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UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

DERRICK SATCHELL, KALINI BOYKIN,
VALERIE BROWN, RICK GONZALES,
CYNTHIA GUERRERO, RACHEL
HUTCHINS, KELVIN SMITH, SR., and KEN
STEVENSON, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

FEDEX EXPRESS, a Delaware Corporation,

Defendant.

Case No. C03-02659 SI; C03-02878 SI

**FEDEX EXPRESS'S OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Date: January 14, 2005

Time: 9:00 a.m.

Honorable Susan Illston

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INTRODUCTION

1
2 Plaintiffs filed this action as an across-the-board, wall-to-wall discrimination action on
3 behalf of African American and Hispanic employees below the senior manager level in FedEx
4 Express's ("FedEx's") Western Region. The premise of plaintiffs' Consolidated Amended
5 Complaint was the erroneous assertion that FedEx had a system-wide practice of "subjective
6 decision-making," characterized by unfettered discretion on the part of local managers, resulting
7 in discrimination against African American and Latino employees. Plaintiffs made this
8 allegation not because they had any evidence that it was true—it is not—but because an
9 allegation of "subject decision-making" had been the basis for class certification in *Butler v.*
10 *Home Depot, Inc.*, and other high-profile discrimination class actions, and plaintiffs sought to
11 ride the coattails of those decisions.

12 FedEx, however, is not Home Depot. To the contrary, discovery has proven that
13 placement, promotion, compensation and discipline decisions at FedEx are driven by *objective*
14 criteria relating directly to the company's core business of delivering packages on time—for
15 example, basic skills tests that measure ability to read a map; performance evaluation scores
16 based on meeting objective delivery or sorting goals; and discipline based on attendance and
17 adherence to safety standards. Thus, while plaintiffs cling to the rhetoric of "subjective decision
18 making," they fail to present any evidence that FedEx has a "standard operating procedure" of
19 intentional discrimination. Instead, the arguments in their Motion for Class Certification have
20 morphed into an attack under adverse impact law of the various facially-neutral objective criteria
21 used at FedEx, such as test scores, performance evaluation scores, and disciplinary records, upon
22 which employment decisions are based. As shown below, these arguments are largely baseless,
23 do not apply generally across the proposed classes, and fail to provide the "significant proof" of
24 class-wide discrimination necessary for class certification.

25 *First*, plaintiffs make no effort in their motion for class certification to support many of
26 the allegations in the Consolidated Amended Complaint. Specifically, for the "Minority
27 Employee Class" they fail to present any proof of:
28

- 1 • Disproportionate initial job assignments to part-time and casual positions;
- 2 • Fewer promotions from hourly to management positions for African Americans; and
- 3 • Assignment of lesser amounts of overtime.

4 With respect to the “Lower Management” proposed class, plaintiffs allege in the
5 Consolidated Amended Complaint the following class-wide discriminatory practices, none of
6 which they support on a class-wide basis:

- 7 • Few promotions to higher-level management positions;
- 8 • Less compensation for the same work with regard to Hispanic lower-level managers;
- 9 • Harsher discipline for Latinos;
- 10 • Discrimination against Latino Operations Managers; and
- 11 • Discrimination against African-American Operations Managers beyond compensation
and discipline.

12 Because plaintiffs have plainly failed to carry their burden of presenting any evidence
13 whatsoever of class-wide discrimination, allegations related to the above claims should be
14 dismissed.

15 **Second**, even where they do attempt to present evidence, plaintiffs do not provide any
16 credible evidence of *class-wide* intentional discrimination in promotion, compensation or
17 discipline decisions. Initially, the focus of their promotion analysis is only to selected jobs of the
18 21 they identify. Then, in order to create “statistical significance,” which is mathematically tied
19 to the size of the sample, plaintiffs improperly include in their analysis decisions prior to the
20 relevant liability period, and based on admittedly incomplete data. Looking at the relevant
21 potential liability period, even according to plaintiffs' analysis, there is *no* statistically significant
22 disparity in (1) promotions of African Americans from Handler to Courier in either 2002 or
23 2003; (2) promotions of Latinos from permanent Handler to Courier in either 2002 or 2003; (3)
24 promotions of Latinos from casual Handler to Courier in either 2002 or 2003; (4) promotions of
25 Latinos from hourly into Operations Manager in either 2002 or 2003; or (5) promotions of
26 African Americans from hourly positions to Operations Manager during any timeframe. Finally,
27
28

1 and perhaps most remarkably, plaintiffs' analysis completely ignores the objective, facially-
2 neutral criteria that form the actual basis for FedEx's employment decisions.

3 **Third**, with respect to compensation, the statistical differences in compensation are
4 attributable to individual performance evaluations, which factor into compensation decisions.
5 Thus, plaintiffs' compensation claims are really an attack on FedEx's performance evaluations.
6 There are 13 different types of performance evaluations used by FedEx for members of the
7 putative classes, all of which have been developed and validated by FedEx's in-house industrial
8 psychologists, and which measure highly objective performance data such as attendance,
9 delivery goals, and flight departure goals. Moreover, the "statistically significant differences" in
10 compensation that result from the performance evaluations that exist in some—but not all—
11 positions have no *practical* significance, depriving them of any objective relevance.

12 **Fourth**, with respect to discipline, it would be impossible to litigate this issue on a class-
13 wide basis. The disciplinary decisions at issue here are imposed on a daily basis by more than
14 800 different first-level managers for a multitude of different reasons, most of which are
15 completely objective in nature. To determine whether the discipline was discriminatory, every
16 instance of discipline would require, in effect, a separate trial on what the employee did (or did
17 not do), and what the manager's motivations were. Moreover, this claim raises enormous
18 conflicts among the proposed classes because more than a third of the managers issuing
19 discipline to the proposed class are minorities.

20 **Fifth**, the named plaintiffs cannot adequately represent the class. None of them have
21 standing to assert many of the claims at issue (for example, none of them failed the basic skills
22 tests and none sought promotions to the relevant jobs during the limitation period), and several
23 have serious disciplinary histories that make them improper class representatives.

24 In summary, plaintiffs have failed to present the "significant proof that an employer
25 operated under a general policy of discrimination" that Rule 23 requires. *Gen. Tel. Co. of the*
26 *Southwest v. Falcon*, 457 U.S. 147, 159, n.15 (1982).
27
28

1 **FACTUAL BACKGROUND**

2 FedEx invented express distribution in 1973 and remains the industry leader by providing
 3 rapid, reliable time-definite delivery of packages, documents and freight to 215 countries.¹
 4 FedEx's extensive air route authorities and transportation infrastructure, combined with its
 5 leading-edge information technologies, make it the world's largest express transportation
 6 company.² FedEx employs more than 134,000 employees and operates approximately 53,500
 7 drop-off locations, 643 aircraft and 48,000 vehicles and trailers in its integrated global network.³

8 **A. FedEx's Operations In The Western Region Are Diverse**

9 Effective November 2003, the Western Region became one of four regions nationwide that
 10 handle express package and freight markets within the FedEx structure. The current Western
 11 Region organization includes fourteen states.⁴ Between 1999 and November 2003—most of the
 12 class period—the Western Region was composed of six states.⁵ The Western Region has four
 13 distinct operations – Domestic Ground Operations (“DGO”), Air Ground Freight Services
 14 (“AGFS”), Air Operations Division, and the Customer Call Centers. Employees from DGO and
 15 AGFS are included in plaintiffs' proposed classes.

16 AGFS is responsible for “ramp” operations at 110 airport facilities, 30 of which are in the
 17 Western Region.⁶ In the Western Region, AGFS is also responsible for the hub package sort
 18 facility at the Oakland, California airport and other major sort facilities where packages are sorted
 19 for distribution to airport facilities around the region. Hourly employees at the sort facilities
 20 include Handlers and Team Leaders who load and unload packages, and Checker/Sorters who use
 21 tracking numbers to sort packages. At the airport facilities, Material Handlers load and off-load
 22 aircraft, Ramp Agents perform weight and balance on aircraft, and Ramp Transport Drivers
 23 (“RTDs”) load and off-load semi-trucks carrying packages between the airport and DGO stations.

24
 25 ¹ Declaration of Robert A. Speroff (“Speroff Decl.”), ¶ 4, attached hereto as Exhibit 1.

26 ² *Id.*

27 ³ *Id.*

28 ⁴ *Id.* ¶ 5 (the Western Region currently consists of California, Alaska, Colorado, Hawaii, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, Montana, Texas, Arizona, and Idaho).

⁵ *Id.* (California, Hawaii, parts of Washington, Oregon, Alaska, and Nevada).

⁶ *Id.* ¶ 7.

1 AGFS RTDs also shuttle freight between ramps and customer locations.⁷ AGFS has its own
 2 management team separate from DGO. In AGFS Western Region, there are a Vice President, six
 3 Managing Directors, 42 Senior Managers, 278 Operations Managers, and 6,935 hourly
 4 employees.⁸ Because of the nature of the operations, AGFS rarely hires casual employees. There
 5 are currently only 66 casual employees in the entire AGFS Western Region.⁹

6 DGO is responsible for the operation of the “sort” (separation of packages for location
 7 delivery) and delivery and pick-up activities at approximately 165 local stations in nine separate
 8 districts in the Western Region.¹⁰ DGO employees in the Western Region perform a wide variety
 9 of work. For example, Couriers load trucks and then drive packages from DGO stations to make
 10 on-time delivery of packages directly to customers in a particular area, and Handlers sort
 11 packages and load and off-load trucks and air craft.¹¹ DGO Western Region has a Vice President,
 12 nine Managing Directors who oversee each of the districts, 90 Senior Managers, 538 Operations
 13 Managers, and 13,088 permanent hourly employees.¹² DGO also hires some “casual” employees,
 14 particularly around the holidays, to handle short early morning and late night sorting operations.¹³
 15 Currently, 1,250 casual employees are listed as active in DGO in the Western Region.¹⁴

16 **B. FedEx Has Exemplary People Policies**

17 FedEx’s more than 400-page People Manual sets forth in great detail the policies that
 18 govern promotion, compensation, performance evaluations, and discipline.¹⁵ Additionally,
 19 because their operational needs are distinct, AGFS and DGO maintain separate People Best
 20 Practices Manuals that cover, among other matters, attendance, basic skills testing,
 21 checkrides/checksits (where managers observe employees in their work environment as part of
 22 the performance evaluation process), the effect of discipline on current performance reviews, the
 23

24 ⁷ *Id.*

25 ⁸ *Id.*

26 ⁹ *Id.*

27 ¹⁰ *Id.* ¶ 12.

28 ¹¹ *Id.*

¹² *Id.*

¹³ *Id.* ¶ 13.

¹⁴ *Id.* ¶ 12-13 (not all active casuals work regularly—some remain active even when they are not working so that if their personal circumstances or operational needs change, they can return to working without having to reapply).

¹⁵ See Declaration of Frederick Douglas (“Douglas Decl.”), Ex. A, attached hereto as Exhibit 2.

1 Survey/Feedback/Action process, and the effect of time in position for promotions.¹⁶ As human
 2 resources (“HR”) professionals in the field receive feedback from employees and managers on
 3 best practices, and as operational needs change, personnel policies are regularly updated.¹⁷ In the
 4 Western Region alone, DGO has 33 HR professionals in the field, and AGFS has 14.¹⁸
 5 Additionally, the team of HR professionals in Memphis support DGO and AGFS operations
 6 respectively in the Western Region.¹⁹

7 FedEx has extensive training programs at all levels ranging from an award-winning new-
 8 hire training program to extensive, mandatory training for all managers. All managers attend a
 9 five-day FedEx Leadership and Management Environment (“FLAME”) training.²⁰ The
 10 comprehensive course covers various employment practices, including candidate selection,
 11 performance reviews, discipline, equal opportunity and diversity, compensation, and
 12 consideration of casual employees for permanent positions.²¹ Additionally, HR professionals in
 13 the field counsel managers in complying with FedEx’s detailed personnel practices.²² Senior
 14 managers also train and counsel managers in conducting performance evaluations, administering
 15 discipline, and other employment issues.²³ In the 2002 and 2003 editions of *Training*, FedEx was
 16 ranked 14 and 22 respectively out of the top 100 training organizations; in 2002 FedEx was
 17 selected “Editors’ Choice” because of its leadership training.²⁴

18 FedEx also monitors management compliance with company policy, and holds
 19 management accountable. **First**, employees take part in a regular, anonymous upward review
 20 process known as the Survey/Feedback/Action (“SFA”) program, which can trigger follow-up
 21 from HR and can affect manager compensation.²⁵ **Second**, Operations Managers are expressly
 22 evaluated by senior managers on compliance with FedEx policies and whether they treat

23 ¹⁶ *Id.*, Exs. B and C; Speroff Decl. ¶ 19.

24 ¹⁷ Speroff Decl. ¶ 19.

25 ¹⁸ *Id.* ¶ 17.

26 ¹⁹ *Id.* ¶ 9.

27 ²⁰ Declaration of Jeff Bartusch ¶¶ 5, 7 attached hereto as Exhibit 3.

28 ²¹ *Id.* ¶ 9.

²² Speroff Decl. ¶ 19.

²³ Declaration of Angela Suazo (“Suazo Decl.”) ¶ 5, attached hereto as Exhibit 4.

²⁴ Declaration of Linda DeBerry (“DeBerry Decl.”) ¶¶ 13, 14, attached hereto as Exhibit 5.

²⁵ Declaration of Jennifer Dembowski, Ph.D. (“Dembowski Decl.”) ¶ 9, attached hereto as Exhibit 6; People Manual § 5-70; Declaration of D. Jan Duffy (“Duffy Decl.”) ¶ 15, attached hereto as Exhibit 7.

1 employees fairly and consistently, which again can affect compensation and trigger follow-up
 2 from HR.²⁶ **Third**, FedEx extensively tracks utilization and provides all managers with
 3 information regarding utilization rates.²⁷ **Fourth**, HR managers in the field monitor manager
 4 compliance with employment policies and recommend action plans where issues are identified.²⁸
 5 **Fifth**, Senior Managers and HR Representatives conduct “Skip Level Meetings” with employees
 6 outside the presence of the Operations Manager where employees are encouraged to voice
 7 concerns, ask questions and make suggestions.²⁹ **Sixth**, FedEx has a formal Open Door process
 8 that encourages employees to communicate concerns about employment issues directly to
 9 management via an on-line system.³⁰ **Seventh**, FedEx has a formal process for employees to
 10 voice concerns or complaints about the application of FedEx’s employment policies (including
 11 selections for promotion, application of compensation and benefits policies, discipline, and
 12 performance reviews) through a Guaranteed Fair Treatment Procedure (“GFTP”).³¹ The GFTP
 13 includes (1) management review, (2) officer review, and (3) an Appeals Board on which the CEO
 14 of FedEx and other senior officers sit every Wednesday to review employee concerns. **Eighth**,
 15 employees may file internal EEO complaints to address any allegations of discrimination.
 16 Complaints are investigated according to detailed procedures under the direction of FedEx’s HR
 17 Compliance group.³² Both the GFT and EEO processes can lead to discipline for the relevant
 18 manager up to and including termination. HR Compliance tracks and monitors GFTs and EEO
 19 complaints, and coordinates follow up on personnel issues.³³

20 FedEx has a team of Ph.D. industrial and organizational psychologists responsible for the
 21
 22

23 ²⁶ Declaration of Jerilyn Hayward, Ph.D. (“Hayward Decl.”) ¶ 19, attached hereto as Exhibit 8; Suazo Decl. ¶¶ 5-6.

24 ²⁷ Declaration of Anita Collins, ¶¶ 4, 6, attached hereto as Exhibit 9.

25 ²⁸ Speroff Decl. ¶ 22.

26 ²⁹ *Id.* ¶¶ 23, 24.

27 ³⁰ *Id.* at 21; People Manual § 5-40.

28 ³¹ Declaration of Gwendolyn Rouzan (“Rouzan Decl.”) ¶¶ 9-14, attached hereto as Exhibit 10; People Manual § 5-5; Deposition of Kelvin Smith (“Smith Dep.”) at 123, attached to Douglas Decl. ¶ 4, Ex. D, (“[I]t’s a procedure that you go through when you feel that your manager is not treating you fairly. You go above him to a second level, and they analyze the situation and evaluate it to see if the manager, in fact, was acting biased or harsh and not being understanding to the situation.”); Duffy Decl. ¶ 14.

³² Rouzan Decl. ¶ 16.

³³ Rouzan Decl. ¶ 21.

1 company's employment testing.³⁴ Over the course of more than 10 years, John Hater, Ph.D.,
2 developed, implemented and conducted validation studies of FedEx's four basic skills tests used
3 to select applicants for certain positions, including conducting four separate predictive validation
4 studies that demonstrated, using different performance criteria, that the tests predict job
5 performance.³⁵ For the last four years, Jerilyn Hayward, Ph.D., has been responsible for
6 validating, updating and implementing the performance evaluations used for hourly and
7 management employees.³⁶ Over the course of the last eight years, David Brooks, Ph.D.,
8 developed, implemented and conducted validation studies of the ASPIRE to management process
9 that allows interested employees to participate in training and testing to ready them to apply for
10 management positions.³⁷ Since April 2003, Jennifer Dembowski, Ph.D., has maintained and
11 developed the Survey/Feedback/Action process.³⁸

12 Outside organizations have repeatedly honored FedEx's commitment to diversity and
13 employee-friendly practices. FedEx has received awards for Top 50 Employers (Minority
14 Engineer); Americas Top Organizations for Multicultural Business Opportunities (Div2000.com);
15 Diversity 100 Recognition Award (Next Step Magazine); Top 100 Companies Providing the Most
16 Opportunities for Hispanics (Hispanic Magazine); 100 Best Companies to Work for in America
17 (Fortune Magazine); 100 Best Corporate Citizens (Business Ethics); World's Most Admired
18 Companies (Fortune Magazine); and Outstanding Corporate Support Award (National Minority
19 Business Counsel).³⁹ Independent management consultant Jan Duffy describes FedEx as the
20 "Gold Standard" of American business with regard to effective management of human resources,
21 discrimination prevention, and promotion of workplace equity.⁴⁰

22
23 ³⁴ Plaintiffs' testing expert, Nita French, emphasized the importance of in-house testing expertise: "the selection
24 procedure itself needs obviously to be based on the jobs that it's going to be used for. In addition, the effectiveness
25 and appropriateness of the selection procedure depends not only on the procedure but also on how it's used over time,
26 and that really needs to be seen to by someone who has contact with the company—either somebody on staff, or
27 someone who is in a regular consulting relationship." (Deposition of Nita French ("French Dep.") at 17, attached to
28 Douglas Decl. ¶ 5, Ex. E.)

³⁵ Deposition of John Hater, Ph.D. at 41, Ex. 72 attached to Douglas Decl. ¶ 6, Ex. F.

³⁶ Hayward Decl. ¶ 3.

³⁷ Deposition of David Brooks, at 9, attached to Douglas Decl. ¶ 6, Ex. G; People Manual § 4-70.

³⁸ Dembowski Decl. ¶ 3.

³⁹ Declaration of Joan Lollar ¶ 6, attached hereto as Exhibit 11; Douglas Decl. ¶ 19, Ex. U.

⁴⁰ Duffy Decl. ¶ 11.

1 **I. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF PRESENTING EVIDENCE**
 2 **SUFFICIENT TO SUPPORT CLASS CERTIFICATION**

3 Plaintiffs have taken a kitchen sink approach to the claims in this case, purporting to
 4 challenge “every aspect” of FedEx’s employment practices for 20 hourly positions and managers.
 5 (Pl. Br. at 1.) Such “across-the-board” class actions are disfavored and must be carefully
 6 scrutinized to ensure compliance with Rule 23. *See, e.g., Falcon*, 457 U.S. 147 (1982); *East Tex.*
 7 *Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977). A class action is an exception to the usual
 8 rule that litigation is conducted on an individual basis. *Falcon*, 457 U.S. at 155. Plaintiffs bear
 9 the burden of proof of establishing that each of the requirements for class certification is met. *Id.*
 10 *at 156; Doninger v. Pac. Northwest Bel, Inc.*, 564 F. 2d 1304, 1309 (9th Cir. 1977). “[T]he class
 11 determination generally involves considerations that are enmeshed in the factual and legal issues
 12 comprising the plaintiff’s cause of action.” *Falcon*, 457 U.S. at 160 (internal quotation marks
 13 omitted).

14 The incredible breadth of plaintiffs’ proposed class does not match up with the spotty
 15 evidence they present to support their request for certification. Indeed, for many of the claims
 16 asserted, plaintiffs have not even attempted to meet their burden. They present no evidence
 17 whatsoever about their claims in the complaint regarding: (1) initial job assignment for either
 18 African Americans or Latinos;⁴¹ (2) movement from full-time to part-time for either African
 19 Americans or Latinos; (3) promotion from hourly into management positions for African
 20 Americans. Plaintiffs have also abandoned their claims on behalf of Latino Operations Managers.
 21 All of those class claims in the Consolidated Amended Complaint therefore should be dismissed.

22 Moreover, plaintiffs’ statistician, Richard Drogin, considered various analyses that showed
 23 no statistically significant disparity between minorities and whites in promotion rates—and
 24 indeed many that showed that minorities were *more likely* than whites to receive promotions—

25 _____
 26 ⁴¹ Plaintiffs have chosen to define the proposed class as consisting of “Latino” employees. None of their analyses,
 27 however, look at Latino employees. FedEx’s employment records contain only a designation of whether an
 28 employee is “Hispanic.” Not all of these individuals are from Latin America, and there is no means of identifying
 Latinos as distinct from Hispanics. Thus, class members are not readily identifiable, which is a fundamental
 requirement for class certification. *See Wanstrath v. Time Warner Entm’t Co.*, 93 Civ. 8538 (KTD) 1997 US Dist.
 LEXIS 3008 (S.D.N.Y. 1997) (denying class certification where inclusion in class could only be determined by
 staging numerous mini-trial). Moreover, their “proof” does not match up with their proposed class.

1 and then selectively chose to present only those statistics that arguably supported plaintiffs'
2 position. For example, Drogin chose *not* to report his findings that:

- 3 • African Americans were more likely than whites to be promoted from hourly
4 positions to management;
- 5 • African American Operations Managers were more likely than whites to be
6 promoted to Senior Manager;
- 7 • Latino Operations Managers were more likely than whites to be promoted to
8 Senior Manager;
- 9 • Latino Handlers were more likely than whites to be promoted to Material
10 Handler—one of the hourly jobs plaintiffs apparently consider desirable;
- 11 • Latino Handlers were more likely than whites to be promoted from Handler to
12 Checker/Sorter—another hourly job plaintiffs apparently consider desirable;
- 13 • Latinos were more likely than whites to be promoted from permanent Handler to
14 Courier—another hourly job plaintiffs apparently consider desirable;
- 15 • Latino customer service employees were more likely than whites to be promoted
16 to Courier;
- 17 • There was no statistically significant disparity in the likelihood that African
18 Americans in Customer Service positions would be promoted to Courier;
- 19 • African American Handlers were virtually equally as likely as whites to obtain
20 promotions to other Handler positions;
- 21 • There was no statistically significant disparity in the likelihood that African
22 American Couriers would be promoted to other Courier positions; and
- 23 • Latino Couriers were more likely than whites to be promoted to other Courier
24 positions.⁴²

25 It is unclear whether plaintiffs have abandoned these claims, as implied by their statistical
26 expert,⁴³ or whether they simply hope that no one notices the overwhelming evidence generated
27 by their own expert demonstrating that promotion rates for minorities are not common across the
28 proposed class and that, in many cases, the evidence demonstrates an *absence* of differential
treatment—a fact that is fatal to plaintiffs' ability to show a common issue across all jobs and all
class members. What is clear is that plaintiffs have presented a small group of cherry-picked
statistical analyses that fail to meet plaintiffs' burden of proof with respect to class certification.

⁴² Deposition of Richard Drogin ("Drogin Dep.") at 101-117, 121-127, 136; Exhibits 2-14, attached to Douglas Decl.
¶ 7, Ex. H.

⁴³ See Drogin Dep. at 33-34.

1 **II. THERE IS NO COMMON EMPLOYMENT PRACTICE IN ISSUE**

2 Class relief is appropriate “when the issues involved are common to the class as a whole
3 and when they turn on questions of law *applicable in the same manner to each member of the*
4 *class.*” *Falcon*, 457 U.S. at 155 (internal quotation marks omitted; emphasis added). Perhaps the
5 best expression of the commonality requirement is to ask whether the evidence by which the class
6 representative can be expected to prove the class claims at trial, as well as the evidence with
7 which the defendant will likely defend itself, is simultaneously applicable to all claims of all class
8 members, *i.e.*, whether “class-wide proof” is possible. *See, e.g., Walsh v. Ford Motor Co.*, 807
9 F.2d 1000, 1011-12 (D.C. Cir. 1986).

10 Plaintiffs here have failed to demonstrate that issues of law and fact are common to the
11 class as a whole. Instead, their claims involve highly distinct challenges to every aspect of
12 FedEx’s employment practices—ranging from promotion decisions, to performance evaluations,
13 to various types of discipline, to compensation—across 165 DGO stations in nine districts
14 covering 14 states, 30 AGFS airport facilities, 20 different job classifications, 13 separate types of
15 performance evaluations, and tens of thousands of employees, raising a staggering number of
16 individualized issues. *See Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 55 (N.D.
17 Cal. 1977) (not finding common questions where the employer covers 13 states with 2,600
18 employees, in California, five manufacturing plants, two distribution centers, approximately 50
19 sales offices and divisional headquarters, with workforce comprising of different occupations).
20 There is no common proof that supports these claims, or the myriad defenses that FedEx would
21 be entitled as a matter of due process to present to defend against them.

22 **A. Plaintiffs' "Subjective Decision Making" Theory Does Not Present A**
23 **Common Issue**

24 Plaintiffs’ theory of class certification is that FedEx’s employment practices are based on
25 “discretionary decision-making without guidance or controls.” (Pl. Br. at 8.) For cases involving
26 claims of an alleged “subjective decision making process” the Supreme Court has stated:

27 *Significant proof* that an employer operated under a general
28 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,

1 such as through *entirely subjective* decisionmaking processes.

2 *Falcon*, 457 U.S. at 159, n. 15. See also *Butler v. Home Depot, Inc.*, Case No. C94-4335 SI, 1996
 3 WL 421436 (N.D. Cal. 1996) (approving class certification on a finding that the evidence
 4 established that defendant's practices were "entirely subjective"). Plaintiffs have not come close
 5 to presenting "significant proof" that FedEx's policies are "entirely subjective." Indeed, the
 6 evidence overwhelmingly shows that employment decisions at FedEx are driven by objective
 7 factors. Moreover, plaintiffs' own expert witness concedes that, even where the policies allow for
 8 some management judgment (an inevitable element at some point in every human decision
 9 making process), there is written policy guidance to decisionmakers.⁴⁴ This is simply not the type
 10 of unfettered discretion that demonstrates a common subjective employment practice. See
 11 *Appleton v. Deloitte & Touche*, 168 F.R.D. 221, 229, 231 (M.D. Tenn. 1996) (where "personnel
 12 decisions are not left to the 'unfettered discretion' of local decisionmakers," they are not
 13 appropriate for class certification).

14 **1. FedEx's Employment Policies Are Driven By Objective Factors**

15 Employment decisions at FedEx are driven by objective factors that relate to its core
 16 business. These policies are spelled out in great detail⁴⁵ in the People Manual, in the DGO People
 17 Best Practices Manual, and in the AGFS People Best Practices Manual.⁴⁶

18 Open positions, for example, are available on-line to all permanent employees in the Job
 19 Change Application Tracking System ("JCATS").⁴⁷ Initially, the candidate is evaluated for
 20 whether he or she meets the objective minimum qualifications. For DGO Couriers, for example,
 21

22 ⁴⁴ Deposition of William Bielby ("Bielby Dep.") at 46-52, attached to Douglas Decl. ¶ 13, Ex. N.

23 ⁴⁵ See Bielby Dep. at 37 ("[FedEx's policies] are written, in many areas they go into a great level of detail and they are
 24 disseminated widely and are . . . considered the authoritative or official company position on how various tasks in the
 company are to be done.").

25 ⁴⁶ The staggering breadth of plaintiffs' proposed class, the complexity of FedEx's employment practices, and page
 26 limitations prevent an exhaustive discussion of the components of each of the hiring practices at FedEx. The People
 Manual provides a good overview; more detailed practices are in the separate People Best Practices Manuals for
 DGO and AGFS.

27 ⁴⁷ See also Bielby Dep. at 137-38 ("In fact I think Wal-Mart has a lot to learn from FedEx in terms of how the
 28 JCATS system works . . . The idea and reality of having a computerized Internet based promotion application system
 in a company as big as FedEx is I think an important lesson for Wal-Mart which is of course a bigger company, but
 you know, would be one that is certainly capable of implementing something like that if they had the commitment to
 do so."); People Manual § 4.

1 the minimum qualifications include a valid drivers license with no reported accidents or moving
 2 violations, and having passed the four basic skills tests. Additionally, a candidate cannot have
 3 any active written warnings or performance reminders unless the discipline is not related to the
 4 job being sought (*e.g.*, an employee may have discipline based on an accident, but that is not
 5 considered if the candidate is applying for a non-driving position).⁴⁸ Discipline too is generally
 6 based on objective factors such as attendance, vehicle accidents, or safety violations.⁴⁹ Managers
 7 issue discipline according to specific, written policies based on observable behaviors.⁵⁰ Then,
 8 after looking at whether the employee meets the minimum requirements for the job, most
 9 promotions are filled based on a standardized formula that creates a Credit Equivalency Value
 10 (“CEV”) score based on (1) time in service with FedEx, and (2) the employee’s last two
 11 performance evaluation scores.⁵¹ For their part, FedEx’s separate hourly performance evaluations
 12 are driven by various objective measures related to each specific job that reflect FedEx’s core
 13 business, such as attendance, on-time delivery performance, and sorting accuracy.⁵²

14 Given the largely objective—not to mention complex—nature of FedEx’s employment
 15 processes, plaintiffs cannot meet their burden of establishing commonality. Indeed, courts have
 16 rejected class certification on a record of far greater subjectivity than what exists at FedEx. *See*
 17 *Bacon v. Honda of America Mfg.*, 370 F.3d 565, 571-72 (6th Cir. 2004) (where objective factors
 18 exist in generally subjective process, commonality and typicality requirements are not met). *See*
 19 *also Garcia v. Veneman*, Case No. 00-2445 (JR), 2004 U.S. Dist LEXIS 18400 (D.D.C. Sept. 10,
 20 2004) (denying class certification where policy involves some objective factors); *Webb v. Merck*
 21 *& Co., Inc.*, 206 F.R.D. 399 (E.D. Pa. 2002) (same); *Abrams v. Kelsey-Seybold Med. Group*, 178
 22 F.R.D. 116 (S.D. Tex. 1997) (same).

23 **2. Plaintiffs Have Utterly Failed To Demonstrate Any Common Culture** 24 **of Discrimination**

25 Plaintiffs base their assertion of a common “culture” of discrimination at FedEx almost

26 ⁴⁸ Speroff Decl. ¶ 31.

⁴⁹ *Id.* ¶ 30.

⁵⁰ *Id.*

⁵¹ Speroff Decl. ¶ 28; People Manual at 178.

⁵² Hayward Decl. ¶ 7; *see also* Bielby Dep. at 30-31 (the Courier performance evaluation assesses “various aspects of the courier’s duties from—it involves not just driving but scanning and on-time performance and things like that”).

1 entirely on (1) the inflammatory testimony of a single former employee that this Court already
2 determined is not relevant to the claims being made here, and (2) speculation by plaintiffs' "social
3 framework" expert, who concedes he has done nothing at all to study the culture of Fed Ex. In
4 stark contrast to this pseudo "evidence," not a single named plaintiff even claims to have heard
5 racial comments from their supervisors.⁵³

6 Knowing that they had no admissible evidence on which to base their sweeping claims
7 about a "culture of discrimination," plaintiffs sought approval from this Court to obtain and use
8 the deposition testimony of Michael Snyder, a disgruntled former employee who resigned and
9 then sought to extract a multi-million dollar settlement from the company. This Court expressly
10 rejected plaintiffs' attempt to use this testimony, holding that (1) Pigors, Rebholz and Weise were
11 not decision makers, (2) the "stray remarks" allegedly occurred "long before" the proposed class
12 liability period, (3) there was no "relationship between the remarks and the employment practices
13 at issue in this litigation that is sufficient to establish relevance," and (4) the testimony was not
14 even calculated to lead to the discovery of admissible evidence.⁵⁴ (*See Order Denying Plaintiffs'*
15 *Motion to Compel Discovery, dated 8/31/04.*)

16 In light of this Court's prior ruling on the very issue of the use of this testimony in this
17 case, plaintiffs' use of this testimony to support their class certification motion is disturbing and
18 raises questions about the adequacy of class counsel to represent the proposed class. The Court
19 should strike the entire portion of the class certification motion related to this testimony (pages 5-
20 9), and strike the portions of Dr. Bielby's expert report that rely on this testimony.

21 Moreover, Dr. Bielby's speculation that bias may infect decisionmaking at FedEx based on
22 this irrelevant evidence does not create any common issue to support class certification. Bielby
23 admits he did nothing to study the culture at FedEx, and he has no opinions about its culture
24

25 ⁵³ *See* Deposition of Kalini Boykin ("Boykin Dep.") at 60-62, 151-52; Deposition of Valerie Brown ("Brown Dep.")
26 at 16-20; Guerrero Dep. ("Guerrero Dep.") at 129-30; Deposition of Rick Gonzales ("Gonzales Dep.") at 47-48, 62;
27 Deposition of Rachel Hutchins ("Hutchins Dep.") at 37; Deposition of Derek Satchell ("Satchell Dep.") at 127-28;
28 Smith Dep. at 37; Deposition of Ken Stevenson ("Stevenson Dep.") at 88-93. Excerpts from the depositions of the
named plaintiffs are attached to the declaration of Frederick Douglas, Exs. I through P.

⁵⁴ Without extending any credibility to this testimony, its nature highlights that a "culture" of discrimination could
operate differently for African Americans than for Latinos. All of the alleged stray comments relate to African
Americans, and thus, could not support a culture of discrimination toward Latinos.

1 except double hearsay information from unnamed media articles: “what I know from the
 2 business press and management, sort of management journals is that FedEx is perceived as a
 3 company with a very strong culture.”⁵⁵ Additionally, for those aspects of the promotion process
 4 that Bielby alleges were subjective, he acknowledges that there is guidance to managers in how to
 5 make those decisions.⁵⁶ Finally, Bielby’s speculation is in contrast to many minority employees
 6 at FedEx who experience a very positive environment and believe that FedEx’s employment
 7 policies are fair and non-discriminatory.⁵⁷ Thus, even if there are a handful of employees who
 8 have concerns about their individual treatment, there is no evidence of a “common culture” that
 9 affects all minority employees in the same way.

10 **B. There Is No Common "Promotion Claim"**

11 **1. Promotion Decisions Are Based On A Variety of Objective Factors**

12 As discussed, promotion decisions are based on a variety of principally objective factors,
 13 including (1) time in service with FedEx, (2) whether the applicant meets the minimum
 14 qualification for the position (*e.g.*, drivers license, being over the age of twenty-one, and passing
 15 the relevant basic skills tests), (3) the existence of active discipline related to the position sought,
 16 and (4) the applicant’s past two performance evaluations.⁵⁸ Time in service and the last two
 17 performance evaluations factor into a “CEV” score that is automatically determined by
 18 computer.⁵⁹ Where there are small variations in employee evaluations, the objective time in
 19 service component will, as a mathematical matter, drive the differences among candidates’ CEV

21 ⁵⁵ Bielby Dep. at 28-30.

22 ⁵⁶ Bielby Dep. at 46-52.

23 ⁵⁷ See Declarations of Rosauro Argones; Jayson Apilado; Lasabre Bell; Levi E. Bonner, Jr.; Billy Britt; Derek
 24 Carlton; Manuel Chavez; Sung Chun; Rome Coleman; Angela Collins; Rafael Culian; Fred Davenport; Ratchapol
 25 Dejthai; Felix Diaz; Earl Dicken; Patrick Espinoza; Lorena Finley; Matt Fuentes; Randy Gin; Larry Gonzales;
 26 Venessa Henry; Shari Jackson; Harry Johnson; Robyn King; Lisa Lind-Sampson; Steve Lovell; Gilbert Martinez;
 27 Marjorie Martinez; Tony McClure; Hassan Mostafa; Deborah Monticeaux; Stephen W. Mutahi; Philip Nunez; Victor
 28 Ovalle; Anita Reategui De Pacheco; Lois Parks; Marvin Payne; Raymond Phillips; Bernardo Reyes; Douglas
 Robinson; Bernadette Romero-Dalton; Teresa Rosenau; Von Shuler; Kathy-Stevenson Joyce; James (Jim) Stone;
 Keriana Sugamoto; Jimmie Thompson; Annabelle Unga; Kenneth R. White; Jason Williams; Rose Yaeger-Lund;
 Edgar Yopez; Ruben Anaya; Michael Aroz; Ruben Anaya; Regina Barnes; Avis Brown-Riley; George Chen; Steven
 Chu; Edmund V. Contreras; Dave Correia; David Correia; Paulo Felise; Eric Hernandez; Phillip A. Kelly; George
 Likong; George Likong; Tanasha Malone; Colleen D. Martinez; Danile F. Munoz, Jr.; Dwight Murphy; Thomas
 Nishiguchi; William Pryor; John Robles and Ralph Valenzuela, attached to Douglas Decl. ¶ 20, Ex. V.

⁵⁸ Speroff Decl. ¶ 27.

⁵⁹ See People Manual § 4.

1 scores. And, Plaintiffs do *not* object to the seniority-based component of FedEx's promotion
 2 policy. For hourly positions, managers select the qualified candidate with the highest CEV score,
 3 unless the employee is selected based on an interview.⁶⁰ It is no wonder, then, that plaintiffs have
 4 failed to present any evidence of systemic, class-wide promotion discrimination.

5 Bielby identifies three supposedly discretionary aspects of the promotion process: (1)
 6 managers may waive the requirement that an employee have no active discipline, (2) employees
 7 with lower CEV points are occasionally selected for positions, and (3) some employees in priority
 8 group 2 are promoted over employees in priority group 1. But his assumption that there is
 9 significant discretion in each of these areas is based on fundamentally flawed statistical analysis
 10 from Drogin. The reality is that these exceptions occur far less frequently than plaintiffs
 11 suggest.⁶¹ Moreover, as Bielby concedes, there is written policy guidance for managers in each
 12 of these areas. For example, FedEx has the very reasonable—and fundamentally objective—
 13 policy that managers are permitted to waive active discipline where the discipline does not relate
 14 to the requirements of the job in issue, such as where an individual is applying for a non-driving
 15 position and has discipline based on a vehicle accident.⁶²

16 Plaintiffs' acknowledge that their promotion claims are really piggybacking off other
 17 claims based on FedEx's use of the basic skills tests, performance evaluations, and discipline.
 18 (Pl. Br. at 13.) As a result, there is no single "promotion claim" that presents a common issue—
 19 rather there are a variety of potential claims based on various aspects of other FedEx personnel
 20 policies. Furthermore, as discussed below, none of those claims raise common issues either.

21 **2. Different Claimants Had Different Promotion Preferences And** 22 **Experience In The Promotion Process**

23 Proposed class members had very different actual experiences with the promotion
 24 processes at FedEx. As a result, there is not a common promotion claim.

25 ⁶⁰ For some jobs in the class requiring special skills, such as the RTD position, FedEx also uses an interview to select
 26 the most qualified candidate. (Speroff Decl. ¶ 28.) Plaintiffs' complaint that not all decisions are based strictly on
 27 CEV scores overlooks the interview aspect of the selection process, to which plaintiffs do not independently object.
 If plaintiffs were to challenge decisions made based on the interviews, they would simply be adding another set of
 individualized issues to a proposed class that is already lacking in cohesion.

28 ⁶¹ Report of Mary Dunn Baker, Ph.D. ("Baker Rep.") at 30, attached hereto as Exhibit 12.

⁶² Speroff Decl. at ¶ 31.

1 **First**, plaintiffs' promotion claims assume—incorrectly—that all claimants sought
 2 promotions, and that all employees wanted to be a Courier rather than a Handler, or wanted to be
 3 a manager. That assumption is demonstrably and incontrovertibly incorrect. For example, one of
 4 the named plaintiffs, Calvin Smith, preferred the Handler position to other non-management
 5 positions.⁶³ He is not alone. The Handler job, compared to the Courier job, allows an employee
 6 substantially more flexibility in when to work and how many hours to work.⁶⁴ Many Handlers
 7 are students or individuals with other jobs and prefer to work short shifts, or variable shifts with
 8 fewer opportunities for overtime.⁶⁵ For those individuals, Courier jobs are not an option because
 9 they generally require day-shifts and longer hours.⁶⁶ Additionally, an employee who does not
 10 have a drivers license, or has recent moving violations, or is not 21 years of age, can work as a
 11 Handler but would not be eligible for the Courier position.⁶⁷ Similarly, not all employees have
 12 sought a promotion to management. For example, named plaintiff Rick Gonzales never applied
 13 for a management position, and did not even seek to participate in any management programs
 14 until he was on employees' compensation leave.⁶⁸ Indeed, the fact that over half of all Courier
 15 positions are filled from the outside⁶⁹ coupled with the fact that all such positions are historically
 16 posted internally, show that FedEx is unable to fill Courier positions from qualified internal
 17 applicants. Because not all employees have similar preferences or meet the minimum
 18 qualifications, plaintiffs' promotion claims are not common across all members of the proposed
 19 promotion classes.

20 **Second**, some claimants were promoted quickly into various jobs and thus have no
 21 promotion claim. Indeed, all of the named plaintiffs who were hired for permanent employment
 22 applied for and were promoted into various positions.⁷⁰ Similarly, most of the declarants

23 _____
 24 ⁶³ Smith Dep. at 203.

25 ⁶⁴ Speroff Decl. ¶ 29.

26 ⁶⁵ *Id.*

27 ⁶⁶ *Id.*

28 ⁶⁷ *Id.*; People Manual § 4-48 (Driving Qualifications).

⁶⁸ Gonzales Dep. at 50, attached to Douglas Decl. ¶ 8, Ex. I.

⁶⁹ See Report of Richard Drogin, September 10, 2004 ("Drogin Rep.") ¶ 22, attached to plaintiffs' motion for class certification.

⁷⁰ For example, Ken Stevenson was promoted three times to Courier, full time Courier, and then RTD. (Stevenson Dep. at 122-133.) Valerie Brown was promoted from Service Agent to full time Courier, then back to Senior Service Agent. (Brown Dep. at 36-37.) Rick Gonzales was hired as a part time Courier and was promoted to a full time

1 plaintiffs rely upon were either initially hired for, or promoted quickly into, positions plaintiffs
2 contend are the most desirable.⁷¹ These named plaintiffs, and many of the individuals they
3 purport to represent, will not be able to assert any promotion claim, or will have extremely weak
4 claims based on their promotion history. Again, therefore, there is no promotion claim common
5 to all (or even most) of the classes plaintiffs propose.

6 *Third*, plaintiffs' complaint about the "requirement [that employees must have a most
7 recent performance evaluation score of 5 on a 7 point scale to be eligible for promotion] leads to
8 under-promotion of Minorities" indisputably is not common to the proposed class. Most
9 proposed class members received performance evaluation scores higher than a five. Moreover,
10 the promotion claims of the majority of proposed class members who competed for promotions
11 with others who had high performance evaluation scores would be in conflict with the claims of
12 individuals who received scores below five but contend that they should also have been
13 considered for (and given) the positions. Such conflicts destroy the required cohesiveness of the
14 proposed class.

15 *Fourth*, some class members were denied promotions purely because they had less time in
16 service than other employees. Because time in service is one of the main elements of CEV
17 points, where two applicants have similar performance evaluation scores, the decision would
18 come down to time in service, which plaintiffs have not challenged as discriminatory. And even
19 if plaintiffs had challenged time in service, such claims would be entirely different from claims
20

21 position within a year. (Gonzalez Dep. at 86-87, 90-91.) Kalini Boykin was promoted from Handler to
22 Checker/Sorter after 2 months, and shortly thereafter promoted to information agent, then truck control agent, and
finally RTD. (Boykin Dep. at 10, 142-144.)

23 ⁷¹ For example, Janet Haynes started as a Courier, moved to Service Agent, and then was promoted into Associate
24 Training Specialist, Operations Manager, and later Manger of Human Capital Management Programs. Eric Foreman
25 moved from Handler to Equipment Operator within three months. Maurice Griffin commenced his employment as a
26 permanent part time Handler and within 15 months was promoted to permanent full-time Security Officer. Yolanda
27 Canela started as a Courier. Ingrid James moved from part-time Handler to permanent full-time Courier and then to
28 Operations Manager. Zeno Latin was hired as a full-time Courier and then moved to Dangerous Goods Agent and
then Customer Service Agent. Within a year, Mitchell McCoy moved from permanent part-time Handler to
Checker/Sorter. Venturi McCray, Sr. went from permanent part-time Cargo Handler to permanent Shuttle Driver.
Within six moths of being hired as a part-time Handler, Beverly Patterson was promoted to permanent full-time
Courier. Mimi Stell was promoted from permanent part-time Handler to Checker/Sorter, Information Agent, Courier
and Dispatcher. Brett Hoiland was hired as a part-time Hander and within eight months was promoted to Dangerous
Goods Specialist, and later to Team Leader and then Ramp Agent. Rosalinda Olmos started as a part-time Cargo
Handler and was quickly promoted to Courier, Dispatcher, CTV Operator, Hazard Specialist, and Ramp Agent.

1 based on a poor performance evaluation or failure to meet a minimum job qualification. Once
 2 again, there would be a conflict between plaintiffs attempting to challenge the seniority portion of
 3 the policy, and those attempting to challenge other aspects of the promotion policies because they
 4 would be competing for the same positions.

5 *Fifth*, the first-filed EEOC charge arguably raising a promotion claim was on April 8,
 6 2003. Thus, the earliest possible date for the commencement of the Title VII liability period for
 7 promotions is *June 12, 2002*.⁷² All promotion claims that arose before that date are time-barred.
 8 Thus, the majority of plaintiffs' statistical analyses—which inexplicably go back to 1997⁷³—are
 9 irrelevant. The more recent analyses that plaintiffs and Dr. Drogin presented demonstrate no
 10 statistically significant disparities for many of the most significant claims at issue in either 2002
 11 or 2003. For example, even according to Drogin's analysis, there is *no* statistically significant
 12 disparity:

- 13 • In promotions of African Americans from permanent Handler to Courier in either
 14 2002 or 2003 (Drogin Rep. Table 8(b))
- 15 • In promotions of Latinos from Handler into Courier in either 2002 or 2003
 16 (Drogin Rep. Table 12)
- 17 • In promotions of Latinos from casual Handler into Courier in either 2002 or 2003
 18 (Drogin Rep. Table 13)
- 19 • In promotion of Latinos from hourly into Operations Manager in either 2002 or
 20 2003 (Drogin Rep. Table 14)

21 Again, therefore, plaintiffs have failed to demonstrate a promotion claim common to all members
 22 of the putative classes.

23 ⁷²The earliest possible date for the commencement of any liability period for Section 1981 promotion claims in
 24 California is *January 1, 2002*. Plaintiffs filed the Consolidated Amended Complaint on October 17, 2003. While
 25 the personal injury statute of limitations in California became two years effective January 1, 2003, claims based on
 26 events between October 17, 2001 and December 31, 2001 were time barred under the previous one-year statute of
 27 limitations, California Code of Civil Procedure § 340(3). *See Jones v. R. R. Donnelly*, ___ U.S. ___, 124 S.Ct. 1836
 28 (2004) (state personal injury statute of limitations applied to § 1981 claims maintainable prior to 1991 Civil Rights
 Act); *Sitgaves v. Allied Signal, Inc.* 953 F.2d. 570, 572-73 (9th Cir. 1992) (ruling that promotion denials, including
 changes from temporary to permanent employment, were maintainable prior to the Civil Rights Act of 1991);
Krupnick v. Duke Energy Morro Bay, LLC, 15 Cal. App. 4th 1026 (2004) (new two year statute did not revive claims
 that were time-barred under the old one-year statute of 340(3)).

⁷³ Dr. Drogin concedes that the data pre-1999 is not complete. (Drogin Dep. at 46.) He apparently chose to analyze
 incomplete data that did not cover the class period, and grossly pre-dated the statute of limitations, in order to build a
 table that he thought could support plaintiffs' claims, regardless of the data's relevance.

1 **C. The Statistical Analyses Presented By Plaintiff Do Not Support The Existence**
2 **Of A Common Promotion Claim**

3 Plaintiffs do they attempt to show that, overall, minorities are promoted less frequently at
4 FedEx. Instead, plaintiffs have cherry-picked specific analyses based on discrete promotions
5 paths. Specifically, they contend that there is a disparity in promotions from (1) Casual Handler
6 to Courier for African Americans and Latinos; (2) permanent Handler to Courier for African
7 Americans; (3) other positions into Courier for African Americans; (4) Handler to Material
8 Handler for African Americans; (5) Handler into Checker/Sorter for African Americans; and (6)
9 Hourly into Operations Manager for Latinos. From these limited analyses, it is impossible to
10 infer discrimination in promotions across the class generally.

11 Moreover, as discussed in Section I, analyses plaintiffs conducted but chose not to present
12 show that African Americans and Latinos fare better or equally than whites in obtaining
13 promotions into various other positions that are part of the class. Further, as discussed above,
14 looking at the relevant years analyzed—2002 and 2003—there is *no* statistically significant
15 disparity for *either* Latinos or African Americans in plaintiffs’ chosen analyses of Handler into
16 Courier, as well as promotion of Latinos into management. Additionally, plaintiffs’ own analysis
17 shows that Latinos have different experiences than African Americans, thus explaining their
18 decision not to pursue analyses based on promotion to certain hourly positions for Latinos, not to
19 pursue a Latino management class, and not to pursue a promotion to management class for
20 African Americans.

21 Additionally, plaintiffs’ statistical analyses are fatally flawed. They fail to account for
22 basic job requirements, including whether the applicant passed the basic skills tests, the last two
23 performance evaluation scores, the presence of active discipline, or demonstrating an interest in
24 management by participating in ASPIRE.⁷⁴ Because their statistical “evidence” fails to account
25 for how decisions are actually made at FedEx, it cannot show that FedEx has a general policy of
26 race discrimination. *See Peterson v. Albert M. Bender Co., Inc.*, 75 F.R.D. 661, 664-65 (N.D.
27 Cal. 1977) (plaintiff’s statistical data does not establish that defendant engages in a general policy

28

 ⁷⁴ Drogin Dep. at 80, 82-83, 87-88.

1 of discrimination because it fails to account for relevant work experience or qualifications).

2 Finally, the focus of Drogin's promotion analyses are based on "proxy" pools, rather than
 3 looking at actual applicants for open positions. A comparison of proxy pools to the applicant
 4 pools from FedEx's JCATS data shows that proxy pools are not remotely representative of actual
 5 applicants.⁷⁵ An analysis of actual applicants from JCATS shows that there were no statistically
 6 significances differences in African American⁷⁶ promotions from Handler & Freight Handler to
 7 Material Handler, and that African Americans actually were more likely to be selected from
 8 Handler to Checker/Sorter, and more likely to be selected from non-Courier hourly positions to
 9 Courier.⁷⁷ Additionally, once interest in promotion to management as measured by participation
 10 in ASPIRE is taken into account, promotions of Latinos to Operations Manager for both AGFS
 11 and DGO are consistent with neutral decisions.⁷⁸

12 **D. Casual Employees Do Not Have Common Claims**

13 Plaintiffs also contend that casual employees were discriminated against with respect to
 14 promotions to the Courier position. Once again, however, these claims are not common across
 15 the class, or even with respect to casual employees. As an initial matter, because almost all the
 16 casual employees at FedEx are in DGO, this claim does not support certification of a class of
 17 AGFS employees.

18 Additionally, again without evidence, plaintiffs incorrectly and without supporting
 19 evidence assume that all casual employees have wanted to work in permanent positions. Once
 20 again, this is not the case. Casual positions require fewer hours, and permit employees substantial
 21 flexibility in crafting their work schedules, making these positions frequently preferred by
 22 students and individuals with obligations outside their work at FedEx.⁷⁹ In other cases, a casual
 23 Courier would rather be in that job than be in another position that might be open such as a
 24 Handler position.⁸⁰ Thus, casual positions are *preferred* by many individuals, including those in

25 ⁷⁵ Baker Rep. at 14-18, Tables 2.1, 2.2, and 3.1.

26 ⁷⁶ In their proxy pool analysis, plaintiffs make no allegations regarding Latino promotions except for casual Handler
 to Courier, and hourly to Operations Manager.

27 ⁷⁷ *Id.*, Table 2.1.

28 ⁷⁸ Baker Rep. at 19; Table 5.

⁷⁹ Speroff Decl. ¶ 14.

⁸⁰ Speroff Decl. ¶ 14.

1 the proposed class.⁸¹ Indeed, employees who sign on as casual employees are fully aware of the
 2 parameters of the position. Plaintiff Hutchins, for example, signed an express acknowledgement
 3 of her casual status.⁸² To the extent that plaintiffs seek to challenge that agreement, their ability
 4 to avoid the legal implications of the acknowledgement will depend on the circumstances under
 5 which it was signed, and the particular state contract laws in issue.

6 Additionally, Drogin's statistical analysis of casual movement into Courier positions is so
 7 seriously flawed that it is meaningless. Rather than using JCATS, casual employees compete
 8 with external candidates for positions at FedEx. Looking at external benchmarks based on
 9 Census data, there is actually a statistically significant *surplus* of African Americans selected for
 10 Courier, Checker/Sorter, and Material Handler from casual positions.⁸³ Moreover, many
 11 individuals included in Drogin's analyses were either not interested in these promotions, or not
 12 qualified because they did not pass the basic skills tests, did not meet the driving requirements, or
 13 were not over the age of 21. Additionally, all claims involving promotions prior to 2002 would
 14 be time-barred.

15 **E. There Is No Common "Performance Evaluation Claim"**

16 Plaintiffs have made much in this case about the performance evaluation system at
 17 FedEx—an issue not even raised in their Consolidated Amended Complaint. Plaintiffs' social
 18 framework expert states that his "criticism of FedEx here at the promotion area is primarily in
 19 regards to how performance evaluation feeds into that and a few other discretionary aspects of
 20 it."⁸⁴ While they are critical of the performance evaluations, they have not even *attempted* to
 21 present evidence that the various performance evaluations are not valid measures of job
 22
 23

24 ⁸¹ See Declarations of Luis Barrett; Adam Beltran; Jacqueline Evans; Randall Henriquez; Flora Leos; Ruben Mendez;
 25 Jorge Moore; Nehemiah Reyes; Arnold Simpson; Teresa Strong; George Velasco and Christina Zepeda, attached to
 Douglas Decl. ¶ 21, Ex. W.

26 ⁸² According to the acknowledgement, "I understand that I have been hired in a casual capacity, and will not be
 27 regularly scheduled to work. I understand that my temporary/casual employment may be terminated at any time
 without resort to the company's disciplinary procedures of the [GFTP] set forth for full-time and part-time
 employees. I also understand that I am not eligible to participate in any Federal Express fringe benefits program,
 other than those required by law." (Hutchins Dep. 109-110; 131-132, Ex. 11, attached to Douglas Decl. ¶ 12, Ex. M.)

28 ⁸³ Baker Rep. at 11-14, Table 1.

⁸⁴ Bielby Dep. at 137, attached to Douglas Decl. ¶ 13, Ex. N.

1 performance.⁸⁵ Moreover, plaintiffs' claims based on thousands of individual performance
2 evaluations are entirely inappropriate for class certification.

3 **1. FedEx's Separate Performance Evaluations Assess Employees On A**
4 **Wide Variety of Job-Related Factors**

5 For the jobs in plaintiffs' proposed classes, FedEx uses 12 separate performance
6 evaluations for hourly employees that evaluate the employees on different job-related
7 performance criteria.⁸⁶ These different evaluations reflect the differences in expectations for the
8 various jobs, and FedEx's commitment to tailoring the performance evaluations to ensure that the
9 evaluations use valid, job-related, and largely objective criteria.⁸⁷ Dr. Hayward works closely
10 with subject matter experts in each of the various job categories to evaluate employees based on
11 the unique job requirements.⁸⁸

12 For example, the performance evaluation for the Courier position evaluates:

- 13 • route efficiency measured by meeting stops per hour goals (25%)⁸⁹
- 14 • service quality measured by scan compliance and pick-up service level (20%)
- 15 • attendance and punctuality based on timecard data (15%)
- 16 • vehicle safety measured by documented accidents/occurrences (10%)
- 17 • worker safety measured by documented unsafe acts (10%)
- 18 • acceptable practices observed in a checkride using a detailed checklist (10%)
- 19 • teamwork based on manager observation (5%)
- 20 • station support based on manager observation (5%)⁹⁰

21 In contrast, the performance evaluation for Ramp Agents is based on:

- 22 • flight paperwork accuracy based on flight record data (30%)
- 23 • on-time flight departures based on the time the wheels leave the blocks (25%)
- 24 • leadership and decisiveness based on manager observation (20%)
- 25 • attendance and punctuality based on timecard data (10%)
- 26 • safety measured by documented unsafe acts (10%)

27 ⁸⁵Dr. Hayward is the industrial and organizational psychologist at FedEx responsible for the validity and
28 development of performance reviews. While plaintiffs submitted a report from an industrial psychologist criticizing
the validation work done in connection with the basic skills tests, their expert—who also considers herself an expert
in performance evaluations—said not a word about the validity of the performance evaluations. Nor could Bielby
possibly speak to the validity of the performance evaluations. He is not an industrial psychologist, has never assessed
the validity of a performance evaluation process, and was not remotely familiar with the performance evaluation
criteria used in FedEx's performance evaluations (*See* Bielby Dep. at 111-114; 30-36.)

⁸⁶ Hayward Decl. ¶ 5-6.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ The weights assigned to each category are automatically generated by computer to ensure consistency. (*Id.* ¶ 7.)

⁹⁰ Hayward Decl. ¶ 8.

- attendance at training and recurrent training (5%)⁹¹

Each of the 12 different hourly performance evaluations in issue is unique, as is the Operations Manager evaluation.⁹² Because FedEx uses different performance evaluations and different performance criteria, there is no common performance evaluation claim. *See Grosz v. The Boeing Co.*, 2003 U.S. Dist. LEXIS 25341 (C.D. Cal. 2003) (nexus requirement not satisfied where different performance evaluations used). *Cf. Barefield v. Chevron, U.S.A., Inc.*, 44 FEP Cases (BNA) 1885 (N.D. Cal. 1987) (finding sufficient uniformity to establish commonality where employer used “a *single evaluation with the same criteria* to assess the job performance of all classified operations and maintenance employees from all work areas”) (emphasis added).

Without any real examination or explanation, plaintiffs have suggested that the performance evaluations are too subjective, or they do not give managers adequate guidance to understand what is required of them. (Pl. Br. at 16-17.) Named plaintiff Boykin’s testimony on this subject is devastating to plaintiffs’ assertion. She has conducted performance evaluations of hourly employees and has no difficulty understanding what the reviews require of her.⁹³ She testified that performance reviews provide “specific tools to measure quality, different quality in the work and how they performed it.”⁹⁴ She further testified that, in evaluating employees for efficiency, FedEx has highly detailed standards:⁹⁵

there are standards basically for performing every single task at FedEx that’s monitored on a time card, and actually engineering provides standards for our truck drivers for the RCDs on how long it should take to load a trailer, how long it should take to unload a trailer, how long it take to move a trailer, how long it should take to back a trailer up, and those types of specific, those type of identifiable details, and that’s what I remember using.

As to the teamwork category that plaintiffs allege is so subjective, Boykin states that she relies on written guidance in that category as to “specific things or qualities or duties that an employee

⁹¹ Hayward Decl. ¶ 9.

⁹² *Id.* ¶¶ 7-19. FedEx also continually updates its performance evaluations. For example, for the Courier review alone, FedEx made 22 changes since 1999. (*Id.*)

⁹³ Boykin Dep. at 26.

⁹⁴ *Id.* at 30.

⁹⁵ *Id.* at 31-32.

1 would perform.”⁹⁶ In conducting the evaluations, she consults the safety manual, the HR
 2 database, the People Manual, and uses the on-line system FAMIS to review the employee’s
 3 history of sick calls and late arrivals.⁹⁷ She personally conducts check rides to view drivers’
 4 performance first-hand.⁹⁸ She consults with her HR Representative if there are any “gray areas”
 5 where she needs to verify information, and she finds them helpful and knowledgeable about
 6 company policy.⁹⁹ She conducts reviews without regard to race.¹⁰⁰ Obviously, plaintiff Boykin’s
 7 testimony would be a serious detriment to any individuals pursuing a claim that the performance
 8 evaluations are too subjective or that there is inadequate guidance given to managers in how to
 9 conduct them.

10 **2. Different Claimants Were Treated Differently In Performance**
 11 **Evaluation Decisions, And Such Claims Would Raise Serious Inter-**
 12 **Class Conflicts**

13 Not all class members received poor performance evaluations. Indeed, several of the
 14 named plaintiffs, including Brown, Stevenson and Smith, regularly received above-average
 15 performance evaluations.¹⁰¹ Nor will all of those who received poor performance evaluations
 16 have been limited in their ability to be promoted, depending on when those evaluations were
 17 obtained, when positions were sought, their length of service relative to other applicants for a
 18 position, and the relative differences in applicant performance scores. Moreover, the reasons that
 19 individuals received poor performance evaluations are as varied as the criteria being evaluated
 20 and the performance of each of the employees. It simply is impossible to identify any common
 21 claim based on the individual performance evaluations received by members of the putative
 22 classes.

23 Additionally, performance evaluation claims introduce significant conflict into the class.
 24 Operations manager claimants would be defending the reviews they gave (as Boykin did) while

25 ⁹⁶ *Id.* at 31.

26 ⁹⁷ *Id.* at 20-21; 23; 29-30.

27 ⁹⁸ *Id.* at 25.

28 ⁹⁹ *Id.* 24.

¹⁰⁰ Boykin gave an African American a lower performance evaluation based on driving issues. She gave a Latino a lower score for safety problems. And she gave a white employee a perfect score because he is “an exceptional employee.” (*Id.*)

¹⁰¹ See Douglas Decl., Ex. R.

1 hourly claimants would be trying to argue that their scores were biased. Additionally, because
 2 employees compete for promotions based in part on performance evaluations, class members with
 3 high evaluations will be harmed if the performance evaluations do not count in determining
 4 promotions.

5 3. The Statistical Evidence Does Not Support The Existence Of A 6 Common Performance Evaluation Claim

7 Plaintiffs own statistical analysis of performance evaluations suggests significant
 8 differences in how different groups were evaluated. For example, plaintiffs' analysis shows that
 9 in the year 2000—the only year Drogin chose to highlight—on average Latino Shuttle Drivers
 10 scored identically to whites, Latino Checker/Sorters scored better than whites, and in the category
 11 “Other Hourly in Class” Latinos scored better than whites.

12 In years that actually fall within the promotions liability period,¹⁰² Latinos and African
 13 Americans both received higher performance evaluations on average than whites in a wide variety
 14 of job categories that are part of the class. For example:

- 15 • In 2002, African American and Hispanic Checker/Sorters both scored better than
whites in the same job on average;
- 16 • In 2002, Latino Material Handlers scored identically to whites in the same job on
average;
- 17 • In 2002, Latino Handlers & Freight Handlers scored identically to whites in the
18 same job on average;
- 19 • In 2003, Latino Checker/Sorters scored better on average than whites in the same
job;
- 20 • In 2003, African American Dispatchers scored better than whites on average in
21 the same job;
- 22 • In 2003, African American Information Agents scored better than whites on
average in the same job;
- 23 • In 2003, Latino Dangerous Goods Agents scored better than whites on average in
24 the same job; and
- 25 • In 2003, both African American and Latino Input Auditors scored better than
whites on average in the same job.¹⁰³

26
 27 ¹⁰² There is no liability period for performance evaluations because none of the named plaintiffs filed an EEOC
 28 charge challenging their performance evaluations.

¹⁰³ Drogin Rep., App. 4a.

1 Thus, as readily demonstrated *by plaintiffs' own analyses*, there is no common pattern
2 adverse to African Americans and Latinos in performance ratings across the job categories.

3 4. There Is No Common Compensation Claim

4 Plaintiffs' compensation claims are piggybacking off their performance evaluation claims.
5 For the same reasons that there is no common performance evaluation claim, there is no common
6 compensation claim. After adjusting compensation for performance evaluation scores, there is no
7 overall pattern of statistically significant differences in the compensation of whites, Latinos, or
8 African Americans.¹⁰⁴

9 Indeed, in many jobs in many of the relevant years, African Americans and/or Latinos—
10 particularly in AGFS—received higher compensation than whites on average (*e.g.*, African
11 American Checker/Sorters in 2001, 2002, and 2003; African American Handlers & Freight
12 Handlers in 2001 and 2002; Latino Checker/Sorters in 2001 and 2002; and Latino Handlers &
13 Freight Handlers in 2001, 2002, and 2003).¹⁰⁵ There is no common compensation claim.

14 F. There Is No Common "Discipline Claim"

15 Courts have repeatedly recognized that claims of discrimination related to discipline are
16 particularly ill-suited for class treatment because they turn on whether each class of discipline
17 was warranted under the particular circumstances. *See Pendleton v. Rumsfeld*, 628 F.2d 102, 104-
18 05 (D.C. Cir. 1980) (claims of EEO counselors who were discharged for participating in a
19 demonstration contrary to their proper duties were individual in nature); *Alexander v. Gino's,*
20 *Inc.*, 621 F.2d 71, 74 (3d Cir. 1980) (discharge claims relating to an incident over missing funds
21 too individualized to satisfy commonality and typicality).

22 1. Discipline Decisions Are Based On A Variety of Objective Factors

23 There are multiple reasons, based on carefully articulated policies and procedures, that
24 employees receive discipline at Fed Ex. (Speroff Decl. ¶ 30.) These include attendance
25

26 ¹⁰⁴ Baker Rep. at 25-29, Tables 8-12. In addition to his failure to account for performance reviews, there are several
27 other significant problems with Drogin's compensation analysis. For example, he includes casual employees, whose
28 pay is determined differently than permanent employees. Additionally, he pools everyone into a single analysis, so it
is impossible to determine whether there is a pattern across jobs and locations, and improperly assumes that all
experience is valued equally. (*Id.* at 22-25.)

¹⁰⁵ *Id.*

1 deficiencies, vehicle accidents, and safety violations like crossing a moving belt. (*Id.*) Named
 2 plaintiff Boykin testified that the two primary reasons employees are disciplined are (1)
 3 attendance and (2) accidents. (Boykin Dep. at 37-40.) Discipline takes several forms.
 4 Employees will receive a performance reminder for deficiencies in areas such as attendance,
 5 sorting errors or customer complaints. Employees will receive a warning for behavioral incidents
 6 such as gross safety violations, or altercations with employees and/or customers. *Lang v. Kan.*
 7 *City Power & Light Co.*, 199 F.R.D. 640 (W.D. Mo. 2001) (discipline claims lacked commonality
 8 and typicality where different types of discipline issued to employees in different jobs was at
 9 issue).

10 Managers issue discipline according to specific, written policies based on observable
 11 behaviors.¹⁰⁶ There is generally very little discretion afforded to managers in whether to issue
 12 discipline.¹⁰⁷ If, for example, a manager concludes that a safety violation occurred, policy will
 13 dictate the type of discipline to be issued.¹⁰⁸ Managers have no discretion as to when to issue
 14 discipline based on the employee's attendance record.¹⁰⁹ Given the largely objective nature of
 15 discipline decisions at FedEx, it is not surprising that Bielby did not even attempt to analyze the
 16 subjective nature of discipline decisions.¹¹⁰ Where, as here, discipline "is not entirely subjective
 17 in nature but involve[s] the application of general rules to particular employees," certification of a
 18 class based on discipline is not appropriate. *Carson v. Giant Food, Inc.*, 187 F.Supp.2d 462, 470
 19 (D. Md. 2002) (commonality requirement not satisfied for proposed discipline class).

20 2. Discipline Claims Create Conflicts Among The Putative Class

21 Plaintiffs' discipline claims—and their attempt to tie discipline to promotions—raise
 22 significant conflicts among the class. First, the proposed class does not purport to distinguish
 23 between types of discipline, including warnings, performance reminders, suspensions, or
 24 terminations, or the basis for the discipline. Someone who received a warning based on a vehicle
 25 accident has a very different claim than someone who received a performance reminder because

26 ¹⁰⁶ Speroff Decl. ¶ 30.

27 ¹⁰⁷ *Id.*

28 ¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Bielby Dep. at 31-37.

1 their performance review was below satisfactory. Indeed, for employees asserting discipline
2 claims based on alleged subjectivity or minor infractions, the fact that their claims will be
3 combined with claims for discipline based on vehicle accidents, use of drugs and alcohol,
4 falsification, or carefully documented attendance problems is not helpful. Second, the claims of
5 individuals who have no discipline are in conflict with those who do because they are competing
6 for the same promotions. Allowing individuals who have discipline to be on equal footing with
7 individuals without discipline, compromises the claims of individuals who have perfect
8 attendance, no accidents, and no safety violations. A third major problem with plaintiffs'
9 discipline class is that approximately a third of the relevant managers who issue discipline are
10 *other members of the class*.¹¹¹ This means that, while Operations Managers are trying to justify
11 their conduct as a manager to prove their own compensation and discipline claims, hourly
12 employees will be simultaneously arguing that their Operations Managers discriminatorily issued
13 discipline. The manager class will be testifying against the hourly class, and vice versa. This
14 creates an irresolvable conflict that precludes class certification. *See Falcon*, 457 U.S. at 156;
15 *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-27 (1977).

16 3. The Statistical Evidence Does Not Support The Existence Of A 17 Common Discipline Claim

18 Plaintiffs' discipline claims also are based on faulty statistical analyses. First, unlike their
19 other analyses, plaintiffs do not account for the location of the individual being disciplined. Thus,
20 they are looking at discipline without respect to the manager, or even group of managers, actually
21 issuing the discipline. Second, plaintiffs fail to distinguish among types of discipline or the basis
22 of the discipline, much of which is issued based on entirely objective, observable behaviors.
23 Third, plaintiffs' own analysis shows that African Americans and Latinos have very different
24 rates of discipline, with Latinos receiving, on average, substantially less discipline than African
25 Americans. Fourth, the evidence shows that a large portion (indeed more than would be expected
26 statistically in AGFS) of the disparity in discipline of African Americans and Latinos is discipline

27
28 ¹¹¹ Named plaintiff Gonzales, for example, received a performance reminder from an African American manager for absenteeism and punctuality. Gonzales Dep. at 11, 93, Ex. 9.

1 issued by African American managers.¹¹² And in DGO, there is no statistically significant
2 difference in the overall likelihood that Latinos will receive discipline, regardless of the race of
3 the manager.¹¹³ Consequently, the putative class does not have any common discipline claim,
4 common to the class as a whole.

5 **G. There Is No Common Claim Based On The Four Basic Skills Tests**

6 Plaintiffs own testing expert makes abundantly clear that plaintiffs' new allegation that
7 FedEx's basic skills tests are not valid selection devices is not common across the four tests or the
8 three jobs in issue. FedEx uses four separate basic skills tests that cover reading comprehension,
9 map reading, sorting and listening.¹¹⁴ Not all applicants take all four tests, and some jobs require
10 the applicant to pass only some portions of the test. For example, applicants for Courier jobs and
11 RTD jobs have to pass all four tests, while Service Agents do not have to pass the map reading
12 test. Thus, to the extent that plaintiffs challenge the map reading test, that argument will not
13 support the claim of a Service Agent applicant. Conversely, if the map reading test is found to be
14 appropriate for some positions, those who failed map reading cannot assert that they should have
15 been hired for a position requiring applicants to pass that test. Similarly, if an applicant failed the
16 reading portion of the test, but that part of the test is found to be valid, the applicant would not
17 have a claim. Plaintiffs' expert has opined that the validity evidence for the four separate tests is
18 different.¹¹⁵

19 ¹¹² Baker Rep. at 20-21, Tables 6.1 and 7.1.

20 ¹¹³ *Id.*, Table 7.1.

21 ¹¹⁴ FedEx is more than prepared to defend its basic skills tests, which were developed specifically for use at Ex by an
22 industrial and organizational psychologist, and supported by years of validation studies demonstrating that the tests
23 are highly correlated to job performance. Plaintiffs' expert, who knows next to nothing about the requirements for
24 the jobs in issue, has not surprisingly offered no concrete alternatives to the map reading or listening tests, and the
25 only alternatives vaguely suggested for the sorting and reading tests are off-the-shelf tests that have not been
26 developed or validated for use in the particular jobs. (French Dep. at 108-113). Their expert also proposes that
27 FedEx could have explored a different scoring technique, but concedes that nothing in the professional guidelines
28 requires that, and she cannot cite a single research study supporting a conclusion that such an approach would have
less adverse impact. (French Dep. at 140, 144.) Ultimately, however, the issues raised about whether any or all of
the tests are valid for the different jobs at issue are merits questions, and thus are not part of the class certification
inquiry. What matters now is that the validity evidence is not the same for each of the tests and for each of the jobs
in issue. Since there is not classwide proof on this issue, class certification is inappropriate.

¹¹⁵ *See, e.g.*, French Rep. at 14-15 ("The 1994 studies of airbill accuracy, Reading scores and Map Reading scores
predicted mean airbill accuracy, and pass/fail on Map Reading predicted 3-month airbill accuracy, but P/F on
Reading does not. In the 1995 validation study of Courier job performance, Reading Map Reading, and Sorting
predicted composite research ratings, but Listening did not. Reading predicted 4 of 5 individual performance ratings;
Map Reading predicted all 5; Sorting predicted 4; and Listening predicted no individual ratings or the composite
scores. The 2001 study of Couriers is the only study in which all four BSTs scores had statistically significant

1 Additionally, according to plaintiffs' expert, the validity evidence for the basic skills tests
2 varies depending on the job in issue: "The criterion-related validity studies conducted by Federal
3 Express provide some marginal support for the use of the BSTs for the Courier job but not other
4 jobs."¹¹⁶ Thus, according to plaintiffs, the tests could be valid for one position—*e.g.*, the Courier
5 position—but the case may be different for the RTD and Service Agent jobs, where all or some of
6 the tests are also required. Thus, applicants for the Service Agent, Courier and RTD positions
7 who failed the basic skills tests will be relying on different validity evidence to support their
8 claims that the test is not appropriate. In short, there is no classwide proof on the appropriateness
9 of the basic skills tests.

10 Finally, plaintiffs gloss over the fact that a majority of class members do not have a claim
11 based on the basic skills tests. Some proposed class members never took the tests. Others, like
12 all of the named Plaintiffs, took the tests and passed, or were grandfathered since they already
13 held the positions when the tests were implemented. But even for those proposed class members
14 who failed some of the basic skills tests, they do not all have a claim for discrimination. Because
15 some passed portions of the tests but not others, their ability to bring a claim depends on which
16 jobs they sought, and—assuming plaintiffs could prevail in demonstrating the lack of validity of
17 some of the tests but not others—which tests they passed. Moreover, some claimants who failed
18 the tests will have no employment discrimination claim because they were otherwise not qualified
19 for the jobs (*e.g.*, they did not have a valid drivers license), or did not seek a job for which the
20 tests were required. Thus, there is no testing claim based on the basic skills tests that any named
21 plaintiff has standing to raise, and no testing claim common to the putative classes.

22 **III. THE NAMED PLAINTIFFS CANNOT REPRESENT THE CLASS**

23 **A. There Is No Class Representative For Many Of The Claims In Issue**

24 There is no named plaintiff who can represent the vast majority of the proposed class
25 claims. The lack of a named plaintiff to represent a claim is a fundamental failing that requires

26 correlations with job performance,"); French Rep. at 14 ("Reported test reliabilities were acceptable [for Map
27 Reading, Sorting, and Reading but not for] the Listening tests."); French Dep. at 127: "I think it probably does mean
28 that map reading does better than the other tests [in predicting job performance]." In short, the validity evidence for
each of the four tests is different.

¹¹⁶ French Rep. at 14.

1 rejection of any class based on that claim. It demonstrates, simultaneously, that the named
 2 plaintiffs have no constitutional standing to represent a class based on those claims, that the
 3 claims of the class representative are not typical of the claims of the class, and that the named
 4 plaintiffs cannot adequately represent the class. *See Falcon*, 457 U.S. at 158, n.13; *Wofford v.*
 5 *Safeway Stores, Inc.*, 78 F.R.D. 460, 477 (N.D. Cal. 1978) (“To permit a plaintiff to assert the
 6 claims of a class of which he is not a part and to seek relief in which he has no concrete individual
 7 interest is to sanction a sham class.”); *Warren v. ITT World Communications, Inc.*, 95 F.R.D. 425,
 8 428-29 (S.D.N.Y. 1982) (employee who never sought promotion could not represent employees
 9 denied promotions).

10 **First**, none of the named plaintiffs can assert a claim based on the basic skills tests because
 11 all of the named plaintiffs either took and passed the basic skills tests (Hutchins, Stevenson,
 12 Boykin, Guerrero, and Smith), or were exempt from taking the tests because they were already in
 13 the position when the basic skills tests went into effect (Satchell, Gonzales, and Brown).¹¹⁷
 14 Accordingly, the Court should not certify a class based in whole or in part on the basic skills tests.

15 **Second**, none of the named plaintiffs can represent a class of permanent employees denied
 16 promotions to hourly positions. None of the named plaintiffs sought hourly promotions to
 17 Courier, RTD or Checker/Sorter positions during the limitations period.¹¹⁸ Indeed, the named
 18 plaintiffs have been in the positions that plaintiffs believe putative class members should have
 19 been promoted to, including Courier (Stevenson, Brown, Gonzales, and Smith), Checker/Sorter,
 20 (Boykin), RTD (Stevenson, Boykin) and Operations Manager (Satchell, Boykin).

21 **Third**, none of the named plaintiffs can represent a class of employees who sought and did
 22 not obtain a promotion to management. Plaintiffs bring this particular promotion claim

23 ¹¹⁷ Dembowski Decl. ¶ 18.

24 ¹¹⁸ Stevenson was a Courier or RTD at all relevant times and did not seek an hourly promotion during the statute of
 25 limitations (Stevenson Dep. at 21-32, 122-133); Brown was promoted to Senior Service Agent after being a Courier
 26 and did not seek an hourly promotion during the limitations period (Brown Dep. at 58-64); Boykin was in
 27 management at all relevant times (Boykin Dep. at 10); Gonzales was a Courier at all relevant times and did not seek
 28 an hourly promotion during the liability period (Gonzalez Dep. at 86-90); Guerrero was promoted to several hourly
 positions, and then went out on medical leave in September 2002—she did not seek an hourly position during the
 liability period (Guerrero Dep. at 249-259, attached to Douglas Decl. ¶ 14, Ex. O.); Smith never sought an hourly
 promotion because he either wanted to be a manager or a Handler, and he was not qualified for driving positions
 because of two DUI convictions (Smith Dep. at 203, 206); and Satchell was a manager from 1998 until he was
 terminated (Satchell Dep. at 218, 239-264, attached to Douglas Decl. ¶ 15, Ex. P.).

1 exclusively on behalf of Latinos because African American hourly employees are more likely
 2 than whites to be promoted to management. Thus, none of the six African American named
 3 plaintiffs (Satchell, Brown, Boykin, Smith, Hutchinson, or Stevenson) can represent a promotion
 4 to management claim.¹¹⁹ And neither plaintiff Gonzales nor plaintiff Guerrero ever applied for a
 5 promotion into management.¹²⁰

6 **Fourth**, none of the named plaintiffs can represent an individual with a claim based on the
 7 performance evaluations. None of the named plaintiffs timely filed an EEOC charge alleging
 8 discrimination based on their performance evaluation scores.¹²¹ Additionally, the only plaintiff
 9 who is a Handler—Smith—cannot represent Handlers claiming discrimination in performance
 10 evaluations because, on average, his recent performance evaluations (7.0, 5.9 and 6.4) were above
 11 average for the Handler position. Also, none of the named plaintiffs can show (and none attempt
 12 to show) that they were denied a promotion based on a poor performance evaluation. Finally,
 13 plaintiff Boykin is an inadequate class representative because her testimony with respect to
 14 performance evaluations contradicts the claims of the proposed class.

15 **Fifth**, plaintiff Hutchins—the only named plaintiff who is a casual employee—cannot
 16 represent the class with respect to the only claims brought on behalf of casuals: promotion into
 17 Courier (and perhaps Material Handler and Checker/Sorter). She never sought any of these
 18 positions.¹²² Indeed, she sought only one promotion—to a Customer Service position.¹²³ That
 19 position was not open to Hutchins (or any other employees) because it was made available to an
 20 individual who needed an accommodation for a disabling physical condition, and that was the
 21 only available non-driving position.¹²⁴ And plaintiffs have not presented any evidence of
 22

23 ¹¹⁹ None of the African American named plaintiffs have a claim for failure to promote to management either.
 24 Plaintiffs Satchell and Boykin were promoted to management. Plaintiff Smith did not seek a promotion into
 25 management during the liability period. (Smith Dep. at 13-14.) Plaintiff Stevenson asserts that he applied for a
 26 position to management on “seven to ten” occasions, but cannot prevail on that claim because he does not know the
 positions he applied for, the other applicants, the managers, etc. (Stevenson Dep. at 21-33.) Plaintiff Brown sought a
 management position, which was awarded to another putative class member, David Correia, a Latino. (Brown Dep.
 at 139-140.)

¹²⁰ Gonzales Dep. at 70; Guerrero Dep. at 167.

¹²¹ Douglas Decl. ¶ 16.

¹²² Hutchins Dep. at 169-170.

¹²³ *Id.* at 169-170.

¹²⁴ Declaration of Charles MacQueen, attached hereto as Exhibit 13.

1 discrimination in promotions to Customer Service positions. Thus, there is no named plaintiff to
 2 represent casual employees in a claim for promotion to Courier, or to any other position.
 3 Additionally, there is no Latino casual employee to represent Latino casual employees.

4 **B. The Disciplinary History Of The Named Plaintiffs Make Them Inadequate**

5 Where a named plaintiff has a history of poor job performance or job misconduct, he
 6 cannot represent the class because his claims are not typical. *See Bishop v. New York City Dept.*
 7 *of Hous. Pres. & Dev.*, 141 F.R.D. 229, 238-39 (S.D.N.Y. 1992) (claims of named plaintiff not
 8 typical of class where he had been demoted for misconduct).¹²⁵ Several of the named plaintiffs
 9 have long histories of serious job misconduct.

- 10 • Plaintiff Satchell received three performance reminders for punctuality, a
 11 performance reminder for service failures, a warning letter for failure to follow a
 12 directive to produce an action plan to correct operational problems, a performance
 13 reminder for a below satisfactory performance review, and a warning letter for
 14 falsification of records. He was terminated based on his history of serious
 15 discipline problems.¹²⁶
- 16 • Plaintiff Smith was terminated after he failed to report to work for two days while
 17 incarcerated for a second DUI conviction, the first of which had disqualified him
 18 from his Courier job. He was also issued two performance reminders for vehicle
 19 accidents, another for failure to report a traffic violation, placed on suspension for
 20 possible violation of the drug-free workplace policy while he attended a three-
 21 month drug and alcohol class, and placed on suspension again for falsification of
 22 records. He admits that he was not terminated because of his race.¹²⁷
- 23 • Plaintiff Brown received four separate performance reminders for attendance and
 24 punctuality, as well as a letter of concern for punctuality. She has no reason or
 25 evidence to believe the discipline was issued because of her race, and did not
 26 challenge her discipline through the GTF/EEO process.¹²⁸
- 27 • Plaintiff Guerrero received a disciplinary letter for “driving a FedEx vehicle with
 28 the driver’s side door open” and another letter for preventable vehicle accident
 history. She also received counseling for attendance, punctuality, failure to report
 to her scheduled shift, and a driving complaint.¹²⁹

Plaintiffs will no doubt contend that these individuals should be able to represent a

¹²⁵ *See also Martin v. City of Beaumont*, 125 F.R.D. 435, 438 (E.D. Tex. 1989) (typicality not satisfied where one plaintiff was reprimanded on 15 separate occasions, another plaintiff was terminated for assault, and another plaintiff was suspended for work-related misconduct); *Harriss*, 74 F.R.D. at 57 (plaintiff’s difficulties on the job made her situation unique and not typical of class).

¹²⁶ Satchell Dep. 185, 187, 116-117, 191-193, 212-218.

¹²⁷ Smith Dep. at 96-98, 100, 102, 104, 206.

¹²⁸ Brown Dep. 100-104.

¹²⁹ Guerrero Dep. at 137, 143-145, 149-150, 233, Exs. 7-8, 10.

1 discipline class. But these plaintiffs' lengthy disciplinary histories will put them at odds with
2 class members with minimal or no discipline, and would compromise their ability to represent the
3 putative class, even if a "discipline" class otherwise was maintainable (which it is not).

4 **IV. THE REQUIREMENTS FOR 23(B)(2) CLASS CERTIFICATION ARE NOT** 5 **SATISFIED**

6 Plaintiffs seek to certify a class under Rule 23(b)(2). The Supreme Court has admonished
7 that such mandatory class certification should be granted sparingly. *See Ticor Title Ins. Co. v.*
8 *Brown*, 511 U.S. 117 (1994); *Ortiz v. Fireboard*, 527 U.S. 215 (1999).

9 **A. FedEx Has Not Acted On Grounds "Generally Applicable" To The Proposed** 10 **Class**

11 Certification under Rule 23(b)(2) is permitted only where "the party opposing the class has
12 acted or refused to act on grounds generally applicable to the class, thereby making appropriate
13 final injunctive relief or corresponding declaratory relief with respect to the class as a whole."
14 Rule 23(b)(2). Plaintiffs have alleged a sweeping variety of claims ranging from failure to
15 promote to the positions of Courier, Checker/Sorter, Material Handler, and Operations Manager,
16 to failure to promote casual employees to Courier, to failure to promote Latino hourly employees
17 to management, to compensation in 21 hourly and management jobs, to the appropriateness of 13
18 separate performance evaluations, to discipline arising under a wide variety of circumstances, and
19 to the appropriateness of four basic skills tests used in three different jobs. These employment
20 decisions were made by different individuals applying a wide variety of detailed policies. The
21 requisite homogeneity simply does not exist. *See Arnold v. United Artists Theatre Circuit, Inc.*,
22 158 F.R.D. 439, 451-53 (N.D. Cal. 1994) ("predominance" standard is to be evaluated from the
23 underlying principle of Rule 23(b)(2)—homogeneity); *Barefield v. Chevron, U.S.A., Inc.*, 48 FEP
24 Cases (BNA) 907 (N.D. Cal. 1988) ("the focus of a (b)(2) action is the defendant's conduct
25 toward persons sharing a common characteristic"). In particular, plaintiffs' theory of "subjective
26 decision-making" does not create a basis for 23(b)(2) certification because plaintiffs have not
27 identified any common practice of subjective decisionmaking. *See Wagner v. Taylor*, 836 F.2d
28 578, 594 (D.C. Cir. 1987); *Holsey v. Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984).

The list of requested "injunctive relief" sought by plaintiffs readily demonstrates that the

1 proposed class does not seek a single remedy, and that none of the proposed injunctive actions
2 will apply to—or resolve the claims of—the class as a whole. Not all class members will be
3 benefited by eliminating the basic skills tests, or permitting casual employees to use the JCATS
4 system, or changing the performance evaluation process, or changing the discipline process—and
5 indeed some class members will be harmed by various of these proposals because their strong
6 performance or absence of any disciplinary actions would otherwise benefit them in seeking
7 promotions or higher compensation.

8 **B. Plaintiffs' Requests For Compensatory And Punitive damages Are Not**
9 **Incidental**

10 A class may only be certified under Rule 23(b)(2) where injunctive or declaratory relief is
11 the predominate relief sought. Rule 23(b)(2), Advisory Committee Notes; *Doninger v. Pacific*
12 *Northwest Bell, Inc.*, 564 F.2d 1304, 1311 (9th Cir. 1977); *Allison v. Citgo Petroleum Corp.*, 151
13 F. 3d 407, 416-17 (5th Cir. 1998), *reh'g denied*, 151 F. 3d at 434 (5th Cir. 1998). Plaintiffs
14 vague, off-the-cuff, and unquantifiable injunctive proposals strongly signal the secondary nature
15 of this proposed relief. Indeed, plaintiffs' counsel concedes that there is an "incomplete record"
16 with respect to the injunctive relief proposed.¹³⁰ Plaintiffs cannot meet their burden of showing
17 that the injunctive relief predominates when they do not know what their proposal is. The
18 proposal to eliminate the basic skills tests and instead focusing on training is not supported by any
19 evidence whatsoever supporting a lack of new-hire training at FedEx.¹³¹ And plaintiffs say not a
20 word about how the performance evaluations, or FedEx's detailed discipline criteria, should be
21 modified. Finally, their casual suggestion that the performance evaluations should be "monitored
22 . . . to ensure . . . that they have no adverse impact" would appear to mandate a race-conscious
23 practice tantamount to an impermissible quota. At the same time plaintiffs vaguely hypothesize
24 various types of injunctive relief, they seek significant monetary damages. (Pl. Br. at 34.) This

25 ¹³⁰ Bielby Dep. at 79.

26 ¹³¹ FedEx recently launched a new comprehensive training program for new hires. Its *New Hire Orientation Kit*
27 program provides comprehensive training to new hires and has won more than 20 independent industry awards for
28 training excellence. (DeBerry Decl. ¶ 16.) Plaintiffs have not presented any evidence to support the notion that
FedEx's new hire training is in any way inadequate, and indeed have not even alleged this in the Complaint. Thus,
plaintiffs have not linked their proposed injunctive relief to any claim at issue. Moreover, to the extent that training
is in issue, it changed during the proposed class period, so the evidence will not be common among putative class
members.

1 proposed monetary relief necessarily predominates over their incidental, impossible to quantify,
2 and largely precatory claims for injunctive relief. *See Staton v. Boeing*, 327 F.3d 938, 944, 949-
3 50 (9th Cir. 2003) (classifying injunctive relief in a consent decree as “precatory” only and
4 having no significant value).

5 Plaintiffs suggests that the Court should only certify a (b)(2) class at this time, and worry
6 later about whether to certify a class under 23(b)(3) for their claims for compensatory and
7 punitive damages. Such an approach would allow plaintiffs effectively to evade the class
8 certification requirements because (1) the Court cannot adequately address the claim for (b)(2)
9 relief, *i.e.*, the extent to which the compensatory and punitive damages predominate over the
10 injunctive relief claims because consideration of the former claims is deferred, and (2) the Court
11 does not have the evidence to evaluate whether certification under 23(b)(3) is proper because
12 plaintiffs have not presented any. They should not be permitted to obtain certification without
13 meeting their burden of proof on class certification as to the case as a whole. Moreover, while
14 telling the Court to defer the issue, their proposed Order makes clear that they seek to certify a
15 class based on compensatory and punitive damages. (Proposed Order ¶ 10.) The existence of
16 compensatory and punitive damages would clearly predominate over claims for injunctive relief,
17 and would bog down this Court in an endless, unmanageable proceeding. *See, e.g., Beck v.*
18 *Boeing*, 2003 U.S. App. LEXIS 3619 (9th Cir. 2003); *Allison*, 151 F. 3d at 416-17.

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CONCLUSION

For the foregoing reasons, this Court should decline to certify any class.

Dated: November 5, 2004

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Dated: November 5, 2004

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