

A Plaintiff's Perspective on Some Evidentiary Issues  
and Jury Instructions in Employment Discrimination Litigation

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Statistical Evidence

General Standards

Generally, two standard deviations is the accepted level of statistical significance for statistical evidence in employment discrimination cases. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 874 (11th Cir. 1986); *Page v. United States Indus., Inc.*, 726 F.2d 1038, 1047 (5th Cir. 1984); *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984). A disparity in treatment that is at least two standard deviations is acceptable as evidence of discrimination.

An analysis which accounts for the “major factors,” is sufficient, an analysis need not include *all* measurable variables. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986); *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 458 (S.D.N.Y. 2004). Statistical analyses should focus on factors affecting productivity. *Dalley v. Michigan Blue Cross/Blue Shield*, 612 F. Supp. 1444, 1450 (E.D. Mich. 1985); *Greenspan v. Auto. Club of Mich.*, 495 F. Supp. 1021, 1061-64 (E.D. Mich. 1980); *Anderson v. Zubieta*, 180 F.3d 329, 341-42 (D.C. Cir. 1999).

Defendants' critiques of plaintiffs' experts can only be considered if defendant demonstrates that an alternate analysis would lead to a more favorable result. *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 579-82 (9th Cir. 1989) (“[T]he defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics.”); *Bazemore v. Friday*, 478

U.S. 385, 399-400, 403 n. 14 (1986) (defendant “made no attempt ... to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites” and thus defendant's argument that factors were omitted from plaintiffs' analysis, making that analysis unsound, was rejected); *see also Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 653-654 (5th Cir. 1983) (“defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results”); *Catlett v. Missouri Highway and Transp. Comm’n*, 828 F.2d 1260, 1266 (8th Cir. 1987) (mere assertion that an omitted factor would explain the disparities found is insufficient to rebut the inference of discrimination from the statistical analysis; burden is on defendant to submit “direct evidence demonstrating that [the omitted factor] accounted for the disparity”); *Segar v. Smith*, 738 F.2d 1249, 1277 (D.C. Cir. 1984); *In re Polypropylene Carpet*, 996 F. Supp. at 26-27 (collecting cases).

#### Omission of Tainted Variables

Case law supports the exclusion of “tainted” variables, that is, variables which are themselves either a product of prior discrimination or a pretext for current discrimination. For example, in a case complaining of discrimination in compensation, starting salary might be a relevant variable to consider when evaluating whether current disparities in compensation are due to discrimination or neutral factors. However, if starting salary was itself assigned in a discriminatory manner, then it cannot serve as a “neutral” variable – it is tainted. *See e.g. James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977) (employer’s statistical analysis was rejected because it included performance rating, with court explaining that “If there is racial bias in the subjective evaluations of white supervisors, then that bias will be injected into [defendant’s] earnings analysis.”); *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 479 (8th Cir. 1984) (rejecting statistical analysis of pay which controlled for rank in light of evidence that rank was tainted by discrimination); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 35 (2d Cir. 1988); *Greenspan v. Auto. Club of Mich.*, 495 F. Supp. 1021, 1061-64 (E.D. Mich. 1980).

One variable which has often been challenged as tainted is grade level or similar such variables. While grade level may be an important factor in explaining compensation, in cases where plaintiffs have also alleged discrimination in promotions, the grade level itself may be tainted by discrimination. *See Coward v. ADT Security Sys.*, 140 F.3d 271, 274 (D.C. Cir. 1998) (“Where plaintiffs allege discriminatory promotion practices, for example, this court considers inclusion of grade variables [in salary regression model] 'inappropriate' because an employee's grade may itself reflect discrimination.”); *Valentino v. USPS*, 674 F.2d 56 n.30 (D.C. Cir.1982) (“Absent clear, affirmative evidence that promotions were made in accordance with neutral, objective standards consistently applied, there

is no assurance that level or rank is an appropriate variable, untainted by discrimination.”).

Some courts have required that plaintiffs who want to exclude a variable from the analysis due to taint present specific evidence that the variable is tainted. *Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

#### Individual Cases

Statistical evidence about an employer overall is probative of an employer's motive, and thus it has been held admissible in individual discrimination cases.

Statistical evidence showing a pattern of conduct by an employer is considered evidence of pretext in an individual case.

Because of the relevance of statistical evidence, discovery of data on which such statistical analyses can be based has been permitted, including discovery that goes beyond the individual plaintiffs' place of employment to a region or even the entire company. *See, e.g., Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1363-64 (9th Cir. 1985) (“One way of reaching conclusions about an employer's motives is by ascertaining whether the employer's explicit or implicit policies encourage or permit discriminatory employment decisions by its supervisory personnel.”); *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 305-6 (5th Cir. 1973) (holding that overall statistical evidence was discoverable even in an individual case because data reflecting overall pattern of conduct is probative of whether employer has discriminated against particular individuals); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990) (“evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees,” which would help individual plaintiff prove her case); *Roberson v. Alliedsignal, Inc.*, 1997 WL 222359 (N.D.N.Y. March 21, 1997) (plaintiff entitled to discovery of employment practices company-wide, not limited to those at the facility where the former employee worked); *Clark v. United Technologies Corp. Pratt & Whitney Div.*, 1998 WL 220199, \*1 (D. Conn. 1998) (in order to prove company-wide claim of age discrimination, plaintiffs in multi-plaintiff but non-class case were entitled to statistical evidence); *Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 66 (E.D. Mo. 1995) (company-wide statistical information is discoverable to demonstrate pattern and practice of discrimination, even in an individual disparate treatment case); *Holley v. Pansophic Sys. Inc.*, No. 90 C 7505, 1993 U.S. Dist. LEXIS 13910, \*16-17 (N.D. Ill. Sept. 30, 1993) (permitting discovery of positions not held by plaintiffs, as well as nationwide discovery of all persons with supervisory or managerial positions in this multi-plaintiff case); *Welker v. SmithKline Beckman*, Civ. A. No. 89-866, 1989 WL 121894 at \*1 (E.D. Pa. Oct. 12, 1989) (holding that “statistical analysis might well be the only means by which plaintiff could prove an alleged pattern or practice” of discrimination beyond her immediate supervisor, and authorizing

company-wide discovery, despite the fact that plain tiff presented an individual, and not a classwide claim); *Guruwaya v. Montgomery Ward, Inc.*, 119 F.R.D. 36 (N.D. Cal. 1988) (individual employee entitled to discovery for entire region, not just his facility); *Henderson v. Nat'l R.R. Passenger Corp.*, 113 F.R.D. 502, 507 (N.D. Ill. 1986) (“The plaintiff needs access to statistical data in order to prove that racial discrimination exists.” and permitting nationwide discovery of statistical data).

#### Admissibility of numerical evidence without statistical analysis

There are some circumstances in which courts have permitted simple numerical evidence portraying the demographic make up of the employer's workforce, without statistical analysis and comparison to the available labor pool. Courts have often held that mere numerical evidence is insufficient to prove a *prima facie* case, and must be subjected to analysis including comparison to the available labor pool to be admitted. *See, e.g., Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994).

However, other cases have permitted simply numerical evidence. *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (numerical evidence suggesting equal opportunity was not general policy is probative value on question of whether discrimination motivated individual decision). The court held the district court had erred in excluding numerical evidence of the racial makeup of the employer's workforce, stating: “the jury might have evaluated Estes’s discrimination claim differently if he had been allowed to present evidence that Ford had not hired a single black person among the 153 employees hired from 1978 to 1983, and that only four of the 214 people employed at Ford during this period were black.” *Estes*, 856 F.2d at 1103.

The difference in the treatment of such numerical evidence is explained by reference to the purpose for which it is used. Evidence must be more persuasive when relied upon to establish plaintiffs’ *prima facie* case than when it is used for more limited purposes. *Estes, supra*, and *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988) both differentiate the level of statistical proof needed to establish a *prima facie* case from the lesser showing needed to make such evidence relevant to consideration of pretext. *Estes*, 856 at 1103; *MacDissi*, 856 F.2d at 1058. If plaintiff establishes a *prima facie* case without reliance on statistical evidence, simple numerical data may be admitted to establish pretext.

#### Class Actions

In classwide cases, statistical evidence is even more important – individual cases may be proved without statistical evidence, but class cases rarely can. The basic burden in a class case is to prove that discrimination is the regular,

not the unusual, practice of the employer, that it is the “standard operating procedure.” It would be incredibly burdensome and inefficient to try to meet that burden by presenting evidence for each individual, and would defeat the purpose of the class action device. Statistical evidence, however, permits plaintiffs to make that showing.

Circuit Courts, including the DC, Second, Fourth, Fifth and Eighth Circuits have agreed that, “Statistics alone can make out a prima facie case of discrimination if the statistics reveal ‘a gross disparity in [the] treatment of workers based on race.’” *Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147, 158-59 (2d Cir. 2001) quoting *Lopez v. Laborers Int’l Union, Local No. 18*, 987 F.2d 1210, 1214 (5th Cir.1993); see also, *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 684 (4th Cir.1986) (“Since strong statistical evidence, without anecdotal evidence, may in some cases form a prima facie case, a defendant’s successful rebuttal of each alleged instance of discrimination weakens, but does not defeat, a plaintiff’s class claim. Neither statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other.”); *Segar v. Smith*, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984) (“illicit motive may be inferred from a sufficient showing of disparity between members of the plaintiff class and comparably qualified members of the majority group”); *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 479 (8th Cir. 1984) (statistically significant disparities in employment outcomes permit an inference of intentional discrimination); *Catlett v. Missouri Highway and Transp. Comm’n*, 828 F.2d 1260, 1265 (8th Cir. 1987) (same).

While plaintiffs may establish a *prima facie* case of disparate treatment using statistics alone if the statistics show a “gross disparity” in the treatment of workers based on discriminatory factors, if the plaintiffs’ statistical evidence is insufficient alone to establish a *prima facie* case of disparate treatment, the plaintiffs may combine the statistical evidence with historical, individual or circumstantial evidence. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (anecdotal evidence can “bring the cold numbers to life”); *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987); *Mooney v. Aramco Servs., Co.*, 54 F.3d 1207, 1221 (5th Cir. 1995); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 190, 192 (5th Cir. 1983) (excessive subjectivity is relevant to prove a pattern and practice of discrimination, particularly when coupled with a significant statistical disparity).

### Stereotyping Evidence

The Supreme Court recognized that evidence of stereotyping, including expert testimony, could be used to establish intentional discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989).

In class actions expert testimony is generally used to provide a more clear causal link between the allegation that certain practices lead to discrimination and statistical

evidence showing discriminatory outcomes. Expert testimony often proceeds under “social framework analysis,” in which the point is to provide information to the fact finder about how stereotyping operates, what stereotypes are prevalent, circumstances under which decisionmakers are likely to be more likely or less likely to rely on stereotypes, etc. In other words, they provide a framework of social science within which evidence plaintiffs present about the specific facts of their case can be more accurately evaluated.

In individual cases, experts have gone beyond testimony about the overall social framework and, based upon the record of a particular case, offer an opinion that certain comments or actions reveal underlying stereotyping, in order to strengthen plaintiff’s evidence of intent.

Federal courts have readily admitted testimony on this subject in the past. *See, e.g., Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 881 (D. Minn. 1993) (admitting expert testimony of Dr. Eugene Borgida on sex stereotyping and describing it as providing “a sound credible theoretical framework”); *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 460-62 (S.D.N.Y. 2004) (admitting testimony of Dr. Bielby over claim that social framework analysis was not reliable methodology); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189, 191-92 (N.D. Cal. 2004) (same); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (finding that testimony regarding stereotyping “provided a sound, credible theoretical framework”); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997) (Dr. Bielby’s testimony admitted for class certification); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 301-303, 327 (N.D. Cal. 1992) (Dr. Bielby’s testimony admitted on the merits); *Hurst v. F.W. Woolworth Co.*, 1997 WL 685341 (S.D.N.Y. Nov. 3, 1997) (admitting expert testimony on age stereotypes in age discrimination case); *Flavel v. Svedala Indus. Inc.*, 1994 WL 761447 (E.D. Wis. Oct. 25, 1994) (same); *see also Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996) (holding that district court erred in excluding social science testimony regarding the effect of an advertising campaign on African-Americans); *Beck v. The Boeing Co.*, No. 00-cv-0301-MJP, slip op. at 2 (W.D. Wa. May 14, 2004) (finding social framework analysis testimony from Dr. Borgida was the product of reliable principles and methods where “the sources upon which he relied for his report indicate that his theories are widely accepted, have been published in reputable scientific journals and have been subject to peer review”).

#### Likely Daubert Challenges

methodology not sufficiently accepted – but see above at para. D

methodology not tested, doesn’t have measured error rate

opinion not quantifiable

Most opinions from social scientists, as well as from psychiatrists, are not quantifiable, yet this has not led to their exclusion. Indeed, in *Price Waterhouse*, the Supreme Court approved the admission of expert testimony about gender stereotypes even though the expert

admitted that she “could not say with certainty whether any particular comment was the result of stereotyping.” 490 U.S. at 236.

lack of reliable factual foundation, expert did not do direct empirical research on employer

However, experts testifying under a social framework analysis are not expected to have first hand knowledge of the employer’s practices such as would be gleaned from empirical research. *Morgan Stanley*, 324 F. Supp.2d at 461-62.

### Affirmative Action Plans

Evidence concerning the adoption and implementation of affirmative action plans has generally been admitted in discrimination cases, although “the lack of an affirmative action plan or poor implementation of one does not, by itself, prove classwide discrimination.” *Chang v. University of Rhode Island*, 606 F.Supp. 1161, 1183 (D.R.I. 1985) citing *Metrocare v. Washington Metropolitan Transit Authority*, 679 F.2d 922, 929 (D.C. Cir. 1982).

Cases finding that evidence of effective affirmative action plan defeats claim of classwide discrimination:

*Coser v. Moore*, 739 F.2d 746, 751 (2d Cir. 1984) (“It should be emphasized that the finding that Stony Brook has an effective affirmative action program is of central importance to this litigation. The existence of a comprehensive affirmative action program is the antithesis of a pattern and practice of discrimination based on sex. Such a program is evidence of an intent to eliminate gender as an employment criteria and to root out subtle forms of discrimination. It thus directly controverts a claim that discrimination is the “standard operating procedure.” *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855.”)

Cases finding failure to follow affirmative action plan is relevant evidence of intent to discriminate:

*Craik v. Minnesota State University Bd.*, 731 F.2d 465, 472 (8th Cir. 1984) (“Neither Title VII, 42 U.S.C. § 1983, nor the Fourteenth Amendment requires an employer to institute an affirmative-action program . . . but evidence that an employer has failed to live up to an affirmative- action plan is relevant to the question of discriminatory intent.”) (citations omitted)

*Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 n.14 (8th Cir. 1981) (“Evidence, such as Teletype's failure to live up to its affirmative action program and its failure to support its affirmative action director, is also relevant to discerning the Company's attitude regarding race.”)

*Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991) (“The court did find Jeffboat's noncompliance with its various

affirmative-action plans probative of discriminatory intent, as is permitted under *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 415 (7th Cir.1988). Nevertheless, it clearly recognized that such noncompliance is not dispositive of the question: “Evidence of an employer's failure to follow the requirements of an affirmative action plan is also relevant, though not conclusive, in determining intentional racial discrimination.” Trial Order at 123 (citations omitted).”). Specifically, the district court had noted that defendant had failed to inform its supervisors of the AAP’s and their requirements, did not establish a means to monitor compliance with the plans’ objectives, and that neither the defendant’s affirmative action officer nor his supervisor had even a basic understanding of how such a plan should be implemented. *Id.* at 1044.

*Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 415-16 (7th Cir. 1988) (affirmative action is not required; evidence of a bona fide affirmative action plan can rebut a claim of discrimination and violation of a plan may help support a claim, but violation of AAP is not a per se violation of Title VII; moreover, if there is substantial compliance with AAP, then occasional departures have no significance at all.).

#### Admissibility of EEOC or other Agency Findings

In the past, findings from the EEOC or state agencies were often admitted in Title VII cases. However, since the Civil Rights Act of 1991 brought jury trials to Title VII cases, courts have been more open to arguments for excluding such findings.

Admissibility became fairly routine with the Supreme Court ruling that a:

prior administrative finding made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal sector trial de novo. See Fed Rule Evid 803(8) (C).

*Chandler v. Roudebush*, 425 US 849, 48 L.Ed.2d 416, 432 n. 39 (1976).

Factors governing admissibility of agency findings

The admissibility of reports of administrative agencies is governed by Federal Rule of Evidence 803(8) (C), which provides an exception to the hearsay rule for government reports. In civil actions, “factual findings resulting from an investigation made pursuant to authority granted by law” may be admitted unless there is some indication that the report lacks trustworthiness. Criteria for admitting reports under Rule 803(8) (C) include:

- the timeliness of the investigation;
- the special skill or experience of the official;
- possible motivation problems.

*Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir. 1984).

Cases supporting admission of such findings

Every Circuit which has addressed the question (in both federal sector or private sector cases) held that it is at least within the District Court's discretion to

admit reports of the EEOC or local human rights agencies; the Fifth and Ninth Circuits have gone so far as to make them *per se* admissible. Courts have found administrative agency findings to be “highly probative.” *Barfield v. Orange County*, 911 F.2d 644, 649-51 (11th Cir. 1990)

*Hackley v. Roudebush*, 520 F.2d 108 (D.C. Cir. 1975) (administrative findings and record admissible); *Smith v. MIT*, 877 F.2d 1106, 1113 (1st Cir 1984) (administrative findings admissible); *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985), *affirmed* 479 US 60 (administrative findings admissible); *Walton v. Eaton*, 563 F.2d 66, 75 (3d Cir. 1977) (within discretion of trial court to admit); *Goldberg v. B Green and Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988) (for purposes of reviewing summary judgment, Court assumed Human Rights Commission findings to be admissible); *Cox v. Babcock*, 471 F.2d 13, 15 (4th Cir. 1972) (it is within discretion of trial court to admit); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir 1980) (error to refuse to admit EEOC findings); *McClure v. Mexia Independent School District*, 750 F.2d 396, 400 (5th Cir 1985) (EEOC findings should be admitted in jury trial as well as bench trial); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924 (7th Cir. 1984) (within court's discretion to admit); *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304 (8th Cir 1984) (within trial court's discretion); *Plummer v. Western Int'l Hotels*, 656 F.2d 502, 505 (9th Cir 1981) (administrative findings are *per se* admissible in either bench or jury trials); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821 (10th Cir. 1981) (within court's discretion to admit or exclude); *Barfield v. Orange County*, 911 F.2d 644, 649-51 (11th Cir. 1990) (EEOC determinations are generally admissible, they are highly probative, but trial court has discretion to exclude in certain circumstances).

#### Limitations on Admissibility

Reports can be excluded if “merely conclusory.” *Cf. Johnson v. Yellow Freight System*, 734 F.2d 1304 (8th Cir. 1984) (mere two sentences in letter set forth finding); *Estes v. Dick Smith Ford Inc.*, 856 F.2d 1097, 1105 (8th Cir 1988) (same); *Goldberg*, 836 F.2d at 848 (where EEOC determination restates facts presented to jury and is otherwise conclusory, it will not establish a *prima facie* case, citing *Johnson v. Yellow Freight, supra*).

There has been something of a trend recently to exclude EEOC findings in jury trials under Rule 403 (more prejudicial than probative), but that is by no means universally the case, and circuits continue to leave that decision to the discretion of the trial courts.

**Cases excluding EEOC findings:** *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1345 (3d Cir. 2002) (affirming district court's decision to exclude EEOC finding, noting that while the finding met the requirements for admissibility under Rule 803(8) (C), “a District Court has the discretion to exclude probative EEOC Letters of Determination where the negative factors listed in Rule 403 substantially outweigh the probative value of the

EEOC determinations”); *Smith v. Massachusetts Institute of Technology*, 877 F.2d 1106, 1113 (1st Cir. 1989) (agreeing with the Seventh Circuit that “a rule of per se admissibility of the investigative file would clearly undercut the district court's function as independent fact-finder. The better approach is to permit the district court to determine, on a case-by-case basis, what, if any, EEOC investigator materials should be admitted at trial.”); *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 27 (1st Cir. 2002) (“The district court's routine exclusion of the MHRC letter is consistent with *Smith* 's stated approach. It seems to us that the district court's exclusion reflects a tacit balancing under Rule 403.” and affirming district court’s ruling that conclusory finding, without supporting evidence, was more prejudicial than probative); *Paolitto v. John Brown E.&C., Inc.*, 151 F.3d 60, 65 (2nd Cir.1998) (adopting the majority position that leaves “the question of whether to admit EEOC … findings to the sound discretion of the district court” and finding the district court had not abused its discretion in refusing to admit state agency’s finding of no probable cause).

**Recent Cases Admitting EEOC Findings:** *Heyne v. Caruso*, 69 F. 3d 1475, 1483 (9th Cir. 1995) (“it is reversible error for the district court to exclude an EEOC probable cause determination from a Title VII trial”); *accord Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1015 (9th Cir. 1999); *Plummer v. Western International Hotels Co.*, 656 F.2d 502, 504-05 (9th Cir. 1981) (A “plaintiff has a right to introduce an EEOC probable cause determination in a Title VII lawsuit, regardless of what other claims are asserted, or whether the case is tried before a judge or jury”) ; *Lindsey v. Prive, Inc.*, 161 F.3d 886, 894 (5th Cir. 1998); *Palasota v. Haggard Clothing Co.*, 342 F.3d 569, 577 n.13 (5th Cir. 2003) (an EEOC determination prepared by professional investigators on behalf of an impartial agency, is highly probative); *Rhyce v. Martin*, 2003 WL 57040, at \*1 (E.D.La. Jan. 6, 2003) (“It is clearly the law in the Fifth Circuit that the EEOC determination letter is admissible. Accordingly, defendants’ motion in limine to exclude this particular evidence should be and is hereby DENIED.”) (emphasis in original).

#### Stray remarks, cat’s paws, etc.

Remarks: stray, feral, and otherwise

It seems to me than an excessive amount of effort has gone into parsing the classification of comments evincing bias into “stray remarks” or direct evidence of discriminatory intent. While applied with varying degrees of severity, the general definition of “stray remarks” includes “statements by nondecisionmakers,” or “statements by decisionmakers unrelated to the decisional process itself.” *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 635 (8th Cir.1998) (quoting *Price Waterhouse*, 490 U.S. at 277).

However, the underlying reason that such classification debates became so important was that if a remark were accepted as “direct evidence” of discrimination, then the burden could be shifted to defendant to prove its actions were not discriminatory. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989). Since the Supreme Court’s ruling in *Desert Palace, Inc. v. Costa*, 529 U.S. 90, 94 (2003) made clear that plaintiffs could rely upon circumstantial as well as direct evidence in seeking to persuade a jury that a prohibited characteristic was a motivating factor in the challenged decision, the characterization of a remark as “direct” vs. “stray” should be of virtually no significance. For example, the facts underlying *Costa*, as described in the Ninth Circuit’s ruling, *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), included comments that the plaintiff “did not deserve overtime because she did not have a family to support,” and “sexual language and epithets,” all of which were relevant to prove sex discrimination with respect to plaintiffs’ termination.

However, post-*Costa*, some courts have continued to disregard evidence after characterizing it as a “stray remark.” See, e.g., *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934 (8th Cir. 2006) (“These remarks were stray comments, despite the fact that they were made by decisionmakers.”);<sup>1</sup> *Arraleh v. County of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006) (“[N]ot every prejudiced remark made at work supports an inference of illegal employment discrimination. . . . We have carefully distinguished between comments which demonstrate a discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions, from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process.”) (quoting *Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr.*, 133 F.3d 616, 619 (8th Cir.1998)); *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 272 (7th Cir. 2004) (While nominally allowing that “racial epithets or stray remarks may be direct or circumstantial evidence of intentional discrimination” it qualified this admission by requiring the comments to be “made by the decisionmaker, or those who influence the decisionmaker, and made close in time to the adverse employment decision” which effectively takes them out of the definition of “stray remark.”)

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<sup>1</sup> It is particularly sad to see such narrow rulings on relevance from a court that not too many years earlier ruled it was reversible error to exclude evidence of discrimination against customers in support of a claim of discrimination against employees. *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103-04 (8th Cir. 1988). The court also reversed the district court’s exclusion of racist comments by a manager, and summed up:

Circumstantial proof of discrimination typically includes unflattering testimony about the employer’s history and work practices -- evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, ***however, such background evidence may be critical for the jury’s assessment of whether a given employer was more likely than not to have acted from an unlawful motive.***

*Estes*, 856 F.2d at 1103 (emphasis added).

Other courts have recognized that evidence which does not qualify as “direct evidence of discriminatory intent,” such as a supervisor’s comment about age made months before a challenged termination, must nonetheless be considered, along with other evidence, in evaluating whether plaintiff has made out a case via the indirect method of *McDonnell Douglas*. See, e.g., *Olson v. Northern FS, Inc.*, 387 F.3d 632, 635-36 (7th Cir. 2004) (noting evidence that plaintiff performed job satisfactorily, that defendant hired someone younger and less experienced to replace him, “coupled with Keelen’s remark, stray or otherwise, that Olson was undesirable because of his age, are sufficient to let a jury decide whether Olson’s age actually played a role in Northern FS’s decision to terminate his employment.”); *Plotke v. White*, 405 F.3d 1092, 1107 (10th Cir. 2005) (while still requiring a showing of “nexus” between the statements and the challenged decision, acknowledges that “the Supreme Court has emphasized that courts should not reject a plaintiff’s evidence of additional circumstantial gender-based comments and treatment simply because they ‘were not made in the direct context of [the plaintiff’s] termination.’ *Reeves*, 530 U.S. at 151-53,” and admits evidence of gender-based comments by plaintiff’s supervisor that were not directly linked to the challenged decision)

The Seventh Circuit has more sensibly placed the “stray remarks” debate in the context of Rule 403:

Language in some judicial opinions suggests that prejudicial remarks are always to be excluded unless they are made by someone who had input into the decision to terminate (or take other challenged adverse employment action against) the plaintiff. E.g., *Steger v. General Electric Co.*, 318 F.3d 1066, 1079 (11th Cir.2003); *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir.2000). This language should not be taken literally, however. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir.1986); *Brewer v. Quaker State Oil Refining Corp.*, *supra*, 72 F.3d at 333-34. The admissibility of “stray remarks,” as the cases call them, is governed by Rule 403 of the evidence rules, which establishes a standard rather than a rule-and-a-standard that tilts in favor of admissibility; the probative value of the evidence must not merely be outweighed, it must be substantially outweighed, by its negative consequences, to be excludable. And that will depend on context-the circumstances in which the remarks were made, such as the number of similar remarks, when they were made, and by whom and to whom they were made. *Cummings v. Standard Register Co.*, *supra*, 265 F.3d at 63; *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 356-57 (6th Cir.1998).

*Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 770-71 (7th Cir. 2006)

While not written specifically about exclusion of comments which may demonstrate bias, this general statement discouraging exclusion of evidence in Title VII cases due to “crabbed notions of relevance.”

Proof of such [intentional] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against-the cost

of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative. **A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.**

*Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987) (Posner, J.)

#### Atmosphere of discrimination

Even at the height of the “stray remark” standard, courts recognized that biased comments, even by non-decisionmakers, could demonstrate a “discriminatory atmosphere” which could serve as proof of an employer’s animus.

*Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987) (“While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add ‘color’ to the employer’s decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff.”)

*Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 546 (3rd Cir. 1992) (same); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 922 (3rd Cir. 1997) (statement of nondecisionmaker was admissible because “even if [it] was a mere stray remark, it can constitute evidence of the atmosphere in which the forced ranking was carried out”)

*Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998). (“Circumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant’s workplace in turn may serve as circumstantial evidence of individualized discrimination directed at plaintiff.”)

*Blake v. J.C. Penney Co., Inc.*, 894 F.2d 274, 278 (8th Cir. 1990) (allowing evidence of an employee’s age-based insults to establish animus on the part of an employer, when that employer knew of and tolerated the behavior, holding that “[a]n employer’s knowing and informed toleration of age harassment constitutes evidence of age discrimination.”).

Evidence that the employer has been biased against minorities in general or against one minority group can be used to establish bias against other minority groups. This line of authority serves to further undermine the notion that remarks not made about the plaintiff should be excluded from consideration as “stray remarks.”

The Supreme Court has held that in establishing the employer's intent, it is relevant to look at whether white employees are treated preferentially, and that the employer's “general policy and practice with respect to minority employment” is relevant to establishing a “pattern of discrimination

against blacks.” In other words, proof of the broader pattern with respect to all minorities generally is relevant to how the employer treated black employees specifically. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

The Ninth Circuit has held it is erroneous to exclude evidence of bias against Asians generally from a case involving only allegations of discrimination against a Vietnamese woman. *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994). Indeed, in a later opinion in the same case, the Ninth Circuit went further, and held it was also error to exclude evidence of negative remarks about hiring a Black woman. *Lam v. Univ. of Hawaii*, 164 F.3d 1186, 1188 (9th Cir. 1999).

The same concept, that bias in favor of whites is relevant to claims of bias against any non-white group, was expanded upon in *Abramson v. American Univ.*, 1988 WL 152020, \*1 (D.D.C. 1988) (citing *McDonnell Douglas supra*). In *Abramson*, the plaintiff alleged bias in favor of white, Anglo-Saxon Christians, and thus against him as an Eastern European Jew. He was permitted to present evidence of bias against individuals based on backgrounds including Muslim, Black, and Belgian. *Id.* at n.1 The court held that evidence concerning discrimination “against other minority groups is surely relevant to the issue of his discriminatory intent in *general*,” and that “Plaintiffs’ witnesses will testify only as to the presence of a *general* discriminatory intent.” *Id.* at \*1-2 (emphasis added to first quote, emphasis original to second quote).

Similarly, in *Hollander v. American Cyanamid Co.*, 172 F.3d 192 (2d Cir. 1999), an opinion addressing discovery of companywide statistical information, Judge Calabresi added a concurrence to expand upon the appropriate parameters of discovery in an employment discrimination case, explaining:

I write separately only to note that, in appropriate circumstances, *evidence of discrimination against one group of people can support an inference of discrimination against another group* . For example, if statistical or other evidence indicated that an employer discriminated against Asian-Americans, Asians, Chicanos, and African Americans, it might be reasonable to deem that evidence relevant to a claim that the same employer had discriminated against a Native American or a Nigerian. This would especially be so if the available data were insufficient to establish a pattern of behavior toward the plaintiff’s class specifically, as might be the case if the plaintiff had been the only Native American or Nigerian in the defendant’s employ.

*Id.* at 204.

*Schwapp v. Town of Avon*, 118 F.3d 106 (2d Cir. 1997) (in a racial harassment suit brought by an African American, evidence of derogatory comments about Hispanics, Middle Easterners or other minority groups was also pertinent)

## Cat's Paw

There may be disputes when discriminatory remarks at issue were not made directly by the decisionmaker. However, there is ample authority that where such statements were made by someone who participated in the decisionmaking process, they may be admissible even if the speaker was not the final decisionmaker. This has become known as the “cat’s paw” theory: if the decisionmaker merely served as the “cat’s paw” for another who acted with discriminatory animus, the employer is liable just as if the animus was that of the nominal decisionmaker. Courts have differed over whether the biased input of the “cat” must be the proximate cause of the challenged decision

In the employment discrimination context, “cat’s paw” refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir.1998). The “rubber stamp” doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir.2004) (en banc). Our sister circuits overwhelmingly have endorsed some version of these doctrines. *See Galdamez v. Potter*, 415 F.3d 1015, 1026 n. 9 (9th Cir.2005); *Hill*, 354 F.3d at 290; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir.1999); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1311-12 (D.C.Cir.1998); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir.1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir.1996); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1213-14 (3d Cir.1995); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir.1994); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990) (Posner, J.) (inaugurating the descriptor “cat’s-paw” for this category of claim).

*E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484-85 (10th Cir. 2006) **Cases admitting evidence** of animus from those who gave “advice” “factual information” or “other input” which may have affected the challenged decision. *EEOC v. Watergate at Landmark Condominium*, 24 F.3d 635, 640 (4th Cir. 1994) (admitting hearsay evidence of statements of age bias made by two residents who volunteered on committees which gave advice to the final decisionmaker); *Dey v. Colt Const. & Development Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) (plaintiff can rely on evidence that “an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.”); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988) (error for court to exclude evidence that person who participated in the decision to terminate plaintiff told racist jokes and referred to plaintiff as “nigger”); *Ryther v. KARE 11*, 108 F.3d 832, 842-44 (8th Cir. 1997) (evidence of comments showing age bias by non-decisionmakers admitted to show the general environment and because one biased speaker made factual complaints about plaintiff to decisionmaker); *Lust v. Sealy, Inc.*, 383 F.3d 580, 585 (7th Cir. 2004) (“the prejudices of an employee, normally a subordinate but here a coequal, are imputed to the employee who has formal authority over the plaintiff’s job ... where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision.”); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir.2000) (“[i]f an employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker.... ‘If the [formal decisionmakers] acted as

the conduit of [the employee's] prejudice-his cat's paw-the innocence of the [decisionmakers] would not spare the company from liability.” )

**Cases hewing to a stricter standard:** *Young v. Dillon Companies, Inc.*, 468 F.3d 1243, 1253 (10th Cir. 2006) (“In order to succeed under such a [cat’s paw] theory, however, a plaintiff must show that the allegedly biased investigator’s discriminatory reports, recommendation, or other actions were the proximate cause of the adverse employment action. . . . an unbiased supervisor can break the causal chain by conducting an “independent investigation” of the allegations against an employee.”); *English v. Colo. Dept. of Corr.*, 248 F.3d 1002, 1011 (10th Cir.2001) (employer can be held liable for a subordinate employee's prejudice even if the decision-maker lacked the required intent where the decision-maker failed to independently investigate the subordinate's complaint against the former employee and instead merely followed the biased recommendation of the subordinate); *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 290-91 (4th Cir. 2004) (limiting application of the cat’s paw theory to circumstances where the subordinate is the “actual decisionmaker” and relieving employer of liability even if the biased subordinate exercises “substantial influence” or plays a “significant” role in the employment decision).

### Some Sample Jury Instructions in Class Actions

**PATTERN AND PRACTICE OF DISCRIMINATION:** Plaintiffs allege that Defendant engaged in a “pattern and practice” of treating members of the class differently than whites on account of their race and national origin. In order to show a pattern and practice of disparate treatment discrimination under Title VII or §1981, Plaintiffs must prove, by a preponderance of the evidence, that the conduct complained of is a generally accepted or routine practice – the regular rather than the unusual practice. Plaintiffs do not have to show that discrimination in compensation is a formal policy of Defendant or that these practices are found uniformly in every division or office at Defendant. Discrimination against a group can be established without proving discrimination affected every class member uniformly. An informal but pervasive custom and usage may be sufficient to find that a pattern and practice of discrimination existed or exists at Defendant. You do not need to find the same levels of disparities for each year to find that a pattern or practice existed over the relevant time period. A pattern and practice of discrimination is not present just because isolated or sporadic discriminatory acts might have occurred.

In determining whether Defendant engaged in a pattern or practice of race or national origin discrimination toward the class, you may consider evidence of acts or omissions that occurred before the class statute of limitations period of October 12, 1996 (for §1981 claims) and/or March 12, 1999 (for Title VII claims).

Adapted from Todd J. McNamara & J. Alfred Southerland, *Federal Employment Jury Instructions* §3:400 (Oct. 2003); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (pattern or practice required proof of more than “mere occurrence of isolated or

accidental or sporadic discriminatory acts” – rather plaintiff must show “discrimination was the company’s standard operating procedure, the regular rather than the unusual practice”); *Penk v. Oregon State Board of Higher Educ.*, 816 F.2d 458, 463 (9th Cir. 1987) (in a discriminatory treatment class action, plaintiffs have the burden of proving that “discrimination was defendant’s standard operating procedure maintained through systematic intentional discrimination”) (citations omitted); *U.S. v. Ironworkers Local 86*, 443 F.2d 544, 552 (9th Cir. 1971) (pattern or practice should be found where acts of discrimination are not isolated peculiar or accidental events – a showing that defendant is “uniformly engaged in a course of conduct” is not required); *U.S. v. Lansdowne Swim Club*, 713 F. Supp. 785, 807 (E.D. Pa. 1989) (“A pattern or practice of discrimination may be found even if the Defendant does not discriminate uniformly.”), *aff’d* 894 F.2d 83 (3rd Cir. 1990); *Gonzalez v. Police Dept.*, 901 F.2d 758, 761-62 (9th Cir. 1990); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (employer’s pre-statute of limitations acts of discrimination may be used as background evidence in supporting a timely claim under Title VII); *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) (time-barred discriminatory act “may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.”); *Lyons v. England*, 307 F.3d 1092, 1110-12 (9th Cir. 2002) (same); *Paige v. California*, 291 F.3d 1141, 1149 (9th Cir. 2002) (appropriate to admit statistics using pre-liability data if employment practices remain similar), *cert. denied*, 537 U.S. 1189 (2003); *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003) (time-barred acts could be used to put timely-filed constitutional claims in context).

#### DISPARATE TREATMENT UNDER TITLE VII and § 1981 ELEMENTS AND

**BURDEN OF PROOF:** To prevail on their claim that Defendant discriminated against the plaintiff class in violation of Title VII and §1981’s prohibition against disparate treatment discrimination, the plaintiffs have the burden of proving: 1. That white employees received higher pay than class members; and 2. That the class members’ race or national origin was a motivating factor in the defendant’s decision to pay white employees more than class members. If you find from your consideration of all the evidence that the plaintiff class has proved each of these propositions, your verdict should be for that plaintiff class on this claim. On the other hand, if the plaintiff class has failed to prove either of these elements, your verdict should be for the defendant with respect to the class on this claim. 9th Cir. Civ. Jury Instr. No. 12.1 (2003) (modified)

**DISPARATE TREATMENT UNDER TITLE VII AND § 1981 –INTENT:** The plaintiff class must show that defendant intentionally discriminated against them to prevail on their Title VII and § 1981 disparate treatment claims. This does not mean that plaintiffs must prove that Defendant acted out of hatred, conscious hostility or dislike of the class members. Intentional discrimination is unlawful even if it is the result of subtle stereotypes of the class members and attitudes about their role in the workplace. A stereotype is an assumption about an individual’s character traits or interest in or ability to perform certain kinds of work based on a generalization about the character traits, interests, abilities, and characteristics of persons of the same race or national origin. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *City of Los Angeles, Dept. of Water v. Manhart*, 435 U.S. 702, 707-08 (1978) (“employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females. Myths

and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for . . . paying them less"); *King v. Bd. Of Regents*, 898 F.2d 533, 539 (7th Cir. 1990) ("All that is required is that the action taken be motivated by the gender of the plaintiff. No hatred no animus, and no dislike is required."); *Stender v. Lucky Stores*, 803 F. Supp. 259, 319 (N.D. Cal. 1992); *Halbrook v. Reichold Chemicals*, 766 F. Supp. 1290, 1296 (S.D.N.Y. 1991) (plaintiff seeking to prove sex discrimination "need not demonstrate that her employer bears a conscious animus or malice toward women. Indeed, illegal discrimination often arises out of very subtle stereotyping that may reflect a benign or protectionist view of women and their place in society." (citing *Lenihan v. City of New York*, 636 F. Supp. 998, 1009 (S.D.N.Y. 1985))).

#### DISPARATE TREATMENT UNDER TITLE VII AND § 1981

**PROOF OF INTENT BY INFERENCE – STATISTICAL EVIDENCE:** The class is not required to produce direct evidence of intentional discrimination. Intentional discrimination can be inferred from the existence of other facts. For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against plaintiffs. Statistics alone may be sufficient to establish a pattern or practice of discrimination. To prevail, Plaintiffs do not have to prove discrimination with scientific certainty or mathematical precision.

At issue here are alleged differences, or disparities, in pay received by class members as compared to pay received by whites. Statisticians measure pay disparities in terms of "standard deviations." A standard deviation of 1.96 is considered to be statistically significant. At 1.96 standard deviation, there is no more than a 5% chance that the pay differences found would arise solely by chance. In other words, one can be 95% certain that there really is a difference in how the groups being studied are compensated.

There is no minimum degree of disparity or statistical significance that must be met in order to establish a claim of discrimination. Statistics that may be considered statistically insignificant to a statistician may nonetheless be significant and relevant in a court of law. You must evaluate the usefulness and significance of any statistical evidence offered in this case based on all of the surrounding facts and circumstances.

Adapted from 3C K. O'Malley, J. Grenig & Hon. Wm. Lee, *Federal Jury Prac. & Instr.* § 171.26 (5th ed. 2001); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (statistics are "competent in proving employment discrimination" and "statistical analyses have served and will continue to serve an important role" in discrimination cases) (citations omitted); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 n.3 (1988) (observing that statistics should be judged on a case-by-case basis as there is not a "particular number of standard deviations" that can determine whether plaintiffs have made out a prima facie case of employment discrimination"); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) ("results of greater than 2 or 3 standard deviations is sufficient to make the data "suspect" for a social scientist"); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307, 308 n.14 (1977) (same); *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986) ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty"); *Rudebusch v. Hughes*, 313 F.3d 506, 515 (9th Cir. 2002) ("it would be improper to posit a quantitative threshold above which statistical evidence of [discrimination] is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law.") (citations omitted); *Kadas v. MCI Systemhouse Corp.*, 255

F.3d 359, 362 (7th Cir. 2001) (recognizing that the 5 percent test used by many courts is “arbitrary,” and that a “lower significance level ... when corroborated by other evidence, need not be deemed worthless.”); *EEOC v. American Nat’l. Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981) (standard deviations of less than two are not necessarily statistically insignificant); *Palmer v. Shultz*, 815 F.2d 84, 96 (D.C.Cir. 1987) (plaintiffs not foreclosed from establishing inference of discrimination because disparity less than 1.96 standard deviations); *Beck v. Boeing*, No. C00-301P, April 9, 2004 Order at 10:6-8 (standard deviation of less than two does not necessarily indicate the absence of discrimination).

**PROOF OF INTENT: SUBJECTIVE PRACTICES:** Subjective decision-making processes may provide a ready mechanism for discrimination by allowing conscious or unconscious stereotypical or negative attitudes about class members to affect employment decisions.

While subjective decision-making systems are not, by themselves, unlawful or necessarily discriminatory, subjective employment processes can hide bias against class members, and as a result such systems are particularly susceptible to discriminatory abuse. Therefore, they should be closely scrutinized. You may consider the extent to which Defendant’s decision making is subjective in determining whether Defendant discriminated against class members as alleged. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990-91 (1988) (undisciplined subjective decisionmaking which has the same effects as intentional discrimination is equally vulnerable to interdiction under Title VII); *Jauregui v. City of Glendale*, 852 F.2d 1128, 1135-36 (9th Cir. 1988) (subjective decision-making processes should be viewed with skepticism as they provide a ready mechanism for discrimination); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 481 (9th Cir.1983) (subjective hiring practices are well suited to the disparate treatment focus on intentional discrimination); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir.1981) (overruled on other grounds) (subjective hiring systems “provide a convenient pretext for discriminatory practices”); *Cook v. Billington*, 59 Fair Empl. Prac. 1010, 1013 (D.D.C. 1992) (“excessive subjectivity in employment decisions is traditionally viewed with skepticism by courts, as subjectivity is often a convenient pretext for discriminatory practices.”); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 (8th Cir. 1981) (approving trial court’s consideration of the subjective decisionmaking of the company in finding discrimination and citing *Satz v. ITT Financial Corp.*, 619 F.2d 738, 746 (8th Cir. 1980); *Fisher v. Proctor & Gamble Manufacturing Co.*, 613 F.2d 527, 546 (5th Cir. 1980); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298 n.12 (8th Cir. 1978)).*E.E.O.C. v. Rodriguez*, 66 Fair Empl. Prac. Cas. (BNA) 1649, 1671-72 (E.D. Cal. 1994); *Stender v. Lucky Stores*, 803 F. Supp. 259, 319, 323 (N.D. Cal. 1992).

**EMPLOYER’S DUTY TO ELIMINATE KNOWN DISCRIMINATION:** An employer who becomes aware of discrimination in its workplace must take prompt action to correct its practices and eliminate the discrimination. Anti-discrimination laws require the eradication of discriminatory treatment based on race and national origin.

It is not a defense to a claim of discrimination that an employer has adopted anti-discrimination policies, if the employer fails to enforce those policies. Intentional discrimination may be shown by evidence that defendant knew of discrimination in the workplace but failed to correct practices that it knew caused the discrimination or failed to take other corrective measures.

*Bazemore v. Friday*, 478 U.S. 385, 397(1986) (employer “was under an obligation to eradicate salary disparities based on race”); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987-88 (1988) (employment practices should not be permitted to operate to perpetuate pre-Act

intentional discrimination); *Corning Glass Works v. Brennan*, 417 U.S. 188, 205-06 (1974) (employer required to equalize female wages with male wages to remedy violation and come into compliance); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 900 (9th Cir. 1994) (“purpose of Title VII is not simply to eliminate the appearance of gender inequity, but also to eradicate discriminatory treatment”); *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1270-71 (10th Cir. 1988) (employer had opportunity to promote more women and integrate sexes more adequately); *Penick v. Columbus Bd. Of Educ.*, 429 F. Supp. 229 (S.D. Oh. 1977) (a defendant “intends” the natural or foreseeable consequences of its action or failure to act); *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 472 (8th Cir. 1984) (violating or failing to implement an affirmative action plan is relevant to determine whether the employer acted with discriminatory intent towards plaintiffs); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 n. 14 (8th Cir. 1981) (same); *Mozev v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1044, 1051 (7th Cir. 1991) (same).