

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

OFCCP ATTACHMENT A

Attached to this document is a compendium of orders referenced in OFCCP's portion of the Parties' Joint Case Management Statement.

INDEX OF ORDERS

Attachment #	Date	Description
1	11/29/1996	Recommended Decision and Order, <i>OFCCP v. United Airlines, Inc.</i> (Case No. 94-OFC-1)
2	6/10/1997	Recommended Decision and Order on Remand, <i>U.S. Department of Labor v. Jacksonville Shipyards, Inc.</i> (Case No. 89-OFC-1)
3	7/19/2000	Recommended Decision, <i>OFCCP v. Interstate Brands Corp.</i> (Case No. 1997-OFC-0006)
4	9/10/2007	Order on Liability, <i>OFCCP v. TNT Crust</i> (Case No. 2004-OFC-3)
5	11/3/2016	3d Notice of Hearing and Revised Pre-Hearing Order, <i>OFCCP v. JBS Holdings, Inc.</i> (Case No. 2015-OFC-1)
6	2/22/2017	Order Granting Joint Motion for Continuance, <i>OFCCP v. JBS USA LUX S.A.</i> (Case No. 2017-OFC-00002)

Date: May 2, 2017

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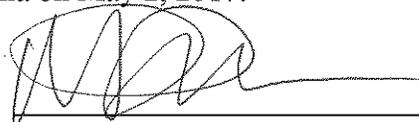
CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

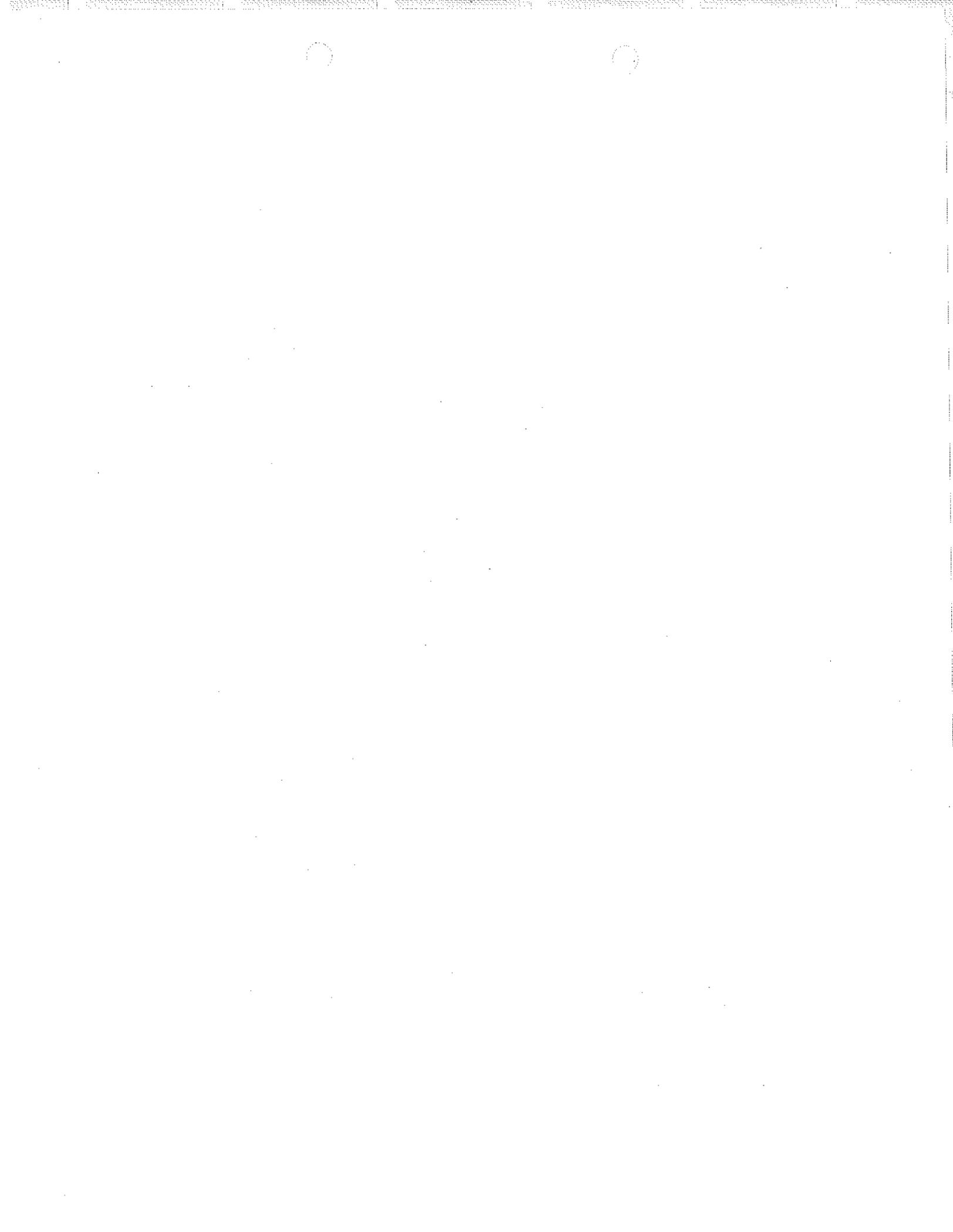
On May 2, 2017, I served the attached **OFCCP ATTACHMENT A and its corresponding exhibits** on Defendant Oracle America, Inc., through serving its agents below via electronic mail, pursuant to the parties' agreement:

Connell, Erin M. (econnell@orrick.com)
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I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Francisco, California on May 2, 2017.



MARC A. PILOTIN
Trial Attorney



DATE ISSUED: November 29, 1996

CASE NO: 94-OFC-1

In the Matter Of

U.S. DEPARTMENT OF LABOR,
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,

Plaintiff,

v.

UNITED AIRLINES, INC.,

Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Intervening Party-in-Interest.

APPEARANCES:

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BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (the Act) and the regulations promulgated thereunder, 41 C.F.R. Part 60. Plaintiff, Office of Federal Contract Compliance Programs, (OFCCP), filed an administrative complaint on October 8, 1993 against United Airlines, Inc. (United). OFCCP alleges in the complaint that United violated Section 503 of the Act by refusing to employ a qualified individual with disabilities, Paul Pyles, because of his disabilities.

United filed a motion for summary judgment on June 1, 1995, principally arguing that Mr. Pyles was not a qualified individual with disabilities within the meaning of Section 503 of the Act. Plaintiff opposed the granting of the motion and a hearing on the motion was held on June 20, 1995 at Chicago, Illinois. I denied United's motion for summary judgment on July 20, 1995 because I believed factual questions remained in controversy. By Order dated August 17, 1995, I allowed the Airline Pilot's Association, International (ALPA), to intervene, on a limited basis, pursuant to 41 C.F.R. § 60-30.24.

A formal hearing on the merits was held on September 11-13, 1995 at Chicago, Illinois. Counsel for OFCCP and United filed post-hearing original and reply briefs. The following findings of fact and conclusions of law are based on a comprehensive review of both the evidentiary record and the briefs of the parties.¹

¹References in this decision to ALJX, PX and DX pertain to the exhibits of the Administrative Law Judge, Plaintiff and Defendant, respectively. The transcript of the September 11-13, 1995 hearing is cited as Tr. and by page number.

ISSUES

The principal issues remaining in controversy are:

1. whether Paul Pyles is a qualified individual with disabilities within the meaning of Section 503 of the Act; and, if so,
2. whether United's refusal to employ Mr. Pyles was discriminatory under the Act or was consistent with business necessity and safety; and,
3. the extent of damages to be assessed against United because of its violation of Section 503 of the Act.

Also remaining to be resolved are questions relating to sanctions sought by both the Plaintiff and Defendant against each other on discovery matters.

FINDINGS OF FACT

United is a commercial airline carrier incorporated under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. During the time pertinent to this case, United had 50 or more employees and maintained contracts or subcontracts with the federal government in excess of \$10,000. Under contracts/subcontracts with the U.S. Postal Service, United was required to transport mail as requested by that postal service on any flight in the contractor's air transportation system. (Tr. 593-594).

Defendant's contract with ALPA provides for various "pilot" positions. A captain is the pilot in command of the aircraft and its crew members who is primarily responsible for the control or manipulation of the aircraft, particularly on take-off and landing. A first officer is the second pilot in command whose principal duty is to assist or relieve the captain in the control of the aircraft but is also responsible for the inspection of the aircraft where there are only two pilots assigned to a flight. The third pilot generally in command is the second officer whose duties generally include assisting the captain and first officer on the analysis, operation and monitoring of the mechanical and electrical systems of the aircraft, as well as making pre-flight inspections of the aircraft. A captain, first officer and second officer must hold an effective airman's certificate authorized for the respective position. (DX 6, 42; Tr. 70-71).

The Federal Aviation Administration of the United States Department of Transportation (FAA) is the federal agency responsible for regulating the use of the navigable airspace in the United States. In addition to meeting certain requirements relating to licensing and age, the FAA requires airline transport pilots, including captains and first officers, to hold a valid first class medical certificate. Commercial pilots, flight engineers and flight navigators, such as United's second officers, are required by the FAA to have a second class medical certificate. A second class medical certificate is valid for 12 months, while a first class medical certificate is valid for 6 months or an additional 12 months for activities requiring a second class medical certificate. (Tr. 599; PX 22, 69; DX 96).

Pertinent to this case, the FAA requires an applicant for a first or second class certificate to meet certain vision requirements. (PX 22, 69; DX 96). Specifically, the applicant must have distant visual acuity of 20/20 or better in each eye without correction or at least 20/100 in each

eye corrected to 20/20 or better with corrective lenses (glasses or contact lenses).² A person with 20/20 distant visual acuity would see an object 20 feet away as a "normal" person would see it, while a person with 20/100 vision would see at 20 feet what a normal person would see at 100 feet. (DX 28, p. 22). A person with uncorrected distant visual acuity of 20/40 or better generally can read, drive and function normally. (DX 28, p. 23). A myopic or "nearsighted" person has difficulty with distant vision because of the inability of that person's eyes to focus sharply on objects at long distances. (DX 28, p. 3).

United's pertinent medical policies with respect to its pilots is essentially consistent with the FAA vision requirements. (DX 26, p. 3). It requires its pilots to have distant visual acuity of 20/20 in each eye without correction, but it also hires pilots with myopia having uncorrected distant visual acuity of at least 20/100 corrected to 20/22 with glasses or contact lens. (DX 26; Tr. 421, 459). Beginning in 1984 or 1985, however, United implemented an unwritten policy of not hiring pilots who had undergone radial keratotomy surgery (RK), which is a surgical procedure on the cornea of the eye that is intended to reduce or correct myopia. (Tr. 170, 409, 413; PX 28, p. 18; DX 109, p. 680).

United's Corporate Medical Director is a physician certified by the FAA as an aviation medical examiner. (Tr. 367). He is responsible for determining and implementing United's medical policy. (Tr. 366-367, 407). After considering pertinent medical literature and consulting with a number of ophthalmologists, this physician implemented United's RK policy for new-hire pilots because he was particularly concerned with reported complications of glare and visual instability following the surgical procedure. (Tr. 384, 409-413). In 1993, United changed its policy pertaining to hiring pilots who had undergone RK. It adopted a written policy which required new-hire pilots with a history of RK to meet minimum criteria. (PX 29; DX 16). This change was implemented after United's corporate medical director determined that the preponderance of medical literature permitted the company to look at cases regarding RK on a case-by-case basis without compromising air safety. (PX 29, 30; DX 16, 17, 32, 33, 59, 62, 63, 65, 69, 83-87, 92; Tr. 157-158, 200-202, 400-401, 421-429).

Between March 1987 and March 1994, approximately 3500 applications for pilot positions were processed through United's regional medical facility at Denver, Colorado. Thirty-five to forty applicants were rejected for pilot positions because of RK. (Tr. 148). No applicant with a history of RK was accepted by United for a pilot position during this time period. (Tr. 173).

Defendant never had a policy regarding incumbent pilots who had undergone RK. (Tr. 141-146, 413). When it was discovered that some of United's incumbent pilots had undergone RK, the company's medical director decided to consider the matter on a case-by-case basis. (Tr. 172). One such pilot was removed from flight status by United's medical director when it was learned that the pilot had RK some 18 months earlier in 1985. (Tr. 150-153, 178-179, 392, 394-395, 416-417; PX 37-44). Another pilot, who had worked with United since 1978, was found in 1988 to have undergone RK while on furlough in 1981. United's medical director decided to let this pilot continue to fly because he believed she had demonstrated that she was able to safely operate United's airplanes over an extensive period of time following her RK. (Tr. 155-156, 174-177, 395, 414-416; PX 73, pp. 27, 80-82, 106, 115-116, 118). For the same reason, United allowed a third pilot, who had undergone RK in 1980 and was hired in 1985, to continue to fly when his history of RK was discovered in 1991. (Tr. 154, 178-182, 396-397, 414, 416-417, 431-

²The controlling regulation also provides requirements for near vision with or without corrective glasses. (PX 22, 69). 14 C.F.R. § 67.13(b).

433; PX 74, pp. 30, 66-67, 88-90, 94, 100-102). United's medical staff required the incumbent pilots with a history of RK to annually submit records of the pilots' ophthalmologists for review. (PX 34-36).

Paul Pyles, born October 3, 1933, began flying as a commercial airline pilot for Pan American Airways (Pan Am) in 1966. He held a first class medical certificate as required by the FAA. After working for about a year as a second officer with Pan Am, he became a first officer and remained working in that capacity until 1975. Pan Am placed Mr. Pyles on disability leave in that year because his myopic condition prevented him from meeting the FAA's distant visual acuity requirement of having vision correctable to 20/20 with glasses or contact lens. (Tr. 26-27, 30-33, 70-72, 598).

While on disability leave from Pan Am, Mr. Pyles worked as a marketing manager for Caribe Aviation from 1975 to 1983, then was self-employed as an aviation consultant until 1986. (Tr. 73, 115-116). His myopic condition progressively deteriorated during this time to such an extent that he was unable to function without glasses with strong lenses. Mr. Pyles' uncorrected distant visual acuity was assessed in 1986 as approximately 20/400 in each eye. (Tr. 32-35, 600). Radial keratotomy surgery was successfully performed on Mr. Pyles' eyes in early 1986, and the FAA issued him a first class medical certificate later in that year. He was re-employed as a first officer with Pan Am in October of 1986 and continued to fly in that capacity with Pan Am until December of 1991. (Tr. 38-42, 79, 598).

United entered into a contract with Pan Am in 1990 to purchase some of Pan Am's flight routes. (PX 4). In this contract, United pertinently agreed to offer employment to some of the pilots assigned to these routes by Pan Am with the requirement that the pilots satisfy United's normal hiring standards including a medical examination. (PX 4). United and ALPA separately agreed in the following year that pilots, who were eligible to transfer their employment from Pan Am to United and were selected, would pass a United pilot physical examination and satisfy all of United's normal pilot hiring criteria. (PX 5, 58, 65). The pilots hired by United would then be entitled to certain benefits and compensation rights, including seniority, based in part on their length of employment with Pan Am. (PX 5, 63; DX 11, 49; Tr. 323-24, 332-336, 341, 603).

Between April 1991 and September 1992, forty-two of Pan Am's pilots were found to be eligible for employment by United under the purchase agreement and several of them subsequently were merged into United's seniority list pursuant to an ALPA arbitration award. (Tr. 323, 332-35, 601; PX 51; DX 38, 49). All of these pilots worked on flights covered by United's contracts/subcontracts with the U.S. Postal Service. (Tr. 596). Paul Pyles is one of the pilots who was eligible to seek employment with United under the Defendant's purchase agreement with Pan Am. (Tr. 43, 48; PX 7, 65).

By letter dated March 18, 1991, Mr. Pyles was advised by a flight manager of United, who was assigned to train and process the Pan Am pilots, to report to United's flight center in Denver, Colorado on April 1, 1991 for the first phase of training. (DX 7, 65). This four day phase was to include a standard United pilot physical examination and the receipt of training packages. The second phase of this training was to involve a home study course of United's training materials while United reviewed the pilot's training and personnel records at Pan Am. The applicants who were to enter phase three of the training program were to be considered employees of United and were to undergo a more extensive five-day training program comparable to United's recurrent training programs for all of its pilots. (PX 7, 65; Tr. 48-49).

Mr. Pyles and several other Pan Am pilots reported to United's flight center at Denver as directed. He initially completed a medical evaluation form (PX 8), underwent a physical

examination and attended various briefings. On the following day, he received his training materials and attended more briefings, then he and some other pilots were requested to return to United's medical department for various reasons. He met with United's regional flight surgeon who advised him that Mr. Pyles' transfer of employment to United was being denied because of the pilot's RK history. (Tr. 42-56, 160-165). The regional flight surgeon became aware of the pilot's surgery by reviewing Mr. Pyles' medical evaluation form. (Tr. 164, 167-168; PX 8; DX 27). Mr. Pyles requested a letter of the regional flight surgeon indicating that United was denying his transfer because of that company's RK policy. (Tr. 167-168). By letter dated April 8, 1991, United's regional flight surgeon did advise Mr. Pyles that the pilot was "not found to be qualified as a flight officer due to the presence of bilateral radial keratotomy scars." (DX 25; Tr. 165).

Paul Pyles filed a complaint with OFCCP on July 15, 1991 alleging United discriminated against him by refusing employment because of his medical handicap which he described as "scars" resulting from radial keratotomy surgery. (PX 10). OFCCP investigated the complaint and unsuccessfully attempted to resolve the matter with United through conciliation. (PX 11-21). Plaintiff then instituted this action by filing an administrative complaint against United on October 8, 1993.

Conclusions of Law

Qualified Individual With Disabilities

Section 503 of the Rehabilitation Act prohibits discrimination in the employment of qualified disabled individuals by Federal government contractors/subcontractors.³ 29 U.S.C. § 793. OFCCP initially alleges that Paul Pyles is a qualified disabled individual. Secondly, it complains that United discriminated against Mr. Pyles by failing to employ him as a pilot because of his disability. OFCCP therefore maintains that the Defendant is liable for relief to Mr. Pyles, and that United essentially should be ordered to refrain from further discrimination against other such qualified disabled persons. United naturally disagrees with all of the positions of OFCCP. My conclusions on these issues are foreshadowed by the void in the findings of fact with respect to the secondary positions of the Plaintiff.

Initially, I should note that jurisdiction of the Act is not in question in this case. The parties stipulated to facts supporting this conclusion. (Tr. 594-596). At all times pertinent to this case, United held contracts or subcontracts with the U.S. Postal Service in excess of \$2,500 and it had more than 50 employees. Moreover, all of the pilots hired by United under its contract with Pan Am worked on routes covered by the Defendant's government contracts. Mr. Pyles also would have worked on these routes, if United had not rejected his employment in 1991. *See* 29 U.S.C. § 793(a); 41 C.F.R. §§ 60-741.1, 60-741.3.

³The Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (Oct. 29, 1992), amended the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b, substituting the term "individuals with disabilities" for "individuals with handicaps." Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (1994) also addresses "disabilities" which "represents an effort by [Congress] to make use of up-to-date, currently accepted terminology." S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989); H.R. Rep. No. 485 pt. 1, 101st Cong., 2d Sess. 50-51 (1990). The revision does not reflect a change in definition or substance. *Id.* The Rehabilitation Act states that complaints filed under Section 503 and under the Americans with Disabilities Act should be "dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards. . . ." 29 U.S.C. § 793(e). *See* 42 U.S.C. § 12117(b).

The initial question to address is whether OFCCP has established a prima facie case that Mr. Pyles should be considered a qualified disabled individual for purposes of this case. The Act, as amended, defines an "individual with a disability" as any person who:

- (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (ii) has a record of such an impairment, or
- (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B); *see also* 41 C.F.R. § 60-741.2.

OFCCP contends that the latter two provisions of the above-quoted statute are applicable to this case because Paul Pyles has a record of an impairment which substantially limited his major life activities and United regarded him as having such an impairment. Interestingly, the Plaintiff initially argues that myopia is the impairment which substantially limited Mr. Pyles' major life activities in the past. On the other hand, OFCCP maintains that the radial keratotomy which the pilot sought to correct his myopic condition is what United regards as Mr. Pyles' substantially limiting impairment.

Obviously, I initially must seek an understanding of the term "impairment" as used in Section 503 of the Act to resolve the questions presented. The regulations pertaining to Section 503 do not contain a definition of impairment. However, this term was defined in *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088, 1097 (D. Haw. 1980), *vacated and remanded to administrative law judge for further findings*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981), as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity." Also, the regulations promulgated by the Equal Employment Opportunity Commission under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, which statute prohibits discrimination against qualified individuals by private employers and state/local governmental employers, defines "physical impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." 29 C.F.R. § 1630.2(h)(1).

Plaintiff argues that myopia has been held to be an impairment under the Act, citing *Padilla v. City of Topeka*, 798 P.2d 543 (Kan. 1985). As correctly noted by Defendant's counsel, however, that finding is of little guidance since the record in that case was held to contain no evidence that the myopia substantially limited a major life activity of that plaintiff. In a recent recommended decision of an administrative law judge of the U.S. Department of Labor, OFCCP's position that myopia is an impairment within the meaning of the Act was rejected because the judge considered the condition to be more of a physical characteristic or relatively common condition that is widely shared by the populous and therefore not intended to be covered by the Act. *OFCCP v. Delta Airlines, Inc.*, Case No. 94-OFC-8 (1996) (Recommended Decision and Order). Plaintiff argues that the fact a disorder is widely shared by the general public is not controlling on the question of whether the condition is an impairment under the Act. *OFCCP v. Washington Metropolitan Area Transit Authority (WMATA)*, 84-OFC-8 (1989) (Assistant Secretary of Labor Final Decision and Remand Order), *rev'd on other grounds sub nom. Washington Metropolitan Area Transit Authority*, 55 Empl. Prac. Dec. (CCH) ¶ 40,507 (D.D.C. 1991). OFCCP further contends in its reply brief that I should not consider the recommended decision in the *Delta Airlines* case because it is overbroad, ignores applicable Section 503 law and is not binding since it has not been approved by the Secretary of Labor. Moreover, the Plaintiff maintains in its reply brief that I should ignore many of the decisions cited by United because the

cases do not involve fact patterns comparable to this case, they were brought under statutes other than Section 503 of the Act, and none of the courts applied legal standards adopted by the Assistant Secretary of Labor for Section 503 cases. This latter position is surprising since OFCCP pointed out in a footnote in its original brief that the Equal Employment Opportunity Commission had issued regulations and other information with respect to the Americans with Disabilities Act that may be considered for guidance in construing Section 503 of the Act.

I am cognizant that the recommended decision in *Delta Airlines, Inc.*, as well as the cases cited by United under the Americans with Disabilities Act, are not binding precedent. I find, however, that there is no case law from the Secretary of Labor which I consider to be clearly on point with the facts involved in this case. Therefore, I would be remiss in my responsibilities if I did not study the wisdom of other triers-of-fact, whom have considered factual situations and statutes comparable to the ones involved in this case. I take this same position with respect to the regulations promulgated under the Americans with Disabilities Act.

In returning to the primary focus of this discussion, I agree with OFCCP that myopia in certain situations can be considered an impairment. The court in *Sutton, et. al. v. United Airlines, Inc.*, No. 96-S-121, 1996 U.S. Dist. LEXIS 15106 (D. Colo. August 28, 1996), acknowledged as much in a case involving the Americans with Disabilities Act. It indicated that "[o]bviously, the Plaintiffs' ability to see without correction is affected, but, as reflected in the statute and regulations, far more is required to trigger coverage under" that statute, alluding to the requirement that the impairment must substantially limit an individual's major life activities.

I believe the degree to which a person is affected by myopia or the extent to which the condition is correctable is the controlling factor. OFCCP notes that case law of the Secretary of Labor holds that a disability must be viewed in its uncorrected state. See *OFCCP v. Commonwealth Aluminum*, 82-OFC-26 (1994) (Ass't Sec'y of Labor Final Decision and Order), *stayed sub nom. Commonwealth Aluminum v. U.S.*, Case No. 94-0071-00(C) (W.D. Ky. 1994). I find this is an illogical approach for myopia because, as the court noted in the *Sutton* case, "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities", citing a whole series of supporting cases.

Obviously, myopia and even hyperopia (farsightedness) affect a large portion of the general public, but cause negligible visual difficulty because of easy access to corrective eyewear. Without enumerating, I believe it is reasonable to say that most of the attorneys and witnesses who appeared at the formal hearing use some form of eyewear to correct a vision irregularity. Thus, I find that the extent to which a myopic condition is correctable is the important factor to consider and this leads to the next question of whether the myopia in its corrected state substantially limits a person's major life activities.

I find that Paul Pyles' myopic condition between 1975 and 1986 was an impairment because it was not correctable to 20/20 and thereby deprived him of the opportunity to continue flying as a commercial airline pilot under the guidelines of the FAA. Indeed, his nearsightedness continued to deteriorate over this period of time to such an extent that his uncorrected distant vision was approximately 20/400 and he was forced to wear strong corrective eyewear to function. The critical question, however, is whether his impairment constitutes a qualified disability under Section 503 of the Act because it substantially limited his major life activities.

The regulations promulgated under the Act provide some guidance as to the meaning of "major life activities." Appendix A to 41 C.F.R. Part 60-741 provides the "*life activities*" include "communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc." OFCCP initially argues in this regard that Paul Pyles'

myopia substantially limited him in the past because it caused him to lose his job with Pan Am in 1975 and precluded his employment as an airline pilot for eleven years. Plaintiff stresses that the primary focus under this aspect of Section 503 is the extent to which a person's life activities relating to employment is affected by an impairment. This is in accord with the pertinent regulations which in part explain that "[a] handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited" under Section 503 of the Act. 41 C.F.R. Part 60-741, Appendix A.

The court in *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980), held that an impairment that interfered with a person's ability to perform a specific job, but did not significantly reduce that person's ability to obtain satisfactory employment, was not substantially limiting under the Act. It emphasized the necessity to examine such a question on a case-by-case approach to determine if the impairment "of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment." *Id.* at 1100. That court went on to enumerate various factors which are relevant in determining whether an individual's impairment substantially limited that person's employment opportunities such as the number and type of jobs from which the individual was disqualified, the geographical area to which the person had reasonable access to secure employment and the individual's job expectations and training. *Id.* at 1100-01; see *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985).

OFCCP has the burden of establishing a prima facie case that Mr. Pyles' past impairment substantially limited his major life activities. See *Id.* at 1249-50. I find that it has not met this burden with respect to establishing the extent to which Mr. Pyles' myopia affected his employment potential other than that it precluded his employment as a commercial airline pilot because he could not obtain the required medical certificate from the FAA. Paul Pyles' training and skills obviously afforded him other employment opportunities which OFCCP conveniently ignored. Indeed, the limited evidence in this regard does prove that the former airline pilot was employed as a marketing manager in the airline industry and as an aviation consultant while on disability leave from Pan Am. Little evidence was offered to prove the number and types of jobs from which Mr. Pyles was disqualified while on disability leave. The same is true concerning the geographical area to which Mr. Pyles had access to obtain employment within the parameters of his skills and training. I therefore find that the evidence offered by the Plaintiff on this question does not meet the standards set forth in the *Black* case or the more recent cases of the Federal circuit courts.

The position taken by OFCCP that Paul Pyles was substantially limited in his major life activities from 1975 to 1986 because his myopia precluded his employment as a commercial airline pilot makes little sense. If this were true, then every pilot who is grounded because myopia prevents the pilot from retaining the required FAA certification could file a complaint alleging discrimination by the pilot's employer under Section 503 or a comparable statute. I reiterate that the pertinent regulation indicates that "[a] handicapped individual who is likely to experience difficulty in ... retaining ... employment" because of the person's impairment would be considered substantially limited under Section 503 of the Act. 41 C.F.R. Part 60-741, Appendix A. Obviously, such an approach would be inconsistent with the overall intent of the Act of protecting truly disabled persons against discrimination because of an impairment.

Plaintiff also argues that Paul Pyles' myopia substantially limited his major life activities in ways unrelated to employment. OFCCP points out that Mr. Pyles' myopia worsened to such an extent that he was unable to function without strong corrective lenses. Plaintiff goes on to contend that Mr. Pyles was legally blind in 1986 because his distance vision was 20/400 in each eye.

I acknowledged in the findings of fact that Mr. Pyles' myopic condition progressively deteriorated while he was on disability leave from Pan Am. I stress, however, that the 20/400 distance visual assessment on which OFCCP relies was factually found to be Mr. Pyles' uncorrected visual acuity. The record contains little evidence as to Mr. Pyles' corrected distant visual acuity during this period of time other than that it was less than the 20/20 required by FAA to retain his commercial pilot's certification. I find that evidence as to Mr. Pyles' uncorrected vision during his disability leave, alone, is not material to the question of whether his impairment substantially limited his major life activities. Again, I stress it is the extent to which one is impaired by his or her corrected vision that should be controlling on the question of whether such an impairment substantially limits a person's activities.

I reiterate that the court in *Sutton, et. al. v. United Airlines, Inc.*, No. 96-S-121, 1996 U.S. Dist. LEXIS 15106 (D. Colo. August 28, 1996), instructed that "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities." It cited a series of supporting case law case, pertinently including *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), *reh'g denied*, 9 F.3d 105 (1993), *cert. denied*, 114 S.Ct. 1386 (1994) (vision correctable to 20/200 is not a handicap under the Act); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1248-50 (6th Cir. 1985) (plaintiff with crossed eyes who had difficulty operating mail-sorting machine but who otherwise was not limited to work or recreation was not handicapped under the Act); *Venclauskas v. Connecticut Dept. of Pub. Safety*, 921 F. Supp. 78, 80-82 (D. Conn. 1995) (applicant for state police trooper trainee who was rejected for failure to meet unaided visual acuity standard failed to state a claim under the Act and the Americans with Disabilities Act); *Joyce v. Suffolk County*, 911 F. Supp. 92, 96 (E.D.N.Y. 1996) (candidate for county police officer position who failed to meet visual acuity standard because his uncorrected vision in each eye was 20/200 but his corrected vision in each eye was 20/20 was not disabled under the Act or the Americans with Disabilities Act); *Walker v. Aberdeen-Monroe County Hospital*, 838 F. Supp. 285, 288 (N.D. Miss. 1993) (a person whose vision is corrected to 20/30 is not handicapped within the meaning of the Act); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, 5 A.D. Cases 853 (S.D.N.Y. April 26, 1996) (plaintiff's diminished vision in one eye did not qualify as a disability because it did not substantially limit his ability to participate in any major life activity). As also stated by the court in the *Sutton* case, "[e]ven accepting all of the Plaintiffs' allegations as true" with respect to Mr. Pyles' uncorrected distant visual acuity, I find that OFCCP has not met its burden of proving that Mr. Pyles was substantially limited in the major life activity of seeing while he was on disability leave from Pan Am.

Assuming *arguendo* that OFCCP established that Mr. Pyles' past uncorrected myopia constituted an impairment which substantially limited his major life activities, United did not reject him for employment because of his past history of myopia. United did not hire Paul Pyles in 1991 because it had a policy of not hiring individuals for pilot positions who had undergone radial keratotomy. This policy was adopted for safety reasons after United's corporate medical director had discussed the effects of RK with ophthalmologists and had considered pertinent medical literature. Regardless of the position advanced by OFCCP, United's reason for rejecting Mr. Pyles for employment as a pilot related to the existing safety questions surrounding radial keratotomy and was not due to Mr. Pyles' history of myopia.⁴

⁴The Pan Am pilots who were considered for employment by United, as well as Mr. Pyles, were new-hire employees rather than transferees or incumbents. The contract between Pan Am and the Defendant and the separate agreement with ALPA made it clear that these pilots were required to meet United's normal hiring standards.

I next turn to OFCCP's secondary position that United regarded Paul Pyles as having an impairment which substantially limited his major life activities when it rejected him for employment as a commercial airline pilot in 1991 due to his radial keratotomy. Actually, this was the basis of Mr. Pyles' complaint to OFCCP. It also appeared to be the principal position of the Plaintiff until United filed a motion for summary judgment regarding that position which was denied because of unresolved factual questions.

Unquestionably, Mr. Pyles' RK does not constitute an impairment under the Act. Indeed, the surgical procedure on the cornea of the eye is intended to reduce or correct myopia, the very condition which OFCCP alleges was the source of the former pilot's past disability. The surgery was successful since Mr. Pyles' distant visual acuity improved to such an extent that he was able to obtain a first class medical certificate from the FAA and resume his employment as a commercial airline pilot with his former employer.

Plaintiff does not maintain that Mr. Pyles' RK disabled him but that United regarded him as impaired because of the surgery. It explains that the Defendant "views RK corneas as weakened, diminished, restricted or otherwise damaged" because of United's belief that the surgery causes side effects such as glare and fluctuating vision. OFCCP goes on to essentially argue that United believes that these side effects impair vision to such an extent that it has adopted a policy that automatically disqualifies from flight officer employment all persons with a history of RK. Thus, Plaintiff contends that this perception of impairment substantially limits or handicaps Paul Pyles' employment, again citing *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088, 1097 (D. Haw. 1980).

United's position on this issue is simple. It contends that there is no evidence in the record proving the Defendant regarded Mr. Pyles as impaired or disabled because of his RK. United strongly relies on the testimony of its corporate medical director who sets the company's medical policy. It also relies on the case law in essentially arguing that disqualification from one job because of a medical condition does not automatically constitute a substantial limitation on that person's ability to obtain satisfactory employment. See *Bauer v. Republic Airlines, Inc.*, 442 N.W. 2d 818, 822 (Minn. App. 1989); see also *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993).

Although the decision in the *Black* case did provide useful criteria for determining whether a person's impairment substantially limits the individual's life activities relating to employment, OFCCP's reliance on part of that decision is misplaced. Plaintiff quotes that portion of the decision at which the court explains:

[T]he focus cannot be on simply the job criteria or qualifications used by the individual employer; those criteria or qualifications must be assumed to be in use generally. The reason for this is that an employer with some aberrational type of job qualification . . . that screens out impaired individuals who are capable of performing a particular job, should not be able to say: 'No one else has this job requirement, so the impairment does not constitute a substantial handicap to employment, and the applicant is not a qualified handicapped individual.' If such an approach were allowable, an employer discriminating against a qualified handicapped individual would be rewarded. . . . In evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.

E.E. Black Ltd. v. Marshall, 497 F. Supp. at 1100. Plaintiff contends in its original brief that the law requires the assumption that all airlines impose the same policy as United regarding RK and that this disqualifies Mr. Pyles from obtaining the same or similar jobs with other airlines. Thus, OFCCP believes this demonstrates that United's policy regarding RK substantially limits Mr. Pyles' employment.

The primary case cited by OFCCP regarding the applicability of the assumption set forth in the *Black* case is *OFCCP v. WMATA*, 84-OFC-8 (1989) (Assistant Secretary of Labor Final Decision and Remand Order), *rev'd on other grounds sub nom. Washington Metropolitan Area Transit Authority*, 55 Empl. Prac. Dec. (CCH) ¶ 40,507 (D.D.C. 1991). The Assistant Secretary held in that decision that an individual who was denied a carpenter's job due to high blood pressure was regarded as handicapped. The Assistant Secretary noted that it should be assumed that similar companies would apply the same blood pressure standards as required by the analysis delineated in *Black*. The defendant did not regard the individual in the *WMATA* case as unsuited for only the particular requirements of just the carpenter's job, but that the person should not perform any heavy labor job. Thus, the individual involved in that case was handicapped under the Act regardless of the standards implemented by other employers.

More recently, courts have refined the application of the standards set forth in the *Black* case and no longer require the use of assumption quoted by OFCCP. In fact, application of the assumption has been expressly or implicitly rejected in several cases. *See Tudyman v. United Airlines*, 608 F. Supp. 739, 745, n. 6 (C.D. Cal. 1984); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992). In both the *Roth* and *Welsh* cases, the courts required an allegedly disabled person to show that other employers have the same job requirements that disqualify that individual from working rather than simply assuming that all employers did.

I also find it significant that the record in this case contradicts the assumption proposed by OFCCP. Obviously, Pan Am did not have a policy against employing pilots who had undergone RK. They allowed Mr. Pyles to return to work as a pilot in 1986 and retained him through 1991. It is indeed interesting to note that OFCCP argues that United's RK policy substantially limited Mr. Pyles when it rejected his employment in April of 1991, yet the pilot continued to work as a first officer with Pan Am until that company went out of business at the end of that year. Also, there is other evidence in the record indicating that not all commercial airlines have adopted an RK policy comparable to United's. (Tr. 82-84; DX 51). Thus, OFCCP has not shown that United's rejection of Mr. Pyles' employment as a pilot substantially limited his employment opportunities with other airlines. While it may be possible that Mr. Pyles' age may have affected other employment opportunities as a commercial airline pilot, that is not the basis of the complaint involved in this case.

OFCCP also argues that United's RK policy excluded Mr. Pyles from all flight officer positions or a "class of jobs" and therefore he should be considered disabled. Even if pilots with a history of RK were precluded from working as commercial airline pilots, it is obvious that other jobs are available considering their training and qualifications. They should have the opportunity to work in capacities such as training in the airline industry or working as a pilot with cargo or courier transportation services. A person's employment range is not limited exclusively to "a single, identical job existing among various employers in the same industry", but rather is expandable to potential employment for which an individual is qualified given his or her training, skills and past job history. *OFCCP v. Yellow Freight Systems*, 84 OFC-17 (1993) (Acting Assistant Secretary of Labor Final Decision and Order of Remand). I note in this regard that I find it interesting that the regulations promulgated under the Americans with Disabilities Act, to which OFCCP referred in its original brief as a source of guidance, provide by way of illustration that

"an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be . . . a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. Appendix to Part 1630.

I agree with United that Mr. Pyles' employment rejection by that company for the position of a pilot does not mean he was disqualified for a "class of jobs" merely because United's contract with ALPA provides for several classifications of pilots. Moreover, the case law clearly indicates that [a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Janany v. U.S. Postal Service*, 755 F.2d 1244, 1249 n. 3 (6th Cir. 1985); accord *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994), cert. denied, 115 S.Ct. 1095 (1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1392 (5th Cir. 1993). I should also note that there is no convincing evidence that Mr. Pyles was interested or sought any job with United other than that of a pilot, or more specifically, a first officer's position, although there is some evidence in the record that he is certified for other positions. (Tr. 84, 94-95). I therefore conclude that Mr. Pyles' RK disqualified him to work as a pilot for United, not a broad spectrum of jobs.

Not only is there a lack of evidence proving OFCCP's position that United regarded Paul Pyles as impaired because of his RK history, the record supports a contrary conclusion. United's corporate medical director, as well as the regional flight surgeon who advised Mr. Pyles that his employment as a pilot was being denied because of his RK history, testified that they did not consider Mr. Pyles to be disabled because of his surgery or even his past problems with myopia. (Tr. 169-171, 420). Defendant's medical director confirmed that United has pilots who are afflicted to some degree by myopia. He also acknowledged that even some of United's incumbent pilots with a history of RK were allowed to continue working in their positions because they had experienced no visual problems for a considerable period of time following their surgery. OFCCP replies that such testimony is self-serving. I agree, but I also find it credible, especially since there is no contradictory evidence in the record. I am convinced that United's corporate medical director did not consider all pilots who had undergone RK in the late 1980's and early 1990's as impaired or disabled. Rather, he was concerned with formulating a policy for his company regarding new-hire pilots which he considered at that time to be in the best interests of United and the public from a safety standpoint. I therefore find that the evidence in this record does not meet the Plaintiff's burden of proving that United regarded Mr. Pyles as impaired within the meaning of the Act because he had undergone radial keratotomy to reduce his myopia.

To summarize my conclusions on this initial issue, I find that the evidence proves that Paul Pyles' past myopia was an impairment because it was not correctable to 20/20, or to that of a normal person, and thereby deprived him of the opportunity to continue flying as a commercial airline pilot under the guidelines of the FAA. However, I conclude that OFCCP has not met its burden of proving a prima facie case that such impairment substantially limited Mr. Pyles' major life activities relating either to employment or seeing. I further conclude that the evidentiary record does not establish that United regarded Mr. Pyles as impaired or disabled when it rejected him for employment in 1991 because of his radial keratotomy history. It therefore follows that the Plaintiff has not established that Paul Pyles is a qualified disabled individual under Section 503 of the Rehabilitation Act. This ultimate conclusion renders moot the remaining issues in controversy on the merits of this case.

Sanctions

The final matters to address relate to OFCCP's and United's cross-motions for sanctions for the attorneys' fees and expenses incurred in responding to various motions. I resolved some

requests for sanctions in pre-hearing orders and they are not the subject of this discussion. However, I reserved my rulings on two requests for sanctions by both OFCCP and United until after the formal hearing to afford counsel the opportunity to respond to the motions at the hearing and to submit affidavits itemizing the costs in question.

Before I even address the matters in controversy, I should note that 41 C.F.R. § 60-741.29(b) provides that all hearings conducted under Section 503 of the Act and the regulations promulgated thereunder shall be governed by the Rules of Practice and Procedure for Administrative Proceedings set forth at 41 C.F.R. Part 60-30. Section 60-30.15(j) of 41 C.F.R., which pertains to the authority and responsibility of administrative law judges in conducting hearings under the Act, specifically provides that the judge has the power to:

- (j) Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:
 - (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;
 - (2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him; and
 - (3) Expelling any party or person for further participation in the hearing.

41 C.F.R. § 60.30.15(j). I find it significant that neither that section of the regulations, the Rehabilitation Act, nor 29 C.F.R. § 18.29, which specifically pertains to the authority of administrative law judges of the U.S. Department of Labor, provide for the imposition of the type of sanctions requested by the parties in this case. Moreover, the Assistant Secretary of Labor has held that an administrative law judge does not have the authority to issue an order granting sanctions in the form of attorneys' fees and expenses relating to discovery matters unless such action is authorized by statute or regulations. *OFCCP v. Mississippi Power Co.*, 92-OFC-8 (July 19, 1995) (Assistant Secretary of Labor Order). *See Rex v. Ebasco Services, Inc.*, 87-ERA-6 (1994) (Secretary of Labor Final Decision and Order). Rather, an administrative law judge's authority to regulate discovery, as well as the conduct of parties and counsel, is limited to that provided in the regulations. *See* 29 C.F.R. §§ 18.29, 18.34(g)(3), 18.36.

Since the parties in this case have not requested any relief other than sanctions in the form of attorneys' fees and expenses, I must initially deny the four outstanding motions because I do not have authority under the Act or regulations to approve such sanctions. However, I believe the motions also should be denied for other reasons. First, I reiterate my ruling from the formal hearing that I deny OFCCP's request for sanctions relating to attorneys' fees and expenses incurred in the preparation of Plaintiff's opposition to Defendant's memorandum regarding the Order of July 20, 1995 and Plaintiff's response to United's proposed protective order dated July 28, 1995 because the Plaintiff did not produce evidence at the hearing to verify such expenses as was directed in the pre-hearing order dated August 7, 1995. (ALJX 4, 5; Tr. 553-555).

I next address United's request for sanctions dated August 17, 1995. On that date, United prepared a response to the plaintiff's motion to quash certain subpoenas. United argues that the Plaintiff did not understand my earlier ruling regarding the motion to quash, or essentially disregarded it, therefore causing United to incur attorneys' fees and expenses in the preparation of a memorandum in opposition to OFCCP's motion to quash. (ALJX 5). United submitted an affidavit at the hearing itemizing its costs for attorneys' fees and expenses totalling \$1,111.50. (ALJX 6, 11).

OFCCP acknowledged at the hearing that there was some misunderstanding surrounding its motion to quash the subpoenas and my order pertaining to that motion. It was noted that there appeared to be some conflict between Fed. R. Civ. P. 45 and the OFCCP regulation pertaining to witnesses, 41 C.F.R. § 60-30.17(c). Plaintiff assured me that it was this misunderstanding that caused OFCCP to file the second motion to quash and was not an intentional disregard of my previous order. (Tr. 557-558, 561). Notwithstanding United's argument that my order made it clear that Fed. R. Civ. P. 45 was to control, I accept OFCCP's position as reasonable and deny the Defendant's request for monetary sanctions relating to its memorandum in opposition to the Plaintiff's second motion to quash. (Tr. 559-560).

The third unresolved request for sanctions pertains to attorneys' fees and expenses associated with the preparation and filing of OFCCP's motion to compel production of documents and memorandum in support thereof dated July 19, 1995. (ALJX 12). OFCCP filed a post-hearing declaration of counsel dated September 22, 1995 in which attorneys' fees and expenses totalling \$292.30 are itemized with respect to the costs incurred in preparing and filing this motion and memorandum.⁵ I provided in the order of July 20, 1995 that United's counsel would be allowed to respond to this request for sanctions at the hearing. (ALJX 13).

Counsel for United and OFCCP respectively presented substantial argumentation regarding this matter at the hearing. (Tr. 567-590). Without intending to diminish the importance of these discovery matters, United's arguments essentially are that it acted in a reasonable manner in attempting to comply with the voluminous discovery requests of the government and experienced considerable difficulty in obtaining the requested documents, not only because of the breadth of the requests, but due to the fact that many of the documents were scattered over various offices of this international corporation. United also questioned the need to produce some of the documentation relating to Pan Am pilots other than Mr. Pyles especially since the Plaintiff did not use this evidence at the hearing. OFCCP responded that it was reasonable to request the documents in question regardless of whether they were used at the trial and that United's continued failure to produce the requested information was prejudicial to the government's position and should be sanctioned.

United also requests additional sanctions against OFCCP for attorneys' fees and expenses incurred in the preparation of the filing of its memorandum in response to the Plaintiff's objection to affidavits certifying its efforts to locate documents dated August 28, 1995. (ALJX 8). This document also related to OFCCP's request for the production of documents pertaining to the medical and personnel files of the Pan Am pilots who apparently were to be hired by United under its contract to purchase certain routes of Pan Am. It also relates to the affidavits required of United pertaining to its attempts to comply with my order of August 15, 1995.

United again refers to the voluminous documentation in question and the question of the relevance of such evidence. The Defendant maintains that much of OFCCP's problems in obtaining documentation were due to the government's failure to pursue discovery in a timely fashion. United therefore argues that OFCCP's request for sanctions relating to these discovery matters are unreasonable, vexatious and harassing and that the Plaintiff should be sanctioned for attorneys' fees and costs incurred by United in responding to OFCCP's objection to the affidavits of United's custodians of the records. Pursuant to my direction at the hearing, United filed an

⁵A copy of this notice of filing of declaration is separated from the pleadings in this case and is hereby admitted in evidence as Administrative Law Judge Exhibit (ALJX) 15.

affidavit of counsel on September 20, 1995 which itemizes attorneys' fees and costs for the work on the memorandum in question totalling \$1,002.15.⁶

Much could be written about the discovery actions in this proceeding. Suffice it to say, such efforts were zealous and at times the principal parties seemed to dwell, or seek unnecessary intervention, on matters of questionable relevance and importance. Notwithstanding, I cannot conclude that the actions of the parties, particularly those remaining in question, were unreasonable or arbitrary. This is particularly true considering the difficulty often confronted a plaintiff in meeting the burden of proving employment discrimination and the need for an innocent employer to present a vigorous defense against such a claim. I therefore deny both of the requests for sanctions of OFCCP and United for the attorneys' fees and costs associated with the Plaintiff's motion to compel the production of documents and the Defendant's memorandum in response to Plaintiff's affidavits regarding its efforts to locate documents.

RECOMMENDED ORDER

For the above-stated reasons, IT IS HEREBY RECOMMENDED that OFCCP's complaint against United Airlines, Inc. for violating Section 503 of the Rehabilitation Act dated October 8, 1993 be dismissed. IT IS FURTHER RECOMMENDED that the requests for sanctions by OFCCP and United for attorneys' fees and expenses associated for the above-mentioned discovery actions be denied.

DONALD W. MOSSER
Administrative Law Judge

⁶A copy of this affidavit is separated from the pleadings and is hereby admitted in evidence as Administrative Law Judge Exhibit (ALJX) 16.



Date: June 10, 1997

Case No: 89-OFC-1

In the Matter of

U.S. DEPARTMENT OF LABOR
Plaintiff

v.

JACKSONVILLE SHIPYARDS, INC.
Defendant

RECOMMENDED DECISION AND ORDER ON REMAND¹

This case has a protracted history. It has been pending before the Department of Labor since the Plaintiff, the Office of Federal Contract Compliance Programs (OFCCP), filed a complaint on September 30, 1988 against the Defendant, Jacksonville Shipyards, Inc. (JSI). This complaint alleged that JSI discriminated against women and minorities in violation of Executive Order No. 11,246, 3 C.F.R. 338 (1964-1965), *reprinted as amended* 42 U.S.C. § 2000e note (1994). A hearing was held on March 18-22, April 1-12, and June 3-4, 1991, in Jacksonville, Florida. At the outset of the hearing, the parties settled the issue of discrimination against minorities, and the partial settlement decree, which I approved on April 15, 1991, is part of the record of this case.

OFCCP alleged at the hearing that JSI discriminated against women in hiring for the entry level job of helper second class (or helper 2/c). JSI denied this allegation. Due to the size of the record, the parties were given until September 30, 1991 to file proposed findings of fact and conclusions of law. On July 7, 1992 I issued a *Recommended Decision and Order* recommending that the complaint be dismissed. On May 9, 1995 the Secretary of Labor issued a *Decision and Remand Order (Secretary's Decision)* which found that JSI "failed to treat all applicants equally and that OFCCP has proved JSI engaged in a pattern and practice of discrimination against women in hiring for Helper 2/c jobs in 1985." (*Secretary's Decision* at 19-20). The Secretary remanded the case to me so that the proper remedies could be determined in light of his decision.²

¹Citations to the record of this proceeding are as follows: PX--Plaintiff's Exhibit; DX--Defendant's Exhibit; TR--Hearing Transcript. On January 31, 1997, OFCCP filed updated back pay and interest calculations for the individual class members. Without objection, this exhibit is admitted into evidence as PX 172.

²To support his finding that JSI discriminated against women in filling helper 2/c positions in 1985, the Secretary cited JSI's answers to OFCCP's requests for admission. *See Secretary's Decision* at 11-12. To the best of my knowledge, JSI's responses to OFCCP's requests for

In the intervening time between the *Secretary's Decision* and the issuance of this decision, JSI closed its shipyard and subsequently filed for bankruptcy. (Revised Notice of Suggestion of Pendency of Chapter 11 Case at 1.) An effort was made to resolve whether a remedies determination could proceed in light of the bankruptcy; both parties participated in a conference call on December 6, 1996. As discussed below, I have concluded that the remedies determination can proceed and am therefore issuing this decision.

I. Back Pay

A. Approach to Determining Back Pay

1. Classwide Approach

The issue of back pay in this case, as in most cases, is complicated and highly contested between the parties. Awards of back pay may be made on an individual-by-individual basis or on a classwide basis. It must also be decided whether each class member will be awarded full back pay (make-whole relief) or whether a shortfall/pro rata approach is more appropriate. After reviewing the record and the parties' arguments, it has been determined that the most equitable method of fashioning a back pay award in this case is to use a classwide/shortfall approach, where the female job applicants who were discriminated against share an aggregate amount of back pay divided in a pro rata fashion. The shortfall/pro rata approach to calculating damages is particularly appropriate in this case where it is nearly impossible to determine with any accuracy which female applicants would have been hired by JSI absent the discriminatory hiring practices found by the Secretary.

While individualized hearings and, therefore, individualized determinations on back pay are generally the favored method of calculating a back pay award, this "should not be read as an unyielding limit on a court's equitable power to fashion effective relief for proven discrimination." *Segar v. Smith*, 748 F.2d 1249, 1289 (D.C. Cir. 1984). In the case at hand the substantive equivalent of individualized hearings has already occurred, with individual women testifying at the hearing as to their likelihood of accepting a helper 2/c job if one was offered to them, the pay that they may have received at other jobs during the period in question, and other factors important to the computation of back pay. However, under the facts of this case, determining which women would have obtained jobs absent discrimination is highly speculative and would lead to "a quagmire of hypothetical judgments." See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974). Thus, where the employer's hiring requirements and the employees' job qualifications are ambiguous, and where the facts of the case do not lead to a clear indication regarding which individuals would have been hired absent discrimination, "a class-wide approach to the measure of backpay is necessitated." *Pettway*, 494 F.2d at 261.

admission were neither offered nor admitted into evidence.

OFCCP proposes an individual-by-individual approach to back pay in this case (Plaintiff's Proposed Findings of Fact and Conclusions of Law (Plaintiff's Findings) at 148-49), and further advocates that each class member is entitled to make-whole relief unless the employer can prove that the applicant was denied employment for a legitimate non-discriminatory reason. (*Id.* at 147; *see also International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 (1977). OFCCP further argues that the issues in this case are not so complex as to preclude an individual-by-individual approach to back pay. But OFCCP does not address the highly speculative approach that an individual-by-individual inquiry would require. Moreover, it should be noted that the back pay award "should not constitute a windfall at the expense of the employer." *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 812 (2d. Cir 1983).

OFCCP argues that the shortfall/pro rata approach is not appropriate in this case because, in part, the overall number of job vacancies was more than twice the number of female applicants (Plaintiff's Findings at 147). While it is correct that 69 women applied for 191 positions, making it theoretically possible that all of the women applicants could have been hired, it is highly improbable. OFCCP's own expert, Dr. Hoffman, testified that in addition to the 69 women (6.08% of the applicant pool), 1065 men (93.92% of the applicant pool) applied for the 191 helper 2/c positions (TR at 2322). Because there is no evidence which suggests that female applicants were *more* qualified than their male counterparts, arguing that 100%, or all 69 women, would have been hired defies both statistical probability and common sense.

A much more likely outcome is that, absent discrimination, females would have been hired in the same proportion as the total proportion of female applicants, *i.e.*, since 6.08% of the applicants were female, 6.08% of the total hires should have been female. This statistical approach to determining the percentage of females likely to be hired was offered by OFCCP's own expert, Dr. Hoffman (TR at 2326-27). In light of the fact that it is possible to estimate with some degree of accuracy the *percentage* of the overall hires who, absent discrimination, would have been women, while also recognizing that it is virtually impossible to determine which of the 69 *individual* women applicants would have been hired, the class-wide approach is the most equitable. This classwide approach to calculating back pay awards has been accepted and utilized by many courts. *See, e.g. Dougherty v. Barry*, 869 F.2d 605 (D.C. Cir. 1989); *Pitre v. Western Elec. Co.*, 843 F.2d 1262 (10th Cir. 1988); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1986); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir. 1983); *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Thomas v. Christopher*, 169 F.R.D. 224 (D.D.C. 1996) (approving settlement based in part on classwide approach); *EEOC v. Spring and Wire Forms Specialty Co.*, 790 F. Supp. 776, 780 (N.D. Ill. 1992).

2. Determination of the amount and distribution of the total classwide award

Several approaches for determining and distributing a classwide award have been used by the courts, most based on the premises set forth in *Hameed v. International Ass'n of Bridge*,

Structural and Ornamental Iron Workers, 637 F.2d 506 (8th Cir. 1980), a racial discrimination case. In *Hameed*, the court based the back pay award on a classwide, "shortfall" approach. "Shortfall" in *Hameed* referred to the number of additional protected class members (in this case black applicants) the employer would have been expected to hire absent discrimination. The shortfall estimation in *Hameed* was computed by subtracting the *expected* number of successful black applicants (67)³ from the *actual* number of successful black applicants (22), amounting to a shortfall of 45 persons. *Id.*

The court then determined that the back pay for the entire class of black applicants should be calculated by computing as accurately as possible the lost earnings of the 45 shortfall applicants and dividing these lost earnings among the entire class of black applicants. To compute the class's lost earnings based on the facts in *Hameed*, the court proposed averaging, on a year-by-year basis, the aggregate earnings of randomly selected successful white applicants and subtracting from this sum the aggregate earnings of an equal number of randomly selected black applicants who were rejected for the program for discriminatory reasons. *Id.* at 520-21. However, the Eighth Circuit, not wanting to tie the district court's hands, gave the district court the latitude to distribute the back pay award in a more equitable matter if it could. *Id.* at 521.

Other courts have also used forms of the shortfall/pro rata approach in calculating the amount of the back pay award and the method of its distribution. As in *Hameed*, this approach requires an estimate of the total number of individuals in the protected group that would have been hired absent discrimination. This number is generally based on a statistical assumption accepted by the courts and, in this case, OFCCP's expert, that the percentage of women (or minority individuals in a racial discrimination case) hired should roughly equal the percentage of women who applied for the position (TR at 2326-27). See also *Thomas v. City of Evanston*, 610 F. Supp. 422, 435-36 (N.D. Ill. 1985). *Catlett v. Missouri State Highway Comm'n*, 627 F. Supp. 1015, 1018-19 (W.D. Mo. 1985); *Patterson v. Youngstown Sheet and Tube Co.*, 475 F. Supp. 344 (N.D. Ind. 1979). Then the shortfall number is calculated by subtracting the number of actual female hires from the number of expected female hires. The back pay award can then be calculated based on the shortfall number through one of two methods. In the first method the shortfall number is multiplied by the salary or wages the position applied for was worth. See *Catlett v. Missouri State Highway Comm'n*, 627 F. Supp. 1015 (N.D. Ill. 1985). In the second method the total of the wages earned by actual hirees is multiplied by the percentage of female applicants who should have been successful absent discrimination; subtracted from this total is any amount that any actual female hirees did earn. See *Thomas v. City of Evanston*, 610 F. Supp. 422 (N.D. Ill. 1985). Either method should produce the same results.

The back pay award can also be computed on the basis of the shortfall percentage, rather than the shortfall number. The shortfall percentage is the difference between the percentage of the protected class that would be expected to be hired absent discrimination minus the percentage

³The expected number of successful black applicants was based on the percentage of blacks in the applicant pool.

of hirees in the protected class that were actually hired. The back pay determination based on shortfall percentage is calculated by taking the amount of total earnings by all hirees during the applicable time period and multiplying that number by the shortfall percentage. See *EEOC v. Spring and Wire Forms Specialty Co.*, 790 F. Supp. 776, at 780 (N.D. Ill. 1992). Under any of these approaches, the back pay amount is then distributed equally among the class members. See *Catlett*, 627 F. Supp. at 1019, *Thomas*, 610 F. Supp. at 437.

3. Calculation of back pay in this case

In this case, back pay will be determined in accordance with the methods described in the above cases, with particular reliance on the approaches used in *Hameed* and *Spring and Wires Forms Specialty Co.* As discussed earlier, Dr. Hoffman determined that of 1134 total applicants for the helper 2/c position, 69, or 6.08%, were female (TR at 2326-8). Using this statistic, both OFCCP's expert and the Secretary found that JSI should have hired approximately 12 women from the applicant pool (TR at 2326-28; *Secretary's Decision* at 10 n.8).⁴ Of the total number of helpers 2/c hired three were women.⁵ Therefore, JSI's 1985 female hiring "shortfall" number is nine women.

The shortfall percentage can also be computed from these statistics. The three women hirees constituted only 1.57% of the total hirees, whereas absent discrimination it can be statistically presumed that 6.08% of the hirees would have been women. Therefore, the shortfall percentage is 4.51%.

Next, the amount of the class award needs to be determined. Both JSI's expert and OFCCP's expert agreed that the total amount of earnings of all 1985 hirees from the 1985 to 1990 period approximated \$1.1 million dollars (see revised DX 272 at 5; TR at 3013). Dr. Haworth's revised Table HD-2 calculated the exact amount of wages paid out to 1985 hirees during the 1985 to 1990 period to be \$1,181,950 (see revised DX 272, at 5). The total back pay award to be divided among the class members can be derived by multiplying the total value of the earnings by the actual 191 hirees, or \$1,181,950, by the shortfall percentage, 4.51%,⁶ which

⁴Actually, according to Dr. Hoffman's testimony, 11.6 women should have been hired absent discrimination. The Secretary rounded this number to 12 women.

⁵Although the Secretary stated "[o]f the total number hired as Helpers 2/c, 191, 2 were women and 189 were men" (*Secretary's Decision* at 10), the Secretary later stated:

I agree with the ALJ that one woman, Kelly Rensdell [*sic*], who applied late in 1985 and was hired in 1986 . . . should be counted as a hire for purposes of this case." (*Id.* at 12 n.11.)

⁶ This method is same used in *EEOC v. Spring and Wire Forms Specialty Co.*, 790 F. Supp. 776, at 780 (N.D. Ill. 1992).

equals \$53,305.95. This sum shall be subject to simple pre-judgment interest. The interest rate is to be the IRS adjusted prime rate. *See* 29 C.F.R. §20.58.

B. Determination of Class Members and Distribution of the Classwide Back Pay Award

1. Determination of Class Members

When a classwide approach to calculating back pay has been chosen “the determination of which employees are entitled to be included in the class receiving back pay becomes crucial.” *Stewart v. General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976). This can require some individual inquiry into employment history. *See Pettway*, 494 F.2d at 261-62, n.151. However, in this case that individual inquiry will be sharply limited. The Secretary found in his decision that JSI discriminated against helper 2/c applicants on the basis of sex (*Secretary’s Decision* at 19-20). The Secretary also found that there was no evidence that JSI required or preferred candidates with prior experience when JSI hired applicants for helper 2/c positions.⁷ (*Id.* at 13-15). Thus, it must be presumed that all female helper 2/c applicants are potential victims of discrimination.

While the baseline assumption for this case is that all female helper 2/c applicants are potential victims of discrimination, there are still valid reasons to exclude certain of the female applicants from the class. Excluded from the class will be female applicants who would not have accepted a job at JSI had one been offered, and those that did not meet JSI’s non-discriminatory minimum requirements for a helper 2/c position, *i.e.*, applicants who were not available to work all three shifts. Also excluded are those women whose earnings were significantly higher than the wages paid to helper 2/c’s during the period in question; these women clearly were not economically damaged by JSI’s discrimination and are not entitled to back pay.

The following twelve women are excluded from the class:

1. Jennifer Cook. Ms. Cook is excluded from the class based upon her testimony that she was afraid of heights and would not work on scaffolding at a height higher than six feet. (TR at 776-77.) Therefore she could not perform the tasks required of a helper 2/c.

2. Darlene (Ricks) Hodges. Ms. Hodges was excluded from the class because of her lack of cooperation during the proceedings, including her failure to respond to a subpoena requesting documents concerning her wages during the time period in question. These documents would

⁷ As stated in the *Secretary’s Decision* “there are a number of examples of JSI hiring men without prior relevant experience, but passing over women who applied at the same time who had such experience.” (*Secretary’s Decision* at 13). The Secretary also included a chart in his decision which illustrated where women were not hired who had relevant experience while men were hired who had no relevant experience. (*See id.* at 14.) From these facts the Secretary concluded “JSI’s preference was not to hire people with relevant work experience, it was to hire men.” (*Id.* at 15.)

have provided information as to whether Ms. Hodges experienced any economic damage during the time period in question. Her related testimony was not credible. Her failure to comply with the subpoena or testify credibly prevented any determination of economic damage, thus she is excluded from the class.

3. Janice Fletcher. Ms. Fletcher is excluded from the class because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

4. Marie (Carter) Jones. Ms. Jones is excluded from the class based upon her testimony that she was told by various doctors not to lift objects heavier than 12-20 pounds and not to raise her arms above her head (TR at 1091-92). Therefore, she could not perform the tasks required of a helper 2/c.

5. Sharon Lewis. Ms. Lewis is excluded from the class based upon her testimony that she would not have accepted the position at JSI if it required her to climb a 10-foot ladder (TR at 1649, 1658). Therefore, she could not perform the tasks required of a helper 2/c. She also is excluded because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

6. Darlene Lockett. Ms. Lockett is excluded from the class because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

7. Iris Mack. Ms. Mack is excluded from the class based on her deposition testimony that she was planning on taking time off (which she did) in the months immediately following her application to care for her ill mother. (PX 168(a) at 33-34.) She would have been unavailable for the job had it been offered to her and should therefore be excluded from the class.

8. Susie Mae Mercy. Ms. Mercy is excluded from the class based on her testimony that she was not healthy enough to work when she applied for the job because of a medical condition (TR at 3152-53). Therefore, she could not perform the tasks required of a helper 2/c.

9. Andrea (Mills) Jones. Ms. Jones is excluded from the class based on the evidence that she passed her physical, but then decided that she was no longer interested in the job (TR at 438).

10. Sheryl (Foster) Mills. Ms. Mills is excluded from the class based on the her testimony that jobs in several of the departments where helper 2/c's worked were too heavy for her to undertake (TR at 612-14). Therefore, she could not perform the tasks required of a helper 2/c.

11. Sharon Renee Norris. Ms. Norris is excluded from the class based upon her testimony that she would not have worked the 3:00 PM to 11:00 PM shift (TR at 3175-78). Therefore, she could not meet pre-condition required of hires for the helper 2/c position.

12. Mary Smith. Ms. Smith is excluded from the class because her earnings during the time period in question were significantly higher than the wages paid to a helper 2/c. (*See* revised DX 276; PX 105.)

The following women are included in the class of female applicants who were discriminated against by JSI and should share in the classwide award:

1. Linda Batten
2. Barbara (Miles) Began
3. Betty J. Bentley
4. Katurah Blue
5. Sonya Brackett
6. Cheryl Diane Branch
7. Rowena (Brown) O'Neal
8. Janice Butler
9. Teresa (Woods) Crosby
10. Serena (Dunn) Dotson
11. Wilma Jean Dunn
12. Velma (Jackson) Ellison
13. Vickie (Mills) Gerhart
14. Pamela Goodwin
15. Paula Hill
16. Willie Mae Hines
17. Janna Mary Howell
18. Kay Johnson
19. Sandra Jones
20. Tina Marie Love
21. Betty Jean Manning
22. Brenda Martin
23. Nan (Brink) Murphy
24. Melanie Murray
25. Margaret Musselman
26. Theresa (Diotte) Potter
27. Carla Steward Purdy
28. Karen (Williams) Rodriguez
29. Mary (Houston) Rouse
30. Carrie Scott
31. Bobbie Jean Simpo
32. Lovely Taft
33. Diane Thompson
34. Downetta Trotter
35. Pamela (Lewis) Weathington

- 36. Linda (Ducharme) Wendling
- 37. Mary Catherine West
- 38. Joyce Anita Williams
- 39. Mary Alice Williams
- 40. Norma Jean Williams

2. *Pro rata share*

As discussed above, it is virtually impossible to tell with any certainty which of the above 40 women would have been hired by JSI absent discrimination. Therefore, the most appropriate means of distributing the back pay award is on an equal, pro rata basis. Accordingly, the back pay award of \$53,305.95 plus pre-judgment interest shall be divided equally among the 40 eligible class members.

II. Bankruptcy

I find that the automatic stay provision of the Bankruptcy Code does not affect this proceeding because of the exceptions contained in 11 U.S.C. Section 362(b), which states in part:

(b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay --

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.⁸

This proceeding falls under the Department of Labor's regulatory authority, and therefore is excepted from the automatic stay. Other courts have held that similar Department of Labor proceedings were excepted from the automatic stay provisions of the Bankruptcy Code. See *Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782 (10th Cir. 1991); *In Re: James H. Crockett, Debtor*, 204 B.R. 705 (Bank. W.D. Tex. 1997); *Martin v. Safety Electric Construction Co.*, 151 B.R. 637 (Bank. D. Conn. 1993); *Dole v. Hansbrough*, 113 B.R. 96, (Bank. D.D.C. 1993). Of course, collection of the back pay award must proceed according to normal bankruptcy procedures. *Martin*, 151 B.R. 637, at 638.

III. Debarment

⁸ 11 U.S.C. 362 (b) (4) & (5).

OFCCP requested in its brief that JSI be debarred if it fails to comply with the final order in this case within 60 days. In light of the fact that JSI is in bankruptcy, which takes its ability to comply with my Order out of its hands and places it in the hands of the bankruptcy court, I find that debarment is not appropriate in this case. An additional fact that renders the debarment issue moot is that JSI has ceased its operations (*see* Plaintiff's Response to ALJ Inquiry Concerning Feasibility of Back Pay Order at 1).

RECOMMENDED ORDER

It is recommended that JSI be found liable for back pay in the amount of \$53,305.95, which shall be subject to simple pre-judgment interest pursuant to 29 C.F.R. 20.58, to be equally divided among the 40 women listed above who belong to the class of women applicants whom the Secretary found were discriminated against in the hiring of helper 2/c positions.

JEFFREY TURECK
Administrative Law Judge



U.S. Department of Labor

Office of Administrative Law Judges
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Newport News, Virginia 23606-1904



TEL (757) 873-3099
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Date: July 19, 2000

Case No.: 1997-OFC-0006

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
Plaintiff,

v.

INTERSTATE BRANDS CORPORATION,
Defendant.

Appearances:

John Black, Esq.
Melissa Anderson, Esq.
For Plaintiff

Leonard Singer, Esq.
Jennifer Robinson, Esq.
For Defendant

RECOMMENDED DECISION

The Office of Federal Contract Compliance Programs, United States Department of Labor ("Plaintiff" or "OFCCP"), filed a complaint pursuant to Executive Order 11246 and regulations found at 41 CFR chapter 60, alleging that Interstate Brands Corporation ("Defendant" or "IBC"), violated the executive order at its Florence, South Carolina bakery

by discriminating against minorities in hiring for entry-level worker positions in 1992 and 1993.¹

On March 6-8, 2000, a hearing was held before me on the liability issue² in Florence, South Carolina, at which both parties were afforded a full opportunity to present evidence and argument.³ The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUE

Did Defendant discriminate against blacks in its hiring process in violation of the Executive Order?

STIPULATION

The parties have stipulated and I find that Defendant is covered by the executive order insofar as its hiring of workers during the period 1989-1994 is concerned (Tr. 20).⁴

¹ Because there are only a small number of non-black minority applicants, Plaintiff in its statistical analyses analyzed blacks versus non-blacks instead of whites versus minorities.

² By pre-hearing order, I ordered that the issues of liability and remedy be bifurcated.

³ By another pre-hearing order, I ordered that all proffered documentary exhibits be admitted subject to post-hearing motions to strike (Tr. 18-19). No motions to strike have been filed (Tr. 755). Defendant reduced some of its demonstrative charts (visual aids) and submitted them as JX 490-518. Plaintiff, given the right to move to strike any of them (Tr. 751), did not do so. Therefore, they are received into evidence.

⁴ The following abbreviations are citations to the record:

Tr. - Transcript of the hearing;
PX - Plaintiff's exhibits;
JX - Joint exhibits; and
DX - Defendant's exhibits.

FINDINGS OF FACT

The following is a summary of hearing testimony:

A. Testimony of Dr. Orley Ashenfelter

Dr. Orley Ashenfelter, Professor of Economics at Princeton University, teaches econometrics and labor economics (Tr. 23-4). He is also the Director of the Industrial Relations Section at Princeton (Tr. 24). Dr. Ashenfelter is the editor of the American Economic Review and a co-editor of the American Law and Economics Review (Tr. 25). He has written several papers that have been published in these reviews on topics such as trade unions and discrimination over time (Tr. 25-6). Dr. Ashenfelter's curriculum vitae is in evidence as PX 1-C.

Dr. Ashenfelter studied employment discrimination at the bakery in Florence using data provided by the company, such as job application forms, new hire lists, and pay rates (Tr. 30-1). He completed three studies: 1) a comparison of the hiring rate between black and white applicants; 2) a study of the correlation over time; and 3) a comparison of differences in employment over time. Each study required different work. David Ashmore, a colleague, worked out a coding and keying system to turn records into documents that could be machine readable (Tr. 31-2). That information was entered into a data base to use for analysis.

The results of the study showed statistical evidence of discrimination in hiring during some periods (Tr. 34). In the first period analyzed (from 1989 to 1994), the total number of applicants was 406, with 178 being hired, which is 43.8%. Of the 406 applicants, 287 were black, of which 111 were hired, which shows that there were fewer blacks hired than expected ($287 \times 43\% = 126$) (Tr. 35). The actual number of hires would never be anticipated to be the exact number expected using this formula. However, there is a simple statistical procedure called calculating the T statistic for determining when the difference is unusual (Tr. 35-6). The T statistic is a measure in standardized units of the difference between the actual number of blacks hired and the expected number. It is scaled into standardized units so that it can be compared against the random distribution that we would expect if the hiring were actually race neutral (Tr. 36). A T statistic which is larger in absolute value than 2 indicates that the chances that the difference observed are due to chance are fewer than 5 in 100. If the T statistic is larger than 2, then the

disparity is statistically significant at the 5% level and is unlikely to be due to chance (Tr. 36).

The 111 actual black hires in the 1989-94 period is smaller than expected, and the difference between black hires and expected black hires on the one hand and white hires and expected white hires on the other hand is large enough to be statistically significant. For the period 1990 through 1994, the number of applicants was 359, and the total hires was 156 or 43.5%. The number of black applicants was 264, which computes to 115 expected black hires. The actual number of black hires was 103, smaller than expected. The T statistic is 2.8, which is larger than 2, which in turn signals significance at the 5% level.

For the period 1992-93, the total number of applicants was 176 with 71 hires, or 40.3% hired. Expected blacks hired would be 49. The actual number of blacks hired was 37. This is statistically significant with a T value of 3.92.

For the years 1990, 1991 and 1994, there were 183 applicants and 85 hired, or 46.4% hired. The number of black applicants was 143, and the expected number of blacks hired would be 66. The actual number of blacks hired was 66. Thus, for the years 1990, 1991, and 1994, there is no statistically significant difference between the number of blacks actually hired and the expected number of black hires (Tr. 37-8).

The shortfall of actual black hires compared with expected black hires for the years 1989 through 1994 is unlikely to occur by chance if there was no connection between race and the hiring of the applicant group (Tr. 39).

Table 2 of PX 1, Dr. Ashenfelter's report, is a comparison of the percentage of black applicants hired in the period 1992-1993 with the percentage of non-black applicants hired during that same period, a gap of 31.2%. The same comparison for the years 1990, 1991 and 1994 showed a gap of 1.3%. The difference between these two groups of years is statistically significant (Tr. 44).

Dr. Ashenfelter corrected table 2, figure 1 of PX 1 to correct the 1991 figure to be 25, which means that the percentage black utilization figure should be 44% (Tr. 45). This figure shows the difference between the percentage hiring rate of blacks and that of non-blacks on the one hand, and the percentage of workers who were black at the end of the previous year on the other. Dr. Ashenfelter prepared a scatter diagram that shows on the Y axis the gap in any given year between the hiring rate of blacks and non-blacks. Where the difference is positive, the black/white percentage difference hired is positive. On the X axis is the percentage of all employees who were black at the end of the previous year. This graph shows that, when the percentage of blacks in the stock of employees at the end of the year was high, in the subsequent year the gap between blacks and whites was more negative. This suggests that there was a relationship, at least in these years, between the black/white difference in hiring rates and the percentage of workers in the stock at the end

of the previous year who are black. He ran a regression analysis and found that it does not appear to be a result of chance as judged by the significance level of 5% or smaller (Tr. 47-9). Even with the correction of the data in figure 1 for year 1991, it is still significant at the 1% level or smaller (Tr. 49).⁵

Dr. Ashenfelter could not offer an opinion as to why, during the period when the percentage of black workers on site was high, the rate of black hires was low, only that the data show this result (Tr. 50-1).

Table 3 of PX 1 is a study of whether the factors most commonly singled out as being of value to employers as useful predictors for productivity on the job (education and prior work experience) influenced the hiring rate (Tr. 51-2). Dr. Ashenfelter found that, of the 244 applicants, 184 black and 60 nonblack, the schooling level was higher for the blacks than for the non-black applicants, and experience levels are very similar for both (Tr. 53). Dr. Ashenfelter did not do the coding for Table 3; it was done by several people under David Ashmore's supervision (Tr. 57-8).

Table 4 of PX 1 is a study for the period 1989 through 1994 of the difference in hiring rates between blacks and nonblacks after controlling for level of education and months of prior work experience as a bake-shop helper, shipping clerk, or other work in a bakery (Tr. 58). The black hiring rate is 24 percentage points less than the non-black one for the period 1989 through 1994. The T statistic is 3.23, which is significant at the 1% and 5% levels. For the period 1992 and 1993, there is a 38% difference in hiring rates, blacks having a lower hiring rate in this period than non-blacks, with a T statistic of 3.83. The results in Table 4 indicate that experience and schooling do not explain the gap in hiring rates over these periods between blacks and non-blacks, and that gap is statistically significant (Tr. 59).

Dr. Ashenfelter did not study the company's hiring procedures; did not study the specific reasons the company gave for hiring or not hiring persons; did not study whether a particular person or group was responsible for hiring; did not study what any applicants or what any interviewer said in any interview; did not know of any way that the company treated any particular applicant differently from other applicants; and agrees that his report does not support the conclusion that any reason which IBC gave for hiring or not hiring a particular person was false (Tr. 69-70).

Dr. Ashenfelter lumped the years 1990, 1991 and 1994 together because the government asked him to (Tr. 70). One of the tests he performed showed that, for the

⁵ Significance at the 1% level means that the difference is statistically significant at the 99% confidence level (i.e., there are 99 chance out of 100 that the observed difference is not a chance occurrence).

period 1990 through 1994, there was no statistically significant disparity in job offers between blacks and whites (Tr. 71-2).

PX 1 Tab AA shows that: in 1990 there is not a shortfall of expected black hires; in 1991 there is a black surplus of one; and in 1992 there is a shortfall of three black hires, which is not statistically significant. For the period 1990-1992, discrimination in hiring was not statistically significant (Tr. 77-81). In 1994 there was a shortfall of one black hire (Tr. 83-4). Dr. Ashenfelter doubts, but is unsure, if the shortfall of five out of 125 hired during 1990-1994 is statistically significant (Tr. 84).

In 1990, of the total of 59 people to whom offers were made, 46 were black. This computes to a surplus of two (Tr. 86-7). In 1991 there was a surplus of one black hire of the people to whom offers were made (Tr. 88). This was probably not statistically significant (Tr. 88-9). In 1992 the number of blacks hired (27) was the same number as expected black hires (Tr. 89).

Dr. Ashenfelter was asked by the government not to include recalls as hires (Tr. 95-7). He was asked by OFCCP to study a certain thing and was given the data to do so. He was unaware of any other jobs that OFCCP may have audited (Tr. 107). Dr. Ashenfelter did not discuss any of the individuals responsible for hiring and their actual hiring because that information does not play a role in his design of statistical analyses (Tr. 108).

Dr. Ashenfelter was asked by OFCCP to study the bake shop helpers and the shipping clerks as entry-level jobs and to treat them as relatively similar. Where the table says "all applicants," these include bake-shop helpers and shipping clerks (Tr. 113-5).

B. Testimony of Lilly Viola Sports

Ms. Sports testified that she works for Interstate Brands as a personnel manager and has been with the company for 25 years (Tr. 123-4). As the personnel manager, her duties include hiring, employee benefits, the affirmative action program, safety, and workers' compensation issues (Tr. 124). During 1992-1993, she hired employees for the bake-shop-helper position (Tr. 124). She also maintained the records on the applicants hired as shipping clerks (Tr. 125).

A bake-shop helper takes the pans off the line as they come out of the ovens, catches the bread, and puts it into bags (Tr. 125). During the early 90's, there was no automatic pan stacker; so pan stacking was a duty of the bake-shop helpers. Once the bread was bagged, they would put it into trays for the shipping clerks to take to the trucks

(Id.). The term "bake-shop helper" is a generic term for any type of work that did not require operating machinery. They also sweep and clean the floors. This is an entry-level position in the production department (Tr. 125-6).

The hours and shifts in the bakery change due to production levels. They can change on a daily basis, and production at the bakery occurs seven days a week (Tr. 126). A bake-shop helper must be able to stand for long periods and be able to withstand extreme heat, which can involve temperatures of over 100 degrees (Tr. 127, 133). It is tedious, repetitive work (Tr. 130). Ms. Sports testified that she interviewed each applicant and decided whether they should be hired based on criteria such as prior work history, behavior during the interview, and references (Tr. 128-9).

During the interview, Ms. Sports inquires about the applicant's tolerance for heat, standing and repetitive motions. She also takes into account a person's size (Tr. 135). After she informs the applicants of the conditions of the work environment, she sometimes asks if they are still interested in the position.

She testified that one of the criteria she measures is whether the application is filled out properly. This is indicative of whether or not a person can follow directions (Tr. 137). Ms. Sports also found it very important that the interviewees remain alert and focused during the interview, as they would be required to stay alert for an 8-12 hour shift (Tr. 138). Education is a factor in hiring applicants as well (Tr. 140). Also, work experience is important in this type of position (Tr. 142). The bake-shop helper position has a maximum lifting requirement of 25 pounds, which Ms. Sports discusses with some applicants (Tr. 146).

Ms. Sports was not involved in the hiring of shipping clerks. However, she did keep all records on who were hired or not hired, and she may have called Job Services on occasion to have applicants sent over (Tr. 148). Most applicants are hired through Job Services, which is the South Carolina employment security agency (Tr. 148). When called, Job Services would send over a required number of applicants for interview (Tr. 149). Job Services would select which person interviewed for each position (Tr. 159). Individuals would fill out the applications at Job Services and bring a copy with them to the interview (Tr. 150). Ms. Sports did not get a copy of the applications ahead of time (Tr. 151).

To conduct interviews, Ms. Sports would contact Job Services and request that applicants be sent over every half hour for a certain amount of time (Tr. 154). She would then be given a list of names and the times when they were supposed to be there for their interview, which would take place in her office (Tr. 156-7). Ms. Sports would go over the applications with the prospective employees and determine by 1) the applications, 2) behavior during the interview, and 3) references which candidates would be best suited for the position (Tr. 158, 161).

Ms. Sports usually asks for references from each applicant and checks at least one (Tr. 164). When the most recent reference cannot be reached, she contacts a reference at the plant or the applicant for a different reference (Tr. 173-5).

Ms. Sports testified that she also calls Job Services for other department heads to interview for open positions (Tr. 177-8). The department heads at IBC interview and fill out essential functions accommodations sheets and administer tests if needed. After an employee is hired, the employee is then sent to the doctor for a physical and drug screen (Tr. 178-9). Also, for the purposes of the affirmative action program, an individual new hire report would be filled out which included the name, race and sex of the applicants (Tr. 184-5). Some applications were lost or misplaced, and the race and sex information did not make it to the new hire report (Tr. 333).

If an applicant came from Job Services to IBC for an interview and was hired, the applicant would be required to fill out a job application (Tr. 186). Ms. Sports decided that some applicants were not interested in the position that they applied for. For example, Keeshia Jordan applied for a job at the bakery, but Ms. Sports determined that she was not interested in the position because of the way she was dressed, her aloof manner during the interview, and her lack of factory experience (Tr. 188-9).

It is not unusual for IBC to hire a person without specific references from previous employers. Some businesses release no information other than when they worked there (Tr. 190-6).

During the hiring process, an application may be reviewed many times for different positions. If not hired for the first job, an applicant may be hired for a subsequent one (Tr. 197). There was some missing information from Sharon Dargan's file such as an interview form, telephone reference check form and her application (Tr. 198-9). On occasion, during the interview, applicants have changed their minds about interest in a position (Tr. 211).

After being audited in May of 1994 by OFCCP, Ms. Sports sent a letter with attachments explaining her hiring procedures and the basic skills necessary for certain positions (Tr. 213-4). She also wrote that some applicants only apply to maintain their unemployment compensation (Tr. 214). Ms. Sports interviewed an applicant that had poor references but was subsequently hired by another department (Tr. 215-20). She also interviewed a young man with no previous job experience and did not hire him (Tr. 221-5). She stated that some people want the pay but do not really want to work for it (Tr. 225). All information on the affirmative action form came from the individual new hire sheets.

In 1992 and 1993, Ms. Sports answered inquiries by applicants regarding their applications (Tr. 251). She was aware of speaking to applicants that she had interviewed but did not keep a record of which applicants she spoke with (Tr. 252). Ms. Sports believes that, if an applicant calls after an interview regarding the position, it should be

taken into account when making the hiring decisions. However, she did not put a notation in the applicants' files regarding phone inquiries (Tr. 253). A "recall" is someone who was laid off and then recalled to work (Tr. 254). She stated that recalls were generally not reinterviewed and did not fill out a new application unless they had been gone "an exceptionally long time" (six months or more) (Tr. 254).

When a supervisor requested more employees due to increasing work load, Ms. Sports would contact those employees who had been laid off in the last few months (Tr. 257). She told the laid-off employees what type of position was available and asked whether they were interested (Tr. 258). Ms. Sports began making the hiring decision for the bake-shop-helper position in April of 1990. However, during the first few months, she would seek the input of her supervisor or the plant manager regarding hiring decisions (Tr. 258-9). From the beginning of 1992 through July 16, 1993, Ms. Sports hired 20 new employees, 18 black, one Hispanic, and one white (Tr. 269).

Regular employees at the bakery have schedules that vary depending on production levels (Tr. 270). Certain times of the year are heavier than others, such as summer, when people like to cook out. Because of this, an employee's daily shift may lengthen (Tr. 271-2). The Florence (Merita) bakery supplies all of South Carolina.

The position of bake-shop helper is essential to the company's functioning. Bake shop helpers take the cooked bread out of the pans, catch bagged bread as it comes down a conveyer belt, and load the bagged bread onto stacked trays (Tr. 274-5). Bake shop helpers must be extremely careful while handling the bread as it is very soft even when 80-120 loaves per minute are coming down the conveyer belt (Tr. 276). Ms. Sports tries to make sure that all new applicants are aware of the extreme conditions of this job.

Once informed of the need for more employees, Ms. Sports would contact Job Services. IBC does not run an ad in the local newspaper. Job Services would send over as many applicants as requested, and Ms. Sports would conduct half-hour interviews with each potential employee (Tr. 277-8).

Hiring is not Ms. Sports' only duty. She is also the safety officer, in which capacity she makes sure that the plant follows OSHA guidelines. In addition, she handles workers' compensation claims and is responsible for the affirmative action program (Tr. 281). Ms. Sports is also the supervisor of the payroll department (*Id.*). She has taken part in union negotiations at the bakery but generally not in grievance meetings (Tr. 282).

An individual new hire report is done for each potential employee. Information from it is used to complete a lotus spreadsheet for the affirmative action program (Tr. 284). It includes minimal information such as race and sex but does not list why a potential employee was or was not hired. The applicant's information is chosen at random to complete new hire reports (Tr. 285-6).

Ms. Sports prepares new hire reports and keeps notes during interviews on things such as whether or not the applicant has a phone and how he/she is dressed for the interview (Tr. 288). She also notes whether or not the applicant can read, as reading is necessary to do the job (Tr. 290).

There is a collective bargaining agreement between IBC and the union. It provides for the termination of seniority in certain circumstances like an employee lay off for over 120 days (Tr. 315). The Bakery, Confectionery, and Tobacco Workers' Union contract with IBC contains this clause on page 4 (Tr. 317). There is also a non-discrimination clause on page 2 of the collective bargaining agreement (Tr. 319). Therefore, if a person loses his/her seniority, the corporation is under no obligation to rehire that person (Tr. 320). Ms. Sports testified that seniority is used for bid rights or possibly for promotion purposes. Seniority is also important when choosing vacation times (Tr. 321).

While heading the affirmative action program, Ms. Sports was required to produce a chart that reflected the representation of minority persons in each job category (Tr. 324). During the period 1990 through 1994, the company was overrepresented according to availability (Tr. 324).

A shipper/switcher is a shipping clerk who can drive a truck in the yard. He loads and unloads the vehicle as well (Tr. 325). Mr. Taylor handles the hiring of the shipper/switchers and has done so since 1990 (Tr. 326). Shipper/switchers may advance and be promoted to a relay driver position that actually takes them out onto the road. They deliver and unload the bakery items (Tr. 326). Of 125 shipper/switchers hired from 1990 to 1994, 94 were black (Tr. 328). According to Ms. Sports, in 1994, 66% of the new hires were black (Tr. 329).

Ms. Sports never administered any reading tests. She would either ask the applicant or would surmise from the applicant's verbalization abilities whether he/she could or could not read (Tr. 334-5).

At some time, Ms. Sports began writing "B/M" or "W/M" instead of "black male" or "white male" on applications (Tr. 352). She testified that she was not told to do this but did it to save writing time (Tr. 353). Eight factors are used by the affirmative action program for the availability of jobs to minorities (Tr. 354). In 1990-91, the availability factor was 50% black. However, more than 50% of the applicants were black (Tr. 355). This had nothing to do with Ms. Sports' hiring practices, as she testified that she "always tried to hire the best qualified person for the job..." (Tr. 356). There were times during the period 1990-1994 when IBC may have been "underutilized," in which case, she would have attempted to hire more minorities.

Ms. Sports testified that she never destroyed any documents pertaining to this case. If an application is missing, this is because it was lost or misfiled (Tr. 359). She believes that she is a good personnel manager (Tr. 360).

C. Testimony of Teresa McAllister

Ms. McAllister testified that she went to Job Services in March of 1993 to apply for a job at the Merita bakery in Florence (Tr. 364). She did not have a job at the time and had previously worked at Hardee's (a fast-food restaurant) and Harris Teeters (a grocery store) (Tr. 365). She testified that she was contacted and subsequently interviewed by Ms. Sports at the Merita bakery. Ms. McAllister stated that the only thing that she remembers speaking about were the hours required (Tr. 366-7).

Ms. McAllister gave a reference from each job that she had previously held (Tr. 368-9). She testified that she called Merita three times a week to see if she would be offered a job, but no one ever returned her calls, and she only spoke with the secretary (Tr. 371).

Ms. McAllister testified that a couple of months prior to the hearing, a woman contacted her mother, who in turn contacted her regarding this case (Tr. 379). She received a letter telling her when the court date was and when she needed to appear to testify. Ms. McAllister could not remember when she received the letter. When she met with Mr. Black, he went over her IBC application form with her. She originally contacted the government regarding this case because she saw her name in a newspaper ad taken out by the Department of Labor (Tr. 381-3).

D. Testimony of Christopher Columbus Bivens

Mr. Bivens applied for a job at the Merita bakery in February of 1992 (Tr. 387). He had his chauffeur's license and was applying for a job as a delivery driver or factory worker (Id.). He had just moved to Florence from Miami and was told that the bakery was hiring at that time (Tr. 388). During his interview with a man (possibly a Mr. Graham), he was asked if he had any experience driving trucks or working at a bakery. He had some experience working with trucks (Tr. 388-9). The interview lasted approximately 15 to 20 minutes, and the interviewer said that he would contact him (Tr. 389-90). Once, after the interview, Mr. Bivens called to check on his application but never heard back from the company (Tr. 390).

Mr. Bivens testified that one Vernon Jones had referred him to the bakery for a job (Tr. 394). At the time, Jones was an employee of the company. Mr. Bivens is currently working at Triple R Farms (Tr. 395). He was contacted by mail regarding this case. Enclosed in the mailing were some forms which his wife filled out and mailed back (Tr. 397-8). Mr. Bivens met with Mr. Black in or around January, 2000. They discussed the application, and he was told that the government needed his help "with trying to find out why...minorities or blacks have not been hired by Merita Bakery" (Tr. 399).

E. Testimony of David Lee Nixon

Mr. Nixon testified that he applied for a job with Merita bakery in April of 1993 (Tr. 402). He actually applied at Job Services and was sent to the bakery for an interview. He had initially requested a truck-driving position, but the only position available was that of bake shop helper (Tr. 402). He attended class on Tuesday nights for the police reserve program (Tr. 403-4).

Mr. Nixon stated that, during the interview, he was asked questions regarding his ability to work in the heat, to handle extensive standing, and to work on short notice (Tr. 404). The interview lasted 20-25 minutes, and the interviewer said that she would contact him about filling in for someone who was going on vacation during the summer (Tr. 405). She asked him if he was interested in the position, and he stated that he was. After his interview, Mr. Nixon called and visited the bakery regularly, checking on the status of his application (Tr. 405-6).

Mr. Nixon stated that he met with the government regarding this case but was unable to remember when. He also stated that he could not remember when he filled out his application for the position at Merita or where he applied for a job after submitting his IBC application (Tr. 408-9). He was later employed by Advanced Security, Inc. and Power Security but was unsure about those dates as well (Tr. 409-10).

Mr. Nixon was sent over by Job Services to interview for the position at IBC and was only asked about references at Job Services, never during his Merita interview (Tr. 410-11). Yet, on the application he filled out at Merita, one of his references is written in a handwriting other than his own (Tr. 412-14).

F. Testimony of Lechone Alston

Mr. Alston applied for a position through Job Services as a bake shop helper at Merita Bakery in August, 1993 (Tr. 417). He testified that he was interviewed at the company by Ms. Sports for about 5-6 minutes. He was told about the conditions and what the job entailed, was asked if he was interested in the position, and was told he would be contacted in one or two weeks (Tr. 418-9).

Mr. Alston testified that his only prior work experience had been one week at McDonald's (Tr. 420). Due to his lack of work experience, he listed school teachers as references. He informed the interviewer that he could work as needed (Tr. 421). He was actually told about the positions available at Merita by his grandfather, who in turn was told by a friend (Tr. 424). Mr. Alston previously met with the government attorney at a hotel two weeks prior to the hearing to go over his application and testimony for the first time (Tr. 424-5).

During his interview at Merita, Mr. Alston informed Ms. Sports that he knew two employees who worked at the bakery (Tr. 425-6). He also told her that he did not get along well with his supervisor during his week at McDonald's. He could not remember the supervisor's name (Tr. 427).

Mr. Alston did not remember being asked whether he was interested in the position. He stated that he wore a suit and tie to the interview, was well mannered and spoke clearly (Tr. 428). Working in the heat would not have bothered him (Tr. 429).

G. Testimony of Sharon Evette Dargan

Ms. Dargan testified that she applied for a position at Job Services for a position at Merita Bakery in March of 1993 (Tr. 433). She was interviewed by Ms. Sports and was told that the position required the applicant to be able to lift 70 pounds, work strange hours, and have reliable transportation (Tr. 434-5). After the interview, she was told that she was "too light for the job" (Tr. 435).

Previously, Ms. Dargan had worked as a clothing inspector at Klear Knit. There she was required to lift bundles of clothes weighing 15 to 20 pounds (Tr. 435-6). Prior to this, she worked at a day care center with children from ages 6 weeks to 4 years. Ms. Dargan testified that an average four year old weighs 50 pounds and that she would be able to lift 70 pounds (Tr. 436). She was asked if she was interested in the position and if she was available to work on call but never about her references. Ms. Dargan never called regarding her application and was never called by Merita (Tr. 437-8).

Ms. Dargan was originally contacted by the Department of Labor approximately three weeks prior to the hearing (Tr. 439). She was shown her application from March of 1993 and spoke with Mr. Black about it for 20 minutes.

She applied for another position through Job Services with a factory in Irby but is unable to remember the name of the factory (Tr. 440). Ms. Dargan has three friends who work at Merita, all of whom are black (Tr. 441). She subsequently worked at Kids World, a day care center, from 1983 to 1987. She also worked at Klear Knit but was fired in January of 1992 for work that was unsatisfactory (Tr. 441-2).

Ms. Dargan testified that, on the reference page of her application, a phone number was written next to Klear Knit by someone other than her. She did not list any work between her firing at Klear Knit in January of 1992 and the date of her application at Merita in March of 1993 (Tr. 442). Ms. Dargan wore a pair of jeans and tennis shoes to her 1993 interview with Ms. Sports (Tr. 443).

H. Testimony of Tyrone Demetrius Baker

Mr. Baker testified that he went to Job Services and applied for a baker's helper position at Merita Bakery in Florence, SC in July of 1993. He heard that there were positions available and had previously been a baker in the Navy (Tr. 445). Mr. Baker was called for an interview, came to the bakery, and spoke with Viola Sports (Tr. 446). During the interview, he was asked questions about previous work experience and his temperament and was told that the job required working under extreme conditions such as heat (Tr. 447). The interview lasted approximately 15 minutes. He did not recall being asked if he was interested in the position (Tr. 448). Ms. Sports did not inquire about his availability to work on call, but Mr. Baker stated that he would have been able to work any shift (Tr. 449). He called a few times after the interview and asked a friend who previously worked there to put in a good word for him (Tr. 449-51).

Mr. Baker was subsequently contacted by Merita and was asked to come in for a drug screening. He went to Merita for a second interview, filled out a second application and completed the drug screening test (Tr. 451-2). He began work shortly after as a bread catcher at the bakery. He worked there for two months. His job was to stand at "the end of a conveyor belt where bread came already wrapped and ...put it in a tray and stack it" (Tr. 453). Working mainly third shifts, he also pulled hot pans of rolls from the ovens (Tr. 453).

Mr. Baker testified that all employees working as bread catchers and pan catchers were black (Tr. 454). There were five or six lines of bread catchers and approximately 20 - 30 pan catchers (Tr. 454-5). He was laid off after two months and never recalled to work (Tr. 455).

Mr. Baker was not aware that his job was covered under a union contract. In addition, he did not complain to EEOC about discrimination and did not know that the previous 17-18 employees hired by the company were all black. He was also unaware that any other employees lost their jobs at the time he was laid off (Tr. 459-62).

I. Testimony of Theresa J. Armijo

Ms. Armijo is an employment opportunity specialist with OFCCP (Tr. 464). She has been with the Department of Labor since June of 1979. Her job is to conduct compliance reviews of federal contractors to ensure compliance with the equal opportunity regulations (Tr. 464). She reviews the company's affirmative action program, looks at personnel data, and goes over interviews with management personnel (Tr. 465).

This case was assigned to Ms. Armijo in early 1994 (Tr. 465). The compliance review consisted of "a review of the company's affirmative action program, analysis of its personnel policies and procedures and activity, and management reviews and employee interviews" (Tr. 466). Ms. Armijo reviewed the 1992 and 1993 affirmative action plan and personnel information. These years were chosen because OFCCP practice was to look at the prior year's affirmative action plan and the current year's if it is at least six months into the current year (Tr. 467). The statistical results initially indicated an adverse impact against minorities in labor jobs at Merita (Tr. 469). She subsequently made revisions to her report and gave the company the opportunity to defend itself (Tr. 470-1).

Ms. Armijo studied many different job classifications at the bakery, including executives and managers, transportation, operatives, engineering, maintenance, and the route sales group (Tr. 472-3). No discrimination was found in any of the listed groups. While at the bakery, she interviewed Ms. Sports and other employees, looked at documents and could find no specific data showing that the company discouraged any group of people from applying at Merita (Tr. 474-5).

Ms. Armijo had stated in her deposition that Ms. Sports interviewed all applicants for the bake-shop-helper position, and Ms. Armijo had no information that Ms. Sports was asking different questions of black and whites (Tr. 476-8). She has never met an employer who does not interview applicants but just hires them off the street (Tr. 479). Ms. Armijo

was aware of the union contract that allowed employees to change jobs at the bakery based on seniority (Tr. 480).

She also testified that Job Services chooses who is sent over based on the qualifications given to them by the company requesting applicants (Tr. 481). In reviewing the interview notes, Ms. Armijo did not find any information written down by Ms. Sports during interviews that was false or misleading regarding references or regarding whether or not the person was interested in the position (Tr. 481-3). Ms. Armijo finished working on the case in 1995 after collecting data from questionnaires sent to applicants at Interstate Brands (Tr. 485-6). She testified that the company does not have any discriminatory procedures of termination, promotion or hiring (Tr. 486-7).

Ms. Armijo testified that Ms. Sports did not turn over some documents initially requested such as the interview sheets, which she saw for the first time the day of the hearing (Tr. 487-8). When she asked Ms. Sports for the applicant flow chart, she also asked for information that Ms. Sports used to prepare this form. Ms. Armijo was not given that information. The individual new hire sheets are one example (Tr. 488-9).

Ms. Armijo based her findings of discrimination on the new hire logs and the applicant flow chart (Tr. 490-1). In 1992, when the government did its statistical analysis of the bake shop helper position, it was 78% black, which shows that blacks were not underrepresented (Tr. 491).

Ms. Armijo used the applicant flow information and the hire information to calculate the significance of the discrimination.

She has had informal on-the-job training but no formal training in statistical analysis (Tr. 492-3).

J. Rebuttal Testimony of Viola Sports

Ms. Sports testified that she never told any applicant that the bake-shop helper position required that a person be able to lift 70 pounds (Tr. 501). She has hired many blacks who were unable to lift 70 pounds and does not believe it to be a requirement (Tr. 501-2).

Ms Sports reviewed a letter sent to Mr. Baker advising him of his lay off effective September 15, 1993. He was then sent a second letter advising him that the third shift he

worked had been terminated and that personnel would recommend rehire on another shift (Tr. 502-3). A recall letter was sent to Mr. Baker in January of 1994, and he subsequently worked two days during the week of January 8, 1994, contrary to Mr. Baker's testimony (Tr. 503-4).

Ms. Sports testified that the job application referred to by Mr. Nixon was not given to him by IBC but by Job Services (Tr. 505). The names written on the application were written by Ms. Sports and could not have been written before the interview (Tr. 506).

The "date hired" at the top of the applicant flow chart is the date on which the employee started work, not the date on which the position was offered by Personnel (Tr. 506). The reason for the two separate dates is that each applicant must undergo a drug screening and a physical before actually beginning work (Tr. 507).

There are also office jobs at the bakery. They include accounting work. Office workers are trained to work at the Thrift Stores selling bread products as well (Tr. 507-8). This is an entry level position with Merita.

Ms. Sports does not prepare the company payroll, nor does she make entries regarding hours worked by employees (Tr. 508-9). Her department provides supervisors with a list of names of employees in that area, and the supervisor keeps track of time for those employees (Tr. 509). Mr. Baker's name was handwritten on this time sheet because he was called back after the printing of the time sheet. According to the time sheet, he worked two days (Tr. 509-10). He would have been recalled by someone in the personnel department, but Ms. Sports does not recall who would have made that call (Tr. 510-11).

Ms. Sports was the supervisor of the payroll department. The W-2 information that is sent to employees is generated in the General Office in Kansas City from information gathered from the bakery (Tr. 513). A form is sent to the local bakery as proof that the W-2 was sent to the employee (Tr. 514).

K. Testimony of Dr. Bernard Siskin

Dr. Siskin is employed by the Center for Forensic Economic Studies, Inc., which specializes in the application of statistics to litigation (Tr. 516-7). He is the senior vice president in charge of the statistical group which deals with employment, credit discrimination and similar topics (Tr. 517). He has worked at the Center on a full-time basis since 1991. He also worked at National Economic Research Associates, Inc, a similar firm, and at Temple University in the Statistics Department (Tr. 517-18). He joined the faculty at Temple in 1968 and was chairman of the department when he left in 1984.

Dr. Siskin received his Ph.D. from the University of Pennsylvania in statistics, minoring in econometrics, which is the use of statistics in analyzing economic data (Tr. 518-19).

Dr. Siskin has written many articles on the application of statistics in the law, some dealing specifically with employment discrimination. He has previously been used by OFCCP as an expert witness as well as by most other government agencies and even by courts as an advisor (Tr. 519-20). Listed in his curriculum vitae is a case in which he was hired by the NAACP for statistical analysis (Tr. 522).

Regarding this case, Dr. Siskin read Dr. Ashenfelter's report, his rebuttal report, some exhibits, and testimony from depositions. There are many areas in which he and Dr. Ashenfelter agree (Tr. 523). He testified that they agree that "there is no statistical significance in the hiring rates" if there were no adjustments made for the job applied for or when they applied. They also agree that looking at the hires from 1990 to June of 1993, there was no significant difference by race in the hiring rates (Tr. 524).

Dr. Siskin testified, "if you look at the total time period and when you look at the data overall, what you see is a blip in the data, which occurs in July and August of 1993.... If you look at the total set of data over the whole time period, and adjust for offers, recalls, or any of the other factors they will wash out and no longer be significant" (Tr. 525). There is no significant statistical evidence of discrimination in Ms. Sports' hiring for the bake-shop helper position from 1990 to 1994 (Tr. 526-7).

Dr. Siskin stated that there were some areas in which he and Dr. Ashenfelter disagreed. There were some technical disagreements such as: the inclusion or exclusion of previous employees as applicants; the comparison of minorities versus non-minorities rather than blacks versus non-blacks; the inclusion of 1989 data; and the effect of which job was applied for and when (Tr. 528-30).

Dr. Siskin testified that Dr. Ashenfelter was pressed to find a reason why the statistical evidence from 1992 and 1993 was very different from 1990, 1991 and 1994. Dr. Ashenfelter came up with the theory that the plant had hired too many blacks and was trying to counter that in 1993 (Tr. 541-2).

Dr. Siskin was not sure why recalls were not included in Dr. Ashenfelter's study in that they were not different from new hires. They did not have rights of re-call, and they were reinterviewed and screened by Ms. Sports (Tr. 544). When Ms. Sports hired 19 minorities out of 20 applicants, it may have been because of the labor pool. Applicants with experience may have been hired, and most of those may have been minorities (Tr. 546-7). When listing the layoffs at the time of hire, there were 23 blacks and five whites, which is 82.1% black. Ms. Sports recalled 19 minorities and one white, which is 95%

minorities, a surplus of three blacks (Tr. 548). These 20 people were not included in Dr. Ashenfelter's report (Tr. 549).

Dr. Siskin saw no evidence of discrimination in Ms. Sports' hiring practices. She called Job Services and picked from the applicants that were sent to her. If referrals were all black, she picked a black and did not call Job Services to ask for more applicants in order to hire whites (Tr. 550-1). If anything, she discriminated against whites (Tr. 552).

The original complaint was discrimination against minorities. After looking at the data, the reports from Dr. Ashenfelter changed the allegation against IBC to discrimination against blacks (Tr. 552-3).

Looking at gross percentages of hires at the bakery, 72.2% were minorities for the entire period (1989-94), and 52.9% were minorities for the 1992-1993 period (Tr. 555).

In preparing exhibits DX 23-26, Dr. Siskin reviewed data on a month-by-month basis. Most hires were made within a few days of the interview; in fact, 87% of bake-shop-helper hires were made within 30 days (Tr. 580-1). He also stated that "...in August of 1990, nothing significant but...more blacks being hired than expected. You have a surplus running all the way through December of 1991. It becomes significant actually at seven. It starts to decline a little in 1992, still stays positive, never significant until you get to July and August, and it goes from minus-three back up to plus-five and it basically stays there" (Tr. 583).

Dr. Siskin described how the different data studied contributed to the differences in the experts' reports. Dr. Ashenfelter's argument is that recalls should not be included in the hiring data because they are hired through different processes (Tr. 599). If that is a correct assumption, why not include different jobs if the only thing that matters is the process by which they are hired? Mr. Taylor did the hiring for the shipper/switcher position as well. In 1992, ten minorities and seven whites applied for these positions. IBC hired four minorities and one white, one more minority than expected (Tr. 600-2).

Dr. Siskin testified that he found some of the data questionable. There was a jump in the figures when the bakery hired 19 minority call backs (Tr. 607). If you focus on 1991, the statistics show this "big favoritism of blacks;" just three whites applied and only one was hired, equaling 33% (Tr. 608).

Dr. Siskin found no importance or relevance to the studies that Dr. Ashenfelter completed (Tr. 613). Dr. Ashenfelter's studies focus on a two-month period, and, if such

a narrow time frame is studied rather than the five years when Ms. Sports was in charge of hiring, there is not enough information to reach an accurate conclusion (Tr. 613). He reviewed U.S. census data regarding hires in Florence and concluded that there was no company action in response to the "plant getting too black." He found that the first six months of every year were essentially the same (Tr. 614-5). Dr. Siskin testified that, if the hiring information were broken down into categories, blacks were more likely to receive an offer but not be hired (Tr. 615-6). They either failed the drug test or the physical or they just did not show up (Tr. 616). Both Drs. Siskin and Ashenfelter agree that, if just hires are compared, there is no disparity (Tr. 617).

Dr. Siskin never used 1989 data for his study (Tr. 627). The data were incomplete, and Ms. Sports did not begin working at the bakery until March of 1990. He was told that any previous time was irrelevant (Tr. 628-9). He also did not study the shipping-clerk and bake-shop helper positions together. Very few applicants applied for both positions (Tr. 630-1). Most applied for either one or the other. There was no evidence that Ms. Sports had any control over the applicants who applied for the shipping-clerk position (Tr. 632). Dr. Siskin testified that it was important to focus on the two-month period in question but to remember that this is not an isolated period and that one should review the entire time span (Tr. 635-6).

Dr. Ashenfelter completed a logistic regression study which focuses on the effect of education and prior experience on hiring percentages (Tr. 636-7). Dr. Siskin did not believe that this study was of any significance. He believes that the two-month time frame was too small, that education was minimal, and that it is very difficult to measure one's previous experience (Tr. 637-8). Dr. Siskin stated again that he has found no reason to suspect discrimination; in 1990, Ms. Sports overhired blacks; in 1993 she overhired whites. There is no evidence of a pattern of discrimination (Tr. 639-40).

Dr. Siskin explained that statistics are used to prove theories, not the other way around (Tr. 644). He did not produce any information regarding the shipping-clerk position (Tr. 651). He had the information "a long time ago" but did not complete a report on it until two nights prior to the hearing (Tr. 652-3).

Dr. Siskin offered his objections to comparing blacks versus whites in the study completed by Dr. Ashenfelter. The original complaint said minorities versus whites. He alleged that, after looking at the statistics of minorities versus whites, OFCCP changed the allegation to blacks versus whites in order to make a better case (Tr. 654-5). A complaint of discrimination should not just be against the company but should include individuals at the hiring level. He complained about the picking and choosing of certain dates and then locking those in so that the data could not be expanded (Tr. 656-9).

Dr. Siskin believes that it would be helpful to analyze each job separately. He stated in his report that "there are differences between blacks and whites in the jobs applied for and the number of job openings for each job" (Tr. 660).

Dr. Siskin testified that he was under the impression that Ms. Sports had made all of the hiring decisions from 1990 through 1994 (Tr. 671). However, information that she did not do so did not change his data or conclusions (Tr. 671).

Dr. Siskin testified that he thought it would be beneficial to look at subgroups of hirers, but this was not done in any analysis (Tr. 673). Dr. Siskin found that, when analyzing Ms. Sports' decisions regarding hiring over time, "...the pattern is not consistent with an allegation of a pattern and practice of considering blacks adversely where similarly situated in this process" (Tr. 679).

L. Recall of Dr. Ashenfelter

Dr. Ashenfelter testified that there are two or three main points on which he and Dr. Siskin disagree. He does not agree with the method which Dr. Siskin used to calculate his results. Dr. Siskin calculates a test statistic, gets the P value, and then reviews a normal table, working back to the number of standard deviations and the probability level (Tr. 684). Dr. Ashenfelter stated that this is not the normal way to report statistical results, and it is not done this way in the journals he has worked on (Tr. 684-5).

The next point of disagreement stems from a hypothetical chart in PX 2, table B (Tr. 688). The table was constructed to show that when you decrease the number of people studied, the ability to detect discrimination also becomes smaller (Tr. 689). Once a shortfall is discovered during a particular period, Dr. Ashenfelter believes, the appropriate thing to do is to check for an alternative explanation (Tr. 691). He took out the applicants per se and just studied their experience and education level to determine if they looked different over the course of the year between blacks and non blacks (Tr. 691-2). The qualifications studied did not show discrimination (Tr. 692).

Dr. Ashenfelter testified that there was not enough information about each recall for recalls to be included in the study (Tr. 700). He agreed with Dr. Siskin that there is no significant difference in the results of the study if the recalls are not used. Dr. Siskin's report which excluded data is not valid as it does not explain the potential problems over the two month period in 1993 (Tr. 701-3). Dr. Ashenfelter analyzed the data just from July

of 1993 and found that, on the whole, blacks were better educated, most having high school diplomas or GEDs, and had more experience (75 months for blacks and 69 months for whites) (Tr. 703-4).

In Dr. Ashenfelter's rebuttal report, he did not study August of 1990 when Ms. Sports hired 100% blacks even though she was still making the hiring decisions in July of 1993 (Tr. 714). The report also did not show what role prior bake-shop experience played in Ms. Sports' hiring decisions. In addition, he did not take into consideration how the applicant performed in the interview (Tr. 717-8).

Dr. Ashenfelter never tested the stated reasons why blacks were not hired because he was unable to code this information (Tr. 737-9). Coding information is often subjective, and any two people may see different things (Tr. 740).

M. Rebuttal Testimony of Dr. Siskin

Dr. Siskin testified that he chose his analytical method because that is the method used by the Supreme Court. It is common in literature and journals and is widely used in employment discrimination cases (Tr. 747-8).

N. Post-Hearing Deposition of Larry Bruce Taylor⁶

Larry Taylor, who lives in Fayetteville, North Carolina, is the distribution manager for IBC at the Merita plant and has been with the company for 27 years (JX 519 at 5). He was a foreman in Rocky Mount NC for 13-14 months; a foreman and assistant distribution manager in Charlotte NC for 2 ½ years; a distribution manager in Fayetteville for 5 years; and a distribution manager in Florence for 18 years (JX 519 at 5-6). He has been involved in the hiring process with IBC for over 20 years (JX 519 at 6). He stated that he has never been accused of race discrimination (JX 519 at 7).

⁶ The post-hearing deposition of Mr. Taylor was taken with my permission (Tr. 751-3) and, without objection, is received into evidence as JX 519.

The function of the Distribution Department is to receive produce and then distribute it to several warehouses, where it is then put into the retail markets (JX 519 at 7). Of seven supervisory positions under the Distribution Manager, five are held by blacks (JX 519 at 7). Positions such as shipping clerk, shipper/switcher and those in the transportation division fall under the Distribution Department (JX 519 at 8). The Assistant Distribution Manager, Mr. Graham, who is black, helps in hiring decisions, and his position was created for him (JX 519 at 8-9).

At present, there are 23 shipping clerks, 19 of whom are black and four of whom are white. There are 30 truck drivers, of whom 18 are black and 12 are white (JX 519 at 10-11). The shipping clerks are responsible for loading products onto trailers for distribution and for unloading trailers from sister plants (JX 519 at 11). There are packing slips that tell the shipping clerks how many trays of bread go into which trailer (JX 519 at 13). Accuracy is extremely important so that there is no waste or mistake with the orders placed by the route salesmen (JX 519 at 14).

There is a labor contract between IBC and the union. It sets forth a specified bidding procedure that states that open positions must first be posted at the bakery and employees from other departments must be given the opportunity to apply (JX 519 at 16). If IBC is unable to fill a position from within, it hires from the public (JX 519 at 17). Mr. Taylor testified that, when hiring from the outside, he first contacts Ms. Sports to let her know this, and she in turn contacts Job Services for applicants to be sent over.

Although some employees have fixed hours, those may change at any time as necessary. Production takes place 24 hours a day, seven days a week. Employees do not have two consecutive days off (JX 519 at 20).

Mr. Taylor interviews applicants in his office at the bakery. Normally, the applicant has filled out an IBC application. He follows the 3-A procedure. The three A's stand for appearance of the candidate, attitude of the applicant, and the application that the candidate has filled out (JX 519 at 21). He goes through the application line by line to avoid misunderstandings. The interview is a conversation between the applicant and Mr. Taylor (JX 519 at 22). He evaluates job history information and asks about previous job duties (JX 519 at 23-4). It is very important to Mr. Taylor that the applicant be able to work any time, day or night (JX 519 at 24).

Most shipping clerk positions being filled are currently full time. References are checked before applicants are offered positions (JX 519 at 26). Appearance is important. If the applicant comes to the interview dressed sloppily, it shows no preparation for the

interview (JX 519 at 28). "If he doesn't see the interview as important, he may not see his duties as being important" (JX 519 at 28-9). Attitude also plays a big role in the interview of potential employees. Mr. Taylor testified that he would not want to hire a person with a negative attitude because it could affect his job performance (JX 519 at 30).

Mr. Taylor follows the same general format for hiring for any position. However, he does inquire about the applicants' driving history when interviewing for the shipper/switcher position (JX 519 at 35). After interviewing all of the candidates, Mr. Taylor chooses the applicant whom he deems best suited for the position (JX 519 at 38). This chosen applicant must then complete and pass a math test that includes addition and subtraction, pass a reference check, and complete a physical that includes a drug test (JX 519 at 38-41).

A new hire report on all applicants is required. It is filled out by the interviewer and given to Ms. Sports (JX 519 at 42-3). The report includes the applicant's race and sex (JX 519 at 46). The purpose of the new hire report is to keep track of the number of applications that the company receives (JX 519 at 47). Because of the high turnover rate, it is very important to try to select the best applicant (JX 519 at 49).

Mr. Taylor testified that he hires the "best suited" candidate for each position (JX 519 at 80). He stated that he "...interviewed and hired based purely on suitability. Color, race never came into play at any time" (JX 519 at 81). All hiring decisions took into account only qualifications and suitability for the position. Applicants were sent over from Job Services without any regard for race or sex (JX 519 at 83). Taylor testified that, when more whites or blacks were hired, it could have been because a plant had closed somewhere in the area and white or black employees flooded the job market (JX 519 at 84).

Mr. Taylor could not explain why, during some periods, more whites were hired other than to say that he always hires the most qualified candidate (JX 519 at 85-7). Sometimes, applicants would come over from Job Services expecting to apply for one position and be considered and hired for another (JX 519 at 92).

During an interview, the judging of appearance is subjective (JX 519 at 96). He also subjectively evaluates attitude and body language (JX 519 at 97-8). He would never expect applicants to tell him that they are not interested in the job after going to the trouble to apply. However, if one did, it would be written on the job application or the new hire report (JX 519 at 99-100). An important aspect of the interview is truthfulness. If an applicant states a reason for leaving a job other than the one give by the previous

employer, Mr. Taylor notes on the new hire report that there was inadequate information. This gives the applicant the "benefit of the doubt" (JX 519 at 101-2).

Mr. Taylor only hires applicants best suited for positions. Why other applicants are not chosen is unimportant (JX 519 at 104). If an applicant failed the math test, the new hire report would probably state that he did not meet the basic job requirements (JX 519 at 106). Only after the applicant is selected for a position would Mr. Taylor, Mr. Graham or Ms. Sports call to check references (JX 519 at 107). Sometimes, only the most recent employer is contacted; other times, they contact all previous employers listed on the application (JX 519 at 108). All applicants are required to fill out IBC job application forms. If one were not on file for an applicant, it must be because it was lost in the shuffle of paperwork (JX 519 at 110). Mr. Taylor does not recall any individual applicants who applied during the 1990-1994 period (JX 519 at 112).

There are many reasons why Mr. Taylor would have noted on a new-hire report that an applicant did not meet the basic job requirements: he may have an allergy to flour dust; he may not want to work on Sundays, or he may not want to work at night (JX 519 at 115-6).

DISCUSSION

Background

In 1993, OFCCP notified Defendant that it would be auditing Defendant's Florence (Merita) bakery concerning Defendant's adherence to requirements of the executive order as to nondiscriminatory hiring (Tr. 465, 467). As a result of her audit, Equal Opportunity Specialist Theresa Armijo concluded that Defendant discriminated against minorities in hiring for laborer positions (Tr. 469-71). After a futile attempt to conciliate the matter, Plaintiff initiated this administrative action.

In its audit, Plaintiff looked at all of the job categories in the Florence bakery and concluded that Defendant discriminated in hiring entry-level laborers (Tr. 469-70). The two laborer positions for which Defendant hired outside applicants during 1992 and 1993 were bake shop helper and shipping clerk (JX 483, 488).⁷ Neither job had experience or education requirements (Tr. 140-2). The shipping clerk applicants had to take and pass

⁷ One person was hired as a garage helper in 1993 (JX 487). Apparently, he was not included in the statistical analyses of either party (see DX 7).

a written math test (JX 519 at 38-9). The bake-shop-helper position was a part-time job that required employees to be available to work any of the three shifts at the bakery. The job involved taking pans off the production lines, stacking pans, cleaning up, etc. as assigned (Tr. 125-7). Bake-shop helpers were "on-call."

The shipping clerk job involved pushing bread from the production department using a two-wheel dolly to trailers at the loading dock. The shipping clerks also loaded and unloaded trailers at the dock and performed some general cleaning duties (JX 519 at 11). During 1992 and 1993, Defendant relied primarily on Job Services, a South Carolina state employment service, as a source of applicants (JX 519 at 18). Previously, in 1990, some applicants applied for bake-shop-helper positions in response to newspaper advertisements (JX 470). In 1991, most hires were recalls of people who had been laid off (JX 477). Ms. Viola Sports, the personnel manager, usually interviewed for bake-shop-helper positions, and Larry Taylor did most of the interviewing for shipping clerk positions (JX 519 at 18; PX 7 at 2).

During her interviews, Ms. Sports usually determined the applicant's previous job experience and informed him/her that the bake-shop-helper position involved a great deal of standing and working in a hot environment (Tr. 157-8). For his part, Mr. Taylor gave a math quiz during his interviews, though he could not recall any applicants who failed the quiz (JX 519 at 106-7).

In all cases, Defendant allegedly attempted to verify job references. This typically involved contacting the most recent employer listed on the job application (Tr. 164, 172-3; JX 519 at 26, 40).

After deciding to hire a particular applicant, Defendant made a job offer conditioned on the applicant's successfully passing a physical examination, including a drug test (PX 3 at 21, 22).

Plaintiff investigated Defendant's hiring practices at the Merita bakery for the period January 1, 1992 through December 31, 1993. This period was allegedly selected based on OFCCP policy, which requires an analysis of the current affirmative action program year and the preceding year (Tr. 467ff.). This decision has been the subject of considerable controversy in this case because Defendant has argued that the proper period for analysis should also include 1990, 1991 and 1994, the last of which was the year following the audit. Defendant also argues that it made most of the bake-shop-helper and shipping-clerk hiring decisions during the entire period 1990-1994, which period provides more data for analysis.

To make its case, Plaintiff relied heavily on the testimony and report of its expert statistician, Dr. Ashenfelter (PX 1), whose evidence tended to show that, based on actual versus expected numbers of black and white applicants hired, black applicants were significantly less likely to be hired relative to expected hiring than were non-black

applicants for the period 1992-93 (PX 1, table 1). The difference was highly statistically significant at the one-percent level (Tr. 39-40). Defendant's statistical expert, Dr. Siskin, did not dispute this conclusion, although, of course, he did dispute whether the 1992-93 period was the appropriate period to be examined (DX 1, 31). In addition, although black applicants were statistically significantly less likely to be hired for the entire period 1990-1994, when the years 1990, 1991 and 1994 were separately analyzed, there were no statistically significant disparities for those years, either individually or as a group (PX 1).

Dr. Ashenfelter also found that the difference between the percentage of black applicants who were hired and non-blacks who were hired was 31.2% during the period 1992-93 (PX 1 at table 2). However, the difference between black and non-black hiring was only 1.3% during the years 1990, 1991 and 1992 (*Id.*). Dr. Ashenfelter found that the difference between the hiring differentials during these two periods was statistically significant at the five percent confidence level (*id.*). Dr. Ashenfelter also concluded that, when the percentage of blacks already in the positions in question was high, the percentage of blacks hired for these positions in the period in question was relatively low (*Id.* at figure 1). The relationship is statistically significant at the one-percent level (Tr. 48-9). This finding of Dr. Ashenfelter's gave rise to Plaintiff's theory that the shortfall of blacks hired during 1992-93 resulted from a conclusion on the part of management that the bake-shop helpers and shipping clerks at the Merita plant were "too black."

Dr. Ashenfelter also concluded that, as a group, black applicants had a somewhat higher level of education than non-black applicants and that black and non-black applicants had about the same amount of prior work experience (*Id.* at table 3).

Based on the above analyses, Dr. Ashenfelter concluded that there was statistical significance of discrimination in hiring of bake-shop-helper and shipping-clerk positions during the period 1992-93 (PX 1).

Defendant's expert, Dr. Siskin, testified that, although there was indeed a statistically significant hiring disparity in 1992-93, these disparities were not the result of discrimination because: a) there was no disparity in hiring for other periods during which Ms. Sports made hiring decisions; and b) there was no similar disparity during July and August 1993 in the hiring of shipping clerks (DX 1 at 68).

The Legal Framework

In this kind of case, the plaintiff must demonstrate that an employer treats some people better than others on the basis of race, color, religion, sex or national origin. International Brother of Teamsters v. U.S., 431 US 324, 335, n.15 (1977). Proof of discriminatory intent is required, but such proof can be based on circumstantial evidence,

including statistical evidence. An unlawful motive may be inferred from a showing of a disparity between class members and comparably qualified members of a minority group. Hazelwood School District v. U.S., 433 US 299, 307 (1977).

Indeed, a prima facie case of a pattern or practice of discrimination may be entirely statistical. Hazelwood, supra; OFCCP v. Greenwood Mills, Inc., No.89-OFC-39, slip. op. at 21-2, 45 (Secretary, 1995). A statistical disparity in treatment of minorities may have one of the following three explanations: 1) it is the product of unlawful discriminatory animus; 2) there is a legitimate nondiscriminatory cause; and 3) it may be the product of chance. Palmer v. Schultz, 815 F. 2d 84, 91 (D.C. Cir. 1987). If the disparity is large enough, that is, if the probability that it resulted from chance is small enough, a court will infer that the disparity has been caused by unlawful animus. Hazelwood, supra, 433 US at 307-8. In Hazelwood, supra, the Supreme Court held that a disparity of two or three standard deviations is sufficient to establish a prima facie case of unlawful discriminatory animus.

Once the plaintiff establishes a prima facie case, the burden shifts to the employer to rebut it by showing that somehow the plaintiff's statistical evidence is inadequate. Greenwood Mills, supra, slip. op. at 22. The employer can do this by attacking the plaintiff's statistical methods or by showing that the disparity resulted from a legitimate non-discriminatory factor. Palmer v. Schultz, supra, at 99.

If the employer proffers evidence that the disparity was indeed caused by a legitimate reason, the plaintiff can still prevail by showing that this reason is but a pretext for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 US 792 (1993).

Plaintiff's Prima Facie Case

I find that Plaintiff has made a prima facie case. Dr. Ashenfelter's evidence, which is not rebutted on this point, establishes that, during 1992-93, Defendant hired black applicants for the position of bake-shop helper and shipping clerk at a rate that was statistically significantly lower than that for non-black applicants (PX 1, tables 1 and 4). The standard deviation ("t-statistic") exceeds 3.8 (Id.). This is a sufficient prima facie case. Hazelwood, supra; Greenwood Mills, supra.

Defendant's Objections

In rebuttal, Defendant challenges Plaintiff's prima facie case on a number of grounds, which I will consider in turn:

1. IBC challenges the choice of the years 1992-93 on the grounds that this period is not representative of the company's hiring practices.

Plaintiff defends its choice of the 1992-93 period on the grounds that a) it was "neutrally selected" in accordance with Department of Labor (D.O.L.) policy and procedure and b) the evidence is clear that this two-year period was different (Plaintiff's brief at 18).

The risk of selectively analyzing a particular period is that it could inject a bias into the process that makes a disparity that is really caused by chance alone look like it was caused by discriminatory animus. The fact that this period was selected according to established D.O.L. procedures does not necessarily make the selection "neutral," although it does provide assurance that the period was not chosen after eye-balling figures. However, Plaintiff is surely correct that this choice of a period to analyze was permissible under Greenwood Mills, supra.⁸ That is, under Greenwood Mills, Plaintiff is entitled to a remedy on the basis of a showing of discrimination against some minorities some of the time even though it does not show discrimination against all minorities all the time. Greenwood Mills, slip op. at 13. See also International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 341-2 (1977).

From the point of view of statistical practice, Defendant refers to this as "gerrymandering."⁹ Again, the risk of this kind of selective choice of periods to be analyzed is that it can create a bias that in turn could cause a chance occurrence to look like discriminatory animus. However, in this case, I am reassured by the fact that Dr. Ashenfelter found statistical significance at a very high confidence level (the ninety-nine percent confidence level) (Tr. 39-40). Thus, I find that Plaintiff's evidence does indeed show that the disparity in hiring of blacks versus nonblacks resulted from discriminatory animus and was not a chance occurrence whether or not the choice of the 1992-93 period was a "neutral" selection.

⁸ Greenwood Mills has not yet undergone the appellate process. Whereas I have some doubts that it would survive such a process unscathed, it is currently controlling precedent for an administrative law judge with the Department of Labor.

⁹ Actually, both sides accuse the other of gerrymandering. According to Plaintiff (reply brief at 4), by choosing to analyze the years 1990-4 instead of, say, 1989-94, Defendant actually chose years that put itself in a more favorable light. (Mr. Taylor, who was hiring in 1989, hired four of six nonblack applicants and none of three white applicants that year.) See JX 468, 469, DX 23 (table 2) and 26 (table 4B). Also, Plaintiff accuses Defendant of gerrymandering by including recalls in its analysis (Plaintiff's reply brief at 5).

2. Defendant objects to the decision to combine Mr. Taylor's shipping clerk hires and Ms. Sports' bake-shop-helper hires on the grounds that it was an inappropriate combination. IBC bases its argument on the fact that OFCCP is alleging that discrimination primarily occurred as a result of Ms. Sports' decisions. However, Plaintiff has alleged discrimination by IBC as a company in entry-level job hiring. Under Greenwood Mills, supra, this is a permissible way to categorize the violation, and I see nothing wrong with it.¹⁰

3. Defendant objects to Dr. Ashenfelter's consideration of hires only and not all persons offered jobs. There were a number of applicants who, having been offered jobs, either failed the physical or the drug test or who simply did not show up for the job. IBC argues that they should have been added to the hires for analytical purposes.

The short answer to this objection is that, from a statistical standpoint, it does not matter, because, even if one does consider all offers instead of only hires, the result for 1992-93 is still statistically significant (standard deviation equals 3.88 plus)(PX 2 at table C).

4. Defendant strongly objects to the exclusion of recalls from the data (Tr. 599, 700).

Again, the answer to this contention is that, for the period 1992-93, from a statistical standpoint, it makes no difference (Tr. 701-2). As stated, I have found that the selection of the 1992-93 period was an acceptable practice under Greenwood Mills, supra. Thus, the fact that the exclusion of recalls would have made a difference for 1991 and 1994 is irrelevant. In addition, I agree with the position of Dr. Ashenfelter that the exclusion of recalls is an appropriate decision in light of the fact that we do not know anything about the pool of people available for recall (PX 2 at 7). Finally, consideration of the year 1994 would be inappropriate because it occurred after OFCCP had filed a complaint in this case, a time when one would expect IBC to be careful not to discriminate or, in the alternative, to overcompensate.¹¹ Under Greenwood Mills, supra, slip op. at 15-18, exclusion of 1994 data is appropriate.

¹⁰ In a somewhat ironic twist, Defendant seeks to use Greenwood Mills as precedent for the proposition that the combining of Ms. Sports' and Mr. Taylor's hires was inappropriate. However, in Greenwood Mills, supra, slip op. at 5, the Secretary disapproved the comparison of two different hiring pools, not (as here) the combining of hires made by two different people from the same hiring pool.

¹¹ There is no evidence of overcompensation in 1994. See Tr. 575.

5. IBC objects that Plaintiff did not include all of the work force at the Merita plant in its analyses.

However, under Greenwood Mills, *supra*, slip op. at 13, this is not required. That is, the government has a remedy if an employer has discriminated unlawfully against some people even though the employer may not have unlawfully discriminated against all people. Just as important, Defendant's evidence does not show that inclusion of absolutely all hires at the plant would have made any difference from a statistical standpoint. Such would be its burden under Bazemore v. Friday, 478 US 385, 404 (1986). Bazemore stands for the proposition that a party cannot merely fault its opponent for not performing a statistical analysis in a preferred way without showing that doing so would have made a material difference.

6. Defendant contends that its timing study (DX 1, 23-5) shows that there was no pattern of discrimination against blacks. Indeed, Dr. Siskin has testified that, except for July and August, 1993, there is almost "total parity" (Tr. 568). However, even Dr. Siskin acknowledged that July and August, 1993 "stick out" (*Id.*).¹² Under Greenwood Mills, this is enough to establish a violation of the executive order.

For the reasons stated above, I find that IBC has failed to rebut Plaintiff's prima facie case by attacking its statistical evidence. However, Defendant does rely on the reasons stated in IBC records for individual rejections as its non-race-based reasons. Therefore, I turn next to a consideration of whether these reasons were pretextual.

Pretext

I find that Defendant's evidence of non-race-based factors shows that they were indeed pretextual. That is, there is substantial documentary evidence of discrimination that belies the totality of evidence of nondiscriminatory reasons.¹³ For example, IBC

¹² Dr. Ashenfelter gave evidence that accounting for timing of applications does not change the fact that the results for 1992-3 are statistically significant (PX 2 at 3-6, Table C).

¹³ Plaintiff refers to this evidence as "nonstatistical" evidence. However, this evidence is in reality also statistical. I do not understand why Plaintiff did not subject this evidence to statistical analysis as it did the primary evidence in this case. Indeed, on brief (p. 52) Defendant objects to Plaintiff's failure to subject Defendant's non-racial reasons for rejection of applicants to statistical analysis. In my view, the disparities cited in the text above are sufficiently persuasive without statistical analysis but would have been more convincing with it. (Incidentally, I note that Defendant did not subject the data to statistical analysis either.)

rejected 14 out of 102 black applicants in 1992-93 because they "could not get references." In all of 1990, 1991 and 1994, IBC never used this reason for rejecting any applicant. Also, during the 1992-93 period, no whites were rejected on this basis.¹⁴ I consider 1) the numerically disparate treatment of blacks and 2) the unique use of the "could not get references" reason to be significant evidence of pretext even though there is relatively little evidence specific to individual applicants that any given reason was false.¹⁵

In addition, during the 1992-93 period, 30 black applicants were rejected because they "did not demonstrate interest in the position," whereas only four whites were rejected for this reason. Prior to 1992, this reason was never used as a basis for rejection of an applicant.¹⁶ Again, I find that the selective and discriminatory use of this all-purpose reason for rejection is strong circumstantial evidence that it is pretextual.

In summary, Dr. Ashenfelter's statistical evidence and the documentary evidence cited above show that the reasons stated on the application forms were largely pretextual.

Conclusion

For the above-stated reasons, I find that Plaintiff has shown by a preponderance of evidence that Defendant discriminated in hiring for entry-level laborer positions during 1992 and 1993. Both statistical and documentary evidence establish that the disparity in hiring did not result from chance but from discriminatory animus. Accordingly, I will recommend that Defendant be held to have discriminated in entry-level laborer hiring. If necessary, following review by the Administrative Review Board, I will contact the parties concerning the remedy phase of this proceeding.

In any case, I will refer to this other evidence as "documentary" evidence because it appears mostly in company hiring reports which are of record. It is conveniently summarized in appendix 1 of Plaintiff's main brief.

¹⁴ See the summary contained in attachment 1 to Plaintiff's brief and documentary exhibits cited there.

¹⁵ I have largely avoided consideration of the treatment of individual applicants even though I deem it to be relevant because it could arguably be characterized as anecdotal evidence. However, I do find that the reasons stated on job application forms for rejecting the following black applicants appear false: 1) Teresa McAllister (JX 266B, Tr. 368-70); 2) Lechone Alston (JX 350A, Tr. 419-22); 3) Sharon Dargan (JX 263A, Tr. 441-2).

¹⁶ See Plaintiff's brief, appendix 1 and exhibits cited there.

RECOMMENDED DECISION

Defendant discriminated in entry-level laborer hiring within the meaning of and under coverage by Executive Order 11246.

FEC/lpr
Newport News, Virginia

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge



U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

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Issue Date: 10 September 2007

In the Matter of:

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,
Plaintiff,

Case No. 2004-OFC-3

v.

TNT CRUST,
Defendant.

APPEARANCES:

Sandra B. Kramer, Esq.
Theresa Schneider Fromm, Esq.
For the Plaintiff

Jaime Ramon, Esq.
Kristin Donahue Dietel, Esq.
For the Defendant

BEFORE: Thomas M. Burke
Administrative Law Judge

ORDER ON LIABILITY

This matter arises under Executive Order 11246 as amended by Executive Order 11375 and Executive Order 12086 (43 Fed. Reg. 46501) ("Executive Order") and its implementing regulations at 41 C.F.R. Chapter 60. The Executive Order and regulations prohibit employment discrimination by government contractors based on race, color, religion, sex, or national origin. Under Section 202 of the Executive Order, federal contractors must take affirmative action to ensure that discrimination does not occur and to treat applicants and employees during hiring and employment without regard to their race, color, religion, sex, or national origin.

On September 30, 2004, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") filed an Administrative Complaint against TNT Crust ("TNT"), a totally owned subsidiary of Tyson Foods, Inc. with offices in Green Bay, Wisconsin, alleging that TNT violated the Executive Order by discriminating against Hispanic applicants for entry-level laborer positions on the basis of their national origin.

The matter was referred to the Office of Administrative Law Judges for hearing. TNT submitted a motion for summary judgment on July 7, 2006, which was denied on September 20, 2006. OFCCP's motion for summary judgment submitted on August 4, 2006, was denied by order issued on November 3, 2006. A hearing on liability¹ was held on November 14 through November 16, 2006, in Sturgeon Bay, Wisconsin. Both parties were afforded a full opportunity to present evidence and argument. OFCCP and TNT subsequently submitted post-hearing briefs and replies thereto. The Findings of Fact and Conclusions of Law below are based upon a review of the entire record in light of the arguments of the parties, the applicable statutory provisions and regulations, and pertinent precedent.²

STIPULATIONS

The parties have stipulated to the following³:

1. TNT is covered by Executive Order 11246, as amended, based on the federal government contracts of its parent corporation, Tyson Foods, Inc.
2. TNT failed to keep applicant records as required by 41 C.F.R. § 60-1.12(a) and 41 C.F.R. Part 60-3.
3. During the review period of July 1, 2001, to December 31, 2001, TNT required that its laborers possess basic English skills.
4. This requirement that laborers possess basic English skills began in 1999 and was discontinued in March of 2002.
5. After TNT instituted its requirement of basic English skills, TNT permitted fifteen employees who either did not possess basic English skills or who TNT was uncertain as to whether they possessed basic English skills to remain working at TNT.
6. The turnover rate in the entry-level laborer position at TNT in 1998 was at least 110 percent.
7. The turnover rate in the entry-level laborer position at TNT for the first six months in 1999 was at least 108 percent.

¹ A joint motion to bifurcate the issues of liability and damages was granted at the hearing. Tr. at 6.

² The documentary evidence admitted at the hearing includes: Plaintiff's exhibits 1-11, 13-29, 31; Defendant's exhibits 1-6, 8, 17-18. The following abbreviates denote references to the record: Tr. – Transcript; JX – Joint Exhibits; PX – Plaintiff OFCCP's Exhibits; DX – Defendant TNT's Exhibits.

³ Tr. at 7-8. The abbreviation ST with the corresponding number will denote references to the stipulations by the parties.

FINDINGS OF FACT

TNT manufactures pizza crusts at two plants located in Green Bay, Wisconsin. JX 1; Tr. at 83-84, 351. There are three eight-hour shifts per day at the TNT plants. Tr. at 514. During an eight-hour shift, TNT manufactures from 20,000 to 55,000 pizza crusts. Tr. at 514.⁴

Roger LeBreck has been the president of TNT since August of 1990. Tr. at 497. As president, LeBreck is involved in all aspects of the business, including human resources. Tr. at 498. When he and his investors purchased TNT in 1990, the company employed around 100 individuals, only one of whom was a minority. Tr. at 497-99. By December of 2001, minorities comprised 44% of TNT's workforce. JX 1. At the time relevant to this case, TNT was owned by Iowa Beef Producers ("IBP") and Tyson Foods, who purchased IBP in 2001. Tr. at 516-17. Currently, TNT is owned by Tyson Foods and is publicly held. Tr. at 516.

TNT is required to develop and maintain an Affirmative Action Plan ("AAP") and to update the plan as a result of its status as a contractor of the federal government. The Equal Employment Opportunity Report conducted for the AAP for the period December 1, 2001 to December 31, 2001 shows that TNT had 314 employees as of December 31, 2001. JX 1. At this time, Hispanic employees made up 32.5% of TNT's workforce. *Id.* The entry-level position at TNT during the relevant time period was laborer, either in production or sanitation. *Id.*; Tr. at 352, 507. TNT's AAP states that 155 of its 314 employees (49%) were in laborer positions with 73 of the 155 laborers working in production. JX 1. Hispanics represented 37.4% of TNT's overall laborer workforce. *Id.* The production laborers worked the manufacturing lines in the plants. Tr. at 508. Individuals hired into the laborer positions had the opportunity to be promoted into the production operative positions. Tr. at 364, 507-08; JX 1. The production operative positions include boxer, backup boxer, doughmaker and team leader, and require the ability to read, write, and understand English. Tr. at 364, 424, 518-21, 526-28, 617. TNT did not have in place an "up or out" policy in which employment was terminated if promotion was not attained; promotion was voluntary. Tr. at 461, 537, 565-66. During the six months from June to December of 2001, TNT did not hire any operatives from the outside other than drivers and rehires with previous production line experience. Tr. at 428-33; JX 1.

During the relevant time period, the Employer applied the following seven criteria in considering applicants for hire to the laborer positions: (1) completed job application; (2) previous work experience; (3) length of service at previous employers; (4) rate of pay at previous job; (5) shift selection (with most openings occurring during the second and third shifts); (6) ability to be trained and promoted into semi-skilled and skilled positions; and (7) basic English skills.⁵ JX 1; PX 22; Tr. 359. TNT preferred individuals who had a stable work history, with no unemployment for more than three months, for the laborer positions. Tr. at 360-61. TNT did not use Social Security numbers as a screening tool but Social Security numbers on applications that were facially invalid were considered in determining whether an applicant was qualified; per

⁴ TNT makes the pizza crusts for specific customers who have individual recipes and requirements; consequently, over 100 different crust formulas are used. Tr. at 507. The labels, formulas, orders, instructions, and paperwork at TNT are in English, with the exception of box labels for foreign customers. Tr. at 506, 509-10, 526-28, 608. TNT uses around 600 different labels that are placed on the boxes and has around 75 items on its price list. Tr. at 507.

⁵ The basic English skills requirement was added in 1999. ST 4.

example Social Security numbers that start with 900 raised red flags because a 900 series does not exist. Tr. at 471; PX 1; PX 21.

TNT experienced growth during the late 1990's. Tr. at 503. To attract job applications, TNT recruited through advertisements in the local newspaper, a free business employment weekly publication, television and a sign on the outside of its premises.⁶ Tr. at 352, 457-58. In addition, TNT had a standing order with the Wisconsin Job Center and sent notification letters to agencies in the community that had contact with the minority population. Tr. at 352, 455-57. TNT recruited through a relationship with the refugee immigration and Hispanic services of the Catholic Diocese of Green Bay. Tr. at 352, 457. TNT advertised employment opportunities through flyers at the local church where Spanish masses were held. Tr. at 687. A referral program in which employees were given a bonus for successful referrals was in place at TNT during the relevant time period.⁷ Tr. at 457, 459-60. TNT hired directly and through temporary employment agencies. Tr. at 353. At the time in question, TNT averaged forty openings a day and could not meet its hiring needs. Tr. at 373.

TNT's Spanish-speaking employee population began to increase around 1997. Tr. at 422. TNT estimates that by the year 2000, thirty-five percent of its employees did not speak English. DX 5; Tr. at 446-47. TNT's team leaders expressed concern about communication problems to management during their meetings. Tr. at 534-35. TNT used translators to communicate between English-speaking and non-English-speaking employees. Tr. at 420-21, 505-06. TNT also used its bilingual employees as translators, paying them overtime when necessary. Tr. at 421, 435-37, 505. TNT offered Spanish classes for its employees through a local technical college and provided English-as-a-Second-Language ("ESL") classes on at least three occasions at its premises. Tr. at 449-51, 597-98. TNT also referred its employees to local ESL classes. Tr. at 449-51.

Amparo Baudhuin has worked as an accredited immigration counselor for Catholic Charities in the Catholic Diocese of Green Bay for over nine years. Tr. at 683. Her work involves advising clients on immigration law and benefits and helping them to complete paperwork. Tr. at 683-84. She also advises her clients on where to apply for employment. Tr. at 684. In addition, Baudhuin works as a translator and has provided translation services for TNT in the past. Tr. at 686. During the relevant time period, most of her clients were immigrants of Hispanic origin as there was a "great influx" of immigrants to the Green Bay area during the late 1990's and early 2000. Tr. at 684. Other companies in Green Bay, including American Food Groups and Pack-a-Long Packing, also had a large number of Hispanic employees. Tr. at 691-92. Ms. Baudhuin has referred her clients to TNT, including during the year 2001. Tr. at 686-87. Many of her clients wanted to work for TNT because "it was an excellent company to work for." Tr. at 687.

Holly Webster works as a receptionist for TNT. Tr. at 211. Her job duties include receiving applications from applicants. Tr. at 211. During the period at issue, two applications were available to applicants, one in English and one in Spanish. Tr. at 211, 354. The only non-

⁶ According to the notations on the applications and a database of applications kept by TNT, the majority of the applicants were walk-ins rather than referrals from other agencies. Tr. at 90.

⁷ The referral program instituted by TNT applied to everyone, not to just its Hispanic employees. Tr. at 142.

English application used by TNT and available to applicants was the Spanish version. Tr. at 211, 222, 354-55, 383. The applicants chose which version to complete and were required to fill out the application on the premises. Tr. at 211, 354. During the relevant time period, Webster was instructed by Candyce Gilmore, TNT's Vice President of Human Resources, to note on the Spanish applications whether the applicants spoke English. Tr. at 211-12, 381. Webster received no special instructions by Gilmore on how to determine whether an individual spoke English. Tr. at 212. Webster received no formal training or certificates and attended no workshops on how to evaluate English proficiency.⁸ Tr. at 218. She asked the applicants filling out the Spanish applications "Do you speak English?" and noted on their applications their exact responses to the question. Tr. at 212-16, 223; PX 1-11, 13-14. Generally, she only asked applicants about the ability to speak English and wrote their responses if they completed the Spanish application. Tr. at 216-17. She rarely asked applicants who completed the English application about their English-speaking abilities. Tr. at 217; see PX 14.

Candyce Gilmore works at TNT as the Senior Manager of Human Resources. Tr. at 350. Her duties include training, compensation, payroll, benefits, employee relations, enforcing policies, oversight of the application and recruitment processes, and safety management. Tr. at 350. At the time of the review by OFCCP, Gilmore held the position of Vice President of Human Resources for which she was responsible for the same duties listed above. Tr. at 351. As the safety manager, Gilmore receives and reviews every accident injury report and records them in the OSHA log. Tr. at 410-11. She conducts safety analyses required by OSHA or the environmental health and safety compliance department. Tr. at 410-11. According to Gilmore, Webster's role was to make a notation using "the best of her judgment" on the application to give TNT an idea of the level of English skills possessed by the applicant. Tr. at 355. Once an application was completed, it was screened by either Gilmore or Cathy Propson, TNT's human resources coordinator. Tr. at 356; JX 1. Propson was the primary employee who reviewed the applications, scheduled the interviews, and made the hiring decisions with Gilmore's oversight. Tr. at 356.

Juan Flores Robles, who resides in Green Bay, Wisconsin, applied to work in any position at TNT in 2001. Tr. at 19-23. He heard about TNT because he lived in the area. Tr. at 23. Robles received a Spanish application from TNT's receptionist who asked him whether he preferred an English or Spanish version. Tr. at 23. The receptionist did not ask Robles any other questions. Tr. at 23. Robles could not recall whether the receptionist asked him if he spoke English. Tr. at 23. The notation of "speaks English" at the top of his application is not in his handwriting. Tr. at 23; PX 1. The rest of the application is in his handwriting, including the signature. Tr. at 23, 35. On his application, Robles noted that he preferred working the second shift. Tr. at 24. He did not talk with any other employee at TNT concerning his application. Tr. at 24. Robles was not given any type of written test at TNT for English proficiency. Tr. at 24. He was not told that he had to understand English for employment at TNT. Tr. at 24-25. He was not hired by TNT. Tr. at 29.

Robles understands written Spanish. Tr. at 29-30. He understood everything written on TNT's Spanish application. Tr. at 34. On his Spanish application to work at TNT, Robles wrote

⁸ Webster did complete four years of Spanish language classes in high school and a conversational Spanish class offered by TNT. Tr. at 219-20; PX 21.

a Social Security number that was not his own. Tr. at 31; PX 1. When he applied at TNT in 2001, he was not an alien authorized to work in the United States. Tr. at 31-32. Before applying at TNT, Robles previously worked as a cook at the airport for two months in 2001 at a rate of nine dollars per hour, then as a cook at a restaurant for two months at a rate of seven dollars per hour. Tr. at 33-34; PX 1. He was not fired from his job as cook at the airport, but cannot recall his reason for leaving the job. Tr. at 34.

Robles worked for three months at American Foods, a company in the food industry in Green Bay, Wisconsin. Tr. at 25-26. Based on his observations, the majority of the workers at American Foods were Hispanic.⁹ Tr. at 27. His employment as a meat cutter at American Foods did not require the ability to speak English. Tr. at 28.

Carlos Guerrero, who resides in Green Bay, Wisconsin, applied for a job in any position at TNT in 2001. Tr. at 38-40. He learned about TNT from a local English newspaper and Hispanic friends who told him that TNT was hiring. Tr. at 39, 50-52. He completed a Spanish application at the company site. Tr. at 39; PX 2. The notation of "a little English" at the top of his application is not in his handwriting. Tr. at 39; PX 2. The receptionist at TNT asked him in English whether he preferred the English or Spanish application and told him in English that he had to complete the application at TNT. Tr. at 40-41, 53. Carlos Guerrero specified on his application a preference for either the first or second shift. Tr. at 41. The Social Security number on his application is his own. Tr. at 44. He was not given a written test for English proficiency. Tr. at 41. He was not told in 2001 that English proficiency was a job requirement. Tr. at 41. TNT did not hire him. Tr. at 43.

Carlos Guerrero worked in the slaughter department at Packer Land, a butcher shop in Green Bay, for about two months in 1999. Tr. at 41-42, 48, 55. Based on his observations, many Hispanics worked at Packer Land. Tr. 42. His Packer Land job did not require the ability to speak English. Tr. at 43. The job did require him to communicate constantly with other employees, which he did in Spanish. Tr. at 55. He did not list his employment at Packer Land on his TNT application because of its short duration. Tr. at 48-49, 57.

Concepcion Guerrero applied for a production job in any position at TNT in 2001. Tr. at 60-61. She completed a Spanish application at the company site. Tr. at 60-61; PX 3. She learned of TNT through a job center and through Hispanic acquaintances. Tr. at 61, 71-72; PX 3. The receptionist gave her the Spanish version of the application and asked her if she spoke English. Tr. at 62. Concepcion Guerrero answered, in English, "a little bit." Tr. at 62. The notation on her application of "a little English" is not in her handwriting. Tr. at 62; PX 3. She specified on her application a preference for either the first or second shift. Tr. at 62; PX 3. The only employee with whom she spoke at TNT was the receptionist. Tr. at 63. Concepcion Guerrero was not given a written test for English proficiency. Tr. at 63. She was not told that the ability to speak English was a job requirement at TNT. Tr. at 63. TNT did not hire Ms. Guerrero. Tr. at 65.

⁹ Robles worked on the floor with around one hundred workers. He estimates that ninety of the one hundred workers on the floor were Hispanic. Tr. at 29.

Prior to applying at TNT, Concepcion Guerrero worked at American Foods in Green Bay as a meat packer. Tr. at 63-64; PX 3. In her packing section, she worked with thirty other employees. Tr. at 63. She estimates that of the thirty other employees, twenty-eight of them were Hispanic. Tr. at 63-64.

After applying at TNT, Concepcion Guerrero worked at Bay Valley Foods in Green Bay as a pickle packer. Tr. at 64. She worked in a room with one hundred other employees. Tr. at 64. She estimates that eighty-five or ninety percent of these fellow Bay Valley Foods employees were Hispanic. Tr. at 64. The foreman at Bay Valley Foods was able to speak Spanish. Tr. at 66. Neither her job at American Foods nor her job at Bay Valley Foods required the ability to speak English. Tr. at 64-65.

Kyle Gille was hired by TNT in 1987 and has worked as a team leader for the past thirteen years. Tr. at 524-25. He supervises twelve people on his production line, including both operatives and laborers. Tr. at 525-26. During the relevant time period, Gille had non-English speaking laborers on his line. Tr. at 536. He currently has non-English speaking laborers working on his line, and his line does not have a problem with productivity. Tr. at 538-39.

Gerber Gonzalez¹⁰ has worked for TNT for eight years and is currently the third shift coordinator. Tr. at 592, 604. His responsibilities include ensuring that the production lines run smoothly and according to schedule. Tr. at 593. He previously worked as a team leader, dough maker, backup boxer, and laborer for TNT. Tr. at 593-94. He learned about TNT through a newspaper and from Hispanic friends who recommended the company. Tr. at 599. When he first applied to TNT in 1997, Gonzalez did not speak much English. Tr. at 602. In 1999 when he was hired by TNT, Gonzalez spoke little English. Tr. at 602-03. He started as a laborer and was able to perform his duties despite his inability to speak much English. Tr. at 603. Gonzalez took an ESL class offered by TNT and subsequently was promoted to an operative position. Tr. at 603-04. He has participated in the referral program offered by TNT and referred Hispanic applicants. Tr. at 601.

Chris Gillum has been a TNT employee for nine years and has been a backup boxer during the first shift for the past year. Tr. at 607. He began as a laborer and also has worked in the boxer and backup dough-maker positions. Tr. at 609-11. His current responsibilities include ensuring the product boxed meets quality standards and is shipped properly on pallets. Tr. at 607-08. He also labels the boxes. Tr. at 608. Any instruction and product sheets relating to his work that he has received have been in English. Tr. at 609, 611. He believes the ability to understand and read English is important for the position of backup boxer. Tr. at 609-10, 613. To his recollection, no employee was hired directly into the operative positions at TNT. Tr. at 612. During the relevant time period, Gillum remembers working with employees who had limited English-speaking skills. Tr. at 613. He believes that this created communication problems because the non-English speaking employees were unable to understand when he asked them to complete certain tasks. Tr. at 613-14. Gillum currently works with employees at TNT who have limited English-speaking ability. Tr. at 616-17.

¹⁰ It is noted that during Gonzalez's testimony, TNT's counsel offered to translate for the witness after he stated "I can't express myself that great so." Tr. at 600.

The expressed intent of the minimal English proficiency requirement, instituted in 1999 and terminated in March of 2002, is for laborers to possess minimal English skills sufficient to carry on a conversation.¹¹ Tr. at 365-66; ST 4. However, the ability to speak and understand English was not necessary to perform the duties of a laborer at TNT. Tr. at 386-87; PX 20. TNT cited promotability, communication, and safety issues as the reasons for requiring basic English proficiency. Tr. at 412-22, 507, 511, 513; JX 1. On February 3, 1998, a TNT employee named Heather Rabideau¹² removed a guard from a piece of equipment without stopping it first and suffered an injury to her pinky finger that required amputation.¹³ DX 3; Tr. at 416. The incident report indicates that Rabideau received a written warning for this unauthorized action. DX 3. On July 18, 1998, a TNT employee named Maria Masis Recarte who was on the sanitation crew sprayed an electrical panel without permission, resulting in a safety violation. DX 4; Tr. at 418-19. The incident report suggested placing warning signs in both English and Spanish on the panels. DX 4.

TNT evaluated English language skills of job applicants by the notations found on the applications made by Webster, TNT's receptionist. Tr. at 211-16, 366. Generally, TNT assumed that individuals who completed the English version of the application possessed the required basic English skills. Tr. at 366. After the institution of the basic English requirement, TNT allowed workers from temporary employment agencies to continue working even though TNT did not know whether the workers possessed basic English proficiency. Tr. at 480-81; PX 29. In addition, there were Hmong employees who did not speak English during the relevant time period. Tr. at 387. Finally, employees who did not speak English and worked at TNT prior to the basic English skills requirement were not terminated following the institution of the criterion. Tr. at 462; ST 5.

The investigation of TNT by OFCCP began in May or early June of 2002 when Equal Opportunity Specialist Donald A. Leonard was assigned to conduct a desk audit review of the company. Tr. at 77-78. Leonard received the assignment from his supervisor, District Director Margaret Kraak. Tr. at 79. Leonard reviewed TNT's Affirmative Action Plan for 2001 and its supporting documentation and conducted statistical analyses. Tr. at 78, 80; JX 1.

TNT's AAP¹⁴ for December 31, 2001, through December 31, 2002, pinpointed a problem with the hiring of minorities for laborer positions. JX 1. According to TNT's AAP, minorities were hired at a disproportionately lower rate than non-minority applicants for the laborer positions.¹⁵ JX 1. In determining adverse impact in its AAP, TNT included every individual who applied during the year 2001 regardless of whether the individuals were qualified or met

¹¹ TNT performed no studies on how the lack of basic English affected the productivity at the plants before instituting the requirement in 1999. Tr. at 388; PX 20. TNT also did not hire an expert to review the situation before the basic English requirement's institution. *Id.*

¹² Heather Rabideau was an English-speaking permanent employee at TNT. Tr. at 480.

¹³ Gilmore testified that Ms. Rabideau called out to another employee to stop the equipment, but the other employee did not understand English. Tr. at 416-17, 481. However, the other employee is not mentioned in the incident report of the accident. DX 3.

¹⁴ TNT's AAP covered both of its plant locations in Green Bay. Tr. at 486.

¹⁵ In determining the available workforce and adverse impact, TNT relied upon the 1990 census because the 2000 census was not yet available. Tr. at 549-50.

TNT's hiring criteria. Tr. at 464-65. The AAP noted TNT's selection criteria, including that of "basic English skills" for laborer positions, a requirement added in 1999. JX 1; ST 4.

Through statistical analysis of TNT's personnel actions, Leonard found an adverse impact for minorities based on an approximate shortfall of thirty-six in the hiring of minorities. Tr. at 80-81. His findings were reviewed by Margret Kraak, his supervisor. Tr. at 148. Initially, the period of review covered January 1, 2001, through December 31, 2001. Tr. at 84-85. However, the review ultimately covered only the six months from July to December of 2001 as TNT had destroyed applications filed during the first six months of 2001.¹⁶ Tr. at 85. During this six month period, TNT received applications from around 1,641 individuals of whom 131 were offered jobs and 115 were ultimately hired. PX 24.¹⁷ Of the 1,641 applicants, 629 (or 38.3%) were classified as Hispanic. PX 24. TNT hired 28 of the 629 Hispanic applicants (or 4.45%) during the six month period. PX 25.

Due to the adverse impact found during the desk audit, Leonard performed a three-day onsite review of TNT in November of 2002. Tr. at 81-82. Kraak attended one of the three days. Tr. at 147. As part of the onsite review, Leonard spoke to Gilmore about TNT's recruitment practices. Tr. at 111. She informed him that TNT sent out letters and participated in job fairs as well as working with the Diocese of Green Bay and offering Spanish classes. Tr. at 111. Leonard never saw proof that the form letters were actually posted. Tr. at 142. In addition, she told Leonard about TNT's practice of paying its employees for successful referrals. Tr. at 112-13. Leonard did not speak to anyone from the Diocese about its involvement with TNT. Tr. at 111. During his interview with a TNT employee, TNT provided an English/Spanish translator due to communication issues that arose. Tr. at 113-14. While on a tour of TNT's facilities, Leonard noticed the presence of signs printed in both English and Spanish throughout the plant. Tr. at 114; *see also* Tr. at 521. He also noted many Hmong employees working at TNT for whom there were no bilingual signs. Tr. at 114.

Based upon the onsite review¹⁸ and the available applications, Leonard concluded that there was disparate treatment and disparate impact against minorities, specifically Hispanic applicants.¹⁹ Tr. at 89. When English-speaking Hispanic applicants were separated from non-English speaking Hispanics, no adverse impact was found against the English-speaking Hispanic applicants while an adverse impact against non-English speaking Hispanic applicants was revealed. Tr. at 131-33. TNT's applicant pool also was refined to consider the applicants who used the English application versus those who used the Spanish application. Tr. at 192. Leonard believed that the applicant flow at TNT was not unusual for Green Bay based upon his conversation with another equal opportunity specialist compliance officer who reported a very high minority, primarily Hispanic, applicant flow in a similar food service company located in

¹⁶ TNT has stipulated to its failure to keep applicant records for the first six months of 2001. ST 2; Tr. at 7.

¹⁷ The total number of applicants of 1,641 excludes duplicate applications and those who were excluded from Dr. Killingsworth's analyses. Tr. at 310, 324; PX 24. Dr. Aamodt, TNT's expert, based his analyses on 1,643 total number of applicants of whom 629 were Hispanic. DX 8. Dr. Aamodt's data showed 34 Hispanic applicants were either offered employment or hired. *Id.* Dr. Killingsworth's data for how many applicants applied and were hired are given greater weight because he eliminated duplicate applications while Dr. Aamodt provides no indication that he did so.

¹⁸ No Hispanic TNT employees complained of discrimination to OFCCP. Tr. at 183-84.

¹⁹ Kraak, Leonard's supervisor, agreed with his findings. Tr. at 148.

the area. Tr. at 89, 141-42. Based on her years of experience including those as a compliance officer, Kraak concluded TNT's applicant pool was not atypical for the Green Bay area in terms of minority representation. Tr. at 158, 187-88.

At the completion of the review of TNT, a predetermination notice was issued by OFCCP on April 24, 2003. PX 15; Tr. at 148-49. Subsequently, a notice of violations was sent to TNT by OFCCP on June 13, 2003, and a notice to show cause was issued on July 10, 2003, after no conciliation agreement was reached.²⁰ PX 16; PX 17; Tr. at 150-53.

Burneill Ott has worked for Tyson Foods, TNT's parent company, since October 2001. Tr. at 547. Prior to 2001, Ott worked for IBP starting in 1989. Tr. at 547. Her current position at Tyson Foods is coordinator of Equal Employment Opportunity ("EEO"), Affirmative Action and Immigration, but she has served in the past as the manager and director of those departments. Tr. at 547-48. Her duties include investigating any internal complaints of discrimination or harassment, preparing affirmative action programs and participating in compliance reviews. Tr. at 548. When preparing utilization analysis and availability analysis²¹ during the relevant time, her department used the census data in the area, broken down into the nine EEO categories and further divided into specific job groups. Tr. at 549. She became involved in the TNT compliance review by OFCCP in 2002 following the onsite review. Tr. at 548, 553. She became familiar with TNT's hiring, recruiting, and rehiring practices and reviewed the applicant data and the applications. Tr. at 553-54. Ott also communicated with both Leonard and Kraak. She testified that neither Leonard nor Kraak inquired about whether production operatives were hired from the outside. Tr. at 554.

After the onsite review, Ott with Gilmore's assistance, prepared a table of the expanded applicant flow, taking into account each application received during the relevant time period and TNT's hiring criteria of employment for the prior three months, shift preference, and basic English proficiency. Tr. at 557-59; DX 6. Based on her review of the applicant data for the relevant six months in 2001, Ott concluded that white applicants were not the most favored group because Asian-Americans and African-Americans were hired at a higher rate than white applicants. Tr. at 560. She concluded that taking shift preference into account, by looking specifically at the shift for which the applicant applied and was or was not hired, there was no adverse impact against Hispanic applicants. Tr. at 560-61.

Dr. Mark Killingsworth²² is a professor of economics at Rutgers University. Tr. at 230; PX 24. His specialty is labor economics, and he has written numerous articles on the subject. Tr. at 232-33; PX 24. Dr. Killingsworth²³ was retained by OFCCP to use the available data²⁴ to

²⁰ Attempts at conciliation occurred between the parties from April 2003 until after the issuance of the show cause notice. Tr. at 153.

²¹ Ott has taken classes over the years on how to conduct availability analyses and how to use census data. Tr. at 549.

²² Dr. Killingsworth received a Dr. Phil. and an M. Phil. in economics from University of Oxford in England. Tr. at 232; PX 24. He also earned his bachelor's degree in economics from the University of Michigan. *Id.*

²³ Dr. Killingsworth was found to be an expert witness in labor economics at the hearing on November 15, 2006. Tr. at 233-34.

²⁴ The available data used by Dr. Killingsworth in his first report included a computerized applicant log prepared by TNT, computerized data files containing information derived from paper job application forms submitted by

analyze national origin differences in hiring by TNT during 2001 with particular attention to the differences between the hiring of Hispanic and non-Hispanic applicants. PX 24. In his first report for OFCCP, Dr. Killingsworth had two basic findings. Tr. at 236; PX 24. First, he found that Hispanic applicants were hired at approximately half the rate at which non-Hispanic applicants were hired.²⁵ *Id.* The difference was statistically significant at 3.198 standard deviations and characterized by Dr. Killingsworth as “quite large in any sort of ordinary sense of the word.” Tr. at 236-37, 240-41; PX 24-25. He then analyzed the data to determine if there were any factors other than national origin causing the difference in hiring rates. Tr. at 238, 241; PX 24. He used three models which included different sets of variables. Tr. at 241; PX 24. In his second finding, Dr. Killingsworth concluded that no other factors included on the application form that he took into account, either singularly or together, were sufficient to explain the difference in hiring rates between Hispanic and non-Hispanic applicants.²⁶ Tr. at 238; PX 24. Factors or variables considered by Dr. Killingsworth included: month of application; shift applied for; educational attainment; years of prior work experience; years at most recent previous job; years of prior work experience by occupation category and by industry category; reasons for leaving previous job; and whether still employed at most recent job. PX 24. Table 21 of Dr. Killingsworth’s first report provides a listing of the variables included in his analyses. *Id.*

In all three models used by Dr. Killingsworth to take into account the various variables, the difference between the hiring rates for Hispanics versus non-Hispanics was large and statistically significant. Tr. at 244, 247; PX 24.

Table 1: Applications for Employment at TNT – By National Origin²⁷

National Origin	Number	Percent of Total
American Indian	101	6.2 %
Asian	87	5.3 %
African-American	116	7.1 %
Hispanic	629	38.3 %
White	708	43.1 %
TOTAL	1641 ²⁸	100.00 %

applicants at TNT, and a computerized data file containing information from the pre-employment application form that usually accompanied the hard-copy job application filed by applicants at TNT. Tr. at 234; PX 24.

²⁵ For the relevant review period, Hispanic applicants were hired at a rate of 4.45 percent while non-Hispanic applicants were hired at a rate of 8.60 percent. PX 25; Tr. at 240.

²⁶ Where an applicant submitted more than one application, Dr. Killingsworth included only the first application in his analyses. Tr. at 310. Dr. Killingsworth also excluded from his analyses those applicants who failed the drug screen or did not return TNT’s phone call and applicants who indicated they had spent time in jail. Tr. at 310-11, 316-17; PX 24.

²⁷ Table 1 is reproduced from Table 1 in Dr. Killingsworth’s first report at PX 24.

²⁸ Dr. Killingsworth’s total number of applicants shows two fewer applicants than Dr. Aamodt’s data. PX 26; DX 8. The two applicant difference is assumed to be due to Dr. Killingsworth’s omission of the two applications that Dr. Aamodt classified as “other.” *Id.*

Table 2: Applications for Employment at TNT – By Whether Hired²⁹

Hired or Not Hired	Number	Percent of Total
Not Hired	1526	93.00 %
Hired	115	7.00 %
TOTAL	1641	100.00 %

Table 3: Applications for Employment at TNT – By National Origin and Whether Hired³⁰

National Origin	Total Applicants	Total Hired	
		Number	Percent
Hispanic	629	28	4.45 %
Non-Hispanic	1012	87	8.60 %
National Origin Difference in Hiring Rates:			
Hispanic/non-Hispanic hiring rate difference		-4.15	
Number of standard deviations		3.198	
P-value		0.001	

Dr. Killingsworth completed a second report in which he reviewed and commented upon the applicant data available to him as well as the findings of TNT's expert Dr. Michael G. Aamodt. PX 26; Tr. at 255-56. Dr. Killingsworth found that when a variable for English language proficiency was created and assessed, no applicant whose English proficiency was noted, either positively or negatively, on the application was hired by TNT. PX 26; Tr. at 260-61. None of the 265 individuals whose job applications included any written comment about their ability to speak English received a job offer from TNT.³¹ PX 26; Tr. at 275. When the applicants whose applications included a notation of English proficiency were removed from the analysis, the results showed no statistically significant difference in hiring rates for Hispanic and non-Hispanic applicants among those who remained. PX 26; Tr. at 261. According to Dr. Killingsworth, this means that having one's English proficiency assessed was a perfect predictor of whether he/she would be hired. Tr. at 275. With only one exception,³² every individual whose application included a notation on English proficiency was classified as Hispanic. PX 26; Tr. at 261. Of the 265 individuals whose applications included the comment on English proficiency, all but three used the Spanish version of the application. PX 26; Tr. at 262. Dr. Killingsworth also reviewed the applicant log provided by TNT in which reasons for not hiring

²⁹ Table 2 is reproduced from Table 5 in Dr. Killingsworth's first report at PX 24.

³⁰ Table 3 is reproduced from Table 17 in Dr. Killingsworth's first report, corrected, at PX 25.

³¹ At the hearing, TNT cited an example of an individual who completed a Spanish application in December of 2001 and was hired in March of 2002. Tr. 331-36; DX 17. TNT's applicant log at DX 17 indicates that the individual possessed English proficiency and that he wrote "some English" on his application. DX 17. However, the individual cited to was hired outside of the review period and in the same month that the English proficiency requirement was terminated. *Id.* In addition, his application was not included in those provided to Dr. Killingsworth, and the applicant log provided to Dr. Killingsworth did not include the column related to English proficiency. Tr. at 401-06.

³² The surname of the only individual whose application included a notation of English proficiency, but who was not classified as Hispanic, was Valenzuela. PX 26; Tr. at 261-62. This applicant was classified as "white." PX 26.

applicants were included. PX 26; Tr. at 264. Lack of English proficiency was not listed as a reason for rejecting any of the applicants. PX 26; Tr. at 264.

Dr. Killingsworth's second report also included a review of the analyses conducted by Dr. Aamodt. PX 26. According to Dr. Killingsworth, Dr. Aamodt took into account several of the same variables and found that taking these variables into account could not explain the difference in hiring rates for Hispanic and non-Hispanic applicants. PX 26-27; Tr. at 257. Dr. Killingsworth encountered problems in trying to reconstruct and evaluate Dr. Aamodt's analyses because the audit trail and computer programming were not provided. Tr. at 265-67, 659. According to Dr. Killingsworth, the analyses conducted by Dr. Aamodt in which he included English proficiency as a variable is in error because the variable of English proficiency is a "perfect predictor" of the outcome. Tr. at 270; PX 27. Dr. Killingsworth believes that English proficiency is a perfect predictor because it is a variable for which applicants are either hired or not hired. Tr. at 271. Including a perfect predictor as a variable renders the results useless. Tr. at 271-72.

Table 4: Notations of English Proficiency on Job Applications³³

Notation of English Proficiency	Number	Percent of Total
Blank entry (no assessment)	1,334	82.04 %
a little English	26	1.60 %
a litle English	1	0.06 %
a lllittle English	1	0.06 %
does speak English	7	0.43 %
does speake English	2	0.12 %
doesn't speak English, understand some	1	0.06 %
litle English	2	0.12 %
litttle	1	0.06 %
Little English	1	0.06 %
litttle English	61	3.75 %
no Englis	1	0.06 %
no English	118	7.26 %
no much English	1	0.06 %
pretty good English	1	0.06 %
some English	23	1.41 %
some English (~40%)	1	0.06 %
speak English	3	0.18 %
speak a little English	1	0.06 %
speak a little, understand most	1	0.06%
speakes English	3	0.18 %
speaks English	1	0.06 %
speaks English	5	0.31 %

³³ Table 4 is reproduced from Table 2.3 in Dr. Killingsworth's second report at PX 26.

speaks a little English	1	0.06%
speaks a little understands most English	1	0.06 %
very little English	27	1.66 %
vey little English	1	0.06 %
TOTAL	1,626	100.00 %

Table 5: Outcome for Applicants with a Notation of English Proficiency on Application³⁴

Category	Number	Percent of Total
Received Job Offer	0	0.00 %
Did not Receive Job Offer	265	100.00 %
TOTAL	265	100.00 %

**Table 6: Applicants with a Notation of English Proficiency on Application
By National Origin³⁵**

National Origin	Number	Percent of Total
White	1 ³⁶	0.38 %
Hispanic	264	99.62 %
TOTAL	265	100.00 %

**Table 7: Applicants with a Notation of English Proficiency on Application
By Version of the Application Form³⁷**

Version of Application Form	Number	Percent of Total
English-language form	3 ³⁸	1.13 %
Spanish-language form	262	98.87 %
TOTAL	265	100.00 %

Dr. Michael Aamodt³⁹ is a professor of industrial psychology at Bradford University in Virginia and is a consultant. Tr. at 618, 620. His field involves the application of psychology to the workplace to study how employees are selected, motivated, and evaluated. Tr. at 618-19. Dr. Aamodt also develops tests and selection methods for hiring and performance appraisal instruments and conducts salary equity analysis to ensure equal compensation. Tr. at 621. His

³⁴ Table 5 is reproduced from Table 2.4 in Dr. Killingsworth's second report at PX 26.

³⁵ Table 6 is reproduced from Table 2.5 in Dr. Killingsworth's second report at PX 26.

³⁶ The single applicant classified as "white" whose application received a notation of English proficiency had a surname of Valenzuela. PX 27; Tr. at 261-62.

³⁷ Table 7 is reproduced from Table 2.6 in Dr. Killingsworth's second report at PX 26.

³⁸ The three individuals who used the English version of the application and received a notation of English proficiency were classified as Hispanic. PX 26.

³⁹ Dr. Aamodt holds a PhD and MS in psychology from the University of Arkansas. DX 18.

work requires statistical analysis to compute adverse impact, to run correlations to validate tests, and to study the effects of minimum qualifications. Tr. at 619.

Dr. Aamodt⁴⁰ was retained by TNT through DCI Consulting, a consulting company, to conduct an analysis of applicant data. Tr. at 622. He used an applicant data set provided by TNT⁴¹ to analyze whether there was an adverse impact in hiring and if any adverse impact could be explained by whether the applicant was coded as possessing basic English skills.⁴² Tr. at 623-24; DX 6. He wrote a report detailing his analyses and findings. Tr. at 624; DX 8. When all 1,643 applications for the relevant period were considered, Dr. Aamodt found an adverse impact against Hispanic applicants with a standard deviation of 3.14. DX 8; Tr. at 628.

Table 8: Adverse Impact Analysis of the Entire Data Set⁴³

Ethnicity / National Origin	Number of Applicants	Number Hired / Offered⁴⁴	Selection Ratio	Standard Deviation
White	708	71	10.03	
Hispanic	629	34	5.41	3.14
African American	116	15	12.93	-0.95
Native American Indian	101	9	8.91	0.35
Asian	87	16	18.39	-2.36
Other	2	0	0	n/a
TOTAL	1643⁴⁵	145	8.83	

From the complete applicant pool, Dr. Aamodt took out those applicants who were not eighteen, who were not eligible for rehire, who did not complete the application process, who did not return phone calls, or who did not appear for the interview and then used the remaining pool of 1,545 applicants to determine adverse impact. DX 8; Tr. at 630. He found an adverse impact still existed against Hispanic applicants with a standard deviation of 3.12. DX 8; Tr. at 631. He further refined the pool to take out applicants with J1SS visas, leaving 1,524 applicants. DX 8; Tr. at 631. For this pool, an adverse impact remained against Hispanic applicants with a standard deviation of 2.99. DX 8; Tr. at 631. He refined the pool again to remove individuals

⁴⁰ Dr. Aamodt was found to be an expert witness in industrial psychology at the hearing on November 16, 2006. Tr. at 620.

⁴¹ Dr. Aamodt did not have the paper job application forms, instead using the applicant log created and provided by TNT. DX 8; DX 18; Tr. at 235-36, 654, 664. Consequently, he had no information on prior work history or education of the applicants. Tr. at 235. In addition, he relied upon TNT's coding of whether an applicant possessed basic English skills because he was not provided the actual applications with the notations. Tr. at 664-67. He did have a more extensive version of the applicant log than did Dr. Killingsworth. Tr. at 235.

⁴² Dr. Aamodt also looked at the hiring of operatives in the year 2004 and found that of the 26 operatives hired, 25 of them were promotions from laborer positions. DX 8; Tr. at 641. He did not use the data for 2001 because it was never provided to him. Tr. at 659-60. Dr. Aamodt concurred that the group of people for 2001 would be completely different than that for 2004. As the relevant period is 2001, this finding for 2004 is of little probative value.

⁴³ Table 8 is reproduced from Table 1 of Dr. Aamodt's report at DX 8.

⁴⁴ Dr. Aamodt classified applicants as hired/offered "if they had been hired, were offered a job but failed the drug screen, were offered the job but refused the job offer, or were offered the job but did not show up for the first day of work." DX 8.

⁴⁵ See FN 31, *supra*.

who wanted only first shift, leaving 1,345 applicants. DX 8; Tr. at 631. An adverse impact still existed against Hispanic applicants with a standard deviation of 2.42.⁴⁶ DX 8; Tr. at 632. In his next analysis, Dr. Aamodt removed from the entire data set those applicants who were coded as not possessing basic English skills, leaving 1,400 individuals. DX 8; Tr. at 635, 655. He found no adverse impact against Hispanic applicants for this refined group. DX 8; Tr. at 635, 638. He concluded that the basic English requirement was driving the adverse impact and, when the requirement was accounted for, the adverse impact went away. Tr. at 635, 672. In the applicant data set he used, there were no notations that particular applicants were rejected because they lacked English proficiency. Tr. at 658.

Dr. Aamodt also conducted logistic regression analyses⁴⁷ to try to determine if applicants' Hispanic origin was related to hiring decisions after accounting for TNT's hiring criteria. DX 8; Tr. at 636. In the first logistic regression analysis, he controlled for shift preference, application completeness, three month stay at previous job, and previous experience and found that being Hispanic was still significant and still affected the hiring decision. DX 8; Tr. at 639-40. In the second logistic regression, he added the criteria of basic English skills and found that being Hispanic no longer affected the hiring decision. DX 8; Tr. at 640. In the third logistic regression, he controlled only for basic English skills and found that being Hispanic did not affect the hiring decision. *Id.*

Upon analyzing the availability data for Hispanics in the Green Bay area, Dr. Aamodt concluded that the percentage of Hispanic applicants at TNT (38.3%) greatly exceeded the availability of Hispanic laborers in the Green Bay area. DX 8; Tr. at 674-75. To determine the availability of Hispanic laborers, Dr. Aamodt relied upon the 1990 and 2000 census. *Id.* In 1990, the availability of Hispanic laborers in Green Bay was 0.86% according to the MSA data. DX 8. In 2000, the MSA data showed the availability of Hispanic laborers to be at 9.7%. DX 8; Tr. at 675.

Dr. Aamodt reviewed the two reports written by Dr. Killingsworth. Tr. at 637. He found that Dr. Killingsworth reached the same conclusion that if applicants who were coded as not possessing basic English skills were removed from the pool, no adverse impact existed. Tr. at 638.

CONCLUSIONS OF LAW

Legal Framework

Executive Order 11246, as amended, and its implementing regulations, codified at 41 C.F.R. Chapter 60, prohibit discrimination by covered government contractors against employees and applicants for employment on the basis of race, color, sex, religion or national origin. The

⁴⁶ Dr. Aamodt found that if two white applicants were coded as Hispanic instead, then an adverse impact would not exist for this group. DX 8; Tr. at 632-33. He maintained that the result for this group was statistically significant, but not practically significant. Tr. at 634-35, 672.

⁴⁷ In each logistic regression analysis, Dr. Aamodt looked at the results for both the pool of official applicants and the pool of applicants with those requesting first shift only and those with JISS visas removed. DX 8.

Executive Order has the force and effect of law. See *OFCCP v. Univ. of Calif.*, Case No. 78-OFCCP-7, at 33-34 (Sec'y Sept. 4, 1980); *OFCCP v. St. Regis Corp.*, Case No. 78-OFCCP-1, at 96 (ALJ Dec. 28, 1984); *United States v. New Orleans Public Serv.*, 553 F.2d 459, 465 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978). Furthermore, the Executive Order's implementing regulations have the force and effect of law so long as they are not unlawful or plainly unreasonable or inconsistent with the underlying authority. See *OFCCP v. Prudential Ins. Co.*, Case No. 80-OFCCP-19, at 11 (Sec'y July 27, 1980); *Univ. of Calif.*, Case No. 78-OFCCP-7 at 34; *St. Regis Corp.*, Case No. 78-OFCCP-1, at 96. The parties have stipulated that TNT is covered by the Executive Order based on the federal government contracts of Tyson Foods, Inc., TNT's parent company. ST 1.

OFCCP argues that TNT had in place selection and hiring policies which discriminated against Hispanic applicants during the period of July 1, 2001, through December 31, 2001. Therefore, this case is analogous to a pattern or practice action prosecuted by the government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in contrast to cases involving individual allegations of discrimination brought by employees. *Dep't of the Treasury v. Harris Trust & Sav. Bank*, Case No. 1978-OFCCP-2, at 4 (ALJ Dec. 22, 1986). Cases interpreting Title VII, while not necessarily binding authority for administrative proceedings under the Executive Order, do supply guidance in analyzing allegations brought by the government. *Id.*; *OFCCP v. Burlington Indus., Inc.*, Case No. 1990-OFC-10, at 15 (ALJ Nov. 2, 1991).

Two avenues exist for proving employment discrimination – disparate treatment and disparate impact. *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 (1977); *St. Regis Corp.*, Case No. 78-OFCCP-1, at 97. Either theory may be applied to a particular set of facts. *Teamsters*, 431 U.S. at 335. Both theories involve a burden shifting formula in which the plaintiff first must establish a prima facie case of discrimination that the defendant then must rebut. See *Segar v. Smith*, 738 F.2d 1249, 1286 (D.C. Cir. 1984). In these pattern or practice actions, the plaintiff typically uses statistical evidence to show a disparity between the percentage of the protected class hired or employed compared to the general pool of applicants or employees. See *Segar*, 738 F.2d at 1273-74; *OFCCP v. Greenwood Mills, Inc.*, Case No. 89-OFC-39, at 3 (Sec'y Nov. 20, 1995).

Under disparate treatment, “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Teamsters*, 431 U.S. at 335 n. 15. Disparate treatment requires the plaintiff to prove discriminatory intent. *Id.* The intent may be established by raising an inference of a discriminatory motivation. See *id.* at 358. A disparate treatment pattern and practice case involves three steps of burden shifting.⁴⁸ First, the plaintiff must establish by a preponderance of the evidence that discrimination was the employer's standard and regular procedure. *Id.* at 336; *Burdine*, 450 U.S. at 253; *Harris Trust*, Case No. 1978-OFCCP-2, at 4. This initial burden requires plaintiff to produce evidence sufficient to create an inference that the challenged employment policy was based on illegal discrimination. *Teamsters*, 431 U.S. at 358.

⁴⁸ While the burden of producing evidence shifts, the burden of persuasion in a disparate treatment case remains at all times with the plaintiff. *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Segar*, 738 F. 2d at 1267, 1270.

A prima facie case of intentional discrimination may be established by statistical evidence. *Id.* at 339; *see also Segar*, 738 F.2d at 1267; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *United States v. County of Fairfax, Virginia*, 629 F.2d 932, 939 (4th Cir. 1980); *Harris Trust*, Case No. 1978-OFCCP-2, at 4. The Supreme Court in *Hazelwood* stated that “[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”⁴⁹ 433 U.S. at 307-308 (1977) (citing *Teamsters*, 431 U.S. at 339). If the statistics focus on the relevant labor pool, an inference may be raised where the disparity reaches a statistically significant level.⁵⁰ *See Segar*, 738 F.2d at 1278. Courts have generally followed statisticians in finding that statistics are significant at two or three standard deviations. *Harris Trust*, Case No. 1978-OFCCP-2, at 23; *see also Hazelwood*, 433 U.S. at 309 n. 14; *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977); *Segar*, 738 F.2d at 1283 (finding that statistics at the 0.05 level, or two standard deviations, are sufficient to support an inference of discrimination).

If the plaintiff establishes its prima facie case of disparate treatment, the burden of production shifts to the defendant for rebuttal. *See Segar*, 738 F.2d at 1267-68. The defendant can rebut the prima facie case in two different ways. *Id.* The defendant may attack the methodology and significance of the plaintiff’s statistics, showing that a disparity does not exist. *Id.* at 1268. When using this approach, the employer must show that the plaintiff’s statistics are flawed. *Teamsters*, 431 U.S. at 360. As the Supreme Court explained, “statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” *Id.* at 340. In *Bazemore v. Friday*, the Supreme Court explained that whether a challenged analysis “carr[ies] the plaintiffs’ ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant.” 478 U.S. 385, 400 (1986). Alternatively, the defendant must provide a legitimate, nondiscriminatory reason for the observed disparity. *Teamsters*, 431 U.S. at 360 n. 46; *Segar*, 738 F.2d at 1267-68; *OFCCP v. Interstate Brands Corp.*, Case No. 1997-OFC-6, at 26 (ALJ July 19, 2000). “The nondiscriminatory explanation must cast sufficient doubt on the plaintiff’s proof to permit the trier of fact legitimately to decline to draw an inference of discrimination from that proof.” *Segar*, 738 F.2d at 1269. At the very least, the defendant must make a “clear and reasonably specific showing” through admissible evidence that the disparity is explained by a nondiscriminatory reason. *Id.* at 1268.

While a satisfactory explanation by the defendant squelches the previously drawn inference, the plaintiff’s evidence may be considered to determine whether the defendant’s explanation is a pretext for discrimination. *Segar*, 738 F.2d at 1269. Under this third and last stage of the burden shifting, the plaintiff in a disparate treatment case is given the opportunity to prove by a preponderance of the evidence that the articulated reason was not the true reason

⁴⁹ As the court in *Palmer v. Schultz* explains, there are three possible explanations for a statistical disparity. 815 F.2d 84, 90-91 (D.C. Cir. 1987). First, the disparity may be caused by unlawful discrimination, as the plaintiff alleges. *Id.* Second, the disparity may be created by a legitimate, nondiscriminatory cause, such as a missing variable. *Id.* at 91. Third, the disparity may be the result of chance. *Id.*

⁵⁰ As the court in *Segar v. Smith* explained, “[s]tatistical significance is a measure of the probability that the outcome of a statistical analysis would have occurred by chance: The lower the probability that the observed outcome could have occurred by chance, the stronger the inference of discrimination that can be drawn from the data.” 738 F.2d at 1282.

behind the challenged employment practice, but merely a pretext. *Burdine*, 450 U.S. at 253, 256; *Segar*, 738 F. 2d at 1269; *Burlington Indus.*, Case No. 1990-OFC-10, at 18. A plaintiff may prevail “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Burdine*, 450 U.S. at 256 (citation omitted).

A case of discrimination also may be established by a showing of disparate impact. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Disparate impact does not require proving discriminatory intent on the part of the employer. *Teamsters*, 431 U.S. at 335. The challenged employment practices are facially neutral, but produce a negative impact for a protected class. *Id.* at 335. “[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). A pattern and practice disparate impact case also involves three steps of burden shifting. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). First, the plaintiff must show that a facially neutral employment practice causes a significant discriminatory impact on a protected class. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). Statistics may be used to show that a facially neutral practice denies a protected class the equal opportunity to be hired for a particular position. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979).

Disparate impact cases brought by the OFCCP that challenge facially neutral selection procedures are governed by the Uniform Guidelines on Employee Selection Procedures (“Uniform Guidelines”) at 41 C.F.R. Part 60-3.⁵¹ The Uniform Guidelines “are designed to provide a framework for determining the proper use of tests and other selection procedures.” 41 C.F.R. § 60-3.1(B). A selection procedure is defined as:

Any measure, combination of measures, or procedure used as a basis for any employment decision . . . includ[ing] the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

41 C.F.R. § 60-3.16(Q). Thus, a “selection procedure” is defined broadly and does not have to be a traditional test. Any hiring procedure used to measure or evaluate an applicant qualifies as a selection procedure under the Uniform Guidelines. *OFCCP v. Priester Constr.*, Case No. 1978-OFCCP-11, at 102 (Sec’y Feb. 22, 1983). The Uniform Guidelines require validation if a selection procedure results in an adverse impact on a protected class. 41 C.F.R. § 60-3.1(B). Adverse impact is defined as “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate” 41 C.F.R. § 60-3.4(D). The Uniform Guidelines define selection rate as “[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected.” 41 C.F.R. § 60-

⁵¹ The Uniform Guidelines went into effect in 1978 and have the force and effect of law for purposes of the applicable Executive Order. See *OFCCP v. Priester Constr.*, Case No. 1978-OFCCP-11, at 104-05 (Sec’y Feb. 22, 1983); *USDOL v. St. Regis Corp.*, Case No. 1978-OFCCP-1, at 96-97 (Sec’y March 2, 1994).

3.16(R). Thus, the guidelines require the employer in this case to look at the number of applicants of a protected class hired from the applicant pool.⁵²

In disparate impact cases, the defendant can rebut a prima facie case in two ways. *Segar*, 738 F.2d at 1267-68. The defendant can attack the plaintiff's statistics by showing a disparity does not exist in the same manner as under the disparate treatment theory. *Id.* Second, a defendant can demonstrate that the challenged practice has a "manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. According to the Supreme Court in *Griggs*, "[t]he touchstone is business necessity," and a facially neutral qualification must "bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 431.

Under the Uniform Guidelines, a selection procedure that results in an adverse impact must be validated according to the guidelines or it will be considered discriminatory. 41 C.F.R. § 60-3.3(A). The job relatedness and business necessity of a selection procedure resulting in adverse impact are proven through validation of the procedure in accordance with the provisions of the Uniform Guidelines. *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 100; *see also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1371-72 (5th Cir. 1974) (failure to validate high school diploma requirement found to render requirement invalid); *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985) (a presumption of discrimination may only be rebutted if procedures causing disparity are validated); *Davis v. City of Dallas*, 483 F.Supp. 54, 58-59 (N.D. Tex. 1979) (defendant could not show selection process to be job related because it failed to validate). Three methods of validation are provided by the Uniform Guidelines: criterion, content, and construct validity. 41 C.F.R. § 60-3.14. Failure to validate a selection procedure that causes an adverse impact under the Uniform Guidelines is a violation of the Executive Order. *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 114; *see also Johnson*, 491 F.2d at 1371.

If the defendant meets its burden of production and persuasion by showing that the facially neutral practice is job related, the plaintiff has the opportunity to demonstrate that other selection procedures exist that would serve the defendant's legitimate business interest without causing an adverse impact. *Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329. In other words, the plaintiff must show that the selection procedure was a pretext for discrimination. *Id.*

OFCCP's Prima Facie Case – Disparate Treatment

OFCCP argues that TNT intentionally treated Hispanic applicants differently from non-Hispanic applicants for entry-level laborer positions on the basis of their national origin. To establish its prima facie case under disparate treatment, OFCCP must put forth sufficient evidence to raise an inference of discrimination. *Teamsters*, 431 U.S. at 358. OFCCP has put forth statistical evidence showing a significant disparity between the percentage of Hispanics hired and the percentage of Hispanics in TNT's applicant pool for the relevant period. PX 24-26.

⁵² The Uniform Guidelines use the second method of statistical analysis described in *Equal Employment Opportunity Commission v. Navajo Refining Company* by determining whether a larger percentage of minority applicants are eliminated by a test or selection procedure. *See* 593 F.2d at 990.

As detailed in the Findings of Fact, *supra*, OFCCP's expert, Dr. Killingsworth, conducted three separate analyses in which he found that the hiring rate for Hispanic applicants compared to that of non-Hispanic applicants exceeded 2.4 standard deviations.⁵³ PX 24, 25; Tr. at 236-37, 240-41, 244, 247. Dr. Killingsworth controlled for nondiscriminatory variables to ensure that they were not causing the disparity. PX 24, 25. These variables included shift preference, month of application, prior work experience, education, reasons offered for leaving previous job, duration of previous job, average duration of prior employment, and wage at previous job. PX 24.

OFCCP has proffered sufficient statistical evidence to raise an inference of discrimination. The statistical analyses conducted by Dr. Killingsworth all produced a disparity exceeding 2.4 standard deviations. Most courts agree with statisticians that statistics at two or three standard deviations are significant. *Harris Trust*, Case No. 1978-OFCCP-2, at 23; *see also Hazelwood*, 433 U.S. at 309 n. 14; *Castaneda*, 430 U.S. at 496 n. 17; *Segar*, 738 F.2d at 1283. In addition, OFCCP's statistical evidence eliminated the most common nondiscriminatory explanations for the disparity, as required by *Segar*. 738 F.2d at 1274. By taking into account multiple variables, Dr. Killingsworth's analyses compared similarly qualified applicants.⁵⁴ PX 24. Furthermore, the statistical evidence focuses on the proper group for comparison by using the applicant flow data. *See Segar*, 738 F.2d at 1274. The methodology and explanatory power of OFCCP's statistical analyses are sufficient to raise an inference of discrimination and, thereby, establish a prima facie case of disparate treatment. *See id.*

Furthermore, TNT's inconsistent use of its assessment of English proficiency strengthens OFCCP's showing of disparate treatment. *See Honeywell*, Case No. 77-OFC-3, at 6 (employer's defense for requiring prior experience rejected in part because the employment requirement was not applied to all applicants). When Dr. Killingsworth reviewed the available applications for the relevant period, he found that of the 265 applications for which English proficiency was noted, all but one of the applicants were classified as Hispanic. *See Table 6, supra*; PX 26. The one exception had the surname Valenzuela. *Id.* In addition, 262 of the 265 applicants whose English proficiency was assessed used the Spanish version of the application. *See Table 7, supra*; PX 26. Notably, the three individuals who used the English application and had their English proficiency assessed were classified as Hispanic. *Id.* TNT had other non-English speaking minorities who applied during the relevant time. Tr. at 461. The non-English speaking minority applicants included Russian, Polish, and Hmong. Tr. at 387, 461-62. TNT's Vice President of Human Resource, Candyce Gilmore, testified that TNT had Hmong employees at the relevant time who did not speak English. Tr. at 387; *see also* Tr. at 114. TNT's applicant flow shows that 87 Asians applied for laborer positions during the relevant time and that the Asian group experienced the highest selection rate. PX 24; DX 8. Yet, not a single non-Hispanic minority applicant had his/her English proficiency assessed. PX 26. Finally, the assessment itself determined that an applicant would not be hired. PX 26; Tr. at 260-61. At least

⁵³ At the end of his first report for OFCCP, Dr. Killingsworth summarized his findings as follows: "Based on the analyses described in this report, I conclude that there is very strong statistical evidence that, during the second half of 2001, Hispanics were less likely to receive employment offers or to be hired by TNT than were non-Hispanics with similar characteristics. These national origin differentials in hiring and in employment offers are sizable in the ordinary language sense, and are highly significant in the statistical sense. Thus, these analyses provide very strong statistical evidence of job-offer and hiring discrimination adverse to Hispanic applicants for employment at TNT, in the sense in which these terms are used by economists." PX 24 (emphasis added).

⁵⁴ See discussion of variables considered by Dr. Killingsworth at p. 11, *infra*.

twenty-two applicants received positive notations of English proficiency, including “does speak English,” “pretty good English”, and “speaks English,” but were not hired. PX 26. The evidence demonstrates that TNT focused exclusively upon Hispanic applicants when assessing English proficiency. This evidence supports an inference of disparate treatment by showing that TNT treated Hispanic applicants less favorably in singling them out for assessment. *See Teamsters*, 431 U.S. at 335 n. 15.

OFCCP's Prima Facie Case – Disparate Impact

To establish discrimination by disparate impact, OFCCP must show that the facially neutral employment practice of requiring and assessing minimal English proficiency had a significantly discriminatory impact. *See Teamsters*, 431 U.S. at 335; *Teal*, 457 U.S. at 446; *Watson*, 487 U.S. at 987. Disparate impact may be established through statistics showing a disproportionately adverse effect in hiring rates for minority and non-minority applicants. *Segar*, 738 F.2d at 1267-68; *see Beazer*, 440 U.S. at 584. OFCCP proffered the statistical analyses and testimony of its expert, Dr. Killingsworth. *See* PX 24-26; *Tr.* at 230-96. As discussed above, Dr. Killingsworth conducted three analyses, taking into account nondiscriminatory variables, and found a significant adverse impact against Hispanic applicants at a standard deviation exceeding 2.4 for each analysis. PX 24; PX 25; *Tr.* at 236-37, 240-41, 244, 247. Dr. Aamodt also found adverse impact against Hispanic applicants in all four of his analyses.⁵⁵ DX 8; *Tr.* at 628, 631-32. In the four analyses conducted by Dr. Aamodt, the standard deviation exceeded 2.4. DX 8. Thus, both experts' analyses show a statistically significant disparity of over two standard deviations when multiple non-discriminatory variables are taken into account. *See Harris Trust*, Case No. 1978-OFCCP-2, at 23; *see also Hazelwood*, 433 U.S. at 309 n. 14; *Castaneda*, 430 U.S. at 496 n. 17; *Segar*, 738 F.2d at 1283. OFCCP has established a prima facie case of disparate impact.

OFCCP also argues that the evaluation of basic English skills conducted by TNT's receptionist is a selection procedure that resulted in an adverse impact and that TNT failed to validate the procedure as required under the Uniform Guidelines. *See* 41 C.F.R. § 60-3.3(A).

OFCCP must establish that the assessment of English proficiency by TNT's receptionist qualifies as a selection procedure under the Uniform Guidelines. The Uniform Guidelines “apply to tests and other selection procedures which are used as a basis for any employment decision,” including hiring. 41 C.F.R. § 60-3.2(B). It is undisputed that TNT required basic English skills for its entry-level laborers during the period at issue. ST 3, 4. Both Candyce Gilmore, the Vice President of Human Resources, and Holly Webster, the receptionist, testified that Webster was responsible for making a notation of applicants' basic English proficiency on their applications. *Tr.* at 211-16, 355, 381. Webster assessed applicants' English proficiency by

⁵⁵ Notably, TNT's own AAP identified an adverse impact against minority employees. JX 1. In addition, in the AAP, TNT speculated that the adverse impact might be due to its basic English requirement for laborer positions. *Id.* Despite TNT's awareness of the disparity and its possible cause, TNT made no attempt to validate the process by which it assessed English proficiency. *Tr.* at 388; PX 20.

asking them, "Do you speak English?" and noting their responses.⁵⁶ Tr. at 212-16, 223; PX 1-11, 13, 14. However, Webster generally completed this assessment for only those applicants who used the Spanish application. Tr. at 216-17.

Despite its informality and subjectivity, the assessment of English proficiency conducted by Webster qualifies as a selection procedure under the Uniform Guidelines. The use of an informal selection procedure like TNT's is anticipated by the Uniform Guidelines, which provide, in pertinent part:

When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

41 C.F.R. § 60-3.6(B)(1). The Uniform Guidelines' broad definition of "selection procedure" specifically includes informal assessments provided that they are used as a basis for employment. 41 C.F.R. § 60-3.16(Q); see *Honeywell*, Case No. 1977-OFCCP-3, at 6. The Equal Employment Opportunity Commission ("EEOC") specifically addresses English proficiency requirements in its Guidelines on Discrimination Because of National Origin. 29 C.F.R. § 1606.6. Under the EEOC's Guidelines, fluency-in-English requirements are classified as "selection procedures [that] may be discriminatory on the basis of national origin." 29 C.F.R. § 1606.6(b). As TNT required basic English skills and the possession of this requirement was determined by the notation on the application, the assessment made by Webster though informal and unscored was used as a basis for employment. Therefore, OFCCP has shown that the assessment of English proficiency performed by TNT qualifies as a selection procedure under the Uniform Guidelines.

Second, OFCCP must show that this selection procedure resulted in an adverse impact on Hispanic applicants. Under the Uniform Guidelines, adverse impact is determined by comparing the selection rate of the protected class to that of the most favored group. 41 C.F.R. 60-3.4(D). Selection rate is "[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected." 41 C.F.R. 60-3.16(R). Adverse impact is found when the protected class is selected at a rate less than eighty percent of the rate of the highest selected group. 41 C.F.R. 60-3.4(D). During the relevant period, Asian applicants had the highest selection rate of 18.39%. See Table 8, *supra*; DX 18. Eighty percent of this selection rate is 14.712%. Therefore, under the Uniform Guidelines, adverse impact may be found for any group selected by TNT at a rate of less than 14.712%. See 41 C.F.R. 60-3.4(D). Hispanic applicants were selected at a rate of 5.41% according to Dr. Aamodt's data and 4.45% according to Dr. Killingsworth's data. See PX 25; DX 8. Even if the selection rate for white applicants is used instead, an adverse impact would be found as they had a selection rate of less than eighty percent of 10.03%, or 8.024%, as compared with Hispanic applicants with the selection rate of, at the most, 5.41%. Thus, OFCCP has shown adverse impact against Hispanic applicants under the Uniform Guidelines.

⁵⁶ This assessment procedure was confirmed by the three witnesses who testified about their experiences applying for laborer positions at TNT during the period at issue. See Tr. at 25-65.

TNT's Rebuttal – Challenges to OFCCP's Statistical Proof

One way TNT can rebut OFCCP's prima facie case of both disparate impact and treatment is to show that flawed OFCCP statistical evidence created an appearance of disparity that does not in fact exist. See *Teamsters*, 431 U.S. at 360; *Segar*, 738 F.2d at 1267-68. As stated by the court in *Trout v. Lehman*, "the most effective way to rebut a statistically based prima facie case is to present more accurate statistics." 702 F.2d 1094, 1102 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984). A defendant who argues that excluded variables caused the disparity "must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims." *Segar v. Civiletti*, 508 F.Supp. 690, 712 (D.D.C. 1981), *aff'd in part and vacated in part*, 738 F.2d 1249 (1984), *cert. denied*, 471 U.S. 1115 (1985). TNT attacks OFCCP's statistics through the introduction of its own statistical analyses and testimony of its expert, Dr. Aamodt, as well as by arguing that OFCCP's statistics are insignificant in light the percentage of Hispanic employees in TNT's workforce.

TNT proffered the report and testimony of its own expert, Dr. Aamodt, in response to OFCCP's statistically-based case. At the outset, it is noted that Dr. Aamodt found a statistically significant adverse impact at greater than 2.4 standard deviations against Hispanic applicants in his three analyses.⁵⁷ DX 8. Nevertheless, TNT argues that its statistical analyses conducted by Dr. Aamodt are more accurate because shift preference of the applicants is taken into account. Shift preference was a selection criteria considered by TNT during the relevant time because most of the openings occurred during the second and third shifts. JX 1; Tr. at 360. However, TNT's argument that OFCCP's statistical analyses failed to account for shift preference is unsupported. Dr. Killingsworth did make shift preference a variable in his analyses.⁵⁸ PX 24; Tr. at 308. He found that shift preference did not explain the disparity against Hispanic applicants in hiring rates. Tr. at 308-9. TNT's argument also fails because its own expert, Dr. Aamodt, did not run a separate analysis focusing on only shift preference, but used shift preference as an additional variable. DX 8. Like Dr. Killingsworth, Dr. Aamodt found that a statistically significant adverse impact remained against Hispanic applicants even when shift preference was considered. DX 8; Tr. at 631-32.

TNT contends that no disparity is found when the English proficiency of the applicants is taken into account. In his report, Dr. Aamodt conducted an analysis using only the applicants who were coded as possessing basic English skills to try to determine whether an adverse impact remained against Hispanic applicants. DX 8. Dr. Aamodt found that no adverse impact existed when the applicants who were coded as not speaking English were removed. DX 8; Tr. at 638. However, this approach by Dr. Aamodt removes from consideration the facially neutral employment practice that is being challenged by OFCCP. A disparate impact case challenging a facially neutral employment practice would be impossible to prove if those applicants who do

⁵⁷ It is noted that at the hearing TNT's expert Dr. Aamodt testified that a standard deviation higher than 1.96 is significant. Tr. at 644.

⁵⁸ TNT mischaracterizes Dr. Killingsworth's testimony when it argues that he did not consider shift preference. While Dr. Killingsworth did not do a separate analysis focusing upon just shift preference, he did include shift preference as a variable in all three analyses. PX 24; Tr. at 308-10. Dr. Killingsworth was asked, "Did your analysis sir, take into consideration shift work?" He answered, "Yes. . . taking a count [sic] of the shift people said they were interested in, did not change my conclusion that there was a large statistically significant difference in hiring rates that was adverse to Hispanics." Tr. at 308.

not possess the challenged requirement were taken out of the equation. The disparate impact avenue of proving discrimination seeks to prohibit employers from using seemingly neutral employment practices “invidiously to discrimination on the basis of race or other impermissible classification.” *Griggs*, 401 U.S. at 431. Removing the applicants who do not possess English proficiency would be akin to removing applicants who do not meet a height requirement in a gender discrimination case. Including the challenged job practice as a variable would effectively dismantle the theory of disparate impact. *See Anderson v. Zubieta*, 180 F.3d 329, 342 (D.C. Cir. 1999).

TNT argues that the adverse impact against Hispanics was not practically significant when applicants who requested first shift only were removed from the analysis.⁵⁹ DX 8; Tr. at 632. Dr. Aamodt conducted such an analysis and testified that a switch of the ethnicity of two applicants from white to Hispanic would have caused the standard deviation to drop below two. Tr. at 632. According to Dr. Aamodt, this result from a switch of two means that the disparity is not practically significant, although it remains statistically significant.⁶⁰ Tr. at 632. He stated that his reliance of the concept of practical significance comes from the questions and answers to the Uniform Guidelines published in the Federal Register on March 2, 1979. Tr. at 647; PX 31. However, the Uniform Guidelines contemplate only a switch of one individual. *See* 44 Fed. Reg. 11,996 at 11,999 (March 2, 1979). The answer to Question 21 printed in the Federal Register states, in pertinent part:

Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from adverse impact against one group to a situation in which that group has a higher selection rate than the other group.

Id.; *see also* PX 31. Thus, the answer only refers to situations in which a switch of one would result in the protected group actually having a higher selection rate rather than where a switch of one would result in a standard deviation under two. *See* 44 Fed. Reg. 11,996 at 11,999 (March 2, 1979); Tr. at 650. Additionally, the answer begins, “If the *numbers of persons* and the difference in selection rates *are so small* that it is likely that the difference could have occurred by chance” 44 Fed. Reg. 11,996 at 11,999 (March 2, 1979) (emphasis added). The number of applicants here of 1,643 is not small enough to justify switching one applicant to a different group.⁶¹ *See* Tr. at 650. In addition, the switch of one concept applies only to the Uniform Guidelines and not to general disparate treatment and disparate impact cases. For the reasons above, TNT’s argument that no practical significance exists when only applicants who did not request first shift are considered fails to undermine the integrity of OFCCP’s statistical methodology. *See Segar*, 738 F.2d at 1268.

TNT further contends that OFCCP’s statistical showing of disparity is insignificant because the percentage of Hispanics in TNT’s workforce at the relevant time exceeded their availability in the labor market. TNT relies upon the 1990 census for market availability data to

⁵⁹ Dr. Aamodt also removed from this calculation those employees who had a JISS visa. He testified that the parties agreed to remove those who possessed a JISS visas from the calculations. Tr. at 631.

⁶⁰ As noted above, Dr. Aamodt testified that a standard deviation above 1.96 is statistically significant. Tr. at 644.

⁶¹ Dr. Aamodt admitted that a group of 1,643 is not a small group. Tr. at 650.

show that Hispanics were not underrepresented in TNT's workforce. JX 1; DX 8. However, courts generally prefer use of applicant flow data over census data because the former narrows the group to those who want the job in question and focuses the inquiry on how the employer treated those who actually applied. *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1287 (5th Cir. 1994); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 165 n. 38 (N.D. Cal. 2004). TNT also confuses the issue. OFCCP's case is not based upon the composition of TNT's workforce at the relevant time. Instead, OFCCP argues that TNT discriminated against Hispanics in its hiring of new employees to fill laborer positions. Therefore, the relevant inquiry is whether the selection rate for Hispanic applicants was significantly lower compared to other applicants in the applicant pool. See *County of Fairfax*, 629 F.2d at 940-41; *Navajo Refining Co.*, 593 F.2d at 990; *Douglas & Lomason Co., Inc.*, 26 F.3d at 1287; 41 C.F.R. § 60-3.4(D).

The Supreme Court has made it clear that a balanced workforce does not excuse discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978); see also *Trailways, Inc.*, 530 F. Supp. at 59; *Greenwood Mills*, Case No. 89-OFC-39, at 6. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco*, 438 U.S. at 579 (emphasis in original). The fact that TNT had a higher percentage of Hispanic employees than the census indicates were available does not give TNT a get-out-of-liability-free card for discriminating against later Hispanic applicants. See *Teal*, 457 U.S. at 445; *Trailways, Inc.*, 530 F. Supp. at 59. Each applicant to TNT is guaranteed an equal opportunity of employment even though the percentage of the applicant's national origin may be represented at TNT. See *Furnco*, 438 U.S. at 579; *Greenwood Mills*, Case No. 89-OFC-39, at 8 ("nondiscrimination law requir[es] equal opportunity for each and every individual applicant, regardless of whether members of the applicant's sex or race are already proportionally represented in the workforce"). Therefore, TNT's argument as to its workforce makeup at the relevant time does not undermine the strength of OFCCP's statistical evidence.

For the reasons discussed above, TNT has failed to undermine OFCCP's statistical evidence by showing that the methodology or significance thereof is flawed. Consequently, TNT must rebut OFCCP's prima facie showing of disparate treatment and impact in order to avoid liability for the disparity shown through OFCCP's statistical evidence.

TNT's Defense to Disparate Treatment – Legitimate, Nondiscriminatory Reasons for Disparity

As TNT has failed to discredit OFCCP's statistical methodology, TNT now must rebut OFCCP's prima facie case of disparate treatment by putting forth evidence showing that the disparity is caused by legitimate, nondiscriminatory factors. *Teamsters*, 431 U.S. at 360 n. 46; *Segar*, 738 F.2d at 1267-68; *Interstate Brands Corp.*, Case No. 1997-OFC-6, at 26. The plaintiff does not have the burden of ruling out the possibility that legitimate, non-discriminatory factors are responsible for the statistical disparity when establishing disparate treatment through statistical evidence. *Palmer*, 815 F.2d at 91 n. 6 (citing *Segar*, 738 F.2d at 1276). The court explained that "as long as a plaintiff's statistical analysis has properly defined the pool of eligible

candidates, by accounting for ‘minimum objective qualifications,’ the burden then shifts to the defendant to introduce evidence of a legitimate, nondiscriminatory explanation if the analysis reveals a statistically significant disparity.” *Id.* TNT argues that the disparity was caused by nondiscriminatory factors that made the rejected applicants unqualified, including shift preference, lack of English proficiency, invalid Social Security numbers, and reasons for leaving previous employment.

As discussed, *supra*, TNT has failed to show that shift preference caused the disparity because the disparity still existed after both OFCCP and TNT’s experts took shift preference into account. *See* PX 24; DX 8. In addition, TNT’s expert, Dr. Aamodt, did not run a separate analysis focusing on only shift preference, but made it an additional variable in looking at the disparity according to national origin. DX 8. TNT cannot show that shift preference was the cause of the disparity by simply arguing that a nondiscriminatory factor was to blame. *See Bazemore*, 478 U.S. at 403-04 n. 14. To prevail, TNT had to provide supporting evidence showing how the factor actually caused the disparity, a required step TNT did not undertake. *Palmer*, 815 F.2d at 101.

TNT argues that the disparity is caused by the lack of English proficiency of the rejected applicants. Dr. Aamodt excluded those applicants who were coded as not possessing basic English proficiency and found no disparity existed. DX 8. However, as the English proficiency assessment is the very discriminatory business practice at issue, it cannot be a nondiscriminatory factor as well. Also, Dr. Aamodt’s approach of removing those applicants coded as not possessing basic English skills fails to take into account the evidence showing that any notation of English, whether positive or negative, meant that an applicant would not be hired. *See* DX 8; PX 26. As explained by Dr. Killingsworth, the variable of basic English skills is a perfect predictor because those applicants whose English was assessed were not hired. Tr. at 270-75. Thus, lack of English proficiency cannot be used as a nondiscriminatory explanation for the disparity when it is the business practice at issue. Including basic English skills as a variable only serves to establish that it is a barrier to employment at TNT. *See Berger v. Iron Workers Reinforced Rodmen*, 843 F.2d 1395, 1418 (D.C. Cir. 1988).

TNT also contends that the three rejected applicants who provided anecdotal evidence at the hearing were not hired for legitimate, non-discriminatory reasons. TNT asserts that Robles was not hired because he provided a false Social Security number on his application. *See* Tr. at 31-32; PX 1. TNT’s Vice President of Human Resources, Candyce Gilmore, testified that Robles’ Social Security number would have raised a red flag because it was facially invalid. Tr. at 471. However, she also testified that she could not remember looking at the application at the time Robles applied, and TNT has no record of the reasons for his rejection. *Id.* In addition, TNT admitted that Social Security numbers were not used as a screening tool during the relevant time. PX 21. Therefore, the argument that Robles was not hired because of his invalid Social Security number is conjecture. Next, TNT argues that Carlos Guerrero was unqualified because he did not list enough work experience, he did not have recent employment, and he left his prior job to go to Mexico. *See* PX 1; Tr. at 46, 48-49. According to Gilmore, leaving a prior job to go to Mexico was a red flag for TNT because previous employees had left their TNT jobs abruptly without notice to return to their countries. Tr. 473-74. Gilmore testified that Concepcion Guerrero would have been rejected for the same reason as well as her lack of employment in the

previous three months. Tr. at 474-75; *see* PX 3. However, Gilmore could not remember whether Concepcion Guerrero received an interview despite the red flags on her application. Tr. at 475-76.

Ms. Gilmore's testimony as to why all three applicants may have been rejected five years ago is merely retrospective conjecture. Gilmore did not screen every application. Tr. at 356. Instead, Cathy Propson, TNT's human resources coordinator who did not testify, was the primary employee responsible for reviewing applications and making the hiring decisions. Tr. at 356; JX 1. In addition, during the review, Leonard found instances of minorities and non-minorities who were hired despite their incomplete applications. Tr. at 95. Notably, two of the rejected applicants had prior work experience in food-manufacturing plants. Tr. at 41-42, 48, 55, 63-64. Finally, possible reasons why these three applicants may have been rejected do not explain why the other two hundred plus applicants who received a notation of English proficiency were denied employment. *See* PX 26.

TNT has failed to make a "clear and reasonably specific showing" with its evidence that the disparity was caused by any of its proffered nondiscriminatory reasons. *See Segar*, 738 F.2d at 1268. The shift preference of applicants does not explain the disparity as both Dr. Killingsworth and Dr. Aadmodt still found a statistically significant adverse impact against Hispanic applicants when shift preference was taken into account. PX 24; DX 8; Tr. at 308-10, 631-32. TNT's proffered reasons why the rejected applicants were otherwise unqualified is speculative and unsupported. Finally, TNT's argument that the lack of English proficiency caused the disparity is, of course, true as the validity of the English proficiency requirement is the issue. Therefore, TNT's explanations cannot be found to "cast sufficient doubt" on OFCCP's proof to rebut the inference of discrimination. *See Segar*, 738 F.2d at 1269.

Disparate Treatment – Pretext

Assuming, *arguendo*, that TNT had rebutted successfully OFCCP's prima facie case of disparate treatment, the burden of production would shift back to OFCCP to show that the proffered explanations for the disparity are pretext for discrimination. *Burdine*, 450 U.S. at 253, 256; *Segar*, 738 F. 2d at 1269; *Burlington Indus.*, Case No. 1990-OFC-10, at 18. For the following reasons, it is found that OFCCP would meet this burden if required.

TNT did not apply the English skills requirement or its assessment to every applicant. PX 26. As discussed, *supra*, 264 of the 265 applicants who received a notation of English proficiency were classified as Hispanic, and the one exception had a surname of Valenzuela. PX 26. TNT did not assess the English proficiency of its Hmong, Polish, or Russian applicants. Tr. at 387, 461-62; PX 26. In addition, of the 265 applicants who received an English proficiency assessment, 262 used the Spanish application. PX 26. The three applicants who used the English application, but received an English skills notation, were Hispanic. *Id.* Candyce Gilmore, TNT's Vice President of Human Resources, testified that Webster only asked Hispanic applicants if they spoke English. Tr. at 381. The application of the basic English skills requirement and assessment on only Hispanic applicants negates TNT's nondiscriminatory explanations for the disparity. *See Honeywell*, Case No. 77-OFC-3, at 6 (employer's defense for

requiring prior experience rejected in part because the employment requirement was not applied to all applicants). TNT's exclusive focus on Hispanic applicants for its basic English proficiency requirement meets the very definition of disparate treatment – treating applicants of a protected class less favorably than non-minority applicants. *Teamsters*, 431 U.S. at 324, 355 n. 15. Even if TNT had made a “clear and specific showing” of nondiscriminatory reasons for rejecting the Hispanic applicants, its explanations would have been found pretextual given its targeted application of the basic English skills requirement. See *Segar*, 738 F.2d at 1268; *Honeywell*, Case No. 77-OFC-3, at 6.

TNT's Defense to Disparate Impact – Business Necessity

As OFCCP has established a prima facie case of disparate impact, the burden of persuasion and production now shift to TNT to prove that the minimal English proficiency requirement had a verifiable relationship to successful performance of the laborer position.⁶² See *Griggs*, 401 U.S. at 431-32; *Segar*, 738 F.2d at 1267. TNT proffers three business concerns that necessitated requiring the possession of basic English skills: communication, safety, and promotability.

TNT argues that the inability of its laborers to communicate in English created a business hardship that could only be relieved by instituting the requirement of basic English skills. TNT estimates that 35% of its employees could not speak English in 2000. DX 5; PX 22; Tr. at 446-47. Concerns about the inability to communicate were voiced by TNT's team leaders in management meetings. Tr. at 534-35. According to TNT, communication between employees in English was required for the performance of job duties, receiving directions and guidance from supervisors, understanding required safety and policy training,⁶³ participation in production meetings, and discussion of daily production needs. PX 22; Tr. at 419-20.

However, the evidence in the record does not support a finding that communication issues required laborers to possess basic English skills, and TNT does not seriously argue that the communication between laborers and with supervisors must be in English. TNT's own witness, Gerber Gonzalez, testified that he spoke barely any English when he first began working for TNT as a laborer. Tr. at 602. He also testified that he was able to perform his duties as a laborer even though he spoke so little English. Tr. at 603-04. Although he started at TNT with barely any ability to communicate in English, he was able to work his way to higher positions. Tr. at 604-05. In addition, Gilmore admitted that the ability to speak English was not required for performing the duties of laborer. Tr. at 386-87; PX 20. She testified that the requirement was added to increase the number of people who were promotable to the operative positions. Tr. at 384. Furthermore, Kyle Gille, TNT's witness and a team member, testified that he currently has

⁶² At the hearing and in its post-hearing briefs, TNT appears to believe that OFCCP had an obligation to investigate its proffered defenses. Tr. at 484, 490-93; *Def. Post-Hearing Brief* at 17, 27; *Def. Reply Brief* at 2-3, 7. TNT goes so far as to argue that OFCCP is precluded from challenging TNT's promotability defense for requiring basic English proficiency because OFCCP did not investigate or dispute TNT's promotion practices during the investigation. *Def. Post-Hearing Brief* at 17. However, the case law is clear that the defendant bears the burden of proving its own defense in disparate impact cases. *Segar*, 738 F.2d at 1267.

⁶³ Notably, TNT's OSHA training was conducted in both Spanish and English. Tr. at 521.

non-English-speaking workers on his production line and that his line does not have any productivity problems. Tr. at 538-39.

TNT's argument that the ability to speak English was necessary for communication reasons also is weakened by evidence showing that other food-production companies in Green Bay did not require the ability to speak English. Robles testified that his work as a meat cutter for American Foods in Green Bay did not require the ability to speak English. Tr. at 27. Similarly, Carlos Guerrero's work at Packer Land, a butcher shop, did not necessitate basic English proficiency, and Concepcion Guerrero testified that her work at two Green Bay food-manufacturing companies, American Foods and Bay Valley Foods, did not require the ability to speak English. Tr. at 7, 43. Finally, TNT's AAP only mentions promotability as the reason behind the basic English skills requirement. JX 1.

TNT has not met its burden of proving job relatedness due to the lack of any concrete evidence demonstrating the relationship between communication in English and successful performance of laborer duties as well as the testimony showing that communication in English was not required.

TNT argues that the temporary requirement of minimal English proficiency was necessitated by safety concerns following two accidents. TNT argues that the accidents involved Hispanic, non-English speaking employees. PX 22. The first safety incident occurred in February of 1998 when an English-speaking, permanent TNT employee, Heather Rabideau, removed a safety guard on a running machine and subsequently injured her finger leading to its amputation. DX 3; Tr. at 416, 480. TNT claims that Rabideau called out to a non-English speaking employee to stop the machine. Tr. at 416. However, the accident report for the incident makes no reference to any involvement of a non-English-speaking employee in the incident. DX 3. The report states that the accident occurred because Rabideau failed to follow company policy. *Id.* In addition, according to TNT, the employee to whom Rabideau called out was a temporary employee. Tr. at 416. By TNT's own admission, its criteria did not apply to temporary employees, so a minimal English requirement at this time would not have had any effect on the outcome of Rabideau's mistake. *See* Tr. at 373-74, 379.

The second incident occurred when a non-English speaking employee, Maria Masis Recarte, sprayed an electrical panel with water after receiving a warning in English not to do so. DX 4; Tr. at 416- 19. Ms. Recarte's action could have lead to an electrical fire. DX 4. On the incident report, no mention is made of Ms. Recarte's lack of English causing the incident. DX 4. In addition, the incident report does not suggest requiring basic English skills of all employees.⁶⁴ The incident report suggested putting up bilingual warning signs around the electric panel. DX 4.

TNT has not offered sufficient evidence to establish a manifest relationship between safety concerns and the basic English skills requirement. Neither of the reports for the two incidents mentions a non-English speaking employee or cites inability to speak English as a

⁶⁴ The safety incident with the electrical panel was not reported to OSHA because it was not of a severe enough nature requiring a report. Tr. at 178. Because the incident was not reported to OSHA, OFCCP could not verify it with anything outside of TNT's own documentation. Tr. at 178-79.

cause. DX 3, 4. TNT's AAP does not cite safety as a reason for the institution of the basic English skills requirement. JX 1. TNT has not established business necessity due to safety concerns.

TNT also argues that minimal English proficiency was required for laborer positions because TNT promoted to the operative position from its laborer pool. TNT contends that during the relevant period, the company was experiencing a dearth of promotable laborers because the higher operative positions required English proficiency and 35% of its workforce did not speak English. See JX 1; DX 5; PX 22; Tr. at 364-65, 446-47, 518-21, 526-28, 617. Prior experience on a production line was required for the operative positions, and nearly all of the operatives during the relevant time were promoted from the laborer positions. JX 1; Tr. at 364, 424, 428-33, 507-08.

The Uniform Guidelines contemplate situations where selection procedures are used to choose applicants who will meet requirements for higher positions when such promotion is likely. The applicable provision provides, in pertinent part:

If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level.

41 C.F.R. § 60-3.5(I). The Supreme Court addressed the question of using selection procedures in anticipation of filling higher positions, and endorsed the EEOC's Guidelines at 29 C.F.R. § 1607.5(I), which are nearly identical to the Uniform Guidelines. *Albemarle Paper Co.*, 422 U.S. at 434. Thus, the Uniform Guidelines approach is applicable to disparate impact cases in general as well as to cases in which the OFCCP is a party.

OFCCP does not question TNT's argument that English proficiency is required for production operative positions.⁶⁵ However, the provision is found not to apply in this case for two reasons. First, TNT did not have an up-or-out policy in which laborers would be terminated if they did not achieve promotion. Tr. at 163, 461, 537, 565-66. A laborer could remain a laborer if he/she so chose. *Id.* Second, while TNT has offered evidence showing operatives who were promoted from laborers, it did not offer evidence showing that a majority of laborers would become operatives within a reasonable time. See 41 C.F.R. § 60-3.5(I). The turnover rate at TNT during the relevant time was so high that few laborers remained long enough to be promoted. ST 6, 7; Tr. at 481-82. Therefore, TNT has not put forth sufficient evidence showing that the practice of promoting laborers to operatives was so established as to necessitate requiring basic English proficiency of the laborer applicants.

Taking into account the burden of rebutting a prima facie pattern or practice case, TNT has not established that the minimal English requirement had a "demonstrable relationship to successful performance" of the laborer position. *Griggs*, 401 U.S. 432; *Segar*, 738 F.2d at 1269-70; *Honeywell*, Case No. 77-OFC-3, at 5.

⁶⁵ Operatives need to be able to read, write and understand English because TNT uses over 100 different crust formulas and around 600 labels. Tr. at 507. The labels, formulas, orders, instructions, and paperwork at TNT are all in English, with the exception of box labels for foreign customers. Tr. at 506, 509-10, 526-28, 608.

Moreover, as OFCCP has established adverse impact against Hispanic applicants under the Uniform Guidelines, the selection procedure causing the adverse impact, namely the assessment of basic English proficiency, is considered discriminatory because it was never validated. 41 C.F.R. § 60-3.3(A); Tr. at 388; PX 20. TNT's defenses discussed above concerning communication, safety, and promotability issues are not applicable when considering violation of the Uniform Guidelines because business necessity and job relatedness are proven through validation under the regulations. See *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 100; see also *Johnson*, 491 F.2d at 1371-72 (failure to validate high school diploma requirement found to make requirement invalid); *Griffin*, 755 F.2d at 1528 (a presumption of discrimination may only be rebutted if procedures causing disparity are validated); *Davis*, 483 F.Supp. at 58-59 (defendant could not show selection process to be job related because it failed to validate).

TNT's Defense to Violation of Uniform Guidelines – Atypical Pool

TNT argues that it was not required to validate its selection procedure because its minority recruitment efforts resulted in an atypical pool of applicants, bringing into play an exception to adverse impact found in the Uniform Guidelines. The Uniform Guidelines contemplate situations where selection rate differences may not signify adverse impact:

Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

41 C.F.R. § 60-3.4. The defendant claiming an atypical pool bears the burden of showing that its recruitment efforts created a pool of unqualified applicants, thus explaining the disparity in selection rates.⁶⁶ *Davis*, 483 F.Supp. at 58; *County of Fairfax*, 629 F.2d at 940.

If this exception to adverse impact applies in this case, TNT would not have been required to validate its English proficiency evaluation procedure because no adverse impact would exist. TNT offered the following evidence of its specialized recruitment.⁶⁷ First, TNT

⁶⁶ TNT appears to believe that it is OFCCP's burden to disprove that TNT's applicant pool was atypical. *Def. Reply Brief* at 2. TNT argues that OFCCP failed to investigate its recruitment efforts. *Id.* As with any defense to a prima facie showing of disparate impact, the defendant bears the burden of proving its applicant pool was atypical. See *Segar*, 738 F.2d at 1267. Requiring the defendant to show that the recruiting attracted unqualified applicants is logical because if the additional applicants' qualifications were similar to those of the defendant's usual applicants, no statistically significant disparity in selection rate should be found. See *County of Fairfax*, 629 F.2d at 940 ("We cannot assume that blacks and women attracted by an affirmative action plan are more likely to be unqualified than white males who apply.").

⁶⁷ In support of its argument of an atypical applicant pool, TNT offers evidence of recruitment efforts that cannot be found to be aimed at attracting minorities. Rather, these were general recruitment efforts that could attract both non-minority and minority applicants. The general recruitment programs included an employee referral program, the posting of a sign on the outside of the plant, maintaining a standing order with a temporary employment agency, use of calling cards, and advertisements in local newspapers and on television. JX 1; PX 22; Tr. at 456-60, 500-01. For example, TNT's employee referral program in which employees received a bonus for successful referrals applied to all TNT employees, not just to its Hispanic workforce. Tr. at 142, 457, 459-60. Therefore, the referral program was not a specialized recruitment aimed at increasing minority applications.

maintained a relationship with the Catholic Diocese of Green Bay and its refugee immigration and Hispanic services. Tr. at 352, 356-57, 686-87. Amparo Baudhuin, who worked for the Catholic Diocese of Green Bay, referred her clients to TNT. Tr. at 686-87. Second, TNT recruited by placing flyers in the local church where Spanish masses were held. Tr. at 687, 692. Third, TNT sent notification letters to community agencies that worked with the local minority population.⁶⁸ JX 1; PX 22. Fourth, TNT argues that its reputation in the community as an excellent employer drew increased numbers of Hispanic applicants through word-of-mouth. See Tr. at 687. TNT contends that the above recruitment efforts increased the percentage of Hispanic applicants in its applicant pool.

The evidence does not show that TNT's applicant pool was atypical for Green Bay during the relevant time. As TNT points out, the plants are located in a Hispanic area of Green Bay. Tr. at 458, 599-600, 688. Thus, many Hispanic applicants probably applied at TNT because it was close to their homes and because vacancies were announced by a sign placed on the outside of the plant, and not by special recruiting on TNT's part. Tr. at 458. TNT's Vice President of Human Resources, Candyce Gilmore, testified that the primary source of recruitment was by word-of-mouth. Tr. at 457. In addition, the Green Bay area experienced a large growth in the Hispanic population in the late 1990's. Tr. at 502, 684. TNT's President, Roger LeBreck, pointed to the two large meat packing companies in Green Bay for the reason the Hispanic population grew. Tr. at 502. The three rejected applicants who testified all related their employment with local food-manufacturing plants in Green Bay that had a majority of Hispanic employees. Tr. at 27, 42, 63-64. Accordingly, other food-manufacturing companies in Green Bay also had high percentages of Hispanic employees and applicants. See Tr. at 89, 141-42, 692.

More importantly, even if TNT had shown its applicant pool to be unusual for the Green Bay area, it would have to show that the specialized recruitment drew unqualified applicants. See *Davis*, 483 F.Supp. at 58; *County of Fairfax*, 629 F.2d at 940. TNT has offered no evidence showing that the increased numbers of Hispanic applicants were unqualified for the laborer positions.⁶⁹ TNT's arguments that the three rejected applicants who testified were unqualified are merely conjecture as Gilmore could not remember if she looked at Robles' application or whether Concepcion Guerrero received an interview. Tr. at 471, 475-76. The review revealed instances of minorities and non-minorities who were hired despite incomplete applications. Tr. at 95. Given that the position at issue is entry level, the qualifications required were not high or specialized. TNT has not shown that the applicants brought in through its recruitment efforts lacked the qualifications for its entry-level laborer position.

Like the court in *County of Fairfax*, *supra*, the undersigned cannot assume that the Hispanic applicants recruited by TNT's affirmative action programs were less qualified than other applicants – TNT must prove that they were unqualified. 629 F.2d at 940. As TNT has failed to do so, the exception for atypical applicant pool provided in the Uniform Guidelines does not apply. The Uniform Guidelines clearly specify that a selection procedure resulting in

⁶⁸ TNT worked with the following local agencies: Refugee, Migration and Hispanic Services, Vision for Race Unity, United Migrant Opportunity Services, Family Services, Multicultural Center of Green Bay, Green Bay Among Women's Organization, and Southeast Asian Community Center. JX 1; PX 22.

⁶⁹ As discussed, *supra*, TNT's argument that the applicants' lack of basic English proficiency made them unqualified fails because the basic English skills requirement is the challenged business practice at issue.

adverse impact will be considered discriminatory unless it is validated according to the Uniform Guidelines' provisions or unless the defendant proves its pool to be atypical. 41 C.F.R. § 60-3.3(A), 3.4(D). Therefore, it is found that TNT violated the Uniform Guidelines by failing to validate a selection procedure that caused an adverse impact on Hispanic applicants.

Disparate Impact – Pretext

Assuming, *arguendo*, that TNT had established the business necessity of its minimal English proficiency requirement, OFCCP would have the opportunity to demonstrate that alternative, non-discriminatory methods existed that would achieve TNT's business interests. *Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329. OFCCP would be able to meet this burden for the following reasons.

If communication, safety, and promotability were bona fide concerns, TNT could have achieved its need of minimally English-proficient employees by adopting and validating a test for English proficiency that was standard, measurable, and applicable to all applicants. *See Dothard*, 433 U.S. at 332. Instead, TNT used a subjective process of determining English proficiency and applied it exclusively to Hispanic applicants.⁷⁰ *See* Table 6, *supra*; PX 26. Furthermore, the evidence of Spanish and ESL classes held by or encouraged by TNT demonstrates the alternative means of achieving English proficient and/or bilingual employees without creating an adverse impact. *See* Tr. 449-50, 597-98. Through its own evidence, TNT has shown that it was possible to hire non-English speaking employees and provide them with the skills TNT argues were required for the operative positions. Tr. at 602-04. In addition, the use of translators was a non-discriminatory means of resolving any safety or communication concerns. Tr. at 420-21, 435-37, 505-06. Thus, OFCCP has demonstrated that alternative, non-discriminatory options were available to TNT to achieve its business interests. *See Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329.

Any argument of the necessity of the English proficiency requirement is negated by the clear fact that not a single applicant whose English received a positive assessment was hired. PX 26. The only explanations offered for not hiring the English-speaking Hispanic applicants were retrospective conjectures about why the three testifying applicants may not have been qualified. Due to TNT's demonstrated need of laborers during the relevant time, there is no non-discriminatory explanation for failing to hire a single Hispanic applicant whose English was assessed positively.⁷¹ *See* ST 6, 7; Tr. at 373, 503. What remains is the conclusion that the actual notations, positive or negative, did not matter. As Dr. Killingsworth explained, "the people whose English language ability was assessed, have a probability of zero of being hired." Tr. at 275. Because applicants who received positive notations were not hired and their rejection

⁷⁰ As noted above, the one applicant who was classified as non-Hispanic, but who received a notation of English proficiency, had the surname Valenzuela. PX 26.

⁷¹ The applications received during the relevant time and reviewed by Dr. Killingsworth show 22 applicants who received a clearly positive notation of English skills. PX 26. Such positive notations included "does speak English," "pretty good English," and "speaks English." *Id.* Both LeBreck and Gimore testified that proficiency in English was not required. Tr. at 365-66, 518-21. TNT was looking for laborers who could communicate on a very basic level. *Id.* Based on their testimony, the 24 applicants who received notations of "some English" also would be included in the pool of those who met TNT's minimal English requirement. *See* PX 26.

has not been explained adequately by non-discriminatory reasons, OFCCP has established by a preponderance of the evidence that the minimal English proficiency requirement was pretextual.

CONCLUSION

For the above-stated reasons, it is found that OFCCP has shown by a preponderance of the evidence that TNT intentionally discriminated against Hispanic applicants during the relevant period from July to December of 2001. *See Burdine*, 450 U.S. at 252. TNT has failed to attack successfully the methodology or significance of OFCCP's statistical evidence showing a significant adverse impact against Hispanic applicants. TNT arguments that legitimate, non-discriminatory factors explain the statistical disparity are unsupported by evidence and insufficient to carry its burden in rebutting OFCCP's prima facie case of disparate treatment.

It is also found that TNT discriminated against Hispanic applicants in utilizing a facially-neutral selection criteria and procedure that resulted in an adverse impact. *See Teamsters*, 431 U.S. at 335. TNT has failed to establish that the minimal English requirement was demonstrably related to legitimate business necessities. *See Griggs*, 401 U.S. at 431-32. Furthermore, TNT has failed to show that its applicant pool was atypical due to recruitment efforts resulting in unqualified Hispanic applicants. TNT's failure to validate a selection procedure that resulted in adverse impact for Hispanic applicants violated the Uniform Guidelines and the Executive Order. *See* 41 C.F.R. § 60-3.3(A); *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 114; *Johnson*, 491 F.2d at 1371.

Accordingly, it is recommended that Defendant TNT Crust be held to have discriminated against Hispanic applicants in hiring for entry-level laborer positions on the basis of their national origin.

Jurisdiction will be retained by the undersigned Administrative Law Judge for the remedy phase of the case. The parties shall confer and jointly submit a proposed schedule for the adjudication of damages within thirty days of receipt of this decision.

DECISION

Defendant TNT Crust discriminated against Hispanic applicants in hiring for entry-level laborer positions within the meaning of and under coverage by Executive Order 11246.

A
THOMAS M. BURKE
Administrative Law Judge



FC

RECEIVED



U.S. Department of Labor

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U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
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Issue Date: 03 November 2016

CASE NO.: 2015-OFC-1

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,

Plaintiff,

v.

JBS USA HOLDINGS, INC., JBS USA, LLC and
SWIFT BEEF COMPANY d/b/a JBS and
f/k/a JBS Swift & Company,
in their own capacity and as successors-in-interest to
Swift Foods Company and Swift & Co.,

Defendants.

THIRD NOTICE OF HEARING AND REVISED PRE-HEARING ORDER

Based upon an all-party conference call conducted on
October 24, 2016, and by agreement of the parties,

IT IS HEREBY ORDERED that the formal hearing on the merits
in the above-captioned proceeding scheduled for May 1, 2017, is
hereby re-scheduled for **August 14, 2017** at **9:00 a.m.** and
continuing from day to day thereafter, until completed in **Salt
Lake City, Utah.** The parties will be notified of the exact
location of hearing by subsequent notice.

Your attention is directed to 29 C.F.R. Parts 18 which
provide the Rules of Practice and Procedure applicable generally
to proceedings before the Office of Administrative Law Judges,
U.S. Department of Labor.

In the interest of expediting the hearing and insuring a
prompt disposition of this matter,

IT IS FURTHER ORDERED that the parties shall take the following action:

1. Discovery:

The parties shall conclude all fact discovery, except for expert depositions, not later than January 6, 2017.

2. Plaintiff's Expert Report:

The deadline for disclosure of Plaintiff's expert report shall be February 17, 2017.

3. Defendant's Expert Report:

The deadline for disclosure of Defendant's expert report shall be April 14, 2017.

4. Plaintiff's Rebuttal Expert Report:

The deadline for Plaintiff's Rebuttal expert report shall be May 19, 2017.

5. Completion of Expert Deposition:

The deadline for completion of expert depositions shall be June 16, 2017.

6. Pre-Hearing Exchange:

On or before July 14, 2017, the parties shall exchange and serve upon this office, a pre-hearing submission containing the following information:

(a) The name and address of each witness the party proposes to call with a short summary of the witness's expected testimony and an estimate of the length of hearing;¹

(b) A list of all documents the party expects to introduce as evidence. Each document must be identified and a copy served on the other parties. Each page of a multipage exhibit is to be numbered. Exhibits should be numerically marked: Plaintiff's

¹ Failure to comply with this provision may result in exclusion of the testimony of witnesses not listed. Cf. Rule 16, Federal Rules of Civil Procedure.

Exhibit No. (PX-____, page ____ of ____) or Defendant's Exhibit No. (DX-____, page ____ of ____;² and

(c) A statement as to any other matters that will aid in the expeditious hearing of this case.

7. Pre-Hearing Motions, Hearing Briefs and Motions In Limine:

The deadline for any pre-hearing motions, to include Motions In Limine, and Pre-Hearing Briefs shall be July 21, 2017.

8. Post-Hearing Briefs:

At the hearing, a date will be set for the filing of proposed findings of fact, conclusions of law and briefs pursuant to 29 C.F.R. § 18.57(a).

9. No Facsimiles:

Facsimile and E-Mail filings and service are not authorized or permitted without prior permission of the undersigned or unless explicitly permitted by statute or regulation. See 29 C.F.R. § 18.3(f)(1).

10. Pre-Hearing Conference:

A telephone pre-hearing conference will be held at 3:00 p.m. CST on August 7, 2017, with the parties to discuss any motions, stipulations and/or objections. The parties are advised to call 1-866-796-1343 with participant code 78271408 to join the telephone pre-hearing conference.

Given the additional extensive amount of time allotted to the parties for pre-hearing preparation, any further Motions to Continue the formal hearing will not be favorably considered absent dire circumstances.

² Exhibits are to be offered during the hearing. DO NOT SEND COPIES TO THE COURT PRIOR TO THE HEARING.

ORDERED this 3rd day of November, 2016, at Covington,
Louisiana.



Digitally signed by LEE J. ROMERO JR
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Judges, L=Covington, S=LA, C=US
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LEE J. ROMERO, JR.
Administrative Law Judge

SERVICE SHEET

Case Name: **OFCCP - DALLAS TX v JBS USA HOLDINGS INC**

Case Number: **2015OFC00001**

Document Title: **Third Notice of Hearing and Revised Pre-Hearing Order**

I hereby certify that a copy of the above-referenced document was sent to the following this 3rd day of November, 2016:



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Issue Date: 22 February 2017

CASE NO.: 2017-OFC-00002

IN THE MATTER OF

**OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, U.S. DEPARTMENT OF LABOR,
Plaintiff**

v.

**JBS USA LUX S.A. f/k/a JBS USA, LLC, JBS USA, INC., and SWIFT & CO.,
and SWIFT BEEF COMPANY,
Collectively d/b/a JBS and JBS USA,
Defendant**

ORDER GRANTING JOINT MOTION FOR CONTINUANCE

The Parties Joint Motion for Continuance is hereby **GRANTED**. The following prehearing deadlines shall apply:

Parties' Designation of Expert Witnesses:	March 16, 2018
Conclusion of Fact Discovery:	May 18, 2018
Plaintiff's Expert Report Submission:	July 20, 2018
Defendant's Expert Report Submission:	December 20, 2018
Plaintiff's Rebuttal Expert Report:	January 20, 2019
Completion of Expert Depositions:	February 20, 2019
Dispositive Motion Deadline:	April 20, 2019
Prehearing Exchange:	May 20, 2019
Prehearing Motions:	June 20, 2019

The hearing in the above matter will be held on July 24, 2019, in Amarillo, Texas. The Parties will be notified of the exact location by subsequent order.

So ORDERED.



Digitally signed by LARRY PRICE
DN: CN=LARRY PRICE,
OU=JUDGE, O=US DOL Office of
Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

LARRY W. PRICE
Administrative Law Judge

SERVICE SHEET

Case Name: OFCCP_-_DALLAS_TX_v_JBS_USA_INCand_SWIFT_

Case Number: 2017OFC00002

Document Title: Order Granting Joint Motion for Continuance

I hereby certify that a copy of the above-referenced document was sent to the following this 22nd day of February, 2017:



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