EXPERT REPORT OF WILLIAM T. BIELBY

Derrick Satchell, et al. v. FedEx Express

September 9, 2004

ASSIGNMENT, QUALIFICATIONS, AND MATERIALS REVIEWED

1. I have been retained by the law firm of Lieff, Cabraser, Heimann & Bernstein, counsel for plaintiffs in *Derrick Satchell, et al. v. FedEx Express.* I have been asked to review testimony and materials describing the personnel policies and practices at the Western Division o FedEx Express ("FedEx") pertaining to compensation, promotion, performance reviews, discipline, and equal employment opportunity (EEO), and to assess whether they created barriers to career advancement and fair compensation for the company's African American and Hispanic hourly employees and African American Operations Managers employed in Domestic Ground Operations ("DGO") and Air Ground Freight Services ("AGFS") in the company's Western Division. Unless noted otherwise, when I use the term "FedEx" below, I am referring to DGO and AGFS functional divisions within the company's Western Division.

2. I have testified as an expert witness in both California Superior Court and Federal Court on cases involving workplace discrimination. A list of cases in which I have been identified as an expert or have given expert testimony since 2000 is attached as Exhibit A.

3. I received a Ph.D. in Sociology from the University of Wisconsin--Madison in 1976. I also have a B.S. in Electrical Engineering and a M.A. in Social Sciences from the University of Illinois. I am Professor of Sociology at the University of California, Santa

Barbara, where I chaired my department from 1992 to 1998. This quarter, I am teaching a course on employment discrimination at the University of California Washington Center in the District of Columbia. I am also affiliated with UCSB's Department of Statistics and Applied Probability. During the 2003-2004 academic year I was a Visiting Scholar at the American Bar Foundation, and during the Spring quarter I was Visiting Distinguished John D. Macarthur Professor of Sociology at Northwestern University, where I taught courses on employment discrimination at both the graduate and undergraduate levels. In January I will join the faculty of the University of Pennsylvania as Professor of Sociology. Among my former positions are Visiting Professor of Management at UCLA and Fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford. I teach graduate and undergraduate courses on organizational behavior, research methods for the social sciences, labor markets, quantitative methods, and social inequality. I also specialize in research in each of these areas. Over the past twenty years, much of my research has focused on issues of workplace discrimination, and on organizational policies and practices more generally. My research on these topics has been supported by four grants from the National Science Foundation, and it has been published in leading peer-reviewed social science research journals. My Curriculum Vitae is attached as Exhibit B.

4. I have received national awards from three different professional associations for my research on gender, labor markets, social psychological aspects of work, and organizational personnel practices. I have served on numerous panels, advisory committees, and professional workshops on topics relating to workplace discrimination, organizational personnel policies and practices, and research methodology. I have served as an advisor, consultant, or reviewer for the following organizations and agencies: the

U.S. Bureau of the Census, the U.S. Department of Justice, the U.S. Department of Labor, the National Science Foundation, the National Institute of Mental Health, the National Academy of Sciences, the University of Michigan's Institute for Social Research, Stanford University, and the Writers' Guild of America, West. I have also served on the editorial boards of leading social science journals, and I regularly review manuscripts for scientific journals on topics relating to organizational behavior, employment discrimination, and research methodology. I have been elected to several offices in the American Sociological Association. I served for three years on the ASA Council, the organization's governing body, and I served as the President of the Association in 2003.

5. I have reviewed the 30(b)(6) deposition testimony of FedEx executives and managers "most knowledgeable" about the company's personnel policies and practices as well as the exhibits that accompany the deposition transcripts. The exhibits include written policies, manuals, forms, reports, and correspondence pertaining to the company's human resources system. I was also supplied with a copy of the company's People Manual, dated October 2003, and documents, forms, validation studies, and related memos, correspondence, and reports related to the company's policy and practice for conducting performance reviews. A list of documents that were supplied to me by plaintiffs' counsel, apart from those that were marked as deposition exhibits, appears in Exhibit C.

6. I also reviewed the deposition testimony of the following "fact" witnesses: David Perry, Senior Manager, AGFS; and Timothy George Wertner, Managing Director, DGO. I also reviewed the deposition testimony given by two individuals in *Jerome Rogers, et al. v. FedEx Express*, et al.: Heather McKnight, Human Resources Manager;

and Darrell Kato, Managing Director in the Coastal Region, DGO. In addition, I reviewed excerpts from the deposition testimony given by Michael Snyder, former Managing Director, for the Southern California District of DGO and former Vice President for Eastern United States, now retired, in Pettaway-Vint v. Federal Express. A list of all the deposition transcripts supplied to me appears in Exhibit D. I also reviewed statistics compiled by Dr. Richard Drogin, the statistical expert retained by plaintiffs, including: computations of the racial composition of the company's workforce from 1997 through 2002; average hourly earnings by job title and race for those years; and average performance ratings by job title and race for 1997 through 2003. I also reviewed Dr. Drogin's analysis of racial disparities in the incidence of exceptions to policy in the application of the company's job change application tracking system ("JCATS").

7. In addition to the materials described above, I have also relied upon a large body of social research on workplace bias. Social research conducted across many decades has generated considerable knowledge about what generates and sustains workplace inequalities. That same research, either directly or by implication, points to the kinds of workplace policies and practices that are likely to minimize bias. The relevant research has applied multiple methodologies in a variety of contexts, including experiments in controlled laboratory settings; ethnographies and case studies in "real world" organizations both large and small, public and private, and in a range of industries; surveys done with representative samples of workers and employers; and historical studies based on archival materials from the United States and abroad. Thus, the scientific evidence about bias, discrimination, and the structure and dynamics of race in organizations that I rely upon has substantial external validity and provides a sound basis

for analyzing FedEx's policies and practices. My method is to look at distinctive features of the organization's policies and practices and to evaluate them against what social science research shows to be factors that create and sustain bias and those that minimize bias. In litigation contexts, this method of analysis is known as "social framework analysis."[1]

SUMMARY OF FINDINGS

8. I have concluded that the personnel system at FedEx is uniform, centralized, and in many ways highly formalized and standardized. It also has discretionary features, and due to inadequate monitoring and accountability, these features are vulnerable to bias against African American and Hispanic employees. Statistical analyses of how discretion is exercised in the FedEx personnel system demonstrate that it has an adverse impact on minority employees, consistent with a large body of research by social scientists and management scholars on the sources of workplace racial bias. The basis for these conclusions is explained below.

OVERVIEW OF THE FEDEX PERSONNEL SYSTEM

9. As in many large, centralized organizations, the FedEx personnel system is in many ways highly formalized and standardized.[2] Centrally developed human resources policies, specified in the People Policy manual, "best practices" manuals, and other

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[1]See J. Monahan and L. Walker, *Social Science in Law: Cases and Materials*, Fourth Edition, Foundation Press, 1998, Chapter Five, "Social Science Used to Provide Context."

documents apply uniformly throughout the Western Division.[3] Divisional, District, and local managers are not authorized to modify the companywide human resources policies.[4] Human Resources policies are coordinated centrally by a corporate Human Resources Division that functions as a service organization to all other divisions.[5]

10. Selection into permanent hourly positions is governed by the FedEx-wide, computerized Job Change Applicant Tracking System (JCATS). Openings are posted on JCATS, and the system is used both by employees to apply for openings and by hiring managers to make their selections.[6] For first-level management jobs, the ASPIRE system is administered throughout FedEx by the Human Resources Development Department.[7]

11. A centralized compensation function within Human Resources sets pay ranges for each pay grade for both salaried and hourly employees. The compensation of nearly all hourly employees is governed by the uniform "merit hourly" pay plan (the exception is the pay category of aircraft maintenance employees whose compensation is governed by the "step progression" policy).[8] Uniform policies also govern the two components of salaried employees: market level differentials based on geographical differences in prevailing pay

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[2]A. L. Kalleberg, D. Knoke, P. V. Marsden, and J. L. Spaeth, *Organizations in America: Analyzing Their Structures and Human Resource Practices*, Sage Publications, 1996.

[3]McQueen depo., p. 91-92.

[4]McQueen depo., p. 29-61, 75-93, 109-114; Davis depo., p. 43; Powell depo., p. 57-58; Rhea depo., p. 19-28; Speroff depo. Vol. I, p. 235-6, Vol. II, p. 28-29, 45-101; Fifer depo., p. 11-13.

[5]McQueen depo., p. 40.

[6]Williamson depo., p. 11-53; Speroff depo., Vol. I, p. 53-61.

[7]Speroff depo., Vol. I, p. 176-177; Brooks depo., p. 11-26.

[8]Rhea depo., p. 101-102; Powell depo., p. 21-56, 94-99.

rates; and annual performance-based merit increases.[9] Uniform policies also govern the pay raises associated with promotions within hourly and salaried ranks and with promotions from hourly to salaried ranks.[10]

12. A central Human Resource Analysis department within Human Resources is responsible for developing the performance assessment instruments used for the annual evaluations of permanent hourly and salaried employees.[11] Performance reviews have a substantial impact on both promotion and compensation. For example, a rating of at least 5 (on a 7-point scale) is required in order to be eligible to apply for an open hourly position in the JCATS system. In addition, internal applicants for promotion into hourly jobs are ranked into two "priority" categories, with first-priority consideration going to employees within the job classification group, and second-priority consideration going to those outside the job classification group. Within priority categories, applicants are ranked by "credit equivalency value" (CEV), which is computed as months of continuous service (discounted 50% for part-time employees) multiplied by the total of the last two performance ratings. CEV is considered the main factor governing selection within priority groups, so among equally experienced candidates, performance ratings will often be the determining factor in selections.[12]

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[9]Davis depo., p. 18-19, 34-36, 43-46, 49-50.

[10]Davis depo., p. 19-42, 45-48; Powell depo., p. 44-46.

[11]Hayward depo., p. 56, 73-74. Merit hourly employees are reviewed every six months for the first year they are in a new job (Hayward depo., p. 128).

[12]Williamson depo., p. 52; Hesser depo., p. 61-65; Speroff depo., Vol. I, p. 53-61. Mr. Speroff testified (Vol. I, p. 53): "At the closing of the process, the computer generates a mathematical computation, and they come up with CEVs, and people are ranked by CEVs, and the top person is the one that is offered the position."

13. Similarly, an applicant for promotion into management under the ASPIRE policy is required to have a score of at least 2.5 (on a 4-point scale) on his or her most recent performance rating, and performance ratings are one factor in the "matrix grid" rankings that are used to select which individuals are to be interviewed for a salaried position.[13]

14. Performance reviews affect compensation both indirectly and directly. First, as noted above, performance ratings have a strong impact on the chances of being considered and selected for a promotion, and a move into a higher pay grade increases and employee's compensation.[14] Second, annual or semi-annual merit reviews are linked directly to performance review scores for both salaried and hourly employees.[15]

VULNERABILITY TO BIAS IN THE PERFORMANCE REVIEW PROCESS CAN RESULT IN SUBSTANTIAL BARRIERS TO CAREER ADVANCEMENT FOR AFRICAN AMERICAN AND HISPANIC EMPLOYEES

15. Because the FedEx personnel system creates such a strong link between performance review ratings and both promotion an compensation, any racial bias in those ratings will have a significant impact on the career trajectories of minority employees. Social scientists describe these kinds of reward systems as systems of *cumulative advantage*. In a cumulative advantage system, factors that result in even small disparities

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[13]Speroff depo., Vol. I, p. 193-195.

[14]Moreover, policy for promotions of merit hourly employees is to award a 2% per pay grade *percentage increase* over pay in the previous job (up to a 6% limit, subject to other restrictions; Powell depo., p. 99-100). Accordingly, a low performance rating in any given merit cycle lowers the base for percentage increases associated with future promotions.

between individuals early in their careers have a cumulative impact and generate growing disparities over time.[16] The materials I have reviewed indicate that discretionary aspects of the performance review system make it vulnerable to bias, and that the company's policies and practices for monitoring the implementation of its policies regarding performance review, promotion, and compensation are inadequate for minimizing racial bias. Below, I first summarize research literature that explains why performance review systems can be vulnerable to bias, and then I explain why FedEx's policy and practice is inadequate for minimizing that vulnerability and is likely to lead to cumulative disadvantage faced by African American and Hispanic employees over the course of their careers.

16. There is ample reason to closely scrutinize any performance review system for potential racial bias. A large body of social science research, including many studies conducted in organizational settings, show that African Americans tend to receive lower performance evaluations than do whites. For example, a 1985 article by Kraiger and Ford performed a meta-analysis of 84 studies with a total of over 20,000 ratees, including 64 field studies and 10 experimental studies of white raters rating a total of 17,159 African

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[15]Davis depo., p. 39, 46-47; Powell depo., p. 56, 75, 83, 94-95.

[16]The first cumulative advantage models were developed to explain differences in the career trajectories of scientists, including gender disparities in scientists' careers. See, for example, P. D. Allison, J. S. Long, and T. K. Krauze, "Cumulative Advantage and Inequality in Science," *American Sociological Review*, Vol. 47, 1982, p. 596-606; S. M. Clark, and M. Corcoran, " Perspectives in the Professional Socialization of Women Faculty: A Case of Accumulative Disadvantage?" *Journal of Higher Education*, Vol. 57, 1986, p. 20-43; R. K. Merton, "The Matthew Effect in Science, II: Cumulative Advantage and the Symbolism of Intellectual Property," *Isis* Vol. 79, 1988, p. 606-623; and W. T. Bielby, "Sex Differences in Careers: Is Science a Special Case?" p. 171-187 in *The Outer Circle: Women in the Scientific Community*, edited by H. Zuckerman, J. R. Cole, and J. T. Bruer, Norton, 1991. For its application more broadly, see A. M. O'Rand, "The Cumulative Stratification of the Life Course," p. 188-207 in *Handbook of Aging and the Social Sciences* (4th ed.), edited by R. H. Binstock, L. K. George, et al. Academic Press, 1996.

American and white ratees.[17] Meta-analysis is a method for quantitatively aggregating results across studies in order to obtain a more precise estimate of the size and reliability of effects than can be obtained from any single study.[18] In addition, a meta-analysis of studies conducted across a variety of settings contributes to establishing the external validity of the research. Kraiger and Ford's meta-analysis found that African Americans, on average, received significantly lower evaluations than did whites. They also found evidence suggesting that white raters give significantly higher ratings to whites than to African Americans; and (2) that African American raters give significantly higher ratings to African Americans than do whites.

17. A subsequent meta-analysis published by Martocchio and Whitener in *Human Relations* in 1992 replicates Ford *et al.*'s finding regarding racial differences in performance measures.[19] The Martocchio and Whitener meta-analysis focused specifically on field studies of performance assessment conducted in private sector firms.[20] The results of their analysis of ten field studies also indicated that race effects were larger on subjective than on objective measures of performance.[21] In an article published in 2003, Roth et al. replicated Kraiger and Ford's research on a larger sample of studies, and they found that overall, racial differences in performance ratings between

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[17]K. Kraiger and J. K. Ford, "A Meta-Analysis of Race Effects in Performance Ratings," *Journal of Applied Psychology*, Vol. 70, 1985, p. 56-65.

[18]J. E. Hunter and F. L. Schmidt, *Methods of Meta-analysis: Correcting Error and Bias in Research Findings*, Sage Publications, 1990.

[19]J. J. Martocchio and E. M. Whitener, "Fairness in Personnel Selection: A Meta-Analysis and Policy Implications," *Human Relations*, Vol. 45, 1992, p. 489-506.

[20]Martocchio and Whitener, *op cit.*, p. 494.

African Americans and whites were comparable to those in the 1985 meta-analysis. However, unlike earlier studies, they found that racial disparities on objective assessments could be as large or larger than those for subjective assessments.[22] The Roth et al. research is also the first large-scale meta-analysis of disparities between whites and Hispanics, and they found that Hispanics tend to be rated lower than whites, although the disparities are generally not as large as those between African Americans and whites.

18. Numerous other studies conducted in organizational settings and published in leading refereed journals report similar findings or racial disparities in performance ratings. For example, Jeffrey Greenhaus and colleagues studied the career experiences of a matched sample of 373 African American and 455 white managers in three companies in the communications, banking, and electronics industry.[23] The African American and white managers included in their study were similar in age, organizational tenure, job function, and organizational level.[24] Their 1991 article in the *Academy of Management Journal* reports that supervisors rate the performance and promotion potential of African American managers significantly lower than whites, findings the authors describe as "remarkably consistent with the results of Kraiger and Ford's (1985) meta analysis."[25]

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[21]Martocchio and Whitener, *op cit.*, p. 500.

[22]P. L. Roth, A. I. Huffcutt, and P. Bobko, "Ethnic Group Differences in Measures of Job Performance: A New Meta-Analysis," *Journal of Applied Psychology*, Vol. 88, p. 694-706.

[23]J. H. Greenhaus, S. Parasuraman, and W. W. Wormley, "Effects of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes," *Academy of Management Journal*, Vol. 33, 1990, p. 64-86; J. H. Greenhaus and S. Parasuraman, "Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects," *Organizational Behavior and Human Decision Processes*, Vol. 55, 1991, p. 273-297.

[24]Greenhaus *et al.*, *op cit.*, p. 81; Greenhaus and Parasuraman, *op cit.*, p. 280-281.

[25]Greenhaus *et al.*, *op cit.*, p. 79.

Compared to white managers, African American managers scored lower on a scale of "corporate fit," expressing higher levels of isolation and lower levels of acceptance within the organization. African American managers reported lower career satisfaction and were more likely to report that there careers had reached a plateau, compared to white managers with similar performance evaluations. A second article published in 1993 in *Organizational Behavior and Human Decision Processes* explored the attributions supervisors made about the reasons for the successful performance of African American and white managers. Their findings were consistent with laboratory studies on this topic: compared to white managers, successful performance by African American managers was less likely to be attributed to ability or effort and more likely to be attributed to help from others.[26]

19. The findings of Greenhaus *et al.* regarding race differences in assessment of promotion potential were replicated in a study by Jacqueline Landau of 682 managerial and professional employees of a Fortune 500 company who had been rated at least "above average" in performance.[27] The study, published in 1995 in the *Journal of Organizational Behavior,* examined the impact of race on supervisors' assessments of promotion potential as recorded in company records from the annual performance appraisal process.[28] Landau found that African American managers and professionals

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[26]Greenhaus and Parasuraman, *op cit.*, p. 285-288. For experimental evidence of race bias in attributions of the causes of successful performance, *see* K. L. Yarkin, J. P. Town, and B. S. Wallston, "Blacks and Women Must Try Harder: Stimulus Persons' Race and Sex Attributions of Causality," *Personality and Social Psychology Bulletin,* Vol. 8, 1982, p. 21-24.

[27]Jacqueline Landau, "The Relationship of Race and Gender to Managers' Ratings of Promotion Potential," *Journal of Organizational Behavior,* Vol. 16, 1995, p. 391-400.

[28]Landau, *op cit.*, p. 394.

were rated lower in promotion potential than whites of comparable age, education, organizational tenure, salary grade, job type, and satisfaction with career support.[29]

20. A large body of social science research shows that personnel decisions such as decisions about promotion selections and performance assessment are vulnerable to stereotyping and bias when they are based on the arbitrary or discretionary use of subjective criteria. A stereotype is a set of beliefs that links personal traits of individuals to specific social groups.[30] The association of such traits as "assertive" and "rational" with the category male, "nurturing" and "emotional" with the category female, "violent" and "hostile" with the category African American, and "gang-banger" and "macho" with Latino, are examples of stereotypes. When stereotypes such as these are allowed to influence social judgments, decisions about members of minority groups will be based on general beliefs about the behaviors, traits, and qualities associated with their gender or race/ethnicity instead of the actual traits of the individuals being judged.[31]

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[29]Landau, *op cit.*, p. 395-396.

[30]S. T. Fiske, A. J. C. Cuddy, P. Glick, and J. Xu, "A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition," *Journal of Personality and Social Psychology*, Vol. 82, 2002, p. 878-902; N. E. Evans, and R. B. Tyler, "Racial Stereotypes: The Contents of Their Cognitive Representations," *Journal of Experimental Social Psychology*, Vol. 22, 1986, p. 22-37; P. G. Devine and A. J. Elliot, "Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited," *Personality and Social Psychology Bulletin*, " Vol. 21, 1995, p. 1139-1150; J. F. Dovidio, J. C. Bringham, B. T. Johnson, and S. L. Gaertner, "Stereotyping, Prejudice, and Discrimination: Another Look," p. 276-319 in *Stereotypes and Stereotyping*, edited by C. N. MacRae, C. Stangor, and M. Hewstone, Guilford Press, 1996; D. F. Mackie, D. L. Hamilton, J. Susskind, and F. Roselli, "Social Psychological Foundations of Stereotype Formation," .p. 41-78 in *Stereotypes and Stereotyping*, edited by C. N. MacRae, C. Stangor, and M. Hewstone, Guilford Press, 1996; K. H. Karim, "The Historical Resilience of Primary Stereotypes: Core Images of the Muslim Other," p. 153-182 in *The Language and Politics of Exclusion: Others in Discourse*, edited by S. H. Riggins, Sage Publications, 1997.

[31]C. O. Word, M. P. Zanna, and J. Cooper, "The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction," *Journal of Experimental Social Psychology*, Vol. 10, 1974, p. 109-120; Devine and Elliot, *op cit.*; P. G. Devine, "Stereotypes and Prejudice: Their Automatic and Controlled Components," *Journal of Personality and Social Psychology*, Vol. 56, 1989; J. F. Dovidio and

21. Research studies show that the effects of stereotypes, in-group favoritism and out-group bias on evaluative judgments such as those involved in hiring, job assignment, promotion, assessments of skills and qualifications, and compensation can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal employment opportunity. For example, research studies show that the effects of stereotypes and outgroup bias on selection decisions can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal opportunity.[32]

S. L. Gaertner, "Stereotypes and Evaluative Intergroup Bias," p. 167-193 in *Affect, Cognition, and Stereotyping*, edited by D. M. Mackie and D. L. Hamilton, Academic Press, 1993. For articles and chapters providing reviews of relevant research, see American Psychological Association, "In the Supreme Court of the United States: Price Waterhouse v. Ann B. Hopkins: Amicus Curiae Brief for The American Psychological Association," *American Psychologist*, Vol. 46, 1991, p. 1061-1070. Also see D. M. Messick and D. Mackie, "Intergroup Relations," *Annual Review of Psychology*, Vol. 40, 1989, p. 49-50; V. F. Nieva and B. A. Gutek, "Sex Effects on Evaluation," *Academy of Management Review*, Vol. 5, 1980, p. 267-275 (especially pages 270-274); D. N. Bersoff, "In the Supreme Court of the United States: Clara Watson v. Fort Worth Bank & Trust, Amicus Curiae Brief for the American Psychological Association" (reprinted in *American Psychologist*, Vol. 43, 1988, p. 1019-1028); S. T. Fiske and S. E. Taylor, *Social Cognition*, Addison-Wesley, 1984 (especially Chapter 9, "Social Inference"); L. H. Krieger, "The Contents of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," *Stanford Law Review*, Vol. 47, 1995, p. 1161-248; B. F. Reskin, *The Realities of Affirmative Action in Employment*, American Sociological Association, 1998; M. B. Brewer and R. J. Brown, "Intergroup Relations," p. 554-594 in *Handbook of Social Psychology, Vol. 2 (4th ed.)*, edited by D. T. Gilbert, S. T. Fiske, and G. Lindzey, Oxford, 1998; W. T. Bielby, "Minimizing Workplace Gender and Racial Bias," *Contemporary Sociology*, Vol. 29, 2000, p. 120-129.

[32]S. T. Fiske, M. Lin, and S. L. Neuberg, "The Continuum Model: Ten Years Later," p. 231-54 in *Dual Process Theories in Social Psychology*, edited by S. Chaiken and Y. Trope, Guilford Press, 1999; T. E. Nelson, M. Acker and M. Manis, "Irrepressible Stereotypes," *Journal of Experimental Social Psychology*, Vol. 32, 1996, p. 13-38; J. L. Eberhardt and S. T. Fiske, "Motivating Individuals to Change: What Is a Target to Do?" p. 369-415 in *Stereotypes and Stereotyping*, edited by C. N. MacRae, C. Stangor, and M. Hewstone, Guilford Press, 1996; A. M. Konrad and F. Linnehan, "Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?" *Academy of Management Journal*, Vol. 38, 1995, p. 787-829; T. F. Pettigrew and J. Martin, "Shaping the Organizational Context for Black American Inclusion," *Journal of Social Issues*, Vol. 43, 1987, p. 41-78;

22. Conversely, substantial discretion in assessing and weighing evaluative criteria invites bias. For example, social psychologists Samuel Gaertner and John Dovidio have conducted research showing that when white evaluators have discretion in how to weigh evaluative criteria, they tend to do so selectively, in a way that biases evaluations in favor of white ratees. In one part of their study, participants were told they were assisting a university in making admission decisions, and they were given information on factors such as test scores and high school grades for (hypothetical) African American and white applicants. When applicants were strong on one dimension and weak on the other, raters tended to give the stronger dimension a greater weight for white applicants and the weaker one a greater weight for African American applicants.[33] In other words, they exercised their discretion in a way that ensured that whites would rank on top. The authors summarize their findings as follows:

G. R. Salancik and J. Pfeffer, "Uncertainty, Secrecy, and the Choice of Similar Others," *Social Psychology*, Vol. 41, 1978, p. 246-55; C. T. Schreiber, K. F. Price, and A. Morrison, "Workforce Diversity and the Glass Ceiling: Practices, Barriers, Possibilities," *Human Resource Planning*, Vol. 16, 1993, p. 51-69; P. E. Tetlock, "Accountability: The Neglected Social Context of Judgment and Choice," p. 297-332 in *Research in Organizational Behavior*, Vol. 7, edited by L. L. Cummings and B. M. Staw, Jai Press, 1985; P. E. Tetlock and J. I. Kim, "Accountability and Judgment Processes in a Personality Prediction Task," *Journal of Personality and Social Psychology*, Vol. 52, 1987, p. 700-709; P. E. Tetlock, "The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model," *Advances in Experimental Social Psychology*, Vol. 25, 1992, p. 331-376. To see how human resource professionals apply these principles in the design of personnel systems, see R. D. Gatewood and H. S. Field, *Human Resource Selection*, Fifth Edition, Dryden Press, 2001; and H. G. Heneman, III, R. L. Heneman, and T. A. Judge *Staffing Organizations*, Third Edition, Mendota House and Richard D. Irwin, 1999.

[33]G. Hodson, G., J. F. Dovidio and S. L. Gaertner, "Processes in Racial Discrimination: Differential Weighting of Conflicting Information," *Personality and Social Psychology Bulletin*, Vol. 28, 2002, p. 460-471.

> White college participants (whom, relative to the general population may be regarded as generally moderate to low prejudiced...), give White candidates the "benefit of the doubt," a benefit they do not extend to Blacks.[34]

23. Formal written policies alone, such as specific guidance on assessing and weighing evaluative criteria, are not sufficient to minimize bias. Passive organizational approaches to the prevention of discrimination that take action only after an incident is brought to the attention of management are often ineffective. A written antidiscrimination policy that is simply reactive, responding to complaints, and lacking effective accountability, is often a symbolic exercise in "going through the motions," with little substantive impact on creating organizational policy and practice that is free of bias.[35] The most effective approaches rely on proactive policies and practices, including recurring and mandatory training of managers and supervisors, and systematic and consistent monitoring of outcomes of personnel decisions.[36]

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[34]S. L. Gaertner, J. F. Dovidio, J. Nier, G. Hodson, and M. A. Houlette, "Aversive Racism: Bias Without Intention." Forthcoming in *Handbook on Employment Discrimination Research: Rights and Realities*, edited by R. L. Nelson and L. B. Neilson, Kluwar Academic Press, 2005 (internal citation omitted).

[35]L. B. Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *American Journal of Sociology*, Vol. 97, 1992, p. 1531-1576; L. B. Edelman, S. Patterson, E. Chambliss, and H. S. Erlanger, "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma," *Law and Policy*, Vol. 13, 1991, p. 73-97; L. B. Edelman, H. S. Erlanger, and J. Lande, "Employers' Handling of Discrimination Complaints: The Transformation of Rights in the Workplace," *Law & Society Review*, Vol. 27, 1993, p. 497-534; L. B. Edelman, Lauren B. and S. Petterson, "Symbols and Substance in Organizational Response to Civil Rights Law," in *Research in Social Stratification and Mobility*, 1999; J. S. Leonard, "Women and Affirmative Action," *Journal of Economic Perspectives*, Vol. 3 (No. 1), 1989, p. 61-75. Also see J. S. Leonard, *Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers*, Report prepared for the U. S. Department of Labor, Glass Ceiling Commission, April 1994.

[36]For a review of monitoring and accountability as strategies for ensuring equal employment opportunity, see W. T. Bielby, 2000, *op cit.*, and the research cited therein.

24. Effective accountability also requires explicit evaluation of managers and supervisors on their contributions to an organization's equal opportunity goals. Nearly all medium- to large-scale organizations have a written antidiscrimination policy, and many have a written policy stating that implementing the objectives of the Affirmative Action Plan is the responsibility of every employee. However, such policies are merely symbolic unless they also delineate explicit duties and responsibilities relating to equal opportunity in each manager's or supervisor's job description, which can then be related to specific evaluative dimensions in the performance reviews of those employees.[37]

DEFICIENCIES IN THE FEDEX PERSONNEL SYSTEM FOR MINIMIZING BIAS

25. A number of FedEx's policies are based on sound principles of human resource management. For example, it is the company's stated claim that selection criteria are to be limited to job-relevant factors, based on systematic job analyses with input from subject matter experts.[38] It is company policy that any manager who conducts interviews as part of the ASPIRE selection processes for promotion into management is to be trained in behavioral interview techniques (interviews are used in only a limited number of promotions into hourly positions).[39] In addition, employee perceptions of managerial performance and workplace climate are assessed via the Survey Feedback Action (SFA) program, and that information is used in making selection decisions about promotion into

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[37]Bielby, 2000, *op cit*.

[38]See, e.g. Hater depo., Vol. II, p. 169-170, 291-293; Brooks depo., p. 152-153.

management.[40] The MGRAAP system provides a mechanism for underutlization information from the companies Affirmative Action Plans to be communicated to managers who are filling job openings.[41]

26. However, the system has significant deficiencies as well. Perhaps the most pervasive is the almost complete absence of any monitoring of racial disparities or disparate impact in personnel outcomes, apart from the utilization analyses provided by an outside vendor that supplies analyses for the Affirmative Action Plans. Most importantly, there is no monitoring of racial disparities and adverse impact of performance reviews, despite the large body of scientific and management studies demonstrating that this is an area of human resources systems that can be especially vulnerable to bias, and despite the fact that the data for conducting such an analysis is readily available to the human resources professionals responsible for the effectiveness of performance assessment.[42] Nor have those professionals at FedEx undertaken efforts to analyze how performance reviews affect other employment decisions such as promotion and compensation.[43]

27. While the company's human resources professionals devote considerable effort to assessing the "content validity" of selection criteria and performance dimensions, those exercises only address the relationship between job knowledge, skills, and aptitudes and the policies as they exist on paper. Very little effort is devoted to monitoring how

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[39]Speroff depo., Vol. I, p. 203-209, 233-234.

[40]Speroff depo., Vol. I, p. 193-194; Hayward depo., p. 60-61.

[41]Collins depo., p. 41-42.

[42]Hayward depo., p. 50-51; also see Brooks depo., p. 25.

[43]Hayward depo., p. 92-93.

performance assessment and selection tools are actually applied in practice. For example, Dr. Hayward testified that management has access to and monitors reports on whether performance reviews are being conducted according to the planned schedule of deadlines, but she was aware of no requirement that management monitor how reviews are conducted in practice. She testified that higher level managers have access to all completed reviews which they can use "to audit at any point they see fit," but as the person responsible for the effectiveness of performance reviews, she had never seen one done.[44]

28. While guidelines for ratings of performance dimensions appear on performance review forms, Dr. Hayward was not aware of any company policy or practice to ensure that they are in fact applied consistently. She testified: (1) that there is no specific policy outlining how to make a rating; (2) that judgments about the weights to be assigned to individual components of a performance dimension in order to obtain an overall rating are left to the discretion of individual managers; and (3) that the company took no efforts to monitor whether managers were taking into consideration factors other than those specified in the written guidelines.[45]

29. Dr. Hayward, the professional responsible for the effectiveness of performance reviews, was aware of no company-mandated training on how to apply the written guidelines, although she had "anecdotal evidence" that some training was done on-

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[44]Hayward depo., p. 144-146. Mr. Perry, a Senior Manager at the Oakland hub, testified that he does "random audits" of how his managers conduct performance reviews (Perry depo., p. 110-111). However, Mr. Perry, who testified that he personally refers to no written documents when he conducts a performance review, also testified that he was unaware of his manager (Managing Director Robin Van Galder) auditing any management performance reviews (Perry depo., p. 111, 171-172).

[45]Hayward depo., p. 181-183,203-207.

the-job by peers.[46] Other testimony indicates that managers are exposed to some training about performance reviews, but that this occurs mainly when they first become managers and sporadically after that, and that it primarily involves an overview of how to fill out forms, and disseminating information about various resources related to conducting performance reviews.[47] In contrast, management scholars explain: (1) that effective training on conducting fair and effective performance reviews requires hands-on rating exercises with instructor feedback, rather than overviews lasting no more than a few hours; (2) that training needs to be repeated at regular intervals, not just when a new system is introduced; and (3) that training needs to be tied to a policy of holding raters accountable for how they perform the task, with real consequences for inadequate performance.[48]

30. FedEx policy and practice regarding promotion, compensation, and discipline is similar to that regarding performance reviews: no analysis of racial disparities or disparate impact; and little monitoring of how policy is implemented. Danny Rhea, Managing Director for Global Compensation, testified that the company has not done any studies of compensation disparities by race.[49] Similarly, Managing Director Robert Speroff, designated by the company to testify about promotion policy and practice, was

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[46]Hayward depo., p. 180-181

[47]Buchanan depo., p. 179-182; Perry depo., p. 142-143, 147-149, 156, 160-170, 175-176.

[48]M A. Hauenstein, "Training Raters to Increase the Accuracy of Appraisals and the Usefulness of Feedback," pp. 404-442 in *Performance Appraisal: State of the Art in Practice*, edited by J. W. Sither, Jossey-Bass, 1998.

[49]Rhea depo., p. 69-70.

not aware of any studies done of promotion disparities by race.[50] Dr. David Brooks, who participated in the development and implementation of the ASPIRE process for promotion into management, testified that there have been no disparate impact studies of that process or of any of its components.[51] Shannon Brown, the Vice President for Human Resource Services and the company's top diversity officer, testified that during the past four years, he saw only one written document addressing the representation of African Americans in management, and that was a one-page document prepared in early 2004.[52]

31. Mr. Speroff testified that he was aware of no proactive monitoring of managers' compliance with promotion policies. According to him, there is no direct assessment of managers' compliance with promotion policies as part of their regular performance reviews, and the *only* way departures from policy would be detected is if a promotion candidate filed a complaint under the company's Guaranteed Fair Treatment (GFT) dispute resolution process.[53]

32. Mr. Speroff gave similar testimony regarding monitoring of the company's discipline policies. According to him, the GFT process is the only mechanism for

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[50]Speroff depo., Vol. I, p. 49.

[51]Brooks depo., p. 107-108, 129-131. Nor has there been any study of the racial composition of the interview panels that make selection decisions (Brooks depo., p. 71-72).

[52]Brown depo., p. 50-57. Ms. Anita Collins, the Senior Human Resources Representative responsible for Affirmative Action Plans (AAPs) in the Western and Southwestern regions, testified that apart from the studies down by the outside vendor for the AAPs, there are no annual analyses of minority representation in any job category at FedEx (Collins depo., p. 32-33).

[53]Speroff depo., Vol. I, p.39-40, 47-49, 71-72, 101-102, 120-121, 134-137; Speroff depo., Vol. II, p. 46-47.

monitoring whether managers are complying with policy in their handling of disciplinary suspensions or suspensions with pay pending investigations.[54]

33. Besides being a reactive form of accountability, FedEx's practice of relying on complaints as a monitoring mechanism is especially ineffective, since the company does not do any tabulations or analysis of outcomes of employee complaints and disparities by race.[55] It also provides no accountability for personnel actions involving casual employees, since they are not covered by the GFT process. Those employees are especially disadvantaged, since they do not receive performance reviews, are ineligible for merit raises, and are treated as outside hires and therefore do not have access to the JCATS system.[56] Nothing in FedEx policy prohibits managers for using a "tap on the shoulder" system for inviting casual employees to apply for open permanent hourly positions.[57]

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[54]Speroff depo., Vol. II, p. 164-165, 181-182. However, the policy regarding terminations is more proactive. It is company policy that three notifications of a disciplinary deficiency (warning letter or performance reminder) "normally results in termination." However, the registration of the third deficiency automatically triggers a full review of the employee's entire work history at FedEx, and written policy specifies that "management is responsible for thoroughly reviewing an employee's disciplinary record with the Company and exercising judgment in determining appropriate action" (Policy 2-5, p. 54 of the October, 2003 People Manual; Speroff depo., Vol. II, p. 194-197). That is, with three active disciplinary actions, Human Resources is required to approve a manager's decision not to terminate (Speroff depo., Vol. II, p. 197-198). Mr. Speroff was asked: " Is there any reason that FedEx does not use this type of prompting or alert mechanism to ensure compliance with FedEx's policies in cases where discipline is being issued and the employee is adversely impacted?" His response (p. 198) was: "I can't think of any."

[55]Brown depo., p. 88-90, 92-94; Rouzan depo., p. 15-16; Banks depo., p. 73-74; Dandridge depo., p. 25-26; Brooks depo., p. 23-24.

[56]Huffer depo., p. 11-12, 32-35, 53-56, 79-82; Presnoples depo., p. 124-130; Williamson depo., p. 12;

[57]Presnoples depo., p. 130.

35. In sum, a basic principle of human resources practice is "what gets measured gets done."[58] At FedEx, in the area of equal opportunity and bias due to the exercise of discretion and departure from policy, the principle appears to have been replaced with one of "out of sight, out of mind," or, perhaps, "don't ask, don't tell."

THE EXERCISE OF DISCRETION IN FEDEX'S HUMAN RESOURCE SYSTEM HAS AN ADVERSE IMPACT ON MINORITIES

36. Above, I summarize research by social scientists and management professionals indicating that the exercise of discretion in a human resources system can have an adverse impact on minorities. Data available from the FedEx personnel system allow for several tests of whether the exercise of discretion at the company works to the disadvantage of minority employees. Plaintiffs' statistical expert, Dr. Richard Drogin, has performed three tests of this conjecture, and each supports the conclusion that discretionary aspects of the personnel system disadvantage minority employees relative to whites.

37. In the first study, Dr. Drogin studied exceptions to the requirement that to be eligible to apply for an hourly position in the JCATS system, an employee could have no active disciplinary deficiencies (disciplinary warning within twelve months or disciplinary reminder within six months). Policy allows local managers, at their own discretion, to waive this exclusion if they determine that the disciplinary action is for infractions unrelated to the requirements of the posted job. Dr. Drogin found that nearly half (46%)

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[58]See, for example, S. Black, "What Gets Measured Gets Done: Using Metrics to Support Diversity," Canadian HR Reporter, Vol. 15, p. 13-14

of those who sought to apply despite active disciplinary decisions were indeed approved to apply for an open position, but there were substantial and statistically significant disparities by race: 55% of whites with deficiencies were approved, compared to 46% of Hispanics and 40% of African Americans (see Expert Report of Richard Drogin).

38. Second, Dr. Drogin analyzed the incidence of departure from policy requiring that priority job group 2 be eligible for promotion only if there are no priority job group 1 applicants for an open position. Dr. Drogin referred to selections of priority group 2 applicants over eligible priority group 1 applicants as "job ranking category pass overs." He found that whites received significantly more of these "pass over" promotions than did either African Americans or Hispanics (see Expert Report of Richard Drogin).

39. Third, Dr. Drogin analyzed selections that departed from CEV rankings ("CEV pass overs"). Again, he found that white applicants received significantly more of this type of "pass over" promotion than did either African Americans or Hispanics. In short, social science research demonstrates that the exercise of discretion in personnel systems in the absence of adequate monitoring is vulnerable to bias against minorities, and Dr. Drogin's findings demonstrate that this phenomenon was indeed present at FedEx (see Expert Report of Richard Drogin). It is reasonable to assume that other discretionary and unmonitored aspects of the personnel system for which there is no quantitative data are similarly biased against minority employees.

NOT ALL RACIAL BIAS AT FEDEX IS SUBTLE

40. High-level FedEx managers have used racial slurs in referring to African Americans. Retired executive Michael Snyder, formerly a Managing Director in Southern

California and Vice President for the East Coast region, testified that David Rebholz, who is currently an Executive Vice President in the Western Region, referred to an African American manager as a "nigger with a chip on his shoulder."[59] According to Mr. Snyder, Rebholz called him a "nigger lover" when he registered his disproval of the comments, and advised him to keep his concerns to himself because "that's the way things were at FedEx" due to the "southern boy mentality" of top management.[60] Mr. Snyder testified that another FedEx manager, a Senior Vice President of Grond Operations, used the same racial slur to refer to an African American operations manager, as did Timothy Wertner, who at the time was a FedEx Operations Manager.[61] Mr. Snyder also recalled derogatory comments about African Americans being made by Michael Pigors, currently the Vice President and General Manager of AGFS West.[62]

41. Most of the social science and management scholarship that I have relied upon and summarized above addresses subtle forms of discrimination, such as stereotyping, a cognitive process that under certain circumstances can influence anyone's perceptions and decision-making, regardless of their personal prejudices towards minority groups. However, blatant racism has not disappeared, and Mr. Snyder's testimony demonstrates that it has been a reality in middle-level and high-level management ranks at FedEx. Overt prejudice among managers undermines equal opportunity in two significant ways. First, it

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[59]Snyder depo., p. 52-53.

[60]Snyder depo., p. 56. Mr. Snyder recalled that these comments were made in 1992 or 1992 (p. 70-71).

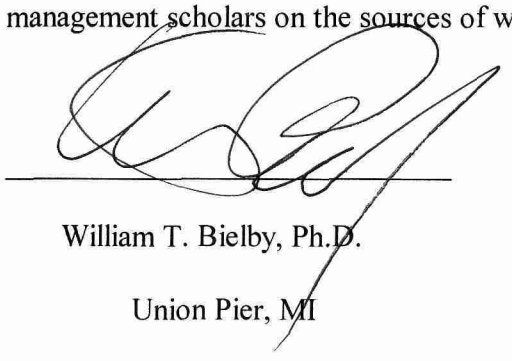
[61]Snyder depo., p. 58-59, 72, 86. Mr. Snyder testified that the Senior Vice President's comments were made around 1997 (p. 70).

[62]Snyder depo., p. 75

contributes to an environment that his hostile toward persons of color, and it signals a lack of management commitment to equal employment opportunity, and--commitment is considered a key element of effective policies for minimizing bias.[63]

CONCLUSION

42. I have concluded that the personnel system at FedEx is uniform, centralized, and in any ways highly formalized and standardized. It also has discretionary features, and due to inadequate monitoring and accountability, these features are vulnerable to bias against African American and Hispanic employees. Statistical analyses of how discretion is exercised in the FedEx personnel system demonstrate that it has an adverse impact on minority employees, consistent with a large body of research by social scientists and management scholars on the sources of workplace racial bias.



William T. Bielby, Ph.D.

Union Pier, MI

September 9, 2004

[63]Konrad and Linnehan, *op cit.*; Bielby, 2000, *op cit.*

EXHIBIT A

WILLIAM T. BIELBY, DEPOSITION AND TRIAL TESTIMONY 2000-2004:

Rebecca Beckmann, et al. v. CBS, Inc., et al.
Docket No: 3-96-1172
Court: United States District Court, District of Minnesota
Counsel: Sprenger & Lang, Minneapolis, MN
Expert Report, Deposition Testimony

Marybeth Cremin, et al. v. Merrill Lynch, Pierce, Fenner & Smith Inc.
Docket No: 96 C 3773
Court: United States District Court, Northern District of Illinois, Eastern Division
Counsel: Stowell & Friedman, Chicago, IL
Expert Report, Arbitration Testimony

Pamela K. Martens, et al. v. Smith Barney, Inc., et al.
Docket No. 96 Civ. 3779 (AGS)
Court: United States District Court, Southern District of New York
Counsel: Stowell & Friedman, Chicago, IL
Expert Reports, Arbitration Testimony

EEOC v. Ian Schrager, Hotels, Inc. d/b/a Mondrian Hotel
Docket No. CV 99-00987 R (RCx)
Court: United States District Court, Central District of California
Counsel: Anat Ehrlich, Kathleen Mulligan, EEOC
Report: Expert Report
Expert Report, Deposition Testimony

Lucy's Sales, et al. v. County of Contra Costa, et al.
Docket No. C98-02955 PJH (JL)
Court: United States District Court, Northern District of California
Counsel: Lawyers' Committee for Civil Rights of the San Francisco Bay Area (Oren Sellstrom)
Wilson Sonsini Goodrich & Rosati (Lisa Davis, David Berger), Palo Alto
Expert Report, Deposition Testimony, Trial Testimony

Ella Bramwell and Marilyn Hill v. BMG Entertainment, Inc.
Docket No. 00C 7751
Court: United States District Court, Eastern District of Illinois
Counsel: Stowell & Friedman (Linda Friedman), Chicago
Expert Report, Deposition Testimony

Eric Bates, et al. v. United Parcel Service
Docket No. C-99 2216 (TEH)
Court: United States District Court, Northern District of California
Counsel: Schneider & McCormac (Todd Schneider), San Francisco
Declaration, Expert Report, Deposition Testimony

Francisco Rodriguez, et al. v. Merrill Lynch & Co.
Docket No. L-5908-98
Court: Superior Court of New Jersey, Law Division: Hudson County
Counsel: Steven Arenson, Arenson, Dittmar & Karbani, New York
Declaration, Expert Report, Deposition Testimony

Carol Gosho, et al. v. U.S. Bancorp Piper Jaffray, Inc.
Docket C 00-01611 PJH
Court: United States District Court, Northern District of California
Counsel: Meites, Mulder, Burger & Mollica, Chicago
Declaration, Expert Report, Deposition Testimony

Betty Dukes, et al. v. Wal-Mart Stores, Inc.
Docket C-01-2252 MJJ
Court: United States District Court, Northern District of California
Counsel: The Impact Fund (Jocelyn Larkin, Brad Seligman)
Expert Report, Deposition Testimony

EEOC & Schieffelin v. Morgan Stanley
Docket 01 CV 8421 (RMB)
Court: United States District Court, Southern District of New York
Counsel: Outten & Golden (Adam Klein), New York, EEOC (Michael Ranis)
Expert Report, Deposition Testimony

Stella Mitchell, et al. v. Metropolitan Life Insurance Co.
Docket 01-CIV-2112 (WHP)
Court: United States District Court, Southern District of New York
Counsel: Saperstein, Goldstein, Demchak & Ballar (Teresa Demchak), Outten & Golden (Adam Klein)
Expert Report, Deposition Testimony

Roderick Arnold, et al. v. Cargill, Inc.
Docket 01-CV-2086 (DWF/AJB)
Court: United States District Court, District of Minnesota, Fourth Division
Counsel: Sprenger & Lang
Expert Report, Deposition Testimony

Derrick Satchell, et al. v. FedEx Express.
Docket C 03-2659 SI, C 03-2878 SI
Court: United States District Court, Northern District of California
Counsel: Lieff, Cabraser, Heimann & Bernstein (James Finberg)
Expert Report

EXHIBIT B

August 2004

CURRICULUM VITAE

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CURRENT POSITION:

University of California, Santa Barbara
Professor, Department of Sociology, 1983-present
Professor, Department of Statistics and Applied Probability (Affiliated Faculty), 1993-present
Affiliated Faculty, Center for Film, Television, and New Media, 2002-present

University of Pennslyvania
Professor, Department of Sociology, 2005-present

EDUCATION:

B.S. Electrical Engineering (High Honors), University of Illinois--Urbana, 1970.

M.A. Social Sciences (Economics), University of Illinois--Urbana, 1972.

Ph.D. Sociology, University of Wisconsin, 1976.

PREVIOUS POSITIONS:

Northwestern University
Visiting Distinguished John D. MacArthur Professor of Sociology, Spring 2004
American Bar Foundation, Chicago, IL, Visiting Scholar, 2003-2004
Visiting Professor, Graduate School of Management, UCLA, 1985.
Chair, Department of Sociology, University of California, Santa Barbara, 1992-1998.
Associate Professor, Department of Sociology, University of California, Santa Barbara, 1981-83.
Assistant Professor, Department of Sociology, University of California, Santa Barbara, 1977-81.
Research Associate, Institute for Research on Poverty, University of Wisconsin, 1975-77.
Rhythm guitar, bass guitar, The Newports, Harvey, Illinois, 1960-1965.

HONORS AND AWARDS:

Reuben Hill Research and Theory Award from the National Council on Family Relations, 1992 (with Denise D. Bielby)
Sociological Research Association (by election, 1989)
Kathleen Gregory Klein Award for Excellence in Feminist Studies from the Popular and American Culture Associations, 1986 (with Denise D. Bielby)
Fellow, Center for Advanced Study in the Behavioral Sciences, Stanford, California, 1983-84.
European Group on Organizational Sociology Award, Organizations & Occupations Section, American Sociological Association, 1981 (with James N. Baron)
Eta Kappa Nu, Electrical Engineering Honorary Society
Tau Beta Pi, Engineering Honorary Society
Phi Kappa Phi, Scholastic Honorary Society
Riverdale Historical Society (Riverdale, IL), Honorary Member (2002-present)

PROFESSIONAL ACTIVITIES:

Professional Associations:

American Sociological Association
American Economic Association
American Statistical Association
Society of Labor Economists

Officer:

President, American Sociological Association, 2002-2003
Council, American Sociological Association, 1998-2001
Committee on Sections, American Sociological Association, 1998-2001 (Vice-Chair, 2000-2001)
Committee on Nominations, American Sociological Association, 1995-97
Council, (1982-84) and Secretary/Treasurer (1984-88), Methods Section of the American Sociological Association.
Council (1986-88), Organizations and Occupations Section of the American Sociological Association.

Editorial Board:

American Sociological Review (1994-1996)
Westview Series on Social Inequality (1991-1996)
Sociological Methods and Research (1978-1989, 1994-1998)
American Journal of Sociology (1982-84)
Sociology of Education (1981-85)
Gender & Society (1997-2000)

PROFESSIONAL ACTIVITIES (continued):

Member:

Social Science Research Council Site Selection Committee, First Year Fellowships in the Study of the Former Soviet Union (1989-1995)
National Institute of Mental Health, Social Science and Population Study Section Review Panel, (Special Reviewer, 1994)
National Institute of Health, Center for Scientific Review (Special Emphasis Panel Chairperson, August 1999)
National Institutes of Health, International Studies on Health and Economic Development Review Committee (November 2000)
Social Science Research Council Committee on the Sociological Study of the USSR (1988-92)
Jessie Bernard Award Selection Committee, American Sociological Association (1990-92)
Social Science Research Council Committee on Occupational Measurement (1980-88)
National Science Foundation, Sociology Review Panel (1985-87)
National Science Foundation, ADVANCE Institutional Transformation Awards Review Panel (2001)
University of Illinois Foundation (1999-2005)
Program Committee, American Sociological Association Annual Meeting, 2001
Board of Directors, Consortium of Social Science Associations (2002-2004)
Amicus Brief Task Force, American Sociological Association (2002-2003)
Oversight Committee, Workshop on the Utilization of Women-Owned Small Businesses in Federal Contracting, National Research Council, National Academy of Sciences, 2004

PUBLICATIONS:

2005 William T. Bielby
"*Betty Dukes, et al. v. Wal-Mart Stores, Inc*., Expert Report." In Robert L. Nelson and Laura Beth Neilsen (eds.), *Handbook on Employment Discrimination Research: Rights and Realities*. Norwell, MA: Kluwer Academic Press 2005, forthcoming,

2004 William T. Bielby
"Rock in a Hard Place: Grass-Roots Cultural Production in the Post-Elvis Era." *American Sociological Review*, Vol. 69, No. 1: 1-13.

2004 William T. Bielby
"Social Science Accounts of the Maternal Wall: Applications in Litigation Contexts." *Thomas Jefferson Law Review*, Vol. 26: 15-26, Fall 2003.

2004 Denise D. Bielby and William T. Bielby
"Audience Aesthetics and Popular Culture." Pp. 295-317 in Roger Friedland and John Mohr (eds.), *Matters of Culture: Cultural Sociology in Practice*. Cambridge, England: Cambridge University Press, forthcoming.

2003 William T. Bielby
"Can I Get A Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation." *Employee Rights and Employment Policy Journal*, Vol. 7, No. 2: 377-400, Symposium Issue on "Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination."

2003 Denise D. Bielby and William T. Bielby.
"Beyond Contexts: Taking Cultural Objects Seriously in Media, Popular Culture, and the Arts." *Sociological Perspectives*, Vol. 46, No. 4: 429-433.

2003 Denise D. Bielby and William T. Bielby
Co-editors of Special Issue on Media, Popular Culture, and the Arts, *Sociological Perspectives*, Vol. 46, No. 4.

2003 William T. Bielby and Denise D. Bielby
"Controlling Primetime: Organizational Concentration and Network Television Primtime Programming Strategies." *Journal of Broadcasting and Electronic Media*, forthcoming, Vol. 47, No. 4: 573-596.

2003 William T. Bielby
"ASA Submits Amicus Brief in U.S. Affirmative Action Supreme Court Case." *Footnotes: Newsletter of the American Sociological Association*, Vol. 31, No. 3, March, 2003.

2002 Denise D. Bielby and William T. Bielby
"Hollywood Dreams, Hard Realities: Writing for Film and Television." *Contexts*, Vol. 1: 21-27, Fall/Winter 2002.

2002 William T. Bielby and Denise D. Bielby
"Telling Stories about Gender and Effort: Social Science Narratives About Who Works Hard for the Money." Pp. 193-217 in Mauro F. Guillen, Randal Collins, Paula England, and Marshall Meyer (eds.), *The New Economic Sociology: Developments in an Emerging Field*. New York: Russell Sage Foundation.

2002 William T. Bielby
"The SoCal Professor Was an Early '60s Rocker" (interview by Mike Dugo). *Lance Monthly*, Vol. 4, No. 2, July, 2002, http://musicdish.com/mag/index.php3?id=6362.

2001 Denise D. Bielby and William T. Bielby
"Audience Segmentation and Age Stratification Among Television Writers." *Journal of Broadcasting and Electronic Media*, Vol. 45, No. 3: 391-412, Summer, 2001.

2000 William T. Bielby
"Minimizing Workplace Gender and Racial Bias." *Contemporary Sociology*, Vol 29, No. 1: 120-129, January, 2000.

1999 William T. Bielby
"Framing Sociology in Court: Affirmative Action Discourse and Expert Testimony on Employment Discrimination." *Research on Social Stratification and Mobility*, Vol. 17: 265-283, 1999.

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"Whose Stories Are They? Fans' Engagement with Soap Opera Narratives in Three Sites of Fan Activity." *Journal of Broadcasting and Electronic Media*, Vol. 42, No. 2: 35-51, Spring, 1999. Reprinted in Toby Miller (ed.), *Television: Critical Concepts in Media and Cultural Studies*, New York: Routledge, 2002

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"Organizational Mediation of Project-Based Careers: Talent Agencies and the Careers

of Screenwriters." *American Sociological Review*, Vol. 64, No. 1: 64-85, February, 1999.

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The 1998 Hollywood Writers' Report: Telling ALL Our Stories. Los Angeles, CA: Writers Guild of America, West, 53 p.
(http://www.wga.org/manuals/Report/index2.html)

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"Where Sex Composition Matters Most: Comparing the Effect of Job Versus Occupational Sex Composition on Earnings." *Sociological Focus*, Vol. 29, No. 3: 189-207, August, 1997.

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"The Hollywood 'Graylist'? Audience Demographics and Age Stratification Among Television Writers." *Current Research on Occupations and Professions*, Vol. 8: 11-172.

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"Simultaneous Statistical Inference and Statistical Power in Survey Research Applications of the General Linear Model," *Sociological Methodology:* Vol. 8: 283-312.

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BOOK REVIEWS AND REVIEW ESSAYS:

2001 *Creative Industries: Contracts Between Art and Commerce* by Richard E. Caves. Reviewed in *American Journal of Sociology*, Vol 16, No. 6: 1830-1832.

1999 *Organizations in America: Analyzing Their Structures and Human Resource Practices* by Arne L. Kalleberg, David Knoke, Peter V. Marsden, and Joe L. Spaeth. Reviewed in *Administrative Science Quarterly*, Vol. 44, No. 4: 842-846, December 1999.

1999 *The Use of Social Science Data in Supreme Court Decisions* by Rosemary J. Erickson and Rita J. Simon. Reviewed in *Contemporary Sociology*, Vol. 28, No. 2: 222-223, March, 1999.

1998 "Firm Commitments." Review Essay on *The Time Bind: When Work Becomes Home and Home Becomes Work* by Arlie Russell Hochschild. Contribution to Review Symposium in *Contemporary Sociology* Vol. 27, No. 1: 32-34, January, 1998.

1998 *Social Differentiation and Social Inequality: Essays in Honor of John Pock*, edited by James N. Baron, David B. Grusky, and Donald J. Treiman. Reviewed in *Contemporary Sociology*, Vol. 27, No. 2: 152-153, March, 1998.

1992 "Organizations, Stratification, and *The American Occupational Structure*." Review essay in *Contemporary Sociology* as part of a 25 year retrospective on Blau and Duncan's *The American Occupational Structure*, Vol. 21, No. 5: 647-650, September, 1992.

1992 *Revolving Doors: Sex Segregation and Women's Careers* by Jerry A. Jacobs, *and Doing Comparable Worth: Gender, Class, and Pay Equity* by Joan Acker. Reviewed *in Social Forces*, Vol. 70, No. 4: 1165-1168, June, 1992.

1988 *The Process of Occupational Sex-Typing: The Feminization of Clerical Labor in Great Britain* by Samuel Cohen, and *Gender at Work: The Dynamics of Job Segregation* by Sex during World War II by Ruth Milkman. Reviewed in *Social Forces*, Vol. 67, No. 2: 551-553, December, 1988.

1986 "Contractual Arrangements." Review of *Households, Employment, and Gender: A Social, Economic, and Demographic View* by Paula England and George Farkas. Reviewed in *Science*, Vol. 232, No. 4753: 1021-1022, May, 1986.

1984 "Imperatives of the Organization: Stinchcombe's Techno-Marxism." Review essay on *Economic Sociology* by A. S. Stinchcombe. *American Journal of Sociology*, Vol. 90, No. 1: 192-196, July, 1984.

1980 "More Inequality: Christopher Jencks on the Paths to Success." Review essay *on Who Gets Ahead?* by Christopher Jencks, et al. in *Contemporary Sociology*, Vol. 9, No. 1: 754-758, November 1980.

1980 *Mathematical Tools for Applied Multivariate Analysis* by P. E. Green. Reviewed in *Contemporary Sociology*, Vol. 9, No. 1: 105-106, January 1980.

1979 *Inequality in American Communities* by R. F. Curtis and E. F. Jackson; and *Classes in the United States: Workers Against Capitalists* by C. Loren. Reviewed in *Social Forces*, Vol. 57, No. 3: 982-985, March, 1979.

1977 *Women and the Workplace: The Implications of Occupational Segregation*. Edited by Martha Blaxall and Barbara Reagan. Reviewed in *Social Forces*, Vol. 56, No. 1: 287-289, September, 1977.

TECHNICAL REPORTS:

1995 Bielby, William T. and Denise D. Bielby
"Agency Representation and Writers' Employment in Television and Film." Report prepared for the Writers Guild of America, West, West Hollywood, CA, February 1995.

1987 Bielby, William T. and Denise D. Bielby
"Employment Opportunities for Television Writers: Continuity and Change from 1960 to the Present." Report prepared for the Writers Guild of America, West Hollywood, CA, October 1987.

1983 Bielby, William T.
"Measuring Attributes of Jobs in the Panel Study of Income Dynamics." Report prepared for the National Advisory Board on the Panel Study of Income Dynamics, January, 1983.

1983 Nam, Charles B. (Subcommittee Chair), William T. Bielby, Clifford Clogg, Stephen Fienberg, William H. Form, Robert M. Hauser, David L. Kaplan, Ann R. Miller, Mary G. Powers, Donald Rubin, and Donald J. Treiman.
"Alternative Methods For Effecting the Comparability of Occupational Measurement Over Time." Report to the SSRC Advisory and Planning Committee on Social Indicators and the U.S. Bureau of the Census. Subcommittee on Comparability of Occupational Measurement, Social Science Research Council.

1980 Bielby, William T. and Richard A. Berk
"Sources of Error in Survey Data Used in Criminal Justice Evaluation." Final Report submitted to National Institute of Law Enforcement and Criminal Justice.

1979 Bielby, William T.
"Evaluating Measures of Neighborhood Quality in the Annual Housing Survey." *Annual* Housing *Survey Studies No. 2*. U.S. Department of Housing and Urban Development. Washington, D.C.: U.S. Government Printing Office, 1979, 33 p.

1979 Bielby, William T., Clifford B. Hawley and David Bills
Research Uses of the National Longitudinal Surveys. Research and Development Monograph No. 62, U.S. Department of Labor. Washington, D.C.: U.S. Government Printing Office, 1979, 143p.

RECENT PAPERS PRESENTED AT PROFESSIONAL MEETINGS (1999 - present):

2002 "'I Remember Great Times:' Recreating Community in a Suburban Diaspora." American Sociological Association, Chicago, IL, August, 2002 (with Carl Durnavich and Craig Rawlings).

2002 "Insuring Discrimination: Making a Market for Employment Practice Liability Insurance." American Sociological Association, Chicago, IL, August, 2002 (with Michael Bourgeois).

2000 "Segmented Audiences/Segmented Labor Markets: Age Stratification Among Film and Television Writers." Association for Cultural Economics International, Minneapolis, MN, May, 2000.

1999 "Out With the Old: Age Stratification in the Careers of Screenwriters." American Sociological Association, Chicago, IL, August, 1999 (with Denise D. Bielby).

1999 "Controlling Prime-Time: Organizational Concentration and Network Television Programming Strategies." American Sociological Association, Chicago, IL, August, 1999 (with Denise D. Bielby and Shari Ross Altarec).

RECENT INVITED LECTURES AND ACTIVITIES (1999-present)

2004 "Managerial Discretion, Cognitive Bias, and Legal Liability for Discrimination: Can I Get a [Expert] Witness?" Colloquium Series, Department of Sociology, University of Illinois, January 30, 2004; Economic Sociology Workshop, Graduate School of Business, University of Chicago February 3, 2004; Department of Sociology, Northwestern University, February 5, 2004, Department of Sociology, University of Wisconsin--Madison, March 2, 2004.

2003 "Controlling Primetime: Organizational Concentration and Network Television Primtime Programming Strategies." Colloquium Series, Department of Sociology, University of Minnesota, September 23, 2002; Brown Bag Series, Department of Sociology, University of Arizona, October 3, 2003.

2003 "Insuring Discrimination: Making a Market for Employment Practice Liability Insurance." Colloquium Series, Department of Sociology, University of Minnesota, November 2003; Colloquium Series, Department of Sociology, University of Pennsylvania, December 2003.

2003 "Rock in a Hard Place: Grass-Roots Cultural Production in the Post-Elvis Era." Presidential Address, American Sociological Association, Atlanta, GA, August 17, 2003.

2003 Panelist, Open Forum on Electronic Publication. American Sociological Association, Atlanta, GA, August, 2003.

2003 "Thin Vitae: Bigger and Better." Performance, Grand Ballroom, Atlanta Hilton, American Sociological Association, Atlanta, GA, August 16, 2003 (with Steve Gortmaker, Doreen Lebeau, Craig Rawlings, Paul Cleary, Mickey Silvers, Britta Wheeler, Andrew Merritt, and John Sutton; video documentary by Carl Durnavich, CD by Steve Gortmaker).

2003 Presentation, "Controlling Primetime: Organizational Concentration and Network Television Programming Strategies," UCSB Foundation, May 16, 2003 (with Denise D. Bielby).

2003 Panelist/Commentator, "Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality," Thomas Jefferson School of Law Ruth Bader Ginsburg Lecture Series, San Diego, CA, April 25, 2003 (commenting on lecture by Joan Williams).

2003 "Rock in a Hard Place: Home Grown Cultural Production in the Post-Elvis Era." Irene Flecknoe Ross Lecture Series, Department of Sociology, UCLA, April 11, 2003; Colloquium Series, Department of Sociology, University of Chicago, May 6, 2003; Colloquium Series, Department of Sociology, Northwestern University, May 24, 2003.

2003 "Can I Get a Witness? Presenting and Challenging Expert Testimony on Gender Bias in Employment Discrimination Litigation," Social Psychology of Bias Panelist, American Bar Foundation and Stanford Law School Conference, Rights

and Realities: Legal and Scientific Approaches to Employment Discrimination. Stanford Law School, March 24-25, 2003.

2002 "Thin Vitae: Blues & 3-Chord Rock 'n Roll." Performance, Grand Ballroom, Chicago Hilton, American Sociological Association, Chicago, IL, August 16, 2002 (with Steve Gortmaker, Doreen Lebeau, Craig Rawlings, Bryan Salvage, Mickey Silvers, and John Sutton; video documentary by Carl Durnavich).

2002 Discussant, "Profiling and Ascription in Employment." Thematic Session, American Sociological Association, Chicago, IL, August, 2002.

2002 "The Social Psychology of Racial Profiling in Drug Interdiction Stops." Association of Black Sociologists, Chicago, IL, August, 2002.

2002 "Organizational Perspectives on Minimizing Workplace Bias," Cognitive Bias Working Group, Program on Gender, Work & Family, College of Law, American University, May 11, 2002.

2002 "Expert Testimony on Stereotyping and Cognitive Bias in Employment Litigation," Cognitive Bias Working Group, Program on Gender, Work & Family, College of Law, American University, May 10, 2002.

2002 "Social Statistics in Litigation Contexts." Quantitative Methods in the Social Sciences Colloquium, University of California, Santa Barbara, April 18, 2002.

2002 "Controlling Prime-Time: Organizational Concentration and Network Television Programming Strategies," Colloquium, Department of Communication, University of California, Santa Barbara, March, 2002 (with Denise D. Bielby).

2001 "Disney's America and the World." Organizer and Presider, Thematic Session, American Sociological Association, Anaheim, CA, August, 2001.

2001 Professional Workshop: Serving as an Expert Witness. American Sociological Association, Anaheim, CA, August, 2001.

2001 Author Meets Critic, Barry *Glassner's The Culture of Fear: Why Americans Are Afraid of the Wrong Things*. Panelist, Pacific Sociological Association, March 2001.

2001 "Hollywood Graylist? Access to Employment for Writers." Sociology Day - Perspectives on Aging in the 21st Century, California State University, Fullerton, March 20, 2001 (with Denise D. Bielby).

2001 State of California Senate Committee on Government Oversight Hearing, testimony on gender equity in University of California practices for faculty hiring, January 31, 2001.

2000 "Talent Agencies as Labor Market Intermediaries." Invited panelist, Special Session: The Duality of Careers and Organizations, American Sociological Association, Washington DC, August, 2000.

2000 Discussant, "Racial Discrimination Revisited." Thematic Panel, American Sociological Association, Washington DC, August, 2000.

2000 Panelist, "Gender Differences in the Careers of Attorneys." California Women Lawyers Conference 2000, Los Angeles, CA, July 29, 2000.

2000 Panelist, "Studying Artists' Labor Markets: Lessons from Research on Comparable Occupational Communities." Princeton University Center for Arts and Cultural Policy Studies, Research on Artists Working Conference, May 2000.

2000 " Who Works Hard for the Money: A Comparison of Theories about Work Effort and Organizational Commitment." Second Annual Conference on Economic Sociology, University of Pennsylvania, Philadelphia, PA March 2000 (with Denise D. Bielby).

1999 Panelist, "Is Time Running Out for Affirmative Action?" American Anthropological Association, Chicago, IL, November, 1999.

1999 Session Organizer, Legal Issues Surrounding Inequality by Race, Class, or Gender, American Sociological Association, Chicago, IL, August, 1999.

1999 Panelist, "Sociologists as Testifying Experts," Pacific Sociological Association, Portland, OR, April 17, 1999.

1999 "The Hollywood Graylist: Age Bias in the Labor Market for Film and Television Writers." Dipartimento di Sociologia, Universita' degli studi di Milano Bicocca, Milan, Italy, March 30, 1999 (with Denise D. Bielby).

RESEARCH GRANTS:

2002-03 "'Serial Employment': Professional, Managerial, and Technical Workers in the New Economy." University of California Institute for Labor and Employment (with Lisa Torres).

1995-98 "Environments, Organizations, and Jobs: The Causes and Consequences of Workplace Gender Segregation." National Science Foundation, Sociology Division and Human Capital Initiative.

1995-96 "MOST Program: Minority Opportunity Through School Transformation." American Sociological Association, Ford Foundation, and the Borchard Foundation (Co-Investigator, with Kum-Kum Bhavnani).

1989-93 "From Market to Hierarchy: Industrial Change and the Employment Relation in Television Production." National Science Foundation, Sociology Division. (Principal Investigator. Denise D. Bielby, Co-Investigator.)

1985-87 "Men's and Women's Commitment to Work and Family." National Science Foundation, Sociology Division. (Principal Investigator. Denise D. Bielby, Co-Investigator.)

1987 "Research Conference on Occupational Sex Segregation and Comparable Worth." American Sociological Association, Problems of the Discipline Program (with Toby Parcel, James Baron, Paula England, Jerry Jacobs, Barbara Reskin, and Patricia Roos).

1980-83 "Jobs, Firms, and Industries: Economic `Dualism' and the Organization of Work." National Science Foundation, Divisions of Sociology and Applied Research. (Principal Investigator. James N. Baron, Co-Investigator.)

1978-80 "Sources of Error in Survey Data Used in Criminal Justice Evaluation." National Institute of Law Enforcement and Criminal Justice. (Principal Investigator. Richard A. Berk, Co-Investigator.)

1978 "Neighborhood and Household Components of Variation in Respondents' Reports of Neighborhood Quality." U. S. Department of Housing and Urban Development. (Principal Investigator.)

1977 "Research Uses of the National Longitudinal Survey." U. S. Department of Labor. (Principal Investigator.)

RESEARCH AND TEACHING INTERESTS:

Quantitative Methods	Organizations
Media & Popular Culture	Labor Markets & Discrimination
Social Stratification	Gender

REFERENCES: available upon request

EXHIBIT C

Documents Transmitted to Dr. William Bielby

Title	Bates
Consolidated Amended Complaint	N/A
Individual Progress Discussion Courier & Courier/Handler	BV213380073 – 76
Handler and Checker-Sorter (Field Sort and Hub Operations) Performance Review	BK2190110082 – 85
Individual Progress Discussion Form- Handler and Checker-Sorter	SD3568700057 – 61
Handler Interview Record	HR2386950132 – 39
Application for Employment	HR2386950144 – 152
SPACE CBP: The New Courier Performance Review: What's Changed	PCG000173 - 182
Individual Progress Discussion Courier & Courier/Handler (ii)	FDXPR6001928 - 1931
Individual Progress Discussion Courier & Courier/Handler	BV213380264 – 267
Individual Progress Discussion Courier & Courier/Handler	SD1651050106 – 109
Individual Progress Discussion Courier & Courier/Handler	GR806730145 – 146
Inter-office Memo re Special Courier Rating Form	BSTVA158
Confidential Special Rating Form	FDXPR6002005 – 2007
Confidential Special Rating Form	FDXPR3000188 - 190
Individual Progress Discussion – Non-exempt Employees	SK2877570267 – 270
Online Performance Review for Courier	SK2877570431
Ramp Agent Interview Guide	FDXPR3002774 - 2811
Ramp Agent Performance Areas	FDXPR3002720 – 2722
E-mail to K. Boykin from Kim Ottina, requesting completion of attached RTD Application	BK2190110311 - 317
Ramp Transport Driver Evaluation Guide for Internal Applicants	BK2190110342 - 347
Inter-office Memo, dated 12/14/94 re Arithmetic Test Materials	FDXPR3002633 - 2637
Hiring Checklist – Road-Licensed Vehicle Driving Positions (People Manual, May 2002)	PM0502P222
Drivers' Requirements Acknowledgement Form (People Manual, May 2002)	PM0502P223
Driver Capacity Form (People Manual, May 2002)	PM0502P224
Vehicle Operator Certification of Violations and Review Record (People Manual, May 2002)	PM0502P225
FedEx Express Vision Requirements for NonDOT Revenue Driving Positions	PM0502P226
Driver Training Classroom Progress Report	BK219011319 - 11320
Driver Training Daily Yard Activity Progress Report	BK219010321 - 324
Backing & Base Docking Comments	BK2190110325
Backing Maneuvers Test Scoring Sheet	BK2190110326 - 327
Driver Training Classroom Progress Report	BK2190110328
Base Road Demonstration Record	BK2190110330

Title	Bates
Road Trip Comments	BK2190110331
Driver Training Final Grading Sheet	BK2190110337
Driver Training Final Skills Tests – Driving and Yard	BK2190110333 - 334
Driver Training Program Objectives	BK2190110340
Driver Training Program Objectives	BK2190110335
Defensive Driving Performance Evaluation	BK2190110338
Job Change Application	EJCA033
Management Performance and Contribution Review	PKB00082 - 87
Management Performance and Contribution Review	BK2190110239 - 243
Individual Performance and Contribution Discussion Form Management	SD1651050062 - 66
Structured Interview for Managers Form A	SD1651050547 – 577
Fleet Vehicle Operator Record of Road Test and Certificate of Road Test (Internal Employees)	SD1651050094 – 95
Fleet Vehicle Operator Record of Road Test and Certificate of Road Test (Internal Employees)	GR806730149 – 150
Fleet Vehicle Operator Driver Road Test	BK2190110336 - 341
Vehicle Operator Record of Road Test and Certificate of Road Test	SK2877570323 - 326
Driver Application	BV213380304
Vehicle Operator Certification of Violations and Review Record	SK2877570327
Ramp Transport Driver Check Ride Form	BK2190110291 – 296
Evaluation/Checkride	PDSA00001006
DGO Vehicle Operator Record of Road Test and Certificate of Road Test	GC2318410315 – 316
Coach – Employee Instructions for Reviewing the Initial Evaluation	PL002935 - 36
Coach – Step Manager's Initial Evaluation of the One: Employee's Competencies	PL002932
The Dual Line Performance Review Process	FDX5000551 – 552
Service Agent Course (CAE-147) Class Plotter & Completion Form	FDXPR1001536 – 1538
Memo dated 2/23/98, from Roger Flude to Ken Stevenson re Checkride Recap	SK2877570399 – 400
Inter-office memo dated 9/7/99, from L. DeBerry to Linda Becker re Oper Door File Code 18199 – concerning Management Profile	ASPBUDCOMM0098
E-mail dated 11/1/99, from Mark Tarwater to Open Door	ASPBUDCOMM0088
E-mail dated 8/25/99, from Linda Becker to Open Door	ASPBUDCOMM0099
Checkride – Overview	PL000535 – 1345
Online Performance Review for Service Agent	GC2318410317 – 320
Task Statements for Domestic Customer Representatives	FDXPR4001249 - 1252
The People Manual (October 2003)	PM1003C001 - 21; PM1003P001 - 403

Title	Bates
List of videos produced by FedEx	N/A
FedEx Organizational Charts provided by Gil Diekmann	N/A
New Hire Employee Orientation Workbook	FDXPR6001403 - 1160
Manager's Guide USA	MGC001 - MGC013; MGP001 - MGP263
A Look at Biases Within Federal Express and the LEAP Program by D. Rankin Payne, Dr. Marsha Walton (Spring 1992)	IOM060292001-2015
Validation of Assessments For The First-Level Manager Job At Federal Express by David L. Brooks, Ph.D. (December 1998)	ASPVALIDATION0005-0028
ASPIRE Follow-up Criterion Validation Report by Joel Vaslow (May 2001)	ASP02VALID0001-0018
2002 Update of the ASPIRE Follow-up Criterion Validation Report by David Brooks (June 2002)	ASP02VALID0019-0026
ASPIRE Follow-up Criterion Validation Report for 2003 by David Brooks (June 2003)	PR400164-176
Haskins to Brooks re: Aspire Follow up (10 August 1999)	ASPBUDCOMM0103-105
SFA Program Guide	SFAPG001-020
Excerpts of the deposition of Michael Snyder, former Managing Director for Southern California, in Pettaway-Vint v. Federal Express	N/A
Transcript of the deposition of Darrell Kato, former Managing Director of the Coastal District, in Rogers v. Federal Express	N/A
Transcript of the deposition of Heather McNight, HR Manager, in Rogers v. Federal Express	N/A

EXHIBIT D

TOPIC	DEPONENT	JOB TITLE & LOCATION
Organizational Structure	McQueen, Tyrone	Managing Director of Station Operations, Golden State District, DGO (Sacramento, CA)
	Van Galder, Robert ("Robin")	Managing Director, Oakland AM District, AGFS (Oakland, CA)
Compensation	Davis, Kathy Michele	Compensation Advisor (Memphis)
	Powell, Elizabeth	Compensation Advisor (Memphis)
	Rhea, Danny	Managing Director, Global Compensation (Memphis)
Promotion, Discipline, Termination	Speroff, Robert	Managing Director, Human Resources, AGFS (Memphis)
AA/Diversity	Brown, Shannon	Vice President, Human Resource Services; Chief Diversity Officer (Memphis)
	Collins, Anita	Senior HR Representative (Memphis)
GFT/EEO	Banks, Catherine	Manager of Human Resources Compliance (Memphis)
	Dandridge, Dionne	Senior HR Corporate Representative (Memphis)
	Rouzan, Gwendolyn	Human Resources Director (Memphis)
Hiring, Recruitment, Assignment	Hesser, Beth	Senior HR Representative (Memphis)
	Huffer, David	Manager of Human Resources, Operations Support (Memphis)
	Presnoples, Paula	Senior Manager of Human Resources (Buffalo, IL)
JCATS	Williamson, Vickie	Business Systems Analyst (Memphis)

Hourly Skills Training	Moses, Richard	Managing Director, Operations, Training, Design, and Delivery (Memphis)
Diversity Training	Sneed, James	Management Facilitator Advisor (Memphis)
Manager Training re Compensation, Promotion, Assignment, Hiring, Discipline, and Termination Decisions	DeBerry, Linda	Managing Director, Human Resource Development (Memphis)
	Buchanan, Gloria	Senior HR Representative (Los Angeles, CA)
Basic Skills Test & Validation	Hater, John	Industrial Psychologist Advisor (Memphis) – RETIRED 12/31/2003
Performance Reviews & Validation	Hayward, Jerilyn	Industrial Psychologist Advisor (Memphis)
ASPIRE & Validation	Brooks, David	Industrial Psychologist Advisor (Memphis)
LEAP	Haskins, Sam	Advisor (in HR Department) (Memphis)
Checkrides	Cioffi, Vincent	Senior Manager (California)
Local/Informal Job Postings and Monitoring	Fifer, Joy	Senior HR Representative, Golden State District (Sacramento, CA)
	Garcia, Deborah	Manager of Human Resources, AGFS, Western Region (Southern California)
Individual Deponent, Non-30(b)(6)	Wertner, Timothy	Managing Director, Los Angeles Empire District, DGO

Individual Deponent, Non-30(b)(6)	Perry, David	Senior Manager, Oakland Hub, AGFS
Individual Deponent (in *Pettaway-Vint* case)	Snyder, Michael	1993 – Planning and Administration Director for Western Region 1994 – Managing Director for Southern California 1996 – Vice President, Eastern United States RETIRED at time of deposition

		1994 – Managing Director for Southern Californi
		1996 – Vice President for Eastern United Sta Why did you leave the company? Didn't wan break the law.

James M. Finberg (SBN 114850)
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Karin A. Kramer (SBN 87346)
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Attorneys for Plaintiffs and the Proposed Classes

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DERRICK SATCHELL, KALINI BOYKIN, VALERIE BROWN, RICK GONZALES, CYNTHIA GUERRERO, RACHEL HUTCHINS, KELVIN SMITH, SR., and KEN STEVENSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FEDEX EXPRESS, a Delaware corporation,

Defendant.

Case No. C 03-2659 SI; C 03-2878 SI

CLASS ACTION

NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: January 14, 2005
Time: 9:00 a.m.
Courtroom of the Honorable Susan Illston

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on January 14, 2005, at 9:00 a.m., Plaintiffs will move this Court for an order:

(1) Certifying two classes under Fed. R. Civ. P. 23(a) and 23(b)(2):

(a) a "Minority Employee Class" comprising all African-American and Latino Handlers, Freight Handlers, Material Handlers, Checker/Sorters, Customer Service Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers, Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service Assurance Agents, Truck Control Agents, Trace Representatives, Input Auditors, Team Leaders, and Dispatchers working in FedEx's Western Region, which includes the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, part of Texas, Utah, Washington, and Wyoming, during the period October 17, 1999 through the date of judgment in this action, for claims of employment discrimination on the basis of race in evaluation, promotion, compensation, and discipline in violation of Title VII of the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. § 1981 (1996), and, for those class members working, or who worked, in California, the California Fair Employment and Housing Act; and

(b) an "African American Lower-Level Manager Class" comprising all African-American Operations Managers in FedEx's Western Region, which includes the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, part of Texas, Utah, Washington, and Wyoming, during the period October 17, 1999 through the date of judgment in this action, for claims of employment discrimination on the basis of race in evaluation, compensation, and discipline in violation of Title VII of the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. § 1981, and, for those class members working, or who worked, in California, the California Fair Employment and Housing Act;

(2) appointing Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Kelvin Smith, Sr., and Ken Stevenson as Class Representatives of the Minority

Employee Class;

(3) appointing Derrick Satchell and Kalini Boykin as Class Representatives of the African American Lower-Level Manager Class; and

(4) appointing the law firms of Lieff, Cabraser, Heimann & Bernstein, LLP; Schneider & Wallace; the Law Offices of John L. Burris; the Law Offices of Michael S. Davis; the Law Offices of Waukeen Q. McCoy; and the Law Offices of Kay McKenzie Parker as Class Counsel, pursuant to Fed. R. Civ. P. Rule 23(g), of both the Minority Employee Class and the African American Lower-Level Manager Class.

Plaintiffs' motion is based upon (1) this Notice of Motion, Motion, and Memorandum; (2) Statistical Analysis of Race and Ethnic Patterns in Federal Express Workforce by Richard Drogin, Ph.D.; (3) the Expert Report of William T. Bielby, Ph.D.; (4) Report on the Basic Skills Tests and Their Use by Federal Express by Nita R. French, Ph.D.; (5) the Declarations of the Proposed Class Representatives; (6) the Declarations of Eighteen Class Members; (7) the Declaration of Chimène I. Keitner (attaching deposition transcript excerpts, alphabetically by deponent, and FedEx documents); (8) the Declaration of Nirej S. Sekhon; (7) the Declarations of the Proposed Class Counsel; (9) any argument of counsel as may be presented at the class certification hearing; and (10) the pleadings and files in this action.

MEMORANDUM

I. INTRODUCTION

FedEx Express ("FedEx") prides itself on its speedy, on-time delivery of letters and parcels throughout the world. When it comes to providing equal opportunity for its African-American and Latino employees, however, FedEx fails to deliver at all.

African Americans and Latinos ("Minorities") who work for FedEx find their progress stalled at the lowest levels of the company hierarchy. They experience discrimination in every aspect of their workplace, including performance evaluation, promotion, compensation, and discipline. Although FedEx has policies that purport to guarantee fair and equal treatment, the actual implementation of the policies depends on arbitrary, discretionary, and subjective decisions, rife with stereotyping and racial bias. FedEx does not systematically monitor its selection procedures for reliability, consistency, or adverse impact. When adverse impact is detected, FedEx takes no steps to identify non-discriminatory alternatives. The result is a segregated workplace where Minority workers do the laborious entry-level jobs of lifting, sorting, loading, and unloading mail and packages, but fail to advance into more lucrative, satisfying, and less physically taxing positions such as courier and management positions.

At FedEx, Minorities make up approximately 56% of "Handlers" — the workers who load and unload freight — but Minorities hold only approximately 29% of Operation Manager positions and only approximately 23% of Senior Manager positions at the company,[1] even though management positions are predominantly filled from within the Company's workforce.[2] FedEx's promotion system is infected with bias. That bias is fostered by (1) a "tap on the shoulder" system of selection for promotion to many jobs; (2) a multiple choice "skills" test, passage of which is required for certain high level hourly positions, that FedEx concedes has

[1] See Statistical Analysis of Race and Ethnic Patterns in Federal Express Workforce by Richard Drogin, Ph.D. ("Drogin Rpt.") at ¶ 14, Tbl. 3.

[2] See Garcia at 27:23-29:5, Keitner Decl., Ex. 10; Speroff 7/22 at 30:2-16, Keitner Decl., Ex. 25; FedEx People Manual § 4-5, Candidate Selection—Hourly Positions (noting that "FedEx Express has a systematic means of selecting candidates for hourly positions within the Corporation for promotions and transfers"), Keitner Decl., Ex. 35.

`statistically significant adverse impact;[3] and (3) promotion eligibility requirements that are tied to performance evaluation scores and discipline records, even though the performance evaluations and discipline systems are arbitrary, discretionary and subjective, and have an adverse impact on Minorities that is highly statistically significant.[4]

The uncontrolled discretion and bias in FedEx's performance evaluation and discipline systems also infects FedEx's compensation system. Because compensation is tied to an employee's performance evaluation scores and discipline records, and because those systems adversely affect Minorities, Minority employees and lower level managers are paid substantially less than their similarly-situated white colleagues — even colleagues performing the same jobs, in the same facility, and with the same seniority.

This action is brought on behalf of two classes of African-American and Latino employees in FedEx's Western Region to remedy and obtain redress for FedEx's discriminatory policies and practices during the period October 17, 1999 through the date of judgment: the "Minority Employee Class" and the "African American Lower-Level Manager Class." FedEx's Western Region is comprised of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, part of Texas, Utah, Washington, and Wyoming.[5]

The "Minority Employee Class" consists of Minority hourly employees in the following positions: Handler, Freight Handler, Material Handler, Checker/Sorter, Customer Service Agent, Courier, Swing Driver, Ramp Transport Driver ("RTD"), Ramp Area Driver, Shuttle Driver, Dangerous Goods Agent, Information Agent, Operations Agent, Ramp Agent, Service Assurance Agent, Truck Control Agent, Trace Representative, Input Auditor, Team Leader, and Dispatcher. The Minority Employee Class is suing to stop FedEx's policies and practices of (1) providing Minority Employees with disproportionately fewer promotions to

---

[3] See Hater at 78:4-22, Keitner Decl., Ex. 12; Draft Memo from Hater to Taylor, 7/19/1994, Keitner Decl., Ex. 43; Drogin Rpt. at ¶¶ 49-52; Report on the Basic Skills Tests and Their Use by Federal Express by Nita R. French, Ph.D., in Support of Plaintiffs' Motion for Class Certification ("French Rpt.") at 17.

[4] See Drogin Rpt. at ¶ 34.

[5] See Van Galder at 11:1-14, Keitner Decl., Ex. 27.

Checker-Sorter, Courier and other driving positions, and Operations Manager than fair and equal treatment would provide; (2) compensating Minority Employees less for the same work than their similarly-situated non-Minority counterparts; and (3) disciplining Minority Employees more frequently and more harshly for the same occurrences than their non-Minority counterparts.

The second class, the "African American Lower-Level Manager Class," consists of African-American managers below the level of Senior Manager. These employees receive lower compensation, including less pay for the same work, and more and harsher discipline than their non-Minority counterparts.

Both classes assert claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. for disparate treatment and disparate impact, and under 42 U.S.C. § 1981. Class members working, or who worked, in California also bring claims under California's Fair Employment and Housing Act, Government Code § 12940 et seq.

In support of class certification, Plaintiffs rely on (1) deposition testimony, declarations, and charges of discrimination by the named plaintiffs; (2) eighteen declarations from current and former FedEx employees; (3) FedEx documents and the testimony of FedEx's corporate representatives; (4) the report of Richard Drogin, Ph.D., a statistician who identifies the statistically significant disparities in FedEx's compensation, evaluation, promotion, and discipline decisions; (5) the report of William Bielby, Ph.D., a sociologist who explains how racial stereotypes infect FedEx's human resources processes; and (6) the report of Nita French, Ph.D., an industrial organizational psychologist, who explains that FedEx's requirement of passage of the race-biased "Basic Skills Test" for promotion to several key jobs is not justified.[6] This evidence demonstrates a pattern of under-promotion, under-compensation, and overdiscipline of Minority Employees and African American Lower-Level Managers throughout FedEx's Western Region. The result of FedEx's discriminatory policies and practices is that Minority Employees disproportionately occupy low-paid, physically demanding hourly positions and the few who do progress to driver and management positions are compensated less than similarly-situated whites.

[6] Proposed Class Counsel also submit declarations regarding their adequacy.

Class certification is appropriate pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2). All of the prerequisites to a class action in Rule 23(a) — numerosity, common questions, typicality, and adequacy — are satisfied. The Minority Employee Class has thousands of class members and the African American Lower-Level Manager Class has several hundred members. Common issues include whether FedEx's uniform promotion, compensation and discipline policies have disparate impact on Minority employees and lower level managers; whether FedEx's discrimination is intentional; and whether the pattern and practice of under-promotion, under-compensation, and overdiscipline of Class members violates the employment discrimination laws. The proposed class representatives are members of the classes they seek to represent and have claims that are typical of other class members. They will adequately represent the classes, and have retained counsel who, collectively, have the resources and experience to represent the Class effectively.

Certification is appropriate under Rule 23(b)(2) because this suit seeks meaningful declaratory and injunctive relief.[7] The primary goal of this litigation is to alter FedEx's performance evaluation, job posting, promotion, compensation, and discipline policies and practices so that FedEx delivers equal employment opportunities to its Minority employees and lower level managers as well as it delivers packages and letters to its customers.[8]

II. STATEMENT OF FACTS

A. Minorities At FedEx Are Relegated To The Most Physically Demanding, Lowest Paid, Jobs.

The cold statistics show that Minority Employees at FedEx are consigned to hourly labor — they perform the more physically demanding, lower paid work of loading and

[7] As it did in Butler v. Home Depot, Case No. C 94-4335 SI, Order of Jan. 25, 1996, 1996 WL 421436 (N.D. Cal.), the Court should bifurcate the case into liability and relief phases. As in Butler, the first phase, certified under Rule 23(b)(2), would "address liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages." Id. at *1. After a finding of liability in Phase I, the Court should grant declaratory and injunctive relief, and equitable relief such as back pay. The Court can decide after the liability phase whether the compensatory damages phase should be certified under Rule 23(b)(3), with notice and an opportunity to opt out.

[8] See Declarations of: Kalini Boykin at ¶ 2; Derrick Satchell at ¶ 2; Valerie Brown at ¶ 2; Rick Gonzales at ¶ 2; Rachel Hutchins at ¶ 2; Kelvin Smith, Sr. at ¶ 2; and Ken Stevenson at ¶ 2.

unloading packages, but are underrepresented in the less physically taxing, better paying, driver and management positions. At each step up the promotions ladder, the percentage of Minorities drops. (Drogin Rpt. at ¶¶ 12-14.)

Among hourly positions, the positions with the highest percentages of Minorities are the Handler, Freight Handler, and Material Handler positions — the three lowest paid positions in the Company. (Drogin Rpt. at ¶ 14, Table 3.) The representation of Minorities among the higher paid Courier and Ramp Transport Driver positions drops by almost half. Although approximately 56% of Handlers are Minorities, only approximately 30% of Couriers are Minorities. (Id.) The drop-off in the percentage of African Americans is particularly dramatic: although approximately 35% of Handlers are African American, only approximately 13% of Couriers are African American. (Id.)

For Latinos, the drop continues into the management ranks. Latinos comprise approximately 17% of Couriers, but only 8.5% of Operations Managers, the lowest management position. (Id.)

B. FedEx Has A Culture Of Hostility To Minorities.

At the root of the statistical disparity between FedEx's Minority employees and non-Minority employees is a mix of conscious and unconscious racial bias and stereotypes. The company's sophisticated exterior masks a culture of hostility towards minorities and disregard for workplace segregation and FedEx's legal obligations. A lack of meaningful standards,[9] controls and monitoring allows those racial biases and stereotypes to infect FedEx's performance evaluation, discipline, promotion, and compensation systems.

Known as the "ole boys network" or "the country club," the management of FedEx's Western Region engages in behaviors that have long since been deemed unacceptable in our society. High ranking FedEx officials, including Mike Pigors, the current Vice President for FedEx's Western Region of the AGFS Division — and the FedEx officer responsible for diversity in the region (Shannon Brown at 73:8-75:5, Keitner Decl., Ex. 3), have repeatedly, and openly,

[9] Although FedEx has written personnel policies that touch upon a variety of subjects, those policies leave large amounts of discretion to local managers.

used racial slurs.[10]

Those racial slurs were not isolated comments: they reflect a corporate culture, and open unwritten policy at FedEx of hostility toward Minorities. Not only were the senior FedEx officials who made those slurs never disciplined for making them, but a manager who challenged his superiors about their use of such terms was warned that supporting Minorities would be harmful to his career at FedEx. (Snyder at 52:25-56:16, Keitner Decl., Ex. 24.) When former Southern California Managing Director Michael Snyder questioned whether such language was appropriate, he was derided by Mr. Rebholz, his boss, as a "nigger lover." (Id. at 54:12-24.) Mr. Rebholz then counseled Mr. Snyder about FedEx's culture and what he needed to do to fit in:

> Q. When Mr. Rebholz made these types of comments, did you say anything to him or react in any way to indicate whether you approved or disapproved of him?
>
> THE WITNESS: Yes, I reacted.
>
> MR. ROOT: In what manner?
>
> A. Challenging him to that thought process and whether it was appropriate.
>
> Q. When you did that, how did Mr. Rebholz respond?
>
> A. I remember on one occasion he called me a "nigger lover." I recall that pretty specifically. He explained --

---

[10] Mr. Pigors referred to African Americans as "niggers." Snyder at 75:3-8. At the time, Mr. Pigors was Vice President of the Western Region of DGO. See also Rogers at 114:2-115:11, 719:8-19, Keitner Decl., Ex. 23, in which Mr. Rogers, a FedEx Senior Manager, testifies that Mr. Pigors intentionally and dismissively called him "boy" during a senior managers meeting in late 2000.

Tim Wertner, who is currently a Managing Director for FedEx's Los Angeles/Inland Empire District, the largest in the Western Region, also referred to African Americans as "niggers." Snyder at 86:18-20. When asked about the statements, Mr. Wertner testified that he could "not recall." Wertner at 256:2-257:18, Keitner Decl., Ex. 28. Jerome Rogers testified that Mr. Wertner made known his views that African Americans are inferior to whites. Rogers at 311:25-313:9, 459:10-464:15, 766:14-768:11. Mr. Wertner also served as a Managing Director of the Bay Area Metro District during the Class period.

David Rebholz, currently FedEx's Executive Vice President of Operations repeatedly called African Americans "niggers" when he was Operations V.P. of FedEx's Western Region in the 1990s. Mr. Rebholz now reports directly to FedEx CEO David Bronczek. Accordingly to Mr. Snyder, Ted Weise, who was President and CEO of FedEx during part of the class period, repeatedly referred to blacks as "niggers." Snyder at 56:22-59:7.

> MR. COCHELL: Objection, form of the question. Go ahead.
>
> THE WITNESS: -- his rationale and how the company was, and that I was going to need to get used to that and understand if I wanted to have a career.
>
> * * * *
>
> Q. BY MR. ROOT: You mentioned in your testimony that he explained to you the way things were at FedEx. And I am asking you what specifically he said in that regard.
>
> THE WITNESS: I understand the question. To the best of my recollection, that it was a southern boy mentality in upper management and you had to fit in, something along those lines. I don't remember the specific quotes. But kind of coaching me and counseling me that -- trying to make a stand on minorities' behalf was inappropriate.
>
> Q. BY MR. ROOT: And by "inappropriate," did you understand him to mean harmful to your career at FedEx?
>
> A. Yes, I understood that's -- I think that's what he was trying to tell me.

(Snyder at 54:12-56:16, Keitner Decl., Ex. 24.) That testimony about FedEx's culture is confirmed by a statement by long-time FedEx HR advisor Sam Haskins in a human resources document produced by FedEx and dated June 2, 1992 that "[i]f any adverse impact [in manager hiring] indeed exists, it's probably due to Federal Express culture and management hiring practices" (Memo, Haskins to Pollard, 6/2/1992, Keitner Decl., Ex. 50) and by Mr. Haskins' explanation of that statement in his August 31, 2004 deposition testimony that in the 90s "we were very much predominantly [a] white male management population, and that was our hiring practice."[11]

Where, as here, a company has a history of racial bias in its corporate culture, that

[11] Haskins at 11:23-12:19, Keitner Decl., Ex. 11; see also Darrell Kato, former Managing Director of the Coastal District, at 60:23-62:12, 130:22-140:2, Keitner Decl., Ex. 16 ("The managing directors within the western region were considered to be a good ol' boys network.").

The culture of hostility to Minorities is manifested in other ways as well. Members of the overwhelmingly Caucasian senior management of FedEx make no secret of their desire not to work with Minorities. See Snyder at 54:12-56:16. The hiring process allows the exclusion of Minorities from certain interviews. See, e.g., Kato at 124:6-125:24. On rare occasions when Minority Employees are promoted into management, they are referred to as "tokens," Snyder at 53:25-54:2, and excluded from group e-mails and other company communications. Rogers at 768:17-770:1, Keitner Decl., Ex. 23.

bias is likely to continue unless the company takes strong affirmative steps to eliminate the biased culture. FedEx has taken no such steps. Instead, FedEx fails to comply with its legal obligations to monitor adverse and impact and turns a blind eye to the adverse impact that permeates its evaluation, promotion, discipline and compensation systems. As a result, the discriminatory corporate culture described by Mr. Rebholz and Mr. Haskins helps to explain the statistical disparities that currently pervade FedEx's Western Region. (Bielby Rpt. at ¶¶ 40-41.)

Racial bias infects every aspect of the FedEx workplace, including evaluation, promotion, compensation, and discipline. Feeding on the atmosphere established by senior management, and given human resources systems that permit application of discretionary decision-making without guidelines or controls, local managers resort to stereotypes and biased attitudes when making evaluation, promotion, compensation, and discipline decisions. (Id. at ¶ 42.)

C. FedEx's Operations Are Uniform.

Throughout the Western Region, and indeed throughout the United States, FedEx's operations are uniform. FedEx's distribution facilities and its workplace systems are standardized. Different facilities have largely the same categories of employees, and the job duties of those employees are the same. (See Van Galder at 45:16-46:9, Keitner Decl., Ex. 27; Garcia at 35:13-23, Keitner Decl., Ex. 10.) The job of a Handler is the same in Alaska as it is in Hawaii. (Van Galder at 48:12-15, 56:1-9, 60:2-17.) The job of a Courier is the same in Seattle as it is in Phoenix. An employee transplanted from Portland, Oregon to Los Angeles, California to Reno, Nevada to Spokane, Washington could make a seamless transition. As a result, employee transfers between facilities not only occur (see Fifer at 40:11-17, Keitner Decl, Ex. 9), but are encouraged by the Company for Managers. (See, e.g., Van Galder at 56:10-57:14; Fifer at 76:23-77:7.)

Uniformity is more than just a feature of FedEx's operations — it is a requirement. FedEx goes to great lengths to ensure consistency in its operations. (Cioffi at 89:9-17, Keitner Decl., Ex. 5.) Only through uniformity and consistency can FedEx ensure proper service to its worldwide customers. (Moses at 32:17-33:18, Keitner Decl. Ex. 18.)

D. FedEx Is Centralized and Hierarchical.

FedEx has two operational Divisions in the Western Region: Air Ground Freight Services ("AGFS") and Domestic Ground Operations ("DGO"). The DGO Division includes the Couriers who drive the familiar trucks and interact most frequently with the public. The AGFS Division is responsible for air transport of packages after they are collected by DGO, as well as for delivery of large and heavyweight packages. (See Van Galder at 27:25-28:8, Keitner Decl., Ex. 27.)

FedEx is also divided into geographical Regions. The FedEx Regions are headed by Vice Presidents of Operations for each Division. The Vice President of the Western Region for AGFS is Michael Pigors, who has referred to African Americans as "niggers." (Snyder at 75:3-8, Keitner Decl., Ex. 24.)

Regions are divided into Districts, which are headed by Managing Directors who report directly to the Vice Presidents of Operations. The Managing Director of DGO for the LA/Empire District is Tim Wertner, who also has referred to African Americans as "niggers." (Id. at 86:18-20.)

The Districts are comprised of individual distribution/service centers in the DGO division, and of "organizations" in AGFS, which may correspond to a single facility or to set of operations within a larger airport based facility. Both service centers and organizations are run by Senior Managers, who report directly to the Managing Directors. Senior Managers supervise Operations Managers, the lowest management positions. The Vice Presidents of Operations, the Managing Directors, and the Senior Managers form the senior management ranks of the Company. The chains of command in the Western Region, as in all FedEx Regions, run directly to FedEx corporate headquarters in Memphis. The Executive Vice President of Operations is David Rebholz, who has made it clear that the "southern boy mentality in upper management" will exclude anyone who speaks up on behalf of Minorities. (Id. at 52:25-56:16.)

E. FedEx's Employment Policies and Practices Are Uniform.

All personnel policies, procedures, and forms are produced by and disseminated

from FedEx's corporate headquarters in Memphis.[12] Included among FedEx's standardized personnel materials are the People Manual (a comprehensive guide to uniform, mandatory policies and procedures); Best Practices guides for AGFS and DGO; a uniform, corporate-wide Legal manual; and uniform materials for employee orientation, training, and evaluation.[13]

Personnel decisions about hiring, evaluation, promotion, discipline, and compensation of hourly employees are primarily made by Operations Managers, who report to Senior Managers. Personnel decisions regarding Operation Managers are primarily made by Senior Managers.

When making these personnel decisions, local managers operate within a system that applies uniformly throughout FedEx, not only in the Western Region, but nationwide. Local managers use the same forms, administer the same tests, and apply the same policies throughout the Western Region.[14]

FedEx's policies regarding promotion, compensation, evaluation, and discipline are set forth in the People Manual. The People Manual policies apply companywide.[15] No officers or managers in the Western Region have authority to alter or deviate from these policies. (Van Galder at 90:16-91:6, Keitner Decl., Ex. 27; Garcia at 9:1-8, Keitner Decl., Ex. 10.) Those policies include the eligibility requirements for promotion and the formulas for setting compensation.

F. FedEx's Policies and Practices Discriminate Against Minorities.

Statistical analysis of FedEx's employment policies and practices establishes that FedEx discriminates against Minority employees with respect to promotions, compensation, evaluations, and discipline, and against African American Lower-Level Managers with respect to

[12] See, e.g., Speroff 7/22 at 22:7-26:7, Keitner Decl., Ex. 25; FedEx People Manual—Publication Information, Keitner Decl., Ex. 31 (indicating that all amendments to the People Manual shall be made by the CEO).

[13] See, e.g., Van Galder at 85:1-88:12, Keitner Decl., Ex. 27; McQueen at 92:6-93:16, Keitner Decl., Ex. 17.

[14] See, e.g., McQueen at 92:6-93:16; Garcia at 9:1-8, Keitner Decl., Ex. 10; Fifer at 13:3-14:14, Keitner Decl., Ex. 9; Speroff 7/22 at 22:7-23:16, Keitner Decl., Ex. 25.

[15] See, e.g., Buchanan at 20:2-20:5, Keitner Decl. Ex. 4 (referring to the People Manual as a FedEx manager's HR "Bible"); Presnoples at 11:24-12:11, Keitner Decl., Ex. 21.

evaluations, compensation, and discipline. With respect to each of these employment practices, these disparities adverse to Minorities are highly statistically significant, and could not have occurred by chance. (See Drogin Rpt.. at ¶¶ 21-66.) These statistical disparities are so powerful that they not only establish the *prima facie* case for a disparate impact claim, see Hazelwood Sch. Dist. v. U.S., 433 U.S. 299, 307-8 (1977), but form a basis for inferring intentional discrimination, see Butler v. Home Depot, 1997 WL 605754 (N.D. Cal.) at *6; Stender v. Lucky Stores, 803 F.Supp. 259, 332-34 (N.D. Cal. 1992).

1. FedEx's Promotion Policies And Practices Are Discriminatory.

a. FedEx Discriminates Against Minorities with Respect to Promotions from "Casual" to "Permanent" Status.

FedEx's pattern of discrimination begins from the moment employees are hired. A new hire can receive either a permanent or "casual" position; "casual" employees do not have regular work schedules, receive no benefits, and do not have access to the FedEx intranet, which contains on-line personnel and training materials, including the on-line Job Change Application Tracking System (JCATS) through which permanent employees apply for promotions. (Williamson at 12:1-13:16, Keitner Decl., Ex. 29; Fifer at 19:2-25, Keitner Decl., Ex. 9.) Upgrading from casual to permanent is considered a promotion.[16] Permanent full-time positions provide greater stability, more prestige, and quicker promotion to other jobs within FedEx.

Minority "casual" employees are treated far worse than similarly situated whites with respect to promotions to permanent positions. A statistical analysis of promotions from casual to permanent, controlling for originating job, geographic location, and time in job reveals statistically significant disparities adverse to both African Americans and Latinos. (Drogin Rpt. at ¶¶ 21-31.) Focusing on the move from casual Handler to permanent Courier — the most

[16] Although one corporate deponent described the placement of a "casual" employee into a permanent position as an external hire, suggesting that "casual" employees are somehow outside the company, see Huffer at 79:3-22, Keitner Decl., Ex. 15, the company's own databases confirm casuals are in fact employees of FedEx. The FedEx computer system contains casual employees in the payroll data and identifies the names of casual employees moving to a permanent position with the "P" code used for promotions. See Drogin Rpt. at n.6. Regardless of what this job move is called, Minorities fare worse.

common path for promotions into the Courier position[17] — similarly establishes dramatic disparities adverse to Minorities.[18]

Of all of FedEx's employees, casual employees are the least protected. They have the least job security; they have no health care security; and they have no regular schedules. Of particular relevance to this case, they have no meaningful protection from racial discrimination, and cannot make use of FedEx's internal procedures for handling race discrimination complaints.[19]

Unlike permanent employees, casual employees are not permitted to apply for positions using FedEx's computerized job application system. (Williamson at 12:1-20, Keitner Decl., Ex. 29; Huffer at 78:18-79:2, Keitner Decl., Ex. 15; Garcia at 23:10-12, Keitner Decl., Ex. 10.) They are not privy to the information about job postings contained in that system. (Id.) As a result, permanent positions filled from the pool of "casual" employees are filled in part by managers inviting certain employees to apply — a "tap-on-the-shoulder" process. (Garcia at 19:16-22:18; see also Huffer at 34:21-35:1, 46:6-25, 54:5-55:16; Hesser at 48:9-14, 50:12-24, Keitner Decl. Ex. 14; Presnoples at 131:6-14, Keitner Decl. Ex. 21.) As Professor Bielby, the immediate past President of the American Sociological Association explains, such processes are susceptible to the influences of racial stereotyping and "in-group favoritism" by white managers."[20]

Managers are not systematically trained on how to select among casual applicants. (Buchanan at 133:18-135:10, Keitner Decl., Ex. 4; Huffer at 60:21-62:10, Keitner Decl. Ex. 15.) Accordingly, a Manager who chooses among casual employees has almost unfettered discretion — even more than a Manager choosing among permanent employees. As Professor Bielby explains, such arbitrary, discretionary and subjective decision-making often is infected by racial

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[17] Of the persons promoted into Courier positions during 1999-2003, approximately 70% were promoted from the Handler and Freight Handler jobs. Drogin Rpt. at ¶ 22.

[18] Id. at ¶¶ 21-26, 31 (for the years 1999-2003, the statistical disparity is -4.49 standard deviations for African Americans; -4.34 standard deviations for Latinos).

[19] Dandridge at 27:4-29:7, Keitner Decl. Ex. 7 (GFT policy applies to permanent employees).

[20] See Expert Report of William T. Bielby, Ph.D. ("Bielby Rpt.") at ¶¶ 4, 8, 20-23, 33, 42.

stereotypes and results in biased outcomes. (Bielby Rpt. at ¶¶ 8, 15-39, 42.) That is what happens at FedEx.

b. FedEx Discriminates Against Minorities with Respect to Promotions to More Desirable Permanent Hourly Positions.

Handler jobs are the most physically demanding and lowest paid jobs at FedEx.[21] Accordingly, moving from Handler jobs to less physically taxing, higher paid, hourly positions such as Checker/Sorter and Courier and Ramp Transport Driver is desirable.

A statistical analysis of the JCATS data[22] establishes that both African American and Latino employees are selected for promotion at rates materially lower than similarly situated whites. This under-promotion is statistically significant with respect to both African Americans and Latinos.[23]

A statistical analysis of all moves from Handler to Checker/Sorter, from Handler to Courier, from non-Handler to Courier, and from Handler to Material Handler, including moves that do not appear in the JCATS data, confirms that Minorities are under-promoted. The disparities are highly statistically significant.[24]

At least three mechanisms of discrimination contribute to these disparities: (1) a biased "skills" test; (2) biased performance evaluations; and (3) a biased discipline system.

i. FedEx Requires Passage of a "Skills" Test that It Knows Has Adverse Impact.

To be promoted from Handler or other low level hourly positions into Courier,

[21] Checkers/Sorters are paid more than Handlers, and Couriers and Ramp Transport Drivers are paid more than Checkers/Sorters. Drogin Rpt. at ¶ 14, Tbl. 3.

[22] The JCATS data are supposed to include all promotions of permanent hourly employees at FedEx.

[23] Drogin Rpt. at ¶¶ 46, 48 (-7.19 standard deviations for African Americans; -4.74 standard deviations for Latinos).

[24] Drogin Rpt. at ¶¶ 21-31 (finding statistical disparities adverse to African Americans during the period 1999-2003, of -6.42 standard deviations as to promotions from Handler to Courier [-4.49 from Casual Handler to Permanent Courier and -4.59 from Permanent Handler to Permanent Courier], -7.75 standard deviations from non-Handler to Courier, -3.37 from Handler to Checker/Sorter, -11.34 from Handler to Material Handler; finding disparities adverse to Latinos as to promotions from Handler to Courier of -4.43 standard deviations from Casual Handler to Permanent Courier, and -3.72 standard deviations from any Handler position to Permanent Courier.)

Ramp Transport Driver, or Service Agent positions, a FedEx employee must pass a group of tests known as the Basic Skills Tests ("BST").[25] FedEx concedes that the BST has statistically significant adverse impact.[26] The adverse impact of the BST is extraordinarily large. For example, the BST disqualifies almost two-thirds of African Americans who apply for the Courier job; the pass rate is less than one-half the pass rate for white applicants.[27]

Although FedEx claims the BST is a valid predictor of performance, Dr. Nita French, an industrial organizational psychologist who has reviewed all of the materials relating to the supposed validation of the BST, has concluded that FedEx's use of the BST is not justified.[28] In addition, the U.S. Department of Labor's Office of Federal Contract Compliance Programs has found that the BST has adverse impact and is not valid.[29] Despite being aware that the BST has statistically significant adverse impact, FedEx has disregarded its legal obligation under the 1978 Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") to monitor adverse impact[30] and to explore alternatives that have less adverse impact.[31]

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[25] See General BST Information, Keitner Decl., Ex. 39.

[26] Hater at 78:4-79:13, Keitner Decl. Ex. 12; see also Drogin Rpt. at ¶¶ 49-52 (finding disparities so significant that the probability of them occurring by chance is "essentially zero").

[27] Hater at 85:1-86:5, Keitner Decl. Ex. 12; see Draft Memo from Hater to Taylor, 7/19/1994, Keitner Decl., Ex. 43.

[28] See French Rept. at 15, 18.

[29] Hater at 51:13-53:23; OFCCP Letter of 6/29/2000, Keitner Decl., Ex. 42.

[30] Hater at 79:4-82:9. The Uniform Guidelines require employers to maintain records that disclose the impact of tests, such as for BST, upon employment opportunities of "persons identified by race, sex, or ethnic group." 29 C.F.R. § 1607.4(c). "Adverse impact determinations should be made at least annually…" 29 C.F.R. § 1607.15.A(2). The Supreme Court has underscored the importance of these recordkeeping requirements. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-58 (1989)

[31] Hater at 82:10-83:3; see French Rpt. at 18. It is a legal duty for an employer to explore whether there is an alternative selection practice or an alternative use of a selection practice that has less adverse impact provided that the alternative is substantially equally predictive of job performance. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3(B) (an employer should "make a reasonable effort to become aware of . . . alternative procedures" with less adverse impact, and that "[w]here the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity of the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it. . . ."). Accordingly, even if an employer demonstrated the validity of a test, the use of the test is unlawful if the plaintiff shows that the employer failed to implement an effective alternative selection device that would have a lesser adverse impact. Albemarle Paper Co. v Moody, 422 U.S. 405, 425 (1975); 42 U.S.C. § 2000e-2k(1)(A)(ii).

FedEx has also failed to demonstrate that Service Agent, Courier, and Ramp Transport Driver candidates who pass the BST perform better on the job than those who fail. (See French Rpt. at 14-15.) FedEx concedes that many skills not tested on the BST are important for these jobs; the BST measures only 16 of the 66 skills identified by Subject Matter Experts as important to the job of Courier. (Hater at 154:10-157:25, Keitner Decl., Ex. 12; see French Rpt. at 9.)

The BST prevents a huge percentage of Courier candidates from obtaining Courier positions even though these candidates would successfully complete the mandatory Courier training course. Of 102 Couriers who took the BST and Courier training in a pilot study, 96 candidates passed training, but only 52 candidates passed the BST. (Id. at 267:16-272:10; see Validation of BST With Courier and Service Agent Training Performance, p. 7, Keitner Decl., Ex. 41.) Because this was a pilot study only, the 44 candidates who failed the BST but passed Courier training went on to work as Couriers. Had the BST requirement been in place at that time, 44 out of 102 Courier candidates would have been excluded from this promotional opportunity even though almost all of them were able to pass training. The inability of the BST to predict success on the job was underscored by Melody Weaver-Thomas, a DGO training manager, in a March 6, 2000 memo in which she calculated Courier and Service Agent training pass/fail rates and concluded that the "basic skills test implemented in November 1996 has not shown a significant change in pass/fail rates in training programs," meaning that the BST requirement has not improved the job performance of courier trainees. (Id. at 92:8-97:8; Memo from Weaver-Thomas to Distribution, 3/6/2000, Keitner Decl., Ex. 44; see French Rpt. at 6.)

FedEx has retained the BST requirement in the face of evidence that its use confers little operational benefit while causing enormous adverse impact. (See Drogin Rpt. at ¶¶ 49-52; French Rpt. at 18.) The BST requirement applies uniformly to all Service Agent, Courier, and Ramp Transport Driver candidates in the Western Region and, indeed, nationwide. The harm to Minorities caused by FedEx's unjustified use of the BST gives rise to a paradigmatic class claim for injunctive relief.

ii. FedEx's Discriminatory Performance Evaluation System Causes Under-Promotion.

In addition to requiring passage of the BST, FedEx restricts promotion eligibility to employees who obtain certain performance evaluation scores on their most recent reviews. The People Manual specifies that hourly employees must have a most recent performance evaluation score of 5 (on a 7 point scale) to be eligible for promotion.[32] Because the performance evaluation system is biased against Minorities, that requirement leads to under-promotion of Minorities.

A statistical analysis of performance evaluation scores establishes that both African Americans and Latinos receive lower evaluation scores than whites in the same jobs. The results are highly statistically significant.[33] The adverse impact is so strong that the probability of it occurring by chance as to Latinos is less than one in ten to the 14th power and the probability of it occurring by chance for African Americans is far less than one chance in ten to the 53rd power.

This disparity raises the question of why the performance evaluations are biased. The answer lies in the lack of guidance given to local managers on how to conduct evaluations, and the failure to implement safeguards to ensure that managers consider the same criteria, weigh the criteria in the same way, rate consistently themselves, and rate consistently as a group.[34]

FedEx's own industrial organizational psychologists concede that the performance evaluations are unreliable. Joel Vaslow, an industrial organizational psychologist at FedEx, harshly criticized the performance ratings in an e-mail to other HR personnel at FedEx. Vaslow stated, among other criticisms, that "[b]asically performance review ratings tend to be unreliable and it may be difficult or meaningless to compare performance reviews from one employee to the next."[35] David Brooks, another industrial organizational psychologist at FedEx, also harshly

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[32] See People Manual § 4-15, Career Opportunity at Tbl. 1, p. 187, Keitner Decl., Ex. 36; Speroff 7/22 at 65:14-67:6, Keitner Decl., Ex. 25.

[33] See Drogin Rpt. at ¶¶ 33-35 (-15.91 standard deviations for African Americans; -8.78 standard deviations for Latinos).

[34] See Bielby Rpt. at ¶¶ 15-29.

[35] See Email, Vaslow to Haskins et al., 8/10/1999, Keitner Decl., Ex. 45; see also Validation of BST With Courier Performance (1995), p. 3, Keitner Decl., Ex. 40, indicating that FedEx

criticized the performance ratings. For example, in the ASPIRE Follow-up Criterion Validation Report for 2003, Brooks categorically described the "limitations" of the performance ratings.[36]

Part of the problem is that the performance evaluation forms require the evaluation of subjective criteria such as "teamwork," lack of complaining (which listed as an indicia of "teamwork"), "professionalism," and neatness.[37] But even more problematic is the lack of guidelines, controls, and monitoring to ensure that the subjective criteria are used in the same way by different managers, and by the same manager with respect to different employees, so that the evaluations are consistent and reliable and stereotypes and biases are controlled. (See Bielby Report at ¶¶ 26-29.)

Although the evaluation forms give guidelines, the guidelines are only illustrative. (Perry at 119:22-126:3, Keitner Decl., Ex. 19.) Different managers consider different things. (Id. at 126:4-128:13.) A Senior Manager testified that he did not apply the criteria the same way from employee to employee. (Id. at 131:1-135:3.) Because FedEx does not define the terms on evaluation forms (id. at 119:22-126:3), adequately train managers about how to use them reliably (id. at 124:17-126:3, 139:7-140:2), or monitor their use to ensure that they are being used reliably and consistently (id. at 117:24-119:8), they have been infected by the influence of racial stereotypes (id. at 118:3-119:8, 136:12-139:16).[38]

FedEx has made no systematic effort to determine whether its performance evaluations, which have a direct influence on compensation, eligibility for promotion, and applicant ranking for promotions, are consistent, reliable, and accurate measures of job

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performance review ratings are characterized by "negative skew and restricted variance." FedEx has not produced, and its industrial psychologists are not aware of, any study conducted to determine the reliability, consistency, or validity of performance reviews. See Hater at 303:7-12, Keitner Decl. Ex. 12; Brooks at 26:7-22, Keitner Decl., Ex. 2.

[36] PR400175-76, Keitner Decl., Ex. 49; see also Validations of Assessments for the First-Level Manager Jobs at Federal Express (1998), p. 18, Keitner Decl., Ex. 48, indicating the "common perception within the company that performance review ratings are inflated and sometimes lack accuracy," a perception that Dr. Brooks confirmed in deposition. Brooks at 83:3-84:5.

[37] See Individual Progress Discussion Form, Keitner Decl., Ex. 37; Courier OLPR, Keitner Decl., Ex. 38.

[38] See Bielby Rpt. at ¶¶ 26-29; see also Declarations of Boykin at ¶¶ 12-16; Satchell at ¶¶ 9-11; James at ¶¶ 14, 15, 18, 23; Haynes at ¶¶ 25-27, 30, 34.

performance, and whether they have adverse impact.[39] FedEx's failure to comply with its legal obligations to determine whether its evaluation system has adverse impact further illustrates its pervasive culture of disrespect for Minorities and disregard for the law.

iii. FedEx's Biased Discipline System Causes Under-Promotion.

The People Manual also provides that an employee with an active discipline warning letter or performance reminder is not eligible for promotion.[40] Warning letters can also be taken into account in performance reviews, even after the warning letter is no longer active.[41] Online counselings, which remain on FedEx's PRISM system indefinitely, can also be taken into account in performance reviews.[42] As described above, performance reviews impact eligibility for promotion. An unsatisfactory performance review in turn automatically results in the issuance of a performance reminder letter.[43] Thus, performance reviews and discipline are intertwined, such that bias entering into any of these decisions contaminates each of the others and reverberates through the employee's FedEx career.

Because FedEx's disciplinary system is racially biased, Minorities are disproportionately ineligible for promotion due to discipline issues. A statistical analysis of FedEx's discipline system establishes that Minorities are disciplined far more frequently than whites.[44] The overdiscipline of both African Americans and Latinos is extremely statistically

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[39] See Hayward at 50:3-51:12, Keitner Decl. Ex. 13 (no study of adverse impact), 83:1-11 (same), 141:25-142:20 (no monitoring of how performance reviews actually used), 145:19-148:10 (no systematic training of managers), 149:8-151:1 (no systematic auditing to detect potential problems), 164:6-166:4 (little guidance provided on how to apply scale of 1-7), 175:12-177:15 (no coherent plan for how to deal with adverse impact if detected), 180:15-183:1 (no follow-up to ensure consistency in ratings), 206:13-212:17 (no written guidelines on how to interpret and apply performance categories other than forms themselves), 222:25-224:17 (no studies done to determine whether stereotypes affect performance reviews).

[40] See People Manual § 4-5, Candidate Selection—Hourly Positions, Tbl. 1, p. 181, Keitner Decl., Ex. 35. A warning letter is active for one year. See People Manual § 2-5, Acceptable Conduct, p. 54, Keitner Decl., Ex. 32. A performance reminder is active for six months. See People Manual § 2-50, Performance Improvement, p. 86, Keitner Decl., Ex. 33.

[41] See People Manual Policy § 2-50, p. 86; Speroff 7/23 at 169:18-173:25, Keitner Decl., Ex. 26.

[42] See Speroff 7/23 at 153:6-17, 171:24-173:21.

[43] See People Manual Policy § 2-50, pp. 86-87.

[44] Drogin Rpt. at ¶¶ 53-55, Tbl. 22 (22.49 standard deviations for African Americans and 4.38

significant.[45]

Although the discipline policy provides certain examples of behavior that would warrant a warning letter, those behaviors are not exhaustive, but simply illustrative.[46] (Buchanan at 149:22-151:11, Keitner Decl, Ex. 4.) Managers have wide discretion in deciding what behavior should be disciplined and how severely it should be disciplined. For example, there are no guidelines to restrict manager discretion in deciding whether to discipline an employee informally, without creating a record, or through an online counseling, which can be considered as part of the employee's file for performance review and promotion purposes.[47] Nor are there guidelines that determine when an employee should receive verbal discipline versus a warning letter. (See Speroff 7/23 at 115:4-119:25, Keitner Decl., Ex. 26.) Moreover, different managers exercise this discretion differently, and the same managers exercise discretion differently from case to case. (See, e.g., Perry at 119:22-128:22, Keitner Decl., Ex. 19.) Such arbitrary, subjective, and discretionary decision-making is susceptible to the influence of racial stereotypes. (See Bielby Rpt. at ¶¶ 22, 30, 32-33.) That is what happens at FedEx.

iv. FedEx's Requirement of Manager Approval to Apply for Promotion Is Arbitrary, Subjective, and Discretionary, and Causes Under-promotion, As Does Manager Discretion in Selections Among Candidates "Approved" to Apply.

FedEx's requirement that an employee's current manager approve the employee's application for promotion provides yet another entry point for uncontrolled discretion in FedEx's promotion practices. This approval functions as the initial gateway to promotion: without it, an employee's application may not be forwarded to the hiring manager, and as a result the employee

standard deviations for Latinos).

[45] Id. at Tbl. 5 (less than 1 chance in 10^{88} for African Americans and far less than 1 in 10,000 chance for Latinos). There is also substantial anecdotal evidence of Minorities receiving disproportionately harsh and more frequent discipline. See Declarations of Mitchell McCoy at ¶¶ 11-12; Griffin at ¶ 12; Canela at ¶ 8.

[46] See People Manual § 2-5; see Speroff 7/23 at 92:12-94:22, Keitner Decl., Ex. 26.

[47] See Speroff 7/23 at 137:19-143:7; 153:6-17. Note that online counselings cannot be challenged by employees through the Guaranteed Fair Treatment ("GFT") process, and there are no other mechanisms for employees to dispute their fairness. See id. at 156:17-157:10. Nor does FedEx have mechanisms to ensure that managers apply online counselings consistently. See id. at 157:11-18.

cannot be considered for the open position. (See Speroff 7/22 at 110:18-111:15, Keitner Decl., Ex. 25.)

While approval to apply is supposed to be granted if an employee meets the minimum performance review and disciplinary record requirements to be eligible for promotion (See id. at 53:19-55:7), in reality managers have complete discretion to approve or not approve an employee's application for any reason. For instance, a manager can disapprove an application because he or she finds that the employee fails to meet the "minimum acceptable standards" in a "significant area of performance," even though the employee has no active disciplinary records and is otherwise eligible for promotion. There are no guidelines for managers regarding what constitutes such a "significant area of performance" or what the "minimum acceptable standards" are. (See id. at 64:6-22, 70:15-20.) When pressed for an example, FedEx's Managing Director of Human Resources for AGFS stated that an employee might be disapproved if they had an undetermined number of absences shy of the number that would instigate formal discipline; how close to the limit they would have to be, he could not say. (See id. at 72:1-73:17.) Such vague and subjective criteria are prone to influence by racial bias and stereotypes. (See Bielby Rpt. at ¶¶ 36-37.)

Moreover, managers are not required to record their reasons for disapproving an employee's application (id. at 70:15-71:25, 74:8-13), nor does FedEx conduct any monitoring or review of manager disapprovals for consistency or adverse impact, unless an employee files a GFT.[48]

Given the ample discretion permitted to managers in making the approval decision, the lack of minority representation in management ranks, and the company culture of hostility to minorities, it comes as no surprise that statistical analysis shows that far more white employees than Minorities are approved to apply for management positions despite having active

[48] See id. at 100:18-102:18. Despite its virtually exclusive reliance on the employee-initiated GFT process as a replacement for monitoring employment decisions, FedEx has no written definition of what "Guaranteed Fair Treatment" actually means. See Dandridge at 29:8-30:22, Keitner Decl. Ex. 7.

discipline letters on file.[49] Under FedEx policy, such letters should render an employee ineligible for promotion, but this policy is selectively enforced, to the disadvantage of Minorities.

Excessive discretion similarly enters into FedEx's procedures for awarding promotions among approved applicants. FedEx's written policy dictates that applicants for promotion be divided into two priority groups according to their current job and full-time or part-time status, and that those candidates in the second priority group may only be considered if there is no one in the first priority group. (People Manual § 4-5.) FedEx policy further dictates that it select for promotion the candidate with the highest Credit Equivalency Value or "CEV" score, a rating calculated according to a formula that takes into account an employee's time in station and recent performance reviews. (Id.) Despite the system set forth in its policies, however, in practice FedEx allows any hiring manager to pick any job applicant, regardless of CEV ranking or priority group. (Williamson at 54:16-55:9, Keitner Decl., Ex. 29.) A hiring manager who deviates from policy and picks lower ranked applicants is not required to obtain approval from higher managers, and FedEx does not monitor or review compliance with these promotions policies. (Speroff 7/22 at 72:11-16, Keitner Decl., Ex. 25; Williamson at 122:9-19, 123:11-19.)

This managerial discretion works to the disadvantage of Minorities. Statistical analyses show that far more Minorities with higher priority or higher CEV scores are passed over in favor of lower-ranked white employees than vice versa.[50] Again, the presence of discretion and lack of monitoring has adverse impact on Minorities. (See Bielby Rpt. at ¶¶ 36, 38-39.)

c. FedEx Discriminates Against Latinos with Respect to Promotions from Hourly Positions to Operations Manager.

The Courier job is the stepping stone to the entry-level management job of Operations Manager. (Drogin Rpt. at ¶ 21.) Although approximately 17% of Couriers are Latino, only 8.5% of Operations Managers are Latino. A statistical analysis of promotions from hourly positions to Operations Manager establishes a statistically significant under-promotion of Latinos. (Id. at ¶ 32 (-4.06 standard deviations for 1999-2003).) This statistical disparity results

[49] Drogin Rpt. at ¶ 39.

[50] Drogin Rpt. at ¶¶ 41-42.

from the highly discretionary system used to select Operations Managers, and the impact of race-biased performance evaluation scores and discipline records on promotion decisions. (See Bielby Rpt. at ¶¶ 9-42.)

i. FedEx Selects Managers Using a Highly Discretionary Process Rife With Opportunities for Biased Decision-Making.

Since 1998, FedEx has used the "ASPIRE" program to select first-line managers in both AGFS and DGO. (Brooks at 19:17-25, Keitner Decl., Ex. 2.) This multi-step process, developed primarily by FedEx in-house industrial psychologist David Brooks, allows hiring managers to exercise a high level of discretion and creates multiple opportunities for racial stereotypes to influence how managers rate candidates.

Aspiring managers must complete an "ASPIRE to Management" class as a pre-requisite to entering the ASPIRE program. (Id. at 33:7-19.) An employee cannot attend these classes without his or her manager's permission. (Id. at 33:25-34:10.) Thus, an employee's current manager has effective veto power over whether or not that employee can even attempt to apply for manager positions. In addition, an employee's manager must sign off on the employee's successful completion of four development classes. (Id. at 36:1-37:18.) FedEx has produced no evidence of studies conducted or steps taken to guard against adverse impact in this enrollment process. (Id. at 40:3-13.)

The hiring manager selects the candidates for a panel interview. There are no guidelines in place for determining how many candidates to interview; the only restriction is that the manager cannot select a candidate with a lower score on the five initial components[51] than another candidate without also selecting the latter.[52]

[51] The components of a candidate's pre-interview "screening" score are: the Professional Employment Test (PET), a standardized cognitive ability test; the Peer Leadership Assessment (PLA), completed by employees chosen by the candidate's manager; a score for Position Specific Knowledge (PSK) and for Other Related Experience (ORE); and the Management Profile (MP).

[52] The components have nominal weights on the ASPIRE score sheet. Brooks at 110:13-112:3; see FedEx's New Process for Selecting Mangers, p. 5, Keitner Decl., Ex. 46. However, FedEx admits that the different standard deviations of the scores in these five areas lead to actual weights that are, in fact, quite different. Brooks at 118:11-122:5. The PET, which has the greatest adverse impact, id. at 121:20-122:5, also has the highest standard deviation, id. at 118:11-16, giving it a disproportionately high actual weight in the current formula.

The PLA's utility in predicting success in management is purely conjectural: FedEx has not produced evidence regarding the development of the items on the PLA form and has not verified its measurement properties. (Brooks at 90:1-92:17; see PLA Forms, Keitner Decl., Ex. 47.)

The PSK and ORE are similarly spurious. There is no requirement in the ASPIRE process that anyone ever review the hiring manager's determination of the PSK and ORE for a particular opening. (Brooks at 50:25-52:3.) Candidates complete application forms without knowing what PSK and ORE the hiring manager is seeking (Id. at 61:24-62:5); if a hiring manager chooses to advise a particular candidate of these requirements or is already familiar with a candidate's experience, that candidate can enjoy a huge advantage in the application process. Moreover, hiring managers are not trained on how to evaluate PSK and ORE. (Buchanan at 142:2-146:1, Keitner Decl., Ex. 4.) Together, PSK and ORE nominally make up almost 50% of an ASPIRE candidate's screening score. (Brooks at 60:16-61:17.) However, FedEx cannot claim on the basis of its existing studies that the PSK and ORE scores are reliable or valid. (Id. at 107:19-109:9.)

The ASPIRE interview process is rife with opportunities for discrimination. First, there is no mandatory calibration training to ensure reliability and consistency in interview scores. (Buchanan at 105:9-108:24.) The hiring manager chooses who will sit on an interview panel (Brooks at 69:17-70:2), and there is no requirement that an HR representative participate in the interview process. (Id. at 77:16-78:14.) FedEx is aware that steps can be taken to reduce or avoid adverse impact in interviews (Id. at 17:4-16), but it has not taken these steps.

FedEx has never studied the racial or ethnic composition of ASPIRE interview panels (Id. at 71:20-25.) The hiring manager is supposed to select the highest-scoring candidate (id. at 68:22-69:12), but FedEx has produced no evidence that this is how the process actually works. FedEx has also disregarded its legal obligation to keep records on the adverse impact of the ASPIRE process and has no system in place for doing so. (Id. at 107:13-18, 129:1-131:1, 137:14-143:5.) FedEx's own study of ASPIRE in 1998 strongly suggests that ASPIRE has adverse impact on both African-American and Hispanic applicants. (Id. at 104:22-107:12; see

Validation of Assessments for the First-Level Manager Jobs at Federal Express, p. 25, Keitner Decl., Ex. 48.) FedEx tracks packages all over the world, but it does not track adverse impact against its own employees, as required by law.

FedEx has disregarded its legal obligation to monitor the adverse impact of ASPIRE and to identify alternative selection procedures that afford equal opportunity to Minority employees. In addition, FedEx's own follow-up studies with respect to ASPIRE's validity show dwindling correlations between ASPIRE scores and job performance. (Brooks at 123:23-128:2; ASPIRE Follow-Up Criterion Validation Report for 2003, Keitner Decl., Ex. 49.)

ii. FedEx's Discriminatory Performance Evaluation and Discipline Systems Block Minorities from Promotions into Management.

In addition to the above hurdles, FedEx employees cannot apply for management positions if they have an active warning letter on file. (Brooks at 23:6-24, Keitner Decl. Ex. 2.) FedEx has done no studies to establish the consistency or reliability of its disciplinary processes, or to determine whether such processes have adverse impact when used as selection criteria. (Id. at 23:25-24:11.) Manager candidates must also meet minimum performance review requirements, which also have not been validated. (Hater at 303:7-12, Keitner Decl., Ex. 12; Brooks at 26:7-22.) In fact, as indicated above, FedEx's own industrial psychologists doubt the accuracy of FedEx's performance reviews in evaluating job performance. The highly significant adverse impact of discipline and performance evaluation at FedEx permeates the operations manager selection process.

2. FedEx Discriminates Against Minority Employees and Lower Level Managers with Respect to Compensation.

FedEx's Minority employees and lower-level Managers are paid less than non-Minority employees and lower-level Managers. They are paid less both by virtue of the fact that they hold lower paid positions, and because even when they and comparable whites hold the same positions, work in the same geographic locations, and have the same seniority, Minorities are paid less. The disparities in compensation within job arise from the impact of FedEx's race-biased evaluation and discipline systems on compensation.

The People Manual provides that compensation is determined by a formula tied directly to performance evaluations (and indirectly to discipline, since discipline affects performance evaluations).[53] Thus, compensation is also part of the feedback loop through which performance evaluation and discipline echo: because Minorities are overdisciplined, they get lower performance evaluations; and because Minorities receive lower performance evaluation scores, they receive lower compensation.

Each year an employee gets a percentage raise based on performance evaluation. As a result, the effect of overdiscipline and lower evaluations of Minorities is cumulative. (See Bielby Report at ¶ 15.) The gap grows each year.

Because of the impact of FedEx's race-biased evaluation and discipline systems on its compensation system, Minority employees and lower level managers at FedEx are paid less than non-Minorities at both the hourly and salaried levels throughout the Western Region, even when relevant non-discriminatory factors are considered. For example, the results of statistical regressions on hourly pay rates for African American hourly employees show that African Americans were paid significantly less per hour than white employees in every year, 1999-2004, even after accounting for seniority, part time/full time status, casual/permanent status, job title, and facility. The results are highly statistically significant for each year studied, ranging from -8.38 standard deviations to -9.61 standard deviations. Drogin Rpt. at ¶ 59.) These disparities are many times greater than the legal threshold of two standard deviations. (See Hazelwood School Dist. v. United States, 433 U.S. at 311, n.17 (1977). The probability of such disparities occurring by chance is approximately one chance in 100 billion.

Similarly, the results of statistical regressions on the hourly pay rates for Latino hourly employees show that Latino hourly employees were paid significantly less per hour than white employees in every year, 1999-2004, even after controlling for job, seniority, status, and geographic location. The results are highly statistically significant, ranging from -4.91 standard deviations in 2002 to -7.07 standard deviations in 1999. (Drogin Rpt. at ¶ 60.) The probability of

[53] See People Manual § 3-10, Merit Hourly Pay Administration, Tbl. 1, p. 112, Keitner Decl., Ex. 34.

such disparities occurring by chance ranges from approximately one chance in one million to a less than one chance in one hundred million. (Id. at Tbl. 5.)

The story is similar with respect to pay disparities in the salaries of lower-level Managers. The results of regressions on the monthly salaries of lower-level Managers show statistically significant disparities adverse to African Americans in every year studied. The salary disparities range from -2.4 standard deviations in 1999 to -3.5 standard deviations in 2001. (Id. at ¶ 61.) The underpayment in monthly salary for African American lower-level managers ranged from $83.78 per month in 1999 to $185.74 per month in 2004. (Id.)

G. FedEx's Discrimination Is Uniform And Pervasive.

In sum, the statistical evidence, the documents, and the testimony all establish the same thing: FedEx discriminates against Minority Employees throughout the Western Region with respect to promotions, compensation, performance evaluation, and discipline, and against African American Lower-Level Managers throughout the Western Region with respect to compensation, performance evaluation, and discipline. (See Drogin Rpt., passim, and Statement of Facts, supra.)[54]

III. ARGUMENT

Class actions are an important tool for remedying employment discrimination. See, e.g., Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142 (N.D. Cal. 2004) ("This anniversary [of the U.S. Supreme Court's decision in Brown v. Board of Education] serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs."). Since the requirements of Rules 23(a) and (b)(2) are satisfied here, class certification is appropriate in this case.[55]

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[54] The map attached to the Declaration of Nirej S. Sekhon in Support of Plaintiffs' Motion for Class Certification as Ex. 1 shows that the plaintiffs in this case are not alone. Hundreds of African Americans and Latinos throughout the Western region have complained of FedEx's race discrimination.

[55] This Court is accorded broad discretion in determining whether class treatment is appropriate. Dukes, 222 F.R.D. at 143; Armstrong v. Davis, 275 F.3d 849, 872, n.28 (9th Cir. 2001); see also the California Supreme Court's recent decision in Sav-On Drug Stores v. Superior Court, Opinion No. S106718, Aug. 26, 2004 (affirming that "'Any valid pertinent reason stated will be sufficient to uphold the [class certification] order.'"). Although the Court is required to undertake a "rigorous analysis" to determine whether the case satisfies the Rule 23 requirements, the Court

A. This Case Meets The Requirements Of Rule 23(a).

1. The Classes Are Numerous.

Rule 23(a) requires that the class be so numerous that joinder of all class members is impracticable. The precise number of class members need not be known prior to certification. See Newberg on Class Actions § 3.05 at 233-35 (4th ed. 2002) (hereinafter, "Newberg"); see also Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement."); Harriss v. Pan Am. World Airways, Inc., 15 FEP Cases (BNA) 1640, 1652 (N.D. Cal. 1977).

Here, the Minority Employee Class has several thousand members. (See Drogin Rpt. at ¶¶ 13-16.) The African American Lower-Level Manager Class has several hundred members. (Id.) Such a number satisfies any standard of impracticability. See Newberg § 3.05 at 247 ("as few as 40 class members should raise a presumption that joinder is impracticable").

2. The Classes Share Common Questions of Fact and Law.

The commonality requirement of Rule 23(a) examines the group characteristics of the class as a whole and seeks to determine whether the class shares common questions of fact or law. The commonality requirement should be "construed permissively." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Not all questions of law or fact need to be common; rather, the test applied is qualitative, not quantitative, and requires only one significant common issue to warrant certification. Savino v. Computer Credit, Inc., 172 F.R.D. 346, 352 (E.D.N.Y. 1997), aff'd, 164 F.3d 81 (2d Cir. 1998). Only a "minimal" showing of commonality is required; where class members share a common legal issue but not common facts, or vice versa, commonality is satisfied. Hanlon, supra, 150 F.3d at 1020. This case involves numerous common issues of both fact and law. Plaintiffs raise "a common legal issue, discrimination against [Minorities], and a common factual problem, discrimination as applied" by FedEx. Bouman v. Block, 940 F.2d 1211, 1232 (9th Cir.), cert. denied, 502 U.S. 1005 (1991).

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may not engage in an assessment of the merits at this stage. General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000).

FedEx's policies regarding promotion, compensation, discipline, and performance evaluation are all governed by the "People Manual," which applies throughout the Western Region.[56] The forms and procedures used for personnel decisions are the same throughout the Western Region.[57] The race-biased BST is used throughout the Western Region. Promotion decisions are based on race-biased performance evaluations and discipline records throughout the Western Region. Compensation decisions are tied to race-biased performance evaluations and discipline records throughout the Western Region. Statistical analyses establish that FedEx's policies and practices have an adverse impact on Minorities throughout the Western Region with respect to compensation, promotion, performance evaluation, and discipline.

Common questions of fact include the following: (1) whether the FedEx work force is segregated by race with respect to job categories; (2) whether FedEx's promotions, compensation, discipline and evaluation policies and practices in the Western Region are arbitrary, subjective, and discretionary and thus susceptible to discriminatory application by predominantly non-Minority managers; (3) whether FedEx denies Minorities equal promotional opportunities; (4) whether FedEx's compensation system has an adverse impact on Minorities; (5) whether FedEx's performance evaluations are race-biased; (6) whether FedEx's discipline system is applied unfairly to Minority employees and African American Operations Managers; (7) whether the Basic Skills Test has been properly validated; (8) whether performance reviews of Minority employees are based on subjective criteria that admit racial stereotyping and bias; and (9) whether FedEx's adverse treatment of Minorities is intentional.

The class claims will also raise common legal issues, including: (1) whether FedEx's under-compensation, under-promotion, and overdiscipline of Minorities constitutes adverse impact in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the California Fair Employment and Housing Act ("Cal. FEHA"); (2) whether FedEx's conduct constitutes adverse treatment in violation of Title VII, § 1981, and Cal. FEHA; (3) whether

[56] See., e.g., Buchanan at 20:25-21:5, Keitner Decl., Ex. 4; Presnoples at 11:24-12:11, Keitner Decl., Ex. 21.

[57] See, e.g., McQueen at 92:6-93:16, Keitner Decl., Ex. 17; Garcia at 9:1-8, Keitner Decl., Ex. 10; Fifer at 13:3-14:14, Keitner Decl., Ex. 9; Speroff 7/22 at 22:7-23:16, Keitner Decl., Ex. 25.

FedEx's conduct can be justified as a "business necessity," or can be replaced by a less discriminatory alternative, see Stender v. Lucky Stores, 803 F.Supp. 259, 319-23, 331-36 (N.D. Cal. 1992); and (4) what injunctive relief is appropriate to remedy FedEx's discriminatory practices.

a. The Employment Policies and Practices of FedEx's Western Region are Uniform and Uniformly Arbitrary, Subjective, and Discriminatory.

Common questions of fact arise in this case because the personnel policies and structure of FedEx's Western Region are uniform and centralized. (See Bielby Rpt. at ¶¶ 8-14.) The facilities in which employees work are virtually identical. The departments, jobs, and management structure are the same in all facilities and all districts across the region. Promotion, evaluation, discipline, and compensation of employees all follow uniform policies and procedures and require use of uniform personnel forms. Common facts such as these support class certification. See Dukes, 222 F.R.D. at 145-49; Adams v. Pinole Point Steel Co., 65 FEP Cases (BNA) 774 (N.D. Cal. 1994); Thornberry v. Delta Air Lines, 30 FEP Cases (BNA) 520, 524 (N.D. Cal. 1978); Reeb v. Ohio Dept. Rehab., 221 F.R.D. 464, 477 (S.D. Ohio 2004).

In addition, the uniform policies and procedures uniformly allow arbitrary, subjective, discretionary, and biased decision-making. Non-Minority managers make evaluation and disciplinary decisions based on arbitrary, subjective, and discretionary criteria that give free reign to racial stereotypes and biases. (See Bielby Rpt. at ¶¶ 8, 15-42.) FedEx's lack of controls and absence of monitoring to ensure Equal Employment Opportunity is uniform throughout the Western Region. (Id. at ¶¶ 25-35.) This type of uncontrolled and unmonitored discretionary decision-making raises common questions of fact and is a well-recognized basis for class certification. Falcon, 457 U.S. at 159 n.15; Caridad, 191 F.3d at 291-92; Dukes, 222 F.R.D. at 149; Butler v. Home Depot, 1996 WL 421436 (N.D. Cal.) at *3; Adams, 65 FEP Cases at 781; Barefield v. Chevron U.S.A., Inc., 44 FEP Cases (BNA) 1885, 1888-90 (N.D. Cal. 1987).

b. Consistent Patterns of Under-Promotion, Under-Compensation, and Overdiscipline Raise Common Questions of Law and Fact.

Common issues of fact also arise out of plaintiffs' showing of region-wide patterns

of under-promotion, under-compensation, and overdiscipline. These consistent patterns raise common factual issues with respect to the significance of the statistical evidence, and FedEx's promotional standards and job assignment patterns. They also raise common legal issues as to the inference of discrimination that may be drawn from the existence of such segregation. Bazemore v. Friday, 478 U.S. 385, 400-04 (1985); Hazelwood School Dist. V. United States, 433 U.S. 299, 307-13 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40 (1977); Dukes, 222 F.R.D. at 154-60; Butler v. Home Depot, Inc., 1997 WL 605754 at *6 (N.D. Cal. 1997); EEOC v. General Tel. Co., 885 F.2d 575, 579-82 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990).

c. Plaintiffs' Disparate Impact and Disparate Treatment Theories Raise Common Issues of Fact and Law.

Plaintiffs have alleged both disparate impact and disparate treatment theories. Under both theories, numerous common issues of fact and law underlie the discrimination claims of the class as a whole.

In proving their case, Plaintiffs will present statistical data and anecdotal evidence that brings "the cold numbers convincingly to life," International Brotherhood of Teamsters v. United States, 431 U.S. 324, at 339, expert testimony from expert sociologists and industrial organization psychologists, and testimony and documents regarding FedEx's policies and practices. The evidence on which Plaintiffs will rely is common to the classes as a whole. The inferences drawn from Plaintiffs' statistical proof and anecdotal evidence will be common to the claims of all class members and will raise common legal issues. Butler, 1996 WL 421436 at *3; Wagner v. Taylor, 836 F.2d 578, 592-93 (D.C. Cir. 1987); Penk v. Oregon Bd. of Higher Educ., 816 F.2d 458, 463-64 (9th Cir. 1987), cert denied, 484 U.S. 853 (1987); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 481 (N.D. Cal. 1978).

Litigation of defendant's "business necessity" defense will also give rise to common issues. See Stender, 803 F.Supp. at 321-22. Once Plaintiffs have established the disparate impact of an employment practice such as use of the BST in promotions decisions, use of performance evaluations in promotions and compensation decisions, or the use of discipline

records in promotions and compensation decisions, the burden of proof shifts to the defendant to show that the challenged practice, despite its disparate impact, "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The defendant must show that the employment practice is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Under Title VII, the demonstration of "some rational basis for the challenged practices" is not enough. Washington v. Davis, 426 U.S. 229, 246-47 (1976). "It is necessary, in addition, that they be 'validated' in terms of *job performance*." Id. at 247 (emphasis added).

Even if FedEx were able to satisfy its burden with respect to job-relatedness and business necessity of employment practices with disparate impact, plaintiffs will be able to demonstrate the existence of alternative employment practices with less disparate impact within the meaning of Title VII. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Albemarle at 425. The evidence and arguments about less discriminatory alternatives raise common factual and legal issues.

3. The Named Plaintiffs' Claims Are Typical.

The typicality necessary to satisfy class certification is that the named plaintiffs "possess the same interest and suffer the same injury as the class members." Falcon, 457 U.S. at 156. Typicality is satisfied when the claims of the class representatives and those of the class arise out of the same legal or remedial theory and when representative parties advance the interests of the class members by advancing their own self-interest. Barefield, 44 FEP Cases at 1890. "Typicality" exists if the claims of the named plaintiffs are "reasonably coextensive" with those of absent class members; there is no requirement that their claims be identical. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Nor is it necessary that every named plaintiff have suffered every form of discrimination challenged by the case. Rather, plaintiffs need only show that in the aggregate, they cover the waterfront of abuses alleged. Staton v. Boeing, 313 F.3d 447, 466 (9th Cir. 2002). Courts recognize that typicality overlaps with commonality, and thus much of the discussion regarding that requirement is germane to typicality

also. See Barefield, 44 FEP Cases at 1890; Harriss, 15 FEP Cases at 1649.

The eight proposed class representatives are members of the classes they seek to represent. They allege that they, and class members, were discriminated against in connection with denial of promotional opportunities (as to the hourly employee class), adverse treatment with respect to compensation, and unfair and harsh discipline. (Consolidated Amended Complaint ¶¶ 58-162.) The eighteen class member declarants claim that they were the victims of the same discriminatory practices by FedEx managers at facilities throughout the Western Region. The claims asserted by plaintiffs individually involve the same discriminatory employment practices with respect to evaluation,[58] promotion,[59] compensation,[60] and discipline[61] complained of by and on behalf of class members. Accordingly, the typicality requirement is satisfied. Butler at *3.

The declarations, charges of discrimination filed with state and federal agencies, and internal complaints of discrimination of class members,[62] and deposition testimony of the class plaintiffs evidence a systematic pattern and practice of discrimination against Minority Employees in FedEx's Western Region in connection with employment decisions, and demonstrate that the experiences of the class representatives are typical. Both the named plaintiffs and the class members have a common interest in seeking an injunction to change the unlawful aspects of FedEx's personnel system.

4. The Proposed Class Representatives and Class Counsel Are Adequate.

Rule 23(a)(4) sets forth the adequacy requirement for class certification. It is comprised of two elements: (1) the representative party's attorney must be qualified, experienced, and generally able to conduct the litigation; and (2) the interests of the plaintiffs must not be

[58] Class member declarants who have experienced discrimination in performance evaluations include: McCray at ¶ 13; Akins at ¶ 8.

[59] Class member declarants who have experienced discrimination in promotion include: Patterson at ¶ 12); Steel at ¶¶ 12-15); Hoilland at ¶ 15; Latin at ¶ 12.

[60] Class member declarants who have experienced discrimination in compensation include: Olmos at ¶¶ 5-6; McCray at ¶ 9; Foreman at ¶ 9.

[61] Class member declarants who have experienced discrimination in discipline include: Mitchell McCoy at ¶¶ 11-12; Griffin at ¶ 12; Canela at ¶ 8.

[62] See Sekhon Decl., Ex. 1.

antagonistic of those of the class. In re United Energy Corp. Solar Power Modules Tax Shelter Investors Sec. Litig., 122 F.R.D. 251, 257 (C.D. Cal. 1985); see also Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978); Harriss, 15 FEP Cases at 1649.

Both elements of the adequacy requirement are satisfied here. Plaintiffs have retained counsel with the requisite expertise and resources to pursue this case. See Declarations of James M. Finberg, Guy Wallace, John L. Burris, Michael S. Davis, Waukeen Q. McCoy, and Kay McKenzie Parker. In addition, both the class and the named plaintiffs share an interest in eradicating discrimination in FedEx's Western Region against its African-American and Latino employees.

B. The Liability Phase of this Case and the Remedial Phase for Declaratory, Injunctive and Equitable Relief Should be Certified Under Rule 23(b)(2).

Rule 23(b)(2) was added to class action procedure specifically to reach cases of this type, i.e., to "facilitate the vindication of civil rights through the class action device." Barefield v. Chevron U.S.A., Inc., 48 FEP Cases (BNA) 907 (N.D. Cal. 1988). See Amchem Prods. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful class-based discrimination are prime examples" of cases where Rule 23(b)(2) certification is appropriate.); Advisory Committee Note to Rule 23(b)(2) ("Illustrative [of cases properly certified under Rule 23(b)(2)] are various actions in the civil rights field"). Certification under Rule 23(b)(2) is appropriate where, as here, meaningful declaratory and injunctive relief is sought. Fed. R. Civ. P. 23(b)(2); Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003); Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 163-64 (2d Cir. 2001).

Plaintiffs seek declaratory and injunctive relief that would apply to and benefit the class as a whole. The injunctive relief plaintiffs seek includes orders, among other things: (1) permitting "casual" employees to apply for, and view the posting of, jobs on the Job Change Application Tracking System; (2) eliminating passage of the BST as a requirement for promotions into Courier and Ramp Transport Driver positions, and instead focus on the training for those positions; (3) modifying the performance evaluation criteria and monitoring performance evaluations to ensure that they are reliable and consistent and have no adverse

impact; and (4) modifying the discipline criteria, and monitoring the discipline system, to ensure that discipline is applied consistently.

In addition, plaintiffs seek forms of equitable monetary relief available under Rule 23(b)(2), including back pay and front pay. Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148, 1152-55 (9th Cir. 1999). Such monetary equitable relief does not defeat class treatment under Rule 23(b)(2). See, e.g., Probe v. State Teachers' Ret. Sys., 780 F.2d 776 (9th Cir. 1986); Salinas Roadway Express, 735 F.2d 1574, 1576 (5th Cir. 1984); Butler, 1997 WL 605754 at *5; see also 42 U.S. C. § 2000e-5(g) (1994).

In Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003), the Ninth Circuit held that (b)(2) class actions can include claims for monetary damages as long as such damages are not the predominant relief sought. In making this determination, it is not the potential size of the damages award that is at issue; rather, courts are directed to examine the "specific facts and circumstances of each case," and attempt to ascertain the "intent of the plaintiffs in bringing suit." Id. at 947, 950. In Molski, the court found the injunctive relief sought by the class plaintiffs to be the primary relief at issue. Id. at 950.

Here, the evidence shows that plaintiffs' primary focus is obtaining effective injunctive relief to end discrimination and engender positive change.[63] This change would be significant. The Class Representatives hope to transform the promotion, compensation, evaluation and discipline systems at FedEx so that instead of hindering equal employment opportunity, they ensure it. Although punitive damages and compensatory damages are sought in this case, they are not the primary relief sought. Accordingly, the liability phase and a remedial phase for declaratory, injunctive and equitable relief should be certified under Rule 23(b)(2). After those phases, the Court can determine whether to certify a phase regarding compensatory damages, and the amount and allocation of punitive damages, under Rule 23(b)(3), with notice and an opportunity to opt out. Butler, supra, 1997 WL 605754 at *5-6.

[63] See Declarations of: Kalini Boykin at ¶ 2; Derrick Satchell at ¶ 2; Valerie Brown at ¶ 2; Rick Gonzales at ¶ 2; Rachel Hutchins at ¶ 2; Kelvin Smith, Sr. at ¶ 2; and Ken Stevenson at ¶ 2.

IV. CONCLUSION

FedEx has become a staple of modern American life. The time has come for FedEx to acknowledge the promises of equal opportunity it makes to employees in its employee manual — and to deliver.

Because this case meets all of the requirements of Rules 23(a) and 23(b)(2), this Court should certify both the Minority Employee Class and the African American Lower-Level Manager Class, and set this case for a liability phase trial.

Dated: September ___, 2004

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