Appeal No. 08-1247

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

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U.S. Court of Appeals
Fourth Circuit

ORIGINAL

QUINTON BROWN, *et al.*

Appellants,

v.

NUCOR CORPORATION, *et al.*

Appellees.

On Appeal from the United States District Court
for the District of South Carolina,
Charleston Division

BRIEF OF APPELLEES NUCOR CORPORATION AND NUCOR STEEL BERKELEY

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U.S. COURT OF APPEALS
FOURTH CIRCUIT

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. and Local Rule 26.1, Appellees make the following disclosure:

1. Is party a publicly held corporation or other publicly held entity:

   Yes

2. Does party have any parent corporation:

   Yes, Nucor Corporation is the parent corporation of Nucor Steel Berkeley

3. Is 10 percent or more of the stock of a party owned by a publicly held corporation or other publicly held entity:

   Yes, the two following entities own 10 percent or more of the stock in Nucor Corporation:

   Barclays Global Investors, NA and related entities
   45 Fremont Street
   San Francisco, California 94105

   State Farm Mutual Automobile Insurance Company and related entities
   One State Farm Plaza
   Bloomington, Illinois 61710

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation?

   No

5. Is the party a trade association?

   No

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COUNTERSTATEMENT OF THE ISSUES

I. Have Plaintiffs/Appellants satisfied their burden of demonstrating that the district court abused its discretion with respect to its ruling that the alleged hostile work environment and promotions class failed the commonality/typicality requirements of Fed. R. Civ. P. 23(a)(2)?

II. Have Plaintiffs/Appellants demonstrated that the district court abused its discretion by holding that the putative class representatives are inadequate owing to their failure to satisfy the typicality requirement and, with respect to the promotions claims, because of conflicts of interest?

III. May Plaintiffs/Appellants prosecute an appeal of a district court's discovery order made approximately two years prior to its certification decision, where their lead counsel in open court stated that he would stand on the discovery permitted under the discovery order; and if that decision is presently appealable under Fed. R. Civ. P. 23(f) has an abuse of discretion been made out?

STATEMENT OF THE CASE

The district court denied class certification on a finding that Plaintiffs below had not satisfied their burden under several provisions of Rule 23(a). The district court specifically limited its analysis to the class definition which Plaintiffs actually brought before it: "All African-Americans who are or were employed at the Nucor Berkeley Manufacturing Plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance and shipping departments...".[1] The class definition was directed at three categories of claims and/or remedies: (1) claims of hostile work environment, (2) a pattern and practice/disparate impact claim of racial discrimination in promotions, (3) and prospective and retrospective remedies arising from the second claim. The district court found that Plaintiffs had failed to demonstrate that the hostile work environment claim could be tried on a representational/class basis because six of the seven named plaintiffs worked in one department while the seventh worked in another; the five departments were discrete and self-contained; the substantive law would require a consideration of the totality of the circumstances affecting each class member and not just consideration of a few plant-wide acts allegedly identified by Plaintiffs; and the experiences of the putative class representatives

[1] JA 09099; 09101.

were, therefore, not representative of the totality of circumstances experienced across the class.[2]

The district court also found that the disparate impact/pattern and practices claims would not be certified because both the direct and statistical evidence of commonality was inadequate. With respect to the direct evidence, most of the affidavits tendered focused on the beam mill, while "reveal[ing] only isolated racist acts occurring in the other production departments,"[3] which were insufficient to support a claim across the class.

With regard to statistics, the district court examined all of the data proffered by Plaintiffs, much of which favored Defendants or was statistically insignificant. In analyzing the data the district court preferred the legally prescribed standard deviation analysis approach, over the so-called 80% (or four-fifths) rule and census data comparisons, and found that when the standard deviation analysis method was applied to the available promotion data, no statistically significant evidence of discrimination emerged. Only when the data was manipulated at both ends of the class period by ignoring data after 2003 and by creating data from surrogate sources not known to contain significant numbers of African-American applicants (in an attempt to recreate missing promotion data from 1999-2001) were Plaintiffs able to claim legal and statistical significance. In reviewing this statistical

[2] JA 09191-92; 09100-102; 05792-98.
[3] JA 09175; 05788-91.

evidence, the district court agreed that Plaintiffs could properly disregard the post-suit data. But even when this adjustment was made, Plaintiffs' data still made no claims of statistical significance without including the circular, speculative and question-begging 1999-2001 data. Having examined the totality of this evidence, the district court exercised its discretion not to certify the promotions claim.[4]

Finally, because the claims of the putative class representatives failed the typicality requirement and because representatives had competed against putative class members for promotion, the district court found antagonistic interests giving rise to a conflict between class members and their putative representatives.[5]

Because a decision not to certify a class, and not to attempt a trial on a representational basis, clearly falls within the range of logical responses to the evidence (and lack thereof) before the district court, Plaintiffs cannot satisfy the abuse of discretion standard and the order denying certification is due to be affirmed.

Before considering these matters in detail, a number of flawed assertions should be identified which tend to skew Plaintiffs' presentation:

- Plaintiffs originally presented three issues in their Rule 23(f) Petition. Now, on appeal, they present five questions, some of which significantly expand the issues certified for appeal by this Court.

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[4] JA 09175-76; 09184-91; 09192-94; 05779-91.
[5] JA 09196-97; 09177; 05825-31.

- Rule 23 requires a party to seeking class certification to satisfy both subsection (a) and (b). The only issues on appeal in this case are the district court's findings under Rule 23(a). Therefore Plaintiffs' prayer that this Court remand with instructions to certify a class overleaps the Rule 23(b) issues. *Infra*, ¶ V.

- Plaintiffs base key positions in their appeal on the claim that they were denied certain discovery. However, appeal of a discovery ruling is improper in the context of this Rule 23(f) interlocutory appeal, particularly where Plaintiffs' counsel in arguing for certification expressly stated that Plaintiffs would stand on the discovery conducted. *Infra*, III (D).

- Plaintiffs' key position in opposition to the district court's finding of a lack of adequacy of representation under Rule 23 is unsupported by the record. Plaintiffs assert that no two putative class representatives bid against one another for jobs and that they did not bid against class members for jobs. The record demonstrates otherwise. *Infra*, ¶ IV (B).

These errors and infirmities in Plaintiffs' brief further weaken their claim to have satisfied the standard of review by demonstrating an abuse of discretion.

Procedural History

This case began when Plaintiffs' attorneys attempted to bring a nation-wide class action. The claims were subsequently severed and transferred in July 2004 to the Northern District of Texas[6], the Northern District of Alabama[7], the Eastern District of Arkansas[8], and the District of South Carolina.[9] Class certification was denied in all of these companion cases.

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[6] *Warren v. Nucor Corp.*, Case No. 3:04-cv-01641-N (dismissed May 25, 2006).
[7] *King v. Nucor Corp.*, Case No. 5:04-cv-02533-CLS (dismissed Oct. 20, 2005).
[8] *Rogers v. Nucor Corp.*, Case No. 4:05-cv-00933-WRW (dismissed Oct. 4, 2007).
[9] *Brown v. Nucor Corp.*, Case No. 2:04-cv-22005-CWH-GCK (motion to certify class denied Aug. 7, 2007).

In a case virtually identical to this one, the Eastern District of Arkansas struck the class allegations against one Nucor facility and denied a motion for class certification against another.[10] In the Arkansas case, involving the same allegations, the same attorneys, and some of the same expert witnesses as the current proceeding, class certification was denied based on many of the same deficiencies present here.

In this case the district court denied Plaintiffs' request for class certification on August 7, 2007.[11] The district court found that Plaintiffs failed to demonstrate that the class claims raised questions of fact or law common to the entire class or that their claims were typical of those of the class.[12] In addition the court found that Plaintiffs have a "conflict of interest with class members competing for the same jobs."[13] Because Plaintiffs failed to establish the commonality, typicality and adequacy, the district court did not determine whether the class met the requirements of Rule 23(b).[14]

On August 21, 2007 Plaintiffs filed a motion for reconsideration of the order denying class certification. The district court denied this motion on January 11,

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[10] *See Bennett v. Nucor Corp.,* No. 3:04CV00291SWW, 2005 WL 1773948 (E.D. Ark. July 6, 2005); and *Bennett v. Nucor Corp.*, No. 3:04CV00291SWW, 2006 WL 2473015 (E.D. Ark. Aug. 25, 2006).
[11] JA 08977.
[12] JA 08994; 05804-25.
[13] JA 08995; 05825-31.
[14] *Id.*

2008.[15] Plaintiffs then timely sought permission for an interlocutory appeal pursuant to Rule 23(f), which was granted.

STATEMENT OF FACTS

On May 7, 2007, Plaintiffs filed a motion for class certification seeking to represent "all African-Americans who are or were employed at the Nucor Berkeley manufacturing plant since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance and shipping departments..., or, "in the alternative, for such separate classes or subclasses of such persons as may be appropriate under the Federal Rules of Civil Procedure."[16] The district court denied class certification, basing its ruling on several considerations. With respect to Plaintiffs' hostile work environment claim, the district court was unable to find commonality and typicality due to the separation, independence and decentralized management of the five departments at issue at the facility.[17] The Court found because there is little mingling of employees between departments, and because the putative class representatives overwhelmingly worked in one department (with a single employee working in another), a hostile work environment across all of the plant's

[15] JA 09099-104.
[16] JA 08980.
[17] JA 08989; 05804-25.

production departments could not be proved by these Plaintiffs on a representational basis.[18]

With respect to the promotions claim, the district court found a want of commonality and typicality.[19] Because "[a] pattern or practice claim is typically proven by statistical evidence bolstered by anecdotal evidence of discrimination,"[20] it is important to note that much of Plaintiffs' statistical evidence consisted of census comparisons which logically have nothing to do with promotions and with comparisons based upon the so-called 80% rule, a rule not recognized in this Circuit. Turning to the legally approved standard deviation analysis method, Plaintiffs' analysis over the time period covered by the class definition revealed no statistically significant discrimination.[21] Only when Plaintiffs' experts reviewed 27 jobs filled during the 1999-2001 period, and assumed that the same percentage of African-Americans applied for those jobs as had applied between 2001 and 2003, were they able to claim statistical significance. That this treatment was grounded in mere speculation is emphasized by the fact that one of Plaintiffs' experts acknowledged that he knew of only one African-American who had competed for

[18] JA 08989-08991; 05792-98.
[19] JA 08987; 05804-25.
[20] JA 09184.
[21] JA 08985; 05780-82.

one of the 27 jobs.[22] In the course of its order, the district court reviewed all statistical evidence; noted that some if it favored Nucor and some of it was statistically insignificant; preferred standard deviation analysis to the 80% rule or census data; discounted the post-2004 data because of the possible confounding effects of the suit (which was initially filed on Aug. 25, 2004); and discounted the recreated 1999-2001 data because it was based on assumptions.[23]

After noting that regression analysis for the pre-suit period does not reveal a pattern of discrimination, the district court went on to analyze the direct anecdotal evidence tendered by Plaintiffs. The district court held that this evidence did not support a pattern or practice claim of promotion discrimination either.[24] Specifically, it noted that only two of the sixteen declarations and affidavits of African-American employees contained allegations of a manager or supervisor treating African-American employees unfairly outside the beam mill.[25] The Court held that the sporadic, isolated allegations from other departments were insufficient to show a pattern and practice of discrimination across the plant.[26] A similar analysis was used to dispose of the disparate impact claim.[27]

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[22] JA 05853.
[23] JA 09189-190; 05780-91.
[24] *Id.*
[25] JA 08987.
[26] *Id.*
[27] JA 09190-191; 05780-91.

Finally, the court found, for the promotions claims, that the Plaintiffs were not adequate representatives of the class.[28] The court noted that because the claims of the class representatives were not typical and because they had bid on the jobs at issue, a conflict of interest exists.[29]

On August 21, 2007, Plaintiffs filed a motion to alter and amend the order denying class certification. After reevaluation of facts presented by Plaintiffs, the district court found that it had correctly denied the motion for class certification and so denied the motion to alter or amend.[30] In addressing the issues raised on the hostile environment claim, the district court reaffirmed its finding that because the plant is separated into different environments, and because hostile work environment claims require a consideration of the totality of circumstances affecting each claimant, the experiences of the putative representatives had not been shown to be the same as those experienced by class members over the entire expanse of the putative class.[31] Plaintiffs again chose not to limit their class definition to the specific department (the beam mill) where six of the seven worked and where their evidence was centered. [32]

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[28] JA 08993; 05825-31.
[29] JA 08992.
[30] JA 09099.
[31] JA 09101; 05814-17.
[32] JA 09101.

The Court found again, based on statistics and direct evidence, that the promotion claims of all African-American employees at the plant are not common and that the named Plaintiffs' individual claims have not been shown to be typical of those of the class members.[33]

Plaintiffs asserted in their motion to alter and amend that discovery limitations had prevented a showing of disparate impact. However, the Court found that Plaintiffs had failed to adduce any support for this assertion.[34]

Because Plaintiffs also had alleged that the district court had improperly reached merits issues, the district court properly noted that it had been forced to address the overlapping merits and class statistical evidence in order to determine whether the statistics proved a plant-wide disparity in African-American promotion rates sufficient to permit a class trial.[35] Once again the district court concluded that the combination of direct and statistical evidence, when considered as a whole, failed to persuade the court that there was adequate class-wide evidence of discrimination.[36]

The district court also reaffirmed its finding of a conflict of interest because the requested injunction awarding a promotion to a putative class representative would eliminate the same remedy to any class member who had bid for the same

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[33] JA 09102; 05804-25.
[34] JA 09103.
[35] *Id.*
[36] JA 09102-03; 05779-91.

promotion.[37] Because the class representatives were not merely seeking an injunction requiring Defendants to create objective hiring practices, but also sought retrospective individualized injunctive relief, a conflict of interest existed for those claims.[38]

SUMMARY OF THE ARGUMENT

Hostile Work Environment: The district court conducted a rigorous analysis under Rule 23 to determine whether Plaintiffs had carried their burden to demonstrate that a hostile work environment claim could be tried on a common, representational basis. The district court was well within its discretion when it found that Plaintiffs had not shown evidence of a common practice of discrimination across departments and were instead relying on alleged incidents that were diverse in time, scope, and severity and that were not shown to exist globally throughout the plant.

As this Court noted in *Stastny v. S. Bell Tel. & Tel. Co.*, (hereafter "*Stastny*") when addressing issues of commonality and typicality, it is important to look at the "nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and personnel policies and practices."[39] The *Stastny* Court went on to decertify a class based in

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[37] JA 09103-04; 05825-31.
[38] *Id.*
[39] 628 F.2d 267, 277 (4th Cir. 1980).

large part on the fact that the class members were subject to autonomous managers rather than a strong centralized administration.[40] The same scenario exists in the current case. Thus, it was not an abuse of discretion to refuse certification of a hostile work environment class under the law of this Circuit.

The district court also properly used its informed discretion when it determined that Plaintiffs' allegations of a hostile work environment were largely confined to just one department at the facility and were not plant-wide. Because six of the seven named P laintiffs, and the vast majority of the allegations of intentional discrimination in the record, involved employees in just one department, the district court could properly find that Plaintiffs had failed to prove the existence of a plant-wide, common question of hostile work environment for which their own experiences were typical. This holding is in harmony with a decision of the U.S. Supreme Court holding that, in order to meet the commonality requirement of Rule 23, plaintiffs must show the "existence of a class of persons who have suffered the same injury as [the class representatives], such that the . . . claims will share common questions of law or fact."[41] Plaintiffs here failed to demonstrate the existence of such a class.

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[40] *Id.* at 279-80.

[41] *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) (hereafter "*Falcon*").

The district court also properly employed its informed discretion to determine that Plaintiffs' claims are too individualized for class treatment. As noted in *Stastny*, the problems and complexities with proving commonality are multiplied when a case is based on an alleged pattern of intentional discrimination.[42] Those same difficulties informed the findings of the district court below.

Promotions: The district court properly employed its informed discretion to determine that Plaintiffs did not present a common issue involving promotions across all of the production departments at the facility for which Plaintiffs' own experiences were typical. In making this determination, the district court correctly observed that neither source of proof for a claim of this sort – direct evidence across the class or statistics – supported certification.

With respect to direct evidence, the experiences of the named Plaintiffs, who were overwhelmingly cabined in one department, provided no basis on which a representational trial could be conducted. Because the direct evidence outside of the beam mill department revealed "only isolated racist acts,"[43] there was no class-wide direct evidence supporting a pattern and practices/disparate impact claim.[44]

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[42] 628 F.2d 267, 274, n. 10 (4th Cir. 1980).
[43] JA 09102.
[44] *See also* JA 09102, n.2 (As for a subclass consisting only of the employees in the beam mill department, the district court noted that "[c]ertification of employees who have worked in the beam mill is not before the Court" and "limiting

Nor was there adequate statistical evidence. The class definition spanned 1999 through the year 2006. For this period, standard deviation analysis provides no evidence of discrimination. Plaintiffs' own experts admitted that a statistically significant demonstration of discrimination cannot be made out through a standard deviation analysis of the existing promotion records. Even when the district court accepted Plaintiffs' argument to discard the post-suit data, Plaintiffs could only make standard deviation analysis work through circular, speculative and question-begging treatment of the 1999-2000 data.

The district court was not persuaded by Plaintiffs' treatment of this 1999-2000 data. It is the essence of abuse of discretion review that the district court acts within its discretion when it rules against the party having the burden of proof, both when there is no evidence in support of an essential proposition and where the evidence is so thin as to fail to persuade the court.

On the promotions claim, all of the clearly admissible statistical evidence favored Defendants. Plaintiffs' 80% rule evidence is inadmissible in this Circuit. Plaintiffs' census data analysis was logically irrelevant because of the disconnect between the general population around the facility and promotions from within the

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certification [to the beam mill] would not likely satisfy the numerosity requirement."). Plaintiffs did not address this issue on their motion for reconsideration.

facility. Finally, Plaintiffs' manipulated 1999-2000 data was either clearly inadmissible or of questionable admissibility.

On a record lacking class-wide direct evidence of discrimination, where the only clearly admissible statistical evidence failed to demonstrate discrimination, for the abuse of discretion standard to mean anything, it must at least mean that the district court was free to find itself unpersuaded that this case could or should be tried on a representational, class basis.

Nothing that Plaintiffs say about subjective decision making changes this conclusion. The decision making on promotions was not completely subjective and there is still a failure of proof that the decision making resulted in discrimination across the class. In the end it should be said that there is no rule of law which compelled the district court to certify the claims of the absent class members where the likely result was their extinguishment on summary judgment upon a likely failure of class-wide proof.

Adequacy of Representation

Because the claims of the putative class representatives have not been shown to be typical across the class and because actual conflicts exist between the named Plaintiffs and the class, the district court did not abuse its discretion in finding inadequate representation.

STANDARD OF REVIEW

Class certification rulings are reviewed under an abuse of discretion standard. *Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002). In an employment discrimination class action case, a trial court may only certify a class if it "is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied." *Falcon*, 457 U.S. at 161.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Ruling That Plaintiffs' Hostile Work Environment Class Claims Failed The Commonality and Typicality Requirement Of Rule 23(a).

The district court's denial of class certification of a hostile work environment claim should be affirmed on two clear grounds. First, the district court had discretion to find the proposed across-department class uncommon and Plaintiffs' claims atypical due to the departmental differences at the plant. Second, the district court had discretion to find the class uncommon and Plaintiffs' claims atypical because their proof ran primarily to the beam mill, with evidence adduced for other departments being insufficient to support class-wide treatment.

A. Defendants' Employee Departments Are Separate And Independent And Any Hostile Work Environment Claim Would Vary Across Them.

As this Court noted in *Stastny*, when addressing issues of commonality, it is important to look at the "nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and

personnel policies and practices."[45] The *Stastny* Court went on to decertify the class action based in large part on the presence of autonomous managers over the putative class members instead of a strong centralized administration.[46]

Here, the district court received clear evidence from the management of the facility regarding the decentralized nature of Nucor's practices.[47] Based on this evidence, the district court found that 1) each employee department has a separate management structure; 2) employees in different departments report to different managers; 3) employees in one department do not have regular contact with managers in other departments; and 4) employees' work is confined to one department and they do not mingle with each other.[48] In accordance with these findings, the district court determined that "[a] class member's claim of a hostile work environment in the hot mill will vary significantly from a class member's claim of a hostile work environment in the beam mill."[49] The district court was within its discretion in finding that the differences among the departments militated against attempting a class trial on the hostile work environment claim because

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[45] 628 F.2d at 277.
[46] *Id.* at 279-280.
[47] JA 07903; 07894; 07898; 07882; 07889; 08196-97; 05814-17.
[48] JA 08989; 09100.
[49] JA 08989.

Plaintiffs' proof did not display sufficient commonality and typicality across the breadth of the class.[50]

B. The District Court Did Not Abuse Its Discretion In Holding That Plaintiffs Failed To Demonstrate The Existence Of A Class Of African-American Employees Suffering From A Hostile Work Environment Outside The Beam Mill.

In *Falcon,* the U.S. Supreme Court held that in order to meet the commonality requirement of Rule 23, plaintiffs must show the "existence of a class of persons who have suffered the same injury as [the class representatives], such that the . . . claims will share common questions of law or fact."[51] Here, the evidence for Plaintiffs' hostile work environment included sixteen declarations of African-American employees.[52] In analyzing that evidence, the district court determined that the vast majority of specific allegations of discrimination were concentrated in only one of the five production departments at the facility -- the beam mill.[53] Specifically, the district court was concerned that:

> Of the sixteen declarations, only [two declarants] make specific allegations of a manager or supervisor treating African-American employees unfairly in a department besides the beam mill. . . [Thus,] the plaintiffs do not present evidence of a pattern of discrimination in the four production departments.[54]

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[50] JA 08989; 05792-98; 05804-25.
[51] 457 U.S. at 157.
[52] JA 08986.
[53] JA 08987; 09102, n. 2 (noting that "[c]certification of employees who have worked in the beam mill is not before this Court" and "limiting certification [to the beam mill] would not likely satisfy the numerosity requirement"); 05816.
[54] JA 08987.

Ultimately, the district court ruled that "the hostile work environment claim does not raise an issue of fact or law common to the entire class."[55] Thus, Plaintiffs' contention that the district court denied class certification because some employees experienced "additional racial hostility" is simply incorrect.[56]

In support of that characterization of the case, Plaintiffs focus a large portion of their brief on one statement from the district court's opinion: "The plaintiffs have presented plant-wide racist acts potentially experienced by every African-American employee working at the plant when the acts occurred. These acts include: (1) racist emails, (2) display of the confederate flag, and (3) racist remarks over the plant radio."[57] However, this lone statement does not reflect any finding that a plant-wide pattern and practice of hostile work environment existed at the facility.

To the contrary, the district court recognized that to demonstrate a pattern and practice of hostile work environment, Plaintiffs would have had to show "that an objectively reasonable person would have to spend the work day running a gauntlet of [racial] abuse in return for the privilege of being allowed to work and

[55] JA 08989; 05804-25.
[56] Plaintiffs' Opening Brief (hereafter "POB"), p. 26.
[57] JA 08988-08989.

make a living [to justify a] finding that . . . harassment is occurring in the workplace."[58]

Not only was Plaintiffs' evidence largely confined to the beam mill, but there was testimony from the Plaintiffs' own witnesses which did not support a finding of a hostile work environment. Declarant Robyn Spann, for example, testified that she has never heard a Nucor employee utter a racial slur.[59] Nor has she ever received or seen a racial e-mail;[60] although she did see the word "Sambo" spray-painted on a wall[61] and heard a racially derogatory remark over the radio.[62]

A second Declarant, John Singletary, also testified that he never heard a racial slur at the facility,[63] and never heard racially derogatory noises over the radio while at Nucor.[64] In fact, Mr. Singletary could not recall any type of racially offensive treatment directed at him while he worked at the plant.[65]

The same is true for Declarant Jerry Nick, who has never seen or received a racially derogatory e-mail.[66] Nor has Mr. Nick ever heard a racial slur.[67] Mr.

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[58] *E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1074 (C.D. Ill. 1998).
[59] JA 07057.
[60] JA 07059-60.
[61] JA 07057.
[62] JA 07060.
[63] JA 07073.
[64] JA 07074.
[65] *Id.*
[66] JA 07087-88.
[67] JA 07092.

Nick claims to have only seen the confederate flag a "couple of times" on cars in the parking lot.[68] He also claims that he may have heard a racist joke, but cannot remember what the joke was.[69] Like Ms. Spann and Mr. Singletary, the experiences of Mr. Nick do not meet Plaintiffs' burden of showing that Plaintiffs had to spend the workday "running a gauntlet of [racial] abuse in return for the privilege of being allowed to work and make a living."[70]

Most importantly for the district court, a finding of a hostile work environment for each member of the class would necessitate consideration of the totality of circumstances affecting each worker and not simply possible exposure to one or more of the few examples of plant-wide conduct sponsored by Plaintiffs. Because the inculpatory evidence was centered in the beam mill, with the evidence respecting the other self-contained departments being insufficient to rise to the level of a hostile work environment, the district court was acting within its discretion when it found itself unable to conclude that the hostile work environment claim could be tried on a representational basis across the breadth of the class.

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[68] JA 07091.
[69] JA 07092-93.
[70] *See Mitsubishi*, 990 F. Supp. at 1074.

C. The District Court Did Not Abuse Its Discretion In Refusing To Certify The Hostile Work Environment Claims Because They Are Too Individualized To Meet Rule 23's Typicality And Commonality Requirements.

In *Stastny*, this Circuit noted special difficulties with proving commonality in a class action based on intentional discrimination.[71] Specifically, *Stastny* stated:

> As is now well recognized, the class action commonality criteria are, in general, more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim. The disparate impact "pattern or practice" is typically based upon an objective standard, applied evenly and automatically to affected employees: an intelligence or aptitude test, an educational requirement, a physical requirement. Both the existence and the "common reach" of such objectively applied patterns or practices are likely to be indisputable from the outset, so that no real commonality problems for class action maintenance ever arise in this regard. On the other hand, *the disparate treatment pattern or practice must be one based upon a specific intent* to discriminate against an entire group, to treat it as a group less favorably simply because of its [race]. The greater intrinsic difficulty in establishing the existence and common reach of such a subjectively based practice is obvious.[72]

Here, the litany of claims cited in Plaintiffs' brief only serves to illustrate the highly individualized nature of these hostile work environment issues and to underscore the difficulty of certifying this class under *Stastny*. Specifically, some employee witnesses allegedly heard racial slurs, some employees allegedly saw confederate flags, and other employees allegedly witnessed inappropriate graffiti.[73] However, few of these alleged incidents shared a common perpetrator, a common

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[71] 628 F.2d at 274, n.10.
[72] *Id.* (citations omitted) (emphasis added).
[73] POB, pp. 14-20.

temporal scope, a common severity, or a common frequency.[74] Accordingly, the district court was within its discretion to find that there was no efficient means of trying a multitude of individualized incidents in one class trial.

Other courts have similarly found that the individualized nature of hostile work environment classes, such as the proposed class here, fail the commonality requirement of Rule 23.[75] Thus, on the basis of the record before it, there was no

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[74] *Id.*

[75] *See Goodwin v. ConAgra Poultry Co.*, No. 03-CV-1187, 2007 WL 1434905, *13 (W.D. Ark. May 15, 2007); ("[W]hether an individual was subjected to a hostile work environment is dependent on the area and department that individual worked and the comments and actions taken by his or her individual supervisor . . ."); *Thompson v. Ingalls Shipbuilding*, No. 1:01CV111-LG-RHW, 2006 WL 2385324, *2 (S.D. Miss. Aug. 17, 2006) ("the plaintiffs' experiences of . . . a hostile work environment . . . vary greatly from individual to individual. The very determination of whether an individual was subjected to a hostile work environment contains a subjective, as well as an objective, element"); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. Civ.02-3780JNE/JGL, 2005 WL 758602, *13-14 (D. Minn. Mar. 31, 2005) ("Plaintiffs fail to demonstrate that the question of whether Plaintiffs in different branches are subjected to severe and pervasive harassment based on sex is subject to common proof. The decentralized and independent nature of the branches and business lines defeats a finding of commonality in this case."); *Marquis v. Tecumseh Prods. Co.*, 206 F.R.D. 132, 174 (E.D. Mich. 2002) ("[M]any of these [alleged hostile work environment] incidents occurred in different departments . . . Hence, there is no basis for treating these allegations as part of an overall atmosphere of harassment, and the incidents themselves are not so severe, standing alone, as to permit the conclusion that they fostered a hostile work environment."); *Int'l Union, UAW v. LTV Aerospace & Defense Co.*, 136 F.R.D. 113, 130 (N.D. Tex. 1991) ("In short, there is evidence indicating that incidents of sexual harassment occur at [Defendant's site]. Nonetheless . . . [t]he complaints are too individualized, [Defendant's] defenses to these varied claims are likely to be very fact-specific, and including these claims in the larger class action would cause the case to devolve into a series of individual trials.").

abuse of discretion to find the hostile work environment class failed to meet the commonality and typicality requirements of Rule 23.

II. The District Court Did Not Abuse Its Discretion In Denying Class Certification Of Plaintiffs' Promotions Claims.

Plaintiffs' class definition of "all African-Americans who are or were employed at [the facility] . . . since December 1999 in the beam mill, hot mill, cold mill, melting, maintenance and shipping departments..." also applied to Plaintiffs' promotion claims.[76] Plaintiffs pursued both pattern and practice and disparate impact theories to support their contention that the class of African-American employees suffered promotions discrimination in a common manner.[77]

However, the district court denied class certification finding that Plaintiffs' statistical and direct evidence was insufficient to show common, class-wide promotions discrimination under Rule 23.[78] Plaintiffs dispute the district court's ruling on 6 points, contending that the district court abused its discretion by: 1) finding that subjective promotions procedures fail to satisfy the standards for class certification;[79] 2) "segmenting" the promotions into numbers too small to detect a statistical pattern;[80] 3) requiring applicant-based statistics;[81] 4) refusing to

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[76] JA 00937.
[77] JA 00970; 08981.
[78] JA 08987; 05779-91.
[79] POB, pp. 35-41.
[80] POB, pp. 41-44.
[81] POB, pp. 43-46.

grant discovery requests;[82] 4) precluding use of the 80% standard;[83] and 6) going too far into the merits to reach its class certification decision.[84] Each of these contentions is without merit.

A. The District Court Did Not Abuse Its Discretion In Refusing To Certify A Promotions Class Simply Because Promotions Decisions Were Partly Subjective.

Plaintiffs argue that because the district court found a degree of subjectivity in Defendants' promotions decisions, a promotions class should have been certified to eliminate the practice.[85] But this is a straw man. Plaintiffs are the masters of their own class definition and they did not ask for certification of a class seeking only that relief; nor would they have been automatically entitled to relief if they had.[86] If Plaintiffs' argument were legally accurate, every company making partially subjective decisions would face employment discrimination class actions

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[82] POB, pp. 46-50.
[83] POB, pp. 50-51.
[84] POB, pp. 51-53.
[85] POB, pp. 35-41.
[86] JA 08982 (*citing Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1183 (9th Cir. 2007) ("[D]iscretionary decision-making by itself is insufficient to meet Plaintiffs' burden [under Rule 23]."); *see also Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) ("Of course, class certification would not be warranted absent some showing that the challenged practice is causally related to a pattern of disparate treatment or has a disparate impact on African-American employees at Metro-North.").

as a matter of course.[87]

Rather, as the district court explicitly noted, because Plaintiffs seek particularized retrospective relief, they must demonstrate commonality and typicality across the class. This is so because:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.[88]

Here, both Plaintiffs' prospective prayer and their individualized retrospective claims interact to Plaintiffs' detriment. Plaintiffs' complaint about subjectivity merely serves to emphasize the multiplicity of disparate decision makers[89] which supports the district court's conclusion that Plaintiffs did not prove their proposed

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[87] Plaintiffs' own expert on employee-selection systems, Dr. Michael Buckley testified that he has never even encountered an entirely-objective system to select employees. Buckley Depo., p. 115, ln. 7-10.

[88] *Falcon*, 457 U.S. at 157.

[89] The court held that "Nucor's plant-wide promotion procedure . . . [relying] on subjective criteria is evidence probative of [discrimination]." JA 09101. However, the court also noted: "existence of subjective decision making diminishes the likelihood that claims among different departments with different decision makers are common . . ." *Id.* (quoting *Stastny*, 628 F.2d at 277). Plaintiffs are not correct in their argument that the court made a finding that there was a class-wide policy of subjective decision making that met with the commonality requirements of Rule 23. Rather, the district court rejected certification of a promotions class specifically due to lack of evidence of African-American employees suffering from promotions discrimination in a common manner across the class. JA 05779-91.

class was populated with employees who actually suffered discrimination from any alleged common policy of subjective decision making.[90]

1. The Law Of Subjective Decision Making

Plaintiffs contend that the district court's statement that "primarily white managers and supervisors . . . relied on subjective criteria to select candidates for promotions"[91] should have led to certification of the promotions class. However this is a skewed reading of the district court's order and of the law. That a company relies on *some* subjective criteria in decision making does not necessarily mean that commonality or typicality is satisfied.[92]

In support of their contention that *some* subjectivity is sufficient to meet the commonality and typicality burdens, Plaintiffs' quote the Fifth Circuit as follows: "courts from around the country have found . . . subjective personnel processes that operate to discriminate [sufficient to] satisfy the commonality and typicality requirements of Rule 23(a)."[93] Yet, this quote appears nowhere in the *Shipes* decision. Rather, that Court held:

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[90] JA 08987 (holding, "[t]he plaintiffs statistical evidence does not present a disparity in African-American promotions rates. In addition, the plaintiffs fail to present direct evidence of plant-wide discrimination.")

[91] POB, p. 35

[92] *Falcon*, 457 U.S. at 159, n. 15; *see also Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333-34 (4th Cir. 1983).

[93] POB , p. 35 (quoting *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993))(hereafter "*Shipes*").

> [S]imilar discriminatory employment practices, such as the use of *entirely subjective* personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a).[94]

Here, Plaintiffs seek to represent a class of promotions claims across five separate and independent[95] departments without limitation.[96] This is an across-the-board class under the *Falcon* standard.[97] And such a class may only be certified if the promotions decisions were "entirely subjective" or "unfettered," assuming, of course, that it can also be shown that the process actually results in discrimination.[98]

2. The Promotions Decisions Here Were Not Entirely Subjective.

Although the district court never addressed the issue explicitly, the decision making here was not entirely subjective. One of Plaintiffs' experts agreed on this point.[99] The district court also noted objective factors in Nucor's promotions selection system such as training requirements and a test in the melt shop.[100] Moreover, Defendants presented evidence that many criteria for promotions are

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[94] *Shipes*, 987 F.2d at 316 (emphasis added).
[95] JA 00937.
[96] JA 08980.
[97] *See generally Ardrey v. United Parcel Serv.*, 798 F.2d 679, 685 (4th Cir. 1986); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 551 (D. S.C. 2000).
[98] *Falcon*, 457 U.S. at 159, n.15; *see also Lilly*, 720 F.2d at 333-34 (equating "entirely" subjective decision making to "unfettered discretion").
[99] JA 05805 (Plaintiffs' expert acknowledged that Nucor managers and supervisors did use objective criteria in making selection decisions and that companies who use no subjective criteria in decision making are "difficult to find.")
[100] JA 08978.

objective, such as specific experience, excellent safety records, the ability to operate a fork-lift, math skills, and good attendance records.[101]

3. The Supreme Court Precedent Cited By Plaintiffs Is Inapplicable To This Case.

Plaintiffs cite the *Cooper* and *Teamsters* decisions from the U.S. Supreme Court for the argument that the district court abused its discretion in not certifying a class based on partially subjective decision making.[102] Plaintiffs argue that under the procedural framework of a pattern and practice claim, their proposed promotions class would meet the commonality and typicality requirements of Rule 23.[103] But this argument is inapplicable here because the court found that there was *no pattern or practice* to begin with.[104] Plaintiffs' failure to demonstrate that a pattern and practice existed makes their argument that they should benefit from the pattern and practice procedural mechanism inconsequential.[105]

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[101] JA 07205; 07216; 07236; 07262; 07266; 07279; 07306; 07318; 07334; 07340; 07350; 07362; 07376; 07394; 07606; 07608; 07606; 07602; 07598; 07563; 07534; 07524; 07512; 07498; and 07484.

[102] POB, p. 39 (citing *Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984) (hereafter "*Cooper*"); *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977) (hereafter "*Teamsters*").)

[103] *Id.*

[104] JA 08987; 05779-91.

[105] *See, e.g., Muhammad v. Giant Food, Inc.*, 108 Fed. Appx. 757, 763-64 (4th Cir. 2004) (unpublished opinion) (Sufficient evidence of a pattern and practice claim must be established before the pattern and practice procedural mechanism can be employed.)

Plaintiffs also cite the Supreme Court's decision in *Watson* for the proposition that proof of partially subjective decision making is sufficient to certify a disparate impact claim.[106] Again, their reliance on *Watson* is misplaced. *Watson* only deals only with the summary judgment standard -- it has nothing to do with Rule 23. This is illustrated by the Sixth Circuit decision in *Bacon v. Honda of Am. Mfg., Inc.* wherein the Court stated:

> An entirely subjective decision-making process may, theoretically, allow different kinds of employees to be in the same class-a question of class membership (*Falcon*). For the *entirely separate purpose* of establishing a *prima facie* case of disparate impact, mixed objective and subjective standards may be considered to be purely subjective (*Watson*).
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> * * *
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> The constructive subjectivity in *Watson* cannot substitute for the actual and complete subjectivity required . . . in *Falcon* because the cases deal with two unrelated legal issues: class membership and the elements of a *prima facie* case. We hold that the *Falcon* requirement is not met because the plaintiffs have not shown that the wide range of class members are all subject to the same, exclusively-subjective, decision-making process.[107]

B. The District Court Did Not "Segment" Plaintiffs' Statistical Evidence To A Point Too Small To Detect A Statistical Pattern.

Plaintiffs' contention that the district court should not have "segmented" their statistical evidence is without merit for four reasons. First, this argument is based on an unsupported assertion that, due to a small sample size, it was

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[106] POB, pp. 40-41 (citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988) (hereafter "*Watson*")).

[107] 370 F.3d 565, 571-72 (6th Cir. 2004) (emphasis added).

statistically impossible to show disparate impact even if one existed. Second, the argument misconstrues the district court's decision. The district court never "segmented" Plaintiffs' statistical data. Rather, it thoroughly analyzed the full range of each of Plaintiffs' statistical analyses under Rule 23.[108] Third, the argument is disingenuous because Plaintiffs themselves chose to significantly segment the promotion data by ignoring all post-lawsuit promotions. Fourth, Plaintiffs' argument fails to acknowledge the true and inadequate character of their statistical evidence.

1. Plaintiffs' Argument That The Sample Size Was Too Small To Show Statistical Significance Is Unsupported Supposition.

Plaintiffs' brief states that the promotions data (or sample size) was "too small to allow a true test of statistical significance."[109] Yet this assertion is completely unsupported.[110] In rejecting this argument, the district court remarked:

> The plaintiffs have not [heretofore even] attempted to show that the limitation [of sample size] prevented them from compiling reliable statistics. Proof that the plaintiffs were unable to compile reliable statistics while adhering to the [sample size] is again absent from the plaintiffs' motion to alter or amend.[111]

Here, on appeal, Plaintiffs again assert without record support that their failure to show class-wide discrimination was somehow the district court's fault as

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[108] JA 08982-86; 05779-91.
[109] POB, p. 44.
[110] *Id.*
[111] JA 09103.

a result of sample-size.[112] Federal Rule of Appellate Procedure 28(a)(9)(A) states: [Plaintiffs'] argument . . . must contain . . . Plaintiffs' contentions and the reasons for them, with citations to authorities and parts of the record on which appellant relies." In discussing unsupported assertions on appeal, the Tenth Circuit has held, "[appellant's] contention . . . is a bald assertion unsupported by any citation to authority or any explanation . . . We conclude that [appellant] has waived these arguments because arguments inadequately briefed in the opening brief are waived."[113] The district court could not abuse its discretion by refusing to certify a class action based on unsupported assertion.

Defendants concede that, statistically speaking, a decrease in the amount of data available for statistical analysis decreases a plaintiff's odds at showing statistical significance.[114] However, it is a significant leap from this general rule to argue that, the *sample size here* was decreased to the point to make it *statistically impossible* to detect disparate impact even if it existed. Without any evidentiary support, this argument should be given no weight.

2. Plaintiffs Misstate The District Court Order When They Allege The District Court "Segmented" Their Statistical Data.

Plaintiffs' assertion on this point is not faithful to the district court's order.

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[112] POB, p. 44.
[113] *Jones, Waldo, Holbrook, & McDonough v. Cade*, 98 Fed. Appx. 740, 747 (10th Cir. 2004) (unpublished opinion).
[114] POB, pp. 41-43.

The district court did not "segment" Plaintiffs' statistical evidence. In the exercise of its discretion, the district court analyzed every statistical analysis Plaintiffs presented in an attempt to show common, class-wide promotions discrimination.[115] Based upon all of the statistical analysis before it, the district court found the most probative evidence consisted of statistical evidence based upon standard deviation analysis of actual promotions records to determine whether a class of African-American employees suffered from promotions discrimination.[116] This evidence demonstrated no such discrimination.

Additionally, the statistical calculation of actual promotions records came from Plaintiffs' expert's own statistical work.[117] In analyzing promotions records from January 2001 through December 2004, Plaintiffs' own expert determined that there was no statistically significant promotions discrimination.[118]

3. Plaintiffs' Argument About The Reduction Of The Promotion Data Is Disingenuous.

Plaintiffs are not really entitled to complain about the absolute size of the sample. Here, a significant reduction of promotions data occurred when Plaintiffs' statistical experts disregarded many of the actual records of promotions data during the relevant period (2001-2006) because the entire array of data showed there was

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[115] JA 08982-08986.
[116] JA 08985.
[117] JA 05891, n. 9.
[118] JA 08985.

no statistical discrimination.[119] Because the straightforward analysis of the statistical data in this case shows no class discrimination exists,[120] Plaintiffs' experts excluded all available promotions data from August 25, 2004, the date suit was filed, until the present,[121] a manipulation accepted by the district court. Disregarding this actual promotion data significantly reduced the available sample size but was Plaintiffs' conscious choice and not the result of any court segmentation. But even this manipulation did not generate statistical significance. So what Plaintiffs are really complaining about is the refusal of the judge below to certify a class based upon the assumptions underlying their treatment of the 1999-2000 data.

4. Plaintiffs' Manipulated Data from 1999-2000 Did Not Require The District Court To Certify the Promotions Class.

In the end, Plaintiffs' statistical evidence of disparate impact came down to their pre-2001 promotions data.[122] This is so because their other data did not

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[119] JA 05887-88.

[120] Plaintiffs' statistical analysis in this case is unique. In the Arkansas case, Plaintiffs simply calculated with available job posting data through the relevant class period to formulate their analysis. Although their calculations in Arkansas contained computational error and failed to control for qualifications, they otherwise followed the standard analysis of prior cases. *See Bennett v. Nucor Corp.*, No. 3:04CV00291SWW, 2006 WL 2473015 (E.D. Ark. Aug. 25, 2006). Here, the analysis widely varied from their analysis in Arkansas -- despite the fact that the Arkansas case dealt with the same claims of discrimination.

[121] JA 05888.

[122] JA 05886-87.

employ a legally acceptable method (the 80% rule and census data); was favorable to Nucor; or was statistically insignificant. Only when the 1999-2000 data was factored into Plaintiffs' standard deviation analysis of the 2001-03 data, were they able to sponsor an analysis for which they claimed statistical significance.

To create this data, Plaintiffs pulled twenty-seven "change of status" forms from the employee personnel files provided through discovery.[123] "Change of status" forms are simply a company record which documents any employee's change of status, whether the employee was promoted, demoted, received a standard pay increase, or was transferred. However, these forms do not indicate whether any African-American actually bid for the job in question. As one of Plaintiffs' experts testified:

> **Question**: Okay. How many of these job selections [of the pre-2001 promotion-selection data] involved—these 27 job selections involved an African-American actually bidding on a job?
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> **Answer**: At least one.
>
> **Question**: Other than the one, how many involved?
>
> **Answer**: I don't know.[124]

Without knowing whether the job at issue was open for bidding, or whether African-Americans bid on the job if it was, the data obtained from the twenty-

[123] JA 05851-52.
[124] JA 05853.

seven job changes is irrelevant to a claim of discrimination in promotions.[125] Thus, the manipulated pre-2001 job selection data cannot answer the essential question of this case -- whether African-American employees were denied promotion due to discrimination.[126]

Despite their admitted lack of knowledge of whether any African-Americans even bid on any of these pre-2001 jobs, Plaintiffs' experts *assumed* that the twenty-seven job changes represent twenty-six instances in which an African-American was denied a promotion.[127] Plaintiffs' expert admitted that this assumption skews the numbers towards a finding of disparate impact.[128]

Class certification orders are reviewed for abuse of discretion.[129] This abuse of discretion standard has been characterized as "deferential."[130] Where the record permits the trial judge to conclude that the elements of Rule 23 have been satisfied, the court has discretion to proceed with conditional certification as in *Gunnells*. And where the record supports the conclusion that elements of Rule 23 have not

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[125] *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 544-45 (4th Cir. 2003) (in order to establish a *prima facie* case of discrimination in promotions, plaintiffs are required to show they applied for the position in question).
[126] *Id.*
[127] JA 05912, n. 4.
[128] *Id.*
[129] *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (hereafter "*Gunnells*").
[130] *Skipper v. Giant Foods, Inc.*, 68 Fed. Appx. 393, (4th Cir. 2003) (unpublished opinion) (hereafter "*Skipper*").

been established, the trial court will be affirmed in its decision not to certify, as in *Skipper*.

On the promotions claim here, putting aside the 1999-2000 manipulated data for the moment, the state of the record before the district court was this: the direct evidence of discrimination was not class-wide and the statistical evidence either favored Defendants, was statistically insignificant, or was clearly inadmissible (for a discussion of the 80% rule, *see* II (E), *Infra*, and for a discussion of the logically irrelevant census comparisons, *see* III (C), *Infra*.)

How then should the 1999-2000 data be characterized? Defendants submit that it is irrelevant and clearly inadmissible for the reasons stated in *Bryant*.[131] But at a minimum there was room for significant doubt that this evidence was admissible either under *Daubert* standards or under general principles of relevancy. And if this evidence was not admitted, there would be no class-wide evidence of discrimination either statistical or direct. If the abuse of discretion standard is to be applied here with its ordinary force and meaning, the district court had discretion to rule against Plaintiffs as the parties bearing the burden of proof either because there was no admissible evidence at all supporting a finding of class-wide discrimination, or because it was sufficiently thin for the district court to find itself unpersuaded that the claim could be tried on a representational, class basis. Nor

[131] *See* n.125 supra.

was the district court, in its capacity as guardian of the rights of the absent class members, legally compelled to certify a class where there was a significant danger that at the end of the case those claims would be extinguished through summary judgment owing to an absence of admissible class-wide evidence of discrimination.

C. The District Court Did Not Require Plaintiffs To Demonstrate "Applicant-Based Statistics."

Plaintiffs further argue that the district court required them to demonstrate "applicant-based statistics" when there were none available.[132] This somewhat misapprehends the record because the district court analyzed both Plaintiffs' applicant-based statistics and non-applicant-based statistics.[133] And it is not that applicant-based statistics were unavailable. They were available but did not favor Plaintiffs.

Plaintiffs argue, under *County of Fairfax,* that "Circuit precedent required that the next-best estimate of missing applicant rates be used."[134] But this is incorrect. In *County of Fairfax*, the defendant did not retain *hiring* data pursuant to an affirmative action plan during the relevant period of the case.[135] In those

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[132] "Applicant-based statistics" is Plaintiffs' terminology for statistics based on actual promotions records.
[133] JA 08982-86.
[134] POB, p. 43 (citing *U.S. v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980) (hereafter "*County of Fairfax*").)
[135] *County of Fairfax*, 629 F.2d at 939-40.

circumstances this Court affirmed the district court's use of census data in place of the pool of actual applicants to determine whether there was disparate impact.

Here, Defendants do not grant promotions to people who do not work for Nucor. Thus, the only relevant statistical analysis is of the actual promotions records and not alternative statistical pools on non-employees; pools which are actually logically irrelevant.[136] As this Court held in *County of Fairfax*: "applicant data are normally highly relevant evidence of an employer's labor market. Those who apply constitute the pool from which employees are selected."[137] Thus, Plaintiffs' argument that statistical analysis of their proffered benchmarks be used *instead of* actual promotions data to determine whether Nucor has discriminated against African-Americans in promotions decisions is without merit.

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[136] *McReynolds v. Sodexho Marriott Serv., Inc.*, 349 F. Supp. 2d 1, 8-9 (D. D.C. 2004) ("In a promotion case, such as this one, the organization in which the class members are employees is appropriately utilized as the relevant labor market") (citations omitted); *U.S. v. City of Miami,* 115 F.3d 870 (11th Cir. 1997) ("Rather than making the proper comparison between the minority composition of the department versus that of the relevant labor market, [Plaintiffs' Expert] testified that his entire report was based on general census data. This analysis conflicts with this court's mandate . . . that the relative proportion of minorities in a junior position [in a promotions case] will generally be the most significant determinant of the proportion of minorities in the qualified applicant pool.") (citations omitted); *Shidaker v. Tisch*, 833 F.2d 627, 631 (7th Cir. 1987) ("Where a company is shown to promote from within, the relevant labor pool of qualified applicants for upper level positions may be the group of employees in the company from which promotees will be drawn."

[137] 629 F.2d at 940 (citing *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 308, n.13 (1977)).

Plaintiffs now argue that the 1999 through 2000 promotions were "the most probative of racial discrimination because they were the only ones that occurred before the EEOC charges began to be filed in early 2001.[138] However, this argument was never presented to the district court, and is waived.[139] In any event, the argument does nothing to alter the fact that the 1999-2000 data is wholly circular, speculative and question-begging. Plaintiffs' argument is unintentionally revealing, however, in what it says about the weakness of Plaintiffs' statistical case because it is tantamount to saying: Defendants stopped Plaintiffs' hypothesized class-wide discrimination when charges were filed so the actual promotion data should be discounted in favor of made-up figures from the two-year period that is most remote in time.

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[138] Plaintiffs' argument on which time period is most probative for analysis of promotions data has been very flexible. Initially, their statistical experts analyzed all promotions data (from December 2000 through 2007) to determine whether a disparate impact in promotions existed at Nucor Steel-Berkeley. However, after the statistical experts determined that no disparate impact in promotions existed for the relevant period, the experts only examined the statistical data that existed before the lawsuit was filed. Plaintiffs also strenuously argued to the district court that pre-lawsuit promotions were the most probative of discrimination. The district court agreed, analyzed the pre-lawsuit statistical data, and found it lacking. However, on appeal, Plaintiffs argue that it is not the pre-lawsuit promotions which are the most probative, but the pre-EEOC charge promotions.

[139] *In re Wallace and Gale Co.*, 385 F.3d 820, 835 (4th Cir. 2004) (failure to raise argument before the district court results in a waiver of that argument on appeal "absent exceptional circumstances").

D. Plaintiffs' Challenge To The Discovery Order.

Plaintiffs complain about a discovery order entered on March 30, 2006, even though that issue was not presented in the Petition for Appeal.[140] That objection should be dismissed because Plaintiffs expressly disavowed it below; because appeals under Rule 23(f) do not extend jurisdiction to discovery issues; and because the district court's order was not an abuse of discretion.

1. Plaintiffs Expressly Disavowed This Argument Below.

Plaintiffs contradict themselves on this issue. While on appeal they object to the discovery order, lead counsel for Plaintiffs – Mr. Robert Wiggins – previously stated to the district court during the hearing on the motion for class certification, "We don't think we need more discovery at the moment, we are willing to stand on the record."[141] Under both waiver and estoppel principles, Plaintiffs are precluded from now objecting to the discovery order.

2. Rule 23(f) Is Not Intended To Provide An Appeal From A Discovery Order.

The plain language of Fed. R. Civ. P. 23(f) reads "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule." This language carves out a limited right of appeal *only* for class

[140] JA 09143-70.
[141] JA 09017.

certification issues.[142] Yet, Plaintiffs request this Court to broaden the scope of Rule 23(f) to pre-hearing discovery matters. In rejecting a similar request, the Eleventh Circuit has held:

> With limited exceptions, the federal courts of appeals have jurisdiction to hear appeals only from ... final decisions of the district courts of the United States. 28 U.S.C.§1291. Although Fed. R. Civ. P. 23(f) permits us to review an order of a district court granting or denying class action certification, the district court's finding [at issue] ... was made in a separate discovery order. The jurisdiction granted by Rule 23(f) does not extend to this separate [discovery] order.[143]

In *De Leon-Granados,* the 11th Circuit found it was precluded from considering issues raised in a discovery order issued *the same day* as the certification order under Rule 23(f).[144] Here, Plaintiffs ask this Court to consider issues raised in a discovery order issued almost *two years* prior to the class certification order.[145]

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[142] *See also Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) (holding ". . . under Rule 23(f), a party may appeal only the issue of class certification; no other issues may be raised.") *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 390 (3rd Cir. 2002) (citing Fed. R. Civ. P. 23(f), advisory committee's notes) ("[an] appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision.")

[143] *De Leon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214, 1218, n.1 (11th Cir. 2007) (hereafter "*De Leon-Granados*").

[144] *Id.* (emphasis added).

[145] The discovery order was entered on March 30, 2006, while the order on Plaintiffs' motion for rehearing from which this appeal was taken was entered January 11, 2008.

To grant Plaintiffs' requested relief from a discovery order would enlarge the scope of Rule 23(f) beyond its intended scope and disregard the standards set by this Court in *Leinhart v. Dryvit Sys., Inc.*, holding "[s]tandards must certainly reflect the limited capacity of appellate courts to consider interlocutory appeals, as well as the institutional advantage possessed by district courts in managing the course of litigation and the judicial diseconomy of permitting routine interlocutory appeals."[146] Thus, Plaintiffs' request for reversal of the district court's discovery order should be rejected on jurisdictional and prudential grounds.

3. In Any Event The District Court's Ruling Was Not An Abuse of Discretion.

But even if the discovery issue were to be taken up, Plaintiffs would still be required to demonstrate that the district court's order was an abuse of discretion.[147] In *Ardrey*, this Circuit reviewed an order limiting discovery to the individual plaintiffs and other similarly situated individuals. On appeal, the *Ardrey* plaintiffs complained that such limited discovery prevented them from generating the necessary statistical evidence to prove their pattern and practice allegations.[148]

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[146] *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145 (4th Cir. 2001).
[147] *Ardrey*, 798 F.2d at 682 (hereafter "*Ardrey*").
[148] *Id.*

Plaintiffs make the same argument here. [149] However, that argument was addressed and disposed of by the *Ardrey* Court. As the district court stated in its order:

> The discovery allowed as to [the plaintiffs] individual claims was sufficient to develop evidence, statistical and otherwise, relating to whether discrimination was the "standard operating procedure" of [the defendant] in regard to [the plaintiffs'] positions, or concerning promotions, transfers, suspensions or discipline, related to their individual claims.[150]

The rule in this circuit is that limiting discovery to information on the Plaintiffs and similarly situated individuals is sufficient to allow Plaintiffs to develop their statistical evidence. The district court followed that holding closely. Thus, in the instant case, Plaintiffs' failure to develop such statistics is not due to insufficient discovery but rather to the absence of evidence of a pattern and practice of racial discrimination at Nucor when examined using the customary procedures and standards.

E. The District Court Did Not Abuse Its Discretion By Affording More Weight To A Standard Deviation Analysis Rather Than The 80% Rule.

This Circuit has found that the 80% rule is not the proper statistical analysis to use in a discrimination case. In *Moultrie v. Martin*, the Court held:

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[149] POB, pp. 49-50.
[150] JA 00486 (*citing Ardrey*, 798 F.2d at 684-685).

> Courts in this circuit, from time to time, have used straight percentage comparisons without the necessary standard deviation analysis in proving and rebutting discrimination cases. Such decisions failed to observe standard mathematical procedures. Consequently, we now hold that, in all cases involving racial discrimination, the courts of this circuit must apply a standard deviation analysis such as that approved by the Supreme Court in *Hazelwood* before drawing conclusions from statistical comparisons.[151]

This Court subsequently revisited the 80% rule in *Deshields v. Balt. City Fire Dep't* holding:

> Here, the four-fifths rule involves a comparison of the percentage of blacks promoted with the percentage of whites promoted. According to the EEOC, adverse impact may generally be inferred if the ratio falls below 4/5 -- *i.e.*, 80 percent . . . The four-fifths rule merely represents, however, a numerical proxy with little independent statistical significance. A rule of thumb used by a federal agency is not binding as a rule of law upon a federal court.[152]

Thus, Plaintiffs' argument that the district court abused its discretion by placing more reliance on the standard deviation analysis than on the four-fifths rule is without merit.[153]

F. The District Court Did Not Abuse Its Discretion By Going Too Far Into The Merits Of Plaintiffs' Claims In Denying Class Certification.

It is a fundamental principle of class action law that plaintiffs cannot achieve class certification on the basis of pleadings alone.[154] To undertake the searching

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[151] 690 F.2d 1078, 1082-83 (4th Cir. 1982).
[152] 884 F.2d 1387 (Table), (4th Cir. 1989).
[153] POB at 50.

analysis required by the case law,[155] the district court analyzed Plaintiffs' statistical proof to determine whether there was sufficient evidence of a common class-wide discrimination in promotions, to permit a representational, class trial of that issue.

Plaintiffs argue that in analyzing the statistics, the district court went too far into the merits of their claims.[156] Plaintiffs' implicit argument is that the district court should have accepted their statistical evidence as true, and certified the promotions class without further inquiry.

In a very similar case, the Eleventh Circuit rejected this argument and affirmed a district court's detailed examination of the plaintiffs' statistical analysis under Rule 23 -- despite the fact that the analysis overlapped with the merits of the case.[157] The *Cooper v. Southern Co.* plaintiffs similarly argued that the district court had abused its discretion by inquiring into the merits of the claims when it denied class certification under Rule 23. However, the Eleventh Circuit responded:

> "[w]hile it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned

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[154] *Falcon*, 457 U.S. at 160 ("[S]ometimes it may be necessary for the [district] court to probe behind the pleadings before coming to rest on the certification question.").
[155] *Id.* at 161 (Rather, district courts must conduct a "rigorous analysis" of all the evidence to determine whether the evidence warrants class certification).
[156] POB, pp. 51-53.
[157] *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004).

> determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements."[158]

The Eleventh Circuit acknowledged that plaintiffs must generally demonstrate a pattern or practice of discrimination through a combination of statistics and anecdote. Similarly, to prove disparate impact, plaintiffs must establish the existence of a statistically significant disparity among members of different groups affected by a type of employment decision. Accordingly, the Eleventh Circuit held:

> Thus, it was plainly necessary for the district court to evaluate the statistical evidence the plaintiffs submitted in order to determine whether it established the discrimination of which plaintiffs complained. The district court concluded the statistical "analysis ha[d] some limitations which undermine[d] its usefulness in measuring whether Defendants' employment practices [we]re racially neutral." Because of substantial analytical flaws in the statistical evidence, the plaintiffs had made an "inadequate showing ... to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies.[159]

The Eleventh Circuit noted that the district court "identified several basic infirmities that undermined" the statistical evidence value.[160]

Here, exercising its informed discretion, the district court also analyzed Plaintiffs' statistical evidence.[161] Plaintiffs argue "rejecting [our] clear statistical

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[158] 390 F.3d at 716 (quoting *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984)) (citation omitted).
[159] *Id.*
[160] *Id.* at 717; *see also Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir 2006).
[161] JA 08982-86.

evidence . . . was . . . to decide the merits of who is likely to prevail at trial."[162] Yet, Rule 23 does not require the district court to accept Plaintiffs' statistical analysis on faith.[163] Rather, a district court in the exercise of discretion under *Falcon* must engage with the probative value and usefulness of Plaintiffs' statistical evidence.

The district court properly applied this principle of law at the outset of its order, acknowledging that "the likelihood of success on the merits is not relevant". . . but that a "district court must take a close look at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification . . . even if the issues tend to overlap into the merits of the underlying case."[164] In doing so, the district court's examination of the statistical evidence was fully congruent with this Court's holding in *Gariety*:

> We conclude that, by accepting the plaintiffs' allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule 23 . . . If it were

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[162] POB, p. 52, (citing *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006)) (holding "The likelihood of success on the merits . . . is not relevant to the issue of whether certification is proper.") Plaintiffs' citation to the *Thorn* decision on this point of law is incomplete. What Plaintiffs omit is more important that what they quote. *Thorn* actually holds: "[a]t the class certification phase, the district court must take a close look at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification. Such findings can be necessary even if the issues tend to overlap into the merits of the underlying case." (internal quotations and citations omitted).

[163] *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (hereafter "*Gariety*").

[164] JA 08982 (citing *Thorn*, 445 F.3d at 319).

> appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a "close look" at relevant matters, *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231, for conducting a "rigorous analysis" of such matters, *Falcon*, 457 U.S. at 161, 102 S.Ct. 2364, and for making "findings" that the requirements of Rule 23 have been satisfied, *see* Fed. R. Civ. P. 23(b)(3).[165]

Accordingly no abuse of discretion is made out.

III. The District Court Did Not Abuse Its Discretion When Finding That Plaintiffs Do Not Satisfy The Adequacy Requirement Of Rule 23(a).

The district court examined the record and found inadequacy both because of a lack of typicality and because of conflicts of interest between Plaintiffs and potential class members that prevented them from serving as adequate class representatives. Specifically, the court found Plaintiffs and class members had a conflict of interest because "Plaintiffs bid against other class members" for the same promotions they are now seeking through litigation.[166] The district court explained: "awarding the Plaintiffs a promotion eliminates the same remedy to another class member who also seeks the promotion."[167] In support of its decision the district court relied upon a U.S. Supreme Court decision holding that a class

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[165] *Gariety*, 368 F.3d at 365.
[166] JA 09104.
[167] *Id.*

representative cannot represent class members with competing remedial interests.[168]

Plaintiffs contend that the district court committed an abuse of discretion in making this decision. In support of this contention they argue: 1) Plaintiffs' interest in proving and enjoining a pattern-or-practice of promotion discrimination throughout a single plant is inherently adequate for a putative class representative and to hold otherwise would virtually doom every class action or pattern or practice case;[169] 2) no class members bid on precisely the same vacancy as a named Plaintiff;[170] and 3) the *Gen. Tel. Co. v. E.E.O.C.* (hereafter "*General Telephone*") decision cited by the district court is distinguishable and this Circuit has since held that a plaintiff's interest in enjoining a pattern-or-practice of promotion discrimination throughout a single plant ensures adequacy of representation.[171] Each of these arguments is without merit.

A. Plaintiffs' Interests Are Not Inherently Consistent With Those Of Putative Class Members And To Hold Otherwise Does Not "Doom" All Promotion Class Actions.

The principal opinion upon which Plaintiffs rely in support of the argument that they met the adequacy requirement has been vacated. Because the eleven line block quotation on page fifty-six of Plaintiffs' brief is taken from a case vacated in

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[168] JA 09104 (*citing Gen. Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 331 (1980)).
[169] POB, p. 53
[170] POB, p. 55
[171] POB, p. 57.

1982 by *Falcon*, it is of no moment. In *Falcon*, the Supreme Court specifically rejected the proposition that a plaintiff's interest in proving and enjoining a pattern-or-practice of promotion discrimination throughout a single plant ensures adequacy of representation. Specifically, the Court held "the mere fact that a complaint alleges racial or ethnic discrimination does not itself ensure that the party who has brought the lawsuit will be an adequate representative."[172]

Accordingly, not all plaintiffs are adequate to represent other class members,[173] and the district court was acting within its discretion when it relied upon the *Falcon* to find that Plaintiffs' individual interests were not adequate to represent the interests of all putative class members here.

The district court's exercise of discretion in determining whether the adequacy requirement of Rule 23(a) is met does not "doom" all pattern-or-practice promotions claims as Plaintiffs suggest.[174] Rather, such an exercise of discretion prevents the "wholesale expansion of class-action litigation" the Supreme Court sought to prohibit in *Falcon*.[175]

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[172] *Falcon*, 457 U.S. at 157.
[173] *Cooper*, 467 U.S. at 877.
[174] POB, p. 53.
[175] *Falcon*, 457 U.S. at 159.

B. The Conflict Between Plaintiffs And Putative Class Members Is Real.

The district court did not abuse its discretion when it found "that Plaintiffs are pursuing the same promotions as other class members."[176] The district court reviewed the evidence and found "the record reveals that Plaintiffs bid against other class members."[177] In the face of the district court's finding and citation of examples, Plaintiffs continue to argue "there were no class members who bid on the exact same vacancy as the Plaintiffs."[178] The record, however, is to the contrary, to wit:

- Class member James R. Bowman and named Plaintiff Jason Guy bid on the same Ladle Wall Helper promotion vacancy;[179] and
- Class member Michael Blanco and named Plaintiffs Jason Guy and Alvin Simmons bid on the same Mill Inspector promotion vacancy.[180]

When Plaintiffs state "the only instance of competitive bidding cited by the court involved two name plaintiffs who bid on the same vacancy, not a competition with putative class members",[181] this statement is also incomplete because the named Plaintiffs repeatedly bid against each other.

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[176] JA 09104.
[177] *Id.*
[178] POB, p. 56.
[179] JA 00289.
[180] JA 00297.
[181] POB, p. 56.

- Named Plaintiffs Gerald White and Ramon Roane bid on the same Stand Assembly Shop Supervisor promotion vacancy;[182]

- Named Plaintiffs Alvin Simmons and Jason Guy bid on the same Finishing Stacker Operation promotion vacancy.[183]

- Named Plaintiffs Alvin Simmons and Quinton Brown bid on the same CP1 Operator promotion vacancy.[184]

These were single and not multiple vacancies.[185]

The fact that five of the seven Named Plaintiffs bid against putative class members and/or each other, and Sheldon Singletary is not recorded as having a bid at all within the relevant period, lends further support to the district court's finding that Plaintiffs were inadequate representatives on typicality grounds as well.[186]

C. The District Court Did Not Abuse Its Discretion By Relying Upon *General Telephone.*

The district court was within its discretion when holding that the relief sought by Plaintiffs put their interests adverse to other class members because "an injunction awarding the Plaintiffs a promotion eliminates the same remedy to another class member who also seeks the promotion."[187] In support of its finding, the district court cited to the U.S. Supreme Court's opinion in *General Telephone* which states, "a class representative cannot represent class members with

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[182] JA 08439; *see also* JA 00261.
[183] JA 08442; *see also* JA 00291.
[184] J.A. 08442; JA 00295.
[185] JA 08434-51; *see also* JA 00261; JA 00291.
[186] JA 09195.
[187] JA 09104.

competing remedial interests."[188] Plaintiffs contend the district court's reliance on the decision in *General Telephone* is ill-founded because the Supreme Court did not have before it the current situation in which employees are trying to enjoin and replace an allegedly subjective promotion process that will benefit all employees alike, not just Plaintiffs.[189] But of course, that was not all that was before the district court.

In addition to seeking to enjoin and replace Defendants' promotions process, Plaintiffs sought an injunction giving them promotions. This real and direct competition between Plaintiffs and class members for promotions is a prime example of the "competing remedial interests" that *General Telephone* sought to avoid.[190] In fact, the degree of competing remedial interests between Plaintiffs and class members is much greater here than it was in *General Telephone* where plaintiffs and class members *might* have competed with each other for "fringe benefits or seniority."[191] In the present case, however, Plaintiffs and class members *would* compete among themselves and with class members making their claims both atypical and in conflict with the class.

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[188] JA 09104 (citing *General Telephone*, 446 U.S. at 331).
[189] POB, p. 57.
[190] 446 U.S. at 331.
[191] *Id.*

IV. Even If The Ruling Below Were To Be Reversed This Class Cannot Be Summarily Certified On Appeal Because Rule 23(b) Has Not Yet Been Considered By The District Court.

Plaintiffs ask this Court to "certify the putative class of African-American employees from December 8, 1999 forward."[192] However, the district court never examined whether the alleged class satisfied the requirements of Rule 23(b).[193] Hence, were this Court to find any abuse of discretion, the sole remedy should then be remand for further proceedings in the district court.

CONCLUSION

But no abuse of discretion has been shown and the order of the district court is due to be affirmed.

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[192] POB, p. 58.

[193] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). ("In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)").

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REQUEST FOR ORAL ARGUMENT

Because this is an appeal under an abuse of discretion standard with adequate evidence supporting the disposition below, there is no novel question demanding oral argument. Appellees would nonetheless welcome oral argument in aid of clarity of presentation.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- This brief contains 12,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because:

- This brief has been prepared in a proportionally spaced 14-point Times New Roman font typeface using Microsoft Word XP.

/s/ E. Duncan Getchell, Jr.

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Dated: July 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on July 3, 2008, I have mailed the foregoing document by First Class Mail, postage pre-paid, to the following non-CM/ECF participants, addressed as follows:

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