IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH CAMPBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO. 1:99CV02979 (EGS)**
	)	
NATIONAL RAILROAD PASSENGER CORPORATION,	)	**CLASS ACTION**
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON DISPARATE IMPACT CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUES

FEDERAL RULES OF CIVIL PROCEDURE

LOCAL CIVIL RULES

Pursuant to Local Civil Rule 7(h) and Federal Rule of Civil Procedure 56(a), Defendant National Railroad Passenger Corporation ("Amtrak") submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment on Plaintiffs' Disparate Impact Claims as pled in the Fourth Amended Complaint.

I. INTRODUCTION

Plaintiffs have alleged disparate impact claims under 42 U.S.C. § 1981 ("Section 1981") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"). Amtrak respectfully submits that it is entitled to judgment as a matter of law on both of these claims for several reasons. First, disparate impact claims are not cognizable under Section 1981. Only "purposeful" claims of discrimination violate Section 1981. Second, under Title VII, Plaintiffs have the burden to demonstrate that Amtrak "uses a particular employment practice that causes a disparate impact on the basis of race…[.]" 42 U.S.C. § 2000e. Notwithstanding the fact that Plaintiffs have engaged in more than a decade of litigation, during which they have amended their Complaint four (4) times, taken more than 100 depositions, received over 1.2 million pages of documents from Amtrak, and reviewed and copied thousands of files related to interview and selection decisions dating back to 1995, Plaintiffs have failed to produce evidence of any employment practice that causes a disparate impact on the basis of race.

For these reasons, as explained below and as supported by Amtrak's accompanying Statement of Material Facts as to Which There is No Genuine Issue ("SOF"), this Court should grant summary judgment on Plaintiffs' disparate impact claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that Amtrak's policies and procedures related to the selection of individuals for jobs and discipline of employees had a disparate impact on African-American applicants and employees from 1996 to the present. SOF, ¶¶1-2. Their disparate impact

allegations encompass personnel practices applicable to 36,937 employees covered by 24 different collective bargaining agreements ("CBAs") over the class period, employed in about 730 jobs, in roughly 290 locations across the country, and managed by thousands of managers. SOF, ¶ 5. Each of the jobs had particular selection criteria that may or may not have changed over the relevant time period. SOF, ¶ 6. The specific selection criteria for each job were identified in Job Requisitions and other records contained in job files for each position (which contain the applications, resumes, interview notes, hiring justification memoranda, and tests and ratings, if applicable, for each applicant). SOF, ¶ 7. The selection process for many jobs involved an interview that may or may not have culminated in the assignment of a rating based on the applicant's responses to interview questions. SOF, ¶ 8.

The criteria and procedures for imposing discipline on employees were outlined in each of 24 CBAs, all of which included "just cause" provisions (stating that employees cannot be disciplined without justification) and afforded employees the right to challenge the disciplinary charge at an investigative hearing and file a grievance over the outcome of that hearing, and the union the discretion to seek binding arbitration of any disciplinary action, including suspension, or termination. SOF, ¶ 9. While the disciplinary offenses often overlapped between CBAs, e.g., absenteeism, some of the disciplinary offenses were unique or more important to particular kinds of positions. SOF, ¶ 10.

During discovery, Amtrak produced documents to Plaintiffs on over 70 occasions, culminating in almost 1.2 million pages of discovery. SOF, ¶ 14. Amtrak also permitted Plaintiffs to access thousands of job files related to interview and selection decisions dating back to 1995. SOF, ¶ 13. Plaintiffs reviewed the job files and selected documents from those files to be copied. SOF, ¶ 13.

The parties also agreed during discovery that it would be efficient to use a "Joint Database" containing the various electronic datasets for use by both parties' statistical experts. SOF, ¶ 15. The parties began working on a Joint Database in mid-2010, with Amtrak initially providing sample "joint data" files in October 2010, and an entire proposed Joint Database to Plaintiffs on December 31, 2010. SOF, ¶ 15. The parties had further discussions and arrived at a mostly final Joint Database on July 22, 2011. SOF, ¶¶ 17-19.

The Joint Database contains employment information relevant to this action, including job codes and titles, wage rates, hire and termination dates, education history, and information related to discipline and training. SOF, ¶ 16. The purpose of the Joint Database was to consolidate the data and allow the statistical experts in this case to use a common dataset for their analyses. SOF, ¶ 15. The parties did not agree that the Joint Database would be the exclusive source of information for use by their statistical experts, nor did they agree that records produced during discovery could not be used for the statistical analyses.[1] Nonetheless, Plaintiffs' experts limited their statistical analysis to the Joint Database and did not study whether any particular employment policy or practice caused any statistical disparities at Amtrak. SOF, ¶¶ 26-27.

III. STANDARD FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), "[s]ummary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Moses v. Dodaro*, 774 F. Supp. 2d 206, 210 (D.D.C. 2011) (Sullivan, J.) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see*

[1] The parties' agreement is memorialized in the parties' Joint Motion to Continue Status Conference, which was submitted to the Court on November 16, 2009, the Joint Motion to Modify Scheduling Order submitted on February 18, 2011, and in the Joint Status Reports submitted on May 6, 2011, July 22, 2011, and August 19, 2011. SOF, ¶ 19.

also Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995), *aff'd*, 132 F.3d 1481 (1997). "To determine which facts are 'material,' a court must look to the substantive law on which each claim rests." *Onyewuchi v. Mayorkas*, 766 F. Supp. 2d 115, 120 (D.D.C. 2011), *aff'd*, No. 11-5099, 2011 WL 6759483 (D.C. Cir. Dec. 2, 2011) (citing *Anderson*, 477 U.S. at 248). A dispute is "genuine" only if its "resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Id.* (citing *Celotex Corp. v. Cartett*, 477 U.S. 317, 322 (1986)).

Although the court must "draw all justifiable inferences in favor of the non-moving party in deciding whether there is a disputed issue of material fact, '[t]he mere existence of a scintilla of evidence in support of the [non-movant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].'" *Moses*, 774 F. Supp. 2d at 210 (quoting *Anderson*, 477 U.S. at 252). The non-moving party cannot rely upon mere conclusory allegations, speculation or denials, but must set forth specific facts demonstrating that there is a genuine issue for trial. *See Burke v. Gold*, 286 F.3d 513, 517 (D.C. Cir. 2002); *see also Anderson*, 477 U.S. at 248. Accordingly, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Moses*, 774 F. Supp. 2d at 210.

With respect to disparate impact claims, summary judgment should be granted if the plaintiff fails to "identify the specific employment practice that is challenged" and "offer statistical evidence of a *kind and degree* sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Young v. Covington & Burling LLP*, No. 09-464, 2102 WL 714775, at *10 (D.D.C. Mar. 6, 2012) (emphasis in original); *Reshard v. Peters*, 579 F. Supp. 2d 57, 75 (D.D.C. 2008) (granting summary judgment where plaintiff failed to "isolat[e] and identify[] the specific

employment practices that are allegedly responsible for any observed statistical disparities"); *Onyewuchi*, 766 F. Supp. 2d at 130 (finding summary judgment appropriate where plaintiff failed to demonstrate that an employment practice caused exclusion of applicants on the basis of membership in protected class).

Furthermore, summary judgment is proper in cases where plaintiffs have unearthed no evidence to support their claims despite having ample opportunity for discovery. *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 669 (D.C. Cir. 1977) (holding that district court properly relied on the fact that plaintiffs had six (6) years to conduct discovery in considering whether to grant summary judgment); *Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 294 F.3d 148, 151 (D.C. Cir. 2002) (holding that the 18 months that passed between filing of complaint and motion for summary judgment were sufficient for parties to complete discovery); *Lindell v. Landis Const. Co.*, 714 F. Supp. 2d 103, 106-07 (D.D.C. 2010) (granting summary judgment after determining that plaintiffs had ample opportunity to conduct discovery).

IV. ARGUMENT

A. Disparate Impact Claims Are Not Cognizable Under Section 1981.

Section 1981 "can be violated only by purposeful discrimination." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). Thus, disparate impact claims are not cognizable under Section 1981. *Id.; Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1449 n.3. (D.C. Cir. 1988). Accordingly, Amtrak is entitled to summary judgment on Plaintiffs' disparate impact claims under Section 1981.

B. Plaintiffs Have No Evidence To Meet Their Burden Under Title VII.

Under Title VII, Plaintiffs have the burden to demonstrate that Amtrak "uses a particular employment practice that causes a disparate impact on the basis of race . . .[.]" 42 U.S.C. § 2000e-2(k)(1)(A). Further, "[w]ith respect to demonstrating that a particular employment

practice causes a disparate impact . . ., the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B). As used in these statutory provisions, the term "'demonstrates' means meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

Plaintiffs cannot meet their burden of demonstrating these essential components of a disparate impact claim under Title VII for three fundamental reasons: (1) they do not identify any particular employment practice alleged to have caused a disparate impact; (2) they have no evidence that any particular employment practice in fact caused a disparate impact on African-American applicants and employees; and (3) they have no evidence that the decision-making process for external hires, internal selections and discipline at Amtrak are "incapable of separation for analysis."

1. Plaintiffs Do Not Identify A Particular Employment Practice.

"The plaintiff must begin by identifying the specific employment practice that is challenged." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)). Here, Plaintiffs have argued that "AMTRAK's promotion and hiring selection process has both objective and subjective components." Pls.' Mot. for Class Certification at 7. This concession heightens the Plaintiffs' burden. "*Especially* in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Watson*, 487 U.S. at 994 (emphasis added).

Plaintiffs would argue that their burden of identifying a "specific employment practice" is satisfied by the following: "Plaintiffs challenge the selection interview process, ratings, rank-orderings, input from other managers, amorphous decision-making, and the disqualifying discipline criterion as having an adverse impact on Blacks . . ." Pls.' Mot. for Class Certification at 16; SOF, ¶ 3.[2] However, none of these items is a "specific employment practice" sufficient to meet the Plaintiffs' initial burden.

The problem is that Plaintiffs' list does not include any specific selection criteria or practice, i.e., a factor "used" in deciding whom among competing candidates to select. For example, the bare fact of an interview or that ratings are assigned during an interview is not a selection criterion. *See Brady v. Livingood*, 360 F. Supp. 2d 94, 99-100 (D.D.C 2004) (dismissing a disparate impact claim challenging the defendant's "selection and interview process" based on plaintiff's failure to identify any aspect of the process alleged to have caused a disparate impact). Plaintiffs' disparate-impact claims purport to encompass hundreds of jobs at Amtrak, with different job duties and responsibilities. The selection criteria – even the subjective criteria used during the interviews – were not the same across all jobs. Some interviews focused on, e.g., customer-service skills and traits, some on expertise in technical aspects of train mechanics, and some on the practical nuances of coupling and uncoupling trains.

[2] Even less specific than their Motion for Class Certification, Plaintiffs' Fourth Amended Complaint is replete with wide-ranging references to Amtrak's "selection, transfer, discipline and training policies, practices and procedures." Compl. ¶ 108. While Plaintiffs contend that these policies, as a whole, "have prevented [them] from advancing into higher and better paying positions," they have not isolated a single specific employment policy that is purportedly responsible for this alleged result. *See, e.g.*, Compl., ¶¶ 124, 132, 136, 142, 148. For the reasons discussed, these generalized allegations are plainly insufficient. *See Prince v. Rice*, 453 F. Supp. 2d 14, 27 (D.D.C 2006) (dismissing plaintiff's disparate impact claim because "not even the most generous reading of [the] factual allegations unearths any identification of a specific employment practice that is generally applicable and facially-neutral, but has functioned disproportionately with respect to plaintiff or members of her protected class").

SOF, ¶ 8. The interviewers may have engaged in a subjective assessment of how the candidates answered questions on these different topics. But it is evident that the subjective selection criterion in each of these interviews was not the same. SOF, ¶ 8. Indeed, the Supreme Court recognized that use of an interview meant that the selection process was in a sense "subjective," *Watson*, 487 U.S. at 990, but nevertheless required identification of the precise "subjective criteria used to make employment decisions" to support a disparate impact claim. *Id.* at 989 (emphasis added). Examples of "subjective selection criteria" discussed by the Court included "common sense, good judgment, originality, ambition, loyalty and tact." *Id.* at 991; *see also Green v. Kinney Shoe Corp.*, 728 F. Supp. 768, 774-75 (D.D.C. 1989) (rejecting challenge to "promotion decisions for manager [that] were made primarily through the use of subjective criteria" because this did not identify any such specific employment practice.).

Similarly, "disqualifying disciplinary criteria," while objective, is again a general description that does not identify a specific selection criterion.[3] Rather, a challenge to "disqualifying disciplinary criteria" must be to the specific disciplinary criteria that are disqualifying, e.g., insubordination, tardiness, etc. By contrast to the general "disqualifying disciplinary criteria," in discussing the burden of identifying a particular employment practice, the Supreme Court offered as examples of objective employment practices: use of a written aptitude test, a High School degree requirement, and a requirement that candidates be at least five feet, two inches tall and weigh at least 120 pounds. *Watson*, 487 U.S. at 988 (discussing

[3] Because the business necessity of work rules and imposition of discipline for violating the rules is nearly self-evident, disparate impact challenges to disciplinary criteria are often simply mischaracterized disparate treatment claims. *See, e.g.*, *Rowe v. Kidd*, 731 F. Supp. 534, 540 (D.D.C. 1990) (stating Plaintiff's disparate impact claim was no more than a recharacterization of his disparate treatment claim, i.e., "discriminatory execution of rules and regulations—particularly its disciplinary and discharge policies," which, according to Plaintiff, constitutes "intentional, invidious discrimination.") (internal citations omitted).

prior Court cases addressing objective selection criteria). None of these examples are as general as "disqualifying disciplinary criteria." Otherwise, a plaintiff could meet their burden simply by challenging "promotion criteria." *See Brady*, 360 F. Supp. 2d at 99-100 (rejecting challenge to "selection and interview process" for management promotions); *Green*, 728 F. Supp. at 774-75 (rejecting challenge to "promotion decisions for manager" made through use of subjective criteria).

Further, several of the Plaintiffs' alleged specific practices, such as "input from other managers" and "amorphous decision-making," are plainly the sort of "generalized policy" that the Supreme Court has found insufficient. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989); *see also Reshard v. Peters*, 579 F. Supp. 2d 57, 75 (D.D.C. 2008) (stating overall managerial promotion process does not identify a specific employment practice); *Lu v. Woods*, 717 F. Supp. 886, 890-91 (D.D.C. 1989) (finding subjective evaluation and promotion practices insufficient).

In sum, Plaintiffs have not identified any specific employment practice that allegedly caused a disparate impact and, accordingly, their disparate impact claims should be dismissed.

2. Plaintiffs Fail To Demonstrate That Any Particular Employment Policy Or Practice Caused A Disparate Impact On African-Americans.

Even assuming that Plaintiffs have identified a specific employment practice, which they have not, they similarly cannot meet their burden of demonstrating that each specific employment practice *in fact caused* a disparate impact. 42 U.S.C. § 2000e-2(k)(1)(B) (emphasis added). "[A] plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's *prima facie* case in a disparate impact suit under Title VII." *Wards Cove*, 490 U.S. at 657. To establish a *prima facie* case of disparate impact, "causation must be

proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994; *see also Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (stating "[i]t is not enough for Plaintiffs to simply show statistical disparities, they must go further to show that the facially neutral policy caused the statistical disparities."). Here, Plaintiffs cannot meet this burden for two reasons: (1) the statistical evidence they present is entirely unreliable; and (2) the Plaintiffs' statistical experts never studied and have no opinion as to whether a particular employment practice caused disparate impact.

a. Plaintiffs' Statistical Studies Are Inadmissible.

Plaintiffs can meet their burden of demonstrating causation to avoid summary judgment only by producing admissible evidence. "Nor are courts or defendants obliged to assume that plaintiffs' statistical evidence is reliable." *Watson*, 487 U.S. at 996. As discussed fully in Amtrak's Memorandum of Points and Authorities in Support of its Motion to Exclude the Testimony and Report of Plaintiffs' Statistical Experts, the statistical analyses of Drs. Bradley and Fox do not meet the standards for admissibility of scientific evidence under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). Accordingly, Plaintiffs have no statistical evidence upon which to meet their burden of demonstrating causation. The time is well past the deadline under this Court's Scheduling Order for Plaintiffs to offer new statistical evidence not already presented. After numerous years of discovery and years of working with their statistical experts, Plaintiffs should have satisfied their burden of showing causation, if it were possible, in the report already submitted by Drs. Bradley and Fox. Indeed, Drs. Bradley and Fox testified that they had enough time to and did from their

perspective produce a "comprehensive" study of the question of adverse impact in this case. Bradley Dep., at 12:18-22; SOF, ¶ 34.

b. Plaintiffs' Statistical Studies Do Not Demonstrate Causation.

Plaintiffs have no statistical evidence demonstrating that any particular employment practice in fact caused statistical disparities. The Supreme Court in *Dukes* rejected the plaintiffs' statistical evidence for the "fundamental" defect that it did not study any particular employment practice. *Dukes*, 131 S. Ct. at 2555-56. The Court explained that "merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*." *Id.* (emphasis in original); *see also Young*, No. 09-464, 2012 WL 714775, at *10 (holding that to survive summary judgment "the plaintiff must do more than point to a statistical disparity; the plaintiff must adduce evidence from which a jury could reasonably find that [defendant]'s nonpromotion policy caused adverse consequences for African-Americans").

Plaintiffs here not only fail to prove causation, they never even try. Indeed, Dr. Bradley readily conceded that he did not study any particular employment policies or practices, and could render no opinion that any practice or policy caused the statistical disparities they purport to identify:

> **Q:** Dr. Bradley, I'd like to ask whether or not you can give a professional statistical opinion or do you give a professional statistical opinion in your report that a particular employment practice at Amtrak caused adverse impact against African-Americans?
>
> **A:** I cannot.
>
> **Q:** Did you study whether a particular employment practice at Amtrak caused adverse impact?
>
> **A:** I did not.

Bradley Dep. at 99:4-12; *see also* Fox Dep. at 158:1-10 ("Q: And what process are you talking about? A: …the process by which someone applies for a position and is selected for – you

know, *whatever decisions go into that process*, that has adverse impact against African-Americans") (emphasis added); SOF, ¶ 27.

(i) No Study Of Causation Regarding Selections.

Drs. Bradley and Fox had to concede that they failed to study whether a particular selection criterion caused a disparate impact because they conducted aggregate studies that combined selections across hundreds of different jobs with different selection criteria. SOF, ¶¶ 26-27. As Dr. Bradley conceded, such analyses aggregated across different selection criteria would provide no information about whether any of the particular selection criteria caused disparate impact. Bradley Dep., at 118:3-19:25; SOF, ¶ 27. For example, Dr. Bradley explained, in assessing whether a particular employment test had a disparate impact, it would be improper to aggregate across selections based on different tests. Bradley Dep. at 111:2-12:24; SOF, ¶ 27.

Instead of studying whether a specific selection criterion caused a disparate impact, Dr. Bradley studied the "bottom line" question of whether there was some generalized concern about disparate impact, which would lead to further study as to causation. Bradley Dep. at 118:3-19:25; SOF, ¶ 27. However, he did not "drill down and find out where the problems are occurring" because he was not asked to. Bradley Dep. at 119:3-16; SOF, ¶ 27. In other words, neither Plaintiffs nor their experts made any attempt to identify the particular policy and study whether that policy caused the bottom line alleged statistical disparity. This is insufficient to carry Plaintiffs' burden of demonstrating causation. *Wards Cove*, 490 U.S. at 657 (stating "a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the workforce."); *see also Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011) (affirming grant of summary judgment on disparate impact claims because "the plaintiffs' expert, Dr. Bradley, failed to identify any specific employment practices responsible for the alleged disparate impact in promotion decisions.").

In addition to failing to show causation, Dr. Bradley admittedly failed to eliminate common nondiscriminatory reasons (e.g., seniority, experience, or education) for the alleged disparities in selection rates between African-American and white employees:

> **Q:** But you don't try to analyze when you're trying to figure out whether or not a component or the overall selection process has adverse impact, you don't consider the types of qualifications that a decision-maker might have looked at when making the decision, like experience and other types of qualifications?
>
> **A.** No, I'm not thinking of that. I'm looking only at minimum qualifications.
>
> ***
>
> **Q.** But as you understand it, if seniority was a tiebreaker, if that's the case, then wouldn't you need to control for seniority before concluding there was adverse impact?
>
> **A.** No. There could be adverse impact. Now, the adverse impact can be justified.
>
> **Q.** But if you don't control for seniority, isn't it possible that there actually isn't any adverse impact after you do control for seniority?
>
> **A.** Well, it's possible, possible.
>
> ***
>
> **Q.** So why did you understand that if there's a legitimate factor that plays a role in the selection process, a decisive role in some cases, that you wouldn't control for that in the first place when determining whether there's adverse impact?
>
> **A.** I'm looking at pools that have minimal qualifications and determining if there's adverse impact. Some of that may well be justified, some of it may not be.
>
> **Q.** You don't know what extent of the adverse impact was justified and what was not justified?
>
> **A.** That's correct.

Bradley Dep. at 102:1-9; 103:22-104:6; 105:7-18; SOF, ¶ 30.

The failure to control for nondiscriminatory reasons in the selection process renders the Plaintiffs' statistical evidence insufficient to demonstrate causation. *Garcia*, 444 F.3d. at 635 (ruling that that the plaintiffs' "statistical analyses were analytically flawed because they did not incorporate key relevant variables connecting disparate impact to loan decision-making

criteria.").[4] Not surprisingly, Dr. Bradley conceded that he could not opine whether 1 percent or 100 percent of any adverse impact was justified by legitimate factors that play a role in the selection process. Bradley Dep. at 105:7-106:15; SOF, ¶ 31. Because Drs. Bradley and Fox admittedly cannot prove causation and have no answer to the essential question of whether a facially neutral policy at Amtrak causes a disparate impact on African-American employees, the Court "can safely disregard what [they have] to say." *Dukes*, 131 S. Ct. at 2554. Simply put, Plaintiffs cannot demonstrate that a specific employment practice caused statistical disparities against African-American applicants or employees.

(ii) No Study Of Causation Regarding Discipline.

Plaintiffs' statistical experts also failed to demonstrate that any particular discipline criteria or practices caused a disparate impact on African-American employees. Dr. Bradley admits to aggregating across all disciplinary charges and resolutions and failing to control for any legitimate, explanatory factors such as job, seniority or prior disciplinary record. Bradley Dep. at 241:14-243:8; SOF, ¶ 32. He concedes that this bottom line analysis, however, does not study whether any particular discipline criteria or practice caused the alleged disparities. Bradley Dep. at 252:11-253:4 ("Q: So you can't say anything based on your discipline study about what might have caused the disparate impact in the award of disciplines to African-Americans? A: That's correct."); SOF, ¶ 32.

While Drs. Bradley and Fox studied final disciplinary outcomes (reprimand, suspension and termination), their studies do not demonstrate causation because they failed to compare

[4] In *Garcia*, the D.C. Circuit cited approvingly a Title VII pattern or practice case from the Eleventh Circuit: "The statistical evidence there did not account for variables such as an employee's type or level of acquired skills and field of study, the quality, type and relevance of an employee's experience, an employee's job performance, etc., to ensure that black and white employees were similarly situated." 444 F.3d at 635 n.11 (*citing Cooper v. Southern Co.*, 390 F.3d 695, 717 (11th Cir. 2004)).

similarly-situated employees. Rather, the studies simply compared the rates of each outcome against the representation of all discipline charges that went to African-Americans. *See* Amtrak's Motion to Exclude the Report and Testimony of Plaintiffs' Statistical Experts, at p. 5. The studies did not compare employees who had similar disciplinary records and similar offenses. For example, Dr. Bradley testified that his termination study did not consider the severity of the discipline or the number of disciplines any particular individual received. Bradley Dep., at 275:2-77:24; SOF, ¶ 33. Indeed, he did not study terminated employees in comparison to those who could have been terminated but were not; rather, he studied termination outcomes in relation to all disciplinary charges. SOF, ¶ 33. But only comparisons between similarly-situated individuals could demonstrate disparate impact. *Garcia*, 444 F.3d at 635 n.11 (stating "[t]he statistical evidence there did not account for variables such as an employee's type or level of acquired skills and field of study, the quality, type and relevance of an employee's experience, an employee's job performance, etc., to ensure that black and white employees were similarly situated." (*citing Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004)).

In sum, Plaintiffs have no evidence of causation whatsoever, and their disparate impact claims should be dismissed because their "bottom-line" statistical evidence is inadequate to create a genuine issue of material fact. *Bennett*, 656 F.3d at 817 (granting summary judgment on plaintiffs' disparate impact claim and holding that a similar analysis by Dr. Bradley had "little force").

3. Plaintiffs Cannot Demonstrate That Selection And Discipline Decision-Making Was Incapable Of Separation For Analysis.

Plaintiffs' statistical expert, Dr. Bradley, suggested in his deposition that he could not study whether a particular employment practice caused a disparate impact in part because he did not have the data needed to conduct such a study. Bradley Dep. at 37:22-41:9, 99:4-12, 114:1-

19. Also during Dr. Bradley's deposition, Plaintiffs' counsel asserted that there was an agreement to use only the data in the joint database to the exclusion of all other information or data, and that this was an excuse for not conducting a more detailed analysis. This testimony suggests that Plaintiffs may attempt to argue that their claims fall within a statutory exemption from the duty to identify a particular employment practice and demonstrate that it in fact caused a disparate impact.

Under Title VII, "if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B). Plaintiffs cannot meet their burden of demonstrating that the selection and discipline decision-making processes at Amtrak were "incapable of separation for analysis" for two reasons: (1) they specifically identify the steps used in the decision-making processes; and (2) records existed that would have allowed the Plaintiffs' experts to conduct more detailed analyses of whether particular selection and discipline criteria caused a disparate impact.

First, Plaintiffs effectively conceded that the processes can be separated when they listed the specific components of the decision-making processes in their Motion for Class Certification. For instance, Plaintiffs list the steps of the selection process as:

> (1) HR screens applicants and conducts any pre-screening tests; (2) HR determines who will be interviewed; (3) Interviews (which are supposed to be done using a standard "interview guide") are conducted by line management and often (but not always) an HR representative, sometimes on multi-interviewer panels; (4) Ratings are made, generally on a scale of 1-5; rating forms are used; the guides, and any logs and notes are then collected and retained in a job folder; (5) Selection recommendations and decisions are made, sometimes by a line manager, other times by an amorphous panel "consensus."

Motion for Class Cert., p. 7; SOF, ¶ 3.

The fact that Plaintiffs can identify specific steps in the decision-making processes precludes them from arguing the processes are incapable of separation for analysis. *Grant v. Metro. Gov. of Nashville and Davidson County, Tenn.*, 446 F. App'x. 737, No. 10-5944, 2011 WL 3796329 (6th Cir. Aug. 26, 2011). The *Grant* plaintiffs, for example, challenged a procedure that included tailored job qualifications, selective interviewing, and subjective decision-making as having a disparate impact on African-American employees. But they failed to identify and isolate the effect of each specific employment practice. "Although they purported to challenge the decision-making process as a whole, they never attempted to demonstrate that the elements of that process are incapable of separation for analysis." *Id.* at 740. The Sixth Circuit ruled that the "plaintiff may challenge the process as a whole only if he *first* demonstrates that its elements are incapable of separation." *Id.* (citations omitted).

Plaintiffs provide absolutely no basis for asserting that these practices could not be analyzed separately for disparate impact. To the contrary, Plaintiffs' expert testified that he could have analyzed these components if only he were provided data *that was in Plaintiffs' possession*. Bradley Dep. at 31:4-8 ("…if you're doing an adverse impact analysis, when possible after you do the bottom line you would do some type of component analysis if available to determine what factors might be, you know, driving that adverse impact"); *id.* at 114:1-19 ("…there are various stages here and each of those can be tested"); and *id.* at 253:20-23 ("Q: Why didn't you look at the different types of charges? A: I was interested in the disciplinary process as a whole."); SOF, ¶¶ 27, 32.

Second, records existed which would have allowed Plaintiffs' experts to analyze specific selection and disciplinary criteria to determine if any particular criteria caused a disparate impact. Amtrak produced thousands of pages of job files that Plaintiffs reviewed and tagged for

copying—only a portion of the total job files which Plaintiffs were afforded the opportunity to review and tag for copying. SOF, ¶¶ 13-14. The information contained in the job files included tests, interview forms, hiring justification memoranda, interview evaluation forms, ranked lists of candidates, applicant rating forms, and other documents that relate to the various elements of the selection process. SOF, ¶ 7. There is no reason Plaintiffs' experts could not have used this information in their analysis.

The only justification offered by Plaintiffs' experts for not obtaining these records and using the information contained in the records for their analyses was that Plaintiffs' counsel told them they could rely only on the data contained in the joint database. Bradley Dep. at 37:25-41:9; SOF, ¶ 26. Plaintiffs' counsel further asserted that the parties had an agreement to use the joint database to the exclusion of any other information obtained through discovery. Bradley Dep. at 37:25-41:9; SOF, ¶ 26. This is wrong, as evident by the fact that Plaintiffs' counsel directed Drs. Bradley and Fox to add Craft Group to the data to be used as the central structure of their statistical studies. Fox Dep. at 158:1-10; SOF ¶ 27. Further, Drs. Bradley and Fox extrapolated benchmarks from the candidate data contained in the joint database and used the extrapolated benchmarks to assess the selections for which candidate data was not contained in the joint database. SOF, ¶ 26. This was another example of adding data for purposes of analysis. As demonstrated by the Plaintiffs' own conduct, there was no agreement that precluded Plaintiffs from using the information contained in the job files or any other materials obtained during discovery as part of their experts' statistical analysis.

Thus, Plaintiffs cannot attempt to excuse their failure to isolate a particular employment practice and demonstrate that it caused a disparate impact based on a lack of candidate records. *See Carpenter v. Boeing Co.*, 456 F.3d 1183, 1199 (10th Cir. 2006) (rejecting the plaintiffs'

argument that they should be excused from including factors in their statistical analysis because the information was not available in electronic format, and explaining that "[e]lectronic data are undeniably more convenient, especially for use in statistical studies, but inconvenience does not excuse failure to collect the data."); *Anderson v. Boeing Co.*, No. 02-CV-0196-CVE-FHM, 2006 WL 2990383, at *10 (N.D. Okla. Oct. 18, 2006) (holding that plaintiffs failed to establish a prima facie case of disparate impact discrimination in part because plaintiffs' expert's "study did not incorporate the CBA requirements in its statistical analysis" which the court found "can skew the results" although plaintiffs had access to the CBAs).

The job files containing the pertinent candidate records existed, but Plaintiffs' counsel simply chose not to provide the records for use by their statistical experts. It is now far too late for Plaintiffs to offer completely new expert studies using the records that should have been used in the expert report they submitted in accordance with this Court's Scheduling Order.

Accordingly, Plaintiffs have no evidence that Amtrak's selection and discipline decision-making criteria were incapable of separation for analysis and their disparate impact claims should be dismissed.

V. CONCLUSION

Despite having more than a decade to conduct discovery regarding Amtrak's policies and procedures, receiving 1.2 million pages of documents, and taking over 100 corporate witness, manager and employee depositions, Plaintiffs and their experts have unearthed no evidence that isolates any particular selection criteria or procedure and shows that it caused a disparate impact on African-American applicants or employees. Accordingly, Amtrak respectfully requests that this Court grant its Motion for Summary Judgment and dismiss Plaintiffs' disparate impact claims.

Dated: June 26, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2012, a copy of the foregoing Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment on Disparate Impact Claims, was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/Joyce E. Taber
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