UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Nilda GUTIERREZ,	
Linda MORGAN,	
Wayne BROWN, and	
Krista MARSHALL	**Civil Action No. 01-5302**
Individually and as Class Representatives,	**Filed Electronically**
Plaintiffs,	**REDACTED**
v.	
JOHNSON & JOHNSON,	
Defendant.	

APPENDIX B: REBUTTAL REPORT OF DR. JOHN G. VERES, III

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Individually and as Class Representatives,	**Filed Electronically**
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JOHNSON & JOHNSON,	
Defendant.	

NICOLE M. AUSTIN-HILLERY CERTIFICATION OF EXPERT REPORT

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Nicole M. Austin-Hillery hereby certifies as follows:

1. I am over the age of eighteen and an attorney licensed to practice in the District of Columbia and I have been admitted Pro Hac Vice to the State of New Jersey for this matter. I am associated with the firm of Mehri & Skalet, PLLC, which represents the Plaintiffs in this matter. I make this certification in support of Plaintiffs' Reply Brief in Support of Class Certification.

2. Attached as Exhibit 1 is the original signed Expert Report of John G. Veres, III, A Critique of the Report of Dr. James Outtz in *Gutierrez, et al. v. Johnson & Johnson*, and Appendices 1 and 2.

3. Dr. Veres has been retained by Plaintiffs to testify as an expert in support of the Motion for Class Certification. Plaintiffs submit the attached written report in partial satisfaction of the expert disclosure requirements of Fed. R. Civ. P. 26(a)(2)(B). The supporting data will be produced directly to Defendant.

4. I certify under penalty of perjury that the foregoing is true and correct.

Dated: April 28, 2006

Nicole M. Austin-Hillery

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A Critique of the Report of Dr. James Outtz in *Gutierrez, et al. v. Johnson & Johnson*

Expert Report of John G. Veres III

INTRODUCTION AND PURPOSE

I am John G. Veres III and I am currently employed as the Executive Director of Auburn University Montgomery's Office of University Outreach. I received a Ph.D. in industrial and organizational psychology from Auburn University in 1983. My primary roles are practicing applied researcher, human resources management consultant, and university administrator. I have taught doctoral-level classes in research design, psychometric theory, and instrumentation in industrial and organizational psychology for the Auburn University Psychology Department and currently serve as part of the Auburn University Graduate Faculty. My current research interests include the use of alternative selection/referral methods to reduce adverse impact while maintaining selection procedure utility, the use of organizational citizenship behavior measures and personality inventories as employee selection devices, and test validation and related psychometric issues. I have published books, chapters, and articles in the area of industrial and organizational psychology and served as an expert witness in human resources practices and the analysis of employment decisions in some 75 cases. I was jointly designated by the parties as an expert to federal courts in Arkansas and Georgia, and I currently serve as Court's expert and Special Master for U. S. District Court Judge C. Lynwood Smith, Jr. in the Northern District of Alabama. Additional information concerning my background appears in my resume (copy attached as Appendix 1).

As noted above, my doctoral-level education and subsequent training have been in the discipline of industrial-organizational (I/O) psychology, a field that "tries to understand and measure human behavior to improve employees' satisfaction in their work, employers' ability to select and promote the best people, and to generally make the workplace better for the men and women who work there" (www.siop.org/Media/What.htm). On the more "industrial" side of I/O psychology, practitioners engage in activities such as conducting job analyses, designing jobs, applying human factors to the workplace, assessing candidates for selection or promotion, measuring job performance, and developing training programs. Practitioners with a more

"organizational" focus may study leadership, assess group influences on individual workers, examine stress in organizations, or analyze the effectiveness of alternative organizational structures. Many practitioners of I/O psychology address issues related to eliminating harassment and discrimination in the workplace, and, as a result, testify as experts in employment discrimination lawsuits. I approached my charge from Plaintiffs' counsel from the perspective of industrial-organizational psychology, although I should note that, in my experience, members of my discipline more frequently weigh in on specific issues such as selection procedure validity rather than providing opinions at the class certification stage of litigation.

I was asked by counsel for the Plaintiffs to review the report of Dr. James Outtz, an industrial-organizational psychologist serving as Defendant's expert, and to offer opinions regarding whether Dr. Outtz' conclusions are supported by the available documents and testimony concerning the Johnson & Johnson Family of Companies, whether those conclusions are consistent with established professional standards, and whether the selection procedures and employment practices used by Johnson & Johnson comply with federal regulatory guidance to the extent such guidance is applicable. The documents on which I relied in forming my opinions are listed in Appendix 2. I am being compensated for preparing this report at the rate of $400.00 per hour.

EXECUTIVE SUMMARY

Corporate Structure. Johnson & Johnson's operating structure has been described as featuring a decentralized approach to operations, with corporate staff serving "to ensure uniformity in such areas as compensation and personnel policies" (Aguilar & Bhambri, 1986; p. 15). Aguilar and Bhambri's 1986 Harvard Business School study of Johnson & Johnson summarized the company's operating philosophy. They stated:

> The key organizational units for J & J were the operating company at the business level and the executive committee at the corporate level. The relationship between these two units was carefully managed to produce the cohesive independence that had become a cultural hallmark of J & J's operating structure. Strategic planning, compensation systems, and human resource management were among the major support systems to this relationship (Aguilar & Bhambri, p. 6).

The Johnson & Johnson website addressed the role of Johnson & Johnson's Worldwide Headquarters under the heading "Unifying Our Decentralized Organization" (Kells deposition exhibit 5, p. 1; discussed in Kells deposition, pp. 98-106). It stated: "One of the keys to the success of our organization structure is the **centralization** of certain functions at the headquarters level. Groups at our Worldwide Headquarters in New Brunswick, New Jersey, deal with issues that are common to many or all of our affiliates and operating units (emphasis added)" (Kells deposition exhibit 5, p. 1). Under the heading "Human Resources," the website reported that "[a]reas of headquarters' focus include organization-wide strategic human resource planning and development, employee compensation, benefits and health offerings, and training and development" (Kells deposition exhibit 5, p. 1). The website was still active on 12 April 2006, and was accessible at jnj.com/careers/worldwide.html.

Notwithstanding the description of a centralized human resources function, Dr. Outtz concluded: "each of Johnson & Johnson's companies is autonomous and accountable for its individual performance" (Outtz report, p. 22). Dr. Outtz' stated standard for defining "autonomous" was fairly clear:

> I would define that as operating these companies, having the authority and responsibility to carry out certain things, certain policies and practices, that is, to

> implement them, to operate them, to operationalize them independent of Corporate Headquarters (Outtz deposition, p. 105).

While Dr. Outtz acknowledged that "the Executive Committee, on an annual basis, issues certain policies that serve as a framework for what the operating companies can choose to do with regard to compensation" (Outtz deposition, p. 42), he stated that "headquarters does not tell them how to operate" (Outtz deposition, p. 44).

The statements of company officials were also at odds with Dr. Outtz' view that individual companies were free to pick and choose from whatever guidance they received from corporate human resources offices. Robert Ward, Director of Human Resources for Ethicon Endo-Surgery, testified: "My experience is that we have never ignored any guideline from J & J. We have pursued exceptions" (Ward deposition, p. 19). Peter Gudicello, Director of Compensation for Cordis, testified that "we are influenced by the corporate guidelines, we may have many similarities" (Gudicello deposition, p. 62). Mr. Gudicello went on to state that "[w]e, on occasion, because of the business, our business situation, wanted to do something different than what was possibly stated in our policy manual," and gave an example of a "retention bonus plan" that was specific to Cordis (Gudicello deposition, pp. 62 & 63). In fact, Roberta Obler, Vice President for Worldwide Compensation Resources (WCR), testified that compensation plans that represented significant changes from worldwide corporate compensation policies were subject to review by her office (Obler deposition, p. 76), and that affiliate companies' "plans, bonus plans specifically" have been reviewed by WCR and the Management Compensation Committee (Obler deposition, p. 77). The issue of Johnson & Johnson's corporate structure is discussed on pages 16 through 22 of this report.

I do not believe that Dr. Outtz offered a persuasive case for his view of how the Johnson & Johnson companies functioned with respect to human resources management. His belief that HR functions were decentralized may stem from his uni-dimensional approach to assessing centralization or the lack thereof – an approach that is inconsistent with some of the professional literature that differentiates between product/market, operating, and personnel decisions (See Datta & Grant, 1990 and pages 17 and 19 of this report). As noted above, the statements of

company officials did not support Dr. Outtz' view that individual companies chose which policies from corporate human resources to implement without corporate approval. Examples of corporate-level oversight were numerous and reported by both corporate-level and affiliate company-level human resources professionals. Policies were designed to conform to values articulated in Johnson & Johnson's "nonnegotiable" Corporate Credo (Carey deposition, p. 47).

Corporate Policies. In summarizing my impressions of the Johnson & Johnson Family of Companies, I believe that it is important to differentiate between policies, on the one hand, and the procedures and practices used to implement those policies on the other. Dr. Outtz acknowledged this distinction, when he differentiated between compensation guidelines and compensation practices (Outtz deposition, p. 41). In my opinion, the deposition testimony supports the conclusion that corporate policies were approved at the corporate level (Obler deposition, pp. 32 & 33), although suggestions for changes could originate at affiliate-level companies (Carey deposition, pp. 204 & 205). As noted above, policies were designed to conform to values articulated in Johnson & Johnson's Corporate Credo, values described by Michael Carey, Vice President for Human Resources, as "nonnegotiable" (Carey deposition, p. 47). Policies were transmitted to affiliate companies, and were either implemented by the companies (Ward deposition, p. 19), modified by the companies in a manner consistent with a given policy's intent and Johnson & Johnson's framework (Obler deposition, p. 76), or, in rare cases modified by the companies after seeking approval at the corporate level (Obler deposition, p. 77). Examples of Johnson & Johnson's policies being implemented or corporate approval being required appeared in virtually every deposition of affiliate-level human resources management professionals. My discussion of this issue appears primarily on pages 19 through 23 and pages 43 through 50 of this report.

Initial Compensation Practices. With respect to affiliates' practices, Dr. Outtz' own analysis could be interpreted to indicate more similarities than differences. Dr. Outtz' examination of initial compensation factors identified five key factors utilized by the majority of affiliates he studied, and found that only one of the operating companies considered as many as three factors beyond the first five he identified. Twenty-four other companies (96% of Dr. Outtz' sample in

Figure 4) were identified as considering two or fewer additional factors beyond factors A-E (See pages 50 through 53 below). Only two of the five primary factors Dr. Outtz identified ("market pricing data" and "internal equity") were factors that could theoretically vary between companies, and the impact of both these factors was limited by Johnson & Johnson's compensation policies designed to facilitate movement from company to company by minimizing between-company differences in salaries. Roberta Obler testified that some differences in individual compensation occur, but the policy framework overseen by Worldwide Compensation Resources is designed to limit the size of any differences and ensure "that their opportunity for pay is the same" (Obler deposition, p. 44), allowing Johnson & Johnson to move employees from one company to another or one region to another with relative ease.

Merit Pay Practices. With respect to merit pay, Johnson & Johnson's compensation policy and Salary Administration Programs required merit increases to be "performance driven" (Obler deposition exhibit 8). Ten of the 12 factors that Dr. Outtz indicated were considered by at least one of the 12 companies listed in Figure 5 of his report are related to job performance. All 12 companies considered "performance ratings." Of the two non-performance factors, "position within market pricing data" was indicated for five companies and "internal equity" was indicated for one company. My impression is that the differences observed in merit pay are more akin to variations on a theme than every company playing its own tune. Pages 53 through 56 of this report address this issue.

Field Sales Compensation Practices. Base salary and merit increases for field sales personnel seem to have been treated in much the same manner as non-sales employees (David deposition, p. 19). I agree with Dr. Outtz' compensation-related conclusion with respect to field sales compensation in Johnson & Johnson companies, at least it relates to commissions and bonuses driven by sales performance. (See page 57).

Promotion Practices. I believe the promotion process is one of the most important aspects of this case, because compensation increases are almost invariably associated with promotions to higher levels in the organization. For the higher-level jobs filled through the Succession Planning and

Development process, the testimony clearly indicates that the formal ratings of performance, potential, and people development required by Johnson & Johnson of its affiliate companies were not necessarily the driving force in determining which employee received a particular promotion. Michael Carey described a company-wide Succession Planning and Development process that was subjective and downplayed the importance of numeric performance appraisal ratings, substituting a subjective discussion among managers (Carey deposition, p. 331). Affiliate company human resources management professionals echoed Mr. Carey's descriptions (Cachinero deposition, p. 250; Raher deposition, p. 177). It should be noted that Mr. Carey described himself as "the talent officer for the company," because "I was the individual who sat in every company session and every Group Operating Committee review and then the final session" from 1994 to 2001 (Carey deposition, p. 223).

Dr. Outtz testified: "if one reads deposition transcripts, it was readily apparent that the operating companies did not require job posting, at a particular point they didn't require job posting, nor did Corporate" (Outtz deposition, p. 182). Johnson & Johnson has recently "deployed" a policy stating that all positions at and below the director level will be posted (HochbergSmith deposition, p. 66). The Equal Employment Opportunity Commission has identified "failure to post/advertise promotional opportunities" as one of its "barriers to advancement and promotion" in its "Best Practices of Private Sector Employers" (EEOC, 2001). In my opinion, the failure to require the posting of jobs at and below the director level prior to 2003 is inconsistent with good equal employment opportunity practice, let alone best practices. Failure to adequately and consistently post jobs is one element that cuts across virtually all the affiliate companies. My discussion of promotions appears on pages 59 through 63 of this report.

Performance Appraisal Practices. Dr. Outtz devoted approximately 14 pages of his report to the issue of performance appraisals, focusing on perceived differences in affiliate companies' practices and on whether the appraisal systems were "excessively subjective." The four criteria for establishing objectivity presented by Dr. Outtz as "professional standards for objectivity" (Outtz report, p. 37) are, in fact, a reduced subset of recommendations in the professional literature for improving the legal defensibility of appraisals. Dr. Outtz should have included the full list of

Malos' (1998) recommendations and examined whether Johnson & Johnson's companies' appraisals complied with the full set of recommendations, not just the four he chose. Johnson & Johnson's companies' failure to provide adequate job analyses, focus on behaviors rather than competencies, and properly document appraisal processes caused them to fall short even of Dr. Outtz' lowered standard, and well short of the recommendations provided by the professional literature (see pages 23 through 43 and pages 57 through 59 of this report). . Mr. Carey reported that no validation studies were undertaken at Johnson & Johnson (Carey deposition, pp. 611-613).

Monitoring of HR Functions. Dr. Outtz testified that he believed the operating companies maintained the data necessary to conduct adverse impact analyses of promotions (Outtz deposition, p. 274 & 275) and compensation decisions (Outtz deposition, pp. 276 & 277). He made no report of any company actually computing adverse impact analyses except as part of an OFCCP audit, EEO-1 reporting, or an Affirmative Action Plan (Outtz deposition, pp. 200 & 204). I do not understand how conducting no analyses beyond the minimum required by federal agencies can be construed to be exemplary of taking "affirmative steps" to ensure human resources practices "produce the intended results" (Outtz report, p. 57). Testimony from company officials confirms the dearth of analyses monitoring human resources practices in the affiliate companies. Mr. Carey's 2001 draft document describing the role of Group Operating Company Human Resources leaders is instructive. He wrote that the GOC HR role should include a responsibility to "drive diversity across all businesses...no one has owned it in the GOCs or companies for that matter" (Kells deposition exhibit 5). Pages 63 through 68 of this report address monitoring issues.

Criticisms of Plaintiffs' Statistical Experts. Dr. Outtz criticized Drs. Janice Madden and Alexander Vekker's analyses with respect to promotions, compensation, initial job assignments, and initial compensation. He offered an alternative model for such analyses, incorporating performance appraisals as a variable. In my opinion, Drs. Madden and Vekker's approach was consistent with the *Uniform Guidelines* model for assessing adverse impact and therefore preferable and, in fact, required. Dr. Outtz' criticisms of Drs. Madden and Vekker are not cogent, nor do those criticisms undermine the relevance of their analyses. My discussion on this issue appears on

pages 59 through 63 of this report.

Dr. Outtz' Methodology and Report. I was unable to fully address some of Dr. Outtz' observations and conclusions for several reasons. Dr. Outtz testified: "My report focuses on two issues, as I say in the report. It focuses on Plaintiff's claim of excessive subjectivity and Plaintiff's claim that the putative class is similarly situated across the operating companies" (Outtz deposition, p. 183). I am uncomfortable with some of the language Dr. Outtz used to discuss differences he observed in human resources management practices, such as "significant," "similarly situated," and "similarly affected." I am unable to attach the adjective "significant" to any differences that exist without conducting a statistical test of a specific hypothesis. I am unable to comment on "similarly situated" or "similarly affected," because these terms are not terms of art in industrial and organizational psychology. I cannot offer an opinion regarding whether the promotion or compensation practices at the affiliate companies are "similar" enough to fulfill the requirements for class certification or different enough to prevent it. I view that determination as something outside the scope of industrial and organizational psychology, a determination more appropriately made by the Court.

Dr. Outtz' report was difficult to interpret due to his focus on dissimilarities to the exclusion of similarities. When asked where he reported any findings of similarity in performance appraisals, Dr. Outtz replied: "I do not. I report the findings of dissimilarity" (Outtz deposition, p. 362). He also omitted discussions of any "constant," such as Johnson & Johnson's posting practices (Outtz deposition, p. 182). Another impediment to interpreting Dr. Outtz' report was his frequent use of adjectives such as "some" or "many" without specifying the quantities involved. The failure to enumerate similarities and the lack of quantification and specificity discussed on pages 6 to 10 of this report contributed to difficulties in interpreting Dr. Outtz' findings.

Dr. Outtz makes reference to professional standards without specifying where those standards are codified and memorialized. He translated a single reference (Grote, 1996) into standards for best practices for job analysis in developing appraisal systems (Outtz report, p. 39), and opined that Johnson & Johnson's companies' factors for determining initial compensation

(Outtz report, p. 49), merit increases (Outtz report, p. 52), sales compensation (Outtz report, p. 54), and promotions (Outtz report, p. 57) were consistent with professional standards for best practices without any reference whatsoever to the professional literature upon which he presumably relied. In a single instance, Dr. Outtz provided sufficient information on his "accepted professional standards for objectivity" in performance appraisal for me to comment on them (See pages 30 through 37).

Dr. Outtz' Conclusions. I address Dr. Outtz' conclusions on pages 72 through 78 of this report. My findings are summarized above. I believe that Johnson & Johnson's HR professionals' failure to conduct adverse impact analyses beyond those absolutely required by federal regulations, coupled with their excessive faith in the companies' identity-blind processes, probably contributed to the differences observed by Drs. Madden and Vekker. The system was not self-correcting, because racial differences in promotion rates and compensation often went undetected by the affiliate companies.

While Dr. Outtz testified that he was not retained to address "the merits" or "whether something is valid or not" (Outtz deposition, p. 232 & 233), he nonetheless reported with some frequency that the companies' human resources practices were consistent with "best practices." Moreover, Dr. Outtz opined that, while the affiliate companies' practices of performance appraisal, initial compensation, merit increases, and promotions differed one from another, all companies' practices were consistent with best practices. His position lies in stark contrast to previous testimony he offered, when he stated: "Again, if a personnel selection procedure is used, it should be valid. That's a professional judgment. It's not a legal judgment," and "the legal issue is not for me to decide. But if you draw inferences from a selection procedure, validity has to do with evidence of the accuracy of those inferences, so the question is has the organization demonstrated evidence, provided evidence, which supports the accuracy of those inferences. That to me is the relevant issue" (Outtz transcript attached to the certification of Nicole Austin-Hillery and filed under seal, p. 46). I fully agree with Dr. Outtz on this point. The Johnson & Johnson selection procedures at issue (e.g., compensation and promotions and their subcomponents such as performance appraisals) should be demonstrably job related, and they are not.

THE OUTTZ REPORT – ORGANIZATION AND GENERAL CONCERNS

Dr. Outtz' report is organized in two volumes. Volume 1 provides an executive summary, a statement of purpose, and six chapters: 1) about Johnson & Johnson (J & J), 2) Johnson & Johnson's decentralized management system, 3) performance management, 4) human resources policies, practices, and procedures, 5) Plaintiffs' analysis in promotion, compensation and initial job assignments, and 6) conclusions. Volume 2 provides descriptions of policies and procedures at 27 Johnson & Johnson companies, supposedly in support of Dr. Outtz' findings in Volume 1. I focused my attention on Volume 1, as Dr. Outtz' conclusions were presented therein. Prior to commenting on the specifics of Dr. Outtz' report, I shall make several general observations that pertain to issues arising throughout the document.

My first observation is that Dr. Outtz focused almost exclusively on dissimilarities across affiliate companies, rather than discussing any similarities he may have observed. His report is silent in many instances concerning common practices across companies. In his deposition, Dr. Outtz explained his approach:

> Q. Is there a chapter in your report where you present your opinions regarding the similarities in policies, practices, and procedures of the subsidiaries with regard to compensation, performance appraisal and promotion?
>
> A. My report doesn't describe similarities between—it doesn't specifically describe similarities, it describes the ways in which they are dissimilar, which speaks to whether or not they are similar.
>
> Q. Help me with that, how does describing dissimilar speak to similarity?
>
> A. If they are dissimilar they are not similar. By virtue of being dissimilar, right, I'm saying, in effect, that they are not similar. So one can conclude by my saying they are dissimilar in these ways, then they are not similar (Outtz deposition, pp. 423 & 424).

He offered a parallel description in the context of performance appraisals:

> Q. Okay. And this, do you have a section here where you discuss the similarities in appraisal systems, do you have a heading for that in your report?

A. No.

Q. Is that because you found no similarities?

A. Not necessarily, no.

Q. Do you think to be scientific or more objective that one should have a section about similarities as much as differences?

A. I don't believe that was necessary for the point I was making in this report. As line two says, assess a similarity or dissimilarity.

Q. Okay.

A. It doesn't say address the similarity and the dissimilarity.

Q. Okay. So you only looked at the dissimilarity in terms of what you reported in this report?

A. I was assessing the performance appraisals to determine the extent to which they were similar or dissimilar, and if I established that they were dissimilar, that speaks to whether they are similar. In other words, if I looked at all of them for similarity and found that they weren't similar, then they are dissimilar. If I look at them for dissimilarity and find that they are dissimilar, then in my opinion they are not similar.

Q. Where do you report any findings of similarity?

A. I do not, I report the findings of dissimilarity (Outtz deposition, pp. 361 & 362).

Dr. Outtz also reported that he did not include commentary on job posting in his report, because it was a "constant," and "it was readily apparent that the operating companies did not require job posting, at a particular point they didn't require job posting, nor did Corporate" (Outtz deposition, p. 182). Dr. Outtz' report did not devote much attention to another common aspect of human resources practice, the performance rating scale used to communicate performance to WCR. He was asked at his deposition:

Q. Sir, isn't it true that each of the performance appraisal systems has the same rating score, the one through five and then later the one through nine?

MR. JOHNSON: Objection to form.

A. At any time?

Q. No, at one point in time there was one through five and then later there was a change and Mike Carey and the Executive Committee communicated to all the operating companies to change to a nine point scale.

A. I think that is true generally but there may have been instances in which there were, for example, color schemes in the performance appraisal system, red, blue, yellow, green, whatever, so I'm not certain that is 100 percent accurate, but there was a rating scale and I think typically prior to 2001, yes, 2001, perhaps 2002, there was a 1.5 [one to five] scale operationalized by each operating company and then, after that, a one to nine scale operationalized by each operating company and Corporate Headquarters (Outtz deposition, p. 362 & 363).

Another difficulty I encountered was Dr. Outtz' routine use of adjectives such as "some" and "many" when describing employment practices at Johnson & Johnson. The lack of more specificity in his report makes it impossible to estimate what percentage of the approximately 30 companies he studied adhered to a particular employment practice. I shall identify specific examples as they are relevant in subsequent sections of my report, but one example illustrating this difficulty involves the weighting of performance factors or goals in performance appraisals. Dr. Outtz opined that "[s]ome subsidiaries structured their appraisal system such that employee goals and objectives were given numeric weights" (Outtz report, p. 34), after previously observing that "many operating companies" did not weight job components (Outtz report, p. 32). If 33 of 34 companies did not weight components (or 30 to 32 companies out of 34 if "some" means two to four companies), one might conclude that Johnson & Johnson companies seldom weighted components. The reader cannot know the precise number of companies that employed weighting based upon the text Dr. Outtz produced. In fact, Dr. Outtz provides only a single example of a company weighting appraisal components, Ethicon Endo-Surgery (Outtz report, p. 32).

Elsewhere in Dr. Outtz' report, Biosense Webster is offered as an example of a company limiting the Succession Planning and Development process to its president, management board members and their direct reports, a pool of candidates to replace those direct reports, and a limited number of "high potential" individuals (Outtz report, p. 25). The list of employees included in Biosense Webster's process on page 25 is strikingly similar to the general list of those

included in the Johnson & Johnson Succession Planning and Development process on page 24 of Dr. Outtz' report. Dr. Outtz offered no other examples of companies including a similar list of employees in the Succession Planning and Development process, so we are left to wonder how many other companies have practices similar to Biosense Webster and the generalized list of "positions at the Subsidiaries covered by the S&DP processes" (Outtz report, p. 24).

What level of specificity in writing a report such as Dr. Outtz' is desirable? I believe guidance is available in the form of the *Principles for the Validation and Use of Personnel Selection Procedures* (SIOP, 2003) and the *Uniform Guidelines on Employee Selection Procedures* (29CFR1607). The *Principles* offer advice on reports of validation efforts that are, in my opinion, germane in the case of Dr. Outtz' report. While his report is not a validation study, the *Principles'* statement on level of specificity in reporting would assist other professionals in evaluating and replicating his methodology and confirming or disconfirming his conclusions. They opine, in part, that:

> Reports of validation efforts should include enough detail to enable a researcher competent in personnel selection to know what was done, to draw independent conclusions in evaluating the research, and to replicate the study. The reports must accurately portray the findings, as well as the interpretations of and decisions based on the results. Research findings that may qualify the conclusions or the generalizability of results should be reported (p. 50).

The *Principles'* language cited seems relevant to the present circumstances for several reasons. One is that the *Principles* offer a definition of selection procedures that clearly encompasses the compensation and promotion decisions at issue in *Gutierrez v. Johnson & Johnson*:

> Selection procedures refer to any procedure used singly or in combination to make a personnel decision including, but not limited to, paper-and-pencil tests, computer-administered tests, performance tests, work samples, inventories (e.g., personality, interest), projective techniques, polygraph examinations, individual assessments, assessment center evaluations, biographical data forms or scored application blanks, interviews, educational requirements, experience requirements, reference checks, background investigations, physical requirements (e.g., height or weight), physical ability tests, appraisals of job performance, computer-based test interpretations, and estimates of advancement potential. These selection procedures include methods of measurement that can be used to assess a variety of individual characteristics that underlie personnel decision making (p. 3).

Another reason I believe the *Principles'* strictures are relevant is that the *Principles'* text represents an expression of our profession's collective wisdom that is documented and, therefore, amenable to comparison with actual practices in human resources. Dr. Outtz repeatedly makes reference to professional standards without specifying where those standards are codified and memorialized. He provided sufficient information on his "accepted professional standards for objectivity" in performance appraisal for me to comment on them, and I shall at length in following sections. However, Dr. Outtz translated a single reference (Grote, 1996) into standards for best practices for job analysis in developing appraisal systems (Outtz report, p. 39), and opined that J & J's companies' factors for determining initial compensation (Outtz report, p. 49), merit increases (Outtz report, p. 52), sales compensation (Outtz report, p. 54), and promotions (Outtz report, p. 57) were consistent with professional standards for best practices without any reference whatsoever to the professional literature upon which he presumably relied. Dr. Outtz did not show his work or explain his standards for most of the topics his report addressed.

Perhaps more importantly, the findings of adverse impact in promotions and racial differences in compensation trigger scrutiny under the requirements of the *Uniform Guidelines*, particularly sections 14C (technical standards for content validity studies) and 15C (documentation of impact and content validity evidence). In my opinion, the *Uniform Guidelines'* strictures become the standards for "best practices" when adverse impact has been detected. Werner and Bolino (1997) noted that the *Uniform Guidelines* require employers to validate all employment criteria, whether subjective or objective in nature, where adverse impact has been uncovered, and observed that "[t]his is the official position of Division 14 of the American Psychological Association" (p. 2). Compliance with the *Uniform Guidelines* represents a safe harbor for employers whose selection procedures create adverse impact. When asked if he had ever testified that racial differences in performance appraisals would necessitate compliance with the *Uniform Guidelines*, Dr. Outtz stated "if adverse impact has been properly determined, with regard to performance appraisals I would testify that those performance appraisals need to be validated" and "[t]he *Uniform Guidelines* require that they be complied with if there is adverse impact" (Outtz deposition, pp. 295 & 296). He also stated in a previous report that "[i]f there are differences in ratings based upon race or gender, then the rating process must be validated in accordance with

the Uniform Guidelines on Selection Procedures" (Outtz declaration attached to certification of Nicole Austin-Hillery and filed under seal, pp. 6 & 7).

Dr. Janice Madden and Dr. Alexander Vekker, Plaintiffs' statistical experts, found that African-American employees were statistically significantly underrepresented in promotions compared to their White non-Hispanic counterparts at Johnson & Johnson (Madden report, p. 2). They also found that African-American and Hispanic Johnson & Johnson exempt and non-exempt employees were paid statistically significantly less in base salary than their White counterparts with comparable age, level of education, and tenure at Johnson & Johnson (Madden report, p. 3). Drs. Madden and Vekker found that racial and ethnic differences in total direct compensation paid were larger for exempt employees than the differences detected in base salary (Madden report, p. 4). Dr. Outtz himself found racial differences in performance appraisal scores. When asked: "Sir, did you ever see any evidence that, at any of the operating companies at Johnson & Johnson, that there was a disparity in the performance ratings that was adverse to African-Americans?" – Dr. Outtz responded: "Yes" (Outtz deposition, p. 242). The validity of the promotion and compensation processes is, therefore, a critical issue, and the observed racial differences in appraisal scores is a particular concern in a "performance driven" organization. Given the facts that Drs. Madden and Vekker uncovered adverse impact in promotions and racial differences in compensation (Madden report, pp. 2-4), that Dr. Outtz found racial differences in performance appraisals in some cases (Outtz deposition, pp. 242 & 269), and Dr. Wise, Defendant's statistical expert, found that ratings were "systematically lower for African American employees" (Madden rebuttal report, p. 6), Dr. Outtz' failure to mention the *Uniform Guidelines* in his report is surprising. It is particularly surprising in light of his earlier opinion, expressed in the previous report cited above (Outtz declaration attached to certification of Nicole Austin-Hillery and filed under seal, pp. 6 & 7).

CHAPTERS 1 & 2 – SUMMARY OF JOHNSON & JOHNSON AND ITS ORGANIZATIONAL STRUCTURE

Chapters 1 and 2 of Dr. Outtz' report provided a summary of Johnson & Johnson's corporate history and its organizational structure. However, several points contained therein are

unsupported by either theory or data. For example, while it is clear that Johnson & Johnson has grown and evolved due to mergers, acquisitions, and divestitures, whether those mergers, acquisitions, and divestitures "highlight the criticality of the decentralized, autonomous structure of Corporate Headquarters and the Subsidiaries to the issue of equal opportunity" (Outtz report, p. 20) is another matter entirely. Organizations that choose highly centralized philosophies can merge, acquire, or divest companies in much the same manner that Johnson & Johnson has acted over time. The mere fact that such activity has occurred says little about organizational philosophy *per se*. As another example, Figure 3 does appear to substantiate Dr. Outtz' point "that each subsidiary had a management board responsible for day-to-day company operations" (Outtz report, p. 20). However, the organizational chart shows a direct reporting relationship (indicated by a solid line) from that Management Board to a Company Group Chairman, and in turn, to a Group Operating Committee, the Executive Committee, and the Board of Directors. Victoria Walker-Manella, Vice President of Human Resources for the Consumer Pharmaceuticals and Nutritionals Group (CP&N), a group comprised of McNeil Consumer and Specialty Pharmaceuticals, McNeil Nutritionals, Merck Joint Venture, McNeil Europe, and SJJP (in China) offered the following testimony about the chain of command:

Q. And the chain ends where?

A. Well, a manager, typically our managers would report to directors, this is typical, there's exceptions to everything, directors would work for the VP and VP work for the president.

Q. And who holds the president accountable?

A. The president's supervisor.

Q. Who is that?

A. Well, it could vary, but in our case, since, I guess it would be Rose Crane [Company Group Chair], if I use a current example.

Q. And then she reports to Christine Poon [Executive Committee Member]?

A. That's right.

Q. Do you know who Christine Poon reports to?

A. Christine Poon reports to Bill Weldon.

Q. The CEO of Johnson & Johnson?

A. Correct (Walker-Manella deposition, pp. 71 & 72).

Dr. Outtz concluded that "[b]ased on this organizational structure, each of Johnson & Johnson's companies is autonomous and accountable for its individual performance" (Outtz report, p. 22), but his report leaves the reader unable to discern his methodology and standard for determining autonomy. However, when asked to describe his methodology for concluding that Johnson & Johnson's operating companies were autonomous, Dr. Outtz stated:

> The methodology that I used was to gather information about the organizational structure of Johnson & Johnson as of 2001, including information in deposition transcripts, declarations submitted by managers and executives from the operating companies, documents such as the annual reports produced by Johnson & Johnson Corporate, I assume they are produced by Johnson & Johnson Corporate (Outtz deposition, p.104).

While Dr. Outtz' description of his methodology was somewhat murky, his stated standard for defining "autonomous" was fairly clear:

> I would define that as operating these companies, having the authority and responsibility to carry out certain things, certain policies and practices, that is, to implement them, to operate them, to operationalize them independent of Corporate Headquarters (Outtz deposition, p. 105).

Dr. Outtz testified that his meaning of "independent of corporate" was "[w]ithout having to get the approval of Corporate" (Outtz deposition, p. 105). He elaborated on how he would test his conclusion on autonomy thusly:

> Are there policies, specific operations, documents describing specific operations that exist in the operating companies and they don't exist in documents at Corporate? Is there testimony from individuals in the operating companies which directly describes a situation in which there is a policy in their company and they didn't have to get permission from it, from Corporate? Those are ways in which I would test that conclusion (Outtz deposition, p. 107).

He added:

> But more specifically, with regard to management, there is a decentralized structure in which management policies and procedures, there are management policies and procedures at the operating companies, that is, the way they carry out these policies and practices, that don't require permission from Corporate. (Outtz deposition, p. 109).

Dr. Outtz' conclusion that Johnson & Johnson's "human resources policies and practices have been implemented within that decentralized environment" (Outtz report, p. 22) may be the result of his failure to differentiate between Johnson and Johnson's product/market decisions (e. g., developing new product lines, changing distribution channels), operating decisions (e. g., changing inventory policy or maintenance decisions), and personnel decisions (e. g., changing salary levels or fringe benefits). Datta and Grant (1990) measured the extent of autonomy given to acquired firms along these three dimensions in their study of the relationship between the level of autonomy granted by acquiring companies and perceived success of acquisitions. It is possible for acquiring companies to provide considerable autonomy in operational decisions, while maintaining tighter control of personnel decisions. Dr. Outtz' illustration of what the decentralized approach means on an operation level seems to reflect confusion between operating and personnel decisions. He cited Michael Carey's testimony: "'At the operating level, staff functions such as finance, information management, and human resources are quite different.' (Carey Dep., P. 644)" (Outtz report, p. 22). A closer reading of Carey's deposition reveals something rather different. He stated "as we have discussed before, the staff function of finance or the staff function of information management or H – human resources, are very much the same throughout J & J" (Carey deposition, p. 644). The earlier discussion to which Mr. Carey referred focused on filling vice-presidential positions across companies, and Mr. Carey testified that "worldwide financial procedures are pretty much the same" (Carey deposition, p. 253), and that "[a] Human Resources function would be very similar and Information Management would be similar" (Carey deposition, p. 254).

It is noteworthy that Mr. Carey's description of similarities and differences across companies is consistent with past research on Johnson & Johnson and inconsistent with Dr. Outtz' report and

deposition testimony. Aguilar and Bhambri's 1986 Harvard Business School study of Johnson & Johnson summarized the company's operating philosophy. They stated:

> The key organizational units for J & J were the operating company at the business level and the executive committee at the corporate level. The relationship between these two units was carefully managed to produce the cohesive independence that had become a cultural hallmark of J & J's operating structure. Strategic planning, compensation systems, and human resource management were among the major support systems to this relationship (p. 6).

Aguilar and Bhambri cited Johnson & Johnson's "Statement of Strategic Direction," a document that outlined the responsibilities of corporate management thusly:

> Corporate management is responsible for providing resources, guidance, leadership, and control of the various business entities within the framework of these principles. Management's most important responsibility is one that it shares with presidents and managing directors in attracting the kind of people who can manage our businesses in the future, providing them with the kind of environment that maximizes their potential and with a system that rewards them appropriately for their accomplishments (p. 13).

They stated that the executive committee was "the principle management group responsible for the company's policies and operations" (Aguilar and Bhambri, p. 11). Aguilar and Bhambri's study found that company-level managers were responsible for "traditional personnel functions," but that "corporate staff served to ensure uniformity in such areas as compensation and personnel policies" (Aguilar & Bhambri, p. 15). They noted that corporate-level HR "maintained a computerized managerial skills inventory" and "a comprehensive corporate wide search was conducted" when "an open position could not be filled from within an individual company" (p. 15). The "cohesive independence" described by Aguilar and Bhambri is markedly different than Dr. Outtz' portrayal of "autonomous" subsidiaries, but consistent with Datta and Grant's (1990) methodology differentiating between operational and personnel decisions. Although Dr. Outtz observed "Corporate Headquarters issues guidelines" that companies "can use to design salary administration policies and practices," he argued that companies employed different policies, practices, and procedures.

Dr. Outtz indicated that "independent" of corporate approval "is not the same as contrary to" (Outtz deposition, p. 106). The statements of other company officials were at odds with Dr. Outtz' view that individual companies were free to pick and choose from whatever guidance they received from corporate human resources offices. Robert Ward, Director of Human Resources for Ethicon Endo-Surgery, testified: "My experience has been that we have never ignored any guideline from J & J. We may have pursued exceptions" (Ward deposition, p. 19). Mr. Ward went on to describe a change in Ethicon Endo-Surgery's cycle for reviewing field sales personnel designed to line that cycle up with a time period that "J & J was requiring us to move to" (Ward deposition, pp. 23 & 24). Peter Gudicello, Director of Compensation for Cordis, testified that "we are influenced by the corporate guidelines, we may have many similarities" (Gudicello deposition, p. 62). Mr. Gudicello went on to state that "[w]e, on occasion, because of the business, our business situation, wanted to do something different than what was possibly stated in our policy manual," and gave an example of a "retention bonus plan" that was specific to Cordis (Gudicello deposition, pp. 62 & 63). In fact, Roberta Obler, Vice President for Worldwide Compensation Resources (WCR), testified that compensation plans that represented significant changes from worldwide corporate policies were subject to review by her office (Obler deposition, p. 76), and that affiliate companies' "plans, bonus plans specifically" have been reviewed by WCR and the Management Compensation Committee (Obler deposition, p. 77).

The Johnson & Johnson website addressed the role of Johnson & Johnson's Worldwide Headquarters under the heading "Unifying Our Decentralized Organization" (Kells deposition exhibit 5, p. 1; discussed in Kells deposition, pp. 98-106). It stated: "One of the keys to the success of our organization structure is the centralization of certain functions at the headquarters level. Groups at our Worldwide Headquarters in New Brunswick, New Jersey, deal with issues that are common to many or all of our affiliates and operating units" (Kells deposition exhibit 5, p. 1). Under the heading "Human Resources," the website reported that "[a]reas of headquarters' focus include organization-wide strategic human resource planning and development, employee compensation, benefits and health offerings, and training and development" (Kells deposition exhibit 5, p. 1). Mr. Kells indicated that the language quoted applied to the "corporate campus" (Kells deposition, p. 100), but his interpretation seems at odds with the website's reference to

"many or all of our affiliates and operating units." The website discussed in Mr. Kells' deposition was accessible on 12 April 2006 at jnj.com/careers/worldwide.html. The website's emphasis on centralization is also consistent with Mr. Larsen's letter to shareholders appearing in Johnson & Johnson's 1994 Annual Report. His letter stated:

> In keeping with our objective of improving our competitiveness, we have made steady gains in productivity in recent years. We have encouraged our companies to share services, such as finance, purchasing and human resources administration, while strengthening the vital strategic capabilities - such as research and development, marketing and sales - that make them highly competitive in the marketplace. This process is continuing to yield important savings (J&J EXP 0039675).

Michael Carey, Vice President for Human Resources, was asked to describe the process by which corporate-level policies were approved at Johnson & Johnson since 1993. He reported:

> Policy changes of a certain nature would be certainly approved by at least one or several members of the Executive Committee. Russ Deyo, our Chief Financial Officer if it had a policy that had an impact. They both sat on the Pension Committee and many policies related to Compensation and Benefits were brought before the Pension Committee. Many policies certainly are brought before the Management Compensation Committee of the Executive Committee which numbered four people on the Management Compensation Committee. And more than my having the authority, we, as in the Human Resources community, had the responsibility to constantly assess policies or at least our business practices and ensure that they're serving the business well (Carey deposition, p. 204 & 205).

Mr. Carey explained that the members of the Management Compensation Committee during the 1990's included the "Chairman," "Vice-Chairman," "head of Administration," and "Chief Financial Officer" (Carey deposition, p. 205). When asked if he recalled policy changes from 1993 to mid-2003 that were approved by the Management Compensation Committee, he replied in part:

> what is included in the policy manual in some cases - in the area of Compensation for example, might be a broad statement of how we look to remain a competitively paying company and using certain compensation elements wisely to motivate people and to have them behave in a certain way to reinforce our values and reinforce attainment of business objectives. What we actually - and that may be in a policy manual written in a way that doesn't fully describe, for example, moving from a job level system, in a policy that might talk about promotions from one job level to another job level, to a market pricing system where the marketplace dictates

> the opportunity for a job of a certain title at a certain scope and a certain type of comp environment size company.
>
> So the Executive Committee would more deal with the description of moving from one approach to valuing jobs to another approach. It wouldn't necessarily deal with the actual writing of how it's described in a policy manual. They would – that would be delegated to Russ Deyo and Bob Darretta, for example, versus the entire Executive Committee (Carey deposition, pp. 206 & 207).

Mr. Carey indicated that the Executive Committee would approve of a policy change in concept (Carey deposition, p. 207), and that such approved changes included compensation policies, the number of vacation days, the vacation schedule, the number of holidays granted to employees, Succession Planning, the Common Ground alternative dispute resolution program, downsizing, and other policies (Carey deposition, pp. 207-209). He differentiated between policy and "encouragement" with respect to college recruiting (Carey deposition, p. 209) and utilizing diverse slates of candidates ("not a requirement but it's an encouragement") (Carey deposition, p. 212). Mr. Carey also cited policy changes such as "the introduction of company based bonus plans" that were "based on the attainment of business objectives" (Carey deposition, p. 210), an indication that some company to company differences observed by Dr. Outtz may have resulted from expressed Johnson & Johnson policy rather than company "autonomy." I shall address the specifics of some Johnson & Johnson compensation and promotion policies and how they reportedly affect the individual operating companies below, but it is clear that the picture painted by Dr. Outtz of Johnson & Johnson's organizational structure and operating practices in Chapters 1 & 2 of his report is over-simplified and incomplete, at best. Company officials reported high-level involvement in formulating and approving policies, and the distinction Mr. Carey twice drew between "encouragement" and "requirement" seems superfluous if policies were merely guidelines from which the operating companies were free to deviate.

CHAPTER 3 – PERFORMANCE MANAGEMENT

Chapter 3 of Dr. Outtz' report began with a statement, supported by references to and excerpts from depositions and declarations, asserting the "key role" of performance appraisal in

"compensation and promotion decisions" at Johnson & Johnson's operating companies (Outtz report, pp. 28). He noted that "the philosophy of each subsidiary is to link pay and advancement to performance" without discussing whether the common philosophy might stem from a common policy (Outtz report, p. 29). Dr. Outtz then presented his rationale for comparing performance appraisal systems "to determine whether the practices of the subsidiaries are the same or different with regard to a key element related to compensation and promotion" and to "determine whether the appraisals from the different subsidiaries are consistent with professional standards with regard to objectivity (i.e. not excessively subjective)" (Outtz report, p. 30).

Ericksen Sample

Dr. Outtz reported that Dr. Eugene Ericksen drew a sample of employees working in EEO categories 10 through 50 at "corporate Headquarters and the Johnson & Johnson companies in existence at the start of 2001" (Outtz report, p. 30). Dr. Outtz stated that he "examined the 287 performance appraisals randomly sampled by Dr. Ericksen that constitute the representative sample drawn by Dr. Ericksen" (Outtz report, pp. 30 & 31). In fact, Dr. Ericksen planned to draw a stratified (not random) sample described on pages 5 through 10 of his report that included 300 employee files, because that number "would provide adequate representation of evaluation processes at Johnson & Johnson" (Ericksen report, p. 7). Dr. Erickson reported that Johnson & Johnson personnel "searched for the 2001 performance evaluations of each of the 300 original selections. They were able to locate 220 of them" (Ericksen report, p. 10). Dr. Ericksen found that six performance evaluation files were missing due to position seniority, divestment by Johnson & Johnson, or the employees' newness in their position, leading him to substitute for these 6 employees. He then attempted to find 74 alternate personnel files to replace the missing files. He ultimately located 61 additional cases. Why is an exhaustive description of the sampling worth repeating in these pages? The 74 missing performance evaluation files represent 24.7% of the original sample. Johnson & Johnson failed to uncover records of its companies' performance appraisals for approximately one in four of the employees sampled, an important point related to Dr. Outtz' criteria for objectivity discussed below.

Differences in Appraisal Systems

Dr. Outtz stated that he found "systematic differences produced by the following six factors:" 1) job complexity, 2) source of appraisal information, 3) weighting of appraisal components, 4) team versus individual performance, 5) acquisition status of a company, and 6) sales versus non-sales positions (Outtz report, pp. 31-33). Consistent with his approach to examining organizational structure, Dr. Outtz omitted any discussion of similarities that affiliate companies may share including the most obvious, the common rating scale promulgated by Worldwide Compensation Resources (Obler deposition, pp. 162- 166; Carey deposition, pp. 287 & 288). In the following sections, I shall address each of his six factors.

Job Complexity. I have little doubt that varying job complexity within an organization can produce differences in the specific rating elements on which employees are evaluated, if those elements accurately reflect the work performed by those employees. It is less clear that job complexity represents a significant contributor to between-company differences. Dr. Outtz' examples do not present a compelling case for such an assumption. He cited the work of employees "providing statistical support for published articles that appear in peer-reviewed journals," "oversight of clinical trials of experimental medications," and "implementing and monitoring compensation policies, procedures and practices" (Outtz report, pp. 31 & 32). Presumably, the examples were offered to illustrate differing levels of complexity across the organizations represented, but I cannot confirm or disconfirm Dr. Outtz' assumption of varying job complexity based on the information he provided. Moreover, the Associate Human Resources Analyst example on page 31 of his report appears to represent a job that one would expect to encounter in virtually any of the companies Dr. Outtz studied, so its inclusion does not support any conclusion regarding between-company differences in complexity.

Source of Appraisal Information. Dr. Outtz stated: "performance appraisal systems at the Subsidiaries differed in the number of sources from which appraisal information was obtained" (Outtz report, p. 32). He noted that "some" companies relied on supervisor appraisals with second-level supervisory review, while in "other Subsidiaries, information regarding an employee's performance was obtained from a number of sources in addition to the immediate supervisor"

(Outtz report, p. 32). Dr. Outtz found "numerous instances" in which employees provided either self-ratings or input on their accomplishments. His language raises questions rather than providing answers. How many is "some?" What percentage of companies utilized multiple sources of input? How many is "numerous?" Does "numerous" denote the norm across J & J companies? Dr. Outtz observed that employee input is more likely to be sought for more complex jobs. Did his "numerous instances" reflect practices across companies for more complex jobs? The paucity of information provided in Dr. Outtz' discussion leaves the reader unable to fathom which companies engaged in what practices or if a norm exists from which a small number of companies may have deviated for certain jobs within their organizations.

Weighting of Appraisal Components. As noted above, Dr. Outtz offered a single example of weighting appraisal components, Ethicon Endo-Surgery, and observed that "many operating companies" did not weight job components (Outtz report, p. 32). Conversely, Dr. Outtz opined that "[s]ome subsidiaries structured their appraisal system such that employee goals and objectives were given numeric weights" (Outtz report, p. 34). Based upon Dr. Outtz' descriptions, one might conclude that Johnson & Johnson companies seldom weight components, but the reader cannot know the number of companies utilizing weighting based upon the text Dr. Outtz produced. Again, Dr. Outtz' lack of specificity precludes the conclusion that weighting constitutes an important factor that creates variability in companies' performance appraisal processes. However, he leaves the impression that weighting job components is the exception rather than the rule at Johnson & Johnson.

Team Versus Individual Performance. Dr. Outtz' fourth factor was team versus individual performance, and his text indicated that appraisals from an unspecified "number of Subsidiaries indicate that the key component of the employee's job was leading a team" (Outtz report, p. 32). He offered an example from Centocor of a Senior Area Business Manager who was rated on the performance of his sales team compared to other sales teams. Once again, Dr. Outtz has identified a factor that seems more likely to differ within companies than between companies, as management personnel, regardless of organization, are more likely to be held accountable for their teams' performances than non-management employees. Indeed, Dr. Outtz appeared to echo this

belief, as he stated "[o]bviously the degree to which team accomplishments play a role in job performance depends upon the level of the position and the nature of the work performed" (Outtz, p. 32). I agree with Dr. Outtz on this point, but I cannot perceive why he believes that team responsibility is a factor that differentiates **between** organizations. It is, rather, a variable more likely to differentiate managers from support staff in many, if not all, of the affiliate companies.

Dr. Outtz also described two Principal Scientists at Johnson & Johnson Pharmaceutical Research and Development, one with responsibility for leading a team and another without such responsibility, as examples of his observation that "[e]ven within the same Subsidiary, two employees with the same job title or job function may have different responsibilities with regard to team leadership" (Outtz report, p. 32). Again, I agree that such differences can occur, but fail to understand how this fact can be construed as evidence that one company differed from others with respect to how it appraised its employees. Moreover, the observed difference could have resulted from an error in classifying the Principal Scientists' jobs, as the small sample Dr. Outtz inspected did not allow for a comparison across many employees with the same job title for the company under scrutiny. For all we know, 98% of similarly classified employees may, or may not, have responsibility for a team.

Acquisition Status of a Company. I agree with Dr. Outtz' observation that the acquisition status of a company played a role in determining the degree to which its performance management system mirrored systems in use by other Johnson & Johnson companies. Michael Carey, when testifying regarding a change in the Succession Planning and Development, explained that the change applied to "all companies who were participating in Succession Planning and the exclusion being a newly acquired company that would be in transition or the early stage of their joining Johnson & Johnson" (Carey deposition, p. 244). Dr. Outtz noted that Centocor was acquired in early 2000, and that the appraisal of a Human Resource Coordinator reflected post-acquisition improvements in HR processes at the company. When asked whether a human resources professional was endeavoring to bring Centacor's policies into alignment with Johnson & Johnson guidelines, Dr. Outtz stated: "That is my interpretation" (Outtz deposition, p. 312). He

observed that prior practices "will at some point have to reflect Johnson & Johnson's business philosophy as exemplified for example in the Johnson & Johnson Credo" (Outtz report, p. 33). He went on to state:

> This undoubtedly takes time. Therefore it may be inappropriate to consider the human resources practices of a subsidiary to be those of "Johnson & Johnson" until the company has had sufficient time to examine those practices and consult with the new Subsidiary to change them if necessary (p. 33).

The examination of an acquired company's human resources practices by Johnson & Johnson, and resulting changes to those practices "if necessary" implies a Johnson & Johnson corporate standard to which acquired companies must adhere, as does Mr. Carey's reference to a "transition." One might well ask whether the improvements in HR processes at Centocor represented movement toward a Johnson & Johnson norm. Dr. Outtz essentially presented a rationale for excluding newly acquired companies from any analysis of Johnson & Johnson's human resources practices. However, he chose not to exclude them. Rather, he chose to list "acquisition status" as a factor that "produced" differences between operating companies.

Sales Versus Non-sales Positions. It seems reasonable to accept Dr. Outtz' observations that "appraisal for sales positions differed from those for non-sales positions in that the rating criteria were more formulaic," and that "specific formulas used to evaluate performance were developed by the sales management of each Subsidiary, and differed by Subsidiary" (Outtz report, p. 33). Sales personnel are often paid on commission, based upon sale revenues or market share. Different products, current market shares, forecasted growth, and other environmental factors seem likely to produce different rating criteria for different product lines.

Dr. Outtz' Findings on Appraisals. Dr. Outtz concluded that the "six factors described above resulted in differences in the manner in which employee performance was evaluated at each of the domestic subsidiaries in 2001" and that "[e]ach of these factors in and of itself provides, in my opinion, sufficient basis for concluding that the performance appraisal practices at the Johnson & Johnson subsidiaries, as of 2001, were significantly different" (Outtz report, pp. 33 & 34). Again, I cannot accept Dr. Outtz' conclusions. One must ask what he means by "significantly different."

Ordinarily, the use of the term "significantly different" is applied when some statistical test uncovers a difference unlikely to have occurred by chance alone. Dr. Outtz did not report conducting any statistical test. Moreover, taken literally, Dr. Outtz' statements demand that the single factor "acquisition status" (presumably "newly-acquired") of any one company would require a conclusion that "each of the domestic subsidiaries" was significantly different than any other.

Indeed, Dr. Outtz provided no indication of how dissimilar two companies' appraisal processes must be in order for him to classify them as different, or what criteria he applied to his examination of appraisals. Would 90% overlap in appraisal processes be sufficient to classify two companies as essentially equivalent? Is it possible that Dr. Outtz' standard is that **any** difference, no matter how trivial, is a significant difference? His statement that any one factor "in and of itself" is sufficient to conclude that differences exist gives credence to such an inference regarding his standard, as does his statement that acquisition status alone would be sufficient to conclude that performance appraisal processes differed between companies (Outtz report, p. 34). Does this mean that the acquisition of any one company in a given year demands a finding that no two Johnson & Johnson companies are alike? Such a position is difficult to accept. Dr. Outtz' has not established any standard defining differences in appraisals from his report, and, therefore, I cannot accept his findings.

Dr. Outtz stated: "it is my opinion that the human resource policies and practices of the Johnson & Johnson Corporate Headquarters and the Subsidiaries regarding performance appraisal were significantly different from one company to next and reflected the decentralized, autonomous nature of Johnson & Johnson" (Outtz report, p. 35). He went on to state:

> What this means is that employees at each Subsidiary in 2001 were not similarly situated with regard to the assessment of their job performance and consequently were not similarly affected by human resources decisions such as compensation and promotion that were based on appraisals of their job performance. At a minimum, the level of analysis for assessing Johnson & Johnson's human resources policies and practices as of 2001 must begin at each Subsidiary and likely must be carried out at the individual level (Outtz report, p. 35).

I am troubled by Dr. Outtz' inferential leap from a conclusion (albeit problematic) that appraisal systems within each company differed from all other companies to the conclusion that employees "were not similarly affected" by compensation or promotion decisions, without any foundation regarding the compensation and promotions practices within the companies. Both Ms. Obler and Mr. Carey testified that the affiliate companies reported performance appraisal outcomes for compensation on a common scale distributed at the corporate level (Obler deposition, pp. 162-166; Carey deposition, pp. 287 & 288).

Even more disturbing is Dr. Outtz' assertion that the "likely" level of analysis appropriate for assessing Johnson & Johnson's human resources practices is the "individual level" (Outtz report, p. 35). Such a position harkens back to my earlier observation that Dr. Outtz may view **any** difference from one human resources decision to another as a reason to treat them as essentially different, a concern underscored by Dr. Outtz' statement that "[p]romotions were specific to the circumstances present at a particular company and the individual employee or employees involved" when describing promotions (Outtz report, p. 57). Dr. Outtz labeled such individual-by-individual decision-making "haphazard" and "inconsistent" in another case (Outtz deposition exhibit 9, pp. 64-67).

Excessive Subjectivity

Dr. Outtz devotes some five pages to an assessment of excessive subjectivity in the various operating companies. He cites two primary sources (Grote, 1996; Malos, 1998) for criteria regarding objectivity, enumerating three criteria: 1) the degree to which the appraisal process is based upon a job analysis, 2) the degree to which the appraisal is based on behavior rather than traits, and 3) the degree to which the appraisal is related to specific functions. Dr. Outtz added a fourth criterion: the degree to which sufficient detail is provided to document the basis for the performance rating. These four criteria differ from Dr. Outtz' previously articulated opinion on the topic of objectivity, when he stated:

> Reasonably objective would be assuming that you have done a job analysis, you would have the appraiser evaluate on the basis of dimensions that have been demonstrated to be important to the job, that a person uses a particular, uses behavioral anchors to make the rating, the person is properly trained and I think

> that would basically summarize a reasonably objective process. (Outtz deposition, pp. 249 & 250; quoting Outtz deposition exhibit 9).

Defining "Objectivity." In support of his current criteria, Dr. Outtz cites Malos' (1998) list of appraisal criteria leading to legally sound performance appraisal systems thusly:

Legally sound performance appraisal:
- Should be objective rather than subjective
- Should be job-related or based on job analysis
- Should be based on behaviors rather than traits
- Should be within the control of the ratee
- Should be related to specific functions, not global assessments
- Should be communicated to the employee

(Malos, In Smither (1998) P. 80) (Outtz report, p. 36)

Dr. Outtz also included Grote's (1996) description of Feild and Holley's (1982) list of factors common to performance appraisal systems successfully defended in court cases:

- Appraisers were given specific written instructions on how to complete the appraisals.
- Job analysis was used in developing the content of the appraisal.
- Appraisals focused on observable behaviors rather than traits.
- Performance ratings were reviewed in advance by upper management.
- Appraisers were trained in how to appraise performance and in how to conduct the appraisal interview.
- The results were discussed with the employee who had been appraised.

In my opinion, Dr. Outtz should have included additional advice from Malos, who stated that performance appraisal procedures:

- Should be standardized and uniform for all employees within a job group
- Should be formally communicated to employees
- Should provide notice of performance deficiencies and of opportunities to correct them
- Should provide access for employees to review appraisal results
- Should provide formal appeal mechanisms that allow for employee input
- Should use multiple, diverse, and unbiased raters
- Should provide written instructions and training for raters
- Should require thorough and consistent documentation across raters that includes specific examples of performance based on personal knowledge
- Should establish a system to detect potentially discriminatory effects or abuse of the system overall

(Malos; In J. Smither [Ed.], 1998; p. 83)

I would feel more comfortable in accepting his representation of what constitutes "accepted professional standards" if Dr. Outtz had included the additional recommendations on performance appraisal procedure, although I believe a more apt description of Field and Holley's (1982) and Malos' (1998) recommendations would be "accepted professional standards for legal defensibility in appraisal systems," as Malos summarized the extant research in that context. Objectivity is an important characteristic in performance appraisal systems, but it is evident from a cursory reading of both Feild and Holley and Malos that procedural characteristics beyond objectivity are crucial to ensuring the legal defensibility of performance appraisals.

Dr. Outtz noted that all four of the characteristics he selected from the above-referenced lists "can be applied by examining completed performance appraisals," and that if such an examination "resulted in a finding that the four criteria above were met, then in my professional opinion the performance appraisal system met accepted professional standards for objectivity" (Outtz report, p. 37). I take exception to Dr. Outtz' statement. I am aware of no "accepted professional standards for objectivity" in the professional literature, and Dr. Outtz himself provided no reference to any professional literature outlining a standard for "objectivity." Instead, Dr. Outtz redacted recommendations in the professional literature on legal defensibility, incorporating four of Malos' 15 recommendations and three of Feild and Holley's five research findings, to create his own standard for objectivity. I do not dispute that objectivity is an important characteristic in performance evaluation, but adopting Dr. Outtz' limited number of substantive recommendations while excluding all of the procedural recommendations of Malos (1998) would not ensure an effective and equitable performance appraisal system, in my opinion.

Job Analysis. Dr. Outtz chose to lower the bar on his four self-selected criteria by asserting that Grote's (1996) guidelines on conducting job analysis in the context of performance appraisal constitute some sort of professional standard. He provided a lengthy excerpt from Grote explaining that:

> When an individual and manager discuss the important goals and objectives that the individual will address during the course of the year and against which his performance will be appraised, that is a job analysis (Outtz report, p. 38), and

> When a supervisor and subordinate together determine what results the subordinate should concentrate on producing over the upcoming year and they also discuss how the subordinate will go about generating these results - the behaviors and competences that must be demonstrated - a legitimate job analysis has been conducted (Outtz report, p. 39).

Dr. Outtz himself has questioned the adequacy of such an approach. Two exchanges from a previous deposition in which Dr. Outtz discussed the procedures for ensuring valid performance appraisal systems are illustrative:

> Q. What kind of evidence would you look for if you were looking for validity evidence?
>
> A. I would look for first job analysis, proper job analysis that the performance appraisal system is based on a proper job analysis, proper study of the job for which the appraisal system is to be used, and I'm describing a content validity approach which is the most typical approach I found in industry.
>
> Once the job analysis information has been identified, I would look for evidence that the performance appraisal system emanates from that job analysis information. The job analysis information would indicate what parts of the job are covered by the performance appraisal system, the relative importance of those parts of the job, and how the performance appraisal system is geared to measure those parts of the job, and what kind of checks and balances are in place to ensure that, in fact, takes place (Outtz deposition exhibit 9, p. 15).
>
> Q. If the supervisor and employee sit down together and agree on the goals that that particular employee is to achieve that year, is that an indication that a performance appraisal system, at least in that aspect, is reasonably objective?
>
> A. Not necessarily, no.
>
> Q. Why not?
>
> A. Because they can agree on what is to be looked at, but how is it going to be looked at and what will be evidence of performance and how will that evidence be collected and recorded and who is going to collect it and record it – that determines whether it is objective. Simply sitting down, from what you just stated, an employee and supervisor deciding what is going to be assessed doesn't make it objective (Outtz deposition exhibit 9, pp. 31 & 32).

The "checks and balances" noted by Dr. Outtz above are strikingly similar to Malos' (1998) recommendation that performance appraisal systems "should establish a system to detect

potentially discriminatory effects or abuse of the system overall." A built in job analysis also seems likely to run afoul of Malos' admonitions that appraisal systems "should be standardized and uniform for all employees within a job group" and "should use multiple, diverse, and unbiased raters."

Grote's advice can be also contrasted with what the *Principles* say about the analysis of work:

> There are two major purposes for conducting an analysis of work. One purpose is to develop selection procedures. Part of this process is an analysis of work that identifies worker requirements including a description of the general level of ability, skill, knowledge, or other characteristics needed. Such an analysis of work would determine the characteristics workers need to be successful in a specific work setting, or the degree to which the work requirements are similar to requirements for work performed elsewhere. The other purpose is to develop or identify criterion measures by assembling the information needed to understand the work performed, the setting in which the work is accomplished, and the organization's goals.
>
> There is no single approach that is the preferred method for the analysis of work. The analyses used in a specific study of work are a function of the nature of work, current information about the work, the organizational setting, the workers themselves, and the purpose of the study. Understanding the organization's requirements or objectives is important when selecting an appropriate method for conducting an analysis of work. The choice of method and the identification of the information to be gathered by that method should include the relevant research literature (pp. 10 & 11).

Dr. Outtz stated that he knew of no peer-reviewed literature supporting Grote's position beyond what appeared in Grote's chapter (Outtz deposition, p. 138). Mr. Grote himself cited no article from the research literature in support of his belief that a "built in" job analysis is acceptable. Moreover, the presence of adverse impact further calls into question the adequacy of a job analysis built into the appraisal system, as Dr. Outtz referred to Johnson & Johnson's practice (Outtz report, p. 39). Recall that Werner and Bolino (1997) reported that the *Uniform Guidelines'* provisions, in concurrence with the official position of Division 14 of the American Psychological Association (also known as the Society for Industrial-Organizational Psychology), require employers to validate all employment criteria, whether subjective or objective in nature, where

adverse impact has been found. The *Uniform Guidelines'* technical standards for job analysis are clearly articulated:

> There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job (29CFR1607.14C[2]).

The *Uniform Guidelines* are rather specific with respect to the documentation required of such job analyses:

> A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s) (29CFR1607.15C[3]).

I saw no evidence that Johnson & Johnson's "built in" job analysis produced the information demanded by the *Uniform Guidelines'* requirements. It also falls short of Dr. Outtz' own stated preference. When asked about the procedure by which one could determine that an appraisal system was valid in the Texaco case, he replied:

> Let me try this again. I said part of it was job analysis. I certainly didn't say that was the only thing that's done. So I'll go through the steps again. I'm looking for evidence of a job analysis that has been done. What sample was used for the job analysis, who conducted the job analysis, what information was collected and in what form. I'm looking to find out whether the job analysis produced the components of each job, relative importance of the components of each job, and independent verification that the job analysis information is, indeed, accurate.

> Once this is done, I look at – I would look at and do look at the performance appraisal process itself to see whether because the most common approach is the content validity approach, whether content validity exists, whether the performance appraisal assesses the content domain generated by the job analysis and whether the performance measure is itself reliable, is itself reasonably objective. All of those things go into determining whether there is sufficient validity evidence to draw reasonable inferences about performance. (Outtz deposition exhibit 9, pp. 29 & 30).

Dr. Outtz made no mention in his report of "independent verification that the job analysis information is, indeed, accurate," and reported no steps taken to ensure the accuracy of the built in job analyses at Johnson & Johnson companies. Yet, Dr. Outtz translated Grote's singular suggestion into a standard for "best practices" (Outtz report, p. 39).

Behaviors v. Traits. The second criterion Dr. Outtz "used to evaluate the companies' performance appraisal practices was the degree to which completed performance appraisals were based upon actual behaviors rather than traits" (Outtz report, p. 39). I must quibble with Dr. Outtz over his use of the term "actual." We may assume that the behaviors appearing on the forms represent behaviors agreed upon by supervisors and subordinates, based upon training materials provided to raters and employees. However, lacking independent job analysis information, one cannot know to what degree the behaviors appearing on Johnson & Johnson appraisal forms represent the actual behaviors being performed on the job. A more fundamental problem is Dr. Outtz' shift in defining his second criterion. He quotes Malos (1998) as stating that legally sound performance appraisals "should be based upon behaviors rather than traits" (Outtz report, p. 36) and Grote's (1996) recitation of Feild and Holley's (1982) findings advocating appraisals "focused on observable behaviors rather than traits" (Outtz report, p. 37), but later translated these admonitions into the statement: "However, an excessively subjective performance appraisal can result when the appraisal process **only** calls for a supervisor to evaluate an employee on traits, without defining behaviors that determine the rating" (Outtz report, pp. 39 & 40; emphasis added).

Johnson & Johnson's "Standards of Leadership" that were incorporated in part or all by many affiliate companies in their appraisal systems are not specific behaviors, and include such characteristics as "forges a vision of the future," "promotes innovation and continuous learning," and "challenges and motivates people to reach their highest potential" (Examples drawn from the "Competencies" section of the Cordis Performance Management & Review Guide; Ward deposition exhibit 17). Fourteen of the 16 affiliate-level human resources professionals who were deposed mentioned the Standards of Leadership in the context of performance, potential, or rewards. Bernardin, Hagen, Kane, and Villanova (1998) observed:

> Increasingly, we note a trend in evaluating the extent to which ratees possess certain "competencies." This trend concerns us because these so-called competencies look a whole lot like the old traits that have been condemned in a plethora of articles on appraisal. As an illustration, the managerial competences used by the American Management Association include self-confidence, positive regard, self-control, spontaneity, stamina, and adaptability (Parry, 1996). Competencies such as these can be a useful component in a program of personal development or perhaps in defining elements of a job function. But an assessment of my competencies is not a measure of my performance (Bernardin, et al., p. 8).

Dr. Outtz stated: "the performance appraisals of Johnson & Johnson's Corporate Headquarters and the Subsidiaries were evaluated on the degree to which actual work behaviors of the employees were used to make performance ratings" (Outtz report, p. 40). He did not indicate how they were evaluated or what criteria he used to determine whether "actual behaviors" were assessed.

Specific Functions v. Overall Performance. The third criterion listed by Dr. Outtz was "the degree to which performance ratings were related to specific job functions rather than overall performance, with specification of job functions" (Outtz report, p. 40). I agree that the rating forms used by the Johnson & Johnson companies assessed performance on specific job functions in virtually all the examples I reviewed. Dr. Outtz' fourth criterion was documentation, or "whether the appraisals contained sufficient information to support the rating" (Outtz report, p. 40). Again, Dr. Outtz did not define "sufficient," but I agree that the vast majority of the example forms I reviewed required explanations for the ratings assigned to specific goals or examples of behaviors for competencies assessed. However, the *post hoc* justification of ratings represents a lower standard for assessing appraisals than the *a priori* assignment of behavior anchors to rating

scales advocated by Dr. Outtz (Outtz deposition, pp. 249 & 250). I have additional concerns about the documentation issue that are discussed below.

Documentation. Dr. Outtz' "evaluation" led him to conclude: "the performance appraisal systems at Johnson & Johnson Headquarters and the Subsidiaries well exceeded accepted professional standards for objectivity. Specifically, 96% of the appraisals examined were:

(a) based on a job analysis,

(b) based on behaviors

(c) described specific job functions and

(d) contained sufficient detail to document the appropriateness of the appraisal" (Outtz report, p. 40).

I cannot agree with his conclusion. I do not believe that "accepted standards for objectivity" exist, for the reasons given at length above. The standards for "objectivity" are simply Dr. Outtz' redaction of guidance from the research literature on substantive issues in legal defensibility. I do not believe the "built in" job analyses he describes constitute adequate job analyses. I do not believe the competencies assessed are behaviors, although I agree that some portions of the rating components assessed by the companies were behavioral in nature, or at least called for behavioral examples to support ratings (but not the behavioral anchors advocated by Dr. Outtz). Even if I accepted Dr. Outtz' conclusion with respect to the first three criteria, and I do not, the 96% figure clearly cannot be correct when considering the documentation criterion. Recall that Dr. Ericksen reported that 74 performance evaluation files, representing 24.7% of the original sample, were missing performance appraisal documentation. The substitution of additional files does not change the fact that the "representative sample drawn by Dr. Ericksen" of Johnson & Johnson's performance appraisal files leads to the conclusion that almost 25% of performance appraisals did not contain "sufficient detail to document the appropriateness of the appraisal." The 96% figure is not supported by Dr. Outtz' own standards.

Missing performance appraisals appears to have been a pervasive problem at Johnson & Johnson's companies. When Dr. Wise included performance ratings (albeit erroneously) in his analyses of promotions, approximately 20% of employees promoted and a higher percentage of

employees not promoted were not included due to missing performance ratings. In Dr. Wise's compensation analyses that included performance ratings (again, erroneously), he removed from consideration between 25% and 50% of employees (depending on year) due to missing performance ratings (Madden rebuttal report, p. 10).

Further, if one compares the evaluation outlined in Dr. Outtz' report to the professional literature on legal defensibility, one finds no mention of Malos' (1998) procedural recommendations that performance appraisal systems should: "be standardized and uniform for all employees within a job group;" "provide formal appeal mechanisms that allow for employee input;" "use multiple, diverse, and unbiased raters;" "require thorough and consistent documentation across raters that includes specific examples of performance based on personal knowledge;" or "establish a system to detect potentially discriminatory effects or abuse of the system overall," to list but a few. Neither does Dr. Outtz mention behavioral anchors, a key ingredient in his earlier list of characteristics defining "reasonably objective." Moreover, given that racial differences have been found in compensation and promotions at Johnson & Johnson, I believe the accepted standards for job analysis studies intended to serve as a proper foundation for performance appraisal systems are sections 14C and 15C of the *Uniform Guidelines*, because Dr. Outtz identified performance ratings as a key element in determining merit increases and promotions. The "built in" job analysis advocated by Mr. Grote and Dr. Outtz in this case falls well short of the *Uniform Guidelines'* requirements, the preferred statement of best practices when adverse impact is detected, in my opinion.

Calibration. Finally, even if I accepted Dr. Outtz' premise that affiliates "operationalized" the "attributes" represented by the Standards of Leadership (Outtz deposition, pp. 346-348) and the five- and nine-point performance scales used to communicate performance to Johnson & Johnson's corporate human resources offices (Outtz deposition, pp. 363-365), there is evidence that the final representations of performance, or performance codes, were sometimes products of group discussions by managers. Fifteen of the 16 affiliate-level human resources professionals deposed reported calibrating performance ratings. Only one of those deponents, Milton Brougham of Codman, reported comparisons of employees' performances against their specific

objectives (Brougham deposition, p. 143). Ms. Walker-Manella, when describing calibration meetings at McNeil, stated that finance and marketing "did have calibration meetings where they could talk about the different ratings, people could have input and they could get calibrated" (Walker-Manella deposition, p. 201), while other divisions attempted to ensure consistency across managers by having an "HR generalist" "meet with the head of the division and they would make sure that they were consistent with, say, their interpretation of how someone who meets requirements, what kind of direction looked like, to make sure it was consistent from department manager to department manager" (Walker-Manella deposition, p. 202). Ms. Walker-Manella indicated that supervisors at McNeil sometimes summarized their employees' performance ratings on a one-page card that she "would call the highlights taken right from the performance assessment," and utilized that card during calibration meetings (Walker-Manella deposition, pp. 202-205).

Mr. Ward indicated that Ethicon Endo-Surgery considered "what monetary increase that performance data is driving," when calibrating ratings (Ward deposition, p. 118). John Reardon of Janssen described the calibration process thusly:

> Prior to delivery of the metrics, on the individual's performance review, meetings would take place among managers with direct reports in an effort to ensure that everyone is being evaluated fairly. In other words, you are going to have some people do appraisals differently, some are going to be tougher and some are going to grade more leniently and the idea is, as these are discussed amongst management, peer group conversation is taking place to make sure the people are indeed being evaluated in a fairly equitable way (Reardon deposition, p. 158).

Joseph Michalcewicz of ALZA described a similar calibration process (Michalcewicz deposition, p. 233 & 234). He also described the documentation of the process at ALZA:

> Other than putting stuff up on the board, it's largely oral. As a matter of fact, you would be disinclined to have paper trails migrating around the organization because you're asking people to be incredibly clear and people get incredibly passionate inside these sessions. I think my people are underrated, grossly underrated. Yeah, well, we think the HR Department doesn't deliver squat. That would be by way of example (Michalcewicz deposition, p. 234).

Whatever specificity was achieved through "built in" job analyses and "operationalized" "attributes" could be diluted by performance cards and group discussions that did not "require thorough and consistent documentation across raters that includes specific examples of performance based on personal knowledge," as recommended by Malos (1998). Moreover, calibration sessions generally occurred prior to final ratings being assigned on the five- or nine-point scale promulgated by Worldwide Compensation Resources (See, for example, Brougham deposition, p. 143; Collins deposition, p. 121; Reardon deposition, p. 158; and Shapiro deposition, p. 98), so the "final" ratings transmitted to Worldwide Compensation Resources reflect the effects of the discussions outlined above.

The lack of documentation and specificity is especially troubling because a recent study of performance appraisals by Stauffer and Buckley (2005) found that "racial bias may indeed exist and is significant, both in statistical and practical terms" (Stauffer & Buckley, p. 586). Stauffer and Buckley reexamined Sackett and DuBois' (1991) repeated-measures analysis of performance scores of individuals rated by both a Black supervisor and a White supervisor in two large-scale field studies. Stauffer and Buckley noted:

> In these studies, the researchers used repeated-measures analyses to control for true performance differences that used the same workers (ratees) for both the Black supervisor and the White supervisor treatment. The results obtained from repeated-measures analyses differed substantially from those of the meta-analysis. They [Sackett & Dubois] found that, on average, both Black and White supervisors gave Whites higher ratings than Blacks. This finding supports previous assertions that a true difference exists in mean group job performance between Blacks and Whites (Stauffer & Buckley, 2005; p. 587).

However, Stauffer and Buckley pointed out that:

> Although this finding is important, it does not address the larger question of whether racial bias exists and is not sufficient to dismiss the concerns of the NRC [National Research Council]. If there were a true mean performance difference between Blacks and Whites, and there existed no racial bias in the performance ratings, then Black and White supervisors should not only agree on the direction of the difference in mean job performance but they should also agree on the magnitude of the difference. A reexamination of the large-scale field study data reported in Sackett and DuBois's (1991) study shows that this is not the case (Stauffer & Buckley, p. 587).

Stauffer and Buckley reported that, given an identical sample of African-American and White employees, White supervisors gave significantly higher average ratings to White workers relative to Black workers than did Black supervisors, and concluded: "It would be difficult to dispute that systematic bias exists in this sample of supervisory ratings of job performance" (Stauffer & Buckley, p. 589). They went on to state: "The practical implications of the results of this study are unmistakable: If you are a White ratee, then it does not matter whether your supervisor is Black or White. If you are a Black ratee, then it is important whether your supervisor is Black or White" (Stauffer & Buckley, p. 589). In the specific context of Johnson & Johnson, Drs. Madden and Vekker reported that Dr. Wise found African Americans received lower performance ratings, and that, in keeping with Stauffer and Buckley's finding, African-American raters produced similar scores for African-American and White ratees while White raters "disadvantaged African Americans" (Madden rebuttal report, p. 6).

Another recent study by McKay and McDaniel (In press) also found that the mean racial difference in performance favors Whites. They examined several moderator variables in an attempt to explore their influence on the size of racial differences. McKay and McDaniel included criterion type (e.g., productivity, job knowledge, task performance), cognitive loading of criteria (extent criterion measure is correlated with cognitive ability), data source (published v. unpublished research), measurement level (single item v. multi-item scales), and measurement method (objective v. subjective). It is important to note that McKay and McDaniel did not examine the race of rater-race of ratee interaction studied by Stauffer and Buckley, and, in fact, listed "rating bias" among several potential causes of the observed Black-White differences in job performance in their largely speculative concluding discussion. McKay and McDaniel found that racial differences were generally larger for subjective criteria than objective criteria. At Johnson & Johnson, Dr. Wise found that, among African-American and White employees with the same sales performance (a more objective indicator of performance), African Americans received lower performance ratings than Whites (Madden rebuttal report, p. 6). Milton Brougham described how such differences could affect African-American sales representatives working at Johnson & Johnson affiliates:

Q. Do sales reps get performance ratings?

A. Yes they do.

Q. What portion of their – what facets of their compensation package are keyed to performance, as measured by the performance rating?

A. As measured by the performance rating, their merit increase would be connected to that. I would say that's the most purely connected piece (Brougham deposition, p. 127).

These two recent studies highlight the potential problems with bias in performance appraisal systems, and underscore the importance of the procedural safeguards recommended by Malos (1998) that were ignored by Dr. Outtz in conducting his examination of appraisal practices. The articles, taken together with the findings of racial differences in appraisal ratings at Johnson & Johnson cited above, demonstrate the need to conduct *Uniform Guidelines*-compliant validation studies of appraisal processes at Johnson & Johnson's companies. Mr. Carey reported that no such studies were undertaken at Johnson & Johnson (Carey deposition, pp. 611-613).

CHAPTER 4 – JOHNSON & JOHNSON HUMAN RESOURCES POLICIES AND PRACTICES

Dr. Outtz "examined the policies, practices and procedures of Johnson & Johnson Corporate Headquarters and the Subsidiaries in existence in 2001" and "read the declarations of executives from each Subsidiary," on which he based "opinions regarding the differences in policies, practices and procedures of the Subsidiaries specifically with regard to compensation, performance appraisal, and promotion" (Outtz report, p. 42). He alludes to Volume II of his report, wherein he provides "a summary of each company's policies, practices and procedures" (Outtz report, p. 42). In his first volume, he presented his opinions on how said policies, procedures, and practices differed.

Johnson & Johnson's Compensation Philosophy

Prior to addressing Dr. Outtz' specific conclusions with respect to compensation, a discussion of Johnson & Johnson's compensation philosophy and the management controls designed to ensure compliance with that philosophy should prove helpful. Roberta Obler, Vice

President of Compensation Resources, testified that the compensation committee of the board of directors has, "certain oversight responsibility" for the compensation system at Johnson & Johnson (Obler deposition, p. 24). According to Ms. Obler, the compensation committee approves "all compensation actions for all members of the executive committee," and are "responsible by plan document for the option plan – the stock option plan" (Obler Deposition, p. 24). Ms. Obler stated that she served as the "liaison" to the compensation committee. Ms. Obler stated that the Management Compensation Committee is "technically a subcommittee of the compensations and benefits committee," (Obler deposition, p. 29) the current name of the compensation committee occasioned by the merger of two committees. The management compensation committee is chaired by the President of Johnson & Johnson and includes Johnson & Johnson's Chief Financial Officer and the Vice President of Human Resources (previously the Vice President of Administration) (Obler Deposition p. 30). Ms. Obler described the Management Compensation Committee's responsibilities as follows:

> The management compensation committee reviews and approves all compensation for executives above a certain level. That level varies from time to time, but represents the senior management of the corporation. They – probably the top few hundred people they review.
>
> They also are responsible for reviewing all of the – and approving all of the compensation guidelines, except for those guidelines that also must be approved by the compensation committee of the board and that is generally the stock – just the stock option guidelines.
>
> They review and approve the bonus plan assessments for each of the business units, for each of the business units at a certain – again, at a certain level. They review the major franchises above a certain sales volume level and below that, that – the review is delegated to the head of that unit, the head of that business line.
>
> They are – they review and approve changes to programs that are global or at least US wide, and they are over – they are responsible for oversight of our competitive positioning. We review with them the competitive position of Johnson & Johnson and any changes that they might request as a result of those – the competitive positioning. I'm sure there's other items I've omitted, but those are the major responsibilities I believe (Obler deposition, pp. 32 & 33).

Ms. Obler outlined Johnson & Johnson's compensation strategies/principles in a document entitled "Changing Culture: Using Compensation As a Strategic Business Tool" (Obler

deposition exhibit 5). Among the strategies/principles articulated were "competitive opportunities with peer companies." Ms. Obler summarized this strategy by saying "we believe that the opportunities for rewards should be competitive with our peer group. The actual payment of course is based on performance. And other factors" (Obler deposition pp. 41 & 42).

A second strategy/principle was "comparable opportunities across businesses." Ms. Obler explained this strategy/principle as follows:

> It's across the businesses, meaning our consumer companies, our pharmaceutical companies, medical devices and diagnostics, as well as consumer pharmaceuticals. It also means that we want to have a certain level of comparable opportunity across regions and countries in order to facilitate talent movement, as it indicates on the page.
>
> Q. This would be talent moving from one Johnson & Johnson affiliate to another one?
>
> A. Right. And this is simply defining the opportunity, not the actual amounts.
>
> Q. And how does Johnson & Johnson's compensation system really facilitate movement of talent across business units?
>
> A. What we mean there is that we want to be sure that there is a certain level of consistency in the programs so that moving someone from one organization to another organization does not - does not - the compensation does not represent a barrier to that movement. So that means that the overall programs are similar in terms of their design, such that there isn't an advantage, for example, to work in a pharmaceutical business as opposed to the medical devices business, that there isn't a higher bonus target in one versus the other.
>
> As long as the targets are similar, then it's a fairly simple matter to move someone from one business to another. If we were to have separate and distinct compensation programs by business line, it would be difficult to move people around.
>
> Q. And how is the compensation system designed to achieve consistency within countries, if we talk about the United States for a moment?
>
> A. Well, within the United States, it's actually a bit easier than outside the United States because we do have consistent programs. And that's what we're really talking about. We're talking about the opportunity for reward, and so the design of the programs is the same. We have a market - you know, we have one stock option

plan worldwide that allows for the consistency in the stock option plan. We have one - within the US, one set of targets for bonus payments, and so that provides a level of consistency. And the same thing with the market data for base salary. We have one set of benchmark market data within the United States.

And so, again, a job in California has the same market data working for Neutrogena as a job at Ethicon in Somerville, New Jersey. And so that allows for some consistency to move someone around. It doesn't mean that the people are paid the same, and there may be factors that enter into that, but it does mean that their opportunity for pay is the same (Obler deposition, pp. 42-44).

David Hind addressed how the process affected Ortho-Clinical Diagnostics (OCD):

Q. In the third sentence, under overview, which we are discussing, does OCD seek to provide comparable opportunities for salary growth within Johnson and Johnson companies?

MS. KEANE: Objection to form.

A. Do we—read that question again.

(Whereupon the reported read the pending question)

A. OCD is a member of the Johnson and Johnson Family of Companies. An advantage of being a member of the Johnson and Johnson Family of Companies is that there is a broader talent pool and a broader field of opportunity for employees than if we were just Ortho-Clinical Diagnostics, a separate little company with its shares and what have you, but we were it.

We have, we are part of a family, so being part of a family, it is important that we use data which facilitates using that opportunity, it makes it easier using that opportunity. So, for example, it would be very disappointing if my manager, having seen opportunity across the street at Biotech, and then found that her pay was so out of line that she would be unattractive, so what we try and do is work within data that was commonly used by the organization.

Q. Would that be benchmark data?

A. What is your definition of benchmark data?

Q. As the term is used in OCD's salary administration program?

MS. KEANE: Objection to form.

A. I would use the term market data.

Q. Okay. Market data, I'll yield to your definition.

A. We use market data.

Q. Is that market data that is unique to OCD?

A. That market data is the –preparation of certain generic market data is part of the, what I assume shared service provided to the organization, so the organizations of, to the Family of Companies.

Q. Provided by whom?

A. It is provided by Worldwide Compensation Resources, the people who make the data available and we use it (Hind deposition, pp. 97-99).

Mr. Hind's description is consistent with Ms. Obler's discussion on how Johnson & Johnson remains faithful to the Credo value of ensuring fair and adequate compensation. When asked how the compensation system was designed to ensure that value, she stated:

> Well, there are two parts to that, fair and adequate. Adequate in terms of competitive with the external marketplace, and that relates to annual benchmarking studies that we conduct on all elements of compensation to insure that our programs are highly competitive when compared to our peer companies.
>
> In addition, we monitor how we pay according to those policies to make sure that overall Johnson & Johnson is meeting its objectives with respect to competitiveness.
>
> In terms of fairness, we have a variety of safeguards that are built within – into the programs to insure that compensation is delivered in a fair and equitable manner (Obler deposition, pp. 51 & 52).

A third strategy/principle is that "pay should be performance driven." Ms. Obler indicated "individual employee performance is used to make salary decisions" (Obler deposition p. 85). When asked if that is a principle applicable to all of Johnson & Johnson domestic operating companies, Ms. Obler stated:

> The salary administration program here applies to all salaried employees, so all non-sales, non-collective bargaining employees, non-hourly employees, and the salary administration system indicates that performance is a factor in determining salary – any compensation decision (Obler deposition, pp. 85 & 86).

The three other compensation strategies/principles articulated included "provide equity in stake Johnson & Johnson," "emphasize management for the long term," and "reinforce adherence to Credo values" (Obler deposition exhibit 5). Ms. Obler's characterization of Johnson & Johnson's compensation philosophy does not support Dr. Outtz' vision of "autonomous" companies pursuing their own compensation plans. When shown an example of a "Salary Administration Program: Plan Summary" (Obler deposition exhibit 8) and asked to define the term "salary administration program of Johnson & Johnson, Ms. Obler replied:

> Our salary – the Johnson & Johnson salary administration program is a program of – which has been developed to provide a framework for administering salaries, to provide managers an understanding of the factors that they should be considering when administering salaries and – and some guidance in terms of how to think about those items, the definitions and certain other certain other – certain other facts that they should be aware of in administering salaries for their employees, and that the compensation people should understand in order to monitor the salary administration in their business unit (Obler deposition, pp. 68 & 69).

Ms. Obler indicated that the managers and compensation professionals alluded to in her answer were professionals in Johnson & Johnson affiliates, the Family of Companies, and that the salary administration program would be applicable to salary positions throughout the domestic operating companies (Obler deposition, p. 69). She also indicated that Johnson & Johnson's policy indicated that "[a]ffiliate, national and regional plans which represent a significant change from worldwide corporate policies are subject to review by Corporate Worldwide Compensation Resources," that said policy applied to companies within the U.S., and that "there have been affiliate plans, bonus plans specifically, that have been reviewed by WCR and have been reviewed by the Management Compensation Committee" (Obler deposition, pp. 76 & 77). Ms. Obler identified the Johnson & Johnson Worldwide Policy Manual (Obler deposition exhibit 10), and stated that "[w]ith respect to the compensation section, the majority of these policies go back many, many years" (Obler deposition p. 78). She indicated that some of the policies embodied in the Worldwide Policy Manual required Management Compensation Committee approval, while others do not (Obler deposition, p. 78). Ms. Obler stated that the policies "have been reviewed and approved by the appropriate people, depending on the topic" (Obler deposition, p. 79).

Ms. Obler reported that Johnson & Johnson has been using market pricing data since the early 1980's (Obler deposition, p. 91). She stated that "market data is developed from surveys that are run by the most part by consulting firms" whose responsibility it is "to validate the data" (Obler deposition, pp. 91 & 92). After those data are analyzed by Johnson & Johnson compensation staff, they are "posted on our Website so that all compensation practitioners around the world have access to it" (Obler deposition, p. 92). That is not to say that all market pricing responsibility falls on the shoulders of Worldwide Compensation Resources (WCR). Ms. Obler stressed the importance of matching each Johnson & Johnson employee to the appropriate job (Obler deposition, p. 94), and noted:

> The benchmark jobs are developed based on initially a review by worldwide compensation resources, looking at the job titles that exist within the operating companies, looking for commonality there, and then we also request input from the affiliate compensation managers and staff, compensation staff, as to their views of what positions ought to be identified as benchmark jobs.
>
> And then it's a function of whether we can find market data on those jobs as to whether they become benchmarks (Obler deposition, pp. 95 & 96).

Ms. Obler reported that job descriptions for benchmark jobs are maintained by WCR and made available to affiliate companies on a website (Obler deposition, p. 96). According to Ms. Obler, the "affiliates are expected to use the benchmark market pricing data for jobs that are identified as matches to the benchmarks" (Obler deposition, p. 138). Affiliate companies' compensation staff matches individual employees to benchmark jobs, while WCR annually reviews job matching in collaboration with affiliate companies' staff (Obler deposition, pp. 100 & 101). Non-benchmark jobs, jobs unique to a particular company, are the responsibility of the individual companies (Obler deposition, p. 95). Worldwide Compensation Resources offers training to affiliate compensation staff "at least once a year, I think a couple of times a year on our methodologies in benchmark market price – in market pricing so that we – the compensation practitioners have a common understanding of the methodologies to market price the non-benchmarks" (Obler deposition, p. 135). Affiliate-level human resources professionals appeared to confirm Ms. Obler's statements on pervasive and consistent compensation training. For example, Victoria Walker-Manella described compensation at McNeil:

Q. And who trained the trainers?

A. Well, for purposes of the McNeil training, Lisa Blair did.

Q. Who trained Lisa Blair?

A. When Lisa Blair was hired, when I hired her, she had compensation – she already had compensation experience, so she was really trained and experienced in comp.

Q. Was she trained and experienced in Johnson & Johnson's compensation program?

A. I believe she was. I hired her from Cordis (Walker-Manella, pp. 191 & 192).

Ms. Obler's description of Johnson & Johnson's compensation approach portrays a philosophy designed to minimize company-to-company differences in pay. With respect to market pricing, Ms. Obler's observation that "a job in California has the same market data working for Neutrogena as a job at Ethicon in Somerville, New Jersey" (Obler deposition, p. 44) illustrates the relative importance of market pricing as a substantial contributor to difference from company to company at Johnson & Johnson.

Initial Compensation

Dr. Outtz examined the compensation practices of Johnson and Johnson's corporate headquarters and affiliated operating companies. He enumerated 14 factors "typically considered by Subsidiaries as described in the declaration of Subsidiaries executives" (Outtz report, p.43). These factors included:

A. Market pricing data
B. Candidate's education and experience
C. Candidate's current/last salary (compensation package)
D. Candidate's salary request
E. Internal equity (a comparison with what others in similar positions at the Subsidiary are being paid)
F. Degrees awarded (for college hires)
G. Geographic location of the position
H. Recommendation of the recruitment agent (if applicable)
I. Candidate's bargaining position
J. Expected level of contribution

K. Requirements of the position
L. Competing offers
M. Competitiveness of the college attended (for college hires)
N. Market trends reflecting industry demand for the employee's skills (Outtz report, p.43)

Dr. Outtz indicated in his Figure 4 which of the operating companies typically considered each of the 14 factors when determining initial employee compensation (See Outtz report, pp. 44- 46). He indicated that the vast majority of companies identified in Figure 4 considered the first five factors listed above. Three of the first five factors (market pricing, education and experience, and internal equity) were considered by 24 of the 25 (96%) companies examined, according to Dr. Outtz. He reported that candidate's current/last salary was considered by 20 of the 25 (80%) companies, and that candidate's salary request was considered by 17 of the 25 (68%) companies. Of the remaining factors, Figure 4 indicates that three factors (recommendation of recruitment agent [if applicable], geographic location of the position, and market trends reflecting industry demand for the employee's skills) were the only additional factors considered by as many as four of the operating companies.

Only one of the operating companies (Johnson & Johnson Health Care System Inc.) considered as many as three factors beyond the first five identified, according to Figure 4. Five other companies identified considering two additional factors beyond factors A-E. The remaining 19 companies (76% of the sample) are shown to have considered either one or no additional factors. In fact, Dr. Outtz reported that market pricing data, candidate's education and experience, candidate's last salary, candidate's salary request, and internal equity "were most frequently used across subsidiaries" (Outtz report, p. 47). He also indicated that "[a]ll of these factors are either 'person specific' or 'subsidiary specific,' and that factors 'B, C and D are person specific in that they are, by definition, unique to each applicant'" (Outtz report, p.47). It stands to reason, therefore, that Dr. Outtz considered factors A (market pricing data) and E (internal equity) to be "subsidiary specific," although he limits his discussion almost entirely to internal equity. It seems reasonable to focus on these two factors, because the purpose of his investigation was to ascertain whether differences existed between companies. However, one could ask whether these factors are, indeed, company specific.

Dr. Outtz stated "the initial compensation offer for applicants seeking similar jobs may be quite different between subsidiaries because the pay scales for employees in the companies differ" (Outtz report, p. 48). Ms. Obler's lengthy recitation of Johnson & Johnson's efforts to avoid different pay scales for different companies serves to refute Dr. Outtz' explanation. Moreover, company compensation groups make determinations of internal equity within a Johnson & Johnson framework developed for that purpose. Those Johnson & Johnson policies are supported by salary administration training and on-line training designed by WCR (Obler deposition, pp. 89 & 90). Company-to-company differences may well occur in cases involving jobs unique to a given company, but I cannot evaluate the frequency of such occurrences based upon Dr. Outtz' report. Moreover, the Johnson & Johnson job coding system assists affiliate companies in describing jobs "in terms of function and hierarchy and scope" (Obler deposition, p. 96), allowing them to create codes for unique non-benchmark jobs in a manner consistent with WCR's codes for benchmark jobs. Similar positions should bear similar job codes leading to similar pay rates. Finally, WCR works with affiliate companies to convert non-benchmark jobs to benchmark jobs in an ongoing audit process that enhances salary consistency across companies (Obler deposition, pp. 142-150).

The extensive interaction between Worldwide Compensation Resources and the affiliate companies' compensation staffs, the periodic market survey efforts, and the ongoing audit of company job codes by WCR and affiliate companies appear to work effectively in achieving Johnson & Johnson's stated compensation philosophy of minimizing differences in company pay plans and pay rates. Ms. Obler testified that some differences occur, but the policy framework overseen by WCR is designed to limit the size of any differences, allowing Johnson & Johnson to move employees from one company to another or one region to another with relative ease. Other factors can, and indeed Johnson & Johnson's policies dictate some should, influence actual pay rates. However, the first two factors listed ("competitive opportunities with peer companies" and "comparable opportunities across businesses") can reasonably be expected to substantially influence initial compensation decisions. Ms. Obler's comments of the Johnson & Johnson approach are worth repeating. She stated:

What we mean there is that we want to be sure that there is a certain level of

> consistency in the programs so that moving someone from one organization to another organization does not – does not – the compensation does not represent a barrier to that movement. So that means that the overall programs are similar in terms of their design, such that there isn't an advantage, for example, to work in a pharmaceutical business as opposed to the medical devices business, that there isn't a higher bonus target in one versus the other.
>
> As long as the targets are similar, then it's a fairly simple matter to move someone from one business to another. If we were to have separate and distinct compensation programs by business line, it would be difficult to move people around (Obler deposition, pp. 42 & 43).

Dr. Outtz' conclusions cannot be reconciled with Ms. Obler's statements of how compensation functions at Johnson & Johnson, so I must reject his conclusion with respect to initial compensation. Dr. Outtz also noted that the factors considered in determining initial compensation were "consistent with professional standards for best practices" (Outtz report, p. 49), although he gave no reference for those standards. Using "best practices" as an adjective for the Johnson & Johnson companies implies, at least in my mind, that each company is considering the vast majority of "best practices" available, not fewer than half of best practices identified by the profession. However, Dr. Outtz' Figure 4 depicts that only six of the companies considered as many as seven of the 14 "best practices" factors. Finally, it seems to defy logic that each and every company is described as being different from every other company, yet **all** companies' practices "are consistent with professional standards for best practices."

Merit Pay

Dr. Outtz illustrated the basis for his conclusions on merit pay in Figure 5 of his report. He identified 14 factors considered by the dozen operating companies for which "documents and/or testimony from company officials addressing the factors considered in determining merit increases for non-sales employees were available (Outtz report, p. 49). The factors included:

A. Performance rating
B. Position within market pricing
C. Future growth potential
D. People development skills
E. Technical skills
F. Functional competencies

G. Achievement of operating company core competences
H. Internal equity
I. Calibration
J. Achievement of individual goals and objectives
K. Proficiency in standards of leadership
L. Current placement in salary range
M. Ratings of team performance
N. Contribution to business (Outtz report, p. 49).

The first thing that struck me about the list above was the number of factors that seem to be variants of job performance. Technical skills, functional competencies, achievement of operating company core competencies, proficiency in standards of leadership, and ratings of team performance are descriptors of items that appear on some performance appraisal forms used by the affiliated companies (See, for example; Gudicello deposition exhibit 10; Hind deposition exhibit 7; Raher deposition exhibit 4) and calibration of performance ratings is a practice of many others, as previously noted. As such they are part of the process that produces factor A, the performance rating. Future growth potential and people development are two of the three scales currently used in Succession Planning and Development (Carey deposition, pp. 218, 220, 225, & 231), and a small number of affiliates have incorporated them in the performance appraisal process (See, for example, Brougham deposition exhibit 9; Walker-Manella deposition on Consumer Companies exhibit 1; Woodring deposition exhibit 9). The job performance scale used in Succession Planning and Development is the same scale used for compensation decisions (Carey deposition, p. 231). Factors L (current placement in salary range) and M (ratings of team performance) are not indicated for any of the 12 companies listed in Figure 5 of his report. Five factors (technical skills, operating company competencies, internal equity, calibration, and contribution to business) are marked as considered by only one of the 12 companies listed. The factors that are indicated for as many as five of the 12 companies are performance rating (12 of 12), position with market pricing (5 of 12), functional competencies (5 of 12), and individual goal attainment (5 of 12). As noted above, the only one of these four factors not closely tied to overall job performance is "position within market pricing."

Another problem with Dr. Outtz' merit pay analysis is that it is based on a small and apparently nonrandom sample of the 27 business units listed in the Table of Contents in Volume

2 of Dr. Outtz' report. He did not explain why 15 units' information was not available, but the numbers in Figure 5 seem even less compelling when one realizes that position within market pricing, functional competencies, and individual goal attainment are reportedly considered in 5 of the 27 units Dr. Outtz listed as studied in Volume 2 of his report. We have no way of knowing whether Dr. Outtz' conclusions with respect to the 12 companies he studied in compiling Figure 5 can be generalized to the 15 he did not.

Dr. Outtz' description of merit increase completely ignored any discussion of Johnson & Johnson's announced policy for determining merit increases. Ms. Obler's description of the Salary Administration Program above bears directly on merit increases:

> Our salary – the Johnson & Johnson salary administration program is a program of – which has been developed to provide a framework for administering salaries, to provide managers an understanding of the factors that they should be considering when administering salaries and – and some guidance in terms of how to think about those items, the definitions and certain other certain other – certain other facts that they should be aware of in administering salaries for their employees, and that the compensation people should understand in order to monitor the salary administration in their business unit (Obler deposition, pp. 68 & 69).

The guidance provided was clear with respect to merit increases:

> The first step is to develop all merit increases for the year. Merit increases are those which RECOGNIZE PURE PRERFORMANCE ONLY. The Johnson & Johnson Salary Administration Program is performance driven. Therefore, it is important to understand the principles behind the awarding of merit increases. These principles are outlined in Section I page 2. Additionally, it is important to practice good performance assessment, wherein each employee's performance is carefully measured against the standards of his or her job.
>
> When developing merit increases, you should see a wide range of increases which reflect performance. There should be increases which are fairly close to the guideline, for employees meeting standards, as well as some at of the guideline for outstanding performance, and 0% for poor performance.
>
> The average of all merit increase for your employees should not exceed the Merit Guide. Remember, the Merit Guide is designed to keep J & J salary increase competitive with those of high growth companies. Therefore, it is not necessary to exceed this guideline (Obler deposition exhibit 8, p. 10).

REDACTED

Section I page 2 provided the basis for increases:

> In the absence of satisfactory performance, there is no opportunity for salary growth. Effective performance is but the threshold requirement for any increase in salary.
>
> Significant contributions to the business require significant rewards. Salary increases for performance are based on the Merit Guide and should vary from 0% to of the Merit Guide to reflect performance.
>
> Increase should correlate with employee's performance ratings. For example, if you provide a merit increase of (against a 4% merit guide) for an employee who exceeds job standards, you should provide something significantly larger than for an employee who greatly exceeds standards. The employee who meets standards should receive an increase around, or slightly below the Merit Guide, while the employee who does not meet standards should receive no increase (Obler deposition exhibit 8, p. 2).

Recall that Ms. Obler indicated that Johnson & Johnson's policy indicated that "[a]ffiliate, national and regional plans which represent a significant change from worldwide corporate policies are subject to review by Corporate Worldwide Compensation Resources," and that said policy applied to companies within the U.S. (Obler deposition, p. 76). For example, Mr. Gudicello, noted "Corporate World Compensation Resources provides the guideline, we implement it at Cordis and where we want to deviate from it, we have to have a rationale," when discussing the distribution of performance ratings (Gudicello deposition, p. 176). Mr. Collins, Vice President of Human Resources for Ortho Biotech stated that managers receive training on Comp Navigator to help decide where in a range of merit increase percentages an employee should be placed on the basis of his/her performance, and that Comp Navigator "has all the background information on that employee's compensation history," including "performance ratings'" "rankings," and "the decile the individual is in" (Collins deposition, pp. 97-99).

Dr. Outtz' findings appear inconsistent with the testimony of company officials and documents circulated by Johnson & Johnson. I do not believe that he demonstrated that "the factors typically considered by the Subsidiaries in determining merit increases varied significantly" (Outtz report, p. 52). I am not convinced that the performance-related factors represent anything more than semantic differences (See prior discussion at page 45 of this report), given Dr. Outtz'

failure to explain how, or if, they differed from one another. Even if I accepted his list of factors, only the performance rating that all 12 companies are reported to have considered is consistent with the testimony of company officials. I am also compelled to repeat my surprise that Dr. Outtz asserts that the affiliates differ significantly in the factors they consider, while at the same time stating that all the differing affiliates use factors that "are consistent with professional standards for best practices" (Outtz report, p. 52) for the reasons discussed above.

Field Sales Compensation

Dr. Outtz observed that compensation for sales employees at the affiliate companies "typically consisted of base salary and incentive compensation based upon sales performance" (Outtz report, p. 52). Base salary for field sales personnel seems to have to been treated in much the same manner as non-sales employees. Randall David testified: "They are the same, field and non-field would be the same in terms of how the base salary is determined" (David deposition, p. 86). Milton Brougham commented on merit increase for sales representatives:

Q. Do sales reps get performance ratings?

A. Yes they do.

Q. What portion of their – what facets of their compensation package are keyed to performance, as measured by the performance rating?

A. As measured by the performance rating, their merit increase would be connected to that. I would say that's the most purely connected piece (Brougham deposition, p. 127).

I agree with Dr. Outtz' observation that "compensation processes for sales employees are handled by the Subsidiaries with each company developing a system that best suits its needs" (Outtz report, p. 53), at least with respect to incentive compensation. Ms. Obler testified that Worldwide Compensation Resources was responsible for U. S. compensation programs, except for sales compensation and collective bargaining units (Obler deposition, p. 285). Dr. Outtz once again found that, while the affiliate companies utilize different factors in determining field sales compensation, all companies' processes are "consistent with" unarticulated professional standards for "best practices" (Outtz report, p. 54).

Performance Appraisal

Dr. Outtz' discussion of performance appraisal on pages 54 through 56 of his report repeated information presented in Chapter 3, and added a new list based upon "an additional difference in design that involves factors used to actually define performance" (Outtz report, pp. 55 & 56). He provided a new list of 13 factors, and concluded that:

> Given the wide variety of factors underlying the design of performance appraisal procedures across Subsidiaries, it is my opinion that an analysis of plaintiffs' claims regarding performance appraisals must at a minimum be studied at the level of the Subsidiary, unit within Subsidiary, or more likely at the level of the individual employee (Outtz report, p. 56).

Dr. Outtz' assertion that the preferable level of observation is the "individual employee" is essentially a statement that **no** system exists within Johnson & Johnson's affiliate companies. If each individual performance appraisal must be examined on a case-by-case basis, one must conclude that Johnson & Johnson's affiliates' performance appraisal processes are at their core asystematic in nature, as no two decisions can be assumed to be alike. As noted above, Dr. Outtz labeled such individual-by-individual decision-making "haphazard" and "inconsistent" in another case (Outtz deposition exhibit 9, pp. 64-67). Dr. Outtz testified that practices implemented in an inconsistent matter are "problematic," "[b]ecause, in my opinion, it can result in differential assessment of potential or performance that may not be related to actual performance" (Outtz deposition exhibit 9, p. 65). He stated: "Given the lack of behavioral anchors to use, and object, structure of objectivity, you could use these forms and you could have two people performing a job the same way and get a different performance rating" (Outtz deposition exhibit 9, pp. 65 & 66). As an example of Dr. Outtz' point, one of Johnson & Johnson's human resources professionals was asked what weight was given to each of the performance competencies evaluated by supervisors. He testified: "There can't be a given weight because every job is different," and indicated that whatever weighting occurred in the supervisor's mind was "one of the inputs" in determining an employee's final one to nine performance rating (Michalcewicz deposition, p. 229). It does not seem reasonable to conclude that such subjective processes represent "best practices," or even adequate practice. Advocating a case-by-case analysis of performance appraisal processes

would seem to reinforce Plaintiffs' concern that performance appraisals are excessively subjective at Johnson & Johnson. Dr Outtz pointed out both the potential danger in excessively subjective ratings and the evidence needed to avoid that danger in an earlier report. He stated:

> Performance ratings are used to determine promotions, pay increases, bonuses, and merit increases, etc. The primary inference that is made on the basis of performance ratings is that employees with higher ratings are better performers and, therefore, should be rewarded as such. However, the performance rating used by REDACTED are excessively subjective; therefore, inferences drawn from them are suspect. The excessive subjectivity in the rating process can lead to differences in ratings that are due to inappropriate factors such as race or gender.
>
> The appropriateness of the inferences made on the basis of performance ratings rests upon the existence of underlying validity evidence. If there are differences in ratings based upon race or gender, then the rating process must be validated in accordance with the Uniform Guidelines on Employee Selection Procedures. My initial examination of the documents associated with REDACTED review process indicates that the review process has not been demonstrated to be valid (Outtz declaration attached to certification of Nicole Austin-Hillery and filed under seal, pp. 6 & 7).

No *Uniform Guidelines*-compliant validation evidence has been presented for the appraisal process at Johnson & Johnson's companies.

Promotions

In Dr. Outtz' brief treatment of promotions, he found that promotions occurred when: 1) an employee's job responsibilities were significantly increased, 2) there was a job progression or progression ladder, 3) there was a promotion above the employees' salary range, 4) succession planning was utilized, or 5) there was a promotion in line with the development plan for the employee (Outtz report, p. 57). He stated "each subsidiary included consideration of the employee's job performance as assessed by that company's performance appraisal process" (Outtz report, p. 57). Dr. Outtz did not describe how the appraisal information was "considered" in promotions decisions, yet he concluded that the "circumstances in which promotions occurred and the manner in which performance was used to determine promotions are consistent with professional standards for best practices" (Outtz report, p. 57). How the performance appraisal information is considered is a crucial issue. Michael Carey testified regarding the common

Johnson & Johnson performance rating reported to corporate in the context of Succession Planning and Development. He stated:

> It is a rating system that begins a conversation and it is a shorthand version, it is a shorthand version of communicating information about thousands of people to the Executive Committee. The rating does not put someone in a job. The rating does not keep someone out of a job (Carey deposition, p. 330).

Mr. Carey later elaborated:

> But when a job comes open we talk about people, we talk about names. We don't talk about the ratings. We talk about what's necessary for their development and how to have a job further an individual's development. It's not about the statistical piece. It's about their career track and what experiences would help them grow (Carey deposition, p. 331).

Mr. Carey's insight into how appraisal data are "considered" for the higher-level Johnson & Johnson employees participating in the Succession Planning and Development process is troubling. The process he described is a subjective one that downplays the importance of numeric performance appraisal ratings, substituting a subjective discussion among managers. It should be noted that Mr. Carey described himself as "the talent officer for the company," because "I was the individual who sat in every company session and every Group Operating Committee review and then the final session" from 1994 to 2001 (Carey deposition, p. 223). Tim Raher of Noramco echoed Mr. Carey's descriptions of the process. Mr. Raher described Succession Planning as "a process where that data is presented and talked about in a more holistic format" (Raher deposition, p. 177). Benito Cachinero of Ethicon testified "potential ratings don't do anything, the important thing would be to analyze the outcome of actual management decisions," and "the potential rating is just a reflection of a conversation at any given point in time but it is not an indication of what the outcome is going to look like" (Cachinero deposition, p. 250).

The internal promotions that seem to be the norm within Johnson & Johnson's companies (See, for example, Carey deposition, pp. 53 & 54; Kells deposition, p. 45; Michalcewicz deposition, p. 101) appear to be no less subjective. Gerald Kells was contacted by the president of his company, who informed him that Alan Anderson was interested in talking to him about a position as Director of the Operations Institute for Johnson & Johnson around 1990 (Kells

deposition, pp. 11-14). He didn't recall whether the job was posted, and did not apply for the position (Kells deposition, p. 13). When asked how he found out about positions in the other business units, Mr. Carey responded: "My supervisor often was the person through whom the communication of that information came to me that my name appeared on a slate and I was asked if I were to be interested in a position that was mentioned" (Carey deposition, p. 19). When asked how his name appeared on the slate, he stated:

> Within the Financial community and the Information Management community and later in the Human Resources community there was a combination of jobs being posted and also candidates being discussed within the Succession Planning Process or within knowledge of candidates within those staff functions who had potential for growth and as positions came open, the candidates were discussed and – by the operating company Vice-Presidents and candidate names were surfaced" (Carey deposition, p. 20).

Mr. Carey mentioned only one of the jobs he received prior to 1993 being posted, his first job in 1976 (Carey deposition, p. 20). Dr. Outtz testified that he didn't know that executives were promoted without a job posting or disclosure of a vacancy (Outtz deposition, pp. 166 & 167).

When describing the manner in which he became aware of his current position as Vice President of Human Resources for Ortho Biotech, Mr. Collins stated the person who referred him for the position was "a friend of mine I worked with at McNeil Pharmaceutical by the name of William Weldon" (Collins deposition, p. 26). Examples of other in-house influences include Ms. Famularo's promotion to the vice president level as a result of her former manager's suggestion (Famularo deposition, p. 13), and Ms. Shapiro's promotion to her former manager's position (Shapiro deposition, p. 119). Ms. Shapiro also shared an experience where she was informed that she was selected "as a potential candidate" for a position she did not recall being vacant before receiving the e-mail inviting her to interview (Shapiro deposition, pp. 117 & 118). None of these affiliate-level human resources management deponents described being assessed by any formal selection procedures.

Subjective approaches to promoting employees are not "consistent with professional standards for best practices." The arithmetic combination of scores has been recognized for many years to

yield more accurate predictions than clinical (or judgmental) combination of the same scores (see Meehl, 1965; Sawyer, 1966; and Wiggins, 1973). Comparisons of clinical/judgmental and statistical modes of data combination almost invariably find statistical data combination to be superior. The use of judgmental methods for combining data also runs afoul of the *Principles'* admonition that "[w]here predictors are used in combination, researchers should consider and document the method of combination" (p. 20). The discussion in the *Principles* does not even contemplate the judgmental combination of data, focusing instead on various methods for establishing the weighting of scores by statistical methods. Therefore, even if one had high confidence in the rating scores generated by Johnson & Johnson's companies' performance appraisal systems, one could have little confidence in subjective promotion decisions. If those decisions did include consideration of performance ratings, the adverse impact in promotion decisions found by Drs. Madden and Vekker demands either more specific study of whether appraisals contributed to that impact or the validation of the components used in promotion processes under the requirements of the *Uniform Guidelines*, if any of those component contributed to the observed adverse impact. Dr. Outtz presented no evidence of *Uniform Guidelines*-compliant validity studies supporting the job-relatedness of Johnson & Johnson's promotion process. In fact, he testified that his "report does not speak to the issue of validity at all" (Outtz deposition, p. 380). When asked whether he had seen evidence that the operating companies had conducted validity studies of their performance management systems, Dr Outtz replied:

> I have not seen evidence nor have I looked for evidence that the operating companies have validated their policies, practices and procedures.
>
> Q. Have you seen any evidence that Johnson & Johnson has validated the ratings used in Succession Planning on a company-wide basis?
>
> A. I have not addressed whether the company has evidence of the validity of its performance appraisals, and had I seen such evidence, I would have ignored it with regard to my responsibilities in this case (Outtz deposition, p. 234).

I am also troubled by Dr. Outtz' failure to mention job posting, or the lack thereof, in the affiliate companies. He testified: "if one reads deposition transcripts, it was readily apparent that the operating companies did not require job posting, at a particular point they didn't require job posting, nor did Corporate" (Outtz deposition, p. 182). Dr. Outtz did not comment on postings

because "[i]t was understood, prior to 2001, that none of the operating companies nor Corporate required posting. So why would I need a chart to put in some blanks" (Outtz deposition, p. 183). Johnson & Johnson has recently "deployed" a policy stating that all positions at or below the director level will be posted" (HochbergSmith deposition, p. 66). Ms. HochbergSmith was not sure that the new posting policy would affect the representation of African-American employees at Johnson & Johnson (HochbergSmith deposition, p. 75), although the Equal Employment Opportunity Commission identified "failure to post/advertise promotional opportunities" as one of its "barriers to advancement and promotion" in its "Best Practices of Private Sector Employers" (EEOC, 2001). In my opinion, the failure to post jobs below the director level prior to 2003 (See Hamway deposition, p. 91) is inconsistent with good human resources management practice, let alone "best practices."

Monitoring Employment Practices

Dr. Outtz reported that "[i]t is not good enough to simply formulate policies that meet accepted professional standards, the employer must take affirmative steps to ensure that they produce the intended results" (Outtz report, p. 57). He stated: "each Johnson & Johnson company was responsible for monitoring implementation of its human resources policies and procedures including those related to equal employment opportunity" (Outtz report, pp. 57 & 58). Dr. Outtz' description of the companies' monitoring activities basically amounted to completion of the mandated EEO-1 forms and Affirmative Actions Plans. He noted that subsidiaries were "required to formulate and implement steps designed to address" "underutilization," but provided no example of any company uncovering or correcting underutilization. He also stated that "each subsidiary was held accountable for its human resources polices and practices with regard to equal employment opportunity and was required to monitor practices in accordance with federal regulations" (Outtz report, pp. 58 & 59). Thus, Dr. Outtz' concept of "affirmative steps" equates to the minimum required by federal regulations.

Dr. Outtz was asked about his testimony in a prior case concerning appropriate levels of monitoring and how it related to Johnson & Johnson, resulting in the following exchange on Dr. Outtz' views on Texaco:

Q. Why did you focus on whether or not the company has taken appropriate steps to ensure they are effective and consistent implementation company-wide?

A. Because simply formulating, as I indicated in my report in this case, simply formulating policies is not good enough, there should be some indication they have been implemented properly and consistently.

Q. And can you read the last sentence of Paragraph 9 into the record?

A. Without control over the implementation of its employment policies and practices, Texaco does not maintain the essential evidence needed to ascertain whether its employment policies and practices are having an adverse impact on African-Americans or even whether they are being effectively implemented.

Q. Is it your testimony in this case that Johnson & Johnson has control over the – strike that. Is it your testimony in this case that Johnson & Johnson has taken appropriate steps to ensure effective and consistent implementation of policies such as promotion and compensation policies?

A. And by Johnson & Johnson, you mean?

Q. I mean the same Corporate entity that files its filings in the Securities and Exchange Commission.

A. Johnson & Johnson gives to the operating companies the responsibility to do the kinds of things I talk about with regard to, quote, Texaco. And the operating companies at Johnson & Johnson do what I thought was not done at Texaco.

The operating companies do, in fact, monitor their policies and practices in a number of ways and they do make sure, each operating company has its methodology for making sure that its policies and practices with regard to the issues in the Johnson & Johnson case are consistent and implemented properly. It may not be done by, directly by Corporate, but that is because Johnson & Johnson has a different structure (Outtz deposition, pp. 216 & 217).

Dr. Outtz testified that he believed the operating companies maintained the data necessary to conduct adverse impact analyses of promotions (Outtz deposition, p. 275) and compensation decisions (Outtz deposition, pp. 276 & 277). He made no report of any company actually computing adverse impact analyses except as part of an OFCCP audit, EEO-1 reporting or an Affirmative Action Plan (Outtz deposition, pp. 200 & 204). I do not understand how collecting the requisite data for adverse impact analyses but not conducting such analyses can be construed

to be exemplary of taking "affirmative steps" to ensure human resources practices "produce the intended results."

Testimony from company officials confirms the dearth of analyses in the affiliate companies. Nancy Shapiro, Vice President of Human Resources at McNeil Consumer and Specialty Pharmaceuticals testified: "I don't recall personally ever making any reports to Johnson & Johnson regarding minority representation in the work force at McNeil Consumer and Specialty Pharmaceuticals" (Shapiro deposition, p. 168). Ms. Walker-Manella indicated that any analyses that looked at race would have been part of the Affirmative Action plan but she was not sure if any were conducted (Walker-Manella deposition, p. 143). Ms. Walker-Manella did not know if adverse impact analyses were conducted of potential award ratings, performance ratings, or bonuses (Walker-Manella deposition, pp. 105, 189 & 190). Julia Lochner, Manager of Compensation/HR Business Partner for The Spectacle Lens Group (TSLG) was not aware of analyses to make sure African-Americans are not discriminated against in potential ratings (Lochner deposition, p. 150) or by using the Standards of Leadership (Lochner deposition, p. 224).

Benito Cachinero, Vice President for Human Resources for Medical Devices and Diagnostics and the former Vice President of Human Resources for Ethicon, testified that "[e]very manager was responsible to make sure that the salaries of employees at Ethicon that work for him or her were fair and adequate" (Cachinero deposition, p. 71). When asked whether the Company Group Chairman was ever given a report analyzing whether African-Americans or Hispanics were being paid less than their white counterparts, he responded: "No, those reports were not generated for Mr. Longstreet" (Cachinero deposition, p. 72). When asked whether anyone generated such reports, he responded: "We did not generate those reports" (Cachinero deposition, p. 72). He did indicate that he believed the Johnson & Johnson legal department conducted "some analysis" (Cachinero deposition, p. 72). Mr. Cachinero indicated he did not review the analyses Johnson & Johnson legal conducted, (Cachinero deposition, p. 90). Mr. Cachinero did testify that Ethicon-specific measures were put in place to track promotion and advancement of employees, and that "we were practicing to see whether there was any differential

by race in those" (Cachinero deposition, p. 265). When asked if anyone was held accountable for shortfalls in expectations, he responded:

> I don't think we look at this as – this is an ongoing process, right. And, like in any other area of the business, was looking for improvement, always, we are talking about revenue income or workforce diversity, right? So I don't know that this is an all or nothing situation, it is something where we are looking to improve on an ongoing basis (Cachinero deposition, p. 265).

Johnson & Johnson affiliates leave human resources processes largely unmonitored. For example, Tim Raher reported that Noramco conducted no analyses of whether African-Americans were adversely affected by the performance management process (Raher deposition, p. 150 & 156) or its succession planning process (Raher deposition, p. 200). Others appear to monitor some, but not all, processes. For example, Ethicon Endo-Surgery reportedly assessed its initial hiring salaries and overall salary position for disparities (Ward deposition, pp. 106 & 164). However, Mr. Ward was not aware of an Ethicon Endo-Surgery study of performance appraisal or merit increases (Ward deposition, pp. 146, 163 & 164).

When asked whether potential ratings were assessed for adverse impact, Mr. Hind responded with a description of a calibration process for potential ratings that was "a very similar process to the process we use for performance ratings" (Hind deposition, pp. 224-226). When the question on adverse impact was repeated, he replied: "I consider that the amount of rigor that we put into the action is sufficient to ensure fairness and equity in the organization" (Hind deposition, p. 227). Mr. Ward held a similar view. He stated:

> Our approach to the calibration process of performance, the assessment of potential, the inherent levels of review by higher levels of management, the calibration systems and processes, inherently establishes a series and a system of checks and balances that give us a, the best assurance that we can have that we are not adversely impacting African-Americans, which I believe does demonstrate that it is a valid process (Ward deposition, p. 147).

Mr. Carey's 2001 draft document describing the role of Group Operating Company Human Resource leaders is instructive. He wrote that the GOC HR role should include a responsibility to

"drive diversity across all businesses...no one has owned it in the GOCs or companies for that matter" (Kells deposition exhibit 5).

Dr. Outtz stated: "each Johnson & Johnson company was responsible for monitoring the implementation of its human resources policies and procedures including those related to equal employment opportunity" (Outtz report, pp. 57 & 58). However, the key question is: Did each company adequately monitor the implementation of its human resources policies and procedures? The examples presented above indicate that many did not. I found no example of a affiliate company reporting monitoring of all compensation, promotions, and performance evaluation processes in the depositions of affiliate companies' human resources officials. Dr. Outtz' conclusion that "each subsidiary was held accountable for its human resources policies and practices and was required to monitor those practices in accordance with federal regulations" appears to be based upon the fact that "compliance action could be taken by the appropriate governmental agency" (Outtz report, pp. 58 & 59), not on the actual practices of the affiliate companies as expressed in the depositions cited above. I do not agree that each of Johnson & Johnson's affiliate companies adequately monitored its human resources practices for adverse impact against minorities.

Dr. Outtz testified that adverse impact analyses of hiring, promotions, and involuntary terminations are conducted as part of EEO reporting, Affirmative Action Plans (Outtz deposition, p. 200), or of compensation in response to OFCCP audits (Outtz deposition, pp. 200 & 204). When asked what affirmative steps were taken by Johnson & Johnson or its operating companies to monitor implementation of its human resource procedures in addition to what is required under the law for EEO-1 reports, Affirmative Action Plans, and responding to government audits, he replied:

> The operating companies, within the operating companies, management evaluates the internal equity of the compensation of the employees, internal equity, meaning is the compensation between employees within a given operating company, or site, equitable across the employees, including African-American employees.
>
> And that is done on an annual basis.

> Managers, as part of their performance appraisals, are evaluated in terms of what they refer to as people development, how do you develop the people underneath you, and that is to include Equal Employment Opportunity for minorities and women.
>
> The operating companies can determine the extent to which their Succession Plan will go beyond the management board and management board reports, further down into their company. And that the activities of the operating companies and with regard to what I've just described, is monitored by the company president, the company group chair, at least (Outtz deposition, pp. 201 & 202).

Dr. Outtz was asked to identify other affirmative steps taken by Johnson & Johnson or its operating companies:

> Q. Anything else?
>
> A. Not that I can think of right now.
>
> Q. Based on your professional judgment, is the internal equity that you refer to, does that rise to the level of a professionally acceptable adverse impact analysis?
>
> A. I think, standing alone, it is a way of determining whether there is equity, although it is not statistically based would be my response (Outtz deposition, 202).

Dr. Outtz' response was strikingly similar to that of Mr. Ward presented above, a response evidencing reliance on procedural mechanisms to produce fairness or equity rather than statistical studies of adverse impact in those cases not mandated by law.

CHAPTER 5 - PLAINTIFFS' ANALYSES OF JOHNSON & JOHNSON

Dr. Outtz offered criticisms of Drs. Madden and Vekker's initial report on promotions, compensation, and initial job assignments. Drs. Madden and Vekker more than adequately address those criticisms on page 25 of their rebuttal report. His chief criticism stemmed from the fact that their "conclusions in all three areas are based on the premise that they accurately identified African American, Hispanic and White non-Hispanic employees who were equally qualified" (Outtz report, p. 61). Dr. Outtz identified the factors considered by Drs. Madden and Vekker and opined that their failure to include ratings of job performance undermined their

analysis because "job performance was the primary factor used by each subsidiary to determine promotions" (Outtz report, p. 63). He also stated that Drs. Madden and Vekker did not show "that the methods they used to measure education and experience accurately reflect the manner in which those factors were considered by the Johnson & Johnson companies," and concluded "their analysis of promotions is not relevant to the facts in this case" (Outtz report, p. 63).

Without exploring the factual basis for Dr. Outtz' assertions, one can still determine if the underlying criticism (failure to accurately account for the procedures actually employed by Johnson & Johnson) is valid. A key issue in deciding whether Dr. Outtz' criticism is valid is whether it is appropriate to "control" for variables related to candidate qualifications when assessing adverse impact, and the short answer is **no**. Section 4D of the Uniform Guidelines sets out the Federal enforcement agencies' approach to identifying adverse impact. It states, in part:

> *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

The "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures" (EEOC et al., 1979) describe the process by which the four-fifths calculations should be made in Question 12, presented below:

> **12. Q. How is adverse impact determined?**
>
> A. Adverse impact is determined by a four step process.
>
> (1) calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from the group).
>
> (2) observe which group has the highest selection rate.
>
> (3) calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).

> (4) observe whether the selection rate for any group is substantially less (i.e., usually less than 4/5ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances. See Section 4D.
>
> For example:
>
> | Applicants | Hires | Selection rate, Percent hired |
> |---|---|---|
> | 80 White | 48 | 48/80 or 60% |
> | 40 Black | 12 | 12/40 or 30% |
>
> A comparison of the black selection rate (30%) with the white selection rate (60%) shows that the black rate is 30/60, or one-half (or 50%) of the white rate. Since the one-half (50%) is less than 4/5ths (80%) adverse impact is usually indicted.
>
> The determination of adverse impact is not purely arithmetic however; and other factors may be relevant. See, Section 4D.

The *Uniform Guidelines* language quoted above represents the approach preferred to assess a single selection/promotion event. Statistical techniques exist that permit aggregation across multiple selection/promotion pools, allowing researchers to assess an organization's decision-making at the unit, department, and whole organization levels. However, what is telling in the language provided is that there is no mention of taking qualifications into account in making an initial determination of adverse impact. Indeed, the *Uniform Guidelines* define adverse impact as "a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group" (29CFR1607.16B). At its heart, the mathematics of adverse impact is rather simple.

The *Uniform Guidelines* require an assessment of adverse impact without regard to qualifications as an initial step. If adverse impact is uncovered, an employer can justify its existence by a showing that the factors considered in promoting employees are job related. Section 1607.3 states, in part:

> The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

The Uniform Guidelines also require follow up assessments of individual components of the promotion process. Question 13 addresses this issue:

> **13. Q. Is adverse impact determined on the basis of the overall selection process or for the components in that process?**
>
> A. Adverse impact is determined first for the overall selection process for each job. If the overall selection process has an adverse impact, the adverse impact of the individual selection procedure should be analyzed. For any selection procedures in the process having an adverse impact which the user continues to use in the same manner, the user is expected to have evidence of validity satisfying the Guidelines. Sections 4C and 5D. If there is no adverse impact for the overall selection process, in most circumstances there is no obligation under the Guidelines to investigate adverse impact for the components, or to validate the selection procedures used for that job. Section 4C. But see Question 25.

Drs. Madden and Vekker's control of certain variables was in some cases necessary. The year of promotion, business unit, job function, job major subfunction, job hierarchy, and participation in succession planning allowed them to create pools of candidates for observed promotions at Johnson & Johnson's companies. These candidate pools are a way of defining the applicable work force when conducting adverse impact studies. *The Uniform Guidelines* commented on the necessity of using the "applicable work force" in some situations:

> Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force (29CFR1607.4D)

It was entirely appropriate for Drs. Madden and Vekker to define the available work force for purposes of their analyses. Dr. Outtz' assertion that Drs. Madden and Vekker should have included a measure of job performance is inconsistent with the *Uniform Guidelines* requirements. Dr. Outtz is essentially advocating the inclusion of a selection procedure (performance appraisal) for which no *Uniform Guidelines*-compliant evidence of job-relatedness or validity has been presented. Dr. Outtz stated: "I have not addressed whether the company has evidence of the

validity of its performance appraisals, and had I seen such evidence I would have ignored it" (Outtz deposition, p. 234). The *Uniform Guidelines* requirements prescribe testing of adverse impact in order to determine whether validity studies for selections procedures are required. They certainly do not permit explaining away differences in promotion rates based on one of the very selection procedures that may be contributing to adverse impact.

As a simplified hypothetical example, suppose we wanted to know if an interview used to promote employees displayed adverse impact. Decisions made on the basis of scores on our interview result in 10 of 100 women and 40 of 100 men being promoted, because men scored much higher on average than did women candidates. Using Dr. Outtz' model, we would control for interview score – the outcome of the very practice we are trying to study for adverse impact. Such an analysis would find that men and women with equivalent interview scores had an equal chance of being promoted, so we find no adverse impact. We would erroneously conclude that we had no need for a validation study. Under the *Uniform Guidelines* model, we would conduct an entirely different analysis. A four-fifths rule calculation or test of statistical significance would find that adverse impact resulted, as the promotion rate for men was "substantially different" than the promotion rate for women. If our interview could be shown to meet the technical standards for content validity embodied in Section 14C of the *Uniform Guidelines* through the production of a study meeting the documentation requirements listed in Section 15C, we would conclude that men were better qualified than women in our pool and, consequently, that the observed adverse impact was not discriminatory. Lacking such evidence, our interview would be considered discriminatory. Dr. Outtz' approach will generally preclude a study of job-relatedness of the assumed qualifications, if the factors for which he controls collectively favor non-minority candidates.

Dr. Outtz repeats his criticism with respect to compensation, initial job assignments, and initial compensation. My opinion is the same in all cases: the *Uniform Guidelines* model for assessing adverse impact is preferable, and, in fact required. Dr. Outtz' criticisms of Drs. Madden and Vekker are not cogent, nor do those criticisms undermine the relevance of their analyses.

CHAPTER 6 – CONCLUSIONS

Dr. Outtz began his concluding chapter by describing the purpose of his report. He stated: "My evaluation was not directed at the merits or validity of the human resources policies, practices and procedures of corporate Headquarters and the subsidiaries, but rather, at determining (a) whether putative class members were similarly affected by those policies, practices and procedures and (b) whether those polices, practices and procedures were excessively subjective" (Outtz report, p. 66). Dr. Outtz' endorsement of "best practices" at Johnson & Johnson's companies was therefore outside his self-described charge. His first conclusion was:

> As of 2001, Johnson & Johnson consisted of approximately 197 companies worldwide, including over 30 domestic subsidiaries that operated as autonomous companies, each responsible for its human resources policies, practices, and procedures (Outtz report, p. 66).

I cannot agree with Dr. Outtz' characterization of the affiliate companies as "autonomous," given his own definition of the term. Recall that his definition was fairly clear:

> I would define that as operating these companies, having the authority and responsibility to carry out certain things, certain policies and practices, that is, to implement them, to operate them, to operationalize them independent of Corporate Headquarters (Outtz deposition, p. 105).

Dr. Outtz testified that his meaning of "independent of corporate" was "[w]ithout having to get the approval of Corporate" (Outtz deposition, p. 105). The testimonies of company officials do not seem to support Dr. Outtz' view that individual companies were free to pick and choose from whatever guidance they received from corporate human resources offices (See, for example, Carey deposition, pp. 209 & 212; Gudicello deposition, pp. 62 & 63; Obler deposition, p 76; Ward deposition, pp. 23 & 24).

Neither do I agree with Dr. Outtz' conclusion that each Johnson & Johnson affiliate company was responsible for its own "policies, practices and procedures." My own reading of the deposition testimony leads me to conclude that policies were promulgated by Johnson & Johnson's corporate human resources function, in keeping with its website's theme of "unifying our decentralized organization." The website identified "organization-wide human resource planning and

development" and "employee compensation," among others, as "areas of focus" (Kells deposition exhibit 5). Policy changes were approved at the highest levels of Johnson & Johnson (Carey deposition, pp. 204-209; Obler deposition, p. 77). Mr. Larsen's letter to shareholders appearing in Johnson & Johnson's 1994 Annual Report confirms this view. His letter stated:

> We have encouraged our companies to share services, such as finance, purchasing and human resources administration, while strengthening the vital strategic capabilities – such as research and development, marketing and sales – that make them highly competitive in the marketplace (J&J EXP 0039675).

Dr. Outtz' conclusion is inconsistent with Aguilar and Bhambri's finding that company-level managers were responsible for "traditional personnel functions," but that "corporate staff served to ensure uniformity in such areas as compensation and personnel policies" (p. 15). I do not dispute that practices and procedures at the various affiliates may vary according to specific circumstances, but even in this arena corporate offices exerted control in areas such as ratings of performance for compensation and ratings of performance, potential, and people development for Succession Planning and Development (Carey deposition, pp. 215 & 216, 218, and 231). I do not dispute that the affiliate companies were responsible for their own human resources practices, as long as those practices did not conflict with Johnson & Johnson policy.

Dr. Outtz' continued the theme of decentralized structure in his second conclusion, that stated:

> The decentralized and autonomous management structure of Johnson & Johnson Corporate Headquarters and the Subsidiaries requires that any examination of the companies' human resources policies, practices and procedures appropriately account for this management structure (Outtz report, p. 66).

As noted above, I disagree with his characterization of Johnson & Johnson as possessing an "autonomous" and "decentralized" management structure with respect to human resources management functions. Therefore, I cannot agree that "any examination of the companies' human resources policies, practices and procedures" must "account" for such a structure. Moreover, an examination of a given company's policies and practices without making any assumption concerning its organizational structure might yield conclusions about that organization that are more reflective of reality than an examination influenced by preconceived notions of its

structure. A "bottom-up" study of practices and procedures, followed by an examination of affiliate companies' policies with respect to whether they differ from corporate policies may have proven itself more fruitful.

> Dr. Outtz' third conclusion dealt with performance appraisal. It stated:
>
> Examination of a random sample of completed performance appraisals from the Johnson & Johnson companies in existence in 2001 revealed that the performance management systems at the companies (a) exceeded the standards of accepted professional practice with regard to objectivity and (b) were significantly different among companies (Outtz report, p. 67).

I cannot accept Dr. Outtz standard for objectivity. As noted previously, his four criteria represent a redaction of a larger body of recommendations on legal defensibility of appraisal systems drawn from the research literature. Dr. Outtz could, and in my opinion should, have included additional advice from Malos, who stated that performance appraisal procedures:

- Should be standardized and uniform for all employees within a job group
- Should be formally communicated to employees
- Should provide notice of performance deficiencies and of opportunities to correct them
- Should provide access for employees to review appraisal results
- Should provide formal appeal mechanisms that allow for employee input
- Should use multiple, diverse, and unbiased raters
- Should provide written instructions and training for raters
- Should require thorough and consistent documentation across raters that includes specific examples of performance based on personal knowledge
- Should establish a system to detect potentially discriminatory effects or abuse of the system overall

(Malos; In J. Smither [Ed.], 1998; p. 83)

I agree that objectivity is an important characteristic in performance appraisal systems, but it is evident from reading the research literature that procedural characteristics beyond objectivity are crucial to ensuring appraisals' legal defensibility and overall effectiveness.

I acknowledge that some differences existed between the operating companies' performance appraisal systems in 2001, but I cannot accept Dr. Outtz' characterization that they were "significant." Dr. Outtz did not present the criteria he used for establishing the significance of differences he observed. I did note similarities across companies' appraisals, such as the

incorporation of the Standards of Leadership, the adoption of a common rating scale, and the calibration sessions discussed previously. Additionally, these calibration discussions described by affiliate-level human resources officials appeared to focus on the overall performance ratings that are promulgated by corporate human resources offices (Carey deposition, pp. 215 & 216, 218, and 231), and are currently entered into Comp Navigator (Collins deposition, pp. 97-99; Michalcewicz deposition, p. 195) and Talent Navigator (Lochner deposition, p. 128; Raher deposition, p. 177), so whatever unique characteristics existed in a given company's appraisal process are at least diluted by the use of the Johnson & Johnson performance rating scales, if not eliminated.

The fourth conclusion presented by Dr Outtz addressed compensation policies, procedures, and practices. He opined:

> Examination of the compensation policies, practices and procedures of the companies indicated significant differences among the companies (Outtz report, p. 67).

I cannot agree with Dr. Outtz' conclusion regarding compensation polices. Recall that Ms. Obler identified the Johnson & Johnson Worldwide Policy Manual (Obler deposition exhibit 10), and stated that "[w]ith respect to the compensation section, the majority of these policies go back many, many years" (Obler deposition p. 78). Ms. Obler stated that the policies "have been reviewed and approved by the appropriate people, depending on the topic" (Obler deposition, pp. 78 & 79). Ms. Obler indicated that Johnson & Johnson's policy indicated that "[a]ffiliate, national and regional plans which represent a significant change from worldwide corporate policies are subject to review by Corporate Worldwide Compensation Resources," and that said policy applied to companies within the U.S. (Obler deposition, p. 76).

Affiliate company human resources professionals reported adhering to, requesting permission for variances from, or creating more specific policies that were consistent with the intent of established corporate compensation policies (See, for example, David deposition, p. 28; Gudicello deposition, pp. 62 & 63; Ward deposition, pp. 23 & 24). Consistent with the affiliates' HR professionals' reports of seeking permission for exceptions, Ms. Obler testified: "there have been affiliate plans, bonus plans specifically, that have been reviewed by WCR and have been

reviewed by the Management Compensation Committee" (Obler deposition, pp. 76 & 77). Affiliate company-level human resources staff reported similarities in processes (See, for example, Milton Brougham deposition exhibit 1, p. 2; Codman's HR policies for non-sales employees in 2001 "were similar to the policies of AcroMed, another subsidiary of DePuy").

I agree with Dr. Outtz' compensation-related conclusion with respect to field sales compensation in Johnson & Johnson companies, at least as it relates to commissions and bonuses driven by sales performance. Ms. Obler testified that Worldwide Compensation Resources was responsible for U. S. compensation programs, except for sales compensation and collective bargaining units (Obler deposition, p. 285). Base salary for field sales personnel, on the other hand, seems to have to been treated in much the same manner as non-sales employees. Randall David testified: "They are the same, field and non-field would be the same in terms of how the base salary is determined," and "[t]hey are the same, field and non-field would be the same in terms of how the base salary is determined" (David deposition, pp. 86 & 90).

Dr. Outtz fifth conclusion was:

> Examination of the promotion practices of the companies indicated that promotions were obtained in a variety of ways. Analysis of plaintiffs' claims as to promotion requires information in detail about the specifics of each promotion (Outtz report, p. 67).

I agree with Dr. Outtz' conclusion that promotions were obtained in a variety of ways. I cannot agree with his conclusion that any analysis of Plaintiffs' promotion claims requires information in detail about the specifics of each promotion, because I am uncertain precisely what he means. If Dr. Outtz' conclusion is a reiteration of his discussion advocating analysis at the "individual level," then I disagree. I remain concerned by Dr. Outtz' statement that "[p]romotions were specific to the circumstances present at a particular company and the individual employee or employees involved" when describing promotions (Outtz report, p. 57). Dr. Outtz also testified: "if one reads depositions transcripts, it was readily apparent that the operating companies did not require job posting, at a particular point they didn't require job posting, nor did Corporate" (Outtz deposition, p. 182). Johnson & Johnson has recently "deployed" a policy stating that all positions

at or below the director level will be posted (HochbergSmith deposition, p. 66). The Equal Employment Opportunity Commission has identified "failure to post/advertise promotional opportunities" as one of its "barriers to advancement and promotion" in its "Best Practices of Private Sector Employers" (EEOC, 2001). In my opinion, the failure to post jobs at or below the director level prior to 2003 is inconsistent with good human resources management practice, let alone "best practices." Failure to adequately and consistently post jobs is one element that cuts across virtually all the affiliate companies.

> The final conclusion presented by Dr. Outtz was:
>
> Examination of the human resources policies, practices and procedures of Johnson & Johnson Corporate Headquarters and the Subsidiaries indicates that plaintiffs' experts did not utilize appropriate methodology in evaluating the companies' human resources policies, practices and procedures. Specifically plaintiffs' experts sought to determine whether African American and Hispanic salaried employees at Johnson & Johnson received significantly fewer promotions, less compensation and lower initial job assignments than similarly qualified White non-Hispanic employees. Plaintiffs' experts' analysis failed to achieve their goal because the analysis was not based on the actual factors used by Johnson & Johnson Corporate Headquarters and the companies to determine compensation and promotion. Plaintiffs' experts' analysis does not address initial job assignments. Additional information is needed to adequately address that issue (Outtz report, p. 67).

I addressed this issue in my critique of Dr. Outtz' discussion in Chapter 5 of his report. I disagree with Dr. Outtz' assessment of Drs. Madden and Vekker's analyses. The "actual factors used by Johnson & Johnson compensation and promotion" are among the selection procedures that are the appropriate targets of scrutiny under the *Uniform Guidelines* once adverse impact has been determined. The *Uniform Guidelines*' approach to assessing adverse impact is clearly presented and markedly different than the approach advocated by Dr. Outtz. The *Uniform Guidelines*' language makes no mention of taking qualifications into account in making an initial determination of adverse impact. Indeed, the *Uniform Guidelines* define adverse impact as "a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group" (29CFR1607.16B). While I cannot dispute that additional information may be helpful in identifying every selection procedure or component that contributed to the observed adverse impact in promotions and racial disparities in

compensation, the effect of those factors is evident in Drs. Madden and Vekker's analyses, and, indeed, in some of the analyses performed by Drs. Outtz and Wise.

CONCLUDING OBSERVATIONS

In my opinion, understanding the Johnson & Johnson Family of Companies requires differentiating between policies on the one hand, and the procedures and practices used to implement those policies on the other. In my opinion, the deposition testimony supports the conclusion that corporate policies were transmitted to affiliate companies, and were either implemented by the companies, modified by the companies in a manner consistent with a given policy's intent and Johnson & Johnson's framework, or, in rare cases, modified by the companies after seeking approval at the corporate level. Examples of Johnson & Johnson's policies being implemented or corporate approval being required appeared in virtually every deposition of affiliate-level human resources management professionals. Even after protesting that one of CEO Ralph Larsen's annual compensation letters was "a lot of sound and fury," Mr. Hind was forced to admit that the letter "contains elements of fact" and that the domestic company for which he worked changed its succession planning and development codes to comply with Mr. Larsen's mandate (Hind deposition, pp. 165-167).

With respect to affiliates' practices, Dr. Outtz' own analysis could be interpreted to indicate more similarities than differences. Dr. Outtz' examination of initial compensation factors found that only one of the operating companies considered as many as three factors beyond the first five he identified. Five other companies (20% of Dr. Outtz' sample) identified as considering two additional factors beyond factors A-E, and 19 companies (76% of the sample) are shown to have considered either one or no additional factors. Dr. Outtz indicated that the degree of overlap might be misleading, because the companies differentially weighted the five factors (Outtz deposition, pp. 154-157). However, he provided no basis for his conclusion on weighting other than his reading of documents, so I cannot evaluate the degree to which weighting of the five core factors differed among companies. It was noted previously in my discussion of appraisals that two of the five factors (market pricing and internal equity) could be considered affiliate company-

specific, as Dr. Outtz classified the remaining three as "person specific." Ms. Obler's testimony regarding Johnson & Johnson's compensation philosophy and her descriptions of the pains taken to ensure comparable salary opportunities across Johnson & Johnson's companies would seem to limit differences created by market pricing or internal equity. Ms. Obler testified that some differences occur, but the policy framework overseen by Worldwide Corporate Resources is designed to limit the size of any differences, allowing Johnson & Johnson to move employees from one company to another or one region to another with relative ease.

I agree with Dr. Outtz' observation that "appraisal for sales positions differed from those for non-sales positions in that the rating criteria were more formulaic," and that "specific formulas used to evaluate performance were developed by the sales management of each Subsidiary, and differed by Subsidiary" (Outtz report, p. 33). Sales personnel are often paid on commission, based upon sale revenues or market share. Different products, current market shares, forecasted growth, and other environmental factors seem likely to produce different rating criteria for different product lines.

With respect to merit pay, Johnson & Johnson's compensation policy and Salary Administration Plan requires merit increases to be "performance driven," and 10 of the 12 factors that Dr. Outtz indicated were considered by at least one of the 12 companies listed in Figure 5 of his report are related to job performance. All 12 companies "considered" "performance ratings." Of the two non-performance factors, "position within market pricing data" was indicated for five companies and "internal equity" was indicated for one company. My impression is that the differences observed in merit pay are more akin to variations on a theme than every company playing its own tune.

I believe the promotion processes may be among the most important aspects of the case, because compensation increases are almost invariably the result of promotions to higher levels in the organization. Unfortunately, Dr. Outtz devoted little more than one page to this important issue. For the higher-level jobs filled through the Succession Planning and Development process, the testimony clearly indicates that the formal ratings of performance, potential, and people

development required by Johnson & Johnson of its affiliate companies were not the driving force in determining which employee received a particular promotion. Mr. Carey described a Succession Planning and Development process that was subjective and downplayed the importance of numeric performance appraisal ratings. Affiliate company human resource management professionals echoed Mr. Carey's description.

The failure to post most jobs was a common element that cuts across virtually all the affiliate companies. Dr. Outtz testified: "if one reads depositions transcripts, it was readily apparent that the operating companies did not require job posting, at a particular point they didn't require job posting, nor did Corporate" (Outtz deposition, p. 182). Dr. Outtz did not comment on postings because "[i]t was understood, prior to 2001, that none of the operating companies nor Corporate required posting" (Outtz deposition, p. 183). Johnson & Johnson recently "deployed" a policy stating that all positions at or below the director level will be posted (HochbergSmith deposition, p. 66). Ms. HochbergSmith was not sure that the new posting policy would affect the representation of African-American employees at Johnson & Johnson (HochbergSmith deposition, p. 75), although the Equal Employment Opportunity Commission has identified "failure to post/advertise promotional opportunities" as one of its "barriers to advancement and promotion" in its "Best Practices of Private Sector Employers" (EEOC, 2001). In my opinion, the failure to post jobs at or below the director level prior to 2003 is inconsistent with good human resources management practice, let alone "best practices."

I was unable to fully address some of Dr. Outtz' observations and conclusions. Dr. Outtz testified: "My report focuses on two issues, as I say in the report. It focuses on Plaintiff's claim of excessive subjectivity and Plaintiff's claim that the putative class is similarly situated across the operating companies" (Outtz deposition, p. 183). I am uncomfortable with some of the language Dr. Outtz used to discuss differences he observed in human resources management practices, such as "significant," "similarly situated," and "similarly affected." I am unable to attach the adjective "significant" to any differences that exist without conducting a statistical test of a specific hypothesis. I am unable to comment on "similarly situated" or "similarly affected," because these terms are not terms of art in industrial and organizational psychology. I cannot offer an opinion

regarding whether the promotion or compensation practices at the affiliate companies are "similar" enough to fulfill the requirements for class certification or different enough to prevent it. I view that determination as something outside the scope of industrial and organizational psychology, a determination more appropriately made by the Court.

As a final observation, I believe that affiliate company human resources professionals and corporate HR leaders had excessive faith in their procedural mechanisms designed to promote fairness. When asked whether potential ratings were assessed for adverse impact, Mr. Hind responded with a description of a calibration process for potential ratings that was "a very similar process to the process we use for performance ratings" (Hind deposition, pp. 224-226). When the question on adverse impact was repeated, he replied: "I consider that the amount of rigor that we put into the action is sufficient to ensure fairness and equity in the organization" (Hind deposition, p. 227). Mr. Ward's response to questioning on assessing racial differences in performance appraisal was interesting, in that it echoed testimony of other deponents who described the processes their companies utilize to ensure fairness in lieu of conducting analyses for racial differences. Mr. Ward stated:

> Our approach to the calibration process of performance, the assessment of potential, the inherent levels of review by higher levels of management, the calibration systems and processes, inherently establishes a series and a system of checks and balances that give us a, the best assurance that we can have that we are not adversely impacting African-Americans, which I believe does demonstrate that it is a valid process (Ward deposition, p. 147).

Mr. Ward's response indicates his faith in processes to achieve fairness, so much so that he appears to believe that following those processes precludes the possibility of adverse impact. Such a belief, coupled with a philosophy that pits "income revenue" against "diversity" (Cachinero deposition, p. 265), may have led to underestimating the magnitude of equal employment opportunity issues in Johnson & Johnson's family of companies. Brief, Butz, and Deitch (2005) comment on ignoring group status in human resources management systems:

> One can think of equal employment opportunity (EEO) legislation and administrative orders (e.g., Executive Order 11246) as having generated what Konrad and Linnehan (1995) called "formalized human resource management (HRM) structures" within organizations. These structures refer to formal rules,

> procedures, programs, and positions that influence personnel decisions. As noted above, these formalized structures merely may be symbolic (e.g., Edelman, 1992), intended to do little to improve the employment status of protected groups. A more favorable view is that these structures are ineffective because they are intended to be "identity-blind" (Konrad & Linnehan, 1995) or to function under a "veil of ignorance as to group identification" (Glazer, 1988, p. 32) thereby supposedly eliminating discrimination based on group membership. However, Konrad and Linnehan reasoned that the impact of identity-blind structures is limited, for they do not adequately control biases against members of protected groups. Alternatively, they argue that "identity-conscious" or "race-conscious" (e.g., Glasser, 1988) structures, which include demographic group identity in HRM decision-making processes, are more effective. This is so because personnel decisions are monitored more closely and, thus the numbers, experiences, and outcomes of protected group members are attended to more closely, with special efforts made to employ and promote them.
>
> Empirically, Konrad and Linnehan (1995) observed, among the organizations they studied, that identity-conscious but not identity-blind HRM structures were associated positively with indicators of the employment status of people of color. Therefore, it seems vigorous law enforcement matters, likely by promoting HRM policies, practices, and procedures that are race sensitive. Weak law enforcement, on the other hand, likely promotes ineffective or simply symbolic gestures on the part of organizations subjected to them. These conclusions were drawn based upon research addressing the enforcement of federal law (Konrad & Linnehan, p. 131).

Johnson & Johnson's HR professionals' failure to conduct adverse impact analyses beyond those absolutely required by federal regulations, coupled with their faith in the companies' identity-blind processes, probably contributed to the differences observed by Drs. Madden and Vekker. Mr. Carey neatly summarized what appears to have been the prevailing attitude regarding rigorous studies of adverse impact at Johnson & Johnson when he said: "You know, the statistics are like the tip of the iceberg. Unless you look deeper and understand what's below the water, you don't know what to base your judgment on and I would like to know what's below the water" (Carey deposition, p. 985). In this particular case, looking at what was above the water would have informed Johnson & Johnson that their compensation practices yielded in racial differences and that promotion processes created adverse impact against minority employees.

Had Johnson & Johnson officials found what Drs. Madden and Vekker found, they may have taken steps to ensure the validity of their selection procedures, in keeping with Dr. Outtz' previous testimony: "Again, if a personnel selection procedure is used, it should be valid. That's a professional judgment. It's not a legal judgment," and "the legal issue is not for me to decide. But if you draw inferences from a selection procedure, validity has to do with evidence of the accuracy of those inferences, so the question is has the organization demonstrated evidence, provided evidence, which supports the accuracy of those inferences. That to me is the relevant issue" (Outtz transcript attached to the certification of Nicole Austin-Hillery and filed under seal, p.46). I fully agree with Dr. Outtz on this point. The selection procedures at issue (e.g., compensation and promotions and their subcomponents such as performance appraisals) should be demonstrably job related, and they are not. Again, Mr. Carey neatly identified the problem. When asked whether it was true that "you've never validated the evaluation processes used at Johnson & Johnson," he responded: "It is, going back to the prior deposition testimony, it is true that we have never taken a labor economist or a statistician and we have taken our system and given it to a person like that and asked questions about it and asked them to give their opinions . . ." (Carey deposition, p. 688).

Certification

I hereby certify that the report appearing above was written solely by John G. Veres III. I certify that I have no interest, present or contemplated, in the above referenced matter, and that the compensation for the effort to produce the report is not contingent upon any conclusions reached therein. I certify that, to the best of my knowledge and belief, all statements and information contained in the report are true and correct.

John G. Veres III

26 April 2006

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Appendix 1 – Resume of John G. Veres III

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Education

PhD Industrial/Organizational Psychology
Auburn University, June 1983
Dissertation title: *Bias in Content Validity: An Investigation into Sources of Racial Differences in Job Analysis.* Directed by W. R. Boyles and W. I. Sauser, Jr.

MS Psychology
Auburn University Montgomery, June 1978
Major Professor: W. O. Jenkins

BS Psychology
Auburn University Montgomery, June 1976
University Year for Action Student, 1976

Current Position

Executive Director, Office of University Outreach, Auburn University Montgomery, since March 2000. University Outreach reports to the Chancellor and is comprised of four centers conducting applied research and providing consulting services, in addition to core consulting activities in economic forecasting, equal employment opportunity, and public policy formation. The **Center for Advanced Technologies** focuses on consulting and technical assistance in information technology, with particular emphasis on network, software, and Internet applications. The **Center for Business and Economic Development** provides research expertise and consulting services in grant development, human resources management, litigation support in equal employment opportunity lawsuits, market and survey research, organizational analysis, and quantitative methods. It also develops regional econometric models, conducts economic impact studies, and engages in research designed to assist decision makers and economic development professionals. The **Center for Demographic Research** studies population trends in the context of important public policy issues such as health, education, and societal welfare. The Center publishes salient demographic data as an aid to decision makers and conducts work force utilization analyses. The **Center for Government and Public Affairs** focuses on human resources management, organizational consultation, performance management, and employee training in public sector agencies. Through its Alabama Certified Public Manager and the Governmental Accountant and Auditor Training programs, the Center delivers training to employees of Alabama's state agencies. Dr. Veres currently serves as a member of the **Governor's Commission for Action in Alabama's Black Belt** and as technical advisor to the **Alabama Commission on Government Accountability**. University Outreach hosts the Commission's website, AlabamaResults.info.

Dr. Veres also serves as an *Affiliate Faculty Member*, Auburn University Department of Psychology. He is a member of the Auburn University Graduate Faculty. His duties include teaching psychometric theory and measurement methods courses, applied training of graduate students, scoring of doctoral preliminary exams, and serving on dissertation committees.

Past Employment/Appointments

February 2000 to August 2005 - Professor of Information Systems and Decision Sciences, Auburn University Montgomery. Worked with Department Head on an Applied Technology Program curriculum, specifically with respect to managing information technology resources.

October 1982 to March 2000 - Director, Center for Business and Economic Development, Auburn University Montgomery. The Center is a research and extension arm of the university, reporting to the Vice Chancellor for Financial and Administrative Services. Principal activities include personnel administration, selection procedure development and validation, organizational analysis, expert testimony and litigation support in equal employment opportunity law suits, and applied research in human resources management and industrial/organizational psychology.

January 1993 to May 1993 - Acting Executive Director, Alabama Certified Public Manager (CPM) Program and the Governmental Accounting and Auditing Training (GAAT) Program, Auburn University Montgomery (concurrent with Center for Business directorship). Responsible for administrative oversight and financial management of programs delivering training to employees of Alabama state agencies.

November 1986 to July 1987 - Acting Dean of Continuing Education, Auburn University Montgomery (also concurrent with Center directorship). Responsible for renovating the facilities and expanding the equipment holdings of the Division of Continuing Education. Microcomputers were acquired, videotape equipment was obtained, offices were refurbished, and an organizational diagnosis was completed during tenure as Acting Dean.

September 1982 to September 1985 - Assistant Professor of Management, Auburn University Montgomery. Courses taught included undergraduate classes in general management, personnel management and organizational behavior. Also taught a graduate seminar in advanced human resources management.

November 1979 to September 1982 - Research Associate in the Center for Government and Public Affairs, Auburn University Montgomery (Acting Assistant Director, August 1981 to May 1982). Duties included training in data collection methods, supervising ten interviewers and one research associate in data collection efforts, and administrative activities such as serving as project liaison to the grant administrator and communication of results via monthly progress reports and technical reports.

June 1978 to November 1979 - Research Associate for the Alabama Merit System Test Validation Project, Center for Government and Public Affairs, Auburn University Montgomery. Duties included job analysis, test development and content validation, development of criterion measures for criterion-related validity studies, administration of performance tests, development of in-basket exercises, and item writing for multiple-choice selection tests.

March 1977 to August 1981 - Research and Development Consultant for Behavioral Evaluation, Treatment and Analysis, Incorporated. Duties included consultation to state and federal agencies for training of staff in the techniques of behavioral interviewing and related methods of data collection, preparation and delivery of workshops (including oral presentations, interviewing for demonstration, and assessment of participant performance), consultation in program design, data analysis, and public relations.

October 1976 to March 1977 - Research and Training Assistant for Auburn University Montgomery. Duties included training of Alabama Department of Youth Services (D.Y.S.) staff in behavioral interviewing and related methods of data collection, program design, behavior control, and program evaluation.

Current Research Interests

Effects of racial differences in panel composition on structured situational interview outcomes. Using alternative selection/referral methods to reduce adverse impact while maintaining selection procedure utility. Alternatives to realistic job previews for lowering new employee expectations upon organizational entry. Using organizational citizenship behavior measures and personality inventories as employee selection devices. Test validation and related psychometric issues.

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Sims, R. R., & Veres, J. G. (1985). Professional education as preparation for professional jobs and changing career roles. *Business Education, 6,* 50-54.

Reviews

Stutzman, T. M. & Veres, J. G. (1989). Review of the Minnesota Clerical Assessment Battery. In J. Hogan & R. Hogan (Eds.) *Business and industry testing: Current practices and testing reviews.* Austin, TX: Pro-ED.

Benson, P. G., Sauser, W. I., & Veres, J. G. (1983). More than ping-pong balls: A review of current personnel management texts. *Personnel Psychology, 36,* 385-400.

Papers

O'Leary, R. S., Jackson, K. A., Veres, J. G., & Facteau, J. D. (2005, April). *A construct validity comparison of alternative structured interview scoring methodologies*. Poster presented at the annual meeting of the Society for Industrial and Organizational Psychology (SIOP), Los Angeles, CA.

Jackson, K. A., & Veres, J. G. (2000, April). *Rating effects based on candidate race and interview panel composition.* Poster presented at the annual meeting of SIOP, New Orleans, LA.

Gray, J. P., Perlow, R., & Veres, J. G. (1994, April). *Job analysis items effect on profiles of "essential functions."* Paper presented at the annual meeting of SIOP, Nashville, TN.

Veres, J. G., & Palmer, C. I. (1994, April). *Implications of alternative methods of test score use in personnel selection: A follow-up study.* Paper presented at the annual meeting of SIOP, Nashville, TN.

Cascio, W. F. & Veres, J. G. (1993, April). *Implications of alternative methods of test score use in personnel selection.* Paper presented at the annual meeting of SIOP, San Francisco, CA.

Veres, J. G., Palmer, C. I., & Boyles, W. R. (1992, May). *Setting a cut score for an engineering examination: An application of Berk's eclectic judgmental-empirical approach.* Paper presented at the annual meeting of SIOP, Montreal, Canada.

Veres, J. G. (1991, March). *Effects of the Americans with Disabilities Act and the Civil Rights Act of 1991 on I/O practice.* Panel discussion at the annual meeting of Southeastern Industrial and Organizational Psychological Association (SEIOPA), New Orleans, LA.

Veres, J. G. (1990, March). *The role of the I/O psychologist.* Panel discussion at the annual meeting of SEIOPA, Atlanta, GA.

Sims, R. R., & Veres, J. G. (1988, April). *Introducing technology in the form of office automation.* Paper presented at the Operations Research Society of America/The Information Management Society (ORSA/TIMS) annual meeting, Washington, DC.

Sims, R. R., & Veres, J. G. (1988, April). *The impact of technology on today's employees.* Paper presented at the ORSA/TIMS annual meeting, Washington, DC.

Veres, J. G., & Lahey, M. A. (1988, April). *The I/O psychologist as external consultant in employment discrimination cases.* Panel discussion at the first annual meeting of SIOP, Chicago, IL.

Veres, J. G., Buckley, M. R., & Shake, L. (1987, November). *A new perspective on the change typology.* Paper presented at the Southern Management Association annual meeting, New Orleans, LA.

Veres, J. G. (1986, March). *The impact of federal regulations and judicial decisions on the practice of I/O psychology.* Paper presented at the Southeastern Industrial/Organizational Psychology Association annual meeting, Orlando, FL.

Veres, J. G., & Lahey, M. A. (1985, June). *Difficulties with delta.* Symposium at the International Personnel Management Association Assessment Council (IPMAAC) annual conference, New Orleans, LA.

Veres, J. G., & Lahey, M. A. (1984, November). *The relationship between color vision and job performance in air traffic control specialists.* Paper invited by the Metropolitan Washington Personnel Testing Council, Washington, DC.

Boyles, W. R., Hill, J. B., Lahey, M. A., & Veres, J. G. (1984, May). *The necessity for convergence and integration of personnel subsystems.* Symposium at the IPMAAC annual conference, Seattle, WA.

Veres, J. G., & Boyles, W. R. (1983, November). *Bias in content-valid tests: Implications for personnel selection.* Paper presented at the Southern Management Association conference, Atlanta, GA.

Veres, J. G., Boyles, W. R., & Champion, C. H. (1983, May). *Bias in content-valid tests revisited.* Paper presented at the IPMAAC annual conference, Washington, DC.

Veres, J. G. (1982, May). *Administrative vs. research performance ratings: Implications and impact.* Paper presented at the National Industrial/Organizational and Organizational Behavior Graduate Student convention. In *Program and Proceedings,* College Park, MD.

Kemery, E., Veres, J. G., & Boyles, W. R. (1982, May). *Selection procedures for a new, single-incumbent, managerial position.* Paper presented at the National Industrial/Organizational and Organizational Behavior Graduate Student convention. In *Program and Proceedings,* College Park, MD.

Veres, J. G., Feild, H. S., & Boyles, W. R. (1981, May). *Validating performance appraisal forms.* Paper presented at the IPMAAC annual conference, Denver, CO.

Boyles, W. R., Palmer, C. I., & Veres, J. G. (1981, March). *Results of performance testing of clerical workers* and Palmer, C. I., Veres, J. G., & Boyles, W. R. *Trends in content validation.* Both presented at SEIOPA annual meeting, Atlanta, GA.

Boyles, W. R., Palmer, C. I., & Veres, J. G. (1980, July). *Bias in content valid tests.* Invited paper presented at the IPMAAC annual conference. In *Proceedings*, Boston, MA.

Selected Technical Reports

Facteau, C. L., Bordas, R., Tears, R., & Veres, J. G. (2001). *Organizational citizenship behavior interviews: Validation study report.* Montgomery, AL: Center for Government and Public Affairs (CGPA), Auburn University Montgomery.

Facteau, C. L., Bordas, R., Tears, R., & Veres, J. G. (2000). *Organizational citizenship behavior structured oral interview pilot study technical report.* Montgomery, AL: Center for Business and Economic Development (CBED), Auburn University Montgomery.

Boyles, W. R., Hill, J. B., Jackson, K. A., Livingston, A. P., Palmer, C. I., & Veres, J. G. (1997). *Setting a minimum passing score on the 1996 fundamentals of engineering examination.* Clemson, SC: National Council of Examiners for Engineering and Surveying.

Jackson, K. A., Brightwell, D., Veres, J. G., & Palmer, C. I. (1996). *Montgomery Police Department content validation report: Sergeant's selection procedures.* Montgomery, AL: CBED, Auburn University Montgomery.

Boyles, W. R., Palmer, C. I., Prewett, A. J., Veres, J. G. (1993). *Setting a minimum passing score on the 1993 fundamentals of engineering examination.* Clemson, SC: National Council of Examiners for Engineering and Surveying.

Locklear, T. S., Prewett, A. J., Champion, C. H., Livingston, S. R., & Veres, J. G. (1993). *Developing job-related selection procedures, Volume 1: Alabama job analysis method training manual.* Montgomery, AL: CBED Manual 93-13, Auburn University Montgomery.

Prewett, A. J., Champion, C. H., & Veres, J. G. (1993). *Developing job-related selection procedures, Volume 2: Selection procedure plan training manual.* Montgomery, AL: CBED Manual 93-14, Auburn University Montgomery.

Gray, J. P., Livingston, S. R., Igou, F. P., Jackson, K. A., Allentoff, H. L., Hogan, J. B., & Veres, J. G. (1993). *Developing job-related selection procedures, Volume 3: Selection procedure construction.* Montgomery, AL: CBED Manual 93-16, Auburn University Montgomery.

Hogan, J. B., Livingston, S. R., & Veres, J. G. (1992). *Content validation report: Police lieutenant promotional procedures for the Montgomery, Alabama Police Department.* Montgomery, AL: CBED Technical Report 92-03, Auburn University Montgomery.

Boyles, W. R., Palmer, C. I., & Veres, J. G. (1991). *Setting a minimum passing score on the 1990 fundamentals of engineering examination.* Clemson, SC: National Council of Examiners for Engineering and Surveying.

Palmer, C. I. & Veres, J. G. (1991). *Evaluating the utility of the Mantel-Haenszel procedures for the 1990 Montgomery Police Department Sergeant Test.* Montgomery, AL: CBED Technical Report 91-04, Auburn University Montgomery.

Reyna, M., & Veres, J. G. (1989). *Montgomery County Commission: Report of content validation of promotion procedures for sergeant, corrections division, Montgomery County Sheriff's Department.* Montgomery, AL: CBED Technical Report 89-02, Auburn University Montgomery.

Locklear, T. S., & Veres, J. G. (1988). *The role of job analysis in the Alabama Department of Mental Health and Mental Retardation's appraisal system.* Montgomery, AL: CBED, Auburn University Montgomery.

Locklear, T. S., & Veres, J. G. (1988). *Job analyses for the ranks of police sergeant, lieutenant and captain in the Atlanta Bureau of Police Services.* Montgomery, AL: CBED, Auburn University Montgomery.

Locklear, T. S., Palmer, D., Veres, J. G., & Granger, B. B. (1987). *Evaluation of an appraisal system's efficacy in the Alabama Department of Mental Health and Mental Retardation.* Montgomery, AL: CBED, Auburn University Montgomery.

Veres, J. G., & Lahey, M. A. (1985). *The reliability of the merit promotion process at Maxwell AFB.* Montgomery, AL: CGPA, Auburn University Montgomery, USAF Contract 1600-84-R0059.

Veres, J. G., Smith, E. N., Palmer, C. I., Boyles, W. R., & Ruch, W. W. (1984). *Air University job analysis and PEP development guide.* Montgomery, AL: CGPA, Auburn University Montgomery.

Lahey, M. A. & Veres, J. G. (1984). *A study of occupations in the Alabama Department of Mental Health.* Montgomery, AL: CBED, Auburn University Montgomery.

Lahey, M. A., Kuyk, T. K., Veres, J. G., & Clark, D. J. (1984). *The impact of color weather radar equipment on the job of air traffic control specialists -- Flight service station option.* CBED, Auburn University Montgomery, OPM Contract 83-50.

Lahey, M. A., Veres, J. G., Kuyk, T. K., Clark, D. J., & Smith, E. N. (1984). *Job analysis and determination of color vision requirements for air traffic control specialists.* CBED, Auburn University Montgomery, OPM Contract 83-50.

Smith, E. N., Veres, J. G., & O'Donnell, E. C. (1982). *Functional description of the Alabama Personnel Department.* Montgomery, AL: CGPA, Auburn University Montgomery.

Jenkins, W. O., deValera, E. K., Cogburn, H. E., & Veres, J. G. (1981). *A systematic follow-up evaluation of the Alabama CETA Program.* Montgomery, AL: CGPA, Auburn University Montgomery.

Elliott, R., Boyles, W. R., Hill, J. B., Palmer, C. I., Veres, J. G., & Thomas, P. (1980). *Content-oriented personnel selection procedures -- A training manual.* Montgomery, AL: CGPA, Auburn University Montgomery.

Boyles, W. R., Palmer, C. I., Hill, J. B., Elliott, R. H., Veres, J. G., Lassiter, C. M., Boyd, Z. A., & Perkins, D.B. (1979). *Criterion-related validity study: Clerical classes I and II. Alabama Merit System Test Validation Project Report.* Montgomery, AL: CGPA, Auburn University Montgomery.

Other Professional Activities

Editorial Board Member

Journal of Managerial Issues, 1989-1998.
Review of Business, 1989-1996.
Southwestern Business Review, 1990-93.

Ad hoc Reviewer

Journal of Business & Psychology, 2004.
Journal of Applied Psychology, 1990-91.
Journal of Social Issues, 1988.

Program co-chair, Southeastern Industrial and Organizational Psychological Association (SEIOPA) annual meeting, New Orleans, March 1988; Washington, DC, March 1989.

Professional Affiliations

Academy of Management
American Association for the Advancement of Science
American Educational Research Association
American Psychological Association (Divisions 5, 14, 41, & 45)
American Psychological Society
Economic Development Association of Alabama
International Personnel Management Association Assessment Council
National Council on Measurement in Education
Society for Industrial and Organizational Psychology
Society for the Psychological Study of Ethnic Minority Issues

University Service

Auburn University Psychology Advisory Council, 2006-present.
Auburn University *Ad Hoc* Strategic Planning Committee, 2005-present.
Auburn University Montgomery (AUM) SACS Reaffirmation Steering Committee, 2005-present.
AUM Planning and Budget Advisory Committee, 2001-present.
Iota Chi (AUM) Chapter of Alpha Tau Omega Fraternity Board of Trustees, Member 2001-present.
AUM Executive Council, 2000-present.
AUM Information Technology Advisory Committee, 2000-present.
AUM Marketing Team, 1994 -present; Chairperson, 2002-2003.
Auburn University-AUM Relationship Task Force, 2005.
Auburn University I-85 Corridor Planning Group, 2003-2005; Executive Council 2004-2005.
AUM Executive Director of University Relations Search Committee 2002-03; Chairperson.
AUM *ad hoc* Website Committee, 2001-2003; Chairperson.
AUM Salary Advisory Council, 1997-2000.
AUM Staff Council Past President's Committee, 1995-2000.
AUM Mardi Gras Steering Committee, 1994-2000.
AUMFest Steering Committee, 1994-2000.
AUM Southern Association of Colleges and Schools (SACS) Re-accreditation Committee on Administration, 1996-97.
Auburn University Research Advisory Council (ex-officio), 1995-96.
AUM Research Council, 1991-96; Interim Chairperson, 1994-95.
AUM Budget Advisory Committee, 1995.
AUM School Mascot and Colors Committee, Chairperson, 1995.
AUM Committee on Internships, Chairperson, 1994-95.
AUM Staff Council President, 1991-92.
AUM Staff Council Vice President, 1990.
AUM Staff Council Unit Representative, 1989.
Auburn University I/O Psychology Graduate Program Advisory Board, 1988-91.
AUM SACS Re-accreditation Self-Study Steering Committee, 1986-88.
AUM Community Challenge Team Captain, 1985-87, 1990.
AUM School of Business Performance Appraisal Committee, 1983-84.
AUM Management Department Head Search Committee, 1983.

Community Service

Alabama Commission on Government Accountability, Technical Advisor, 2004-present.
Alabama History Day Advisory Board, 2004-present.
Catholic Housing Authority of Montgomery Board of Directors, 2005-present; Vice President.
Church of the Holy Spirit Pastoral Council, 1990-92 and 2004-present.
Governor's Commission for Action in Alabama's Black Belt, 2004-present.
I-85 Corridor Alliance Board of Directors, 2005-present.
Imagine a Greater Montgomery Community Leadership Coalition, 2006-present.
Montgomery Area Chamber of Commerce Board of Directors, 2004-2005.
Montgomery Area Chamber of Commerce Board Small Business Incubator Board of Directors, 2004-present.
Montgomery Area Chamber of Commerce Small Business Advisory Committee, Chairperson, 1998-present.
Montgomery Catholic High School Boy's Basketball Coach Search Committee, 2005.
Montgomery Catholic High School Athletics Planning Committee, 2001.
Montgomery Catholic High School Development Campaign Business Subcommittee, 1999-2000.
Montgomery Catholic High School Booster Club, 1997-present; Vice President, 1999-2000.
Chamber of Commerce Education Partnership; Chair, Professional Development Subcommittee, 1999.
St. Bede School Information Technology Committee, 1996-98.
Montgomery Rotary Club, 1988-1996; Literacy Committee, 1989-91.
St. Bede School Long Range Finance Committee, 1990.
Church of the Holy Spirit Youth Committee, 1988-90.
Church of the Holy Spirit Youth Leader, 1986-87.
YMCA Boy's Basketball Coach, 1994-95; YMCA Girl's Basketball, 1993.
Dixie Youth Girl's Softball Coach, 1990, 1993, 1995, 2001.

Selected Clients

Public-sector clients, past and present, include the U. S. Air Force, the U. S. Office of Personnel Management, the Alabama Department of Economic and Community Affairs, the Alabama State Board of Education, the Alabama Department of Finance, the Alabama State Personnel Department, the Alabama Department of Public Safety, the Alabama Department of Transportation, the Pennsylvania State Police Department, the Montgomery County (AL) Sheriff's Department, the Mobile County (AL) Sheriff's Department, the Macon County (GA) Sheriff's Department, the DeKalb County (GA) Police Department, the City of Selma Alabama, the City of Montgomery Alabama, and the City of Atlanta Georgia. Private-sector clients, past and present, include The Boeing Company, the Southern Natural Gas Company, the General Electric Company, the Southern Nuclear Operating Company, PPG Aircraft, ALFA, Inc., Ampex, Information Specialists, Inc., Derringer Aircraft, Inc., Caterpillar, the Gulf States Paper Company, Norman Properties, Charles Smith, Thompson Tractor, U. S. Pipe, and the Monsanto Corporation. The Center for Business' Monsanto organizational development effort was selected as a model for industry-university cooperation by the American Association of State Colleges and Universities in 1987, and the Centers for Business and Government were cited by AASCU as exemplars of good practice in outreach activities in 1998.

Recent Reports and Testimony

Keith Jordan v. the City of Ozark, Alabama (USDC MD AL, 2004)
Consultation to Defendant's counsel on issues involving the Americans with Disabilities Act. Submitted report.

Rhodes, et al. v. Cracker Barrel (USDC ND GA, 2004)
Consultation to Plaintiffs' counsel on human resources management issues and testing procedures. Deposed.

McDermott, et al. v. Cracker Barrel (USDC ND GA, 2005)
Consultation to Plaintiffs' counsel on FSLA issues. Deposed. Testified at hearing.

Morgan, et al. v. Family Dollar (USDC ND AL, 2006)
Consultation to Plaintiffs' counsel on HR issues involving the FLSA. Deposed.

Reynolds v. McInnes (USDC MD AL, Ongoing)
Retained by Defendants to develop and administer selection procedures required by consent decree. Deposed. Testified at hearings on test validation issues. Consultation to Defendants' counsel.

Tappin v. Arkansas State Police (USDC ED AR, Ongoing)
Court-appointed expert monitoring the implementation of selection/promotion procedures. Submitted report. Testified at hearing.

Carlson et al. v. C. H. Robinson Worldwide, Inc. (USDC DMN, Ongoing)
Consultation to Plaintiffs' counsel on test validation issues in a gender-based Title VII case. Submitted report.

Yapp, et al. v. Union Pacific Railroad Company (USDC ED MO, Ongoing)
Consultation to Plaintiffs' counsel on adverse impact calculations. Submitted report and declarations. Deposed.

Edith Brown, et al. v. Dolgencorp, Inc., et al. (USDC MD AL, Ongoing)
Consultation to Plaintiffs' counsel on HR issues involving the FLSA. Submitted report. Deposed.

Marable et al. v. District Hospital Partners, L.P. (USDC DC, Ongoing)
Consultation to Plaintiffs' counsel on adverse impact and validation issues. Submitted report.

Bennett, et al. v. Nucor Corporation, et al. (USDC ED AR, Ongoing)
Consultation to Plaintiff's counsel on job analysis issue. Submitted report. Deposed.

Nilda Gutierrez, et al. v. Johnson & Johnson (USDC ND NJ, Ongoing)
Consultation to Plaintiff's counsel on compensation and appraisal issues. Submitted report.

United States v. Jefferson County Personnel Board (USDC ND AL, Ongoing)
Court-appointed Special Master and Court's Expert overseeing analyses of adverse impact and development of job-related selection and promotion procedures for jurisdictions served by the Personnel Board of Jefferson County, Alabama.

Appendix 2 – Documents Reviewed and Relied Upon

Documents Primarily Relied Upon

- Expert Report of Dr. James Outtz with Appendices
- Expert Report of Janice Fanning Madden and Alexander Vekker on Evaluating Whether Employment Practices of J&J are Racially and Ethically Neutral
- Expert Rebuttal Report of Janice Fanning Madden and Alexander Vekker on Evaluating Whether Employment Practices of J&J are Racially and Ethically Neutral
- Expert Report of Dr. David Wise with Appendices
- Expert Report of Dr. Eugene Ericksen: Description of Johnson & Johnson Employee Sampling Plan
- Johnson & Johnson 1994 Annual Report (J&J Exp# 0039672-0039724)
- Outtz declaration attached to the certification of Nicole M. Austin-Hillery and filed under seal
- Plaintiffs' Brief in Support of Motion for Class Certification

Deposition transcripts of:

- Joan Berle with exhibits
- Milton Broughman with exhibits
- Mike Carey with exhibits (4)
- Benito Cachinero with exhibits
- Jerald Collins with exhibits
- Randal David with exhibits
- Dr. Eugene Ericksen with exhibits
- Laura Famularo with exhibits
- Peter Gudicello with exhibits
- Jeanne Hamway
- David Hind with exhibits
- Marion HochbergSmith with exhibits
- Gerard Kells with exhibits
- Julia Lochner with exhibits
- Joseph Michalcewicz with exhibits
- Roberta Obler with exhibits
- Dr. James Outtz with exhibits
- Dr. James Outtz in a transcript attached to the certification of Nicole M. Austin-Hillery and filed under seal
- James L. Outtz in Bavi-Ellen Roberts, Sil Chambers, Janet Leigh Williams, Marsha Harris, Beatrice Hester and Veronica Shihault v. Texaco
- Tim Raher with exhibits
- John Reardon with exhibits
- Nancy Shapiro with exhibits
- Victoria Walker-Manella with exhibits (2)

- Robert Ward with exhibits
- Dania Woodring with exhibits

Documents Reviewed

- Brief in Support of Plaintiffs' Motion for Sanctions
- Cover letter from Melanie Stein dated September 23, 2005
- Declaration of Melanie H. Stein
- Declaration of Jean Messina with exhibits
- Declaration of Daniel T. Lemaitre
- Declaration of Michael J. Carey
- Defendant's Memorandum in Opposition to Class Certification Concerning Initial Assignment with Appendices
- Memorandum in Opposition to Plaintiff's Motion for Class Certification with Appendices
- Plaintiffs' Motion for Sanctions
- Stein Deposition Filed in Opposition to Plaintiffs' Motion for Class Certification
- Materials supplied by Defendant and identified as materials reviewed by Dr. Outtz
- Various policy documents produced by Company in response to Plaintiffs' 7th Request for Production related to HR declarants
- Declaration of Nicole M. Austin-Hillery on selection of deponents

Deposition transcripts of:

- Frank Bolden with exhibits
- Linda Bright with exhibits
- Russell Deyo with exhibits (2)
- Ralph Larsen with exhibits
- Jean Messina with exhibits
- Judith Smith
- Pilar Vittoria
- Dr. David Wise

CDs
Performance Appraisal Data Files – J&J EXP 0038572
Performance Appraisal Data Files – J&J EXP 0038573
J&J Database Copy 10s – 50s All Planning Cycles J&J EXP 0038571
J&J EXP 0038576
J&J EXP 0038575