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PRELIMINARY STATEMENT

In certifying the class in this matter, the Court considered a “comprehensive record” and found that plaintiffs had made “a convincing showing of a common policy of discriminatory treatment that extends across divisions, units, and geographic regions.” McReynolds v. Sodexo Marriott Servs., Inc., 208 F.R.D. 428, 445 (D.D.C. 2002). In preparing for trial since then, the class has amassed a mountain of documentary evidence, testimony from company officials and class members, and expert statistical analyses, all of which defendant Sodexo Marriott Services, Inc. (“Sodexo”) has vigorously disputed in this Court, in the D.C. Circuit and in the U.S. Supreme Court. In the instant motion for summary judgment, Sodexo has continued its assault on plaintiffs’ evidence -- labeling it as “slim,” “isolated” and generally insufficient to support a pattern and practice claim -- but its characterization of that evidence is highly disputed. As this Court remarked just five months ago, “[o]bviously there are fact issues in dispute.” (Dec. 15, 2003 Tr. at 53, Exh. 112).

As demonstrated both in this opposition and in plaintiffs’ Rule 7(h) statement filed herewith, the evidence upon which the class relies is even more “convincing” now than it was two years ago. However, the fact that it is disputed is sufficient to doom this motion and send the case to trial. What the jury will hear at trial is, in the words of one recently hired Vice President at Sodexo, “very eye-opening and shocking.” (Taylor Dep. at 107, Exh. 77). And the evidence will come not just from dozens of class members, who were prevented from even seeking promotions in most cases and who listened to white managers say things like, “How can you be such a dumb nigger?” It will also come from two senior-level white managers who saw and heard things most class members are not privy to. It will come from absent class members who were described as “critical to Defendant’s trial preparation” because they would “rebut the

anecdotal allegations of race discrimination Plaintiffs will offer at trial” -- but who testified in deposition that they experienced discrimination in the same way as the active plaintiffs. It will come from a consultant Sodexho hired to develop a positive diversity brochure, who reported instead that black managers appear to be “in positions that are career limiting and have received messages that they are less qualified and competent for further advancement.” And it will come from defendant’s own expert statistician, whose \$4 million year-long “logit” analysis, even with its many biased controls, showed that for blacks at Sodexho, skin color lowers one’s chance of promotion by 20 percent. Because a trial is the only way to decide the disputed facts in this case, defendant’s motion for summary judgment must be denied.

FACTS

I. Promotions Are The Product Of Unfettered Discretion Of Mostly White Managers

A. Blacks Are Denied The Chance To Even Compete For Promotions

Merits discovery has confirmed that the vast majority of positions at Sodexho are never even posted. Sodexho’s statistical expert, Joan Haworth, has now admitted that 75 percent of the events she calls “promotions” were never posted at all, thus depriving black managers of the chance to even compete for most promotions. (See Haworth 7/03 Rep. at ¶ 101, Def. SJ Exh. 1). The impact on class members of not posting three out of every four jobs is illustrated by the examples cited in Plaintiffs’ Statement of Disputed, Material Facts No. 1. (See Pl. 7(h) Stmt. at Disp. Fact No. 1). Even after Sodexho launched its web-based “Career Center” in 2000, managers were still not posting positions.¹ (See Lee Dep. at 205-06, Exh. 40). Plaintiffs’ expert

¹ Sodexho’s witness on its promotion process testified that although the posting system changed from MCMS to Career Center in 2000, in most other material respects the
(continued...)

Dr. Erich Prien, one of the nation's most experienced and accomplished industrial and organizational psychologists,² observed that Sodexho's Career Center "continues to suffer [from] many of the same deficiencies of the MCMS system," including rampant preselection. (Prien 10/01 Rep. at ¶ 9, Exh. 163). Dr. Prien's testimony has not been rebutted, because Sodexho chose not to retain an expert industrial psychologist until it was far too late.

In the unusual cases where a job is posted, favored candidates are often preselected by Sodexho's predominantly white decisionmakers.³ Indeed, Sodexho's own internal study of its posting process revealed that preselection is common and that posting is a mere "formality." (Exh. 123). The adverse impact of this practice on black managers, however, was anything but a "formality," as seen again by the plethora of examples in Plaintiffs' Statement Of Disputed, Material Facts No. 2. Sodexho's routine preselection practices have now been confirmed by two successful white District Managers. (See Hymes Dep. v.1 at 95-99, 105-07, 284-87, Exh. 34; Cipollini Decl. at ¶¶ 3, 5-9, Exh. 98).⁴ Robin Clayton, a black Corporate Headquarters manager who was deposed by Sodexho in the hope that she would support the company, instead described how a non-posted, high-paying position was created for one of her white co-workers. (Clayton Dep. at 69-70, Exh. 14).

¹ (...continued)
selection process for salaried jobs did not change. (Anstee Dep. at 134, Exh. 4).

² See Attachments 1-2 to Prien Rep. (describing Dr. Prien's qualifications and experience).

³ A further barrier black managers experienced was the frequent denial of supervisory approval to apply for posted positions. (See Pl. 7(h) Stmt. at Disp. Fact. No. 30).

⁴ The President of the Heath Care Division, Dick Macedonia, described Kelly Hymes, one of these senior-level managers, as dedicated, honest and "extremely competent." (See Macedonia Dep. v.1 at 132-33, Exh. 41).

Sodexo's use of preselection rather than open and fair competition for promotions is not limited to a few districts or even divisions -- it is endemic. Human resources managers in the School Services Division in Delaware and the Corporate Services Division in California testified that hiring managers nationwide regularly preselect favored white candidates before positions are even posted, or signal that a job is not really "open" by inserting the phrase "strong internal candidate" in the posting, a code phrase for preselection. (Murray Dep. v.1 at 97-98, Exh. 57; Hardy Dep. at 210, Exh. 25; Exh. 118; Exh. 121). Former School Services President Jim Seaton confirmed that the phrase "strong internal candidate" means "there's a candidate, potential candidate already either exists usually on site that has probably been groomed or getting ready or had been mentored and prepared for that position . . ." (Seaton Dep. at 64-65, Exh. 69). This "grooming" process disadvantages blacks because of the premium it places on personal ties to Sodexo's predominantly white decisionmakers. As a result, when blacks did get the chance to post for a position, the train had already left the station. For class members across the country, the very act of seeking a promotion became a futile gesture. (See Pl. 7(h) Stmt. at Disp. Fact No. 2).

B. Promotion Decisions Are Standardless and Not Documented

After reviewing the scant documentation of actual promotion decisions, plaintiffs' expert industrial psychologist, Dr. Prien, concluded that "except in a trivial number of instances, there was simply no documentation of any kind to suggest how the candidate was evaluated, whether they were evaluated at all, whether any candidate other than the one selected was even considered for the opening, how any candidate compared in qualifications to any other candidate, or what qualification standards were used in making the decision." (Prien 10/01 Rep. at ¶ 18).

Sodexo cannot even determine from its records whether an employee received a promotion,⁵ let alone why a particular promotion was given to one person and not someone else. In Dr. Prien's expert opinion, if there are no written records and no controlling selection criteria, particularly in a company of Sodexo's size, "there is no way of knowing whether the qualifications of an applicant for promotion were of any relevance at all in the promotion decision." (Id. at ¶ 18 (emphasis added); see also Barksdale Decl. at ¶¶ 5-10, Exh. 97). Dr. Prien testified that in his 40-year career, he has "never seen a company of this size with such lax and corruptible selection criteria and procedures." (Prien 10/01 Rep. at ¶ 4). In this system, predominantly white hiring managers, left to act on their own by the lack of fixed standards, tend to select candidates who are more like themselves, thus systematically disadvantaging African-Americans and "allow[ing] racial bias to affect promotion decisions to a much greater extent than it would in a professionally validated system." (Id. at ¶ 7; Prien Dep. v.1 at 144-45, Exh. 64).

Dr. Prien's conclusion is supported by Sodexo's own admissions. In 2001, Sodexo Associate General Counsel J. Victor Wayne asked Sodexo's senior managers throughout the company to provide any "standardized interview question sets or hiring process guidelines. . . [a]ny rating or ranking sheets, matrixes or formulas for scoring or comparing candidates," and "[a]ny forms for interviewers to record interview notes or impressions." (Exh. 116). Most of the responses to this email produced to plaintiffs indicated there were no such documents. In response after response, the unchanging columns of "no" answers to these

⁵ In Sodexo's MARRPAY payroll system, promotions within a pay band can be indistinguishable from pay "adjustments," thus Sodexo cannot identify when in-band promotions occur. (Coe Dep. at 43-44, 60-61, Exh. 13). This has led to a dispute between the parties' statistical experts regarding the definition of a "promotion." (See Section V(B) and (C), infra).

questions left no doubt that Sodexho had no set promotion standards or criteria, and that decisions were being made entirely subjectively. Even members of Waye's own legal department in Gaithersburg provided the same responses. (See id. at SDH 22681-83 (from Dave Hayes, Associate General Counsel at Sodexho)).

C. Sodexho's Newly Contrived H.R. Declarations Lack Credibility

Sodexho does not have any records of how promotion decisions were made other than a trivial number of interview and rating forms produced in response to plaintiffs' document request three years ago. (See Pl. 7(h) Stmt. at Disp. Fact No. 5). Although Sodexho made 10,002 promotions during the period 1995-2001 (Siskin 11/01 Rep. at ¶ 6, Exh. 160), the number for which there are any explanatory records is a mere handful. Because no one at Sodexho kept any records of these decisions, it is not surprising that the decisions themselves are the product of unfettered managerial discretion. Faced with admissions by its own witnesses and in its own documents which led the Court to find that Sodexho's promotion process has "no company guidelines or fixed criteria or anything . . . to follow in making those decisions," 208 F.R.D. at 433, Sodexho has prepared new declarations solely for the purpose of this motion which purport to show that "promotion decisions typically had concrete and common processes." (SJ Brf. at 8). The declarations are from nine Sodexho human resources managers, but they speak only to the parts of the company over which these managers have H.R. responsibilities. There are major parts of the company, including three of the six divisions, that are not addressed in any of these declarations. Sodexho thus cannot rely on these statements to support its assertion about how promotion decisions "typically" are made. (Id. at 8, 39). Moreover, the sheer volume of contradictory evidence from other company witnesses and documents, attesting to the absence of

standards and controls, raises serious questions as to the credibility of these declarations, which can only be resolved at trial.⁶

There are many shortcomings in these post-hoc declarations which render them useless as support for this motion. Hardly a single sentence is both material to this case and not in dispute.⁷ The specific weaknesses of these declarations include the following:

- Sodexho argues that these declarations show the promotion process was “concrete” and “structured,” but Sodexho’s expert Dr. Haworth has already admitted that 3 out of 4 promotions were not posted, which is corroborated by the testimony of numerous witnesses and by company documents. (See Haworth 7/03 Rep. at ¶ 101; see also Pl. 7(h) Stmt. at Disp. Fact No. 1). In light of this evidence, the nearly identically worded statement in 8 of 9 of these declarations that “[a]ll job openings in my area are posted” during the period “at issue in the pending class action litigation” is simply not credible. No support for this conclusory statement is offered in any declaration.
- Because most parts of the company are not covered by any of these 9 declarations, defendant’s attempt to rely on them to show what was “typical” about promotion decisions (SJ Brf. at 8, 39) is unavailing. There is no declaration at all discussing the Corporate Services Division, the Corporate Headquarters Division, or the Laundry Services Division. The only declaration covering the Campus Services Division is limited to West Coast states, and the only declaration discussing the School Services Division is confined to only 13 states in the middle of the country. Because Tammy King’s declaration is unclear as to whether it covers the whole Health Care Division or only the Central Region, it is difficult to determine how much of that division is described by these declarations. If King’s declaration is national in scope, it contradicts the statements of several other declarations describing specific regions in that division. (See Sodexho SJ Exh. 59, Biaggi Decl. at ¶ 1; Sodexho SJ Exh. 37, Walker Decl. at ¶ 1; Sodexho SJ Exh. 31, King Decl. at ¶ 1, 3; see also Pl. 7(h) Stmt. at Rebuttal No. 37).
- Some of the declarants state that the interview questions, rating forms and other procedures described in the declarations were “available” or “provided” to hiring managers, but they do not state that managers ever used those measures. Most of

⁶ In light of this Court’s prior findings on the entirely subjective and discretionary nature of Sodexho’s promotion process, it is remarkable that Sodexho asserts in this motion that “Plaintiffs offer no credible evidence to support their conclusion that Sodexho’s promotion systems were wholly subjective and discretionary.” (SJ Brf. at 44).

⁷ See Pl. 7(h) Stmt. at Rebuttal Nos. 37-39.

the declarations state that the “structured” process described was confined to certain types of promotions (e.g., above-the-unit), meaning that many other promotion decisions in that division/region did not follow such process. For example, Peter Simon-Gerard’s declaration is limited to promotions to a single job title, District Manager. Moreover, some of the declarations describe procedures not in place until after 2001, and others use limiting language including what hiring managers “generally” or “usually” did. Karen Fricker’s declaration clearly seems to describe a process only recently adopted and nowhere does it state that the process was in place during a time relevant to this case. (See Sodexho SJ Exh. 33, Gerard Decl. at ¶¶ 3-4; Sodexho SJ Exh.58, Fricker Decl. at ¶¶ 1-3; see generally Pl. 7(h) Stmt. at Rebuttal Nos. 37-39).

- Although all of the declarations refer to and attach copies of sample interview questions, rating forms and other documents allegedly used by decisionmakers, only one declaration attaches forms that were actually completed during the promotion process -- and those forms relate to a single promotion. (See Sodexho SJ Exh. 31, King Decl. at attachments). There is no evidence that any of the other forms were actually used. (See generally Pl. 7(h) Stmt. at Rebuttal Nos. 37-39; see also Pl. 7(h) Stmt. at Disp. Fact No. 5).
- None of the declarations applicable to the time period of this case describes any actual selection criteria used by decisionmakers, such as job competencies or job related knowledges, skills and abilities, except in the most vague and generic terms such as “past experience,” “past performance,” “experience,” and “other qualifications identified as desirable for the position prior to the interview process.” Of course, not one of the declarations even suggests that any of the purported procedures were validated in conformance with professionally accepted standards. (See generally Pl. 7(h) Stmt. at Rebuttal Nos. 37-39; see also Pl. 7(h) Stmt. at Disp. Fact No. 6).

Sodexho’s carefully contrived declarations are also refuted by recent evidence obtained from two former District Managers, one white and one black, who had an inside view of how promotion decisions were made. Curtis Stancil was a District Manager in the Campus Services Division and is one of the absent class members Sodexho deposed in an effort to show that black managers had not experienced discrimination. He testified:

[W]e did not have any normal criteria that the company provided to go against . . . not all of our positions at that time had job descriptions associated with them. So even determining what the job needed was up to, in my case, myself, . . . it was discretionary as it related to how I came to a

conclusion in terms of what that interviewing process was going to look like, who made the list and who didn't.

(Stancil Dep. at 105-06; see also id. at 136-38, Exh. 76). John Cipollini is a white former Sodexo manager who worked for the company for 14 years, and served as a District Manager from 1996 to 1998, after which he was promoted to a Sales Director position. Like Kelly Hymes, Cipollini was successful at the company and has nothing to gain from participating in this case.

This is his sworn description of Sodexo's posting and promotion system:

Decisions regarding promotions at Sodexo were made by a small group of District Managers and Vice Presidents who decided which managers were going to take open positions . . . These decisions were usually made without using the posting system . . . [P]romotion decisions were highly subjective and not tied to any identified qualification standards or criteria for determining the best qualified person. To my knowledge, the company did not have guidelines regarding what qualifications a candidate had to have to qualify for a promotion. Decisions were often based upon who you knew rather than any list of job related abilities.

(Cipollini Decl. at ¶¶ 8-9). In light of all of this evidence regarding the promotion process, Sodexo's argument that it uses "objective measures" or "objective criteria" is both immaterial and highly disputed.⁸

II. Sodexo's "Regional Vice President" System Is A Hoax

Although this Court certified a nationwide class after finding a "company-wide policy of not having any consistent promotion policy, guidelines, or requirements" and "statistical evidence of discrimination in promotion," from which a company-wide policy or

⁸ Just as it did at the class certification stage, Sodexo supports its claim that it uses "objective criteria" by misrepresenting the testimony of various class members. (See SJ Brf. at 7-8, 41-42; see also Sodexo's 7(h) Stmt. at Undisput. Fact Nos. 31, 32, 34, 36). Sodexo's characterization of the class members' testimony is highly disputed. (See Pl. 7(h) Stmt. at Rebuttal Nos. 31, 32, 34, 36). Moreover, this Court has already rejected Sodexo's argument on this point. See McReynolds, 208 F.R.D. at 441-42.

practice of discrimination may be inferred, 208 F.R.D. at 441, Sodexho now argues for the first time in this four-year-old case that the “company’s principal decision-making units,” which are “functionally and independently responsible for the vast majority of the promotion decisions at issue,” are entities called “RVP regions.” (SJ Brf. at 2, 17.)⁹ Sodexho claims to have 155 of these RVP regions, and it argues that it is entitled to summary judgment because plaintiffs’ statistical as well as anecdotal evidence is confined to a “small handful of RVP regions,” thus foreclosing any chance of establishing a company-wide pattern and practice of discrimination. (Id. at 2).

Sodexho relies on “RVP regions” in an effort to provide its expert statistician, Dr. Haworth, an operationally-based rationale for disaggregating the promotion data for the company into 155 smaller units so as to mask the statistically significant promotion disparities adversely affecting African-Americans. Indeed the importance of RVP regions is so central to Sodexho’s motion that the words “RVP,” “region” or “regional” appear approximately 90 times in its brief. But the “RVP” argument is based on a hoax: contrary to Sodexho’s representations RVPs do not represent any meaningful geographic regions; they are not headed by “Regional Vice Presidents;” they are not related to Sodexho’s operations; and they do not function independently with separate promotion procedures. Under this argument, the District of Columbia would consist of 12 different “regions.” (See Exh. 1 to Siskin 5/04 Decl., Exh. 158. At most, the term “RVP”

⁹ Sodexho did argue in opposing plaintiffs’ motion for class certification that only a small number of RVP regions showed statistically significant disparities, but this is the first time defendant has attempted to trick the Court into accepting as genuine the preposterous notion that “RVP regions” -- a term company officials are barely familiar with (see Siskin 5/04 Decl. at ¶¶ 7-10) -- have the operational significance defendant attributes to them.

represents an accounting code with no operational significance and no role in any promotion decision or policy.

The second sentence in defendant's Statement of Undisputed Facts (SJ Brf. at 4) and in the first paragraph of its separately filed Rule 7(h) statement, asserts that Sodexho's "operations are divided among six corporate divisions . . . and approximately 155 regions (headed generally by Regional Vice Presidents)." In neither place is any record support offered for the second half of this assertion. The facts are to the contrary. The term "Regional Vice President" was a pre-merger, Marriott job title, and in fact from 1995 to 1999 there were only 16 such jobs in the entire company. (See Siskin 5/04 Decl. at ¶ 5). The job title apparently disappeared in February 1999 and has not been used since that time. (Id.). The only significance of the acronym "RVP" during the period relevant to this case appears to be as an accounting code in the MARRPAY database. "RVP" has no operational significance. For example:

- Each unit or account in Sodexho's database has an assigned, three-digit "RVP code." As long as that unit remains active, its RVP number never changes, even if the senior managers overseeing the unit do change. (See Exh. 3 to Siskin 5/04 Decl. and ¶¶ 11, 14).
- Each RVP code belongs to only one division (which is also true of units). Depending on the time period, there have been approximately 150-160 RVP codes in the whole company. (Siskin 5/04 Decl. at ¶ 12, n.11). The number of RVPs per division ranges from a low of 2 to a high of 52. (Id. at ¶ 12).
- Although Sodexho's attorneys have used the terms "RVP" and "region" interchangeably, an RVP is not a geographical region as that term is generally understood. Some RVPs consist of a single employee in one office and other RVPs have over 150 employees working in 25 states and every section of the country. (Siskin Exhs. 1 & 5 to Siskin 5/04 Decl. and at ¶¶ 12-13). The same geographic location can also be in four or five different RVPs. (Id. at ¶¶ 12-13).
- Because RVPs do not have any operational significance, they are not headed or directed by anyone. Senior managers, such as Vice Presidents of Operations or Senior Vice Presidents, have responsibility over different accounts, but those assignments are not based on RVP. For example, the same VP of Operations or

other senior manager is often responsible for accounts in more than one RVP, and because the person heading those accounts is the same person, the RVPs do not operate independently and they are not separate decisionmaking units, contrary to defendant's claims. (Id. at ¶¶ 14-15).

- Another indication that the RVP code has no operational significance is the name of the senior manager who is associated with that code in the company's database. Each RVP code number also has an RVP name attached to it, which Sodexho would argue is the Regional Vice President in charge of that "region." But the "RVP name" for a given RVP never changes during the period 1995 to 2001, even when the person listed as the RVP no longer works for the company. Ollie Lawrence is the RVP-name for RVP 251 for each year from 1997 to 2001 but he left the company from 1998 to 2000. (Exh. 3 to Siskin 5/04 Decl. and ¶ 14; Lawrence Dep. v.1 at 9, Exh. 38). There are even instances where a person is listed as the RVP name years before he started working for Sodexho. (Siskin 5/04 Decl. at ¶ 14 (James Taylor, RVP 811)).
- Although the corporate structure, operation and organization of this company have been described in detail by two Sodexho experts, Dr. David Bloom and Leonard Biermann, neither one even refers to RVPs or suggests that there are 155 distinct "regions" in Sodexho. Neither do any of the nine Human Resources managers who submitted declarations with this motion, which purport to describe selection procedures in certain parts of the company. In all cases, the states each of these managers is responsible for encompass multiple RVPs, again proving that RVPs are not independent and distinct regions. (See Exh. 114; Bloom Rep., Exh. 164; Biermann Rep., Def. SJ Exh. 41).
- Although Sodexho claims that RVP means region, there is a different code in the same database which is called "region." Each division has a maximum of nine regions (Northeast, Southeast, West, etc.) and the total number of regions for all six divisions is 54. (Haworth 7/03 Rep. at ¶ 244). Thus, Dr. Haworth's claim that there are 153 regions is contradicted by her in the very same report. (Compare id. at ¶ 119 and ¶ 244). Furthermore, the same RVP code often covers multiple region codes and multiple states, such as RVP 066, which encompasses all 9 regions in the country and RVP 074, which encompasses 25 states. (Siskin 5/04 Decl. at ¶ 13).

Dr. Siskin's May 2004 declaration provides additional reasons why the conclusions defendant attempts to draw from the RVP analysis are invalid and insupportable.

(See Siskin 5/04 Decl. at ¶¶ 6-25). Sodexho's intentional misrepresentation of the RVP code should be considered in evaluating the genuineness of any of its factual assertions.¹⁰

III. Sodexho Operates With A Plantation Mentality

A. Class Members Are Segregated Into Black Accounts

Merits discovery in this case has also revealed additional anecdotal evidence of Sodexho's racially discriminatory intent. The patterns of segregation and racial remarks cut widely across geographical areas and divisions of the company. To put it simply, being black at Sodexho is a major disadvantage, particularly in the area of promotions. Even the very organization and staffing of the company reflects the segregation of African-American managers into dead-end "black accounts," *i.e.*, accounts that Sodexho perceives to be appropriate for black managers because the decisionmaker at the account is black, because the hourly employees there are predominantly black, and/or because the consumers of the service are predominantly black. (See, *e.g.*, Mercer Dep. v.1 at 111, Exh. 48). Named plaintiff Sam Cokes has worked at "black accounts" almost his entire career. When he began working for defendant's predecessor company in 1956, he could only enter the workplace through the back door due to his race. He testified that the company "was segregated then and it's just as bad now . . . [t]his company has not changed in all that time." (Cokes Dep. at 45, Exh. 16). Cokes' testimony is supported by

¹⁰ Sodexho further misrepresents the results of its tainted RVP analysis, which it claims shows that only 9 of approximately 155 "regions" had statistically significant disparities in promotions of African-Americans. It describes any problems identified as "localized and discrete," "very small pockets," and "a tiny handful." (SJ Brf. at 2, 3, 44.) In fact, the geographic area covered by these 9 RVPs, in which even defendant's tainted study shows the presence of promotion discrimination, is hardly a small and discrete "pocket." These RVPs encompass 1,043 Sodexho accounts which are found in 32 states having a total population of over 178 million people, and nearly 1.9 million square miles. (See Siskin 5/04 Decl. at ¶ 22 n.19).

many other class members from around the country (see Pl. 7(h) Stmt. at Disp. Fact No. 27), as well as by Dr. Siskin's statistical analyses. (See infra at Section V(D)). Even former School Services President Jim Seaton testified that he could see how the assignment of blacks into "black accounts" could happen. (Seaton Dep. at 89).

The segregation of accounts at Sodexho was recently described by James Brown, one of the African-American managers whose testimony Sodexho represented to this Court was "critical" to its defense. (See Supp. Mem. in Support of Def. Motion to Increase the No. of Depos. at 5, Exh. 109). Mr. Brown, a two-time runner-up for the "Spirit of Sodexho" award, one of the company's highest honors, testified that "[m]ost black management in this company are of the mindset that if I'm to move up, it has to be a black institution or it has to be an institution with a black executive office. That has been what we see. That has been what I've experienced." (Brown Dep. at 96, Exh. 12). He further testified that he was told by white employees that the only reason he received his managerial position at a Florida college was because the client was black. (Id. at 124-25). He was encouraged by a white sales manager to interact with clients at historically black schools, but forbidden to speak with clients at white accounts. (Id. at 171-75). Confirming what other class members have testified about being segregated into black accounts, Brown described it as "being sent to the slaughter." (Id. at 100-01).

Although Brown works in the South, the segregation at Sodexho and the plantation mentality he describes are nationwide. In Health Care's mid-Atlantic region, a white District Manager who was well connected with Sodexho's senior management told an African-American manager "[y]ou blacks will never move up at the top because that's a good old boy network." (Hendrickson Dep. at 164, 166, 184, Exh. 30). Jackie Barnes, who worked in the

Campus Services Division in Pennsylvania, was told by her white District Manager that “a lot of [promotion] deals were made on the golf course amongst the good ole boys club.” (Barnes Dep. at 71-72, 75, Exh. 6). Bruce White was told by his white District Manager that he was not “the right fit” for a position in Arkansas because they needed a white male instead. (White Dep. at 331-32, 401-02, Exh. 82). See also Ellis Dep. at 206-210, Exh. 50 (H.R. representative told Ellis DePaul University in Indiana was too “ritzy” for her); Mitchell Dep. v.1 at 96-98, Exh. 5 (white District Manager questioned whether Mitchell would be successful in a “ritzy,” “suburban,” “very well-to-do” hospital in Virginia). Gail Darlington, who works in the Corporate Services Division, similarly testified that “client fit” was used as an excuse by white managers to exclude black managers from positions. Darlington regularly heard District Managers and sales personnel claim “they [clients] didn’t want any blacks at the account.” (Darlington Dep. v.2 at 130-32, Exh. 18). The excuse often turned out to be false. (See, e.g., Barnes Dep. at 60-67, 139-40).

Sodexho’s refusal to promote African-Americans is openly acknowledged by the company’s personnel experts. At a company-wide training conference attended by H.R. Managers from each division in 2000, several white H.R. managers remarked that there was no point in training them to recruit more African-Americans to increase diversity, because Sodexho’s “district managers won’t hire black people.” (Hardy Dep. at 163). At least nine other managers at the meeting, including a Corporate Vice President, agreed. (Id. at 208-09).

B. Racism Is Condoned

Rather than punishing managers for making racist statements, Sodexho promotes them instead, thereby signaling to white and black employees alike that disparaging views of

African-Americans are acceptable at Sodexho, even 40 years after the enactment of Title VII.¹¹ At the time plaintiffs filed their EEOC charge in this case, a white supervisory chef, Charles Hills, in Sodexho's Campus Services Division in Washington, D.C., was routinely saying things like, "I don't know why we hire such dumb niggers," and "How can you be such a dumb nigger?" (See Johnson Decl. at ¶ 6, Exh. 101). Hills was promoted after making these remarks. (Id.) In June 2000, Mike Summers, a white upper-level manager, spent 45 minutes explaining to Kelly Hymes that African-Americans are "genetically inferior to whites," and "not as smart and . . . not as capable [as whites]."¹² (Hymes Dep. v.1 at 179, 184). Summers also said that African-Americans "lived like animals" and "didn't deserve to have promotions." (Id. at 179, 183-84). When Hymes complained about these statements to a Vice President and other company executives, they took no action. (Hymes Dep. v.1 at 187-90, 335, 385). Summers received at least two promotions despite his reputation as a racist. (Exh. 134).

Sheila Ellis, who worked in the Corporate Services Division, testified that when a black employee at Anderson University in Indiana did not have the appropriate ingredient to complete a recipe, his white manager gave him a bottle of wine and told him to "nigger-rig-it." (Ellis Dep. at 173-76). This white manager was later promoted and eventually became a District Manager in the School Services Division. (Id. at 227-28). While Bruce White, who worked in the Healthcare Division in Arkansas and Louisiana, was working at West Jefferson Medical

¹¹ Sodexho argues plaintiffs do not have sufficient evidence of a pattern and practice because there were more than 25,000 Caucasian managers between 1995 and 2003, and plaintiffs identified "only" 24 managers who made racial statements. (SJ Brf. at 20). Sodexho's list is inaccurate – there are many more racist statements than Sodexho identified. (See Pl. 7(h) Stmt. at Disp. Fact No. 13 and Rebuttal No. 18). Moreover, Sodexho's list excludes statements that were not made directly to African-Americans.

¹² Summers' racist statements, among others, are not included in Biermann's declaration (see Def. SJ Exh. 11), which Sodexho relies upon to suggest such comments are isolated.

Center in Louisiana in April or May of 1998, he was told by a white employee that he was “just another nigger with a tie.” (White Dep. at 420). The list of racist statements catalogued in Plaintiffs’ Statement of Disputed Material Facts No. 13 is both long and appalling.

Racist attitudes and the defense of racist language are evident even at the highest levels of the company. For example, in 2003 the President of the Healthcare Division, Dick Macedonia, testified that use of the “N” word by whites to refer to African-Americans in the workplace could be a “term of endearment.” (See Macedonia Dep. v.1 at 124-27). Macedonia was promoted to the Chief Operating Officer position a few months later. (See Sodexho June 30, 2003 Press Release, Exh. 113). Likewise, Sodexho’s Chief Diversity Officer, who was hired in 2002 after this lawsuit was filed, stated that use of the term “colored” by white managers to refer to African-Americans in the workplace is still appropriate today in some areas of the country. (See Anand Dep. at 275-77, Exh. 3). Given this abundance of evidence of racial motive, there is ample proof from which a jury can conclude that a plantation mentality exists at Sodexho and that this fact contributes to the intentional denial of promotions to class members.

IV. Sodexho’s Officials Have Known for Years That It Does Not Promote Many Blacks, and The Problem Was Simply Ignored

Sodexho’s management has long known about its promotion discrimination but has failed or refused to rectify it. A 1995 “Pay Equity Study for Associates Above the Unit” conducted by Sodexho identified only 11 African-Americans out of 630 positions, or 1.7 percent. (Exh. 155). The same study revealed that there were only two African-American District Managers out of a total of 145 company-wide, a fact that former Sr. Vice President of H.R. Randy Harris testified “would raise a concern.” (Harris Dep. at 250-52, Exh. 26). Even a glance at this study is enough to see that blacks were not being promoted out of the units. In 1998,

Wynn Watkis, Sodexho's chief EEO officer, told Sodexho's Senior Vice President for Human Resources "there was a serious need to get more African-Americans in above-the-unit jobs," and discussed "the lack of minority representation" with at least three other senior executives. (Watkis Dep. v.1 at 114, 142-43, Exh. 78). Watkis told other officials "since the day [he] started with the company" there needed to be more African-Americans in above-the-unit jobs. (Id. at 115). Watkis warned that "probative [sic] questions from current and prospective clients[] increases the likelihood that [Sodexho's] deficiencies will be exposed." These deficiencies included "[v]ery few minorities . . . in district manager and large-account general manager positions" and "[l]ack of minority . . . representation in key sales roles." Watkis further warned that the risks of such a lack of diversity included "the potential for employment-related class action." (Exh. 147 at SDX 49623-24).

Sodexho also received repeated warnings from Kelly Hymes. In 1998 she met with Randy Harris, Sodexho's Senior Vice President of Human Resources, to discuss the lack of minority and female upper-level managers. (Exh. 120; Hymes Dep. v.1 at 259-60). Harris "agreed that we weren't doing anything," and said he had told Chuck O'Dell, the then-CEO, to stop talking about diversity "if he wasn't going to do anything about it." (Hymes Dep. v.1 at 260). Hymes had similar meetings with other executives from 1994 to 2001, but little came of them, even though she offered to help. (Id. at 310-21, 385). At a recruiting conference in Florida in 2000, Interim Vice President of Human Resources Jimmie Paschall stated with regard to Sodexho's diversity, "I can't tell you we don't have a problem, we have a serious problem." (Hardy Dep. at 221). Plaintiffs' Statement of Disputed, Material Facts No. 12 shows that in terms of the better paying, more desirable jobs, Sodexho has most of the hallmarks of an "all white company."

Because Sodexho ignored the warnings it got concerning the lack of African-Americans in upper-level positions, the situation remained largely the same even by the turn of the millennium. See Watkis Dep. v.1 at 143-45 (Sodexho's chief EEO officer admitted there was no significant improvement for African-Americans in above-the-unit positions from 1998 to 2000).¹³ In fact, the situation worsened over this time period. See Exh. 150 (goal sheets dated December 15, 1998 and attached summaries indicate that whites were four times as likely to occupy an above-the-unit position compared to blacks); Id. at Exh. 153. (in September 2000, whites over five times as likely to be promoted to an above-the-unit position compared to blacks); Watkis Dep. v.1 at 145-46 (testifying that the FY 2001 goal sheets were produced in September 2000).

Sodexho knew that the small number of African-Americans in the company's better jobs was linked to its promotion process. In 2001, after this action began, Sodexho's Senior Vice President for Human Resources, Ollie Lawrence, directed the company's four largest operating divisions to prepare lists of recent promotions to upper level jobs at Band 90 and above, including the race of the person promoted. (Lawrence Dep. v.1 at 20). When these lists were considered along with a similar promotion list for Corporate Headquarters, the combined results showed that only 2.4 percent (5 out of 211) of recent upper-level promotions had gone to African-Americans, all of which post-dated plaintiffs' EEOC charge. (Exh.11 to Landel Dep.;

¹³ In the division-wide goal sheets for the operating divisions, managers in job groups 1A through 1D hold above-the-unit positions. (Exh. 125; Watkis Dep. v.1 at 73-75). There were 188 managers in these positions in the Corporate Services Division in September 2000 and not one of them was African-American. (Exh. 129 at SDH 11679). Sodexho's Chief EEO official said he had "a very high level of concern over the lack of African-American representation." (Watkis Dep. v.1 at 145; see also Watkis Dep. v.3 at 257, Exh. 80) (underutilization is a "problem that [Sodexho] needs to deal with").

Lawrence Dep. v.1 at 16, 23-25, 40, 43). When Lawrence saw these lists, he met with each of the Division Presidents, accompanied by CEO Michel Landel, and told them the number of black promotions to upper-level jobs was “low,” that this low number showed “underutilization” of African-Americans in upper-level positions, and that they “need to be better.”¹⁴ (Lawrence Dep. v.1 at 46-47). Many of these division presidents clearly ignored these warnings because they do not even recall discussing the issue with Lawrence and the CEO. (See Mulligan Dep. at 56-59, Exh. 56; Bond Dep. at 193-94, Exh. 10; Hamman Dep. at 46-48, Exh. 24; Macedonia Dep. v.1 at 214-22; Seaton Dep. at 130-32). Wynn Watkis, Sodexho’s top EEO official testified that there was no need to analyze whether there were fewer black promotions than there should have been because “the lack of black employment at the upper levels of [the] company” would be “obvious” to anyone who looked at the numbers. (Watkis Dep. v.1 at 283-84).

Another strong indication that Sodexho’s white officials simply did not care that blacks were not being promoted is the company’s failure to prepare affirmative action plans (“AAPs”) as required by the Department of Labor’s Office of Federal Contract Compliance (OFCCP). Sodexho claims to have received a “clean bill of health” from the OFCCP. To the contrary, it blatantly ignored its affirmative action obligations as a federal contractor. The OFCCP never conducted anything like a comprehensive, company-wide review of Sodexho’s EEO compliance, thus Sodexho’s violations, of which there were many, went largely undetected. In 18 of the 19 OFCCP audits on which Sodexho relies, the part of the company that was “audited” was a single unit or account, of which Sodexho has over 6,000. (See Compliance

¹⁴ “Underutilization” means “having fewer minorities or women in a particular job group than would reasonably be expected by their availability.” 41 C.F.R. § 60-2.10(a)(1)(2003).

Review Charts, Exh. 170). The number of managers in these accounts was often less than ten, and in most of these units there were no black salaried employees at all. (See id.; Exh. 14 to Biermann Dep., Exh. 85). After the only OFCCP audit that focused on more than a single unit (a “glass ceiling” review of Sodexho’s Corporate Headquarters) the OFCCP found that “Sodexho failed to compile, track and maintain complete applicant data for its Affirmative Action plan years for 1999 and 2000” and that “[a]s a result, OFCCP was unable to determine the presence or absence of discrimination in the selection and non-selection of applicants in the 1999 and 2000 Affirmative Action plan years.” (Exh. 127). This hardly amounts to a “clean bill of health.” Sodexho’s OFCCP “expert” admitted that this record-keeping violation was a violation of the Executive Order. (Biermann Dep. at 156-57, Exh. 9).

Although Sodexho was required to develop annual AAPs covering all of its employees, it never produced any AAPs unless the Labor Department notified the company that it was going to audit a particular unit. (See Pl. 7(h) Stmt. at Disp. Fact No. 22). In fact, Sodexho was out of compliance with respect to over 99 percent of its workforce. (See id. at Disp. Fact No. 20). A 30(b)(6) witness for Sodexho’s external consultant, Berkshire Associates (which Sodexho later hired to produce its AAPs) admitted that when producing affirmative action plans for fiscal year 2002, they were supposed to review prior year AAPs to determine whether the company had made any progress, but were unable to do so because they did not have any plans for prior years. (See Satterwhite Dep. at 98-100, Exh. 67). This purposeful violation is an act of willful blindness by Sodexho. AAPs require a company annually to identify problem areas, including in the promotion of minorities, and to develop specific action steps to rectify those deficiencies. 41 C.F.R. § 60-2.17(a) - (c). Although Sodexho clearly knew about its deficiency

in promoting black managers, it completely ignored its obligations as a federal contractor to prepare the very type of document that should have led to a remedy of the problem.¹⁵

Further evidence that nothing changed even after the lawsuit was filed comes from Sodexho's own external consultant, Ada Posey, a former White House official Sodexho hired in 2001 to develop a diversity brochure. (Posey Dep. at 24-25, Exh. 63). At Sodexho's direction, Posey interviewed a group of company-selected minority and women managers. They told her Sodexho had a poor diversity record and discriminated against African-Americans and others in promotions. In order to alert Sodexho officials to these managers' complaints, Posey sent a detailed memo to Diana Newmier, Senior Vice President of Human Resources, detailing many of the remarks she heard from these individuals, including:

- "I definitely could not say there isn't a bias for White people in higher positions."
- "Why isn't Sodexho doing anything yet (regarding diversity) like other companies and competitors?"
- "This company doesn't do spit to promote diversity."
- "We're not moving in the right direction. As an operator, I see a big White male world."

(Exh. 154). In her summary of these interviews, Posey concluded, "It appears minority middle managers may be subject to placement in positions that are career limiting and have received messages that they are less qualified and competent for further advancement." (*Id.*) Posey's report fell on deaf ears at Sodexho. Indeed, the senior company official to whom it was sent, Diana Newmier, testified that she did not even read the report. (*See* Newmier Dep. v.2 at 207-10, Exh. 60).

¹⁵ See 41 C.F.R. § 60-2.10(a)(3) (finding a positive correlation between the presence of affirmative action and the absence of discrimination).

V. Statistical Evidence Confirms Company-Wide Discrimination Against Blacks In Promotions

The statistical evidence, whether considered in isolation or in conjunction with the abundance of testimony and documentary evidence described in Sections I-IV, supra, must also be considered by the jury as evidence of Sodexho's company-wide practice of discrimination against African-Americans, thereby precluding summary judgment.

As the Court previously concluded, after an extensive review of plaintiffs' statistical evidence, see McReynolds, 208 F.R.D. at 435-36, 441, the statistical analysis by plaintiffs' expert demonstrates a consistent pattern of discrimination against, and segregation of, African-Americans. Dr. Siskin prepared two promotion analyses at the class certification stage. Those analyses demonstrated that the shortfall of African-American promotions at Sodexho is statistically significant at 8.87 standard deviations, and that from 1995 to 2001 black class members lost 265 promotions. (Siskin 11/01 Rep. at ¶ 6). Sodexho's expert, Dr. Joan Haworth, has filed six reports and declarations attacking Dr. Siskin's analyses and putting forth her own, flawed analyses. (See Def. SJ Exhs. 1, 7-9, 12, 46). Dr. Siskin has demonstrated that Dr. Haworth's criticisms are baseless and do not change his conclusions.¹⁶ He has also identified multiple biases and errors in her alternative analyses that improperly conceal a large share of the discrimination that African-American managers have suffered at Sodexho. Despite these biases, some of Dr. Haworth's analyses support plaintiffs' contention that Sodexho discriminates against African-Americans. After class certification Dr. Siskin also presented a second segregation study that confirms that Sodexho's accounts are segregated. This study remains largely uncontested.

¹⁶ Sodexho separately filed a motion to exclude Dr. Siskin's testimony entirely under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Plaintiffs will respond to this motion on May 17, 2004.

A. Dr. Haworth's Own Biased Analyses Show A Company-Wide Pattern Of Promotion Discrimination Against African-Americans

1. Dr. Haworth's 2001 Study On Its Face Shows Company-Wide Discrimination

Dr. Haworth's 2001 pre-certification report was based on the only set of computerized promotion data Sodexho has. Despite its flaws, this report, which purports to analyze multiple "pools" of promotion candidates with similar qualifications, shows a company-wide shortfall of African-American promotions between 1998 and 2001 that was highly statistically significant -- 3.47 standard deviations (4.63 standard deviations between 1995 and 2001). (Haworth 10/01 Rep. Table 18, Def. SJ Exh. 8; Siskin 11/01 Rep. at ¶ 5).¹⁷ Sodexho ignores this analysis in the instant motion, but Dr. Haworth testified that the results are accurate and relevant to the issue of Sodexho's "overall liability" and should be considered by the Court. (Haworth Dep. v.2 at 103-04, 139, 179-180, Exh. 28). In sum, even Sodexho's own expert has added to the mountain of evidence, which the jury must consider, showing that Sodexho has engaged in a company-wide practice of discrimination.

2. Dr. Haworth's \$4 million "Logit" Analysis, On Its Face, Also Confirms Company-Wide Discrimination

In 2003, Sodexho paid Dr. Haworth \$4 million to analyze more than 700 factors that hypothetically might have been considered in evaluating a candidate's suitability for promotion. She found that for African-Americans at Sodexho, skin color lowers one's chance of promotion by 20 percent. (Haworth 3/04 Decl. at Table 4).

¹⁷ As this Court noted in certifying the class, evidence before 1998 is relevant to showing "an ongoing pattern of discrimination." McReynolds, 208 F.R.D. at 434, n.8. Although this Court limited the class period to 1998-2001, defendant produced data going back to 1995 and the 1995-1998 data is probative for determining discrimination.

Because there were no records of who was promoted and why, and no set criteria used to make promotion decisions, Dr. Haworth had to guess as to which attributes might (or might not) affect promotion decisions.¹⁸ Based on a review of employee personnel files, Dr. Haworth's team identified more than 700 of these potential attributes, ranging from what licenses an employee had to the employee's military experience. Employees only received credit for an attribute if it was included in their personnel file. (Haworth Dep. v.2 at 175-76). Thus, the more complete a personnel file, or more detailed a resume, the more "experience" the employee was credited in Dr. Haworth's analysis. Without any evidence that her 700 attributes were used in making promotion decisions, Dr. Haworth then performed a logistic regression ("logit") analysis, which purported to identify the attributes (or groups of attributes) that influenced promotion success. As we discuss below, this logit analysis is severely flawed and infected by bias at almost every step.

However, ignoring these manifest problems for a moment, the logit analysis itself confirms that Sodexho discriminates against African-Americans in promotions. (See Haworth 3/04 Decl. at Table 4, Def. SJ Exh. 46). Table 4 of Dr. Haworth's most recent report reveals that, all other things being equal, one factor -- the color of an applicant's skin -- lowers that applicant's chance of promotion by more than 20 percent (i.e., an African-American's odds ratio of being promoted is .78 of what one would expect), even after including all the irrelevant factors in Dr. Haworth's analysis. (Haworth Table 4, as described in Siskin 5/04 Decl. at ¶ 38). Under Dr. Haworth's own logit analysis, the finding that an African-American's skin color harms his or

¹⁸ Dr. Haworth interviewed numerous decisionmakers to determine what they considered important in evaluating candidates for promotions. The answers were anything but consistent and do not support Dr. Haworth's variables. (See Pl. 7(h) Stmt. at Rebuttal No. 20).

her promotion prospects is extremely unlikely to be the result of chance.¹⁹ Although the standard deviations for this “race effect” are below 1.96, Dr. Haworth’s own finding of this race effect, coupled with plaintiffs’ non-statistical evidence, are sufficient to create a genuine factual issue as to whether Sodexho has engaged in company-wide promotion discrimination against its black managers.

B. Dr. Siskin’s Straightforward Analysis Demonstrates That Sodexho Discriminates

Dr. Siskin found that African-American managers are disproportionately “stuck” at the lowest levels of management. 208 F.R.D. at 435; (Siskin 10/01 Rep. at ¶¶ 3, 23-24, Exh. 159). His first analysis supporting this conclusion was limited to promotions between grades or bands because he did not have the information necessary to study promotions within a single band. (*Id.* at ¶ 7, n.6). After receiving additional information from Sodexho, Dr. Siskin updated his analysis to include within-band promotions and found that the shortfall in promotions almost doubled (from 142.5 to 264.7) due to the increase in the number of promotions counted (from 5,226 to 10,002). (Siskin 11/01 Rep. at 2 n.4, ¶ 6). The significance of this shortfall in units of standard deviation also rose from 6.77 to 8.87. (*Id.*).

Sodexho’s failure to keep promotion records makes it almost impossible to accurately perform a direct promotion analysis that compares the applicants who actually competed for a particular position. Dr. Siskin therefore undertook a simple and complete “from” analysis of promotions.²⁰ In a “from” analysis, because it is reasonable to assume, absent

¹⁹ Table 4 of Haworth’s March 2004 declaration, attached as Def. SJ Exh. 46, shows disparities of 1.89 and 1.06 standard deviations.

²⁰ A “from” analysis groups similarly situated employees into “pools” and compares the percent of African-Americans in each pool with the percent of African-Americans who
(continued...)

evidence to the contrary, that employees in each pool on average have the same qualifications, the percent of African-Americans who are promoted from each pool should on average be the same as the percent of African-Americans in that pool. (See Haworth 10/01 Rep. at ¶ 84).

A proper analysis requires that each “pool” consist of similarly situated employees, i.e., those employees who, all other things being equal, perform similar jobs and thus have a similar chance of promotion. Dr. Siskin defined as similarly situated those employees who were in the same Division (e.g., Health Care), Grade/Band (e.g., Band 75), Job (as defined by Sodexho’s own occupation code) and Market Reference Rate (“MRR”).²¹ This definition included as similarly situated, Health Care housekeeping managers (“housekeepers”) who worked at \$1 million accounts, but distinguished those housekeepers from housekeepers in School Services or engineers in Health Care. Because Health Care housekeepers at \$1 million accounts perform the same job functions in the same types of accounts, they may be presumed to have on average the same qualifications, making it appropriate to compare the percentage of African-Americans and whites who were promoted from that pool. (See infra at Section I(A)).

Similarly a realistic promotion analysis must follow the company’s own definition of promotion. Sodexho defines “promotions” to mean either moves from one grade or band to the next higher grade or band, or “career moves” to positions within the same band but with higher MRRs. (Exh. 128). Dr. Siskin’s analysis defined a promotion as an increase in grade or

²⁰ (...continued)
received a promotion. A “to” analysis compares the percent of African-Americans who were promoted into positions with the percent of African-Americans who are in similarly situated pools with the people who actually received the promotions. (See Siskin 5/04 Decl. at ¶ 2 n.3; Siskin 2/02 Decl. at ¶¶ 3-4, Exh. 157).

²¹ The MRR is “the competitive or ‘going’ rate for a position within the national market . . . [it] is the median rate for all of the employees in the surveyed position. This means many employees are paid below, as well as above the MRR.” (Exh. 105 at SDH 11218).

band or a change in job or unit (i.e., a career move) and either (i) a salary change code of 3 or 4 (the MARRPAY code for a promotion), or (ii) an increase in MRR. (Siskin 11/01 Rep. at ¶ 6). This mirrors Sodexho's definition of promotion. Because Dr. Siskin properly used Sodexho's definition of promotion and grouped similarly situated employees, his analysis is reliable and relevant and his conclusion that the shortfall of African-American promotions was 8.87 standard deviations is highly probative.

C. Dr. Haworth's Analyses Are Full of Error and Bias

Contrary to Dr. Siskin's straightforward analysis, all of Dr. Haworth's analyses arbitrarily ignore many employees who are similarly situated, and use a peculiar definition of promotion that conflicts with the company's definition. In addition, her logit analysis controls for irrelevant factors that merely veil discrimination.

1. Dr. Haworth's Arbitrary Definition of Promotion Biases Her Results Against African-Americans

To begin, Dr. Haworth did not even study "promotions" as Sodexho has used that term in its business. This error is described more fully in Plaintiffs' Rebuttal to Defendant's Statement of Undisputed Fact No. 2. Dr. Haworth's study considers an employee who remains in the same job, in the same unit, at the same pay and same salary band, but with an increased MRR (which may simply be due to a new market survey) as having been "promoted." (See Siskin 11/01 Rep. at ¶ 17 n. 15). Because all of Dr. Haworth's analyses inflate the number of "promotions" that low-ranking (disproportionately black) managers received, her analyses artificially reduce the disparity between the promotional success of black and white managers.

2. Dr. Haworth Improperly Compares Employees Who Perform Different Jobs And Excludes from Her Comparison Employees Who Perform Similar Jobs

As discussed previously, it is important that a statistical study compare employees who perform the same types of job duties. As described below, because of the mix of controls or variables that Dr. Haworth chooses for each of her analyses, she compares employees who perform different jobs and excludes employees who perform similar jobs.

a. Dr. Haworth's Biased "From" Analysis²²

Dr. Haworth's "from" analysis compared promotions of employees who were in the same division, RVP code, district, and grade/band. For the reasons discussed supra at Section II, the "RVP" control is utterly meaningless, and has been improperly inserted for the sole purpose of depriving the results of statistical significance. Furthermore, the analysis did not consider the factor that has the most relevance to an employee's promotion chances -- current occupation (which Sodexho's data identify by occupation code and MRR). (See Taylor Dep. at 130-33). Dr. Haworth knows that current occupation is an important factor and has criticized other experts for not controlling for it. (See Exh. 106 at SDHEX 792 (criticizing a promotion analysis that "assumes that everyone in a salary grade has an equal probability of being promoted . . . Consequently engineers are included with accountants when a promotion to a senior accountant is considered.")). This mix of variables by Dr. Haworth led to the following results:

- Housekeeping managers (occupation code 865100) in the Campus Services Division in district 0624 at American University, district 0268 at American University, and district 0165 at Howard University were not "similarly situated"; (see SDH 2868, Exh.171 and Siskin 11/01 Rep. at Exh. S-3);

²² Tables 12 and 13 of her October 2001 report and Table 21 of her July 2003 Report.

- A housekeeping manager (occupation code 865100) and an engineering manager (occupation code 865000) in district 0624 were “similarly situated” (Id.);
- A housekeeping manager at a \$300,000 account (band 75, occupation code 865100, MRR \$30,000) and a housekeeping manager at a \$1.5 million account (band 75, occupation code 865100, MRR \$40,000) who both worked in district 0624 were “similarly situated” and considered interested in a housekeeping manager position at a \$600,000 account (band 75, occupation code 85610, MRR \$35,000) – even though the move would not be a promotion for the manager at the \$1.5 million account – because Dr. Haworth did not control for MRR. (Id.).

b. Dr. Haworth’s Biased “To” Analysis²³

Dr. Haworth’s “to” analyses only include and compare employees in divisions (her first “to” analysis) or units (her second “to” analysis) from which successful candidates came during the relevant period. (Haworth Dep. v.2 at 63). Her first “to” analysis compared employees who were in the same division, RVP code, district, and grade/band. Again, she did not control for current occupation, so her first “to” analysis suffers from the same flaws as described in subpart a. Her second “to” analysis contained the same controls as the first one, but this time she finally controlled for occupation code but improperly added a control for unit.²⁴

This mix of controls led to the following results:

- For her first “to” analysis, if during the 1998-2001 time frame, two General Manager of Housekeeping positions in district 0268 at American University opened up in Washington, D.C. and the successful candidates came from districts in California and Texas, Dr. Haworth assumed, for purposes of her analysis that the only interested and qualified applicants for those two positions were in the

²³ Tables 14, 15, 18, 19 of her October 2001 Report and Table 22 of her July 2003 Report.

²⁴ “Unit” as used by Dr. Haworth in this analysis represents single entities at Sodexho which can be a single cafeteria or gift shop at one account, such as a hospital; it is the smallest entity for which she could control. (Siskin 11/01 Rep. at ¶ 12 and n.9). In fact, over 60 percent of all “units” have just one or two employees. (Haworth 7/03 Rep. at ¶ 23, Table 5). By limiting her analysis to unit, 80.9 percent of her pools of promotional candidates are noncompetitive because they are either all white or all black. (Siskin 11/01 Rep. at ¶ 12). Common sense dictates that if a pool is all black or all white, there can never be a shortfall of promotions based on race.

same grades or bands as the successful candidates and came from the Texas and California districts. Housekeepers at American University (whether in district 0268 or 0624) were not considered as part of the pool of interested and qualified employees. (Haworth Dep. v.2 at 68-73).

- For her second “to” analysis, if during the 1998-2001 time frame, two General Manager of Housekeeping positions in district 0268 at American University opened up and the successful candidates came from units in California and Texas, Dr. Haworth assumed that the only interested and qualified applicants for those two positions were in the same grades or bands as the successful candidates and came from the Texas and California units. Housekeepers at any of the American University units were not considered as part of the pool of interested and qualified employees. (Id.)

c. Dr. Haworth’s Biased Logit Analysis

In addition to other flaws discussed below, Dr. Haworth’s logit analysis also failed to compare similarly situated employees. The controls used in Dr. Haworth’s logit analysis included education, job experience, industry experience, licenses and memberships, Sodexo tenure in management and salaried positions, division, RVP code, grade/band, and race. (Haworth 7/03 Rep. at ¶¶ 154-163). The majority of her logit analyses failed to control for the employee’s current occupation.²⁵ As discussed previously, the RVP code has no operational meaning and as such has no place in a promotional analysis. Because Dr. Haworth included a control for RVP code but not one for current occupation code, she again compared housekeepers and engineers in the same RVP code, but failed to compare housekeepers in different RVP codes. (See supra at Section II and V(C)(2)(a)). When this specious “RVP” control is eliminated, Dr. Haworth’s logit analysis, even with all of its other biases, reveals a statistically significant

²⁵ The only logit analysis that contained a control for current occupation was Table 4 of her March 2004 declaration, which was the third time she presented a variation of her logit analysis. As discussed supra at Section V(A)(2) that table indicates that Sodexo does in fact discriminate.

pattern of discrimination against African-American managers. (Siskin 5/04 Decl. at ¶ 45 and Table 5).

3. Dr. Haworth's Logit Analysis Contains Basic, Inexcusable Design Flaws

Dr. Haworth's logit analysis was seriously flawed from its inception, because she failed to collect data in a standardized manner. In addition, she over-specified the data she collected and included variables that inexplicably lower an employee's chances of promotion.

The initial compilation of data from employees' personnel files was flawed because the data collected were not standardized. (Siskin 5/04 Decl. at ¶ 35). For example, an employee who noted on his resume that he spent one year in college studying history would receive more education "credit" than an employee who graduated college with a history degree but did not include his degree on his resume. (See Haworth Dep. v.2 at 175-76; Pl. 7(h) Stmt. at Rebuttal No. 24). This type of haphazard data collection raises serious concerns in a statistical analysis. (Siskin 5/04 Decl. at ¶ 35).

The data collection was also overly specified, in that it considered any variable in a personnel file, no matter its relevance. Dr. Haworth's analysis initially considered 700 different variables "in an attempt to gather support to explain away the apparent race disparity in promotions," (id. at ¶ 27), even though there was no indication that those characteristics actually made the persons selected more qualified. (See Pl. 7(h) Stmt. at Rebuttal No. 20). The number of variables controlled for does not necessarily mean that the analysis is more complete. (Siskin 5/04 Decl. at ¶ 42). In fact, a simple, complete model is more probative than a complex, disjointed model such as the one presented by Dr. Haworth. (Id. at ¶ 41). Dr. Haworth

considered so many variables that her model crashed and she eventually was forced to collapse or ignore many of the variables she initially considered. (See id. at ¶ 27).

Dr. Haworth's logit analysis also included variables that inexplicably reduced a person's chances of getting a promotion. (Id. at ¶¶ 36-42). Her variables that most often incorporated the experiences and backgrounds of African-Americans, such as employment in a prison or a food service license, operated in her analysis to actually hurt one's chances of getting promoted. (Id. at ¶ 40, Table 3). As Dr. Siskin notes, "having a license may not help one but, all else being equal, it should not lower one's chances of being promoted." (Id. at ¶ 41). A careful statistician must review the coefficients of all variables used and account for the variables that have a negative effect, particularly when those variables are associated disproportionately with race. (Id. at ¶¶ 41-43). Dr. Haworth's failure to do this renders her logit analysis unreliable.

4. Dr. Haworth's Analysis of Posting Data Is Flawed

Finally, Dr. Haworth purports to analyze posting data, which only account for about 25 percent of the promotions (Haworth 7/03 Rep. at ¶ 101), and which fail to account for the many blacks who were discouraged or forbidden from posting. She further limits the number of events studied by disaggregating the former MCMS and current Career Center posting data. This is illogical because the only material difference between the two is that under the Career Center system employees could immediately apply for promotions, without their supervisor's consent. McReynolds, 208 F.R.D. at 432. Combining the posting data, Dr. Siskin found a promotion shortfall of 2.21 standard deviations. (Siskin 2/02 Decl. at ¶ 8).

D. Statistical Evidence Confirms That Sodexho Segregates African-American Managers Into “Black Accounts”

Sodexho does not claim the absence of a disputed material fact as to segregation. (See Sodexho’s 7(h) Statement of Undisputed Facts). It cannot do so because its own unit reports for accounts that employ 50 or more employees indicate that two-thirds (596/878) of all reported units had no black managers (Exh. 34 to Watkins Dep. v.3, Exh. 96), and nearly two thirds of African-American managers in these 878 units are concentrated in fewer than 10 percent of those accounts. (Exh. 37 to Watkins Dep. v.3, Exh. 96). In light of these numbers, the company’s own top EEO officer conceded that anyone looking at these numbers would be “concerned about the number of units that are listed, particularly units with what appear to be high levels of total management employment and no black managers.” (Watkins Dep. v.3 at 93).

Dr. Siskin’s statistical analyses confirm segregation is prevalent at Sodexho. First, in his 2001 report, Dr. Siskin found that African-American managers are two to three times as likely as white managers to report to one of the few African-American District Managers. McReynolds, 208 F.R.D. at 435; (Siskin 11/01 Rep. at ¶ 39). The likelihood that this disparity is due to chance is less than 1-in-one million billion. (Id.). In May 2003, Dr. Siskin performed two additional segregation analyses. The first analysis determined that 5.2 percent of black managers report to black District Managers, while only 2.2 percent of white managers report to a black District Manager. (Siskin 5/03 Rep. at Table S1). Dr. Siskin determined that the likelihood of this level of clustering is less than 2 in 1,000. (Id. at ¶ 7).

The second analysis used the Dissimilarity or Segregation Index, to determine whether African-Americans were segregated into units. (Id. at ¶10).²⁶ Dr. Siskin determined that 18 out of 25 geographic areas show a higher degree of segregation than would be expected from a racially neutral selection process. (Id. at ¶ 14 and Table S2). Dr. Siskin also performed the same analysis while controlling for division and found that 21 of 30 geographic areas show a higher degree of segregation than would be expected from a racially neutral selection process. (Id. at ¶¶ 15-16 and Table S3). None of Dr. Siskin's 1,000 random simulations found a segregation index as high as that actually found at Sodexho. (Id. at ¶ 17 and Tables S4 and S5).

ARGUMENT

STANDARD OF REVIEW

On a motion for summary judgment under Rule 56 it is not the function of the court "to weigh the evidence and determine the truth of the matter," but merely to decide whether there are any genuine issues that warrant a trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In considering a motion for summary judgment, evidence presented by the plaintiffs, as the party opposing summary judgment, is to be believed and all justifiable inferences are to be drawn in their favor. Id. at 255; see also Washington Post Co. v. United States Dep't of Health and Human Servs., 865 F.2d 320, 325 (D.C. Cir. 1989). "Where discriminatory intent and

²⁶ The Dissimilarity Index assumes that if African-Americans constitute 20 percent of all managers in a geographic area, they should represent 20 percent of the managers in each unit in that geographic area. (Siskin 5/03 Rep. at ¶ 10). Because the number of employees in each unit is so small, Dr. Siskin performed a random sampling to be able to reliably compare actual and expected assignments. (Id. at ¶¶ 11-12). For example, if there were 20 Band 75 employees in a geographic area, 5 of which were African-American, Dr. Siskin randomly assigned all 20 employees to all the units in that geographic area. (Id.) Dr. Siskin ran this analysis 1,000 times and compared the results to Sodexho's actual work force. (Id. at ¶¶ 12-13).

disparate treatment are at issue, courts should be cautious in granting summary judgment, because questions of intent and disparate treatment are difficult questions of fact often left to the jury.” Mitchell v. DCX, Inc., 274 F. Supp. 2d 33, 39 (D.D.C. 2003). See also Hayes v. Shalala, 902 F. Supp. 259, 263 (D.D.C. 1995) (same). In this case, “[o]bviously there are fact issues in dispute” (Judge Huvelle, Dec. 15, 2003 Tr. at 53), making summary judgment inappropriate.

I. Plaintiffs Have Presented Significant Evidence Of A Pattern and Practice Of Discrimination

Plaintiffs’ disparate treatment claim centers around Sodexho’s company-wide promotion process in which predominantly white managers have unfettered discretion to fill positions without having to justify their decisions or posting the jobs in the first place. To succeed on a pattern-or-practice claim, plaintiffs need not prove that “each class member is the victim of the discriminatory practice.” Wagner v. Taylor, 836 F.2d 578, 592 (D.C. Cir. 1987). Plaintiffs need only prove that discriminatory acts were “regular,” and not “unusual” or “sporadic.” Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

“Plaintiffs charging discriminatory treatment of a class may build their case on statistical evidence, on descriptions of overtly discriminatory behavior, or on a combination of the two.” McKenzie v. Sawyer, 684 F.2d 62, 71 (D.C. Cir. 1982). “Circumstantial evidence [including statistical evidence] that the disparity, more likely than not, was a product of unlawful discrimination will suffice to prove a pattern or practice disparate treatment case.” Palmer v. Shultz, 815 F.2d 84, 90 (D.C. Cir. 1985). Statistical evidence of disparities in excess of 1.96 standard deviations are sufficient to establish a prima facie case of both disparate treatment and disparate impact. Anderson v. Zubieta, 180 F.3d 329, 339-40 (D.C. Cir. 1999). Conversely, even statistics with fewer than 1.96 standard deviations are probative when properly supported by

expert opinion or anecdotal evidence. See, e.g., Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362-63 (7th Cir. 2001); Segar v. Smith, 738 F.2d, 1249, 1278 (D.C. Cir. 1984); Palmer, 815 F.2d at 96. In this case, plaintiffs have strong statistical support as well as a wealth of anecdotal evidence, much of it from Sodexho's own documents and senior officials, to support a pattern and practice claim of discrimination at Sodexho.

A. Statistics Are Only Relevant If They Control For Factors That Were Used By Decisionmakers And Are Necessary To Perform The Job At Issue

To be relevant, a statistical study of promotions must account for the minimum objective qualifications required for promotion, that is, those truly required to perform the job at issue. Zubieta, 180 F.3d at 342-343. What constitutes a minimum objective qualification depends on the facts and theories of the case. Bazemore v. Friday, 478 U.S. 385, 400 (1986); Coward v. ADT Security Sys., 140 F.3d 271, 274 (D.C. Cir. 1998). Statistical analyses must also exclude qualifications that may "serve as a veil of seeming legitimacy behind which illegal discrimination is operating." Segar, 738 F.2d at 1276. "[I]t is especially important for courts to be sensitive to possible bias in the hiring and promotion process arising from such subjective definition of employment criteria. . . . The lack of meaningful standards to guide the promotion decision, whereby there is some assurance of objectivity . . . encourages and fosters discrimination." Davis v. Califano, 613 F.2d 957, 965-66 (D.C. Cir. 1979) (internal quotations and citations omitted).

If the defendant does not use, in its actual promotion decisions, objective criteria that are truly required to succeed at the higher position, then it is appropriate to compare the percentage of African-American promotions with the percentage of African-Americans in pools of similarly situated employees. Davis, 613 F.2d at 965. So long as the pool is properly

constructed and homogeneous, it is appropriate to assume that, on average, each employee will have the same likelihood of success at the next level. Because Sodexo uses no consistent objective qualifications in evaluating candidates for promotion, it was appropriate for Dr. Siskin to construct homogeneous pools to analyze black promotions. Dr. Siskin's pools are broad enough to encompass everyone who was similarly situated (e.g., housekeeping managers at similar size accounts), yet narrow enough to differentiate between an engineer and a housekeeper. Thus, African-Americans and whites in each of his pools have, on average, the same objective qualifications required to succeed at the next level. See Segar, 738 F.2d at 1277; Zubieta, 180 F.3d at 343; Anderson v. Group Hospitalization, Inc., 820 F.2d 465, 470 (D.C. Cir. 1987).

Sodexo contends that Dr. Haworth's logistic regression analysis should carry more weight than Dr. Siskin's analyses because she included variables that were "missing" from Dr. Siskin's analyses. These "missing" variables include education, job experience, prior industry, licensing and memberships, and tenure as management at Sodexo. (See SJ Brf. at 24-25). This argument fails because Dr. Haworth's gathering of the data was incomplete at best,²⁷ she fails to control for the most important variable -- an employee's current occupation -- and there is no evidence that her "missing" variables were used by decisionmakers or were necessary to perform at the next level.

²⁷ Indeed, Dr. Haworth's logistic regression analysis is the same type of "nonsense" analysis that the D.C. Circuit excluded in Valentino v. United States Postal Serv., 674 F.2d 56 (D.C. Cir. 1982). In Valentino, plaintiff coded for degree only if the employee indicated his or her specialty on a personnel form. Id. at 71 n.21. Similarly, Dr. Haworth included scope of prior experience and area of education (e.g., housekeeping, liberal arts) only if that information was in the employee's personnel file. (See Pl. 7(h) Stmt. at Rebuttal No. 24).

Because Sodexho's witnesses have repeatedly confirmed that there are no fixed criteria used in making promotion decisions and that managers have complete discretion in how they make such decisions, Sodexho's attempt to inject education and experience variables into its analysis is exactly the type of inappropriate post-hoc rationalization that courts have routinely rejected. See Pl. 7(h) Stmt. at Rebuttal No. 20; see, e.g., Mozee v. Am. Commercial Marine Serv. Co., 940 F.2d 1036, 1045 (7th Cir. 1991) (“[w]here subsequently discovered ‘qualifications’ are not obvious and are far from uniformly applied, . . . their use in determining the promotion pool must be carefully restricted”); Townsend v. Washington Metro. Area Transit Auth., 746 F. Supp. 178, 186 (D.D.C. 1990) (because the defendant never engaged in an analysis of the applicants' qualifications at the time of its decision, reliance on those qualifications at trial to rebut discrimination is a post hoc rationalization that “carries the seeds of its own destruction”) (quoting Bishopp v. D.C., 788 F.2d 781, 789 (D.C. Cir. 1986)).

Moreover, as a leading statistical treatise explains, when evaluating classwide quantitative proof “[i]n a disparate treatment case, a defense that legitimate criteria of selection produced the observed results rests on the assumption that certain characteristics of the applicants were in fact considered in the selection process . . . [A] complainant should be able to refute such a defense by demonstrating, by admission of the defendant, that the factor which explains the disparity statistically was not actually considered in the selection process.” Baldus & Cole, *Statistical Proof of Discrimination*, at § 1.221[25] at p.33 (1980 & 1987 Supp.).²⁸ (emphasis added). Sodexho's witnesses have admitted that the various qualifications controlled for by Dr. Haworth were not consistent factors in the selection process. Therefore, plaintiffs are

²⁸ This Baldus & Cole treatise has been described by the D.C. Circuit as a “leading treatise on the role of statistical evidence in Title VII litigation.” See Palmer, 815 F.2d at 94.

not required to control for those factors, “even if the qualification would have been reasonable for the defendant to have considered.” Id. at § 6.222[11] at p. 190. According to Baldus and Cole, the “object of the [statistical] proof is to describe accurately the selection process under scrutiny. How could one infer a particular factor had an influence when it was not even considered by a defendant? Limiting or structuring the population of applicants with a qualification that was not considered misrepresents what actually occurred.” Id. Moreover, “a defense to a prima facie case based on evidence that such a qualification explains the disproportionate impact established by plaintiff should be rejected on the same ground.” Id.

In addition, Sodexho has failed to carry its burden of establishing that the “missing” variables used by Dr. Haworth are required to succeed at the higher position. EEOC v. Radiator Specialty Co., 610 F.2d 178, 185-186 (4th Cir. 1979). Her logistic regression analysis attempts to control for everything except current occupation -- the only absolutely necessary variable. See Valentino, 674 F.2d at 70-71. Even if the Court were to determine that the “missing” variables may have been used in promotion decisions, the jury must still determine whether an employer’s objective “qualifications” are truly required, i.e., whether they are necessary to successful job performance. Zubieta, 180 F.3d at 342-343 (citing Goodrich v. Int’l Bhd. of Elec. Workers, 712 F.2d 1488, 1493-94 (D.C. Cir. 1983)). Finally, Dr. Haworth’s “missing” variables do nothing more than veil discrimination. As noted previously, courts must be particularly wary of unstructured processes. When there are no fixed criteria or guidelines for promotion, an employer can use irrelevant variables to mask discrimination. See Davis, 613 F.2d at 965-66, n.50. The most egregious example of this is Dr. Haworth’s use of variables that relate disproportionately to blacks, and for no legitimate or rational reason, have a negative effect on

one's chance of being promoted. (See Siskin 5/04 Decl. at ¶¶ 37-41, Table 3). Clearly it is race, not the possession of that additional experience, which is causing the disparity.

B. Sodexho's Discriminatory Policies Are Company-Wide And The Statistical Results Should Be Aggregated In The Same Manner

Sodexho argues there is no pattern of discrimination because the disparities in promotions between blacks and whites are statistically significant in “only” 9 out of 155 RVP codes.²⁹ But, as plaintiffs have demonstrated in Section II above, the RVP argument is simply a lawyer's invention to try to “slice and dice” the company into segments too small to produce statistically significant disparities.³⁰ Courts should guard against the use of data which have been segmented to obtain a desired result. In Segar, the DEA's expert performed a cohort analysis that divided agents into 15 cohort groups. Segar, 738 F.2d at 1285. The D.C. Circuit held that it was improper to disaggregate the workforce into such small segments because it was unlikely that the study could detect disparities. Id. at 1286.

Aggregation is particularly appropriate in disparate treatment cases because it measures whether discrimination is defendant's “standard operating procedure.” Capaci v. Katz & Besthoff, Inc., 711 F.2d 647, 656 (5th Cir. 1983). Because the statistical data and the anecdotal evidence demonstrate that Sodexho's discriminatory practices are company-wide, aggregation is appropriate. See Stastny v. Southern Bell Telephone and Telegraph Co., 628 F.2d 267, 278 (4th Cir. 1980) (company-wide discrimination may be inferred from evidence of

²⁹ See supra at n.10. When Dr. Siskin observed the promotion patterns in each RVP code, he found that 73.7 percent of those RVP codes with at least one promotion and one African-American employee showed disparities adverse to African-Americans. (Siskin 5/04 Decl. at ¶ 24).

³⁰ Notably, Sodexho's expert, Dr. Haworth, does not disaggregate to the RVP level in her highly skewed logistic regression analysis. (See Haworth 7/03 Rep. at Table 25).

numerous instances of similar discriminatory treatment throughout the company or similar statistical disparities in treatment at separate facilities or regions throughout the country); Hazelwood School Dist. v. United States, 433 U.S. 299, 311-312 (1977).

Sodexho's only arguments for disaggregating the data based on RVP code are that the RVP code represents the principal decisionmaking unit and employees do not move between RVP codes. These claims carry no weight. First, RVP codes have no effect on promotion procedures and policies. (See Section II, supra). Second, Dr. Haworth's data demonstrate that about one-third of all applicants applied for positions outside of their division, so it goes without saying that at least that many applied for jobs bearing a different RVP code. Dr. Haworth's focus on how many employees actually switched RVP is disingenuous because it veils discrimination in promotion. This is particularly inappropriate where there is substantial evidence that accounts are segregated by race and that blacks are stuck in those accounts.

Measuring the level of discrimination in the company as a whole is clearly proper and the cases Sodexho relies on do not show otherwise. EEOC v. W. Elec. Co., 713 F.2d 1011 (4th Cir. 1983), EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 952 (8th Cir. 1999), and King v. Gen. Elec. Co., 960 F.2d 617, 624 (7th Cir. 1992) are all reduction-in-force cases under the ADEA and as such are not comparable to Title VII actions. See King, 960 F.2d at 624 (using Title VII procedures in ADEA cases is difficult); McDonnell Douglas, 191 F.3d at 952 (considering factors appropriate to age discrimination cases). Additionally, in Western Electric, the EEOC did not have strong statistical evidence, changed its statistical argument on appeal, and had no anecdotal evidence. W. Elec. 713 F.2d at 1019. The statistical and anecdotal evidence in King was sparse. King, 960 F.2d at 626. Similarly, in Hill v. AMOCO Oil Co., 2003 WL 262424, at *6 (N.D. Ill. Jan. 27, 2003), plaintiffs did not even present any statistical evidence,

and in EEOC v. Fed. Res. Bank of Richmond, 698 F.2d 633, 643-44, 648-49 (4th Cir. 1983), only two class members provided anecdotal evidence to buttress the statistics, and the EEOC's expert made fundamental errors. In Morgan v. United Parcel Serv., Inc., 143 F. Supp. 2d 1143 (E.D. Mo. 2000), Carpenter v. Boeing Co., Case No. 02-1019-WEBB, slip op. at 9 (D. Kan. Feb. 24, 2004), and Lewis v. NLRB, 750 F.2d 1266 (5th Cir. 1985), the courts determined that plaintiffs had used the wrong pools. Nothing in these cases suggests that Dr. Siskin should not have measured discrimination on a company-wide basis.

C. Plaintiffs' Numerous, Company-Wide Examples of Discrimination Bring The Cold Numbers To Life

Sodexho also claims that plaintiffs' anecdotal evidence is insufficient to show a company-wide pattern and practice of discrimination. (SJ Brf. at 19-21). First, given the strength of plaintiffs' statistics showing nationwide disparities in promotions, plaintiffs do not even need to present anecdotal evidence to make out a prima facie case of discrimination. See Segar, 738 F.2d at 1278 ("when a plaintiff's statistical methodology focuses on the appropriate labor pool and generates evidence of discrimination at a statistically significant level, no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities."). In this case, plaintiffs have supplemented their statistical evidence with anecdotal evidence to help bring "the cold numbers convincingly to life." Teamsters, 431 U.S. at 339.

However even if plaintiffs had not provided a strong statistical case, the anecdotal evidence alone would be sufficient to establish a prima facie case. McKenzie, 684 F.2d at 71. Here, plaintiffs have provided a rich lode of anecdotal evidence including the regular and widespread use in a white-collar workforce of the words "colored," "nigger," "those people," and

other derogatory references to African-Americans. (See Pl. 7(h) Stmt. at Disp. Fact No. 13). The use of such slurs has been endorsed by Sodexho officials at the highest levels, including the current Chief Operating Officer, Dick Macedonia, and the Chief Diversity Officer, Rohini Anand. (See Macedonia Dep. v.1 at 124-27; Anand Dep. at 275-77). “That the word ‘nigger’ is a slur is not debatable.” NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 n.5 (6th Cir. 2001). This word is “perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.” McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004) (internal quotation and citations omitted).

In addition to racial slurs, plaintiffs have presented evidence of numerous instances of class members being denied promotions or being replaced by less qualified white employees based on their race, of white employees being preselected for promotions where a job was never posted, and of class members being placed at “black accounts.” (See Pl. 7(h) Stmt. at Disp. Fact Nos. 1-6, 8-9, 25, 27-28). These examples come from all over the country and from the five major divisions, including Corporate Headquarters, and they are corroborated by the admissions of numerous white and black officials who have recognized Sodexho’s deficiencies in this area. (See id. at Disp. Fact Nos. 10-11, 15, 18). The totality of plaintiffs’ anecdotal evidence, which is set out in detail in Plaintiffs’ Statement of Disputed, Material Facts, is perhaps as strong as that in any Title VII case involving managerial-level employees.

Still further pattern and practice evidence comes from Sodexho’s disregard of its affirmative action obligations and its repeated violations of Department of Labor requirements for federal contractors. (See supra at Section IV, pp. 21-22). This Court has previously found that an employer’s disregard of its affirmative action program reflected an intention to discriminate against plaintiffs. Milburn v. West, 854 F. Supp. 1, 8, 13 (D.D.C. 1994). Accord

Antol v. Perry, 82 F.3d 1291, 1301 (3d Cir. 1996) (defendant’s “failure to follow its own [affirmative action] plan and the more general resistance by selecting officials to its implementation is relevant under Fed. R. Evid. 401 as to whether . . . the selecting official who rejected [plaintiff], fairly considered [plaintiff’s] candidacy”); Moze, 940 F.2d at 1051 (district court was permitted to consider defendant’s noncompliance with its affirmative action plans as probative evidence of discriminatory intent). Accordingly, in light of this abundance of proof, plaintiffs have provided sufficient anecdotal evidence to show a company-wide pattern and practice of discrimination at Sodexho.

D. Plaintiffs’ Challenge Of Sodexho’s Entirely Subjective Promotion Policy Is Proper

Contrary to Sodexho’s claim that “Plaintiffs have not adduced evidence of a policy or other nationwide practice from which discrimination could be inferred” (SJ Brf. at 34), plaintiffs have developed overwhelming evidence that Sodexho has had a “company-wide policy of not having any consistent promotion policy, guidelines or requirements.” McReynolds, 208 F.R.D. at 441.³¹ Sodexho cites Grosz v. Boeing, SACV 02-0071 CJC (Oct. 27, 2003) (min. order),³² as authority that “[excessive subjectivity] is not an actual company-wide policy or practice.” But, as this Court has already held, this argument runs directly afoul of the Supreme

³¹ For this reason, Sperling v. Hoffmann-La Roche, Inc., 924 F. Supp. 1346 (D.N.J. 1996), an age discrimination case, is inapplicable. In that case, the court noted that plaintiffs never even alleged a discriminatory policy that was practiced company-wide. Id. at 1361-62.

³² Sodexho submitted a faxed copy of an unpublished order from Grosz which contains a single paragraph relating to class certification, but no other factual background of the case from which to determine which policies plaintiffs had challenged. From what can be gleaned from the Order, however, it appears that there were various distinct policies used in different divisions of the company, a situation entirely distinct from this case.

Court's decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, n.15 (1982), which expressly anticipated Title VII liability based on "entirely subjective decisionmaking processes." McReynolds, 208 F.R.D. at 440-41.

Sodexo then argues that its promotion system is not "entirely subjective." (SJ Brf. at 35). Just as it did in its opposition to class certification, Sodexo misrepresents class member testimony regarding the use of criteria in isolated promotion decisions. Furthermore, this Court has already rejected that argument. See supra at n.7; see also Falcon, 457 U.S. at n.15 (focusing on decisionmaking processes, not individual criteria used in interviews); Warren v. Xerox Corp., 2004 U.S. Dist. LEXIS 5115, *37-38 (E.D.N.Y. Jan. 26, 2004) (rejecting Xerox's argument that its highly decentralized decisionmaking process precluded a finding of commonality because "the existence of some objective factors does not negate a claim that the process is 'entirely subjective' where those variables are alleged to have been inappropriately applied").

II. Sodexo's Entirely Subjective Decisionmaking Process For Promotions Has Had A Disparate Impact on African-American Managers

Like disparate treatment claims, a disparate impact claim "attacks . . . the systemic results of employment practices." Segar, 738 F.2d at 1267. However, where a disparate treatment claim focuses on determining the existence of discriminatory intent, disparate impact claims focus on whether facially neutral policies or practices have a disparate impact on a protected class. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). To make out a prima facie case of disparate impact, plaintiffs must establish that specific employment practices have resulted in observed statistical disparities between the racial composition of the desired jobs and the racial composition of the pool of those qualified for the promotions. See Wards Cove

Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989). The burden then shifts to the employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i); see Griggs, 401 U.S. at 431. Finally, if the defendant demonstrates business necessity, plaintiffs must be given an opportunity to demonstrate that an alternative employment practice could meet the employer’s legitimate needs without a similar discriminatory effect. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Albemarle Paper Co., 422 U.S. at 425.

A. Sodexo’s Entirely Subjective Decisionmaking Process Is Not Capable Of Separation For Analysis

Sodexo claims that plaintiffs have failed to identify a specific employment practice that causes the disparate impact (SJ Brf. at 37-38), but ignores the remainder of the statute which specifically does not require plaintiffs to do so “if the complaining party can demonstrate to the court that the elements of respondent’s decisionmaking process are not capable of separation for analysis.” 42 U.S.C. § 2000e-2(k)(1). When that is the case, “the decisionmaking process may be analyzed as one employment practice.” Id. Plaintiffs have alleged from the beginning that Sodexo employs an entirely subjective decisionmaking process in awarding promotions that adversely impact African-American managers, and that this entirely subjective process is not capable of separation for analysis. (Complaint at ¶ 27, Exh. 108).

None of the cases Sodexo cites involved allegations of an entirely subjective decisionmaking process.³³ This case is akin to Cook v. Billington, Civ. A. No. 82-0400, 1992

³³ Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) is particularly off the mark. That age discrimination case involved a seven factor scoring system, completely different from Sodexo’s system which has no standards, and the court found that the phases of the system which plaintiffs claimed gave rise to a disparate impact claim in fact caused “no
(continued...)”

WL 276936 (D.D.C. Aug. 14, 1992), a promotion class action in which this Court rejected the same argument Sodexho makes and recognized that “[t]he specific employment practice which plaintiffs challenge is the Library’s excessive use of subjective decision-making in the establishment and measurement of the criteria used to evaluate candidates for promotion.” Id.

Also instructive is Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992), a class action sex discrimination case against a grocery store chain. In analyzing plaintiffs’ disparate impact claim, the court concluded:

Where the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, the failure to follow set procedures and the absence of written policies or justifications for promotional decisions, the court is not required to “pinpoint particular aspects of [the system]” that are unfavorable to women.

Moreover, the court finds that the elements of Lucky’s subjective and ambiguous decision making processes are not separate for the purposes of analysis, and therefore may be analyzed as one employment practice.

Id. at 335 (citations omitted). Other courts have made similar holdings. See, e.g., McClain v. Lufkin Industries, Inc., 187 F.R.D. 267, 275 (E.D. Tex. 1999) (finding that “Lufkin’s subjective employment practices are inextricably intertwined,” and that because “[t]he discriminatory effects of the constellation of suspect employment practices used by Lufkin Industries cannot be isolated individually,” the decisionmaking process “may be analyzed as one employment practice”) (quoting 42 U.S.C. § 2000e-2(k)(1)(b)); Butler v. Home Depot, Inc., Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754, *13 (N.D. Cal. Aug. 29, 1997) (analogizing case to Stender and finding the elements of Home Depot’s decisionmaking process are not capable of separation

³³ (...continued)
impact” on plaintiffs. The court found that plaintiffs failed to show that a single person “was deprived of [a] promotion” due to the challenged practice or that the practice “actually disadvantaged them at all.” Id. at 639.

for analysis based on evidence that Home Depot “fails to provide its store managers with meaningful criteria by which to guide hiring, assignment, promotion and compensation decisions”).

B. Plaintiffs Have Amassed Significant Evidence Of An Uncontrolled, Entirely Subjective Promotion System To Support Their Disparate Impact Claim

Sodexho claims that plaintiffs “have virtually no evidence in support of their disparate impact claim” and that Sodexho’s promotion process “was marked by a *variety* of processes . . . including screening by local Human Resources staff; interview questions, which often were prepared by Human Resources staff, widespread use of interview panels, and written scoring matrices and scales.” (SJ Brf. at 39) (emphasis in original). However as explained supra at Section I(C), these statements lack credibility and are directly controverted by Sodexho’s own witnesses. A complete response to these assertions regarding the “variety of processes” used to make promotion decisions is set forth in Plaintiffs’ Rebuttal of Sodexho’s Statement of Undisputed Facts Nos. 37-39. Plaintiffs’ evidence is more than sufficient to raise a genuine issue of material fact for trial as to plaintiffs’ disparate impact claim.

CONCLUSION

Viewing the evidence in the light most favorable to the class, plaintiffs have presented compelling evidence of a pattern and practice of intentional discrimination at Sodexho as a result of an entirely subjective promotion process that also has a disparate impact on African-American managers. Plaintiffs respectfully request, therefore, that this Court deny Sodexho’s motion for summary judgment as to classwide liability.

Respectfully submitted,

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