

EXHIBIT NO. 3

**Kenneth Campbell, et al. v. National Railroad Passenger Corporation (a.k.a.
Amtrak)**

**United States District Court
District of Columbia**

EXPERT REPORT OF

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QUALIFICATION

Dr. Jay M. Finkelman is System-wide Associate Dean, Professor, and Program Director of Alliant International University's California School of Professional Psychology, in charge of the Organizational Psychology Programs on all US campuses. He has served as a senior manager, consultant and expert witness in employment, staffing and human resources management for over two decades. He has had hundreds of retentions and depositions, and testified at trial over 46 times.

Dr. Finkelman is an Industrial and Forensic Psychologist as well as a Certified Professional Ergonomist. He holds a Ph.D. in Industrial-Organizational Psychology from New York University and an M.B.A. in Industrial Psychology from the Bernard M. Baruch School of Business of The City College of The City University of New York. He was a tenured Professor of Industrial-Organizational Psychology at The City University of New York as well as Dean of Students at Baruch College. He also served on the Doctoral Faculty in Business, specializing in Organizational Behavior, at the Graduate Center of C.U.N.Y.

Dr. Finkelman served in a variety of senior line management positions after leaving C.U.N.Y., including Station Manager of KTVU Television Channel 2 in San Francisco, Vice President in charge of Marketing for Walt Disney Television, Executive Vice President of United Personnel Services, Executive Vice President of AppleOne Employment Services and Senior Vice President and General Manager for Kelly Services in the Human Resources Management and Staffing Industry, during which he provided training and supervised the

interviewing, vetting, and hiring of candidates ranging from entry level to senior executives, including those at “C” level positions. He also consults with a wide variety of staffing and recruiting firms with similar scopes of engagement. He has addressed the Staffing Industry Analysts’ “Executive Forum” on multiple occasions.

Dr. Finkelman holds a Diplomate from the American Board of Professional Psychology and from the American Board of Forensic Psychology where he is also a fellow. He is a *Certified Personnel Consultant* from the National Association of Personnel Consultants and a Certified Employment Specialist from the California Association of Personnel Consultants.

He is a licensed psychologist in the State of California and in the State of New York and is listed in the National Register of Health Service Providers in Psychology. He is a member of Psi Chi, Delta Sigma Rho – Tau Kappa Alpha and Beta Gamma Sigma, and received the Excellence in Teaching Award from C.U.N.Y.

Dr. Finkelman holds a current General Class Amateur Radio License and a current General Class Commercial Radio Telephone and Telegraph License issued by the Federal Communications Commission. He is an inactive member of the Illuminating Engineering Society.

He is a member of the Industrial Psychology, Consulting Psychology and Engineering Psychology Divisions of the American Psychological Association, the Human Factors and Ergonomics Society and the American Academy of Forensic Psychology.

Dr. Finkelman specializes in Human Resources, staffing industry management practices, employment discrimination (gender, age, race, and disability), sexual harassment, ADA (Americans with Disabilities Act), conflict of interest, negligent hiring/retention, wrongful termination, adverse impact, job analysis, performance appraisal, psychometrics, statistical analysis, human factors and ergonomics.

He teaches the advanced elective doctoral level course entitled Forensic Issues in Employment, focusing on the human resource management issues in employment and discrimination litigation, and the doctoral level course in Human Resource Management, including compensation and job analysis.

Publications (1994 – 2011 only)

Finkelman, J. M. (1994). A large database study of the factors associated with work-induced fatigue. *Human Factors*, 36(2), 232-243.

Finkelman, J. M. (2000). The dysfunctional manager. *Staffing Industry Review (SIReview)*, V(3), 106-108.

Finkelman, J. M. & Editors (2000). Vendor on premises programs — A 10 year retrospective. *Staffing Industry Reports*, August.

Finkelman, J. M. (2000). Choosing an effective board of directors. *Staffing Industry Review (SIReview)*, V(5), 114-122.

Finkelman, J. M. & Editors (2000-2001). Special report — Vendor on premises — Sophistication in services becomes competitive strength. *Staffing Industry Sourcebook*, 243-245.

Finkelman, J. M. (2001). Managing for effective performance. *Staffing Industry Review (SIReview)*, VI(2), 85-88.

Finkelman, J. M. (2001). Vendor on premises programs for the next century. *Staffing Industry Review (SIReview)*, VI(2), 30-36.

Finkelman, J. M. (2001). Exploiting downsizing while avoiding meltdown. Staffing Industry Review (SIReview), VI(3), 14-16.

Finkelman, J. M. (2001). Do the right thing. Staffing Industry Review (SIReview), VI(4), 72-76.

Finkelman, J. M. (2001). Why staffing industry CEOs & general managers fail. Staffing Industry Review (SIReview), VI(6), 38-40.

Finkelman, J. M. (2002). The expert witness in employment litigation (chapter). Expert Witness Update 2002 Edition, Aspen Law & Business.

Finkelman, J. M. (2002). Especially in tough times, management matters. Staffing Industry Review (SIReview), VII(1), 61-64.

Finkelman, J. M. (2002). Enhancing performance with recognition & incentives. Staffing Industry Review (SIReview), VII(3), 27-29.

Finkelman, (2002). J. M. Managing your sales force for greater productivity. Staffing Industry Review (SIReview), VII(4), 25-27.

Finkelman, J. M. (2002). Restructuring sales & service. Staffing Industry Review (SIReview), VII(5), 29-31.

Finkelman, J. M. (2002). Gaining perspective – Listening to the marketplace. Staffing Industry Review (SIReview), VII(6), 44 — 46.

Finkelman, J. M. (2003). Use a valid test, or don't test at all. Staffing Industry Review (SIReview), VIII(1), 49-52.

Finkelman, J. M. (2003). Performance appraisal programs can be hazardous. Staffing Industry Review (SIReview), VIII.

Finkelman, J. M. (2003). If it hurts, don't do it – Correcting dysfunctional management. Staffing Industry Review (SIReview), VIII(6), 40-41.

Finkelman, J. M. (2003). Doing more with less without burning staff. Staffing Industry Review (SIReview), VIII(6), 18-22.

Finkelman, J. M. (2003). "Opportunistic" staffing strategy: Maximizing customer relationships. Staffing Industry Review (SIReview), VIII(10), 30-34.

Finkelman, J. M. (2003). Managing your sales force. Staffing Industry Review (SIReview), IX(3), 24-28.

Finkelman, J. M. (2003). Enhancing performance with recognition & incentives. Staffing Industry Review (SIReview), VIII(3), 34-36.

Finkelman, J. M. (2003). Taming the reckless manager: Inoculating your company against sexual & racial harassment claims. Staffing Industry Review (SIReview), VIII(4), 28 – 31.

Finkelman, J. M. (2004) Sales management best practices. Staffing Industry Review (SIReview),

Finkelman, J. M. (2004). Testing the testing programs: Distinguishing high quality from high risk. Contingent Workforce Strategies, 1.1, 26-27.

Finkelman, J. M. (2004). Make sure you're in the know. Contingent Workforce Strategies, 1.2, 13 & 35.

Finkelman, J. M. (2004). Sexual harassment – The organizational perspective. Chapter in Women, Law & Psychology, Andrea Barnes, Editor, in press.

Finkelman, J. M. (2004). What business are we really in? Gaining profitable market share. Staffing Industry Review (SIReview), IX (5), 50-53.

Finkelman, J. M. (2004). Transparency in management competence. Staffing Industry Review (SIReview), IX (9), 24-27.

Finkelman, J. M. (2004). Take charge of your training. Contingent Workforce Strategies, 1.3, 12-13.

Finkelman, J. M. (2004). The ins and outs of vendor-on-premises programs. Contingent Workforce Strategies, 1.4, 14-15.

Finkelman, J. M. (2004). Don't hesitate to ask. Contingent Workforce Strategies, 1.5, 12-13.

Finkelman, J. M. (2004). Satisfaction for all: Motivating a contingent workforce. Contingent Workforce Strategies, 1.6, 28-31.

Finkelman, J. M. (2004). Let the good times roll. Staffing Industry Review (SIReview), IX.

Finkelman, J. M. (2004). Who's the boss? Contingent Workforce Strategies.

Finkelman, J. M. (2005). You need to know what makes a good VOP program before you can demand one. Contingent Workforce Strategies. (pp.12-13). Los Altos, CA: Staffing Industry Analyst, Inc.

- Finkelman, J. M. (2005). Setting quality standards for suppliers can yield continuous improvement. *Contingent Workforce Strategies*. (pp.15-16). Los Altos, CA: Staffing Industry Analyst, Inc.
- Finkelman, J. M. (2005). Review your staffing supplies on a regular basis. *Contingent Workforce Strategies*. (pp.14-15) Los Altos, CA: Staffing Industry Analyst, Inc.
- Finkelman, J. M. (2005). Here's one gift horse you should look in the mouth. *Contingent Workforce Strategies*. (pp.14-15) Los Altos, CA: Staffing Industry Analyst, Inc.
- Finkelman, J. M. (2005). Juror perception of employment litigation. *The Psychologist-Manager Journal*, 8(1), 45-54.
- Finkelman, J. M. (2005). Legal and forensic issues in management. Special Issue Editor for *The Psychologist-Manager Journal*.
- Finkelman, J. M. (2005). Introduction to special issue: Legal and forensic issues in management. *The Psychologist-Manager Journal*, 8(2), 103-4.
- Finkelman, J. M. (2005). Sexual Harassment – The Organizational Perspective. In A. Barnes Editor (Ed.): *The Handbook of Women, Psychology and the Law*, (pp. 64-78). San Francisco, CA: Jossey-Bass.
- Finkelman, J. M. (2005). Review your staffing supplies on a regular basis. *Contingent Workforce Strategies*, 2(3), 14-15.
- Finkelman, J. M. (2005). Setting and enforcing quality standards can produce continuous improvement among your staffing suppliers. *Contingent Workforce Strategies*, 2(4), 15-16.
- Finkelman, J. M. (2005). What makes a good VOP program before you can demand one. *Contingent Workforce Strategies*, 2(5), 12-13.
- Finkelman, J. M. (2005). When business is good, assembling a workforce can be difficult. *Contingent Workforce Strategies*, 2(6), 12-14.
- Finkelman, J. M. (2005). The good, the bad and the need to make a change. *Contingent Workforce Strategies* 2(7), 10-11.
- Finkelman, J.M. (2005). How well does training work? Make sure to evaluate training programs – your own and your staffing supplier's. *Contingent Workforce Strategies*. 10-11.

- Finkelman, J.M. (2005). Keep an eye on your VOP. *Contingent Workforce Strategies*. 10-11.
- Finkelman, J. M. (2005). When business is good, assembling a workforce can be difficult. *Contingent Workforce Strategies*. 12-14.
- Finkelman, J.M. (2006, July/August). Bigger isn't always better. *Contingent Workforce Strategies*. 3(6). 12-13.
- Finkelman, J. M. & Lowman, R. (2006, June). Ethical conduct in staffing. *Staffing Industry Review (SIReview)*. XI (5).23-26.
- Finkelman, J.M. (2006) Divorcing a supplier is painful, but respect the rule. *Contingent Workforce Strategies*. 3(4). 14-15.
- Finkelman, J.M. (2006) Think carefully before making a move. *Contingent Workforce Strategies*. 3(3), 12-13.
- Finkelman, J. M. (2006). Is vendor neutrality possible? *Contingent Workforce Strategies*, 3(2), 12-13.
- Finkelman, J. M. (2007, June). It's still the Money, Stupid! *Staffing Industry Review (SIReview)*, 12-20.
- Finkelman, J.M. (2007). Employment and discrimination litigation: The dysfunctional side of workplace diversity. In H. Hall (Ed.), *Forensic Psychology and Neuropsychology for Criminal and Civil Cases* (pp.548-564). Boca Raton, FL: Taylor and Francis Group.
- Finkelman, J.M. (2007). Discrimination, harassment, and retaliation: The dysfunctional side of diversity. *Consulting Psychology Journal: Practice and Research*. Vol 59(4), Dec 2007, 254-260.
- Finkelman, J.M. (2008, February). Taming the reckless leader: Inoculate your company against sexual and racial harassment claims. *Leadership Excellence*, February 2008, 19.
- Finkelman, J. M. (2008, March). Guerrilla Recruiting *Staffing Industry Review (SIReview)*, Vol. XIV No 3.
- Finkelman, J.M. (2008, June). So Who Is Responsible for Selling Staffing Services? *Staffing Industry Review (SIReview)*, in press.
- Finkelman, J.M. (2008, July). Negative charismatic leaders. *Leadership Excellence*.

Goodrich, J., Finkelman, J.M. (2008, September). Global leadership strategies and executive coaching as contingency approaches to create and build a culture of peace within organizations. Publication in the World Council for Curriculum and Instruction (WCCI) Conference Proceedings. Judith Johnson and Ismail Mirici (Eds).

Goodrich, J., Finkelman, J.M (2008). Preparing new leaders for a sustainable world – Implications of executive coaching. For submission to The Psychologist Manager Journal (TPMJ).

Finkelman, J.M. & Troper, J. (2009, June). The 7 Attributes of Highly Competitive Staffing Firms: Excerpts from the Forthcoming Book. Staffing Industry Review (SIReview), 39—49. Vol. XIV No 6.

Finkelman, J.M. & Troper, J. (2009, July). The 7 Attributes of Highly Competitive Staffing Firms: How to Lead. Staffing Industry Review (SIReview), 30—42. Vol. XIV No 7.

Finkelman, J.M. & Troper, J. (2009, August). The 7 Attributes of Highly Competitive Staffing Firms: Building Relationships. Staffing Industry Review (SIReview), 26—34. Vol. XIV No 8.

Finkelman, J.M. & Troper, J. (2009, September). The 7 Attributes of Highly Competitive Staffing Firms: Providing Services. Staffing Industry Review (SIReview), 50—60. Vol. XIV No 9.

Finkelman, J.M. & Troper, J. (2009, October). The 7 Attributes of Highly Competitive Staffing Firms: Marketing and branding the Company and its services. Staffing Industry Review (SIReview), 48—64. Vol. XIV No 10.

Finkelman, J.M. & Troper, J. (2009, November). The 7 Attributes of Highly Competitive Staffing Firms: Exploiting Technology. Staffing Industry Review (SIReview), 44—58. Vol. XIV No 11.

Finkelman, J.M. & Troper, J. (2010, January). The 7 Attributes of Highly Competitive Staffing Firms: Mitigating Risk. Staffing Industry Review (SIReview), 24-32. Vol. XV No 1.

Finkelman, J.M. & Troper, J. (2010, February). The 7 Attributes of Highly Competitive Staffing Firms: Managing Growth Profitably. Staffing Industry Review (SIReview), 28-35. Vol. XV No 2.

Finkelman, J.M., & Troper, J. (2010). The 7 Attributes of Highly Competitive Staffing Firms. Mountain View, CA: Crain Communications, Inc.

Finkelman, J.M. (2010b). Litigation consulting: Expanding beyond jury selection to trial strategy and tactics. *Consulting Psychology Journal*, 62, 12-20.

Finkelman, J.M. (2010a). New and emerging practices in consulting psychology. *Consulting Psychology Journal*, 62, 1-3.

Finkelman, J.M. (Special Issue Ed.). (2010). New and emerging practices in consulting psychology [Special Issue]. *Consulting Psychology Journal*. 62.

Finkelman, J.M. (2010, March/April). What the jury hears in employment litigation – And why they can't easily be fooled. *The California Psychologist*. 43(2), 32-33.

Finkelman, J.M. (2010, April-June). The need for consistency to avoid the perception of impropriety in recruiting. *The Psychologist-Manager Journal*, 13(2), 111-116.

Finkelman, J.M., Kelly, L. (2010, September/October). Do Psychologists make good managers? Perhaps... Perhaps not. Featured Article. *The California Psychologist*, 43(5), 25-27.

Finkelman, J.M., Kelly, L. (2011, In Press). The psychology of rule-breaking behavior in organizations. In A. Stachowicz-Stanusch & C. Wankel (Eds.) *Management education for integrity*.

Expert Testimony (1975- 2011)

Trials

1975 P NYS Human Rights Commission v. Suffolk County (Racial Discrimination) NY Supreme Court

1978-80 P NYC v. Local 22 Sheet Metal Trade Union (Racial Discrimination/Human Factors)

1978 D NYS Employees Union v. NYS Civil Service Commission (Psychometrics)

1980 D Police Guardians v. NYC (Racial Discrimination) Federal Court 2nd District NY

1988 D Sutherland v. Arthur Young Accounting (Sexual Discrimination/Constructive Discharge) Wash. DC

1992-93 P Parker & Beeson v. Miller Beer (Wrongful Termination) Norwalk Superior Court

1993 P Bonsangue v. ADP (Age Discrimination/Constructive Discharge) LA Superior Court

1993 P Cobb v. USC (Racial Discrimination/Constructive Discharge) LA Superior Court

1993 D Rothenberg v. Saturn (Sexual Harassment) LA Superior Court

1995 P Schneider v. Hormel (Age Discrimination) testimony perpetuated for trial – District Ct New Orleans

1995 D Doerr v. J.C.Penney (Age Discrimination) Orange County Superior Court

1997 D Bahsoun v. Dean Wilkinson, Metropolitan Auto Center (Racial Discrimination) Bench Trial

1997 D Barklage & McCard v. Birraporettis (Sexual Harassment) Orange County Superior Court

2000 P Ishimaru v. Vario (Breach of Contract/Negligence) Santa Clara Superior Court

2000 P Bruns v. Henry (Human Factors) Solano County Superior Court

2001 P Pineda v. Able Building Maintenance Co. (Gender Discrimination) San Francisco Superior Court

2001 P Farmer v. Add Staff (Negligent Background Checking/Negligent Misrepresentation) Colorado District Court

2001 D Moore v. County of Nevada (Constructive Discharge-Damages) Nevada County Superior Court

2001 D Synergy Staffing v. Westaff (Staffing-Damages) Binding Arbitration – San Francisco

2002 P Kotla v. Regents Univ. of Cal. DbA LLNL (Gender Discrimination/Wrongful Termination/Whistler Blower) Alameda Superior Court

2002 D May v. Cal. State Univ. (Monterey Bay) (Racial Discrimination /ADA/Retaliation /Wrongful Term) Monterey Superior Court

2002 D Goodman v. Tickets.com (Wrongful Termination/Breach of Contract) Los Angeles Superior Court

2002 D Foti v. Aventis Pharmaceuticals (ADA/Constructive Discharge) Marin Superior Court

2002 P Mascarenas v. Kaiser Permante (Racial Discrimination/Constructive Discharge) Alameda Superior Court

2002 P Sims v. National University (Retaliation/Whistle Blower) Binding Arbitration – San Francisco Superior Court

2003 D Kennedy v. Chevron U.S.A. (Conflict of Interest/Retaliation/Wrongful Termination) Contra Costa Superior Court

2003 D Hobbs v. HRS (Gender Discrimination/Retaliation/Harassment) San Francisco Superior Court

2004 P Pico v. UC Regents dba LLNL (ADA/Wrongful Termination) Alameda Superior Court

2005 D Norwood v. Stanford (Race Discrimination/Retaliation) US District Court No. District of CA

2005 P Kotla v. Regents Univ. of Cal. Dbal LLNL (Gender Discrimination/Wrongful Termination/Whistler Blower) Alameda Superior Court

2005 P Garcia v. Napa County Juvenile Hall (Sexual Harassment/Retaliation) Napa County Superior Court

2005 D Hayes v. UCSF / Regents (Assault, Harassment) San Francisco Superior Court

2005 P Davenport v. Donald T. Sterling / Beverly Hills Properties (Sexual Harassment/Wrongful Termination/Retaliation) LA Superior Court

2006 D Irving v. City of Sacramento (Gender Discrimination/Sexual Harassment/ Retaliation) Sacramento Superior Court

2006 P Gant v. Pinal County-Sheriff Vanderpool (Race Discrimination/ Harassment) US District Court – District of Arizona

2007 P Powers & McCarthy, et al., v. U.S. Department of Transportation / FAA (Age and Gender Discrimination) Chicago District Court, EEOC

2007 D San Juan v. Magic Plastics (Sexual Harassment/Sexual Orientation Discrimination) Los Angeles Superior Court

2007 P Petrovska v. Loma Linda University (Disability Discrimination in Medical School)

2008 D Ausman v. Lake Elsinore Unified School District (Harassment/Retaliation)

2008 D. Narayan v. City of Sacramento (Race Discrimination/Retaliation) Sacramento Superior Court

2009 P Taylor et al. v. Social Security Administration (Race & Gender Discrimination) Baltimore District Court EEOC

2009 P Wiley v. Trendwest (Retaliation, Age Discrimination, Disability Discrimination) Contra Costa County Superior Court

2009 P Phillips v. Alameda County Social Services (Wrongful Termination, Retaliation, Discrimination)

2010 P Landau v. County of Riverside (Disability Discrimination, Retaliation, Medical Leave, Age Discrimination, Failure to Pay Overtime) United States District Court, Central District of California

2010 D Cartwright v. UC Regents (Race and Gender Discrimination, Retaliation) United States District Court for the Eastern District of California

2010 D Veroness v Lucasfilm (Gender/Pregnancy/Disability Discrimination and Retaliation) County of Marin Superior Court

2011 P Martin v. Ricoh American Corporation, et al. (Age and Race Discrimination)

2011 D Gutierrez v. Meadows of Napa Valley (Exempt Status, Wage and Hours) California Superior Court, County of Napa

Depositions (1992-2011 only)

- 1992 P Straley v. Becton-Dickinson (Human Factors/Employment Practices)
- 1992 P Hollway v. Snelling (Negligent Hiring/Retention)
- 1992 P Mauer v. Western Industrial Management (Human Factors/Sexual Discrimination)
- 1992 D Jolley v. Grubb & Ellis (Wrongful Termination/Conflict of Interest)
- 1992 P Jimeno v. Mobil Oil Corporation (Human Factors/Disability Discrimination)
- 1993 P Rupp v. Nordstrom (Wrongful Termination/Sexual Preference)
- 1993 P IBM v. Zachariades (Conflict of Interest)
- 1993 D Thompson v. Thrifty Corporation (Constructive Discharge)
- 1993 P Cobb v. USC (Racial Discrimination/Constructive Discharge)
- 1993 P. Bonsangue v. ADP (Constructive Discharge/Age Discrimination)
- 1994 D Tahvildari v. First Interstate Bank of California (Wrongful Termination/Discrimination)
- 1994 D Anderson v. Thrifty (Constructive Discharge/Sexual Discrimination)
- 1994 P Rothman v. Ocean House (Negligent Hiring/Retention)
- 1994 D Phelps v. Lewis, D'Amato, Brisbois & Bisgaard (Wrongful Termination/Sexual Discrimination)
- 1994 D Rothenberg v. Saturn (Sexual Harassment)
- 1995 D Rodriguez v. Thrifty Corporation (Sexual Harassment)
- 1995 P Nemeth v. International Union of Operating Engineers (Sexual Harassment)
- 1995 D Doerr v. J.C. Penney (Age Discrimination)
- 1995 D Martin v. Texaco (Sexual Discrimination)
- 1996 D John Doe v. Randolph & Hein (Wrongful Termination/AIDS Discrimination)
- 1996 D Garringer v. Viking Freight System (Wrongful Termination)
- 1997 D Pederson v. National Broadcast Company (Age Discrimination)
- 1998 D Pedroza v. Fashion 21 (Racial Discrimination)
- 1998 D Amador v. County of L.A. (Age & National Origin Discrimination)

- 1998 D Cawthon v. Community Housing Services (Sexual Harassment/Discrimination)
- 1999 D Warr v. Intermountain Staffing (Negligent Background)
- 1999 D A.Z. v. Libertas Healthcare Facility (Negligent Hiring)
- 1999 P Folb v. Motion Picture Industry Pension & Health Plans (Age Discrimination /Wrongful Termination)
- 1999 D Ramsey v. WMC Mortgage Corp (Sexual Harassment)
- 1999 P Pagter v. First Alliance Mortgage Co. (Fraud/Negligent Misrepresentation)
- 2000 P Lappa v. Regents Univ. of Cal. Db a LLNL (Constructive Termination/Whistle Blower)
- 2000 P Bruns v. Henry – Arbitration Hearing (Human Factors)
- 2000 P Ishimaru v. Vario Inc. (Breach of Contract/Negligence)
- 2000 D Goodman v. Tickets.com (Wrongful Termination/Breach of Contract)
- 2000 P Bruns v. Henry (Human Factors)
- 2000 P Ramirez v. Kroonen (Racial Discrimination)
- 2001 P Salem v. NASD (Contract/Age Discrimination)
- 2001 D Express Staffing Services v. Hill (Staffing Franchise/Conspiracy)
- 2001 P Farmer v. Add Staff (Negligent Background Checking/Negligent Representation)
- 2001 D Moore v. County of Nevada (Constructive Discharge)
- 2001 P Creggett v. Tosco Refining Company (Wrongful Termination/Whistle Blower)
- 2001 D Perry v. Marriott (Sexual Harassment/Discrimination)
- 2001 P Kotla v. Regents Univ. of Cal. Db a LLNL (Gender Discrimination/Wrongful Termination/Whistle Blower)
- 2000 D May v. Trustees of Cal. State Univ. (Monterey Bay) (Racial Discrimination/ADA/ Retaliation/Wrongful Termination)
- 2002 D Swet v. Starwood Hotels (Sexual Harassment)
- 2002 P Sims v. National University (Wrongful Termination/Whistle Blower)
- 2002 D Foti v. Aventis Pharmaceuticals (Constructive Termination/ADA)
- 2002 P Garner v. Univ. of Cal. (Santa Cruz) (Racial Discrimination)
- 2002 P Mascarenas v. Kaiser (Racial/Religious Discrimination & Harassment)
- 2002 D Haddock v. Thrifty Payless (Age Discrimination)

- 2003 D Ortiz v. Roadway Express (Race Harassment/Retaliation)
- 2003 D Richter v. Wink Communications (Gender Discrimination/Retaliation)
- 2003 D Hobbs v. URS (Gender Discrimination/Retaliation/Harassment)
- 2003 D Woo v. Southbayside System Authority (Gender Discrimination/Retaliation)
- 2004 D Jeffries v. Santa Clara Water District (Race Discrimination/Retaliation)
- 2004 Pico v. UC Regents dba LLNL (ADA/Wrongful Termination)
- 2004 D Rivera v. NIBCO (Discrimination/Literacy)
- 2004 P Johnson v. Department of Corrections (Race/Gender Discrimination/Harassment/Retaliation)
- 2004 D Thornquist v. The University of California, UCSF-Fresno (Disability Discrimination, Retaliation, Defamation)
- 2004 D Dao v. The University of California, Berkeley (Disability Discrimination, Wrongful Termination)
- 2005 P Johnson v. Dept. of Corrections (Race/Gender Discrimination /Harassment/Retaliation)
- 2005 P Garcia v. Pepsi (Racial Discrimination/Harassment/Retaliation)
- 2005 P Kotla v. Regents Univ. of Cal. DbA LLNL (Gender Discrimination/Wrongful Termination/Whistle Blower)
- 2005 P Garcia v. Napa County Juvenile Hall (Sexual Harassment/Retaliation)
- 2005 P Davenport v. Donald T. Sterling (Sexual Harassment/Retaliation)
- 2005 D Irving v. City of Sacramento (Gender Discrimination/Sexual Harassment/ Retaliation)
- 2006 P West v. Torrance Unified School District (Racial Discrimination/Retaliation)
- 2006 P Deshera v. California State Automobile Assoc. (Wrongful Termination /Racial Discrimination)
- 2006 P Cromer v. LFP (Sexual Discrimination/Retaliation)
- 2007 P Chicago Police Fund v. Apollo Group, Inc. (Failure to Disclose Material Information / Incentive Compensation Issues)
- 2007 P Powers & McCarthy, et al., v. U.S. Department of Transportation / FAA (Age and Gender Discrimination)
- 2007 P Petrovska v. Loma Linda University (Disability Discrimination in Medical School)
- 2007 D Ausman v. Lake Elsinore Unified School District (Harassment/Retaliation)
- 2008 P Taylor et al. v. Social Security Administration (Race & Gender Discrimination)

- 2008 D Acosta v. Fashion World (National Origin Discrimination, Sexual harassment, Retaliation, Wrongful Termination)
- 2008 P Bishop v. Windham Worldwide/Trendwest Resorts (Disability/Association Discrimination, FMLA Violation, Wrongful Term, Retaliation, Harassment)
- 2008 P Wiley v. Trendwest (Retaliation, Age Discrimination, Disability Discrimination)
- 2008 P Landau v. County of Riverside (Disability Discrimination, Retaliation, Medical Leave, Age Discrimination, Failure to Pay Overtime)
- 2008 P Belshe v Ojai Valley School (Discrimination and Retaliation)
- 2009 P Tammi Heron v. Richard Niner, Niner Wine Estates (Sexual Harassment, Constructive Discharge)
- 2009 D Cambra v Chevron International Exploration (Race Discrimination and Retaliation)
- 2009 P Phillips v. Alameda County Social Services (Wrongful Termination, Retaliation, Discrimination)
- 2009 P SOC-SMG v. Christian and Timbers (Breach of Contract, Negligence, Breach of Fiduciary Duty, Intentional Misrepresentation and Concealment, Negligent Misrepresentation)
- 2010 P Loftin & Li vs. Trendwest/Windham Worldwide Corp. (Gender & Race Discrimination, Sexual & Race Harassment)
- 2010 P Adame et al. v. Bank of America (Race Discrimination, Retaliation)
- 2011 P Heffington et al. v. Precision Health Imaging (Pregnancy Discrimination, Gender Discrimination, Disability Discrimination)
- 2011 D West v. City of Sacramento (Disability Discrimination, Gender Discrimination)
- 2011 P Martin v. Ricoh American Corporation, et al. (Age and Race Discrimination)
- 2011 D Gutierrez v. The Meadows of Napa Valley (Age & Race Discrimination, Wage and Hour Violations)
- 2011 P Willis v. Santa Fe Protective Services (Age Discrimination)
- 2011 D Gutierrez v. Meadows of Napa Valley (Exempt Status, Wage and Hours)
- 2011 D Majeske v. DRS Technologies (Age Discrimination)

SCOPE OF ENGAGEMENT

I was asked to review the hiring, promotional, and discipline policies of Amtrak, with respect to the Plaintiffs and class members in this lawsuit, and determine

whether or not they were consistent with generally accepted Human Resource Management practices and the principles of Industrial-Organizational Psychology that are applicable to hiring, promotion, and discipline.

CASE SUMMARY

Plaintiffs filed this lawsuit against the National Railroad Passenger Corporation ("AMTRAK") in November of 1998, alleging class-wide race discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 28 U.S.C. Sec. 2000e, *et. seq.*, and the Civil Rights Act of 1866, 42 U.S.C. Sec. 1981. *The proposed class in this case is composed of incumbent and former employees of AMTRAK who work or have worked, or applicants who have applied for work, in collective bargaining agreement-covered positions throughout the AMTRAK system, excluding the Northeast Corridor. The various labor organizations representing hourly employees at AMTRAK are nominally Defendants in this case, with the exception of the Pennsylvania Federation of Maintenance of Way Employees, which is a party-Plaintiff. The union's joinder was necessary because the relief sought by the Plaintiffs includes injunctive relief involving workplace changes that may affect, or be affected by, existing collective bargaining agreements; hence, without the unions "the court cannot accord complete relief among existing parties." Fed.R.Civ.P. 19(a)(1)(A).*

The present case is the third, and largest, in a trilogy of employment race discrimination cases against AMTRAK. From 1998 to 2000, Thornton, et.al. v. National Railroad Passenger Corporation, No. 98-00890 (D.D.C. filed April 8, 1998) was litigated in the United States District Court for the District of Columbia. Thornton addressed race discrimination against African-American track workers belonging to the Pennsylvania Federation of Maintenance of Way Employees and working for AMTRAK in its Northeast Corridor. Thornton was settled for \$16,000,000 (\$10,000,000 as an award to the Thornton Plaintiffs and Thornton class and \$6,000,000 in attorneys' fees and costs for the litigation and monitoring) and certain injunctive relief, all pursuant to a Consent Decree, which was originally to be in effect from July 1, 2000 to July 1, 2004, but was extended by the United States District Court for the District of Columbia until July 31, 2005. Thornton, No. 98-00890 (D.D.C. June 21, 2000)(order approving consent decree).

From 1998 to 1999, McLaurin, et.al. v. National Railroad Passenger Corporation, No. 98-02019 (D.D.C. filed August 20, 1998), addressing race discrimination in *inter alia*, promotions, discipline and the creation of a hostile work environment against management-level positions and applicants for management-level positions at AMTRAK nation-wide, was litigated in the United States District Court for the District of Columbia. McLaurin was settled for \$8,000,000 (of which \$5,000,000 was awarded to the McLaurin Plaintiffs and McLaurin class and \$3,000,000 in attorneys' fees and costs for the litigation and monitoring) and

certain injunctive relief, all pursuant to a Consent Decree that was in effect from November 2, 1999 to November 2, 2003,

The present case, Campbell, et.al. v. National Railroad Passenger Corporation, encompasses the African-American workers of AMTRAK who were not covered by either Thornton or McLaurin, i.e., those who work or have worked, or applied to work, in collective bargaining agreement-covered positions throughout the AMTRAK system, excluding the Northeast Corridor.

OPINIONS

Human resources management is a sub discipline of Industrial/Organizational Psychology. Over the years there has evolved a pattern of policies and practices that are consistent with good human resource management policies and practice, including incentive compensation and wage and hour issues. While there is typically more than one acceptable way to accomplish human resource objectives, there are absolute prohibitions on discriminatory practices or consequences that adversely impact employees - based on gender, age, race, etc. - and, of course, on sexual or racial harassment and on retaliation.

In essence, good human resource management practices are primarily designed to preclude opportunities for discrimination, harassment and retaliation. Thus, human resource policies and practices that are considered to be consistent with generally accepted human resource management policies and practices - are those that protect against unlawful discrimination, harassment and retaliation.

Human resource management has a dual constituency and dual responsibilities within organizations. It must safeguard the rights of employees and protect them from unlawful practices (discrimination, harassment and retaliation) while also protecting the organizations from the liability associated with improper policies and practices. Typically, the best way to accomplish both objectives is to insure that good human resource management policies and practices are in place - namely ones that protect employees from discrimination, harassment and retaliation. Amtrak has not accomplished either objective, in my opinion.

Generally accepted human resource management practices allow for a variety of approaches to accomplish these objectives. These include such techniques as validation of hiring and promotion measurement devices based on a professionally conducted job analysis, preventive training, vigilant monitoring, management coaching, proper postings of employee rights and complaint channels, effective employee and management manuals, prompt and effective investigations of allegations of improper conduct, user friendly complaint procedures and mechanisms, appropriate disciplinary procedures and mechanisms to preclude retaliation, among others. Based on the documents and deposition testimony that I have reviewed, Amtrak did not appear to have adequate mechanisms in place to accomplish these objectives.

A few specific observations are in order:

- I reviewed multiple declarations alleging that class members complained about their alleged discriminatory, harassing, and retaliatory treatment and the vast majority of the time, nothing was done about their complaints. This observation was consistent among nearly all Plaintiffs and class members. The majority of the time, these complaints appear to either have been completely ignored by their supervisors or only partially investigated. Even when some investigation was done and the complaint was confirmed, the perpetrator of the discriminatory action, harassment, or retaliation was disciplined so superficially as to be meaningless. This type and level of response is not consistent with generally acceptable human resource management practice.
- To my knowledge, a common technique used by organizations practicing discrimination is to conduct inadequate investigations of complaints of discriminatory practices, and/or not appropriately punishing wrongdoers when they are identified and deemed to be guilty.
- I could not find evidence in the documents that I reviewed that Amtrak properly trained its managers in proper EEO reporting procedures or how to handle EEO complaints from subordinates. This is an essential requirement from a human resource management perspective.

- Denying promotional opportunities to employees who are subject to a disciplinary investigation is a rather equivocal process that requires extra vigilance from human resources in order to be sure that employees who are not found guilty are afforded the same opportunity as those who were not subjected to the investigation to begin with. This is especially the case when certain employees are inequitably investigated for discriminatory reasons. This has been an issue with many African Americans at Amtrak. As an example, Christopher Clipper, a Conductor in Portland, was not permitted to apply for a promotion to Locomotive Engineer because of a pending investigation.
- Human resources has an obligation to control – and preferably eliminate – the use of subjective judgment criteria for any personnel decision-making process. These include, but are not limited to selection, training, performance evaluation, transfer and promotional recommendations. There is an affirmative obligation to take action to avoid the likelihood that racial stereotypes and discrimination creep into any process that has the potential for adverse impact on a protected group class, especially when decision-makers do not represent the members of that class. Based on what counsel for plaintiffs has told me, this has occurred with Amtrak, which has a predominantly White management structure.
- Tom Guerin (Manager of Station Operations, Washington, D.C.), uses rating forms that are sometimes filled out by each interviewer and sometimes they are jointly agreed upon. The overall rating is derived from averaging six factors. (Guerin Dep., pp. 32, 35, 37-40, 46) From an industrial psychology and human resource management perspective, this inconsistent methodology is highly vulnerable to discriminatory bias. Furthermore, the averaging of factors to comprise an overall rating needs to be supported by statistical weighting analysis, and should not simply be an arithmetic average, which would require an empirical demonstration that all six factors have an equal weight in predicting job success. A stepwise multiple regression analysis should have been used to determine appropriate weightings.
- Robert Frank (Assistant Superintendent, Mechanical, Ivy City, District of Columbia), fills out ratings at the end of each interview and decides the overall rating based on his general impressions after the interview is

complete. Selection does not appear to be based on the individual ratings. (Frank Dep., pp. 53, 55-56) This is not an acceptable procedure because of the inherent subjectivity and lack of a consistent structured methodology being used to determine the ratings and to make the final selection decisions.

- Bernard Campbell (Assistant Terminal Superintendent/Terminal Manager/General Foreman, Washington, D.C. and Ivy City, District of Columbia), does not use numerical ratings or rankings of candidates. Rather, he creates his own scale in which candidates are rated as poor, good, or in the middle range. Mr. Campbell essentially picks from what he believes are the best candidates that come into the room. (B. Campbell Dep., pp. 31-32, 45-46, 52.) Regardless of whether or not he intended to be fair, his procedure is very subjective and thus vulnerable to discriminatory decision-making. It is certainly not consistent with acceptable Industrial-Organizational or HRM practices.
- Jack Wilson (Superintendent of Road Operations, Los Angeles, California), uses a rating scale from 1 to 5; assigns a numerical value to each question, totals it up, and then averages it. At the end of the interview, the panel discusses the candidate's response to each question and comes up with a consensus and a written summary of the notes of all panel members, which is given to Human Resources. (Wilson Dep., pp. 64-84) There are a number of concerns and vulnerabilities inherent in this process. First, there is no documentation of the training for raters. Then there is the question of how Mr. Wilson determines the numerical value of each question. It seems as though he is generating his own unscientific, weighted rating scale, and without the required foundation of a professionally conducted job analysis or a statistical analysis to determine the appropriate weightings. This is obviously not an acceptable Industrial Psychology or HRM practice.
- Barney Blair (Manager of Crew Base, Los Angeles, California), first looks at test results and a panel then conducts interviews. Each panel member rates each individual interviewed separately, on scales of either 1 to 4 or 1 to 5. Then all panel members discuss each candidate's responses to each question and come to an agreement on a score. They then total the numbers and discuss whether they recommend the candidate or not. If there is a tie, usually the department manager decides who to select. (Blair Dep., pp. 63-70, 72-75, 83) This procedure has essentially the same

vulnerabilities that have been previously described. The two different rating scales are illogical and indefensible from an I-O Psychology perspective. The structure of the candidate discussions is not provided. You can't combine different rating scales without standardizing them. The process is subjective and vulnerable to discrimination. Allowing the department manager to break ties is similarly precarious with respect to preventing biased decision-making.

- Richard Zajic (Trainmaster, Los Angeles, California), notes that HR provides questions for the candidate interviews. Panel members alternate asking questions and whoever asks the question takes notes of the responses of candidates. Each panel member fills out a rating sheet, but there is no overall rating. Rather, each panel member decides either to recommend or not to recommend the candidate, making this assessment before discussing it with the other panel members. Human Resources collects the rating sheets after each interview. After all interviews are completed, there is a discussion of all the candidates, with Human Resources providing a sheet ranking the candidates in order of their scores (all scores added up). When Human Resources comes back with a compilation of scores, the panel members compare the compilation with the resumes and background checks and decide to whom to make an offer. (Zalic Dep., pp. 29-40, 48-50) From an I-O Psychology and HRM perspective, this is yet another unstructured and non-standardized approach to selection, which allows for subjectivity and uncontrolled discriminatory decision-making.
- Robert Olson (Assistant Signal Engineer, Chicago, Illinois), notes that the interview panel consists of the manager(s) who are filling the job and a member of HR. Interview questions are developed from the resume and job application and the candidate's response during interview. Questions are not written down. The panel discusses each individual after each interview and then all interviews after all of the interviews have been completed, and then reaches a consensus on whom to select. (Olson Dep., pp.43, 47, 50-52) Once again, there appears to be no standardization or controls on the hiring process that might serve to protect against discrimination or bias.

- James Allen (Assistant Superintendent, Chicago, Illinois), reports that Interview panels consists of the Department Manager and from 1 to 5 HR representatives. Questions asked to candidates come from a pre-printed form provided by HR. The same questions are asked to each candidate. Only the questions on the pre-printed form can be asked. Candidates are rated from 1 to 5 on each response to each question and overall. The ratings for each response are purely subjective, however. There is no written standard for evaluating interpersonal skills or motivation. (Allen Dep., pp.34-35, 44-45, 49-50, 53-55, 58-61, 72-78, 86-96) From an I-O Psychology and HRM perspective, the consistency of questions is good, but it is effectively undermined by subjective ratings and apparently, no rubric or standards for evaluation.
- Sheila Davidson, head of HR for the Amtrak NEC (Northeast Corridor), testifies that the interviewer(s) may seek input from other persons outside the selection process. (Davidson Dep., pp. 116-17; 126-29) This further undermines the selection process, which is already excessively subjective, by introducing an uncontrolled, unstructured, undocumented, and unreviewable element. This type of input easily permits the infusion of bias by either the manager consulted or the manager interpreting the input. It is not an acceptable human resource management practice.
- From a human resource management perspective, employers have an obligation to reduce adverse impact wherever possible and to search for alternative approaches to any process that lessen such impact. I did not see evidence that Amtrak made the effort to reduce adverse impact or consider alternatives with lesser impact. Obviously, if the adverse impact is deliberate – or based on discriminatory stereotypes – the violation of generally acceptable HR policies and practices is even more egregious.
- It is inappropriate, from a human resource management perspective, to utilize selective training or any other discriminatory process, in order to restrict protective group members from equal eligibility for promotion, hiring or salary increases.
- Similarly, the withholding of training opportunities to make protected class members effectively less qualified for promotion is contrary to generally acceptable HR management practices. A derivation of this practice that is

alleged by plaintiffs and class members is selectively withholding essential portions of a training agenda, necessary to pass promotional requirements, in order to disadvantage protected class members, such as Mr. Campbell.

- Job and promotional opportunities must be shared in a non-restrictive fashion with protected class members and not restricted to preferred applicants, or those favored for promotion, in a discriminatory way, according to generally accepted HR policies and practices.
- An essential element of good human resource management practices, with respect to hiring and promotion is to openly post, publish and disseminate information about the opportunities in an equitable and non-discriminatory way that does not favor or advantage a preferred group to the detriment of protected Plaintiffs and class members. Amtrak does not appear to have created a level playing field in this regard.
- Dr. Bradley and Fox's Expert Report also documents the statistically significant adverse impact in the hiring and promoting of African Americans, relative to their non-African American counterparts at Amtrak. African American employees at Amtrak are also charged with disciplinary violations at a rate that is statistically significant as being higher than their non-African American counterparts, resulting in additional adverse impact.

CONCLUSION

The pattern for selection – or more accurately the lack of a pattern – is abundantly clear throughout the specific examples cited throughout this report. They appear to be representative of all the situations, which I was able to review. There is a disturbing and pervasive randomness to the evaluation, selection and discipline procedures that Amtrak apparently uses throughout the system. There are few if any controls against intentional or inadvertent bias or discrimination. The process appears to be highly subjective and unstructured. It is certainly not consistent with generally accepted Human Resource Management practices nor with the professional requirements of Industrial-Organizational Psychology.

I reserve the right to amend this report or file a supplemental report if I receive additional documents to review and/or to comment upon opposing expert reports.

APPENDIX

Documents Relied Upon

3rd Amended Complaint;
Answer to 3rd Amended Complaint;
Deposition of Wanda Hightower and the 4 exhibits attached thereto;
Deposition of Gerri Mason Hall and the 14 exhibits attached thereto;
Deposition of Lorraine Greene and the 74 exhibits attached thereto;
Deposition of Sheila Davidson and the 6 exhibits attached thereto;
Expert Report of Drs. Bradley & Fox

Respectfully Submitted in Los Angeles, February 21, 2012:



Jay Finkelman