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PRACTICE GROUP MEETING**

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**COMPENSATION ANALYSIS
SUBJECTIVE DECISIONMAKING THEORY
OFCCP APPROACH TO COMPENSATION ANALYSIS
SELF ANALYSIS OF COMPENSATION**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. RECENT HIGH-PROFILE CASES AND MEDIA ISSUES.....	1
III. THE SUBJECTIVE DECISION MAKING THEORY AND EXPERT STEREOTYPING TESTIMONY IN CLASS CASES.....	3
A. Subjective Decision Making Theory	3
1. Cases that Reject the Theory.....	4
2. Cases that Accept the Theory and Expand Its Reach	5
B. Stereotyping Experts.....	9
1. Dr. Bielby.....	9
a. Profile.....	9
b. <i>Daubert</i> Challenges to Dr. Bielby’s Testimony	10
i. Legal Standards.....	10
ii. Cases Rejecting Challenges to Dr. Bielby’s Testimony	12
iii. Cases Rejecting or Limiting Dr. Bielby’s Testimony.....	13
2. Dr. Susan Fiske.....	15
3. Dr. Michael Harris.....	16
C. Challenges to the Stereotyping Theory.....	16
D. Larger Debate Over the Causes of Pay and Promotion Disparities.....	17
IV. THE ROLE OF STATISTICS IN COMPENSATION AND PROMOTION CASES.....	21
A. Cases Discussing The Use of Statistics To Show Causation	21
1. Cases That Deny Class Certification	21
2. Cases That Grant Certification	23
B. Analyzing Compensation Data	23
1. Multiple Regression Analysis.....	23
2. The Workforce Studied.....	24
3. Aggregation of the Data.....	25
4. Determining What Variables To Include	26
a. “Tainted Variables”	27
b. Number of Variables.....	28

c. Use of “Proxies” for Missing Variables	30
C. Analyzing Promotion Data	30
1. Applicant Flow/Feeder Pool Analysis	30
a. Availability of Applicant Flow Data	31
b. “Qualified” Applicants	32
c. Employee “Interest Level”	33
d. Effects of Past Discrimination	34
2. “From” Or Cohort-Type Analyses	34
3. EEO/Benchmarking Analysis	35
D. The Two Standard Deviation Threshold	35
V. EVOLVING OFCCP APPROACHES TO COMPENSATION ANALYSIS	37
A. Dubray Method	37
B. OFCCP’s Human Capital Theory Approach In The <i>Wyeth</i> Case	37
C. OFCCP and Wyeth Settlement	38
D. Proposed New Guidelines	39
1. Interpreting Nondiscrimination Requirements of Executive Order 11246	39
2. Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246	40
a. Self-Audit	40
b. Privileged Self-Analysis	42
3. Implementation of the New Compensation Analysis Process	42
VI. ANALYZING EMPLOYER DATA BEFORE LITIGATION	44
A. Protecting Internal Analyses of Compensation from Disclosure	44
1. Attorney-Client Privilege	44
2. Attorney Work Product	46
3. Self-Critical Analysis Privilege	47
4. Conclusion	49
B. Developing A Multiple Regression Model	49

C. Conducting A Compensation Equity Analysis Without Regard to Any Protected Category.....	50
1. Analyzing The Results	50
D. Assessing Whether A Compensation System Has A Disparate Impact On Any Protected Group	51
1. Considering The Plaintiffs' Approach	52
E. Dealing with Findings of Statistical Disparities	54
1. The Risks Inherent to Making Broad Compensation Adjustments Based On Statistical Analysis	54
2. Conducting A Targeted Individualized Review of Employee Compensation	54
3. Conclusion	55

TABLE OF AUTHORITIES

CASES

Abram v. UPS of Am.,
200 F.R.D. 424 (E.D. Wis. 2001) passim

Allen v. Chi. Transit Auth.,
No. 99C7614, 2000 WL 1207408 (N.D. Ill. July 31, 2000) 40

Bakewell v. Stephen F. Austin State Univ.,
975 F. Supp. 858 (E.D. Tex. 1996), *aff'd*, 124 F.3d 191 (5th Cir. 1997)..... 25

Bazemore v. Friday,
478 U.S. 385 (1986)..... 23, 24, 28

Beckmann v. CBS, Inc.,
192 F.R.D. 608 (D. Minn. 2000) 8, 23, 29

Boykin v. Ga.-Pac. Corp.,
706 F.2d 1384 (5th Cir. 1983) 30

Butler v. Home Depot,
984 F. Supp. 1257 (N.D. Cal. 1997)..... 13, 15

Butler v. Home Depot,
No. C-94-4335, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996)..... 10

Butler v. Home Depot,
No. C-94-4335, 1997 WL 605754 (N.D. Cal. Aug. 29, 1997)..... 12

Caridad v. Metro-North Commuter R.R. Co.,
191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000) 8, 20

Carson v. Giant Food, Inc.,
187 F. Supp. 2d 462 (D. Md. 2002)..... 25

Castaneda v. Partida,
430 U.S. 482 (1977)..... 36

Claar v. Burlington N. R.R. Co.,
29 F.3d 499 (9th Cir. 1994)..... 11

<i>Coates v. Johnson & Johnson</i> , 756 F.2d 524 (7th Cir. 1985).....	26
<i>Cooper v. S. Co.</i> , 205 F.R.D. 596 (N.D. Ga. 2001), <i>aff'd</i> , 390 F.3d 695 (11th Cir. 2004)	21, 31, 34
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	10, 11, 13, 14
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 43 F.3d 1311 (9th Cir. 1992), <i>cert. denied</i> , 516 U.S. 869 (1995)	11
<i>Denney v. City of Albany</i> , 247 F.3d 1172 (11th Cir. 2001).....	5
<i>Donaldson v. Microsoft Corp.</i> , 205 F.R.D. 558 (W.D. Wash. 2001)	38
<i>Dukes v. Wal-Mart Stores, Inc.</i> , 222 F.R.D. 137 (N.D. Cal. 2004)	passim
<i>Dukes v. Wal-Mart Stores, Inc.</i> , 222 F.R.D. 189 (N.D. Cal. 2004)	9, 12, 13
<i>EEOC v. Chi. Miniature Lamp Works</i> , 947 F.2d 292 (7th Cir. 1991).....	33
<i>EEOC v. Joe's Stone Crab, Inc.</i> , 220 F.3d 1263 (11th Cir. 2000).....	36
<i>EEOC v. McDonnell Douglas</i> , 17 F. Supp. 2d 1048 (E.D. Mo. 1998), <i>aff'd</i> , 191 F.3d 948 (8th Cir. 1999)	5
<i>EEOC v. Morgan Stanley & Co., Inc.</i> , 324 F. Supp. 2d 451 (S.D.N.Y. 2004)	passim
<i>EEOC v. Morgan Stanley & Co., Inc.</i> , No. 01 Civ. 8421, 2004 WL 1542264 (S.D.N.Y. July 8, 2004).....	10
<i>EEOC v. Sears, Roebuck & Co.</i> , 628 F. Supp. 1264 (N.D. Ill. 1986).....	19, 33
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984).....	35

<i>Ellis v. Elgin Riverboat Resort</i> , Civ. A. No. 98-7093, 2003 WL 22006249 (N.D. Ill. Aug. 22, 2003)	5
<i>Gen. Tel. Co. v. Falcon</i> , 457 U.S. 147 (1982).....	3-4, 5, 7
<i>Gosho v. U.S. Bancorp Piper Jaffray, Inc., slip op.</i> , No. C00-1611-PJH (N.D. Cal. Oct. 1, 2002)	14
<i>Gutierrez v. Johnson & Johnson</i>	1
<i>Hazelwood Sch. Dist. v. U. S.</i> , 433 U.S. 299 (1977).....	29, 36
<i>Hemmings v. Tidyman's Inc.</i> , 285 F.3d 1174 (9th Cir. 2002).....	30, 32, 33
<i>Hopkins v. Price Waterhouse</i> , 825 F.2d 458 (D.C. Cir. 1987)	15
<i>Kadas v. MCI Systemhouse Corp.</i> , 255 F.3d 359 (7th Cir. 2001).....	37
<i>Kirkland v. N.Y. State Dep't of Corr. Servs.</i> , 520 F.2d 420 (2d Cir. 1975).....	26
<i>Kumho Tire Co. v. Carmichael</i> , 119 S. Ct. 1167 (1999).....	11
<i>Malave v. Potter</i> , 320 F.3d 321 (2d Cir. 2003).....	36
<i>Mancuso v. Consol. Edison Co.</i> , 56 F. Supp. 2d 391 (S.D.N.Y. 1999)	11
<i>McClain v. Lufkin Indus., Inc.</i> , 187 F.R.D. 267 (E.D. Tex. 1999)	34
<i>McReynolds v. Sodexo Marriot Servs., Inc.</i> , 208 F.R.D. 428 (D.D.C. 2002), <i>appeal denied</i> , No. 02-8008, 2003 WL 22299806 (D.C. Cir. Feb. 25, 2003), <i>cert. denied</i> , 2003 WL 21276099 (U.S. Oct. 6, 2003).....	passim

<i>Moore v. Hughes Helicopters, Inc.</i> 708 F.2d 475 (9th Cir. 1983)	30
<i>Morgan v. UPS</i> , 169 F.R.D. 349 (E.D. Mo. 1996), <i>aff'd on other grounds</i> , 380 F.3d 459 (8th Cir. 2004).....	passim
<i>Munoz v. Orr</i> , 200 F.3d 291 (5th Cir. 2000).....	11, 28
<i>Ottaviani v. State Univ. of New York</i> , 875 F.2d 365 (2d Cir. 1989).....	28, 36
<i>Paige v. California</i> , 291 F.3d 1141 (9th Cir. 2002).....	31
<i>Palmer v. Schultz</i> , 815 F.2d 84 (D.C. Cir. 1987)	29
<i>Penk v. Or. State Bd. of Higher Educ.</i> , No. Civ. A. 80-436, 1985 WL 25631 (D. Or. Feb. 13, 1985), <i>aff'd</i> , 816 F.2d 458 (9th Cir. 1987)	25, 29
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	13, 15
<i>Reap v. Cont'l Cas. Co.</i> , 199 F.R.D. 536 (D.N.J. 2001)	22
<i>Reid v. Lockheed Martin Aeronautics Co.</i> , 205 F.R.D. 655 (N.D. Ga. 2001)	passim
<i>Reiff v. Convergent Techs.</i> , 957 F. Supp. 573 (D.N.J. 1997).....	11
<i>Rhodes v. Cracker Barrel Old Country Store, Inc.</i> , 213 F.R.D. 619 (N.D. Ga. 2003)	22
<i>Richardson v. Sugg</i> , 325 F. Supp. 2d 919 (E.D. Ark. 2004).....	34
<i>Robertson v. Sikorsky Aircraft Corp.</i> , No. 397 Civ. 1216, 2000 WL 33381019 (D. Conn. July 5, 2000)	22

<i>Robinson v. Jacksonville Shipyards, Inc.</i> , 760 F. Supp. 1486 (M.D. Fl. 1991)	15
<i>Robinson v. Metro-North Commuter R.R.</i> , 175 F.R.D. 46 (S.D.N.Y. 1997), <i>overruled on other grounds by Caridad v. Metro-North Commuter R.R.</i> , 191 F.3d 283 (2d Cir. 2003).....	14, 17
<i>Rudebusch v. Hughes</i> , 313 F.3d 506 (9th Cir. 2002).....	27
<i>Sengupta v. Morrison-Knudsen Co.</i> , 804 F.2d 1072 (9th Cir. 1986).....	5
<i>Smith v. Va. Commonwealth Univ.</i> , 84 F.3d 672 (4th Cir. 1996).....	24, 26
<i>Smith v. Xerox Corp.</i> , 196 F.3d 358 (2d Cir. 1999).....	28
<i>Sobel v. Yeshiva Univ.</i> , 839 F.2d 18 (2d Cir. 1988).....	24, 26, 30
<i>Sperling v. Hoffman-La Roche, Inc.</i> , 924 F. Supp. 1346 (D.N.J. 1996).....	5
<i>Stasny v. S. Bell Tel. & Tel. Co.</i> , 628 F.2d 267 (4th Cir. 1980).....	25
<i>Stender v. Lucky Stores, Inc.</i> , 803 F. Supp. 259 (N.D. Cal. 1992).....	passim
<i>Stout v. Potter</i> , 276 F.3d 1118 (9th Cir. 2002).....	31
<i>Tagatz v. Marquette Univ.</i> , 861 F.2d 1040 (7th Cir. 1988).....	28
<i>Int'l Brotherhood of Teamsters v U.S.</i> , 431 U.S. 324 (1977).....	
<i>Thomas v. Deloitte Consulting LP</i> , No. Civ. A. 3-02-CV-0343, 2004 WL 1960097 (N.D. Tex. Sept. 2, 2004).....	36

<i>Viterbo v. Dow Chem. Co.</i> , 826 F.2d 420 (5th Cir. 1987).....	11
<i>Waisome v. Port Auth. of N.Y. & N.J.</i> , 948 F.2d 1370 (2d Cir. 1991).....	36
<i>Wards Cove Packing Co. v. Atonio</i> , 490 U.S. 642 (1989).....	30, 32
<i>Warren v. Xerox Corp.</i> , No. 01-CV-2909, 2004 WL 1562884 (E.D.N.Y. Jan. 26, 2004).....	8, 26, 37
<i>Watson v. Fort Worth Bank & Trust</i> , 487 U.S. 977 (1988).....	36
<i>Webb v. Merck & Co.</i> , 206 F.R.D. 399 (E.D. Pa. 2002)	5, 22, 29
<i>Wright v. Circuit City Stores, Inc.</i> , 201 F.R.D. 526 (N.D. Ala. 2001)	22

I. INTRODUCTION

In recent years, employer compensation and promotion practices have increasingly come under attack by both the government and plaintiffs. These attacks have taken place in a number of forums, ranging from EEOC and OFCCP investigations, single- and multi-plaintiff lawsuits and, perhaps most significantly, broad-based class action litigation. An employer's potential financial exposure in these types of cases – especially those brought on behalf of a large number of employees – can be significant. The publicity and negative attention such cases bring can also be very harmful. Plaintiffs' attorneys and the government are advancing increasingly sophisticated arguments to attack employer policies, using a combination of statistical analyses and sociological expert testimony.

This Paper explores all of these topics in depth. First, the Paper discusses the recent high-profile lawsuits that have challenged employer pay and promotion practices and the new ways plaintiffs are using the media to advance their cause in these cases. Second, the Paper discusses the "subjective decision making" theory and the "stereotyping" experts who testify on plaintiffs' behalf to support this theory. Third, the Paper details the role that statistics plays in these cases and describes the methods courts accept for studying pay and promotion data. Throughout these sections, the Paper analyzes recent cases that address the subjective decision making theory and plaintiffs' attempts to prove that subjective employment practices *cause* discrimination. Finally, the Paper addresses the new OFCCP guidelines for reviewing contractor compensation practices and provides guidance for compliance.

II. RECENT HIGH-PROFILE CASES AND MEDIA ISSUES

A sampling of the companies that have recently been subject to major Title VII class actions reads like a "who's who" of the nation's corporate elite, spanning a diverse range of employers and industries:

- **Amtrak** (*Campbell v. Amtrak*, race, D.D.C. 1999)
- **BellSouth** (*Jenkins v. BellSouth Corp.*, race, N.D. Ala. 2002)
- **Boeing** (*Beck v. Boeing Co.*, gender, W.D. Wash. 2000)
- **Coca-Cola** (*Abdallah v. Coca-Cola*, race, N.D. Ga. 1998)|
- **Costco** (*Ellis v. Costco Wholesale Corp.*, gender, N.D. Cal. 2004)
- **Dial** (*EEOC v. Dial Corp.*, gender, N.D. Ill. 2003)
- **Johnson & Johnson** (*Gutierrez v. Johnson & Johnson*, race, D.N.J. 2001)
- **Kodak** (*Alston v. Eastman Kodak Co.*, race, W.D.N.Y. 2004)
- **Merck** (*Webb v. Merck & Co.*, race, E.D. Pa. 1999)
- **Microsoft** (*Donaldson v. Microsoft*, race and gender, W.D. Wash. 2000)
- **Morgan Stanley** (*EEOC v. Morgan Stanley*, gender, S.D.N.Y. 2001)
- **UPS** (*Morgan v. UPS*, race, E.D. Mo. 2001)
- **Wal-Mart** (*Dukes v. Wal-Mart*, gender, N.D. Cal. 2001)
- **Xerox** (*Warren v. Xerox Corp.*, race, E.D.N.Y. 2001)|

This resurgence in class action activity follows a significant lull during the late 1980s and early 1990s. Whereas in 1976 there were 1,174 employment discrimination class actions filed in the federal courts, the number of such cases then dropped dramatically, reaching a low of 32 cases filed in 1991. See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 820 (2004).

Several recent developments have led to a resurgence in class filings. *First*, the passage of the Civil Rights Act of 1991 made punitive and compensatory damages available in disparate treatment cases and undoubtedly led to an increased interest in such cases by the plaintiffs' bar. *Second*, as discussed below, plaintiffs have refined their legal theories and have achieved newfound success in convincing courts to grant class certification of their claims.

Class actions bring significant negative media attention to their targets. In EEOC cases, the EEOC typically issues press releases that often include inflammatory statements about the existence of discrimination at a company, even though the allegations have not been proven and the company vehemently denies them. Indeed, even after such cases have settled – with a complete denial of any wrongdoing by the defendant employer and an acknowledgement that there has been no finding of wrongdoing – EEOC representatives continue to make press statements accusing the employer of discrimination. The following attached articles and press releases are just a sampling of these post-settlement EEOC press statements:

- *Soap Maker Dial Corp. Reaches \$10 Million Settlement in Sexual Harassment Case*, The Associated Press (Apr. 30, 2003) (including statement by Chicago EEOC Regional Attorney John Hendrickson that the settlement will create “a workplace in which the ability of women to work without fear, without experiencing harassment, is going to become a reality”).
- *\$10 Million Settlement Averts Dial Sex Harassment Trial*, Chicago Sun-Times (Apr. 30, 2003) (including statement by Hendrickson that “[t]he monitors are going to be all over Dial like flies on you know what”).
- EEOC Press Release, *Consolidated Freightways to Pay \$2.75 Million for Racial Harassment of African Americans* (Jan. 12, 2005) (discussing settlement in which employer denied any liability but nevertheless including statement by EEOC St. Louis District Office Director Lynn Bruner that “[n]o employee should be subjected to graphic racial symbols, racial graffiti or threats of physical violence,” and by EEOC Regional Attorney Robert Johnson that “[t]he company’s bankruptcy keeps us from obtaining full relief for these victims of gross racial harassment, but we expect that they will soon receive substantial compensation from the bankruptcy proceedings”).
- EEOC Press Release, *Burger King Franchise Pays \$400,00 for Alleged Sexual Harassment of Teens* (Dec. 6, 2004) (discussing settlement in which employer denied any liability but including statement by Bruner that “[t]his lawsuit could have been avoided if assistant managers and others had acted to stop the

harassment when they first received complaints about the restaurant manager. We are pleased that the companies will compensate these young victims.”).

The plaintiffs’ bar has also been using the media to its advantage more than ever before. Today’s Title VII class actions are publicized in ways not even possible a decade ago. Now, as a matter of course, plaintiffs’ counsel establish web sites devoted to specific cases. These web sites include a myriad of information and provide easy public access to pleadings, press releases, plaintiff profiles, court orders and more. The web sites also serve as a public forum for plaintiffs’ counsel to recruit potential class members. Prominent examples include www.walmartclass.com, www.discriminationcaseagainstj.com and www.genderclassactionagainstcostco.com.

Plaintiffs’ counsel also are coordinating media coverage of new class cases with the filing of the suits themselves. Within hours of plaintiffs’ filing a class suit against Costco Wholesale alleging gender discrimination last summer, for example, numerous web-based news organizations reported on the filing, often with statements from plaintiffs’ counsel. *See, e.g.*, Impact Fund Press Release, *National Class Action Gender Bias Suit Filed Against Costco* (Aug. 17, 2004) (including allegation by lead plaintiffs’ counsel Brad Seligman that “[t]here is no clearer example of a glass ceiling than how Costco promotes workers into assistant manager and general manager positions . . . [W]omen must rely on the subjective and arbitrary decisions of Costco’s all male senior management. Not surprisingly, the men at Costco get a better deal when it comes to promotions.”); *see also* Impact Fund Press Release, *Women Present Evidence of Widespread Discrimination at Wal-Mart; Ask Judge to Expand Case to be Largest Ever Sex Discrimination Case* (Apr. 28, 2003) (including accusations by Seligman that “[w]omen are treated as second class employees from Florida to Alaska . . . Wal-Mart has known about this for years and has refused to Act.”).

These plaintiff media efforts are significant because they serve to increase pressure on the defendant employers by “selling” plaintiffs’ cases to the public.

III. THE SUBJECTIVE DECISION MAKING THEORY AND EXPERT STEREOTYPING TESTIMONY IN CLASS CASES

A. Subjective Decision Making Theory

The legal standards applicable to class certification in employment discrimination cases derive in large part from the Supreme Court’s decision in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982). The *Falcon* Court held that before maintaining a class action alleging systemic discrimination, putative class representatives must, *inter alia*, identify a *specific* discriminatory employment practice that harmed all would-be class members alike. *See Falcon*, 457 U.S. at 159. The Court explained that, “in this regard, it is noteworthy that Title VII prohibits discriminatory *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible

claims of discrimination against a common employer.” *Id.* at 159 n.15 (emphasis in original). Despite this helpful language for employers, however, the *Falcon* Court went on to note that:

[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as through entirely subjective decision making processes.*

457 U.S. at 159 n.15 (emphasis added). This “entirely subjective decision making processes” language increasingly has become the legal basis for plaintiffs’ motions for class certification in employment discrimination cases.

Recent plaintiffs are arguing that the requirements of Rule 23 are met when employers vest managers with unfettered subjective discretion to make employment decisions. Plaintiffs contend that they are all the victims of the same subjective decision making process and that this process is the thread that unites all employees in the putative class. As explained by one court, “[t]he basic idea behind lawsuits alleging ‘excessively subjective’ decision making is that the employer systematically discriminates against its employees by permitting subordinate managers to make employment decisions without providing any objective framework for the exercise of that subjective judgment.” *Abram v. UPS of America*, 200 F.R.D. 424, 426 (E.D. Wis. 2001) (internal quotations omitted).

There are numerous recent cases that both reject and accept the subjective decision making theory as a basis for class certification in Title VII cases.

1. Cases That Reject the Theory

The cases that reject the subjective decision making theory as a basis for class certification are often based on the view that there is nothing inherently discriminatory about vesting managers with discretion to make employment decisions, and that economic reality and successful company management actually often requires managers to wield such discretion.

In *Abram v. UPS of America*, 200 F.R.D. 424 (E.D. Wis. 2001), for example, where plaintiffs’ motion for class certification was premised on the theory that defendant used a subjective compensation system that resulted in systemic discrimination against African-Americans, the court held that a company’s “decision to permit some consideration of subjective factors is not, *in and of itself*, a discriminatory practice that provides the unifying thread necessary for ‘commonality’ to exist.” *Id.* at 430. The court elaborated: “If the decision to permit some measure of subjectivity could be regarded as itself a discriminatory practice, virtually all Title VII cases against large employers would be transformed into nationwide class action lawsuits. The class action device was never intended to have such broad application.” *Id.* The court explained further that “an employer’s reliance upon legitimate, job-related subjective considerations should not raise a ‘red flag’ because it does not suggest in its own right an intent to facilitate discrimination.” *Id.* (citing *Denney v. City of Albany*, 247 F.3d 1172, 1185-86 (11th Cir. 2001))

(“Subjective evaluations . . . are often critical to the decision making process. . . . It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.”)).

Similarly, in *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996), the court rejected the subjective decision making theory because “the consequences of finding that plaintiffs’ claim fits within the pattern-or-practice framework would be that any time a company gives managers discretion to make employment decisions that company potentially engages in a pattern or practice of discrimination. This is because anytime managers are given discretion they have the opportunity to exercise that discretion in a discriminatory manner.” *Id.* The court explained that

concluding that this situation, without more, is a pattern or practice would bring within the definition of a pattern or practice employment practices that were not intended to be there. This is because a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by *some* managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, company wide policy of intentional discrimination.

Id. (emphasis added).

See also Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986) (“[T]he use of subjective employment criteria is not unlawful per se. . . . Honorable employers frequently use subjective criteria also. Indeed, in many situations, they are indispensable to the process of selection in which employers must engage.”); *Ellis v. Elgin Riverboat Resort*, Civ. A. No. 98-7093, 2003 WL 22006249, at *12 (N.D. Ill. Aug. 22, 2003) (holding that the decentralized and subjective nature of defendant’s personnel practices *precluded* a finding that it engaged in a “pattern or practice” of discrimination); *Webb v. Merck & Co.*, 206 F.R.D. 399, 406 (E.D. Pa. 2002) (same, *quoting Sperling, supra*); *EEOC v. McDonnell Douglas*, 17 F. Supp. 2d 1048, 1052 (E.D. Mo. 1998) (same, *quoting Sperling, supra*), *aff’d*, 191 F.3d 948 (8th Cir. 1999).

2. Cases That Accept the Theory and Expand Its Reach

On the other hand, many courts have accepted the subjective decision making theory as a basis for class certification in Title VII cases. Some recent courts have expanded the reach of the Supreme Court’s *Falcon* footnote 15 beyond situations involving “*entirely* subjective decisionmaking processes,” 457 U.S. at 158 n.15, to cases involving decision making processes that contain *any subjective components at all*. Aggressive class counsel have sought to certify extremely broad classes, and courts have increasingly held that the grant of discretion to managers in a company-wide policy sufficiently links employees who are otherwise geographically, functionally, and departmentally diverse.

In *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 153 (N.D. Cal. 2004), for example, the court certified an across-the-board gender class action of over one million employees based on its conclusion that a company-wide compensation system was marked by excessive subjectivity. The court found that *even though the company's compensation policy provided managers with some objective guidelines*, it also gave them significant discretion to set pay within those prescribed guidelines and was therefore sufficiently subjective to support company-wide class certification. Specifically, for hourly workers, each store had a minimum starting wage for each class of hourly jobs that was set by the Home Office. *Id.*, at 137. Beyond that, however, the court found:

Store Managers are granted substantial discretion in making salary decisions for hourly employees in their respective stores. Specifically, they are allowed to depart from the minimum start rates, within a two dollar per hour range, without being constrained by objective criteria and with limited oversight. Indeed, in setting pay, a Store Manager makes the call based on his or her needs. . . . Store Managers also are allowed to increase pay for exceptional performance, again with limited guidance or oversight.

Id. at 146-47 (internal citation omitted). The court held that there was a “partial constraint” on this manager discretion, in that there was an oversight system known as “management by exception” through which District and Regional Managers received exception reports if Store Managers set an employee’s pay rate at more than six percent above the minimum rate set by the Home Office. *Id.* at 147. The District and Regional Managers were required to approve such rates. *Id.* The court concluded, however, that such “limited oversight” still left “individual Store Managers with substantial discretion in setting pay rates for in-store employees.” *Id.*

Similarly, in Wal-Mart’s policy for salaried employees, “there was a broad pay range within which District Managers had discretion to set pay rates with little guidance and limited oversight.” *Id.* The court concluded that

there is a basic compensation structure that applies similarly to all in-store salaried management positions across all types of Wal-Mart stores . . . [that] share the common feature that there is a broad range of discretion built into the compensation structure for each position. . . . [T]his feature also provides a potential conduit for gender discrimination that is common to all class members.

Id. at 148. When coupled with the anecdotal and statistical evidence of discrimination presented by the plaintiffs’ experts and the testimony of Dr. William Bielby with respect to gender stereotyping (see detailed discussion below), the court concluded that there was sufficient evidence of commonality and typicality with respect to plaintiffs’ claims of company-wide discrimination to warrant class certification. *Id.* at 148.

Similarly, in *McReynolds v. Sodexo Marriot Services, Inc.*, 208 F.R.D. 428 (D.D.C. 2002), *appeal denied*, No. 02-8008, 2003 WL 22299806 (D.C. Cir. Feb. 25, 2003), *cert. denied*, 2003 WL 21276099 (U.S. Oct. 6, 2003), the court certified an across-the-board class of African American employees in a case involving claims of discrimination in promotions to management. The court held that class certification was appropriate *even though the company's promotion policies contained many objective elements*. The court explained that Sodexo's arguments against class certification (which were based on the many objective features in the promotion policies)

miss[ed] the point of *Falcon's* footnote 15, which carved out an exception to the across-the-board rule for "entirely subjective *decisionmaking processes*," rather than requiring entirely subjective hiring criteria. Whether a particular manager uses objective criteria in making particular promotion decisions is irrelevant to the commonality analysis; instead, what is significant is that the determination of which criteria to use is left entirely to the individual manager.

208 F.R.D. at 441-42 (internal citation omitted). The court held, essentially, that having *no* company-wide policy *was* a company-wide policy in that it allowed for discriminatory behavior by individual supervisors across all business units without any oversight to correct biased results. *See id.* The court cited the following facts in support of its conclusion:

- There was a company-wide posting process for promotions, but there was no company-wide policy as to which positions should be posted and how long they had to be posted. Plaintiffs alleged that jobs were often filled without being posted.
- There was no company policy on whether hiring managers were required to conduct interviews when filling management positions, no standards for a manager's decision as to whom to interview, and no requirement that any notes be taken during the interview process.
- There was no requirement that a hiring manager explain why he/she decided to promote one candidate over another or keep any written records as to the promotion decisions.
- There was no system for getting back to people who did apply for a promotion to inform them that the position had been filled – i.e., people were "left hanging."

Id.

The court found similar deficiencies in a company's promotion system and certified a class action under the subjective decision-making theory in *Beckmann v. CBS, Inc.*, 192 F.R.D. 608 (D. Minn. 2000). That case involved a claim by female technicians who worked at the defendant television stations that they were "segregated in non-advancement track

assignments, while males [were] placed in assignments and given training that results in further advancement and additional compensation. . . .” *Id.* at 610. “Plaintiffs allege[d] that supervisors’ unfettered discretion in determining which technicians receive training and remote assignments, which lead to overtime and advancement opportunities, serves as a vehicle for gender discrimination . . .” *Id.* The court granted the plaintiffs’ motion for class certification and denied the defendant’s motion for summary judgment, finding that “CBS fails to provide any objective standards to follow in filling open positions that apply to all stations. For example, *there are no written guidelines* for determining promotions from per diem to full-time employees at the stations; instead, such promotions are left to the discretion of the manager at the station.” *Id.* at 614 (emphasis added). In addition, “[o]ften, promotions [are] awarded *without the positions being posted.*” *Id.* (emphasis added.) The court concluded that the plaintiffs’ “allegations of similar discriminatory employment practices across the Defendant stations, including the Defendant’s use of entirely subjective personnel processes that operate to segregate the Plaintiffs in a non-advancement track, satisfy the commonality requirement for class action purposes.” *Id.*

Similarly, in *Morgan v. UPS*, 169 F.R.D. 349, 353 (E.D. Mo. 1996), *aff’d on other grounds*, 380 F.3d 459 (8th Cir. 2004), the plaintiffs sought to certify a class alleging that “through subjective [promotion] selection procedures, the defendants retard and limit the advancement of black salaried employees.” The defendant countered that “the promotional decisions at issue in this case are made on a decentralized basis by autonomous decision makers” and, as a result, the plaintiffs could not establish commonality and typicality. *Id.* at 356. The court, however, ruled that the defendant’s decentralized, subjective decision making process would not defeat class certification. *Id.* The court found that the defendant’s promotion policies “are uniform throughout the country and are promulgated by the national corporate office.” *Id.* The plaintiffs’ evidence of the discriminatory results of the policies throughout the country was therefore sufficient to establish commonality and typicality. *Id.*

See also Caridad v. Metro-North Commuter Railroad Co., 191 F.3d 283 (2d Cir. 1999) (rejecting employer’s argument that its policy of delegating discretionary authority to supervisors precluded a finding of commonality and typicality, reasoning that the policy of delegating discretion *itself* gave rise to a common question of fact that warranted company-wide class certification), *cert. denied*, 529 U.S. 1107 (2000); *Warren v. Xerox Corp.*, 01-CV-2909, 2004 WL 1562884, at *11 (E.D.N.Y. Jan. 26, 2004) (granting across-the-board class certification despite fact that company policies took into account several objective variables, because “Xerox provided only general goals, not specific formulas as to how those factors should be applied . . . the existence of some objective factors does not negate a claim that the process is ‘entirely subjective’ where those variables are alleged to have been inappropriately applied”).

B. Stereotyping Experts

An integral part of plaintiffs’ reliance on the subjective decision making theory is the use of expert testimony by sociologists, such as Dr. William Bielby, who postulate that when employers allow managers to use discretion when making personnel decisions, they necessarily allow managers to use stereotypes when making those decisions. When employers fail to

monitor managers' decisions through oversight procedures, these experts posit, discrimination against women and minorities *necessarily* results.

Dr. Bielby has clearly been the most prominent proponent of the stereotyping theory. Other experts who espouse the theory include Dr. Susan Fiske and Dr. Michael Harris. A brief profile of each of these experts and a discussion of a selection of the decisions in which they have testified follows.

1. Dr. Bielby

a. Profile

Dr. Bielby received his Ph.D. in sociology from the University of Wisconsin – Madison in 1976. February 3, 2003 Expert Report of William T. Bielby, Ph.D., at 1, in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189 (N.D. Cal. 2004); *see also Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 301 (N.D. Cal. 1992). Dr. Bielby taught sociology at the University of California, Santa Barbara, where he chaired the department from 1992 to 1998, and he is currently a professor of sociology at the University of Pennsylvania. Expert Report, at 1, *Dukes*; Justin Scheck, *Expert Witness: Bill Bielby Helped Launch An Industry – Suing Employers for Unconscious Bias*, The Recorder, Oct. 28, 2004, at 1.

Dr. Bielby's first foray as a testifying expert was in the *Lucky Stores* case, *supra*. *See Scheck, supra*, at 1. According to Scheck, "[i]n 1990, Brad Seligman wanted to bring an employment discrimination class action by arguing that a group of female employees were victims of unconscious bias, rather than explicit workplace discrimination." *Id.* "We wanted to find a way of using a lot of interesting sociological research that had been done, but no one had used before," said Seligman . . . [but he] couldn't find an expert witness to present the new work in court." *Id.* Eventually, attorney Seligman met Dr. Bielby, and the expert stereotyping "industry" was launched. *Id.*

In *Lucky Stores*, Dr. Bielby testified that "[v]ague and ambiguous criteria and limited accountability reinforces the influence of gender stereotypes on managers' decisions." 803 F. Supp. at 303. Dr. Bielby concluded that "[g]iven the high level of ambiguity and individual discretion involved in making such decisions, *it is inevitable that personnel practices will be influenced by stereotypes regarding gender and race.*" *Id.* (emphasis added.) With the help of this testimony, the *Lucky Stores* plaintiffs forced a \$107 million settlement. Scheck, *supra*, at 1.

Since *Lucky Stores*, Dr. Bielby "has provided expert testimony in more than 50 cases . . . [and] has helped plaintiffs' attorneys win about \$1 billion in settlements." *Id.* The recent high profile cases in which Dr. Bielby has proffered testimony include *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 153 (N.D. Cal. 2004) (certifying plaintiff class of over 1.5 million women based in part on Dr. Bielby's testimony that "[s]tereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker discretion tends to allow people to 'seek out and retain stereotyping-confirming

information and ignore or minimize information that defies stereotypes”); *EEOC v. Morgan Stanley & Co.*, No. 01 Civ. 8421, 2004 WL 1542264 (S.D.N.Y. July 8, 2004) (holding that Dr. Bielby could “properly testify about gender stereotypes, about how these stereotypes may have affected decisions at Morgan Stanley,” and about “whether policies and practices relating to gender bias might affect employees’ utilization of an equal employment opportunity program”); *Butler v. Home Depot*, No. C-94-4335, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996) (granting class certification based in part on stereotyping theory proffered by Dr. Bielby).

Dr. Bielby’s testimony in each of these cases has essentially been the same: that the defendant employer permits managers unfettered discretion when making personnel decisions, and that stereotypes and discrimination therefore result. See William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 377 (2003).

b. Daubert Challenges to Dr. Bielby’s Testimony

i. Legal Standards

For expert testimony such as that proffered by Dr. Bielby to be admissible, it must meet the standards set forth in Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Fed. R. Evid. 702 provides that

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under *Daubert*, the trial courts are to act as “gatekeepers” and exclude proposed expert testimony unless it is both reliable and relevant. 509 U.S. at 592-93. To meet *Daubert*’s test for reliability, the methodology behind an expert’s testimony must be scientifically valid. *Id.* at 590. When assessing this requirement, courts should consider the following non-exhaustive list of factors: (i) whether the expert’s theory can be (and has been) tested; (ii) whether it has been subjected to peer review and publication; (iii) whether it has a high rate of error; and (iv) whether the theory enjoys general acceptance within the relevant scientific community. *Id.* at 592-94.

In addition, the expert’s testimony must be relevant, i.e., it must “fit” with the facts of the case so as to assist the court or jury in determining an issue in dispute. *Id.* at 591-92. When the expert is offered on the issue of causation (e.g., to testify that an employer’s subjective decision making policies *caused* stereotyping and discrimination to result), a court should consider whether the expert has conducted a differential diagnosis to rule out other possible causes of the result about which he is testifying before deciding whether the expert’s testimony

will be helpful to the court or jury. Numerous cases have rejected expert causation testimony that is comparably uncertain to that typically offered by Dr. Bielby. In *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1992), *cert. denied*, 516 U.S. 869 (1995), for example, the court excluded testimony that a drug manufactured by defendant was “capable of causing” birth defects. The court reasoned:

[W]hat plaintiffs must prove is not that [the drug] causes some birth defects, but that it caused *their* birth defects . . . [and] [a]s the district court properly found below, “the strongest inference to be drawn for plaintiffs based on the epidemiological evidence is that [the drug] *could possibly have caused* plaintiffs’ injuries.”

43 F.3d at 1322 (emphasis added). This inference, the court held, was insufficient to be helpful to the trier of fact. *Id.* See also *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502-03 (9th Cir. 1994) (excluding testimony of expert on causation issue where he made no effort to rule out the other possible causes of plaintiff’s injury); *Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000) (same); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 423-24 (5th Cir. 1987) (same); *Mancuso v. Consol. Edison Co.*, 56 F. Supp. 2d 391, 406 (S.D.N.Y. 1999) (same); *Reiff v. Convergent Techs.*, 957 F. Supp. 573, 583 (D.N.J. 1997) (same).

Under the Supreme Court’s *Kumho Tire Co. v. Carmichael* decision, 119 S. Ct. 1167, 1176, 1178 (1999), the Court clarified that the *Daubert* standards apply to all expert witnesses, including social scientists, and that it is the role of the trial court to ensure that the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Despite these rigorous standards, and despite the serious shortcomings and methodological flaws in Dr. Bielby’s approach (discussed below), Dr. Bielby has been remarkably successful in withstanding challenges to the admissibility of his testimony. As reported by Scheck, “[Dr.] Bielby’s testimony has proved extremely difficult for the defense bar to disqualify or counter. In just one case, Bielby’s testimony was disqualified due to questions with evidence he used. In two cases, certification failed. Two more cases ended in trial verdicts, with one decision favoring the defense. In all other instances, Bielby’s cases have settled, often for large sums.” Scheck, *Expert Witness*, at 2.

ii. Cases Rejecting Challenges to Dr. Bielby’s Testimony

In *Dukes*, 222 F.R.D. at 192, the court denied Wal-Mart’s motion to strike Dr. Bielby’s testimony despite its numerous shortcomings, including the fact that Dr. Bielby could not offer an opinion as to “whether 0.5%, 5%, 50%, or 95% of the employment decisions at Wal-Mart might [have been] determined by stereotyped thinking.” See Defendant Wal-Mart Stores, Inc.’s *Daubert* Motion to Strike Declaration, Opinion, and Testimony of Plaintiffs’ Expert William T. Bielby, Ph.D., July 25, 2003, at 9-10.

The sum of Dr. Bielby's proposed testimony there was that Wal-Mart managers *sometimes* used gender stereotypes rather than job-related performance information to make decisions; that Wal-Mart had taken insufficient steps to control those stereotypes; and that Wal-Mart's policies were uniform nationwide. *Id.* at 7-8. Wal-Mart contended in its motion to strike that Dr. Bielby's theories had not been tested; he relied on research that had no applicability to the facts of the case; and he failed to use the degree of intellectual rigor in his litigation work that he used in his non-litigation professional endeavors. *Id.*, at 1-3.

In support of these contentions, Wal-Mart highlighted numerous deposition admissions by Dr. Bielby, including that he had never done: "any laboratory research . . . into the content of stereotypes"; "any study of the impact that 'individuating' information might have on the operation of stereotypes"; "any study of the circumstances under which gender stereotypes [were] likely to influence decisions"; or "any study to determine the intensity of stereotypes held by any group of individuals, least of all Wal-Mart managers." *Id.* at 8-9. Indeed, Dr. Bielby admitted that no study existed that had *ever* tested his hypotheses. *Id.* In addition, Dr. Bielby admitted that there were several material differences between Wal-Mart managers and the subjects in the studies on which he relied; specifically: "Wal-Mart managers ha[d] more time to make employment decisions"; "Wal-Mart managers ha[d] orders of magnitude more relevant 'individuating' information"; and "Wal-Mart managers ha[d] far greater incentive to be right in their decisions." *Id.* at 9. Dr. Bielby admitted further that each of these factors would have a material impact on the role stereotypes played in decision making, and indeed might "erase" the impact of stereotypes altogether. *Id.*

Wal-Mart also argued in its Motion to Strike that the sociological "evidence" on which Dr. Bielby relied to support his theories – a study of husbands' feelings about the rights of women that was 20-30 years out of date; a study of community college students who were asked to rate expected performance of hypothetical male and female fighter-pilots; interviews taken in 1985 of married, male Air Force security guards and their spouses about the imminent addition of women to the security guard ranks; a study of college students that measured the time it took to rate the attributes of fictitious men and women; and a study of the feelings of lower-middle class college students toward a working mother with a young child – had no application to the real-world situation of Wal-Mart managers and their employees. *Id.* at 11-12. Indeed, the demographic make-up of *none* of the subjects in the studies came anywhere near mimicking that of Wal-Mart's managers. *Id.* at 17. Finally, Wal-Mart argued that Dr. Bielby had failed to rule out the other possible causes of the pay disparities at Wal-Mart or to consider the data that contradicted his theory. *Id.* at 19.

The *Dukes* court rejected all of these attacks and admitted Dr. Bielby's testimony. 222 F.R.D. at 192. With respect to Dr. Bielby's admission that "he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking," the court held that "[w]hile this could present a difficulty for Plaintiffs at trial, the question here is whether Dr. Bielby's opinion is so flawed that it lacks sufficient probative value to be considered in assessing commonality" for purposes of whether plaintiffs could achieve class certification. *Id.* Relying on the Supreme Court's *Price Waterhouse v. Hopkins* decision, "in which the trial court relied on a social psychologist's testimony [Dr. Susan

Fiske, see discussion below] that the defendant was ‘likely influenced by sex stereotyping,’ even though the expert ‘admitted that she could not say with certainty’ whether any particular comment was the result of stereotyping,” the *Dukes* court reasoned that Dr. Bielby’s failure to offer any concrete opinion on causation was not a basis to exclude his testimony. *Dukes*, 222 F.R.D. at 192 (quoting *Price Waterhouse*, 490 U.S. 228, 235-36 (1989)).

See also *Butler v. Home Depot*, No. C-94-4335, 1997 WL 605754, at *7 (N.D. Cal. Aug. 29, 1997) (denying defendant’s motion to exclude Dr. Bielby’s testimony that “[i]n the context of a male-dominated culture, relying on highly arbitrary assessments of subjective hiring criteria allows stereotypes to influence hiring decisions. Under such circumstances, there is likely to be a strong tendency for women to be considered unqualified or inappropriate for ‘men’s work’ in Merchandising jobs, regardless of any individual female applicant’s qualifications . . . for such positions.”).

iii. Cases Rejecting or Limiting Dr. Bielby’s Testimony

At least three courts have found serious flaws in Dr. Bielby’s proffered testimony and have either limited the topics on which he could testify or excluded his testimony entirely.

In *Robinson v. Metro-North Commuter Railroad*, 175 F.R.D. 46 (S.D.N.Y. 1997), *overruled on other grounds by Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 2003), for example, the court recognized Dr. Bielby’s “expert report” as “purchased canned advocacy lacking any pretense as to scientific credibility”:

As for [Dr. Bielby’s] sociological opinion, even if one puts aside reservations one might have as to its ultimate admissibility under [*Daubert*], *it consists on its face of little more than rank conclusion and gross speculation*. For example, the opinion baldly premises that negative stereotypes result in African American’s being considered “inappropriate for higher level jobs by defendant’s managers.” Similarly, the opinion simply presumes that [defendant’s] personnel and disciplinary systems are inherently subjective and allow managers to materially circumvent policies that would reduce subjectivity and bias. *No meaningful weight can reasonably be attributed, even at this stage of the proceedings, to a report so facially suspect*.

175 F.R.D. at 48 (emphasis added, internal citations omitted). (When reversing the *Robinson* decision, the Second Circuit did not question the district court’s rejection of Dr. Bielby’s testimony. See 191 F.3d at 287-88.)

In *Gosho v. United States Bancorp Piper Jaffray, Inc.*, slip op., No. C00-1611-PJH (N.D. Cal. Oct. 1, 2002) (unpublished), the district court excluded Dr. Bielby’s testimony entirely. The court held that Dr. Bielby’s report could not be tested and was not established in the scientific community because Dr. Bielby admitted in his deposition that “he had no specific

knowledge of the operations of any particular Piper Jaffray branch office, nor did he visit any of the branch offices, or speak to any branch managers or any Piper Jaffray employee.” *Id.*, at *6-7. To the contrary, the court observed that Dr. Bielby’s entire premise was based on extrapolations and soundbites from a “Cultural Assessment Report” prepared for Piper Jaffray by Sepler & Associates. Thus, the court held that because Dr. Bielby had failed to utilize the scientific method in testing his theories at Piper Jaffray branch offices, his testimony failed to pass muster under *Daubert*. *Id.*

In *EEOC v. Morgan Stanley*, 324 F. Supp. 2d 451, 457-58 (S.D.N.Y. 2004), the court restricted the topics on which Dr. Bielby could testify. The court reasoned:

Bielby’s discussion about the susceptibility of the [Institutional Equities Division]’s pay and promotion procedures to gender bias would tend to confuse the jury about the burden of proof. The gist of his conclusion is that in a male-dominated context where men are in charge[,] women are discriminated against unless certain safety measures are instituted. He therefore asks the jury to begin with the expectation of discrimination and compel Morgan Stanley to prove that it took enough steps to prevent it.

. . . . While his testimony would be helpful in understanding the mechanism of discrimination, and consequently, in fashioning an appropriate remedial scheme, it may not illuminate the initial inquiry, i.e., whether Morgan Stanley discriminates.

Id. at 462. As a result, although the court allowed Dr. Bielby to testify regarding gender stereotypes, how these stereotypes may have affected decisions at Morgan Stanley, and whether policies and practices relating to gender bias might affect employees’ utilization of an EEO program, the court held that Dr. Bielby could not testify as to whether there was any evidence of discrimination at Morgan Stanley. *Id.*

2. Dr. Susan Fiske

Another stereotyping expert is Dr. Susan Fiske, a psychologist at Princeton University.

Dr. Fiske’s first litigation testimony occurred in a case that ultimately went to the United States Supreme Court – *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989). (Note that the case pre-dates *Daubert* and arose in a factual context very different than the subjective decision making class actions discussed herein.) The case was a single-plaintiff claim by a female accountant who alleged that she had been denied partnership in her firm because she failed to meet the male partners’ stereotypes as to how a woman should act. Dr. Fiske testified in support of plaintiff, opining that “the disappointed stereotypical expectations of male partners played a major determining role in the firm’s decision not to make Hopkins a partner.” *Hopkins v. Price Waterhouse*, 825 F.2d 458, 467 (D.C. Cir. 1987). The Supreme Court affirmed the circuit court’s rejection of defendant’s attack on the admissibility of Dr. Fiske’s testimony. The

defendant had argued that Dr. Fiske's testimony should not be admitted because she had never met Hopkins or the authors of the alleged stereotypical statements about her. The circuit court held, and the Supreme Court agreed, that such factors were immaterial because Dr. Fiske had "made clear that experts in her field do not require such data in order to determine whether stereotyping is occurring in a given employment context." *Id.* at 467.

Dr. Fiske testified in the class action context in *Butler v. Home Depot*, 984 F. Supp. 1257 (N.D. Cal. 1997). Her testimony parroted that of Dr. Bielby's usual testimony, that "gender stereotyping plays a major role in Home Depot's hiring, placement, and promotion patterns," that stereotyping is "automatic," and that "Home Depot has not taken adequate steps to control these biased individual practices." *Id.* at 1262. In rejecting Home Depot's *Daubert* challenge to Dr. Fiske's testimony, the court held that Dr. Fiske's theories had been tested, in both the laboratory and the field, had been subjected to peer review, and had generally been accepted by experts in the field of psychology. *Id.* at 1263. The court also categorized Home Depot's criticism of Dr. Fiske's testimony (that it was biased, and that she had not conducted any empirical studies on the topic) as going to the weight, rather than the admissibility, of her testimony. *Id.* See also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fl. 1991) (granting judgment for plaintiff based in part on Dr. Fiske's sexual stereotyping testimony).

Dr. Fiske also recently co-authored an article entitled *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, in 60 J. Social Issues, 701 (Winter 2004). The article states that a study shows that "[w]orking moms risk being reduced to one of two stereotypes: homemakers – viewed as warm but incompetent, or female professionals – characterized as competent but cold," and that "people report less interest in hiring, promoting, and educating working moms relative to working dads and childless employees." *Id.* It bears noting that, as with many of the studies upon which Dr. Bielby relied in the *Dukes* case, the study upon which Dr. Fiske relies in this article is one that examined the feelings of college undergraduates and therefore arguably does not apply at all to the real workplace setting.

3. Dr. Michael Harris

Dr. Harris, a professor of management at the Business School at the University of Missouri – St. Louis, has recently emerged as a purported, self-declared "expert," who is willing to testify about stereotyping. There are no reported decisions citing his testimony.

In Dr. Harris's December 2004 expert report submitted in the *Jenkins v. BellSouth Corp.*, 2:02-CV-01057-VEH (N.D. Ala. 2002), class action, Dr. Harris admits that in the last four years he has only testified in one case, by deposition, on behalf of a defendant.

Dr. Harris's report in the *Jenkins* matter opines that "[o]ne explanation for the finding that Blacks fare less well than Whites in terms of pay and promotions is the presence of stereotypes." *Id.* at 30. Dr. Harris states further that "[o]ne key strategy [for companies that wish to discourage the use of stereotypes] is to create and implement HR practices that are sufficiently systematic and concrete so as to minimize stereotyping." *Id.* at 35-36. Dr. Harris

does not offer any opinion as to whether stereotyping or discrimination actually occurred at BellSouth. Rather, he merely surmises that the company's pay and promotion processes failed to meet his standards of being "systemic" or "concrete." *Id.* at 41. This failure, he claims, "could create racial disparities." *Id.* (emphasis added.)

C. Challenges to the Stereotyping Theory

We know of no reported expert testimony that has attacked Dr. Bielby's theories head-on in litigation, i.e., that gender or other stereotypes were not present in a given workplace or did not cause any of the protected group plaintiffs' alleged statistical pay or promotion disparities.

The recent firestorm created by Harvard University President Larry Summers' public statement that women are underrepresented in tenured positions in science and engineering at top universities and research institutions because of innate gender differences and personal choices is exemplary of how controversial a head-on attack of Dr. Bielby's testimony might be, and may be one of the reasons why no experts appear to have been willing to offer one. *See generally* Robert Tomsho & John Hechinger, *Harvard Clash Pits Entrenched Faculty vs. Brusque Leader*, The Wall Street Journal, Feb. 18, 2005, at A1. Specifically, President Summers announced during an economic conference that:

I've had the opportunity to discuss questions like this with [CEOs] at major corporations, the managing partners of large law firms, the directors of prominent teaching hospitals, and with the leaders of other prominent professional service organizations, as well as with colleagues in higher education. In all of those groups, the story is fundamentally the same. . . . [T]he relatively few women who are in the highest ranking places are disproportionately either unmarried or without children.

* * *

And it is a fact about our society that [high-ranking positions require] a level of commitment that a much higher fraction of married men have been historically prepared to make than of married women. . . . [It is] the choices that people make . . . [that] is contributing substantially to the outcomes that we observe.

Text of Summers's Remarks At Economic Conference, The Wall Street Journal, Feb. 17, 2005 (emphasis added.) Summers also opined that the pattern is even more prevalent in the fields of science and engineering because there are differences in overall IQ, mathematical ability and scientific ability between men and women, and that these differences are "not plausibly, culturally determined," but are innate to the genders. *Id.* Specifically, he stated, they are "issues of intrinsic aptitude." *Id.* These statements, along with other controversial moves by the Harvard president, have caused a majority of Harvard's Arts and Science faculty to issue a vote

of no confidence on Summers' leadership. *Harvard President is Given A Vote of No Confidence*, The Wall Street Journal, March 16, 2005.

Despite the controversy that might be created by an expert offering similar testimony in court, there are experts who are willing to attack Dr. Bielby on the topic of the scientific methodology (or lack thereof) behind his opinions. Dr. Christopher Winship, for example, "has testified in seven class actions since 1996 with the express goal of discrediting [Dr. Bielby]." Scheck, *Expert Witness*, at 3. Dr. Winship received his Ph.D. in sociology from Harvard University in 1977 and is currently a professor of sociology there.

The cases in which Dr. Winship has provided testimony include *Robinson v. Metro-North Commuter Railroad*, 175 F.R.D 46 (S.D.N.Y. 1997), where the defendant was successful in having the trial court discount Dr. Bielby's testimony, and *EEOC v. Morgan Stanley*, 324 F. Supp. 2d 451, 466 (S.D.N.Y. 2004), where Dr. Winship's testimony about five major omissions in Dr. Bielby's analyses, and his opinion that it lacked scientific vigor, helped persuade the court to limit the topics on which Dr. Bielby could testify.

Dr. Winship's criticism of Dr. Bielby in these and other cases includes that his theories have not been and cannot be tested; that the case studies upon which he relies have no practical applicability to the real world; that he fails to treat with evidence that contradicts his theories or to discount the possible reasons (other than stereotyping and discrimination) why statistical pay or promotion disparities exist; and that he does not analyze the practices of individual managers at different company locations, but simply assumes that they are all the same.

D. Larger Debate Over the Causes of Pay and Promotion Disparities

Perhaps one of the most interesting flaws in the stereotyping theory proffered by Dr. Bielby and others – especially in the gender context – is its utter failure to treat with the myriad other possible causes for statistical pay and promotion disparities between men and women found in the majority of workplaces today. The large volume of social science and political literature that refutes Dr. Bielby's theory makes clear that the certainty of his theory is far from settled.

In the February 27, 2005 New York Times article entitled *Are Women Responsible for Their Own Low Pay?*, for example, Claudia H. Deutsch reports on findings by Dr. Warren Farrell that support the notion that "using pay statistics to prove sex discrimination is akin to using the horizon to prove that the world is flat." Dr. Farrell asserts that women

methodologically engineer their own paltry pay [by choosing] psychically fulfilling jobs, like librarian or art historian, that attract enough applicants for the law of supply and demand to kick in and depress pay. They avoid well-paid but presumably risky work – hence, the paucity of women flying planes. And they tend to put in fewer hours than men – no small point, he says, because people

who work 44 hours a week make almost twice as much as those who work 34 and are more likely to be promoted.

Id. Dr. Farrell’s advice to women is that “[i]t is okay to trade a fatter paycheck for more time with children and hobbies. Just recognize that society did not force the choice on you.” *Id.* Women who make this choice, Dr. Farrell concludes, “should feel powerful and happy that [they] have control over [their] own li[ves]. It’s better than feeling like an angry victim of discrimination.” *Id.*

A January 10, 2005 article in Fortune magazine by Betsy Morris entitled *How Corporate America Is Betraying Women*, presents evidence of different causal factors. Morris discusses a recent study that actually controlled for the many supposed “choices” that individuals like Dr. Farrell claim cause the gender pay divide (e.g., women’s perceived unwillingness to relocate, unwillingness to work in physically dangerous or demanding jobs, and biological need to take time off to bear children) and found that despite controlling for these factors in targeted multiple regression pay analyses, there was still a huge pay gap between men and women. *See id.* The study also found that widespread anecdotal evidence of women’s exclusion from informal male networks – the “boys’ after dinner drinks, the golf games, the men’s clubs” – played a far greater role in causing the pay gap than women’s lifestyle choices. *See id.*

Other articles and literature addressing the potential causes for the gender pay divide include:

- Linda Tischler, *Bridging the (Gender Wage) Gap – Staying on Top of Your Game*, Fast Company, Jan. 2005, at 85 – noting that “until kids enter the picture, women earn as much as men,” and providing guidance for how women should act to remedy the wage divide, including advising them to “sign up for a job with bottom-line responsibility,” “find a field that entails financial or emotional risk taking,” “work more hours, more weeks, and more years,” “be willing to relocate to unsexy places at the company’s behest,” “pick technology or hard sciences over the arts or social sciences,” and “choose a field where you can’t ‘check out’ at the end of the day”;
- Diana Furchtgott-Roth & Christine Stolba, *Women’s Figures* (Independent Women’s Forum 1996) – discussing the economic progress of women in America, including, *inter alia*, topics such as the wage gap, glass ceiling, “pink ghetto,” and specific female entrepreneurs;
- Stephanie Boraas and William M. Rodgers III, *How Does Gender Play a Role In The Earnings Gap? An Update*, Monthly Labor Review (Mar. 2003) – citing numerous current statistics on the wage divide between men and women and suggesting that the relative percentage of women in a given field is a strong predictor of whether women and men will be paid comparably in that field; and

- Linda Babcock et al., *Women Don't Ask* (Princeton Univ. Press 2003), reporting that studies show that women are more likely to accept a salary offer “without quibbling.” See Morris, *supra*. One such study of Carnegie Mellon graduates, for example, found that men were eight times more likely to negotiate over a starting salary, often resulting in men receiving a higher starting salary than women for comparable positions, even when their qualifications and experience are the same. See *id.*

To prevent the occurrences discussed in this Carnegie Mellon study (which, over a lifetime, can result in huge earnings disparities between men and women even when other factors are held equal), Wal-Mart announced that it will require identical starting pay for new hires that have the same experience, regardless of what their pay was at their prior position or what pay they demand during an interview. See *The Trouble with Women*, The Economist, Oct. 25, 2003, at 8.

The issues of whether women and men (or whites and non-whites) make different occupational choices, and whether a purported “lack of interest” in higher-paying jobs or other perceived lifestyle “choices” of protected groups should be factored into any analysis of pay and promotions, have also been hotly debated in the judicial arena. Compare *Morgan Stanley*, 324 F. Supp. 2d at 464-65 (refusing to allow Morgan Stanley to introduce the testimony of a labor economist that some pay disparities between men and women were attributable to gender roles and occupational choices) with *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1323 (N.D. Ill. 1986) (finding that Sears had proffered “credible evidence” that “men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women” in higher paying jobs). See also Vicki Schultz & Stephen Peterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. Chi. L. Rev. 1073, 1081 (1992) (surveying all published Title VII race and sex discrimination cases decided from 1965 to 1989 and concluding that “courts have compromised both women’s and minorities’ protections against job segregation . . . [and] imposed more stringent standards of proof for refuting the lack of interest defense on sex discrimination plaintiffs than on race discrimination plaintiffs”).

The many issues surrounding the gender pay gap and the determination as to who – individual employers, individual women, or society at large – is responsible and/or should bear the cost for the problem will likely remain hotly debated both in the courts and the academic and political literature for years to come.

A key issue for courts assessing expert stereotyping testimony and the subjective decision making theory when determining the propriety of class certification is the potential inconsistency between plaintiffs’ claims that (i) individual managers were permitted to make independent discriminatory decisions based on their own discretion, and (ii) there existed a single, company-wide discriminatory practice. As one court put it:

There is an inherent tension between Plaintiffs’ arguments that the facilities . . . had common, centralized employment policies and their contention that local, first-level supervisors had the autonomy to make

subjective, discriminatory decisionsThe best characterization of Plaintiffs' theory is that Defendants had a centralized policy of decentralization.

Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 670 (N.D. Ga. 2001). Due to this tension, it is sometimes difficult for class representatives who base their certification attempt on the subjective decision making theory to establish that common questions of law or fact exist and that their claims are typical of absent putative class members. The existence of numerous individualized questions also presents a hurdle to plaintiffs seeking to demonstrate the propriety and manageability of a class action. In addition, it is difficult for plaintiffs to establish that the abstract concept of "subjectivity" in defendant's policies was the same *cause* of discrimination against all putative class members.

To overcome these hurdles, class representatives will typically offer company-wide statistical evidence to try to show that all members of the protected class have suffered from discrimination, so as to further support their claim of commonality and typicality. *See, e.g., id.* at 677 ("Where the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact.") (*quoting Caridad v. Metro-North Commuter R.R.*, 191 F.2d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 11007 (2000)). Through company-wide statistics, plaintiffs try to bridge the gap between the employer's alleged practice of subjective decision making and the plaintiffs' claim that that practice *caused* discrimination that is common to all putative class members.

IV. THE ROLE OF STATISTICS IN COMPENSATION AND PROMOTION CASES

A. Cases Discussing The Use of Statistics To Show Causation

1. Cases That Deny Class Certification

Courts that have rejected class certification attempts based on the subjective decision making theory often reason that plaintiffs' statistics are insufficient to establish a causal nexus between alleged subjectivity and common discrimination against all class members.

In *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), for example, the court affirmed the denial of class certification in a case alleging systemic racial discrimination in promotions and compensation. The court criticized plaintiffs' expert's statistical analysis because the expert had failed "to incorporate variables that would allow for the comparison of individuals who were similarly situated with respect to managerial decision-makers, job types, locations, departments, and the specific criteria relevant for the jobs in question." *Id.* at 717. The court concluded that the "methodological deficiencies" in the expert's analysis "rendered it 'impossible to determine whether the [salary and promotion] gaps [we]re, whether they [we]re statistically significant, or whether factors other than race [we]re involved.'" *Id.* at 718 (*quoting* district court opinion). The court also explained that "the compensation and promotion decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics." 390 F.3d at 714-15. The court reasoned that the plaintiffs were trying to represent a very broad class of all black employees at all levels of the corporate hierarchies, in all of the defendant companies, and that although the named plaintiffs' claims might have been typical of some employees, they were not typical of all of them. The court concluded that commonality was lacking because plaintiffs had failed to adduce sufficient evidence that the employer's alleged subjective decision making caused discrimination that was common to this wide variety of otherwise diverse and differently situated putative class members. *See id.* at 715.

In *Abram v. UPS of America*, 200 F.R.D. 424 (E.D. Wis. 2001), the court analyzed the plaintiffs' proffered statistics and found that "it is impossible to infer, from the statistical data adduced by the plaintiffs, that UPS managers uniformly or systematically evaluate African American supervisors in a discriminatory fashion, if indeed they do so at all." *Id.* at 431. The court noted that although the statistics showed a significant disparity in pay when looked at *in the aggregate*, there were actually no statistically significant differences in the majority of the local units. *Id.* The court went on to conclude that the plaintiffs could not satisfy the commonality and typicality requirements of Rule 23 in part because "the decisions of apparently hundreds of center managers are implicated, requiring many individualized inquiries that not only undermine 'commonality' but also have the potential to render class treatment unworkable." *Id.* at 432.

Similarly, in *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001), the court rejected class certification on the grounds that the statistics plaintiffs presented did not provide a sufficient link between the alleged subjective decision making process and

company-wide discrimination. Plaintiffs there were a group of African American employees who claimed that “Lockheed maintain[ed] an overall corporate culture, originating at the highest levels of the corporation and flowing to all facilities operated by [the company], that is openly antagonistic to its black employees . . . [T]his culture has resulted in common and centralized policies and practices . . . [that] give supervisors, almost all of whom are white, wide discretion and autonomy in making personnel decisions, which in turn fosters racial discrimination in the areas of promotions, compensation, and performance evaluations.” *Id.* at 658. In rejecting this claim and denying class certification, the court reasoned: “Plaintiffs correctly assert that subjective employment practices may, under certain circumstances, give rise to discrimination. But this does not mean that subjective employment practices necessarily give rise to a broad, multi-facility class.” *Id.* at 670 (citation omitted). The court reasoned that with respect to plaintiffs’ claim of discriminatory promotions and training, plaintiffs had failed to present any statistical evidence that the defendant had engaged in discrimination that was class-wide. *Id.* at 671. With respect to plaintiff’s claim of pay discrimination, the court held that although plaintiffs’ statistics in the aggregate showed a statistically significant pay shortfall for blacks, because there were no statistically significant shortfalls in many individual units and in many specific yearly time periods, the statistics failed to reveal a company-wide, common discriminatory result. *See id.* at 671, 677 (noting that plaintiffs’ statistics showed that significantly adverse disparities only occurred in 6 out of 43 pay grades and 3 out of 5 years). The court concluded that “[t]he statistical evidence in the instant cases demonstrates wide variations in disparities depending on job group, pay grade, year of comparison, and the particular claim for which relief is sought.” *Id.* at 677. Accordingly, class certification was inappropriate. *Id.*

Other courts have reached similar results. *See, e.g., Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 664-65 (N.D. Ga. 2003) (denying class certification in a denied promotions case on the grounds that plaintiffs’ statistics failed to support their class-wide discrimination theory because an individualized, “store level analysis helps to answer the question whether the difference found by Plaintiffs’ experts when evaluating test failures was a common pattern across all stores or the result of aggregating statistics across a large number of tests over a long period of time”); *Webb*, 206 F.R.D. at 408 (denying class certification because statistics failed to take into account variables that distinguished employees in different parts of the company and therefore failed to support the claim of class-wide discrimination); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) (rejecting class certification where plaintiffs claimed promotion policies were marked by excessive subjectivity because “the purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof”); *Reap v. Cont’l Cas. Co.*, 199 F.R.D. 536, 545 (D.N.J. 2001) (finding that plaintiff’s statistical evidence did not “tend to show that [the defendant’s] delegation policy was intended to achieve a company-wide policy of discrimination against women, or older women. At most, these statistics might show that the policy resulted in unintentional discrimination at the local level.”); *Robertson v. Sikorsky Aircraft Corp.*, No. 397 Civ. 1216, 2000 WL 33381019, at *6 (D. Conn. July 5, 2000) (rejecting class certification where plaintiffs claimed discriminatory treatment based on evaluations and decisions made by many different supervisors in many different areas including promotions and compensation).

2. Cases That Grant Certification

By contrast, the cases that have granted class certification and endorsed the subjective decision making theory have not generally discussed why the plaintiffs' statistics demonstrate that subjective practices *caused* discrimination. Rather, they appear to accept plaintiffs' contention that the mere existence of class-wide statistical disparities is enough, when there is other independent evidence of commonality.

In *Morgan*, 169 F.R.D. 349, for example, the court found that the defendant's promotion policies were "uniform throughout the country and [were] promulgated by the national corporate office," and the court therefore concluded that the plaintiffs' statistical evidence of the discriminatory results of the policies throughout the country was sufficient to establish commonality and typicality. *Id.*

Similarly, in *Dukes*, 222 F.R.D. at 150, the court distinguished the conclusions of the *Reid* and *Rhodes*' courts (discussed above) that "there was no evidence to provide a nexus between the subjective decision-making and discrimination," by explaining that the *Dukes* plaintiffs had, in contrast to the plaintiffs in those cases, "presented evidence of such a nexus by presenting evidence of gender stereotyping and a corporate culture of uniformity" as well as, "over a hundred declarations by designated class members showing common subjective practices across the country"). *See also McReynolds*, 208 F.R.D. 428 (granting class certification where plaintiffs produced statistical evidence of class-wide promotion disparities, but basing decision on subjective elements of company's promotions practices that were common, class-wide); *Beckmann*, 192 F.R.D. 608 (same).

B. Analyzing Compensation Data

1. Multiple Regression Analysis

The most widely accepted statistical approach for analyzing compensation data in litigation is the multiple regression analysis. *See Bazemore v. Friday*, 478 U.S. 385, 399 (1986). Moreover, as discussed in greater detail below, the OFCCP has recently indicated that it, too, will use this approach for analyzing federal contractor compensation practices and will be guided by existing court case law for the proper way to conduct such analysis. *See generally* 69 Fed. Reg. No. 220, at 67246 *et seq.* (Nov. 16, 2004).

A multiple regression analysis attempts to reveal relationships between explanatory variables and a dependent variable. Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, Reference Manual on Scientific Evidence at 181 (Federal Judicial Center 2d ed. 2000). Explanatory variables are the expected influences on the dependent variable. *Id.* In a pay equity analysis, compensation is the dependent variable. The regression controls for the nondiscriminatory explanatory variables and then compares the wages of protected group and non-protected group employees. "At best, the regression equation used to assess discrimination in compensation levels can be viewed as a good representation, based on available information, of what factors seem to be related to compensation levels, on average." *Morgan v. UPS*, 380

F.3d 459, 466 (8th Cir. 2004) (*quoting* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* § 6.01, at 3 (2002)).

“When inappropriately used,” however, “regression analysis can confuse important issues while having little, if any, probative value.” David H. Kaye & David A. Freedman, *Reference Guide on Statistics, Reference Manual on Scientific Evidence*, at 183 (Federal Judicial Center 2d ed. 2000). Two variables that are closely related (e.g., age and salary) may be misinterpreted as having a causal relation, for example, even though they are both caused by a third, unexplained, variable (e.g., productivity). Kaye & Freedman, *supra*, at 183. As the Second Circuit has observed:

As with any multiple regression analysis, the validity of the influence attributed to a particular variable will depend heavily on how accurately the model mimics the actual factors influencing the dependent variable, salary. For example, if the model omits an important variable that affects salaries, the portion explained by that variable will seem to be unexplained, and thus may erroneously be attributed to sex. Conversely, if an extraneous factor is erroneously credited with influencing salary, it may serve to mask the effect of sex on . . . compensation.

Sobel v. Yeshiva Univ., 839 F.2d 18, 22 (2d Cir. 1988). For this reason, courts require that the “major” factors affecting salary be accounted for in any model testing for compensation disparities. *Bazemore*, 478 U.S. at 399; *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (observing that “common sense require[s] that any multiple regression analysis used to determine pay disparity must include all the major factors on which pay is determined”).

Accordingly, employers and the statisticians and counsel they use to help them formulate their multiple regression analyses will want to consult their written compensation policies and practices and craft their regression models around the variables that decision makers actually consider when making compensation decisions and those factors that help explain differences in compensation.

2. The Workforce Studied

The first step in a multiple regression analysis is to determine the workforce to be analyzed. A study might look only at particular categories of employees (e.g., sales, store employees), only employees associated with particular lines of business, or only employees at particular locations.

It is imperative that a study properly identify the workforces that can and should be assessed together. If categories of employees are included in the study who do not belong, the results may not be reliable and will be subject to attack. *See, e.g., Bakewell v. Stephen F. Austin State Univ.*, 975 F. Supp. 858, 895 (E.D. Tex. 1996) (noting that administrative faculty members were not properly included in workforce analyzed where they were unrepresentative of faculty members because, for example, departmental chairs received a stipend for administrative work),

aff'd, 124 F.3d 191 (5th Cir. 1997). Specifically, when improper workforces are included in the study, the explanatory variables included in the multiple regression analysis will be skewed. For example, in *Penk v. Oregon State Bd. of Higher Educ.*, No. Civ. A. 80-436, 1985 WL 25631, at *53 n.4 (D. Or. Feb. 13, 1985), *aff'd*, 816 F.2d 458 (9th Cir. 1987), the district court noted that plaintiffs studied a workforce that included not just positions eligible for tenure, but also research assistants and research associates, both of whom are not ordinarily eligible for tenure. The court acknowledged that doing so “may skew plaintiff’s results, because although research assistants and associates may have high ‘years since’ variable values, they will be in fixed-term positions.” *Id.* In other words, the use of an improper workforce inappropriately affected the weight given to a variable attempting to explain compensation. *See id.*

In the OFCCP audit context, determining the workforce to be studied will involve a “determination of employees who are ‘similarly situated’ . . . [based] on the similarity of the work performed, the levels of responsibility, and the skills and qualifications involved in the positions.” 69 Fed. Reg. No. 220, at 67249. (See detailed discussion of OFCCP concept of similarly situated employee groups (“SSEGs”), *infra.*)

3. Aggregation of the Data

In addition to identifying the workforce to be studied, any study of compensation requires a determination of whether the workforces analyzed should be assessed separately or together. *See, e.g., Dukes*, 222 F.R.D. at 157 n.25 (wherein defendant challenged plaintiffs’ multiple regression analysis because it aggregated defendant’s workforce data); *see also Stasny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278-80 (4th Cir. 1980) (affirming district court’s denial of class certification in part based upon a rejection of statistical evidence because the statistics were not probative of separate facilities, but only showed overall disparities); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 n.8 (D. Md. 2002) (denying class certification in part because plaintiffs’ “statistics are not separated by facilities or departments”); *Abram*, 200 F.R.D. at 431 (finding that plaintiffs had improperly aggregated compensation data where employer’s standardized personnel procedures involved compensation decisions that took place on decentralized and individualized level, explaining that aggregate statistical evidence “masks differences from district to district and from supervisor to supervisor that preclude a finding of ‘commonality’”).

As explained in the proposed new OFCCP guidelines, “[t]he factors that influence pay decisions may not bear the same relationship to compensation for all categories of jobs in the employer’s workforce. For example, performance may have a more significant influence on compensation for a high-level executive, than for technicians or service workers.” 69 Fed. Reg. No. 220, at 67250.

In general, the determination of whether to aggregate data will turn on each individual employer’s compensation practices. *Dukes*, 222 F.R.D. at 157 (“The proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices, and the interchange of employees, at the various facilities.”) (*citing Kirkland v. N.Y. State Dep’t of Corr. Servs.*, 520

F.2d 420, 425 (2d Cir. 1975)). If there is a material issue of disputed fact on the appropriate level of analysis, courts are inclined to allow the finder of fact to weigh the appropriate approaches. *See, e.g., id.*

One way to help determine the propriety of an aggregated or non-aggregated approach is to conduct a “Chow” test. *Id.* Although a court may not require a Chow test where sufficient evidence demonstrates that it is appropriate to aggregate the data, such a test may help prove to a fact finder that such aggregation was inappropriate. *See Dukes*, 222 F.R.D. at 157 (citing *Coates v. Johnson & Johnson*, 756 F.2d 524, 542 (7th Cir. 1985) (where defendant used the Chow test, among other evidence, to convince the factfinder that the weight of the competing expert testimony favored the defendant’s position that the data should not be aggregated in the manner proposed by plaintiffs)).

The OFCCP has indicated that it will pool regressions of multiple job categories when “separate regressions by categories of jobs would not permit OFCCP to assess the way the contractor’s compensation practices impact on a significant number of employees.” In the pooled regression approach, these categories of jobs will be combined “into a single regression (while including an OFCCP-developed category factor in the ‘pooled’ regression that controls for groupings of employees who are similarly situated based on work performed, responsibility level, and skills and qualifications).” 69 Fed. Reg. No. 220, at 67251. The OFCCP explains that if it uses this “pooled” method, it will include in the regression appropriate “interaction terms” (i.e. variable in the regression that consists of a combination of sub-variables, to account for situations where an explanatory variable (e.g. performance) has a different impact on compensation depending on job level. *Id.* The OFCCP has also endorsed use of the Chow Test to determine which interaction terms should be included in a pooled regression analysis. *Id.*

4. Determining What Variables To Include

Selecting which variables to include in a regression model “is a function of the particular employer’s compensation determinations.” *Morgan*, 380 F.3d at 469; *see Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (observing that “common sense require[s] that any multiple regression analysis used to determine pay disparity must include all the major factors on which pay is determined”); *Sobel*, 839 F.2d at 22 (“As with any multiple regression analysis, the validity of the influence attributed to a particular variable will depend heavily on how accurately the model mimics the actual factors influencing the dependent variable, salary.”). *See also* OFCCP Proposed Guidelines, 69 Fed. Reg. No. 220, at 67250 (explaining that the “multiple regression model must include those factors that are important to how the contractor *in practice* makes pay decisions”) (emphasis added).

One means of evaluating the propriety of including certain factors in a regression model is to test the model on a group of only white or male employees, where one assumes discrimination does not impact compensation. If the factors considered effectively explain differences in the compensation of these groups, then there will be a greater comfort that the relevant factors affecting compensation have been accounted for in the aggregate model. If the

factors do not adequately explain the differences in compensation, then additional work on the model is advisable.

Typically, the relevant variables can be broken down into two broad categories: (1) job related characteristics and (2) productivity related characteristics. Job related characteristics can include the type of work performed, the level of responsibility for the position, and the geographic location of the position. Productivity related characteristics can include direct measures of performance (e.g., performance rating, sales data), as well as indirect measures that may have a bearing on performance (e.g., education, prior experience, seniority).

It is important that the explanatory variables selected actually impact compensation or else the precision of the regression results is diminished. *See* Rubinfeld, *Reference Guide on Multiple Regression* at 189. Where the sample size is small, this diminution can be significant. *Id.*

a. “Tainted” Variables

Plaintiffs often challenge the inclusion in the regression model of subjective factors that affect compensation, especially those that the employer can control, arguing that they mask discrimination in the regression. For example, plaintiffs might argue that performance evaluation scores should not be included in the regression, even though performance scores affect pay, because the performance evaluation system itself is discriminatory. Explanatory factors that themselves are potentially the product of the unlawful discrimination should generally be excluded from a regression analysis. Courts refer to such factors as “tainted” variables. *See* Paetzold & Wilborn, *The Statistics of Discrimination* § 6.13; Rubinfeld, *Reference Guide on Multiple Regression* at 187 n.22 (“Whether a particular variable reflects ‘legitimate’ considerations or itself reflects or incorporates illegitimate biases is a recurring theme in discrimination cases.”); *Rudebusch v. Hughes*, 313 F.3d 506, 511 (9th Cir. 2002) (noting that adjustments for rank in compensation analysis may be inappropriate if it were the case that because of discrimination male faculty members are more likely to be promoted than females; in that situation, “controlling for rank in the analysis would result in underestimating salary inequities.”). *See also* OFCCP Proposed Guidelines, 69 Fed. Reg. No. 220, at 67250 (indicating that the OFCCP will “investigate the facts of each particular case to ensure the factors included in the regressions are not themselves influenced by discrimination, which is often discussed in the case law as a factor ‘tainted’ by discrimination. However, OFCCP will not automatically presume that a factor is tainted [and] will determine whether a factor is tainted by evaluating proof of discrimination with respect to that factor....”).

It is usually not sufficient, however, for plaintiffs simply to allege that the defendant used a tainted variable. Instead, they must demonstrate that the variable actually reflects past or present discrimination. In *Bazemore*, for example, the defendant maintained a segregated pay scale for blacks and whites prior to the passage of Title VII in 1964. *See* 478 U.S. at 390-91, 401-02. This practice was admittedly discriminatory and caused the disparity in past pay rates between blacks and whites. *See id.* Accordingly, the Court held that it was not

appropriate to include past pay as an explanatory variable in the regression model used to study current pay.

In contrast, in *Morgan v. UPS*, 380 F.3d 459, 466, 470 (8th Cir. 2004), the court rejected plaintiff's argument that past pay was a tainted variable that should not have been included in the regression model, because the plaintiffs were unable to link past pay to any discrimination. The plaintiffs argued that the pay disparity in existence during the class period itself demonstrated discrimination in past pay. *Id.* The court held that this argument was circular and insufficient to justify the removal of an otherwise explanatory variable from the regression where there was no evidence of past pay discrimination. *Id.* See also *Smith v. Xerox Corp.*, 196 F.3d 358, 371 n.11 (2d Cir. 1999) ("Absent evidence tending to show that the CAF scores were tainted they should have been included in a multiple regression analysis in an effort to eliminate a relatively poor performer compared to coworkers as a cause of each plaintiff's termination."); *Ottaviani v. State Univ. of New York*, 875 F.2d 365, 372-73 (2d Cir. 1989) (noting that plaintiffs were required to show that academic rank was a "tainted" variable at trial by demonstrating that discrimination affected rank). The OFCCP has explicitly endorsed the approach of these cases for evaluating whether an explanatory variable should be removed from a regression model. See 69 Fed. Reg. No. 220, at 67250 (explaining that the OFCCP "will not automatically presume that a factor is tainted" but will evaluate "proof of discrimination with respect to that factor") (*citing with approval Morgan, supra, Xerox, supra, and Ottaviani, supra.*)

b. Number of Variables

In many cases, employers argue that plaintiffs have used regression analyses that do not account for enough variables that affect compensation. Depending on the reasonableness of the plaintiffs' analysis, courts may not allow an employer to succeed on a motion for summary judgment or opposition to class certification by simply attacking the plaintiffs' statistical model in this way. As the Eighth Circuit explained in *Morgan*, 380 F.3d at 468-69:

Evaluating the propriety of explanatory variables is a somewhat comparative exercise. When a defendant attacks a plaintiff's regression, he must typically do more than point out the flaws in his opponent's analysis. Instead, the defendant must show that the omission had an impact on the result.

Id.

Thus, for example, in *Dukes*, the plaintiffs' expert considered a number of factors in his regression analysis: position, tenure, number of weeks worked during the year, whether the employee was hired or terminated during the year, full-time/part-time status, which store the employee worked in, whether the employee was ever hired into a management position, and performance. 222 F.R.D. at 159. The defendant argued that the plaintiffs' expert's analysis should nonetheless be rejected, and class certification therefore denied, because the expert failed to consider 11 additional variables that could impact compensation: hours worked, seniority, leave of absence, full-time/part-time status at hire, recent promotion or demotion, prior grocery

experience, pay group, night shift, department, store size, and store profitability. *Id.* The district court rejected the defendant's argument because the defendant failed to prove that including those additional factors would have eliminated any pay disparity, holding:

[T]he law does not require the near-impossible standard of eliminating all possible nondiscriminatory factors. Rather, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. Given that [plaintiffs' expert] clearly considered a broad array of significant factors, whether he omitted some other, relevant factors – and if so, whether that failure is of sufficient magnitude to discredit his analysis – are questions that should await resolution at trial.

Id. at 160 (citations omitted). Thus, missing variables must be likely to affect the results to be considered significant.

There are instances, however, in which the relevance of a factor to the selection process is "so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by plaintiffs' statistics." *Morgan*, 380 F.3d at 468-69 (citing *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987)). Other courts have similarly rejected plaintiffs' regression models where key variables affecting compensation are omitted without requiring the defendants to show the impact of the omitted variables. *Munoz*, 200 F.3d at 301 (statistical expert's report found unreliable for summary judgment purposes in part because the analysis failed to account for other variables such as education and experience); *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988) (holding that failure to control for certain explanatory variables makes an expert's analysis "essentially worthless"); *Penk*, 816 F.2d at 465 (plaintiffs' multiple regression analyses failed to account for factors so central to the academic employment decisions at issue – the subjective variables of teaching quality, community and institutional service commitment, and research and scholarship quality – that defendants could defeat any inference of discrimination simply by pointing out such omissions); *Webb v. Merck & Co.*, 206 F.R.D. 399, 408 n.2 (E.D. Pa. 2002) (holding that because plaintiffs' expert's "statistics do not account for non-discriminatory variables such as the effect of collective bargaining agreements and position grades in her analysis, her statistics are not instructive or determinative").

Also relevant to this issue is whether the allegedly excluded factors were available to the plaintiffs when they conducted their analysis. Courts are particularly loathe to allow an employer to profit from its own failure to provide or maintain the complete employee data needed for a robust analysis. *See, e.g., Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188-89 (9th Cir. 2002) ("If the defendant believed information about the employees' educational background, for example, would have explained the differences in promotions and compensation between male and female upper level employees, [it] should have provided information about education level to the plaintiffs . . .").

For example, in *Morgan*, where the plaintiffs alleged that UPS had engaged in a pattern and practice of pay discrimination against certain minority managers, the plaintiffs'

experts did not include prior salary as a variable in their regression analyses, although at least one expert admitted that including prior salary would eliminate any statistical disparities. In addition, the plaintiffs' experts included only two years' worth of performance data, although at least five years of data was available. The Eighth Circuit held that these omissions rendered the plaintiffs' analysis insufficient to create an issue of fact on their discrimination claims. *Morgan*, 380 F.3d at 472. Compare *Boykin v. Ga.-Pac. Corp.*, 706 F.2d 1384, 1391-92, 1394 (5th Cir. 1983) (holding that defendant could not rest on criticisms of plaintiff's promotion regression when plaintiff considered all information on available application forms).

c. Use of "Proxies" for Missing Variables

Where possible, reasonable proxies can be used to attempt to account for missing variables. For example, although an employer may not have access to electronic information documenting employees' performance in past positions within the company, it may be able to substitute employees' "time in position" and "rank" for this factor, reasoning that successful employees will retain their jobs longer and be in higher ranks than unsuccessful ones. Where multiple proxies are used to demonstrate one variable, they must be shown not to be multicollinear with those variables already included or with each other, and also not tainted by discrimination themselves. *Sobel*, 839 F.2d at 35. It is imperative, moreover, that any such proxies be created only after determining their viability with input from the business leaders and human resources personnel. For instance, it may be that "time in position" is actually a negative factor in compensation because it reflects slow career advancement in lower-level positions where rapid advancement of successful employees is the norm.

C. Analyzing Promotion Data

There are three types of analyses that are typically used in cases involving allegations of discrimination with respect to promotions.

1. Applicant Flow/Feeder Pool Analysis

The most widely accepted analysis in a discriminatory promotions case involves a "comparison . . . between the racial composition of [the at-issue jobs] and the racial composition of the qualified population in the relevant labor market." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 308) (alteration in original). In other words, the appropriate comparison is between the "feeder pool" of individuals who would expect to be promoted into a particular position under a neutral selection process and the number of protected individuals who actually were selected. Given that a particular job usually may have more than one feeder pool, the analysis is often termed a "multiple pools" analysis. *E.g.*, *Cooper v. S. Co.*, 205 F.R.D. 596, 612 (N.D. Ga. 2001), *aff'd*, 390 F.3d 695 (11th Cir. 2004).

There are certain judgment calls that inevitably must be made that can affect the constituency of the pool. For instance, a historical look-back time period will need to be determined. If the feeder pool is constructed using the jobs from which employees were

historically promoted in the past five years, there is a danger of excluding other jobs from which there simply were no promotions in that time period. If there are women or minorities in the excluded jobs, then the feeder pool may not be truly representative.

Once the feeder pool or pools are determined (which, as discussed below, can be a difficult and contentious undertaking), a standard deviation analysis can be performed to measure whether protected group members are being promoted consistent with their population in the feeder pools. *E.g., Dukes*, 222 F.R.D. at 164 (finding that plaintiffs' expert's conclusion that there was a statistically significant disparity using the feeder pool approach was sufficient to create an inference of discrimination for purposes of class certification).

a. Availability of Applicant Flow Data

Determining the appropriate feeder pool(s) can be difficult. If there is complete data that identifies the *actual* pool of applicants for a particular position, courts have recognized the actual pool as the appropriate feeder pool for analysis. *Dukes*, 222 F.R.D. at 162 (*citing Paige v. California*, 291 F.3d 1141, 1147 (9th Cir. 2002)); *see also Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) ("In the context of promotions, the appropriate comparison is between the composition of candidates seeking promotion and the composition of those actually promoted."). Actual applicant flow data exists, however, "only if there is not 'a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate.'" *Paige*, 291 F.3d at 1145 (*quoting Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983)). Thus:

Where . . . openings are not posted, or where the system is poorly documented or biased, it is impossible to determine with certainty how many employees would have applied for openings. . . .

Dukes, 222 F.R.D. at 162. As a result, courts have rejected the use of actual applicant flow data where the selection device itself is under attack or the data is incomplete or otherwise unreliable. *E.g., id.* (finding actual applicant flow data insufficient where job applicant data was incomplete and there was evidence that not all job openings were posted); *Lucky Stores*, 803 F. Supp. at 334 (finding actual applicant flow data insufficient where employer "did not consistently follow the bid list policy, promoted employees who were not on the list, and failed to keep records of many bid lists").

In the more common circumstance, where actual applicant flow data is inadequate or unavailable, plaintiffs typically will argue, as they did in *Dukes*, that the next best source for the appropriate feeder pool is "the incumbents in historical feeder jobs for each promotion." 222 F.R.D. at 162. In other words, feeder pools can be constructed based on the jobs from which employees *historically* were promoted into the jobs at issue. *Id.* Thus, in *Dukes*, where the jobs at issue were certain managerial positions, the plaintiffs' expert identified those feeder jobs from which employees had historically been promoted to those managerial positions, and estimated the applicant flow by counting the employees in those feeder jobs. *Id.* Using this methodology, the expert concluded that there was a statistically significant gender-based disparity in

promotions in 22 of 40 regions. *Id.* at 161 n.33. The *Dukes* court accepted plaintiffs' expert feeder pool methodology, observing:

[I]t is well recognized that where actual applicant flow data is inadequate or unavailable, other measures of applicant flow – including but not limited to 'feeder pools' – are deemed acceptable so long as they are used in a reliable manner.

Id. at 162-63. Accordingly, the court held that plaintiffs' expert's methodology was sufficient to create an inference of discrimination for purposes of class certification. *Id.* at 164. *See also Morgan*, 380 F.3d at 464-65 (observing that the "probative inquiry" involves a comparison with the "population from which division managers are chosen"); *Hemmings*, 285 F.3d at 1186 (observing that the appropriate "comparison pool" for promotions to upper and middle management is comprised of employees in lower management); *Lucky Stores*, 803 F. Supp. at 334 ("[I]t is appropriate for the court to consider the overall rate of movement of women to full-time positions and the disparity in movement of women to full-time when compared with their representation in the relevant 'feeder pool.'").

b. "Qualified" Applicants

Another significant issue is whether the feeder pool should include only those individuals who were *qualified* for the job at issue. In *Morgan*, for example, although the plaintiffs offered evidence that there were no blacks promoted to division manager from 1989 to 1998, they failed to take into account whether there were any qualified black employees available for promotion during that time period. 380 F.3d 459. The employer's expert, by contrast, used a feeder pool of qualified black employees, and found that the number of districts in which no blacks were promoted was actually lower than would be expected. *Id.* *See also Wards Cove*, 490 U.S. at 651 (holding that the lower court's hiring comparison was flawed because applicable work force "in no way reflected 'the pool of *qualified* job applicants' or the '*qualified* population in the labor force' . . . If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not [the employer's] fault), [its] selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites.").

Plaintiffs may argue, however, that identification of the pool of "qualified" applicants is inappropriate where job qualification standards are themselves discriminatory. For instance, in *Hemmings*, the plaintiffs argued that the feeder pool should consist of all lower and middle management employees; the employer argued, by contrast, that the feeder pool should be limited to those who were qualified to be promoted. 285 F.3d at 1186. The court agreed with the plaintiffs and held that the employer's entire lower and middle management population was the appropriate data set because there was evidence that the qualification requirements were themselves discriminatory. *Id.* at 1187 n.17 (citing *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563-64 (8th Cir. 1992), and *Forehand v. Florida State Hosp.*, 89 F.3d 1562, 1574 (11th Cir. 1996)). The court based its decision in part on the fact that the employer had failed to post vacancies and had used subjective promotion practices. *Id.* In addition, there was evidence that

women were directed away from night crew positions when night crew experience was an informal requirement for promotion. *Id.*

c. Employee “Interest Level”

An employee’s preference for or interest in a particular job or promotion is another factor that may be considered when defining the proper feeder pool. In *Stender*, for instance, the employer’s expert incorporated a “preference adjustment factor” into her statistical analysis to reflect an entry-level employee’s willingness to perform night work, which was required for the managerial position to which the employee could be promoted. 803 F. Supp. at 277, 311-13. The employer’s expert examined the relative levels of men and women who expressed an interest in night work in applying for the entry-level position to calculate the relative interest levels. *Id.* at 311-31. She concluded that women generally were more averse to night work than men, and that men’s greater availability for night work explained why more men were promoted to manager. *Id.* The court rejected this analysis, reasoning that the initial placement database was unreliable and there was evidence that the interest level of applicants was not considered in deciding promotions. *Id.* at 333.

See also Morgan Stanley, 324 F. Supp. at 464-65 (excluding testimony of employer’s expert regarding gender roles and occupational choices and observing that although the testimony was irrelevant to claims of disparity in pay and promotion, it might be admissible in a discriminatory hiring case); *Dukes*, 222 F.R.D. at 163 n.37 (noting that employer’s expert had attempted to use an employee preference factor); *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 302 (7th Cir. 1991) (rejecting statistical analysis that did not consider applicant interest based upon commuting time); *Sears*, 628 F. Supp. at 1324 (finding that Sears had proffered credible evidence that men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women in higher paying jobs).

d. Effects of Past-Discrimination

Another common issue in construction of the proper feeder pool is employees’ argument that women and minorities are under-represented in the feeder pool as a result of discrimination at the lower levels.

As the plaintiffs argued in *Dukes*: “Obviously, as women have been under-promoted to the first-level positions, their representation in the feeder pools for store manager is commensurately diminished.” 222 F.R.D. at 161 n.33. For purposes of class certification, the *Dukes* court was persuaded by this argument. *Id.*

See also Lucky Stores, 803 F. Supp. at 333 (“[T]he court finds that the lack of statistically significant disparities in promotions of women to [upper level jobs] is caused by women being blocked from upper management positions at the lower rungs of the promotional ladder.”); *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 274 (E.D. Tex. 1999) (“Discrimination in hiring and advancement, even at the lower levels of the hierarchy, has a rippling effect

upwards through that hierarchy.”) (citations omitted). *Cf. Morgan*, 380 F.3d at 471 (discussing similar concept involving allegations of past pay discrimination in the compensation context).

2. “From” Or Cohort-Type Analyses

For the reasons discussed above, there may be situations in which it is not possible to identify an accurate or defensible feeder pool. Moreover, the feeder pool may be too small to yield statistically valid results. *See Teamsters*, 431 U.S. at 340 n.20 (observing that “small sample size” may detract from the value of statistical evidence); *Cooper*, 205 F.R.D. at 614 (observing that employer’s expert, who used a multiple pools analysis, may have “‘carved up’ the employees into pools so small that it would be unlikely that the results would be statistically significant”).

Under these circumstances, it may be necessary to compare similarly-situated female and male (or minority and non-minority) employees to assess whether they are equally likely to be promoted “from” their jobs. Specifically, by comparing similarly situated employees from a certain point in time (controlling for variables which affect promotions, such as experience, education and job experience), it is possible to ascertain whether female and male (or minority and non-minority) employees are being promoted at the same rate. *Id.*; *see also Cooper*, 205 F.R.D. at 614 (criticizing both parties for failing to offer “evidence concerning what percentages of promotions occur through developmental moves”); *cf. Morgan*, 380 F.3d at 465 (discussing similar type of cohort analysis performed by the parties’ experts and concluding that employer’s expert had properly concluded that “it actually takes whites longer than blacks to get promoted from center manager to division manager”).

3. EEO/Benchmarking Analysis

Another statistical approach, taken by the plaintiffs in *Dukes v. Wal-Mart*, is to “benchmark” an employer’s workforce against that of similar employers through the use of EEO-1 data. Plaintiffs’ expert in *Dukes* compared Wal-Mart against twenty other large general merchandise retailers by comparing workforce data provided to the EEOC by these companies. 222 F.R.D. at 164. The purpose of this “benchmarking” was to assess the issue of labor supply, i.e., the availability of female employees who were qualified and interested in management positions. As plaintiffs’ expert explained: “The logic in benchmarking is that, if retail chains comparable to Wal-Mart are successfully employing women at some rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate.” *Id.* When analyzing this benchmarking data, plaintiffs’ expert found that there was a shortfall in female managers in 79.5% of Wal-Mart stores. *Id.* He further concluded that “while the in-store managerial workforce at the comparison stores was 56.5% female, it was only 34.5% female at Wal-Mart.” *Id.* at 165. The court concluded that plaintiffs’ expert’s analysis “further supported Plaintiffs’ showing of commonality by providing additional evidence . . . to raise an inference of class-wide discrimination.” *Id.*

The plaintiffs’ approach against Wal-Mart is consistent with EEOC guidelines for selecting which companies to target for enforcement activity. EEOC Compliance Manual

Section 16.2, entitled “Standards for Selecting Systemic Respondents,” includes, *inter alia*, the following category of employers against whom it may file a charge:

Employers or other persons subject to Title VII who employ a substantially smaller proportion of minorities and/or women *than other employers in the same labor market who employ persons with the same general level of skills.*

EEOC Compliance Manual, § 16.2(b) (BNA Books, Oct. 1987) (emphasis added). *See also EEOC v. Shell Oil Co.*, 466 U.S. 54, 71 n.25 (1984) (explaining that the EEOC targets employers that have statistical “disparities between the numbers of women and minorities employed in given positions by a given employer and the numbers available in the pertinent labor pool *or the number employed by comparable, nearby employers.*”) (emphasis added.).

In addition, attorney Brad Seligman, (discussed above in connection with his work with Dr. Bielby in the *Lucky Stores* case), and lead counsel in the gender class action cases against Wal-Mart and Costco, indicated in a recent ABA CLE telecast that his group would continue to rely on EEO-1 benchmarking statistics to target companies for possible class action litigation.

D. The Two Standard Deviation Threshold

When analyzing statistics, courts evaluate whether there is a statistically significant difference in compensation or promotion rates between the protected employee group that is alleging discrimination in the suit and the comparator group. The magnitude of the difference between the compensation levels or promotion rates can be calculated and quantified, in terms of the standard deviation. *See Hazelwood Sch. Dist. v. United States.*, 433 U.S. 299, 309 n.14 (1977). The larger the magnitude of the standard deviation, the less likely it is that the difference between the compensation or promotion rates was caused by chance.

Courts generally consider a statistical disparity of two or three standard deviations to be large enough to support an inference of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) (“As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations,” then an inference of discrimination is raised). *See, e.g., Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003) (holding that district court, on remand, should consider whether employee could show a statistical disparity of two standard deviations for purposes of determining whether he could establish prima facie case); *Thomas v. Deloitte Consulting LP*, No. Civ. A. 3-02-CV-0343, 2004 WL 1960097, at *5 (N.D. Tex. Sept. 2, 2004) (acknowledging that “statisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations”) (citation omitted); *Richardson v. Sugg*, 325 F. Supp. 2d 919, 935 (E.D. Ark. 2004) (“Statistical studies resulting in two or more standard deviations are required to allow inferences of discrimination to be drawn from numerical workforce data.”).

Despite the *inference* a court may draw from the existence of two or more standard deviations, however, courts have observed that there is no bright-line rule that a particular statistical threshold mandates a *finding* of discrimination. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (noting that it has never ruled “that any particular number of standard deviations can *determine* whether a plaintiff has made out a prima facie case in the complex area of employment discrimination”) (emphasis added); *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1277 n.14 (11th Cir. 2000) (“[N]o particular numerical deviation is required to establish a prima facie case; instead courts employ a case-by-case approach dependent on the particularized case facts.”). Compare also *Ottaviani v. State Univ. of N.Y.*, 875 F.2d 365, 372-73 (2d Cir. 1989) (stating that a “finding of two to three standard deviations can be highly probative of discriminatory treatment”) with *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (“There is no minimum statistical threshold requiring a mandatory finding that a plaintiff has demonstrated a violation of Title VII. Courts should take a ‘case-by-case’ approach in judging the significance or substantiality of disparities, one that considers not only statistics but also all the surrounding facts and circumstances.”)

Most courts will find that a disparity of two or more standard deviations is probative of discrimination, but will then consider rebuttal statistics proffered by the employer or other evidence that attacks the validity or reliability of the plaintiffs’ statistics before determining that there is a sufficient showing of discrimination. In *Ottaviani*, for example, the Second Circuit affirmed the district court’s determination that the plaintiffs’ statistical evidence of sex discrimination was “persuasive, but not dispositive.” 875 F.2d at 373. Despite the fact that the statistics reached the two standard deviation threshold, the court affirmed the district court’s finding of no discrimination. Specifically, the court noted that “the defendants were able to successfully undermine the plaintiffs’ case by attacking the validity of the plaintiffs’ statistical evidence, and by introducing statistical evidence of their own to negate the inference of discrimination that had been raised.” *Id.* See also *Warren v. Xerox Corp.*, No. 01-CV-2909, 2004 WL 1562884 (E.D.N.Y. Jan. 26, 2004) (holding that plaintiffs’ statistical evidence failed to raise an inference of discrimination where defendant argued that, *inter alia*, plaintiffs’ evidence failed to control for significant variables and failed to account for non-discriminatory causes for the disparity).

At least one circuit court has rejected the two standard deviation threshold entirely. In *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362-63 (7th Cir. 2001), an age discrimination reduction-in-force (“RIF”) case where the court granted summary judgment in favor of the employer (despite the fact that all of the RIF’d employees were over age 40), Judge Posner stated that it is “arbitrary” to have a rule that statistical evidence is not admissible to show discrimination unless it reaches the two standard deviation threshold. *Id.* at 362. The court explained:

A lower significance level may show that the correlation is spurious, but may also be a result of “noise” in the data or collinearity (correlation between independent variables, such as sex and weight); and such evidence, when corroborated by other evidence, need not be deemed worthless. Conversely, a high significance level may be a misleading artifact of the study’s design; and

there is always the risk that the party's statistical witness ran 20 regressions, one and only one of which supported the party's position and that was the only one presented, though, in the circumstances, it was a chance result with no actual evidentiary significance.

Id. The court concluded that “[i]t is for the judge to say, on the basis of the evidence of a trained statistician, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury.” *Id.* at 363. The court reasoned that because only 5 of the 32 employees in the plaintiffs’ department were *under* the age of 40, there was a 59% chance that all three terminated employees would be over 40 years old. *Id.* Therefore, summary judgment for the employer was appropriate. *Id.* at 361. Although the *Kadas* decision could have brought a radical change to how courts evaluate employer statistics, it does not appear to have been adopted by any other circuit courts.

V. EVOLVING OFCCP APPROACHES TO COMPENSATION ANALYSIS

A. Dubray Method

For a number of years, the OFCCP used the Dubray Method (named after Joseph Dubray, the former Regional Director for the mid-Atlantic region of the OFCCP) to analyze compensation when conducting compliance reviews of government contractors. This method compared the median salaries of men and women, or whites and minorities, within a particular salary grade. The OFCCP considered a difference in median salaries of \$1,000 or more to reflect potential discrimination. *See OFCCP Workshop, Understanding OFCCP’s Approach to Statistical Analysis.* If such a difference existed, the OFCCP would compare median performance, level of education and/or experience (and possibly other factors) in the salary grade at issue to see if differences in education or performance could explain the differences in the median salary. *See Systematic Compensation Analysis, An Investigatory Approach*, at 7-8.

The Dubray Method had numerous flaws that made it subject to substantial criticism. It compared employees in the same salary grade without regard to the type of work performed; it did not test whether any salary differences were statistically significant or the product of chance; and it ignored numerous legitimate factors that impact compensation. *See Update on System Compensation Analysis*, at 2. Due in large part to these criticisms, along with new, enhanced capabilities at the OFCCP, the agency has explicitly rejected any further use of this method. (See discussion of proposed new guidelines, *infra.*)

B. OFCCP’s Human Capital Theory Approach In The *Wyeth* Case

The OFCCP’s first use of a more robust compensation analysis occurred in its July 2003 litigation against Wyeth and Wyeth Pharmaceuticals involving alleged gender-based discrimination. The OFCCP alleged pay discrimination in all exempt salary grades from 1997 to the present, even though it had no evidence of discrimination for 1998 to 2003, and even though it had found no discrimination in certain salary grades as a result of its 1997 compliance review. (The 1997 review had used the Dubray Method.) In the 2003 action, the OFCCP used a

regression analysis based on the “human capital” theory. The agency relied on the analysis and testimony of Dr. Henry S. Farber, a professor of economics at Princeton University, and argued that employees with similar measures of education and experience in the same field of work should earn the same salary, regardless of the specific jobs they held or the level of responsibility the positions required (e.g., whether manager or subordinate, or senior or junior engineer). When there was a pay difference between men employed in higher level jobs and women in lower level jobs, the OFCCP argued that the difference was attributable to pay discrimination based on sex.

Wyeth argued that the OFCCP’s human capital theory failed to consider that pay differences might be attributable to a variety of employment decisions within the control of Wyeth, prior employers, and the employees themselves. There were many other variables – such as job performance, specific job duties and an employee’s level of responsibility – that could legitimately result in employees with the same measures of education and experience being employed in different job levels in 1997. Wyeth pointed out, for example, that the OFCCP’s analyses did not consider ability or actual performance whatsoever, even though job performance affects compensation. In addition, the OFCCP’s analyses failed to consider salary grade, even though all of the OFCCP’s prior analyses, including the ones conducted as part of its 1997 Dubray compliance review, had specifically relied on salary grade as a critical factor. Moreover, by failing to include a job level variable, the problem with the OFCCP’s regression models was that they would “invariably find discrimination against women by means of a statistically significant sex coefficient that shows women receiving lower pay than men after controlling for the effects of the other variables in the regression – usually years of schooling and experience, and variants thereof.” Walter Fogel, *Class Pay Discrimination and Multiple Regression Proofs*, 65 NEB. L. REV. 289, 308 (1986). This predictable result was caused, in part, by the fact that the OFCCP’s statistical model compared “salaries paid to employees for performing unequal jobs.” *Id.*

C. OFCCP and Wyeth Settlement

Wyeth and the OFCCP ultimately entered into a settlement agreement, in which the OFCCP agreed to an analysis of Wyeth’s compensation using yet another approach. Although the agreement^{1/} expressly provided that it was not to be relied upon, it provides a good example of a statistical approach that is consistent with the OFCCP’s recently proposed guidelines for a new method of compensation analysis (discussed in detail below). Specifically, the OFCCP agreed to the following analysis of Wyeth’s compensation:

- The analysis would be done separately, i.e., separate regressions, for each of Wyeth’s job families.^{2/}

1/ A copy of the complete settlement agreement in *OFCCP v. Wyeth* is available at: <http://www.oalj.dol.gov/publi/ofccp/refrnc/ofclist.htm> (as of September 11, 2004).

2/ Wyeth’s job families were designed to distinguish between different fields of work. Examples include: Human Resources, Financial/Accounting, and Engineering, Facilities, and Technical Services.

- Factors in the regression would include (1) highest degree attained, (2) age at hire (as a proxy for prior experience), (3) performance, (4) job sub-family, as defined by Wyeth, (5) salary grade, as a proxy for level of responsibility, (6) tenure, and (7) time in grade.
- The time in grade and tenure variables would be considered together with grade to account for the different impact that time and grade or tenure may have on an employee's compensation depending on the employee's salary grade.
- If a salary disparity in a particular job family exceeded 1.96 standard deviations, it would be deemed statistically significant.
- If a statistically significant disparity was found in a particular job family, Wyeth could choose to run a more accurate regression model using actual data for education and prior experience. Specifically, Wyeth could include in the regression measures of (1) actual prior experience, (2) the relevance of that experience, and (3) the relevance of the employee's field of education to her job.
- If a statistically significant (1.96 standard deviations) disparity was not eliminated by including these additional factors, Wyeth would be required to adjust female salaries in the job family sufficiently to eliminate the disparity. Prospective adjustments would be made a part of the company's regular compensation review process. At least eighty percent of the women in the job family would get at least the statistical difference. The remaining twenty percent could receive no increase, or a lesser increase, based on "legitimate business reasons." Retroactive adjustments would then be some percentage of the prospective adjustment, with the percentage dependent on the statistical significance of the disparity found.

D. Proposed New Guidelines

Last fall, the OFCCP published proposed new guidelines concerning the evaluation of potential systemic compensation discrimination. *See* 69 Fed. Reg. No. 220, at 67246-67252 & 67252-67255 (Nov. 16, 2004). These proposed guidelines are largely consistent with the agency's approach in the Wyeth settlement and set forth (1) a suggested protocol for federal contractor self-audit and (2) the methodology the OFCCP will use to study and evaluate employer pay statistics during its compliance reviews.

1. Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination

The proposed new guidelines for the review of contractor compensation systems represents a radical change for the OFCCP. The OFCCP will now use a multiple regression analysis approach like the one relied upon by courts (described in detail above). In addition, the proposed guidelines provide contractors with the opportunity to establish their own framework for compensation reviews by identifying groupings of similarly situated positions for purposes of analysis and the factors that influence compensation decisions in those groupings. The proposed

guidelines indicate that the OFCCP will issue a Notice of Violations alleging systemic discrimination only where there exist statistically significant disparities at two or more standard deviations *and* there is anecdotal evidence of pay discrimination. *See id.*, at 67251.

This indication is consistent with judicial precedent that generally requires plaintiffs to show a statistical disparity of at least 2 standard deviations for the statistics to create an inference of discrimination (see detailed discussion above) and cases that rely in part on plaintiffs' presentation of anecdotal evidence of discrimination to support their claim of systemic discriminations. *See, e.g., Dukes*, 222 F.R.D. 165-66 (discussed in detail above); *see also Teamsters*, 431 U.S. at 338-39 (noting that the government had bolstered its statistical evidence with the testimony of individuals as to specific incidents of discrimination); *Morgan*, 380 F.3d at 471 (explaining that one of the most important flaws in plaintiffs' case was their failure to adduce an individual testimony as to incidents of discrimination).

2. Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination

a. Self-Audit

Under the self-audit process – where the employer examines its compensation system with the expectation of providing the methodology and results to the OFCCP – the employer must meet five conditions to obtain OFCCP deference to its analysis. If a contractor's compensation self-evaluation reasonably meets these five conditions, the OFCCP will consider the practices to be in compliance with the Executive Order. If the first time that the OFCCP audits a contractor using the new methodology, the OFCCP finds the contractor's analysis to be only marginally reasonable, the OFCCP may suggest prospective modifications to the analysis. Thereafter, the OFCCP will assess whether the contractor made the suggested changes. If the contractor has not made such changes, the contractor's evaluation system no longer will be deemed to comply with the Executive Order. The five conditions are as follows:

1. The employer must group employees into SSEGs, as discussed above. Employers have some latitude to group employees based on whether the employees are performing similar work, have similar responsibility levels, and occupy positions involving similar skills and qualifications.
2. Each SSEG should contain at least 30 employees overall, and five or more incumbents who are members of either of the following pairs: male/female or minority/non-minority. Where small numbers of employees are not similarly situated so as to facilitate grouping into any SSEG, the employer may eliminate them from the statistical evaluation process, but must conduct a self-evaluation of pay decisions relating to those eliminated employees using non-statistical methods. If the employer's overall statistical analysis does not include at least 80% of the employees in the affirmative action program or facility (the unit that

would normally be subject to a compliance review), the OFCCP will scrutinize carefully the statistical analysis and non-statistical evaluations.

3. The employer must perform annually some type of statistical analysis that evaluates the SSEGs and accounts for factors that legitimately influence compensation, such as experience, education, performance, productivity, location, and so forth. If the employer has 250 or more employees, the statistical analysis *must* be a multiple regression analysis.
4. The employer must investigate any statistically significant disparities (i.e., those of two or more standard deviations). If the statistical disparities cannot be explained by legitimate factors, the employer must provide appropriate adjustments. The OFCCP does not provide employers guidance on what would be appropriate adjustments, other than to note that the contractor may have to make adjustments based on current and prior disparities. (Thus, it is not clear whether the OFCCP would permit employers to adjust compensation to bring the regression analysis to under two standard deviations, or whether the adjustment would have to be greater than that.)
5. The employer contemporaneously must create and retain for two years: (a) explanations/justifications as to the grouping of employees in SSEGs, the basis for excluding any employees from the analyses and the factors used in the analyses; (b) the data used in the analyses and the results of the analyses; (c) the data and any documents explaining the results of the non-statistical methods that the contractor used to examine the compensation of employees who were not included in the overall statistical analyses; and (d) documentation on any follow-up investigation into disparities and the conclusions of such investigation, including any pay adjustments.

In addition, all of these documents and data must be made available to the OFCCP in a compliance review. The OFCCP also will be permitted to review any personnel records and conduct any employee interviews necessary to determine the accuracy of any employer representations. The OFCCP will direct technical questions about whether a contractor's self-evaluation system meets these standards to its Director of Statistical Analysis in the National Office, Dr. Michael Sinclair, or his designee.

b. Privileged Self-Analysis

The OFCCP has also recognized in its proposed guidelines that some contractors may choose to examine their compensation systems and protect the results of such analyses under the attorney-client privilege. In such circumstances, the contractor will be permitted to certify its compliance with 41 C.F.R. Section 60-2.17(b)(3) in lieu of having to produce the actual methodology and results. The certification must be in writing and signed by a duly authorized officer under penalty of perjury. It must state that the employer has performed the self-audit at the direction of counsel, and that counsel has advised the employer that the analyses and results are subject to the attorney-client privilege or work product doctrine. The OFCCP will then evaluate the compensation system without regard to the employer's own analyses or results.

3. Implementation of the New Compensation Analysis Process

Contractors who have performed a self-evaluation pursuant to the OFCCP's new guidelines, on a non-privileged basis, can submit the self-evaluation documentation in lieu of responding to Item #11 of the desk audit letter. If the contractor has not performed a self-evaluation pursuant to the OFCCP's new guidelines, or if the contractor claims that the self-evaluation is covered by the attorney-client privilege, the OFCCP will evaluate the contractor's compensation system using a three step process. *See OFCCP's Suggested Practices on Compensation Analysis*, Jan. 12, 2005 (presentation by Michael Sinclair, Ph.D.).

Step One will be the standard existing desk audit process with the existing request for compensation information. If this audit shows an indicator of discrimination (i.e. a disparity between protected and non-protected employee groups), the agency will request additional data and move to the next step of the process. If the audit does not show an indicator, it will close the case. *See id.*, at 19.

In Step Two, the agency will request the following 12 data points for each employee in the group that it is studying:

1. Employee ID number (or suitable ID for matching purposes)
2. Gender [Normal]
3. Race/Ethnicity (White, Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native)
4. Time with company or Date of hire
5. Time in current position or date of last change in grade/title (i.e. experience)
6. Date of last degree earned; or if not available, date of birth (this information will be used as a substitute for prior experience outside the company)
7. Current annual salary or hourly wage
8. Part-time vs. full-time status (including typical hours per week)
9. Exempt vs. non-exempt status
10. Job title
11. Grade level or salary band classification
12. Employee location (if not housed at the facility) (now and at hire)

Id., at 10-11, 57. The agency has explained that with respect to the experience variable, relevant factors may include not only time in current job, but also time in other related jobs/career path jobs at company, time in non-related jobs at company, time in other related jobs outside the company, time in non-related jobs outside the company, and any leaves of absence. *Id.*, at 58-59. In addition, when considering time within the company, the agency must consider the time that the company has been under current ownership with the current structure. *Id.* Next, the agency will run a mini-regression analysis, or “cluster analysis,” that will cluster the employees based these various factors. *Id.*, at 12. If, based on this mini-regression, there appear to be statistical disparities, the agency will move to Step Three.

Step Three consists of running a full regression analysis, as outlined in detail in the proposed guidelines, *see* 69 Fed. Reg. No. 220, at 67246 *et seq.*, and as set forth in detail above with respect to existing judicial precedent in this area. In connection with this process, the agency will request documentation on compensation systems and job duties for each title/position. *OFCCP’s Suggested Practices on Compensation Analysis*, at 13. It will also conduct interviews with management and HR officials on the company’s system, compensation factors, organization tree/advancement plan, and specific facility situations. *Id.*

The agency will then determine the workforce to be studied in each regression analysis by grouping employees into similarly situated employee groups (“SSEGs”), based “on the similarity of the work performed, the levels of responsibility, and the skills and qualifications involved in the positions.” 69 Fed. Reg. No. 220, at 67249; *see OFCCP’s Suggested Practices on Compensation Analysis*, at 14. The agency has warned that pre-existing job classification systems may not meet SSEG standards, because (1) grades and bands are too diverse to adhere to the new standards, (2) titles are often too narrowly defined and sample sizes too small to study separately, (3) affirmative action job groups were created for different purposes and have different standards, and (4) job descriptions tend to be too broad in definition. *OFCCP’s Suggested Practices on Compensation Analysis*, at 20. The agency has indicated that to overcome these hurdles, it will use job titles and job descriptions to classify jobs into “functionally similar” groups, sorted within by grade or band, and then conduct targeted face-to-face interviews with a sample of employees from each position in question to clarify and confirm similarities in job functions. *Id.* at 21. The agency will make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis, defined as at least 30 employees with at least five women or minorities in the group. *Id.* The agency has indicated that it will utilize sophisticated statistical techniques and consider sophisticated statistical concepts when conducting the multiple regression analyses, including outliers and influencers, R-squared results, and multi-collinearity. *Id.*, at 63, 68, 70-71.

Overall, it is clear that the agency is finally coming in line with longstanding judicial precedent for how to analyze compensation data, and employers should be able to rely on existing caselaw for guidance on how to structure self-audits properly, using the multiple regression approach outlined in detail above. For federal contractors that adopt the self-audit approach, conducting such audits will serve the dual purposes of (1) satisfying the OFCCP compliance requirements, and (2) helping to minimize the likelihood of class action attacks on

their compensation practices, by identifying, and, if necessary, and with the advice of counsel, correcting any problems in advance of litigation.

VI. ANALYZING EMPLOYER DATA BEFORE LITIGATION

As outlined above, plaintiffs and the government have increasingly challenged employer compensation systems in a variety of legal forums. Many employers have responded to the increased litigation in this area by conducting compensation reviews and risk assessments. This section discusses the practical considerations an employer should explore before undertaking such a review. The paper also proposes a three-step approach to reviewing compensation data, designed to assess the risk of future litigation and, if necessary, assess and perhaps correct any significant statistical disparities.

A. Protecting Internal Analyses Of Compensation From Disclosure

Although the principal purpose of this paper is not to address whether, and how, an internal analysis of compensation might be protected from disclosure by one or more privileges, it is important to consider the potential discoverability of such an analysis. Only by considering these issues at the outset can an employer develop a strategy to maximize the likelihood that an analysis will be protected from disclosure.

There are three privileges which, depending on the circumstances, may apply to preclude discovery of an analysis: the attorney-client privilege, the attorney work product doctrine, and the self-critical analysis privilege.

1. Attorney-Client Privilege

Parties seeking to invoke the attorney-client privilege must satisfy three elements: (1) counsel must be acting as an attorney giving legal advice (as opposed to business or management advice); (2) the communication must be between attorney and client; and (3) the communication must have been made and maintained in confidence.

In the context of compensation analyses, whether the attorney-client privilege applies often turns on the purpose for conducting the analyses. If an analysis is done for business reasons, e.g., to determine if the compensation system is working properly or if pay is being distributed equitably, the analysis may not be privileged, even if an attorney is involved in the process. For example, in Barfoot v. Boeing Co., 184 F.R.D. 642 (N.D. Ala. 1999), the court held that communications regarding a company's investigation of an internal discrimination complaint were not privileged despite in-house counsel's involvement in those communications because the investigation was not done to provide legal advice regarding the complaint.

If, however, a compensation analysis is done to provide legal advice regarding a company's compliance with various EEO laws, or litigation risk, the attorney-client privilege

should apply.³ Thus, in Abdallah v. Coca-Cola Co., No. Civ. A. 1:98-CV-3679RWS, 2000 WL 33249254 (N.D. Ga. Jan. 25, 2000), the court held that the attorney-client privilege protected from disclosure an internal audit of the company's compliance with affirmative action requirements because the audit was prepared at the behest of counsel so that counsel could advise the employer regarding its response to an OFCCP inquiry.

To preserve the privilege, it also is important to document the reasons for conducting the analysis and only use the analysis for the provision of legal advice, because the failure to do so may lead a court to conclude that the information is discoverable. In Beck v. Boeing,⁴ for example, Boeing argued that its own internal statistical analyses of its compensation practices were privileged because they were performed at the direction of counsel to help counsel provide legal advice to the company. The court, however, rejected Boeing's claim. After an *in camera* review of the documents, the court found that the analyses were used for regular business purposes, not just to obtain legal advice, and therefore were not privileged:

[D]ocuments related to [the expert's] analyses lost their privileged status when they were used in the normal course of Boeing's business – for purposes of planning and establishing salaries pursuant to the OFCCP agreement.

The court also found that Boeing employees had improperly tried to shield certain documents from disclosure by including counsel on the distribution list even though the documents were not otherwise privileged. Indeed, some of the documents (which the court was able to read as part of its *in camera* review) apparently contained language suggesting that they were sent to counsel solely to prevent disclosure of the contents. Not surprisingly, the court rejected this tactic, holding:

Boeing is attempting to stretch both the work product doctrine and the concept of attorney-client privilege beyond the boundaries of what they were intended to protect. The Special Master found that Boeing was attempting to shield documents which had not been prepared in anticipation of litigation from discovery by transmitting them to (or passing them through) its attorneys. This is not effective, nor does a document prepared for a business purpose which is later

³ It is well-settled that analyses performed by an expert, such as a statistician, for the purpose of enabling an attorney to provide legal advice to a client are protected by the attorney-client privilege. See, e.g., U.S. v. Kovel, 296 F.2d 918, 920 (2d Cir. 1961) (J. Story) (finding communications to accountant employed by an attorney to interpret defendant's tax information covered by the attorney-client privilege); Cavallaro v. U.S., 284 F.3d 236, 246 (1st Cir. 2002) (holding that the attorney-client privilege extends to "third parties employed to assist a lawyer in rendering legal advice"); Westinghouse Elec. Corp. v. Rep. of Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991) ("When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege. For example, courts have held that the client may allow disclosure to an 'agent' assisting the attorney in giving legal advice to the client without waiving the privilege").

⁴ Case No. C00-301P (W.D.Wash. Oct. 30, 2003).

employed in litigation fall under the protection of the rule.

The legal principles upon which the Boeing court relied were not novel. Nonetheless, the results of that decision – the disclosure of Boeing’s internal analyses of compensation – substantially impaired the company’s ability to defend itself in litigation and in the press. See, e.g., “Coverup At Boeing?,” *BusinessWeek Online*, June 28, 2004. Accordingly, the implications of the Boeing court’s rulings must be considered as part of any decision on whether, and how, to conduct an analysis of compensation.

2. Attorney Work Product

The work product doctrine protects from disclosure confidential information that an attorney has obtained or prepared in anticipation of litigation. The protection covers two kinds of information: “opinion” and “factual” work product. Opinion work product consists of the attorney’s mental impressions, conclusions, opinions, or legal theories. Factual work product is any factual, non-opinion material gathered in preparation for a lawsuit. See, e.g., Baker v. Gen. Motors Corp., 209 F.3d 1051 (8th Cir. 2000) (“There are two kinds of work product--ordinary work product and opinion work product. Ordinary work product includes raw factual information. Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories.”). Opinion work product is, when applicable, afforded almost absolute protection; factual work product, by contrast, may be discoverable under some circumstances:

Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. In contrast, opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud.

Id.

If an attorney is involved in designing and implementing the statistical analysis of compensation, such an analysis will necessarily reflect the attorney’s opinions and mental impressions. Whether an analysis of compensation is protected from disclosure as attorney-work product therefore often will turn on whether the documents were prepared in anticipation of litigation. Most courts require that the information be prepared “because of” the prospect of litigation. See, e.g. U.S. v. Adlman, 134 F.3d 1194 (2d Cir. 1998) (holding that the proper standard was whether the memorandum was prepared “because of” the prospect of litigation, not prepared “principally or exclusively” for litigation, and noting that five other circuits had adopted this formulation). Courts are split, however, on whether documents prepared for dual purposes, i.e., those that are prepared both in anticipation of litigation and for other business purposes, are considered work product. Compare U.S. v. Frederick, 182 F.3d 496 (7th Cir. 1999) (“[A] dual-purpose document . . . is not privileged.”) with In re Woolworth Corp. Sec. Class Action Litig., No. 94 CIV. 2217 (RO), 1996 WL 306576 (S.D.N.Y. June 7, 1996) (company's business purpose for creating material would not preclude application of work product privilege).

Typically, moreover, the litigation must be reasonably anticipated on an objective basis before work product protection is afforded. Thus, a letter from an experienced plaintiffs' attorney making claims of civil rights act violations and warning of the initiation of administrative action with the EEOC was sufficient to invoke the work product protection. See McPeck v. Ashcroft, 202 F.R.D. 332 (D.D.C. 2001). Most courts, however, have held that general concerns that litigation might be instituted, without a specific threat, generally are insufficient to invoke the work product privilege. As one court recently explained:

The inchoate possibility, or even the likely chance of litigation, does not give rise to work product. To justify work product protection, the threat of litigation must be real and imminent.

Heavin v. Owens-Corning Fiberglass, No. 02-2572, 2004 WL 316072 (D. Kan. Feb. 3, 2004). There are exceptions to this rule, however. For example, in Maloney v. Sisters of Charity Hosp., 165 F.R.D. 26 (W.D.N.Y. 1995), the plaintiff sought discovery of computer printouts containing statistical information and analysis pertaining to a proposed reduction in force and a worksheet consisting of the human resource director's notes, all of which were prepared at the direction of counsel in preparation for a meeting regarding the planned RIF. The court held that each of the documents were protected by the work product doctrine because, based on counsel's experience in the area of employment and labor law, it was reasonable for counsel to believe that litigation would likely result from the employees affected by the downsizing.

Ultimately, whether an internal compensation analysis constitutes protected attorney work product will depend on the motivation for conducting the analysis, *i.e.*, whether it was prepared in anticipation of litigation, and the use made of the results.

3. Self-Critical Analysis Privilege

The self-critical analysis privilege is the least accepted of the three privileges. It is designed to protect from disclosure certain internal self-critical analyses that meet five criteria (or some variation thereof):

(1) the information sought must be the result of a critical self-analysis undertaken by the party seeking protection; (2) there must be a strong public interest in preserving the free flow of the type of information sought; (3) the information sought must be of the type whose flow would be curtailed if discovery were permitted; (4) the information sought must have been prepared with the expectation that it would be kept confidential; and (5) the information sought must be subjective analysis designed to have a positive societal effect.

Johnson v. UPS, 206 F.R.D. 686 (M.D. Fla. 2002).

Although some courts recognize the privilege, many do not, particularly in the discrimination context. Even where the privilege is recognized, moreover, it is narrowly applied. The court in Johnson explained:

In the context of employment discrimination, the self-critical analysis privilege was first recognized in Banks v. Lockheed-Ga. Co. [, 53 F.R.D. 283 (N.D. Ga. 1971)] Since the Banks decision, many courts have addressed the self-critical analysis privilege in the context of employment discrimination. ‘A fair number’ of district courts have recognized the privilege in this context, while an equal or greater number have either categorically denied the existence of a ‘self-critical analysis’ privilege or have rejected its application as to particular documents.

206 F.R.D. at 689 (collecting cases).⁵ In particular, some courts have held the privilege inapplicable in discrimination cases for the reasons explained by the Johnson court:

In addition, this Court is concerned that the important issue of public policy purportedly implicated by disclosing information in the context of employment discrimination (e.g., Banks) does not rise to the level of the ‘overwhelming public interest’ clearly implicated by disclosing self-critical analysis in a medical context (e.g., Bredice). Thus, in the employment discrimination context, the rationale for recognizing a judicially created evidentiary privilege is lacking. In fact, many courts and commentators have concluded that the policy objectives underlying employment discrimination laws are more effectively realized through litigation, with unimpeded discovery for plaintiffs, than through a special evidentiary privilege that may or may not actually encourage employers to critically evaluate and improve their employment practices.

Id. at 693.

Because the existence of the privilege is questionable, and the applicability of the privilege is so dependent on the jurisdiction considering the question, employers cannot, at the time an analysis of compensation is being created, expect the analysis to be protected from discovery solely because of the self-critical analysis privilege. Therefore, only by involving counsel in the process – and conducting the analyses of compensation for the purpose of obtaining legal advice and analyzing litigation risks – can an employer offer the best chance of protecting its compensation analysis from disclosure.

⁵ See also Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 385-86 (N.D. Ga. 2001) (finding that self-critical analysis privilege applied to employer’s diversity reports but did not apply to documents containing information mandated by OFCCP), with Freiermuth v. PPG Indus., Inc., 218 F.R.D. 694, 697 (N.D. Ala. 2003) (refusing to recognize self-critical analysis privilege; “The policy arguments espoused in support of recognizing a self-critical analysis in the employment context ring hollow in this post-Enron era where corporate governance is not only expected, but *en vogue*.”); see also Etienne v. Mitre Corp., 146 F.R.D. 145, 148-49 (E.D. Va. 1993) (holding that the self-critical analysis privilege did not apply to salary and promotion reviews performed by an outside consultant).

4. Conclusion

Any analysis of compensation must be undertaken with the understanding that it may be discoverable. Nonetheless, there are steps that can be taken before the analysis is conducted to increase the likelihood of protecting it from discovery based on one of the above privileges. These steps should include (1) defining the purpose of the analysis in advance, in writing (e.g. to obtain legal risk assessment); (2) controlling those involved in collecting data for the analysis, preparing the analysis, and reviewing the results of the analysis (e.g. inside counsel and key executives); (3) identifying the information in question as confidential; and (4) ensuring that the results of the analysis are not used for ordinary business purposes or for purposes other than those identified above. Critically, the failure to follow these principles can, as reflected in the Boeing decision discussed previously, contribute to a perception that a privilege is being invoked merely to hide unfavorable information and cause the loss of the privilege.

Moreover, even after a statistical analysis is complete, employers (like Boeing) often desire to use those results as the basis for making adjustments to a compensation system, or the compensation of particular individuals. Before undertaking this exercise, however, consideration must be given to the fact that these business uses of the information may render a previously privileged analysis discoverable. Working with counsel throughout this process – to make clear that the analyses are being conducted to obtain legal advice and/or assess legal risks – can minimize the chance of losing the privilege.

At the end of the day, it may be in an employer's best interest in litigation to disclose its own analyses of its compensation system to dissuade a government agency (e.g., EEOC or OFCCP) from pursuing a potential lawsuit or to demonstrate in litigation an employer's commitment to non-discrimination. Only by carefully developing and following a strategy to protect the confidentiality of the information from the beginning, however, can an employer maximize its chances of having the control over whether those analyses are disclosed.

B. Developing A Multiple Regression Model

The first step in assessing an employer's compensation practices will be to develop a multiple regression analysis of the compensation system being analyzed. The three-step approach to compensation analysis and risk assessment described below involves conducting regression analyses without and with protected characteristics included in the model. Of course, unlike some of the governmental approaches described above, employers will want a robust analysis that analyzes the key factors that influence compensation and that explains differences among employees rather than using an approach that excludes variables and/or presumes the existence of tainted variables based on alleged past discrimination. The employer will want to develop a model, similar to one that they would create if in litigation, which includes the major variables impacting compensation and tests the appropriate population of employees.

In making determinations regarding the factors relevant to the multiple regression analysis, it is important that employers consider how their compensation system currently works.

Plaintiffs will often point to the employer's own written materials and policies to justify their method of grouping employees in a multiple regression analysis. For example, in Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1186 n. 14 (9th Cir. 2002), the defendant argued that plaintiffs' regression improperly considered store managers and corporate managers together. The court rejected this argument, noting that defendant treated corporate staff and store management in the same group for the purpose of its salary policy and its internal corporate management flow charts included store director and manager positions. See also Abram, 200 F.R.D. at 426-433 (finding that plaintiffs improperly aggregated compensation data where employer's standardized personnel procedures involved compensation decisions that took place on decentralized and individualized level). Accordingly, employers will want to consult written compensation documents and policies and craft their multiple regression analysis around the actual variables considered when compensation decisions are made as well as those which may explain differences in compensation. It is advisable that both counsel and a statistical expert be involved in the decisions regarding the composition of the multiple regression model used.

C. Conducting A Compensation Equity Analysis Without Regard To Any Protected Category

Before developing a multiple regression model to determine whether there are statistically significant disparities between males and females or minorities and non-minorities, it may be desirable to develop a multiple regression model that does not account for the protected characteristics of its employees. Using this model, the employer can determine employees' statistically anticipated compensation and identify individuals who are earning significantly more or less than that amount.

An employer's statistical analysis of compensation will be more credible and defensible if decisions made regarding how that analysis should be conducted are made without knowing how those decisions will affect the results of any analysis of discrimination.⁶ Such an analysis can be used to test and refine the statistical model before reaching any conclusions, or even performing any analysis, about the existence of discrimination in the workplace. Perhaps more importantly, however, this analysis can be used as a diagnostic tool to test which factors actually affect compensation and whether factors an employer considers important to compensation (e.g., performance, education) actually impact compensation as intended. A model can also provide a basis for identifying compensation issues which should be addressed independent of their impact on employees in protected categories.

1. Analyzing The Results

Once an appropriate model is selected, an employer will need to analyze the results of the regression analysis. This process should begin with a determination as to whether the model is effectively accounting for the nondiscriminatory factors that impact employee

⁶ Even under the cloak of the attorney-client privilege, a statistical analysis conducted by an employer that indicates the existence of discrimination may raise issues and present greater risks than desired.

compensation.⁷ In any multiple regression analysis it is possible for outliers in the data to unduly influence the overall statistical results. See David H. Kaye and David A. Freedman, Reference Guide on Statistics p. 137 (demonstrating how, in the extreme case, one outlier can “reduce a perfect correlation to nearly nothing”); Penk, 1985 WL 25631, at *49 (“Because regression is an averaging technique, the sex coefficients may be strongly influenced by a few extreme cases”). Examining these employees’ circumstances may indicate that they should be excluded from any further statistical analyses because of unique circumstances and/or may indicate potential changes that should be made to the statistical model. Id. at 137-38. To the extent such outliers are heavily weighted toward one group, the employer will face a heavier burden to justify their exclusion. In such situations, a plaintiff may argue that the explanatory variable is used by the employer to mask discrimination. See, e.g., Penk, 1985 WL 25631, at *49 (rejecting plaintiff’s argument that expert’s “outlier analysis,” which removed individuals more than two standard deviations from the mean, simply removed highly paid men and low paid women).

Moreover, if it appears that some employees are underpaid relative to similarly situated co-workers, compensation adjustments can then be made on a race/gender neutral basis.⁸ Such adjustments, even though undertaken without regard to a protected characteristic, may help an employer avoid any statistically significant differences in compensation for its minority employees because they may drive any overall disparity between protected group compensation and non-protected group compensation below statistical significance. This is significant because it may allow employers to avoid the reverse discrimination litigation that can arise when employers make broad compensation adjustments based upon statistical disparities in compensation. See infra Sec. IV.D.2.a.

Furthermore, by doing these adjustments without regard to protected characteristics, employers avoid the argument that last-minute compensation adjustments to a relatively few number of employees were used by the employer to mask its intentional discrimination. Indeed, many employers already have procedures in place to make equity adjustments to employees who appear underpaid relative to their peers. Using a statistical analysis to identify those individuals adds an additional layer of objectivity, and appearance of fairness, to the process.

D. Assessing Whether A Compensation System Has A Disparate Impact On Any Protected Group

Any review of compensation will ultimately analyze whether disparities exist among groups of employees based upon their protected characteristics, i.e. race, nationality,

⁷ Of course, if the results indicate potential errors in the data being analyzed (e.g., full-time or part-time status, improperly coded data, missing data, mis-classified employees), it must be corrected. Any analysis based on data with too many errors is useless and, in fact, can lead to a false sense of security.

⁸ Every regression model will have outliers. If salary adjustments are made, or outliers are removed from the analysis, a new analysis will simply identify a new set of outliers.

gender, age, etc. Under the Equal Pay Act, employees who perform “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,” should be paid the same compensation. See 29 U.S.C. § 206(d)(1). Similarly, under Title VII of the Civil Rights Act of 1964, an analysis of compensation should compare employees who perform substantially similar work. See, e.g., Am. Nurses’ Ass’n v. State of Ill., 783 F.2d 716, 721 (7th Cir. 1986) (noting in Title VII pattern or practice case that one cannot prove discrimination “based on a comparison of the wage rates of dissimilar jobs”) (citation omitted).⁹ Having reviewed the compensation system without regard to protected characteristics, and having made any necessary and appropriate adjustments, employers should next conduct a multiple regression analysis accounting for the protected characteristics of its employees.

1. Considering The Plaintiffs’ Approach

As noted throughout, there are a number of theories of analyzing compensation upon which a statistical model can be based. Rarely, of course, will an employer reach agreement with an adversary, whether it be the government or plaintiffs, as to the appropriate method for examining whether a pattern or practice of discrimination in compensation exists, except perhaps in a settlement context. Typically a party will utilize the method(s) of analyzing compensation that are most favorable to them and are the easiest to defend against a challenge in litigation. Accordingly, despite attempting to compile a multiple regression model that accurately reflects legitimate, nondiscriminatory explanatory variables in compensation, as part of a risk assessment, employers may also want to undertake analyses similar to those expected from plaintiffs and the government.

Plaintiffs frequently argue that factors that are within the control of the employer – e.g. performance ratings – should not be included in a statistical analysis because they can mask discrimination. The argument is as follows:

- Overall, men and women should have the same performance ratings;
- If including performance in a regression analysis eliminates any statistical differences in compensation between men and women, then men and women must have different performance ratings;
- If men and women have different performance ratings, those ratings must be discriminatory.
-

⁹ See also Conti v. Universal Enters., Inc., 50 Fed. Appx. 690, 699 (6th Cir. Sept. 20, 2002) (“In a Title VII case where the plaintiff seeks to compare herself to another employee, she must prove that all relevant aspects of her employment situation were similar to those of the other employee,” which includes an evaluation of whether the individuals performed “equal work” as under the EPA); Rodriguez v. Smithkline Beecham, 224 F.3d 1, 8 (1st Cir. 2000) (“plaintiff’s Title VII claim fails as a matter of law for lack of a prima facie case” where plaintiff could not make a showing that she was paid less than a male employee for substantially equal work).

See, e.g., Smith v. Virginia Commonwealth Univ., 84 F.3d 672, 692 (4th Cir. 1996) (Michael, J., dissenting) (“For the purposes of conducting [a multiple regression analysis], it is . . . entirely proper to assume that the sexes on the average are equally productive.”). This approach was rejected by the Eighth Circuit in Morgan v. UPS, 380 F.3d 459 (8th Cir. 2004) (discussing and rejecting plaintiffs’ arguments that past pay and performance should not be included as variables in the regression because those factors may mask discrimination).

Plaintiffs also often attempt to aggregate data in a manner that disregards valid distinctions among an employer’s workforce. E.g., EEOC v. Morgan Stanley, 324 F. Supp. 2d 451, 457-58 (S.D.N.Y. 2004) (admitting testimony of plaintiffs’ expert who aggregated data to include foreign offices, finding that the validity of expert’s testimony should be left to the jury). This technique will increase the likelihood of a finding of a statistically significant pay disparity between protected group and non-protected group employees. See Daniel L. Rubinfeld, Reference Guide on Multiple Regression, p. 189.

Plaintiffs may also attempt to use the testimony of social science experts to shift the burden of proof to the employer. For instance, in Morgan Stanley, the plaintiffs sought to introduce the testimony of a social scientist who testifies frequently for plaintiffs, Dr. William Bielby, regarding factors that affect workplace gender bias and the kinds of policies and procedures that minimize gender bias, based upon the assumption that a male-dominated environment existed at Morgan Stanley. 324 F. Supp. 2d at 460. The court observed:

Bielby’s discussion about the susceptibility of the [Institutional Equities Division]’s pay and promotion procedures to gender bias would tend to confuse the jury about the burden of proof. The gist of his conclusion is that in a male-dominated context where men are in charge[,] women are discriminated against unless certain safety measures are instituted. He therefore asks the jury to begin with the expectation of discrimination and compel Morgan Stanley to prove that it took enough steps to prevent it.

. . . . While his testimony would be helpful in understanding the mechanism of discrimination, and consequently, in fashioning an appropriate remedial scheme, it may not illuminate the initial inquiry, i.e., whether Morgan Stanley discriminates.

Id. at 461.

As a result, although the court allowed Dr. Bielby to testify regarding gender stereotypes, how these stereotypes may have affected decisions at Morgan Stanley, and whether policies and practices relating to gender bias might affect employees’ utilization of an EEO program, the court held that Dr. Bielby could not give testimony regarding whether there was any evidence of discrimination at Morgan Stanley. Id. Cf. Butler v. Home Depot, Inc., Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754, at *7 (N.D. Cal. Aug. 29, 1997) (denying Home Depot’s summary judgment motion in part based upon Dr. Bielby’s expert opinion that in a male-dominated culture, there is a strong testimony for women to be considered unqualified for

“men’s work” based upon gender stereotypes); *Dukes*, 222 F.R.D. at 154 (granting class certification based in part upon Dr. Bielby’s expert opinion that gender stereotypes contributed to disparities in pay and promotions).

E. Dealing with Findings of Statistical Disparities

Once an employer determines which factors can and should be included in the statistical model, the form of the model, and the workforce to be studied, the employer can assess whether statistically significant disparities exist in the compensation of employees in various protected categories that are not explained by the nondiscriminatory factors accounted for in the statistical model. One seemingly simple solution to such disparities is to provide additional compensation to the protected employees found to be underpaid. As discussed below, however, this approach could subject the employer to a reverse discrimination claim, which, at a minimum, puts the employer in a position of announcing and attempting to prove its prior compensation disparities. It is also likely to disrupt an employer’s compensation system. As an alternative, employers should consider a more individualized review of the compensation data and less reliance upon broad assumptions drawn from a multiple regression analysis.

1. The Risks Inherent In Making Broad Compensation Adjustments Based On Statistical Analysis

Employers need to tread carefully when determining whether to make broad compensation adjustments designed to address disparities in pay identified by a multiple regression analysis. Although relatively infrequent to date, such adjustments have been challenged on reverse discrimination grounds by male and non-minority employees not provided with comparable adjustments, most typically in the public sector or academia. See *Rudebusch v. Hughes*, 313 F.3d 506, 523-24 (9th Cir. 2002) (class action brought by professors alleging equal protection and Title VII violations based on salary adjustments made for female and minority professors as a result of an internal pay equity analysis; fact issues mandated reversal of summary judgment for university); *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1018 (8th Cir. 1998) (reversing summary judgment for university in reverse discrimination action brought by male professor challenging salary adjustment plan for female academic employees implemented pursuant to consent decree); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 677 (4th Cir. 1996) (en banc) (class action brought by professors alleging Title VII violations based upon salary adjustments for female professors as result of internal pay equity analysis; summary judgment for university reversed). At least one court has noted the irony that such adjustments, often undertaken to avoid Title VII litigation, have spawned that very litigation. *Rudebusch*, 313 F.3d at 520.

2. Conducting A Targeted Individualized Review Of Employee Compensation

Employers attempting to avoid the costs and pitfalls of a broad pay equity adjustment can consider using their statistical risk assessment to help them conduct a targeted

review of individual employee compensation. In this individualized review, employers could undertake case studies that look at categories of employees, or cohorts, who despite being similarly situated are identified as having significant disparities in compensation. Counsel can conduct a more detailed review of those groups by reviewing appropriate performance and personnel files and interviewing relevant managers and human resources personnel.¹⁰ As discussed above, using a regression analysis to identify outliers can be very useful in this process. This detailed review may unearth factors that explain the compensation for those groups, but that were not or could not be accounted for in the aggregate statistical model. Alternatively, this detailed review may help the employer identify areas where targeted compensation adjustments are warranted.

3. Conclusion

Determining how best to analyze an employer's compensation practices depends on the type of compensation system in place and the reasons for performing the analysis. It is critical, however, that counsel and a statistician be involved in the process to ensure that the process is statistically sound, legally defensible, and consistent with the employer's goals.

Regardless of the method used to analyze compensation, once the analysis is complete, the question then becomes what to do with the results. If the results indicate a disparity between men and women, or whites and minorities, an employer must examine why those disparities exist and whether they can be explained. Potential causes could include a flawed model, flawed data, or a problem with the compensation system. To address the disparity, a new model might need to be developed, the data might need to be corrected, additional data may need to be collected and put in an electronic format, adjustments may be needed to the compensation system or compensation of particular employees, or, very often, the employer might simply need to delve behind the statistics to find explanations for differences in employees' salaries that cannot be identified with statistics. An employer should take care when making gender or race-based compensation adjustments to avoid "reverse" discrimination and to avoid the suggestion of past discrimination.

Even if the statistical model utilized indicates no statistically significant disparities, an employer should consider whether other analyses (e.g., a plaintiffs' attorneys' model) would yield similar results. If favorable results are obtained only because a particular statistical model is used, an employer must be prepared to defend the use of that model over others. Furthermore, once a database of employee information has been gathered for one statistical analysis, performing additional analyses can be an inexpensive way to further assess the litigation and public relations risk going forward.

¹⁰ As explained, *supra*, as greater number of lower level employees outside of the employer's upper management become involved in the process, the privileged status of the review becomes more attenuated.