken into account. Saad Rpt. at 19. For instance, Dr. Saad finds that from 1992-1994, females comprised 25.2% of the applicant pool and 29% of the applicants hired by Home Depot. *Id.* at 19.

FN7. Dr. Saad is a labor economist. Dr.

Saad earned a Ph.D. in economics from the University of Chicago, has taught economics at The City University of New York in the Department of Economics and Finance, and is currently partner-in-charge of The Economics and Litigation Services Department in the Los Angeles office of Altshuler, Melvoin and Glasser, LLP, an accounting and consulting firm. Saad Rpt. at 1.

Dr. Saad furthermore conducts an analysis of the 1990 census figures relied on by plaintiffs' experts. Based on this census-data analysis, Dr. Saad reports that women comprised 14.01% of the available labor market for merchandising positions and 81.82% of the available labor market for cashier positions. [FN8] *Id.,* Table 17A. Home Depot emphasizes the lack of disparity between Dr. Saad's census-data figures (i.e., 14.01% female for merchandising positions; 81.82% female for cashier positions) and the gender composition of its work force (i.e., 15.20% female for merchandising hires; 80.60% female for cashier hires). Home Depot concludes that there is no evidence of gender disparity in its hiring or assignment of employees.

FN8. Dr. Bendick challenges Dr. Saad's analysis of the 1990 census data, arguing that the pool of persons considered by Dr. Saad in developing his standard of availability is too narrow:

> *[O]nly 12%* of the experience background of persons that Home Depot hired as sales associate[s] fit the category that Dr. Saad considered-"Retailing-Hardware and Building Supplies." Dr. Saad ignored the *other 88%* of work experience of hires, ranging from carpenters working as carpenters (as distinguished from carpenters working in retailing, who are included in his analysis) to persons in retailing other than hardware and building materials and persons with work experience unrelated to retailing or construction.... Because Dr. Saad's availability of 14.01% does not reflect the vast majority of experiences of actual sales associate hiring at Home Depot, it is not a reasonable standard of availability for sales associate hiring.

Bendick Decl. at ¶¶ 31-32 (emphasis in original).

The Court finds that plaintiffs have presented sufficient evidence to raise an inference of a pattern or practice of discrimination by Home Depot. *See* *Teamsters,* 431 U.S. at 359 (plaintiffs may establish a *prima facie* case of discrimination against individual class members by demonstrating existence of a discriminatory hiring pattern and practice). Plaintiffs' statistical experts conclude that women are significantly over-hired into operations positions and under-hired into merchandising positions at Home Depot. Moreover, Drs. Bendick and Drogin opine that these disparities cannot be attributed to chance alone or the reasons proffered by Home Depot (i.e., prior experience, skills, or job desires). *See* *Hazelwood,* 433 U.S. at 307-08 ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

Home Depot argues, in response, that plaintiffs' experts have not adequately taken skill level and past experience into account in their analyses.[FN9] Home Depot furthermore criticizes the methodology and reasoning of Drs. Bendick and Drogin.[FN10] Home Depot argues that plaintiffs' statistical showing is deficient as a matter of law.

FN9. *See, e.g.,* Def.'s Reply Re: Appl. Class at 9 ("Bendick's 'new' analysis treats all skill levels in retail sales positions as equal in terms of relevant experience, while Drogin *ignores the second and third previous jobs* and previous level in evaluating experience") (emphasis in original); *id.* at 15 ("a review of [Dr. Drogin's] analysis shows ... that he gives the same value to the simple check of one of 17 skills boxes on the application form as he does to working in the construction trade for 10 years-which is absurd.").

FN10. *See, e.g.,* Def.'s Reply Re: Appl. Class at 18 ("Bendick ... somehow comes up with ... a total of 8864 'candidates' from a sample of 463-a feat of multiplication on a scale previously accomplished only with loaves and fish. *See Matthew* 14:14-21; 15:32-38; *see also Mark* 6:35-44; 8:1-9");

Def.'s Suppl. Briefing Re: Appl. Class at 1-4.

Defendant's criticisms of plaintiffs' statistical evidence may indeed be valid. However, plaintiffs' statistical showing is probative and admissible evidence of gender discrimination by Home Depot in the hiring and assignment of its female employees,[FN11] and the weight to be accorded to the statistical findings of each party's experts is an issue that is properly reserved for the factfinder at trial, not this Court on a motion for summary judgment. *See Bouman v. Block,* 940 F.2d 1211, 1225 (9th Cir.) ("Whether the statistics are undermined or rebutted in a specific case would normally be a question for the trier of fact."), *cert. denied,* 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 658 (1991); *Bazemore v. Friday,* 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.' ") (Brennan, J., concurring).

FN11. As noted above, plaintiffs' experts, in performing their statistical analyses, control for factors such as job qualifications and applicant interests. Moreover, plaintiffs present evidence that factors such as qualifications and job interests have not, in fact, been consistently utilized by Home Depot managers in making hiring and assignment decisions. *See* Plaintiffs' Response to Home Depot's Statement of Uncontroverted Facts Re: Applicant Class ("Pls .' Facts Re: Appl. Class") at ¶¶ 6-7, 17, 26, 41-42, 47, 74. Finally, plaintiffs submit evidence that the alleged gender disparities in hiring and initial assignments cannot be explained by the lack of job openings at Home Depot. *See id.* at ¶ 22.

***7** Plaintiffs have also presented sociological and anecdotal evidence in support of their claim of disparate treatment in hiring and initial assignments. Dr. Bielby,[FN12] plaintiffs' sociological expert, opines that Home Depot's working environment is heavily male-oriented, influencing the attitude of male store managers towards female applicants:

FN12. Dr. Bielby received a Ph.D. in Sociology from the University of Wisconsin-Madison in 1976. He is currently Professor and Chair of the Department of Sociology at the University of California, Santa Barbara. Over the past fifteen years, his research has focused on the issue of gender and workplace discrimination, and on organizational policies and practices more generally. Bielby Rpt. at ¶ 1. In an earlier motion, Home Depot sought to exclude Dr. Bielby's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). That motion was denied.

In the context of a male-dominated culture, relying on highly arbitrary assessments of subjective hiring criteria allows stereotypes to influence hiring decisions. Under such circumstances, there is likely to be a strong tendency for women to be considered unqualified or inappropriate for "men's work" in Merchandising jobs, regardless of any individual female applicant's objective qualifications ... for such positions.

Bielby Rpt. at ¶ 73. Plaintiffs furthermore present evidence that Home Depot managers have utilized stereotypes about women in hiring and placing new hires in initial job assignments. Pls.' Facts Re: Appl. Class at ¶ 6.18; Fiske Rpt. at 4-7. Finally, plaintiffs cite to the experience of class members who allege that they were denied employment on account of their gender [FN13] or steered away from traditionally "male" positions.[FN14]

FN13. Monica Zubiate applied for a position with Home Depot three different times in four years. Plaintiffs assert that on her last attempt, she was a department manager for a Target store, had worked in the hardware department, and received a business degree from Cal State Fullerton. Plaintiffs contend that she was denied a position in the hardware department, while her male cousin, who did not have prior experience in sales or home improvement experience, was hired into the hardware department. Pls.' Facts Re: Appl. Class at ¶ 77A .7.

FN14. Plaintiffs contend that Kathleen York

> was denied a merchandising position despite her prior experience hauling lumber and as an office manager for a lumber processing plant. According to plaintiffs, when York submitted her application for a merchandising position in the lumber department at Home Depot, she was told that "girls don't work in the lumber department" and was instead hired as a cashier. Pls.' Facts Re: Appl. Class at ¶ 77A.45.

In sum, the Court finds that plaintiffs' statistical, sociological, and anecdotal evidence establish a *prima facie* case of disparate treatment in hiring and initial assignments at Home Depot. Home Depot disputes plaintiffs' evidence and the inferences that may be drawn from this evidence. However, the evaluation of plaintiffs' evidence is a matter for the jury at trial, not this Court on a motion for summary judgment. Plaintiffs have presented sufficient evidence by which a jury could reasonably infer discriminatory intent on the part of Home Depot. Accordingly, defendant's motion for summary judgment on the issue of hiring and initial assignments is DENIED.

2. *Promotions*

In addition to their hiring and initial assignment claims, plaintiffs allege disparate treatment by Home Depot in job promotions. In support of this claim, plaintiffs cite to the findings of Dr. Drogin. Examining historical patterns of promotion at Home Depot, Dr. Drogin describes the basic lines of progression as follows:

> a) Sales openings are filled mostly by new hires (about 2/3), and employee moves from Cashier and Lot.
>
> b) Merchandise Department Supervisor openings filled through promotions are filled primarily (over 85%) by promotion of Sales workers. Virtually none of the openings in Department Supervisor positions are filled by hires.
>
> c) Assistant manager openings filled through promotions are filled mostly (over 75%) by promotions of Merchandise Department Supervisors, with the remaining openings filled primarily by promotions of workers in Sales, Cashiers, and Cashier Supervisor positions. In addition, about 23% of all openings in Assistant Manager positions are filled by hires.
>
> d) Store Manager openings are filled by promotions of Assistant Managers.

***8** Drogin Suppl. Rpt. at ¶ 62. Dr. Drogin analyzes advancement of employees along these lines of progression-i.e., from Operations to Sales positions, from Sales to Merchandise Department Supervisor positions, from Merchandise Department Supervisor to Assistant Store Manager Trainee positions, and from Assistant Manager to Store Manager positions. He controls for year of promotion, store, department, title code, part-time/full-time status, seniority, and performance rating. Drogin Decl. at ¶¶ 4-5.

Dr. Drogin concludes that there are statistically significant gender disparities in advancements to sales positions, promotions to Merchandise Department Supervisor positions, and promotions to Assistant Store Manager Trainee positions. Drogin Suppl.Rpt. at ¶¶ 65, 67, 71; Drogin Decl. at ¶¶ 4-5. While Dr. Drogin does not find a statistically significant disparity in promotions from Assistant Manager to Store Manager positions (Z-value of - 1.65), he notes that this smaller disparity is explained by the fact that women historically have been excluded from the feeder pool for Store Manager positions. Drogin Suppl.Rpt. at ¶ 76. *See also* *Stender v.. Lucky Stores, Inc.,* 803 F.Supp. 259, 333 (N.D.Cal.1992) ("The statistical evidence is significant for some positions, but not for others. However, the court finds that the lack of statistically significant disparities in promotions of women to Third Person, Assistant Store Manager and Store Manager is caused by women being blocked from upper management positions at the lower rungs of the promotional ladder.").

Home Depot, in turn, cites to the findings of its statistical expert, Dr. Judith Stoikov.[FN15] Dr. Stoikov reports that from 1992 to 1996, 3,772 women were promoted, and that this figure is larger than expected, given female representation in the jobs that serve as feeders for these promotions. Stoikov Rpt. at ¶ 25. In addition, Home Depot criticizes Dr. Drogin's findings, arguing that he creates an artificial shortfall in the number of women promoted by: (1) treating transfers from Operations to Sales positions as "promotions" and (2) assuming that seniority is a relevant factor in promotion decisions. Moreover, Home De-

pot contends that Dr. Drogin has failed to control for a number of factors that might explain the alleged gender disparities, such as knowledge, skills, and interest/commitment. Home Depot argues that Dr. Drogin's findings are insufficient as a matter of law to defeat defendant's motion for summary judgment.

FN15. Dr. Stoikov is an expert in labor economics and statistical analysis. She holds a bachelor's degree in industrial and labor relations from Cornell University and a Ph.D. in economics from the London School of Economics and Political Science. She is presently employed by Employment Economics, a division of Price Waterhouse LLP, which specializes in preparing statistical and economic analyses of employment and labor market issues in connection with litigation. Stoikov Rpt. at ¶ 1.

Plaintiffs have presented sufficient evidence to meet their burden on summary judgment. In response to defendant's motion, Dr. Drogin explains the reasoning behind his analytic choices,[FN16] discusses the shortcomings of Dr. Stoikov's analysis,[FN17] and incorporates defendant's criticisms into his statistical models.[FN18] In addition, plaintiffs offer evidence to rebut Home Depot's contention that factors, such as knowledge, skills, interest, and performance, explain the alleged gender disparities in promotion patterns.[FN19] In sum, the Court finds that Dr. Drogin's testimony is admissible, probative evidence of gender discrimination by Home Depot. The weight to be accorded to Dr. Drogin's and Dr. Stoikov's testimony is not an issue for this Court; that determination is expressly reserved for the jury. *See Bouman,* 940 F.2d at 1225, 42 U.S.C. § 1981a(c) (right to jury trial in Title VII disparate treatment cases).

FN16. Dr. Drogin explains that transfers from Operations to Sales positions are job advancements, similar in nature to promotions, because: (1) on average, Sales personnel earned approximately $2.24/hr more than non-supervisor operations employees in 1996; (2) on average, starting salaries for Sales workers are more than $2.00/hr higher than starting salaries for Cashiers; (3) there is much greater chance for job advancement to higher paying salaried jobs for those in merchandising than those in operations; and (4) from 1992-1996, employees who moved from Cashier to Sales or Merchandising Department Supervisor positions received a higher salary than employees who stayed in Cashier or Cashier Supervisor positions. Drogin Suppl.Rpt. at ¶ 66.

FN17. Dr. Drogin states that Dr. Stoikov undercounts the actual number of promotions from Operations to Assistant Manager Trainee positions. Drogin Suppl.Rpt. at ¶ 73 ("There were 109 promotions from Cashier or Cashier Supervisor into Assistant Manager Trainee positions during 1992 through February 3, 1997.... However, Dr. Stoikov reports only 53 promotions for these moves. If she had correctly counted the number of promotions from Cashier or Cashier Supervisor to Assistant Manager Trainee, she would have found an even greater shortfall in the number of women promoted."). *See also id.* at ¶ 70.

FN18. Dr. Drogin reports that even if seniority is omitted as a variable and performance rating is included as a variable, there is a statistically significant shortfall of women promoted to Merchandise Department Supervisor and Assistant Manager Trainee positions. Drogin Decl. at ¶¶ 4-5.

FN19. Plaintiffs offer evidence that Home Depot has not consistently applied objective criteria in making promotions decisions. *See* Plaintiffs' Response to Home Depot's Statement of Uncontroverted Facts Re: Employee Class at ¶ 18; Bielby Rpt. at ¶ 77.

***9** Plaintiffs' statistical showing is buttressed by their sociological and anecdotal evidence. In his report, Dr. Bielby emphasizes that:

> There are no written guidelines for making decisions about promotions to department supervisor positions, and the company does not provide training to Store Managers and Assistant Managers on how to select employees for promotions. While Standard Operating Procedures specify the process to be followed in making promotions into salaried assistant manager and store manager positions, they do not specify the criteria to be used in mak-

ing promotion decisions. Promotion opportunities in existing stores are not posted, and there is no formal procedure for making vacancies known or requesting a promotion. In making decisions about promotion to department supervisor, there is no requirement that the person under consideration meet any minimum rating on recent performance evaluations, or that written performance reviews are consulted at all in making the decision. Nor is there any requirement to record the reasons why an employee is or is not selected for a promotion.

Bielby Rpt. at ¶ 77 (footnotes omitted); *see also id.* at ¶¶ 78-82. In addition, plaintiffs have cited to the deposition testimony of class members who contend that they were denied promotions in favor of less qualified males. *See, e.g.,* Decl. of Rosanne Mah ("Mah Decl."), Ex. 37, at 172-74 (Butler Depo.); *id.,* Ex. 22, at 15-25 (Harris Depo.).

In sum, plaintiffs have made a *prima facie* showing of disparate treatment by Home Depot in the promotion of its employees. Drawing all inferences in the light most favorable to the plaintiff, as this Court is required to do, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Court finds that there are genuine issues of material fact regarding whether Home Depot has intentionally discriminated against female employees in awarding promotions. Home Depot's motion for summary judgment on the issue of employee promotions is therefore DENIED.

3. *Compensation*

Plaintiffs allege gender discrimination by Home Depot in the compensation that it provides to its female employees. In support of this contention, plaintiffs cite to the findings of Drs. Drogin and Bendick. Analyzing Home Depot's compensation rates, Dr. Drogin determines that there are statistically significant gender disparities in initial salary rates and compensation rates. Drogin Suppl.Rpt. at ¶¶ 24, 77. Through a regression analysis, Dr. Drogin determines that these gender disparities in earnings cannot be explained by seniority, part-time/full-time status, store, department, or title code. *Id.* at ¶¶ 79-80. By analyzing the data of Dr. Saad, one of defendant's statistical experts, Dr. Drogin concludes that prior experience and merchandising skills also do not account for these gender disparities. *Id.* at ¶¶ 58-59.

Dr. Bendick also reports gender disparities in compensation rates adverse to women. Controlling for seniority, part-time/full-time status, store, hours worked, and hourly/salaried status, Dr. Bendick observes that women at Home Depot have suffered a financial penalty in earnings compared to men, subdivided into an "equal pay" component and an "occupational segregation" component. [FN20] Dr. Bendick reports that in the six years which he examined, the "equal pay" penalty averaged $767, and the "occupational segregation" penalty averaged $581. Bendick Suppl. Rpt. at ¶ 69.

FN20. According to Dr. Bendick, labor economists commonly distinguish between two underlying processes that typically contribute to disparities in earnings among men and women. One process is an "occupational segregation" effect (i.e., women might be disproportionately employed as cashiers, men might be disproportionately employed as sales associates, and the average sales associate might receive a higher rate of pay than the average cashier) and the other process is an "equal pay" effect (i.e., among women and men both employed as sales associates, the average male sales associate might receive a higher rate of pay than the average female sales associate). Bendick Rpt. at ¶ 26.

***10** In response, Home Depot cites to the findings of Dr. Stoikov. Dr. Stoikov reports that women fared relatively better than men in terms of the wage boost they received when they left their prior jobs and were hired by Home Depot. Stoikov Rpt. at ¶ 6. In addition, she reports that women with certain work-related characteristics (i.e., 1600 hours of work per year, an average work performance rating of at least 2.4, and an initial salary of $5.00 or more per hour), were as likely as equally qualified men to be fast wage advancers. *Id.* at ¶ 38. Finally, she concludes that among hourly employees, women were paid more than men performing similar work, and that among salaried employees, women were not paid differently than men performing similar work. *Id.* at ¶ 44.

Home Depot argues that plaintiffs, at most, have established gender segregation. Def.'s Reply at 10

("Home Depot readily acknowledges the unremarkable fact that it employs relatively more women as cashiers, and relatively more men as sales associates. It is also known that throughout the labor force ... sales people generally earn more than cashiers"). In addition, Home Depot asserts that plaintiffs have failed to eliminate other potential causes of the alleged gender disparities, including prior wage rates, requested starting wage, and job performance. Home Depot argues that requested wage rates and market factors, in particular, are legal justifications for pay differences within jobs, citing *Kouba v. Allstate Ins. Co.,* 691 F.2d 873 (9th Cir.1982), *Covington v. Southern Illinois Univ.,* 816 F.2d 317 (7th Cir.1987), and *Deroiun v. Louis Allis Div.,* 618 F.Supp. 221 (E.D.Wis.1984), in support of this contention.

In response to defendant's arguments, plaintiffs assert that Dr. Stoikov relies on "tainted variables" in conducting her analysis: [FN21]

> FN21. A "tainted variable" is one whose value is affected by discrimination and has the effect of concealing disparities due to discrimination. Drogin Suppl. Rpt. at ¶ 82.

> Dr. Stoikov includes the variable "starting job" as an explanatory variable. But "starting job" is a tainted variable because women are under-hired in merchandising, initially over-placed in operations, and paid less at hire than men.... The variables "downgrade" and "years in department" in Dr. Stoikov's regressions are also tainted since women experience shortfalls in career advancement at Home Depot ...
> Drogin Suppl. Rpt. at ¶ 83. Dr. Drogin conducts a separate analysis, excluding these "tainted variables", and reports that gender disparities appear in compensation rates. *Id.* at ¶¶ 85-86.

Plaintiffs furthermore argue that the "wage boost" analysis conducted by Home Depot relies on two tainted variables-last prior pay and first Home Depot pay. Plaintiffs emphasize that an employer's use of prior pay rate to set current pay rates may be impermissible. *Kouba,* 691 F.2d at 876 ("An employer ... cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason. Even with a business-related requirement, an employer might assert some business reason as a pretext for a discriminatory objective. *This possibility is especially great with a factor like prior salary which can easily be used to capitalize on the unfairly low salaries historically paid to women.*") (emphasis added). *See also* *Glenn v. General Motors Corp.,* 841 F.2d 1567, 1570 (11th Cir.) ("This Court and the Supreme Court have long rejected the market force theory as a 'factor other than sex' "), *cert. denied,* 488 U.S. 948, 109 S.Ct. 378, 102 L.Ed.2d 367 (1988).[FN22]

> FN22. Cases interpreting the Equal Pay Act, such as *Kouba,* may be applicable to claims alleging discriminatory compensation under Title VII. *See* *Gunther v. County of Washington,* 623 F.2d 1303, 1313 (9th Cir.1979) ("although decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by § 703(h)."), *aff'd,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

***11** Finally, plaintiffs cite to sociological and anecdotal testimony in support of their disparate compensation claim. Dr. Bielby describes Home Depot's compensation policy as follows:

> Home Depot['s] compensation policy is to "pay people what they are worth," a variation on "pay-for-performance" or merit-based pay systems. Effective "pay-for-performance" systems are based on valid, reliable measures of performance that are systematically linked to compensation. In contrast, distinctive features of the Home Depot compensation system are: (1) the absence of specific criteria for initial pay, for wage and salary adjustments at the time of performance reviews, or for merit-based raises; (2) a subjective performance evaluation system that gives little guidance to managers and supervisors on how to rate specific employees; and (3) the absence of any systematic procedure for basing raises on ratings in performance reviews.

Bielby Rpt. at ¶ 83 (footnotes omitted); *see also id.* at ¶¶ 84-91. Plaintiffs also cite to the experiences of class members, such as Sherry Payne, who allege that

they received less pay than comparable males.[FN23]

FN23. For instance, plaintiffs assert that Sherry Payne was laid off by Home Depot “because [she] was making too much money” and was subsequently rehired by Home Depot at a lower wage. Mah Decl., Ex. 21, at 44, 67 (Payne Depo.). According to plaintiffs, a male was hired to replace Payne and was paid a salary greater than the amount Payne was receiving at the time that she was laid off. *Id.* at 44, 64.

The Court finds that plaintiffs' statistical showing, when considered alongside plaintiffs' other evidence, establishes a genuine issue of material fact regarding disparate treatment by Home Depot in the compensation of its employees. At the summary judgment stage, the Court is not to determine the weight to be accorded to the parties' contrary statistical findings; that determination is properly reserved for the jury at trial. Instead, the Court must determine only if plaintiffs have presented sufficient evidence from which a jury may infer discriminatory intent. The Court finds that a sufficient evidentiary showing has been made. *See* *Green v. USX Corp.,* 896 F.2d 801, 807 (3rd Cir.1990) (evidence of discriminatory intent may be direct, circumstantial, or inferred from statistical evidence, and all evidence that the plaintiff presents in that regard can contribute to the inference in a cumulative manner). Defendant's motion for summary judgment on the issue of employee compensation is therefore DENIED.

4. *Training*

Plaintiffs argue that Home Depot has disparately allocated training opportunities to its employees on the basis of gender. Plaintiffs provide no statistical evidence on the issue of training. Instead, plaintiffs cite to Professor Bielby's findings, the anecdotal testimony of individual class members, and the deposition testimony of selected Home Depot managers regarding training. Plaintiffs argue that the absence of specific criteria by which to guide store management allows training opportunities to be allocated disparately on account of gender.

In response, Home Depot argues that plaintiffs have provided no evidence of a pattern or practice of gender discrimination with respect to the provision of training opportunities. Home Depot argues that Home Depot makes training opportunities available to all employees.[FN24] In addition, it emphasizes that plaintiffs have not provided statistical evidence in support of their training claim and questions the inferences that may be drawn from Professor Bielby's findings and plaintiffs' anecdotal testimony.

FN24. *See* Gutek Suppl. Rpt. at 5 (“Each store is required to have at least 4 hours of formal training a month for all associates. This is standard procedure; it is not optional. Associates can receive a lot more training each month, much of it on product knowledge. All associates should have an opportunity to learn about the different products Home Depot sells. Training sessions are not limited to those working in that area, although those working in the area are likely to be given first priority in the event that some particular training session is especially in demand.”).

***12** The Court finds that plaintiffs have not established a *prima facie* case of disparate treatment with respect to training. Plaintiffs have submitted evidence that Home Depot utilizes subjective factors in allocating training opportunities and that individual class members may have been denied training on account of their gender. However, plaintiffs have provided no evidence of a *pattern or practice* of discrimination. The mere occurrence of isolated or sporadic discriminatory acts is insufficient to prove a systemic pattern or practice. *Teamsters,* 431 U.S. at 336. As such, defendant's motion for summary judgment on the issue of training is GRANTED.

5. *Employees in Non-Store Based Positions*

Finally, Home Depot seeks summary judgment on the claims of employees in non-store based positions.[FN25] In their summary judgment motion, Home Depot asserts that plaintiffs have presented no evidence that it discriminated against this sub-class of employees. At oral argument, the Court specifically requested plaintiffs to address this issue. Plaintiffs failed to respond to Home Depot's contentions at oral argument or in their opposition brief. Accordingly, because plaintiffs have presented no evidence of discrimination against non-store based employees, the Court GRANTS summary judgment with respect to

this sub-class of employees.

> FN25. These positions include store support, divisional, distribution center, human resources, and regional merchandising positions.

B. ***Disparate Impact***

A plaintiff may establish a *prima facie* case of disparate impact by showing that an employer's use of an employment practice caused unequal treatment by the employer of a protected group. *Wards Cove,* 490 U.S. at 656-57. In the instant case, plaintiffs argue that Home Depot's policy of giving store-level managers unbridled discretion to make decisions based on vague, unvalidated, arbitrary, and subjective criteria has disparately impacted female employees. In support of this contention, plaintiffs rely on their statistical and sociological experts' findings regarding the practices of Home Depot and the alleged effect of these practices on the opportunities available to female employees.

Home Depot, in turn, argues that plaintiffs have failed to make a *prima facie* showing of disparate impact. First, defendant argues that plaintiffs have failed to demonstrate the existence of gender disparities. Second, Home Depot contends that plaintiffs have failed to isolate a particular employment practice. Third, Home Depot asserts that plaintiffs have failed to demonstrate that a specific practice of Home Depot *caused* the gender disparities alleged by plaintiffs. The Court will address each of the defendant's contentions.

As regards the first element (i.e., disparate impact), plaintiffs have presented statistical evidence of gender disparities in hiring, initial assignments, promotions and compensation. Home Depot asserts that plaintiffs' statistical evidence is unreliable and contradicts the findings of its own statistical experts, except where plaintiffs' experts report no disparities. In addition, Home Depot asserts that plaintiffs have provided no evidence, statistical or otherwise, of gender disparities in training.

***13** As indicated above, plaintiffs have presented sufficient evidence of gender disparities, for purposes of summary judgment, with respect to their hiring, initial assignment, promotion, and compensation claims. However, plaintiffs have produced no evidence of gender disparities in the allocation of training opportunities. The Court therefore GRANTS summary judgment in favor of Home Depot on plaintiffs' training claim.

Home Depot next argues that plaintiffs' disparate impact claim must fail because they have not identified specific employment practices causing the alleged gender disparities. Home Depot argues that the elements of its decisionmaking process are, in fact, capable of separation for analysis and that, as such, plaintiffs must identify discrete employment practices by Home Depot that adversely impact female employees. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i) ("if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.").

Plaintiffs' disparate impact claim in the instant case is analogous to the plaintiffs' claim in *Stender.* The *Stender* Court held as follows:

> Where the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, the failure to follow set procedures and the absence of written policies or justifications for promotional decisions, the court is not required to "pinpoint particular aspects of [the system]" that are unfavorable to women.

803 F.Supp. at 335 (citation omitted). Plaintiffs in the instant case have presented evidence that Home Depot fails to provide its store managers with meaningful criteria by which to guide hiring, assignment, promotion, and compensation decisions. Dr. Bielby notes that:

> A distinctive and integral feature of the Home Depot personnel system is the near total absence of specific criteria for selection decisions about screening and hiring job applicants, initial pay, job assignment, promotion, [and] wage and salary increases.... [I]t is the policy of Home Depot to delegate decisions about hiring, pay, job assignment, and promotions to Store Managers or teams of managers who, individually and as a team, base those decisions on their own subjective judgments, with virtually no written criteria for systematically

> evaluating the qualifications of individual candidates.

Bielby Rpt. at ¶ 56. Having reviewed the evidence in this matter, the Court is satisfied that the elements of Home Depot's decisionmaking process are not capable of separation for analysis.

Finally, Home Depot argues that plaintiffs have not submitted evidence of causation. Home Depot argues that plaintiffs' statistical evidence alone is insufficient to establish causation, citing *Torre v. Federated Mut. Ins. Co.,* 854 F.Supp. 790, 810 (D.Kan.1994), and *Johnson v. Uncle Ben's Inc.,* 965 F.2d 1363, 1369 (5th Cir.1992), *cert. denied,* 511 U.S. 1068, 114 S.Ct. 1641, 128 L.Ed.2d 362 (1994). As regards plaintiffs' sociological evidence, Home Depot contends that this evidence demonstrates at most that Home Depot's decisionmaking process *may have caused* the gender disparities claimed by plaintiffs. According to Home Depot, evidence of potential causation is insufficient to withstand summary judgment, under the Ninth Circuit's holding in *Atonio v. Wards Cove Packing Co., Inc.,* 10 F.3d 1485, 1498-99 (9th Cir.1993).

***14** The Court finds that plaintiffs have presented sufficient evidence of causation to meet their burden on summary judgment. In *Watson,* the Supreme Court held that:

> Once the employment practice at issue has been identified, causation must be proved; *that is, the 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.*

487 U.S. at 994-95 (emphasis added). As stated above, plaintiffs have presented statistical evidence of a kind and degree from which causation may reasonably be inferred. Moreover, plaintiffs have presented sociological evidence to buttress the causal link between Home Depot's alleged subjective practices and the gender disparity in the work force. *See* Bielby Rpt. at ¶¶ 50 ("Gender stereotypes influence personnel decisions in work contexts with male-dominated cultures and subjective personnel practices."); 54 ("Stereotypical beliefs ... are not unique to Home Depot managers, but the company's subjective personnel system makes them especially consequential for personnel decisions."); 106 ("The subjective decision-making throughout the Home Depot personnel system, applied in the context of a male-dominated corporate culture which encourages managers to ignore the objective qualifications and interests of women employees, leads to a pattern of segregation whereby women have limited opportunities to advance into the most rewarding positions in the company.").

In sum, plaintiffs have made a *prima facie* showing of disparate impact with respect to their hiring, initial assignment, promotion, and compensation claims and have established genuine issues of material fact for trial. Accordingly, defendant's motion for summary judgment as regards these claims is DENIED.

II. Class Certification

On January 25, 1996, this Court certified two separate classes (i .e., applicant class and employee class) under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Court found that the requirements of Rule 23(a) had been met and that plaintiffs' claims for injunctive relief were not overwhelmed by plaintiffs' request for damages. The Court further ordered that litigation be bifurcated into separate phases: the first phase would address liability and relief available to the class as a whole, including declaratory and injunctive relief, and whether defendant was liable for punitive damages; the second phase would address appropriate individual compensatory and equitable relief. The Court certified the first phase under Rule 23(b)(2) and deferred ruling on plaintiffs' request for class certification as regards the second phase.

Home Depot has filed a motion to decertify the applicant and employee classes in light of recent developments. Home Depot contends that it is now clear that plaintiffs' claims for monetary damages predominate over any potential injunctive relief that may be awarded in this matter so as to make certification under Rule 23(b)(2) improper. In addition, Home Depot argues that plaintiffs have failed to meet the "commonality" and/or "adequacy of representation" requirements of Rule 23(a). The Court will address defendant's contentions in turn.

***15** Home Depot argues that it can no longer be seriously contended that this case is primarily about injunctive relief. Home Depot emphasizes the potential

liability it faces if plaintiffs prevail on their claims for compensatory and punitive damages. In addition, Home Depot emphasizes that the injunctive remedies (e.g., timetables, goals) sought by plaintiffs cannot be obtained from this Court, in light of the restrictions that the Supreme Court placed on class-based remedies in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), and *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Finally, Home Depot argues that programs and initiatives are already in place at Home Depot, whose purpose is to promote equal opportunity. As such, Home Depot concludes that no injunctive relief need be awarded in this matter.

In support of its argument, Home Depot cites a number of cases which held that certification was improper under Rule 23(b)(2) where damages issues predominated over plaintiffs' demands for injunctive or declaratory relief. Plaintiffs, in turn, cite cases in which various courts certified classes, notwithstanding the fact that plaintiffs sought punitive and compensatory damages in addition to declaratory and/or injunctive relief. In addition, plaintiffs note that the cases cited by defendant do not stand for the broad proposition that plaintiffs seeking injunctive and monetary relief are precluded from seeking class certification under Rule 23(b)(2). *See, e.g., McKnight v. Circuit City Stores, Inc.,* 168 F.R.D. 550, 553 (E.D.Va.1996) (cited by Home Depot in its decertification motion) ("Certainly there are cases where the sheer size of a class and the complexity of the common issues would lead a court to conclude that efficiency factors override certain considerations of fairness.").

From the Court's review of these cases, it seems clear that the determination of which type of relief is predominant is a matter within the sound discretion of the court. *See Shores v. Publix Super Markets, Inc.,* 1996 WL 407850, at *9 (M.D.Fla. Mar.12, 1996); *Morgan v. United Parcel Service of America, Inc.,* 169 F.R.D. 349, 358 (E.D.Mo.1996). *See also Bouman,* 940 F.2d at 1232 ("The determination as to whether to certify a class is committed to the discretion of the district court and will not be disturbed on appeal absent a showing of abuse of discretion."). The Court has reviewed the materials submitted by both parties and concludes that certification under Rule 23(b)(2) remains proper.

The injunctive relief sought by plaintiffs includes a formal method of announcing job openings; promotion and advancement goals for women based upon the percentage of qualified women who register their interest in, apply for, or are available for a particular position; use of validated job criteria; and various accountability mechanisms. The relief sought by plaintiffs is not barred, as Home Depot contends, by recent Supreme Court decisions. The Supreme Court has squarely held that courts are empowered to impose affirmative action as a remedy for past discrimination. *See Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.,* 478 U.S. 421, 475-76, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986); 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may ... order such affirmative action as may be appropriate ..."). Home Depot may disagree as to whether after trial plaintiffs will have made a sufficient showing of discrimination so as to justify imposing such remedies; however, the merits of plaintiffs' claims are not properly before the Court for purposes of class certification. *See Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

***16** The Court also rejects Home Depot's argument that it has already implemented the injunctive relief plaintiffs seek in their complaint. The extent to which Home Depot has, in fact, implemented such measures and the extent to which these measured need to be "fine tuned" are issues contested by the parties. The Court need not resolve these disputes at this juncture; it is sufficient that plaintiffs seek injunctive relief in their complaint, that the injunctive relief sought is authorized under existing case and statutory law, and that the relief sought by plaintiffs in Stage I of these proceedings is primarily injunctive in nature.

Next, Home Depot argues that decertification of this matter is appropriate because individual class members are in a better position to protect their rights and recover meaningful damages than the certified classes. Home Depot argues as follows:

> (1) Under the Civil Rights Act of 1991, only declaratory and injunctive relief is available to a plaintiff in a mixed-motives case where the employer can demonstrate that it would have made the

same decision independent of gender.

(2) The method of proof chosen by the applicant and employee classes in this matter establishes at most that gender was a factor, not the sole factor, in Home Depot's personnel decisions.

(3) Stage I of this litigation will therefore not resolve any issue for any individual plaintiff seeking monetary damages because the applicant and employee classes are putting on a mixed-motives case, which precludes an award of monetary damages.

In sum, Home Depot concludes that class certification is inappropriate in the instant case.

The Court soundly rejects this argument. Even if the Court were to accept the premises of Home Depot's argument, which are disputed by plaintiffs, Home Depot proves only that class certification is appropriate under Rule 23(b)(2). Home Depot argues that the only class-wide relief available in this litigation is injunctive and/or declaratory relief. If Home Depot is correct, plaintiffs have undoubtedly met the requirements of Rule 23(b)(2). *See* Fed.R.Civ . Proc. 23(b)(2) ("An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition ... the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"). In sum, the Court finds that certification under Rule 23(b)(2) remains the proper course of action.

Home Depot alternatively seeks decertification on the ground that the requirements of Rule 23(a) have not been met. Home Depot argues that plaintiffs' statistics fail to demonstrate gender disparities in promotions and compensation so as to meet the "commonality" requirement of Rule 23(a). In addition, Home Depot argues that the interests of female employees and female managers, who are included within this Court's class definitions, are antagonistic in nature.

***17** The Court disagrees. Home Depot both argues the merits of plaintiffs' case and raises arguments previously considered and rejected by this Court. The Court declines to revisit its decision to certify this matter as a class action based on defendant's proffer of evidence. Defendant's motion for decertification is therefore DENIED.

CONCLUSION

For the foregoing reasons, the Court hereby:

(1) DENIES defendant's motion for summary judgment on the applicant class claims;

(2) GRANTS IN PART and DENIES IN PART defendant's motion for summary judgment on the employee class claims; and

(3) DENIES defendant's motion for decertification.

IT IS SO ORDERED.

N.D.Cal.,1997.
Butler v. Home Depot, Inc.
Not Reported in F.Supp., 1997 WL 605754 (N.D.Cal.)

END OF DOCUMENT