IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA PIPPEN, et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF IOWA, et al., AND ALL OTHER AGENCIES SIMILARLY SITUATED IN USING THE HIRING AND PROMOTION OF ADMINISTRATIVE SERVICES, Defendants.	Case No. LACL107038 RULING

I. Statement of the Case

This class-action lawsuit was tried from September 12, 2011 to October 4, 2011. The record remained open for final submission and amendment of documentary and deposition evidence, transcript preparation and post-trial briefing. The record closed on February 7, 2012.

Plaintiffs are African-Americans who sought employment with or promotion within the State of Iowa merit-based employment system. They claim that because of the State's failure to enforce extant statutory and regulatory policies, a disproportionate number of their class were denied an equal opportunity for employment. They do not claim this was done intentionally or with malice. Nor do they assert that some quota was not met. They simply argue that the natural unintended consequences of failure to follow rules designed to ensure equal opportunity in the workplace resulted in unfair treatment because of their race. In their own words, they describe this as an "uncommon approach" to the law.

The Defendants are the State of Iowa and the 37 departments of the executive branch. The State concedes that the operation of its merit-based employment system is not perfect. Its

defense is twofold: 1) the legal theory upon which Plaintiffs base their claims is not recognized by the law and 2) even if it were, the evidence offered by the class is not adequate.

Much has been argued about the gravity of the issues thus joined. Called into question is the fair treatment of minorities by the largest employer within our borders: the executive branch of State government; the potential financial consequences for the class members and the taxpayers alike; and the potential for extended and extensive legal entanglement between the judicial and the executive branches in an effort to compel the latter to do its duty under the law.

The novelty of the class claim is conceded. The Plaintiffs urge the court to broaden the horizons of Iowa's legal landscape premised on their belief in our state's progressive stance on civil rights. The State counters that the conventional boundaries of the law in this field are well defined and intellectually sound. It finds the invitation to expand the law a plea to circumvent clear and timely pronouncements of the United States Supreme Court.

The law is an evolutionary process, layered and stratified over time by a multitude of legal precedent, each affected by the social, scientific and moral forces of its day which inevitably shift and change through the progress of the human experience. Those who might question this and think the law is immutable and unalterable would do well to recall that when this nation was forged, only free men were equal, regardless of how they may have been created. Most African-Americans were then not whole persons – a mere three-fifths of a being. Women could not vote nor sit on juries. Their independent rights to hold property were limited. Nearly a century later, after a civil war and the purchase price of 600,000 American lives, the three-fifths man became whole, though not practically equal. After another half century, the law granted women suffrage. And a century after the meeting at Appomattox Courthouse the chief executive in the White House signed legislation to take us further down the road of equality. Since that

time it has been primarily the courts that have monitored and guided, kept us on the path and nudged us when we balked to walk farther.

The question here is not so much whether the law of equal rights will evolve – it will. The issue in this case is whether that process will include the unique legal theory tendered here and whether the evidence supports it. Notwithstanding the magnitude of the decision in this case, it cannot be, as no case should be, determined by the possible consequences of that decision. As in any case, here the law must be identified and defined and the evidence weighed in relation to those legal requirements: if met, there will be one consequence; if not, another. The dispute, distilled to its simplest form: is this a cognizable claim and has it been proven?

II. Procedural History

The first Iowa Civil Rights Commission complaints were filed by class representatives on May 4, 2006. Each complaint listed specific agencies and specific positions unique to the complainant. Each included "attachments" raising class allegations and described a statewide system "designed" to limit opportunities for African-Americans. Each complainant later amended their complaint to allege that the "State has engaged in practices and policies that have a disparate impact on the hiring and retention of blacks in all departments in state government." Right-to-sue letters were issued on November 27, 2007.

This class-action lawsuit was commenced on October 26, 2007. It alleged racial discrimination in hiring and promotion within the State of Iowa's "hiring system" in violation of the Iowa Civil Rights Act ("ICRA"), Iowa Code § 216 et seq., and Title VII, 42 U.S.C. § 2000e et seq. ("Title VII"). As originally cast, this case named fourteen (14) plaintiffs and focused on the hiring practices of one state agency: Iowa Workforce Development. It was alleged that a few managers took control of hiring practices and implemented a system of favoritism that effectively excluded African-Americans.

The petition was amended, adding eighteen (18) more Plaintiffs and making claims against all 37 executive branch departments. The amended lawsuit asserted disparate impact and disparate treatment claims against the entire State merit system, beginning in 1990, caused by the Department of Administrative Services' abdication of its statutory obligation to oversee the State's hiring system.

Plaintiffs sought class certification on July 1, 2010. On September 28, 2010, the parties agreed to class certification of the following class and class claim:

> CLASS DEFINITION: All African-American applicants or employees who sought appointment to or held a merit-system position with an executive branch agency (not including Board of Regents) at any point from July 1, 2003 through the date of this decision.
>
> CLASS CLAIM: Disparate impact or adverse impact discrimination with respect to hiring and promotion decisions and/or unequal terms and conditions of employment associated with those decisions under Title VII and the Iowa Civil Rights Act arising from subjective, discretionary decision-making permitted by the State's abdication of statutory or regulatory responsibilities and obligations and/or failure to follow its own policies.

The concession to certify the class claim expressly reserved and retained the parties' rights to make any and all of their respective arguments on the merits of the class claim during the next phase of this litigation.

On April 6, 2011, the Court severed all non-class claims, the disparate treatment claims, from the present lawsuit. Those disparate treatment claims are now pending trial.

The State's motions for summary judgment were denied. The case proceeded to trial on the merits of the class claim on September 12, 2011. In addition to numerous exhibits, Plaintiffs offered live testimony from six class representatives, five class members, four DAS representatives, two DAS personnel, three agency representatives, and three expert witnesses. Plaintiffs also offered video deposition clips of one DAS representative, one DAS personnel, and

a representative of CPS Human Resources Services. Defendants offered live testimony from two DAS representatives, an expert witness, and their own exhibits.[1]

III. Statement of the Law

This is a disparate impact case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. and the Iowa Civil Rights Act of 1965, as amended, Chapter 216, Code of Iowa (2009).

A. Disparate Impact

Discrimination can arise from unintentional conduct. When the result of that unintentional action results in unequal treatment of a protected class of citizens, the consequence is disparate impact.

In the seminal disparate impact case of *Griggs v. Duke Power Co.*, the Supreme Court noted that "[u]nder [Title VII], practices, procedures or tests neutral on their face, even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. 424, 430 (1971).

In *Connecticut, et al. v. Teal et al.*, 457 U.S. 440 (1982), the Supreme Court recognized the congressional history of Title VII and the changing nature of racial discrimination in our society:

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs.
>
> *Teal*, 457 U.S. at 447, n. 8.

The Iowa Civil Rights Act was intended "to establish parity in the workplace and market opportunity for all." *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999). The Iowa Supreme Court noted that the Iowa Civil Rights Act was "another manifestation of a massive national

[1] Given the volume of documentary evidence, the parties agreed to preserve that record evidence by scanning the thousands of documents and storing them on DVDs. Those DVDs, in lieu of the documents themselves, constitute the non-testimonial evidence in the record.

drive to right wrongs prevailing in our social and economic structures for more than a century" and that its language was analogous to Title VII. *Iron Workers Local No. 67 v. Hart,* 191 N.W.2d 758, 765 (Iowa 1971).

The Iowa Supreme Court recognizes unintentional discrimination as "[a] conscious course of practice which results in a 'built-in headwind' against minorities . . . surely as illegal as a practice motivated by a clear discriminatory intent." *Wilson-Sinclair Co. v. Griggs*, 211 N.W.2d 133, 140 (Iowa 1973).

As one court has observed, good intentions alone may not stand as a defense to a Title VII claim:

> But the problem is not whether the employer has willingly-yea, even enthusiastically-taken steps to eliminate what it recognizes to be traces or consequences of its prior pre-Act segregation practices. Rather, the question is whether on this record-and despite the efforts toward conscientious fulfillment-the employer still has practices which violate the Act. In this sense, the question is whether the employer has done enough. Of course, under an Act which is essentially enforced through private parties shouldering the burdens of private attorneys general . . . this court has the duty of directing appropriate legal action to the extent the employer's beneficent practices fall short.
> *Id.* at 355 (citations omitted).

Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972).

B. Burdens of Proof

To prove disparate impact under Federal or Iowa law, the parties have similar, but not identical, burdens.

In 1991, Congress amended Title VII by setting out standards for "disparate impact" discrimination claims. The Act provided, *inter alia*, that: "[a]n unlawful employment practice based on disparate impact is established under this title *only* if — (i) a complaining party demonstrates that a respondent uses a *particular employment practice* that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged

practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e2(k)(1)(A).[2] (emphasis added).

Plaintiffs need only show as a *prima facie* case that a challenged employment practice resulted in a disparate impact on the basis of race. *See Lewis v. City of Chicago*, 130 S.Ct. 2191, 2197 (2010). ("a plaintiff establishes a prima facie disparate-impact claim by showing that the employer 'uses a particular employment practice that causes a disparate impact' on one of the prohibited bases.")

Unintentional discrimination is illegal under the Iowa Civil Rights Act. *See Wilson-Sinclair Co.*, 211 N.W.2d at 140. The Iowa Supreme Court has held, "disparate impact is when an employer's practice is 'facially neutral . . . but . . . in fact fall[s] more harshly on one group than another.'" *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 803 (Iowa 2003) (citing *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000)). *See also Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 n.2 (Iowa 2003) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 1705, 123 L.E.2d 338, 346 (1993)).

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[2] The Title VII language concerning burdens of proof is as follows:

> (k) Burden of proof in disparate impact cases
> (1)
> (A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice
> (B)
> (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.
> (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
> (C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."
> 42 U.S.C. § 2000e2(k).

If Plaintiff meets its burden, then the burden of proof shifts to the Defendant "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)(l)(A)(i). If Defendant shows business necessity, then the burden shifts back to Plaintiff to articulate an alternative employment practice that would meet Defendant's business necessity with less disparate impact. 42 U.S.C. §2000e-2(k)(l)(A)(ii). The analysis of the employment practice or process is focused on the *job-specific* level.

The Iowa Civil Rights Act applies a burden-shifting approach similar to that under Title VII. *See Iowa Civil Rights Commission v. Woodbury County Community Action Agency*, 304 N.W.2d 443, 449 (Iowa App. 1981) ("once plaintiff makes out a prima facie case by showing disparate impact, the burden is shifted to defendant to show the 'job relatedness' of the employer's practices or the 'business necessity' behind the policies") (emphasis added).

The Iowa Supreme Court has explained the parties' burdens as follows:

> In the first stage the employee must show that a particular employment practice has an adverse impact on a protected group in 'marked disproportion to its impact on employees outside that group." [quoting Holdeman, *Watson v. Ft. Worth Bank & Trust: The Changing Face of Disparate Impact*, 66 Den.U.L.Rev. 179, 182 (1989)]. This stage depends almost entirely on statistical evidence. . . .
>
> Once the employee has established a prima facie case, the case proceeds to the second stage. At this point, the burden of persuasion shifts to the employer to show the business necessity of the challenged employment practice. . . .
>
> If the employer succeeds in showing the business necessity of the employment practice, the case enters the third stage. In this stage, the employee must show there are other reasonable alternatives that would have less adverse impact. . . .

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 517-518 (Iowa 1990); *accord Dubuque City Assessor's Office v. Dubuque Human Rights Comm'n,* 484 N.W.2d 200, 203, (Iowa App. 1992).

C. Particular Employment Practice

Title VII does not define an "employment practice" for purposes of disparate impact analysis. Nor does the Iowa Civil Rights Act.

It is clear that Title VII allows challenges to employment practices other than tests or objective selection devices. *See Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 991 (1988), ("subjective or discretionary employment practices may be analyzed under the disparate impact standard in appropriate cases"). In *Watson* the selection process did not include any "precise" or "formal criteria" for evaluating job applicants but rested on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." *Id.* at 982.

If an employment system combines "subjective" and "objective" criteria, it is evaluated as if it were "subjective." The *Watson* Court explained:

> However one might distinguish "subjective" from "objective" criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature. Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school diploma and who passed the company's general aptitude test, its selection system could nonetheless have been considered "subjective" if it also included brief interviews with the candidates. So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs,* disparate impact analysis might effectively be abolished.

Id. at 989-90.

Identity of the employment practice is of particular importance in cases, such as this one, where both objective and subjective tests are used. "Especially in cases where an employer combines subjective criteria with the use of more standardized rules or tests, the plaintiff is ... responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparity." *Id.* at 994.

The Iowa Supreme Court in *Hy-Vee* likewise required the disparate impact plaintiff to "'identify[] the specific employment practice that is challenged.'" *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission,* 453 N.W.2d at 518. The two Iowa appellate disparate impact decisions since *Hy-Vee* have followed its application of federal precedent. *See Dubuque City Assessor's Office v. Dubuque Human Rights Comm'n*, 484 N.W.2d at 203; *Taylor v. State*, Nos. 9-157, 98-0089, 1999 WL 710899, at *1 (Iowa Ct. App. Aug. 27, 1999).

The definition of "employment practice" is particularly significant here because of the nature of Plaintiffs' claim. They argue that a failure to enforce or implement an "integrated" statewide employment system is tantamount to an employment practice. They cite two Federal cases as support: *McClain v. Lufkin Indus. Inc.*, 519 F.3d 264 (5th Cir. 2008), cert. denied, 555 U.S. 881 (2008) (affirming judgment for class plaintiffs on disparate impact claim); and *Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259, 335 (N.D. Cal. 1992). ("[w]here the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, [and] the failure to follow set procedures and the absence of written policies or justifications for promotional decisions," the plaintiff need not identify a particular employment practice.)

There is some Iowa authority permitting a claim under the Iowa Civil Rights Act for an employer's failure to follow its own policies. *See Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency,* 304 N.W.2d at 449 (applying federal authority to the Iowa Civil Rights Act and stating "[a] claim is shown where supervisors subjectively make employment decisions without definite standards for review and a pattern clearly disfavoring minorities results"). The Court of Appeals found "that the hiring practices followed for the job opening at issue were not those prescribed by petitioner's adopted policies and procedures. This incident, however, was the only one established, or even alleged, wherein petitioner did not

follow its regular procedures. . . . In considering the only incident of improper practice at issue, we find that a single isolated incident is insufficient to state a claim of race discrimination." *Id.*

The Plaintiffs are assailing the employment decision-making process as a whole. This is an approach that is permitted when the process itself cannot be separated for independent analysis. To do so under Title VII, the "complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, *except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice."* 42 U.S.C. § 2000e-2(k)(1)(B)(i) (emphasis added). No comparable provision exists under the Iowa Civil Rights Act.

Determining whether an employment process is "not capable of separation for analysis" is generally a fact-intensive inquiry. Courts have struggled to create a legal framework for deciding whether separate analysis can be had. In *Appleton v. DeLoitte & Touche, L.L.P.*, 168 F.R.D. 221, 226 (M.D. Tenn. 1996), the court gave some insight into Congress' thoughts:

> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

(citing 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991)) (emphasis added).

The lower court in the *McClain* case made this observation:

> The pervasive subjective decision-making process interacts with other facially neutral employment conditions to the disadvantage of African–Americans. The lack of transportable seniority under the CBAs falls more harshly on black employees who have been channeled into the Foundry or Trailer divisions. . . .
>
> Lufkin's subjective employment practices are inextricably intertwined. The disparate impacts begin on the day one is hired and are potentially magnified each time one's career intersects a subjective decision-making process. Channeling in job placement is reinforced by informal systems of training and promotion. The

> seniority structure locks employees into their divisions. Layoffs and rehires function to keep African–Americans from advancing.
>
> The discriminatory effects of the constellation of suspect employment practices used by Lufkin Industries cannot be isolated individually. The "elements of a respondent's decision-making process are not capable of separation for analysis, [and thus] the decision-making process may be analyzed as one employment practice." 42 U.S.C. § 2000e–2(k)(1)(B)(i). Plaintiffs have met their burden in identifying the employment practice resulting in the alleged disparate impact. We must now consider whether evidence can establish that a disparate impact in fact exists.

McClain v. Lufkin, Indus., Inc, 187 F.R.D 267, 274-275 (E.D. Tex. 1999).

In *Griffin v. Carlin*, 755 F.2d 1516, 1524 -1525 (11th Cir. 1985), the Court noted that "limiting the disparate impact model to situations in which a single component of the process results in an adverse impact completely exempts the situation in which an adverse impact is caused by the interaction of two or more components."

In *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390 (8th Cir. 1983), the Court found a constellation of objective and subjective employment tests required an analysis that included the interrelationship of them all, rather than one. A more recent Eighth Circuit case sheds further light on how the analysis is separable or not contingent upon the separability of subjective and objective tests in an employment process. In *Bennett v. Nucor,* the Court held that the employer's system was capable of separation for analysis because the objective criteria could be viewed independently from the subjective.

> This is not a case where the components of the employer's selection process were incapable of separation. As discussed, Nucor's five departments used a variety of measures to evaluate candidates for promotion, including objective criteria like experience, training, disciplinary history, and test scores, and subjective criteria such as interview performance and the opinion of the candidate's current supervisor.

Bennett v. Nucor Corp., 656 F.3d 802, 817-18 (8th Cir. 2011). See also *Stender v. Lucky Stores, Inc.,* 803 F.Supp. at 355; *Butler v. Home Depot, Inc.,* 1997 WL 605754, *13 (N.D. Cal. Aug 29, 1997).

Whether the process is subject to separate analysis of its steps can also be affected by the employer's failure to maintain adequate records. In *Port Auth. Police Asian Jade Soc. of New York & New Jersey Inc. v. Port Auth. of New York & New Jersey*, 681 F. Supp. 2d 456, 464 (S.D.N.Y. 2010), the Court found that because of failed recordkeeping, "the role of each step cannot be determined, [and] the steps cannot be examined separately to discover whether a particular step causes a disparate impact." *Id.* at 464.

The burden to demonstrate that the components of the process are not subject to separate analysis rests clearly on the Plaintiffs. *See Grant v. Metro. Gov't of Nashville*, 446 Fed. Appx. 737, 740 *(6th Cir. 2011) (stating "[t]he problem, however, is that Plaintiffs make no effort to isolate any of these practices or examine their individual effects on the [hiring and] promotion process") (citing *Watson*, 487 U.S. at 994; 42 U.S.C. § 2000e-2(k)(1)(B)(i)). Plaintiffs may not "take advantage of the statutory exception" and challenge the decision-making process as a whole without first demonstrating that "the elements of that process are incapable of separation for analysis." *Id.* "[M]erely challenging the ... process as a whole ... is simply not the law. The law clearly requires plaintiffs to identify and isolate specific employment practices ... [and] may challenge the process as a whole only if he *first* demonstrates that its elements are incapable of separation." *Id.* at 741.

D. Statistical Evidence

The U.S. Supreme Court first recognized a "disparate impact" claim under Title VII as one challenging objective tests or criteria. *See Griggs v. Dukes Power Co.*, 401 U.S. at 433. In *Watson*, the Court held that "subjective or discretionary employment practices" could also be challenged "in appropriate cases." 487 U.S. 977, 991 (1988). The *Watson* Court appreciated an expansion of the disparate impact analysis, with its "inevitable focus on statistics," could have an unintended "chilling effect" on "legitimate business practices" and put "undue pressure" on

employers to adopt "inappropriate prophylactic measures." *Id.* at 992. The *Watson* Court cautioned:

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.... It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces.

Id. (citations omitted).

Justice O'Connor made clear that "high evidentiary standards of proof"—identification of particular employment practices, proof of causation, and the business necessity defense—were necessary to "serve as adequate safeguards" against the danger that the "inevitable focus on statistics" in disparate impact cases would lead to preferences and de-facto quotas. Justice O'Connor warned:

> Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.[3]

The concern about a statistically based claim has prompted the Courts to focus upon "identifying the specific employment practice that is challenged." *Watson,* 487 U.S. at 994.

The *Watson* decision led to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989). S*ee also Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 518 (recognizing the "re-examination [of evidentiary burdens in disparate impact in *Watson*] became the basis of the majority opinion" in *Wards Cove*).

Wards Cove focused on Justice O'Connor's "safeguards"—the requirement of identifying a particular practice, the requirement of showing causation, and the business necessity defense. The *Wards Cove* Court defined the proper role of statistical evidence:

> Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his workforce is balanced (where particular hiring practices

[3] *Watson,* 487 U.S. at 993.

> may operate to deprive minorities of employment opportunities), ... a Title VII plaintiff does not make out a case of disparate impact simply by showing, "at the bottom line," there is a racial imbalance in the workforce.

490 U.S. at 653. The proper analysis in disparate impact cases is a *job-specific* analysis that compared "qualified applicants" for the "at-issue jobs." *Id.* at 650.

The correlation between statistical evidence and specificity in a questioned employment practice was recently addressed in *Wal-Mart v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011). This case highlights both the need to identify a particular employment practice, the pertinence of discretionary decision-making in the employment process, and the interconnection with statistical proof.

In *Wal-Mart*, the Supreme Court considered the question of whether, at the class certification stage, a claim challenging a system-wide policy of subjective, discretionary decision-making satisfied Title VII's requirement of identifying a "particular employment practice." *Wal-Mart* had an express practice of "allowing discretion by local supervisors over employment matters." *Id.* at 2554.[4] The Supreme Court found such a policy is "just the opposite of a uniform employment practice that would provide the commonality needed for a class-action; it is a policy against having uniform employment practices." *Id.* The Supreme Court reiterated that to establish a disparate impact claim, a plaintiff must begin by identifying a "specific employment practice," and held that merely identifying a generalized policy allowing broad discretion at lower levels does not suffice even at the lower threshold of the class certification stage. *Id.* at 2555-56. The disparate impact theory advanced by the *Wal-Mart* plaintiffs failed to satisfy the standards previously set out in *Watson* and *Wards Cove* standards:

> In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory,

[4] Here, Defendants have no express written policy of subjective decision-making, although the ultimate determination to hire an applicant for a position with one of the executive agencies is vested in the discretionary decision-making of a department supervisor.

> the plurality opinion conditioned that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is not enough. [T]he plaintiff must begin by identifying the specific employment practice that is challenged.

Id. at 2555 (internal quotations omitted).

The degree of statistical evidence needed to meet the causation standard is not measured by any "rigid mathematical formula." *Watson*, 487 U.S. at 994-95. But statistics alone may be enough to establish a prima facie case, especially "when . . . an employer does not offer meaningful statistical evidence to attack or rebut the statistical conclusion of employment discrimination." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission,* 453 N.W.2d at 522-23. It can raise an inference of adverse impact.

The four-fifths rule, or 80% rule, is one means of raising the inference that certain employment decisions work to the disadvantage of members of one particular race. The EEOC (Equal Opportunity Employment Commission) Uniform Guidelines on employment selection provide a simple rule for determining if an employment system adversely affects a minority group. It is based on the comparable rates at which different races are hired. A selection rate of one racial group which is less than four-fifths (80%) of the rate for the group with the highest rate raises the inference of adverse impact. This standard has been criticized on technical grounds. *Watson*, 487 U.S. at 995.

IV. The Merit Employment System

A. The Beginnings

The Iowa Civil Rights Commission was created in 1965,. In 1973, Governor Ray created a voluntary affirmative action program with input from other State agencies. The Merit Employment Department retained the human resource information and did training and recruitment.

In 1986, operation of the affirmative action program shifted to Iowa Department of Personnel. It performed recruitment, prepared reports, and utilized task force recommendations, all under statutory directives. The plan created by IDOP in 1987 was revised in 2002. Professor Russell Lovell, hired as a consultant, had concerns about aggregating all minorities, but given the small numbers of minorities, affirmative action could not be justified if they were disaggregated. The annual reports became more detailed over time, and by 2007 the report was broken down into different minority groups, by department and EEO class. These reports went annually to the governor and legislature. Quarterly reports went to the agencies.

The present merit system has been in place since 1973, prior to the merger of the Iowa Department of Personnel into DAS in 2003.[5]

B. Present Executive Branch Structure

The State executive branch has 37 departments of varying sizes, missions, and funding sources. Each exercises its own independent hiring authority. *See generally* Iowa Code § 7E.5. Iowa's hiring processes is a "merit system" with a statutory framework that describes an "entrepreneurial model."[6] The merit system establishes a "human resource administration based on merit principles and scientific methods to govern the appointment, compensation, promotion, welfare, development, transfer, layoff, removal, and discipline of its civil employees, and other incidents of state employment." Iowa Code § 8A.411(1). "[A]ll appointments and promotions to positions covered by the State merit system shall be made solely on the basis of merit and fitness, to be ascertained by examinations or other appropriate screening methods...." Iowa Code § 8A.411(3). The State system includes more than 700 diverse job classifications, each of

[5] DAS was created in 2003 by the legislature to centralize all services provided to all executive departments in one agency. DAS did not exercise close oversight of the agency. As an entrepreneurial model, DAS provides services upon the request of the customer agency.

[6] The entrepreneurial model was first implemented in July 2003.

which includes one or more separate job titles. There are 2000 supervisors in the executive branch of government that have authority in the hiring process.

1. Department of Administrative Services

The Department of Administrative Services is a "customer-focused organization" providing a "complement of valued products and services to the internal customers of state government," i.e., the Defendant departments, including human resource products and services. Iowa Code § 8A.103.[7] DAS "[e]xamine[s] and develop[s] best practices for the efficient operation of government and encourages state agencies to adopt and implement these practices," through resources such as the Applicant Screening Manual, Managers and Supervisors' Manual, and Competency Guide. Iowa Code § 8A.104(12).[8]

DAS has the ultimate responsibility to see that hiring decisions are made in accordance with the equal-opportunity merit system. DAS appreciates that bias could affect the hiring process. The goal of DAS under the merit system is to hire the most qualified applicant regardless of race. The process is designed to avoid discrimination, not necessarily to remedy past discrimination, other than compliance with affirmative action laws.[9]

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[7] DAS had the expectation that the agencies would follow the best practices outlined in the manuals they provided. However, from 2003 to 2007, DAS exercised no specific oversight of the agencies' hiring processes. It did collect raw data concerning racial makeup of the workforce. It was the position of DAS that under the entrepreneurial model, it would assist if requested, but not dictate.

[8] The Applicant Screening Manual was first issued in June of 2000 and last revised in December of 2006. The Applicant Screening Manual was created when DAS stopped its testing of applicants and DAS sought to have the department managers make applicant selection without generating liability. It was also anticipated that the manual would minimize the risk of bias that could affect the hiring process and promote a discrimination-free environment. However, DAS has no specific method to determine or measure the impact of noncompliance with that manual.

The Managers and Supervisors' Manual is designed to put written policies and procedures in place to support human resources programs. The Competency Guide gives departments guidance on how to evaluate and define certain competencies requisite to the performance of a particular job.

[9] Affirmative action, diversity and underutilization of minorities are overseen by the Bureau of Employment Services of DAS. Among the powers delegated to the agencies were enforcement of statutes and application of Chapter 19B relating to affirmative action efforts of the State. The data concerning underutilization of minorities is compiled as a whole, an agency being permitted to consolidate minority groups in their reporting by administrative rule. This is due, in part, to the relatively small minority population in Iowa. Statewide, the goals relating to underutilization have generally not been met, although from 2002 to 2009 there was a substantial increase in the

DAS provides the rules, and the departments are to follow them. DAS is the expert in drafting screening-devices and training. Only DAS can monitor systemic compliance, collect statewide data, and take enforcement action for noncompliance. DAS has a wide range of options to foster the goals of the merit system, including retention of independent consultants, such as CPS.[10] It can provide materials and training and has the authority to enforce compliance

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number of minorities in the workforce. The State as a whole never met its annual goal, and in some years some but not all the agencies met their goals. Agencies were expected to set their own goals regarding underutilization, but DAS did not mandate this.

[10] CPS is a private human resources agency hired to audit some agencies for compliance with best practices. CPS was hired by the State in 2006 and reported in April of 2007. Lawsuits settled with African-Americans between 1999 and 2006 prompted the retention of CPS. The State itself had never done a statistical analysis to see if minorities are disproportionately excluded from the hiring process.

CPS's mission was to determine if African-Americans were treated differently by the hiring practices of the State. Looking at the larger agencies' records between 2004 and 2006, CPS found problems. The report notes that whites were hired at higher rates than blacks within the qualified hiring pool. Problems were noted from referral to interview and interview to hire. A rebuttable inference of adverse impact was noted because the 80% rule was exceeded. This computation was made without any regressions. The CPS report found some screening-devices were unrelated to job functions. CPS recommended more monitoring and oversight of the departments' design and use of screening-devices. CPS also found record-keeping deficiencies both at the agency and DAS levels. People who were drafting questions for screening-devices did not have consistent training. The agencies examined were inconsistent in the underutilization of minorities.

CPS was able to analyze the State's recruitment, screening, selection, retention and turnover of workers as discrete processes. The CPS analysis reviewed applications, not applicants, and did so on a statewide basis rather than by departments. CPS only looked at 56 hiring files. CPS did not identify the cause of the discrepancies in rates of referral to interview and notes there may be legitimate reasons for them. The State acknowledged that CPS accurately described the functions of DAS and identified remedial action, within the agency's authority, that could be undertaken.

Executive Order IV was issued by the Governor in October of 2007 in response to the findings of the independent investigations. This order gave no further authority to DAS to achieve its mission but did create the Diversity Council which took the place of the Hiring Practices Committee to whom DAS had previously reported and supplied information.

DAS developed a plan, the "written practice summary," to address the CPS concerns. This consisted of DAS's own audits of the departments' compliance and had completed five or six by 2010. The DAS audits found problems similar to the CPS audit. The departments were requested to respond to certain questions about their hiring practices. The responses and responsiveness to this auditing procedure varied between the departments. In light of the initial responses, DAS went into the field to do more extensive reviews. A detailed review of five of the larger agencies was completed, and directives for corrective action were issued. Some were implemented. DNR and DOC, in particular, made significant efforts to achieve equal employment among the races. The record reflects that use of a second resume screen and spelling and grammar screens were curtailed by DNR, DHS, and IWD as a result of DAS efforts.

Those reviews were suspended in light of the questions that arose relating to affirmative action plan practices of "lumping" all minorities together.

through legal action against an agency.[11] DAS does workforce analysis for certain departments upon their request and provides a newsletter to affirmative action contacts in all departments that include EEO and human resource information about legal trends.

DAS assigns personnel officers as human resource advisors to various departments to assist with hiring and employment functions. Each works with a designated department or departments. They often have an office provided by the agency. Since 2003, DAS has employed approximately ten full-time personnel officers. Personnel officers serve as consultants to the departments for personnel-related issues. They provide informal training, help develop screening tools, and generally provide human resource support.[12] Personnel officers assist departments during the hiring process to ensure that the screening criteria are related to the duties of the job. They also work to ensure that specific positions are assigned to the proper job classification.

2. Executive Branch Departments

The departments are the ultimate hiring and decision-making authority for merit-covered positions within their own department. *See generally* Iowa Code § 7E.5. They are subject-matter experts on the job-related skills required for each department position and develop their screens accordingly. The departments' hiring and employment practices differ for each job opening at each step of the process, depending on the particular job-related skills for each specific job.

Within the State system there is no true difference between a new hire and a promotion. If a job opening is posted, interested incumbent employees and external applicants alike follow the same application process. While a job opening may be limited to employees by the hiring agency or currently employed by the State of Iowa, the process does not differ – all applicants submit applications through DAS.

[11] DAS never sanctioned an agency for failure to follow best practices.
[12] DAS provides training upon request of a department. This training indicates not to give more weight to an applicant because of education, but rather to have more flexibility with regard to weighting experience.

The hiring system used by the State is a structured interview process with three separate decision-making steps:

Step 1: DAS receives applications for merit-covered job posting, screens those applications for basic eligibility of the *job classification*, and refers eligible applicants to the hiring department;

Step 2: The hiring department screens the referred applicants for the job-title specific requirements, determines which candidates to interview; and

Step 3: The hiring department interviews the selected candidates and decides which candidate to offer the job.[13]

DAS is the central application repository for all merit-covered job openings. DAS maintains electronic data on every applicant and application including:[14]

(1) *Job information*, which includes detail on the job classification, EEO-4 category, hiring department (and departmental subdivision, where applicable), required education and experience, specific job selectives (such as required license or degree), job posting date, hire date, pay grade, and similar data;

(2) *Applicant information*, which may include an applicant's age range, race, gender, education, experience, and similar information, to the extent it was provided by the applicant;

(3) *Application information*, which includes the detail provided by each applicant, which applicants were competing for the same job, and further information about which step each application progressed to, and, for certain jobs, the reason(s) the application may have been screened out.[15] DAS used the data contained in AS-400 and BrassRing to review and annually report applicant flow and affirmative action information and

[13] The State's employment process is a "funneling" of ever-decreasing numbers of applicants and concomitant increasing levels of specificity of job duties ultimately leading to the hiring. This contemplates filtering first by job classification, then PDQ, then job description.

[14] This data was maintained in two databases—the AS-400 system was used from July 1, 2003 until June 2006, and the BrassRing system thereafter. DAS upgraded to BrassRing at a cost of $116,000.00 annually. BrassRing was tailored to fit the State's system and was specifically designed to serve the needs of the State and its applicants and had additional reporting functions that were not part of AS-400. The original applicant flow program, AS-400, was cumbersome. When the State converted to the BrassRing system between 2004 and 2006, the transition was difficult but yielded reports that were more easily created.

[15] The specific department with the job opening would code the final status for each application into the applicant tracking system. Only authorized persons within each department have limited access to code information into BrassRing for a particular position.

other annual reports, such as Just the Facts.[16]

In general, the hiring process is as follows: A department identifies the need for a specific position and then follows the applicable collective bargaining agreement requirements to fill the position. Once met, if the position has not been filled, then the department works with a DAS personnel officer to ensure that the specific job is correctly classified. If the opening is a new position, a Position Description Questionnaire ("PDQ") is created. A PDQ describes the general duties and competencies of the particular position and allocation of the required duties.[17] This ensures proper job and pay classification. If the position already exists, then the extant PDQ is reviewed and updated, as necessary. Once properly classified, DAS advertises the job opening on the State's website.

Applicants apply online through the BrassRing system and sometimes by hard copy submission. After the job posting closes, DAS reviews the applications and identifies those which meet the minimum qualifications of the job classification, *not* the broader department-specific job duties. DAS sends the department a hiring list of those applicants with the minimum qualifications. The department screens those applications against the specific duties and competencies of the job (as defined in part in the PDQ) and decides which candidates to interview and hire. As the applicants move farther into the hiring funnel, the practices and procedures become more individualized to a given department and a particular job.

While the general practice of the merit system is followed by all the departments, their practices in the hiring process vary. Some use a second résumé screen, some require candidates

[16] Prior to the CPS audit, applicant flow data was run only upon a request by a department. DOT, however, was the one agency that requested the data on an annual basis.

[17] A PDQ is a refinement of a general job classification developed by the agency and tendered to DAS. The purpose of the PDQ is to tie any screening to the essential functions and competencies of the position offered for employment. Screening-devices, used by the agencies to determine who will be interviewed, are likewise developed by the departments. The PDQ is to be used at every stage of the process. The PDQ should remain constant throughout the process, including development of screening-devices and interview questions prior to the screening or interview.

to explain how their experience would satisfy the specific job functions listed in the PDQ. Some departments require a typing test or familiarity with certain computer programs. For applicants interested in obtaining a law enforcement position, the Department of Public Safety administers a test unique to selection of police officers. Criminal records checks, conducted by some departments, might be done in addition to research relating to tax filing status.

Each department, having common protocols, may use unique screening-devices and interviewing procedures. The departments maintain data relating to an applicant and to each particular job in a hiring file. Unlike the DAS BrassRing data system which is stored electronically, the departments' hiring files contain actual paper documents.[18] Each hiring file, however, bears the BrassRing registration number, so a correlation between a specific job posting and the applicant's performance on the screening-devices and/or interview records can be correlated.

Terms and conditions of employment with a department, including collective bargaining agreements, are provided to DAS by each department for its employees. This information is used by DAS to make reports concerning affirmative action, annual workforce composition and classification and pay reports.

V. Statement of the Facts

It is axiomatic that the employment practice of the State, whatever that might be, must cause injury to Plaintiffs to be actionable. The construct of the Plaintiffs' evidence has three components intended to establish not only the disparate impact, but its cause as well: statistics, social science and anecdotal testimony and documentation.[19] A similar approach was taken by

[18] DAS retains no data, computerized or otherwise, that allows one to see how a certain person was screened and scored as compared to another applicant by a department. This information is in hard copy form in the hiring file.

[19] Plaintiffs in their brief also argue that the mere existence of the merit-based system's policies and practices are evidence of causation. This contention is based on the assertion that "but for" the failure to implement and enforce these policies, disparate impact would not exist. This assumes, of course, that disparate impact has been proven and

the Plaintiffs in the *Wal-Mart* case. The latter category includes the specific experience of certain class members in seeking certain jobs or promotions and the contents of hiring files identifying and highlighting certain subjective decision-making in the use of screening-devices and interview scoring.

The State's defense has four components: 1) the unreliability of Plaintiffs' statistical analysis, 2) the unreliability of Plaintiffs' social science, 3) testimonial and documentary evidence that DAS and the departments acted to promote merit-based policies and practices, and 4) statistical evidence contradicting that of Plaintiffs' experts.

A. Anecdotal Evidence of Class Members

Several class members testified at trial and referred to documents secured from the State relating to their applications for hire or promotion. The anecdotal evidence from class members included in Plaintiffs' brief also refers to certain documents of class members who did not testify. As a consequence, some of these facts, although in "the record," were untested by cross-examination. Following are pertinent examples offered by Plaintiffs in which the hiring system did not function as intended.

1. A qualified African-American applicant for promotion was not referred to a department by DAS, who incorrectly reported the applicant was not qualified. Informed of the error, DAS referred the applicant to the department head who indicated he already had another person in mind. (Simpson).

2. A qualified African-American applicant was not referred to a department on the basis he was not qualified. However, in the past he had not only been referred for a prior opening for the same job, but had interviewed for it. DAS caught its error and put the applicant on the hiring list, but the agency went forward with the hiring process without screening the applicant's résumé for possible interview. (Ellis). [20]

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that there were not other causes for Plaintiffs not being interviewed, hired or promoted.. This is similar to the argument that failure to follow a rule of the road is deemed negligence. However, merely because a duty is breached is not the functional equivalent of causation of damages.

[20] However, in another instance DAS reversed its original assessment that an Asian applicant did not meet minimum qualifications, determined he was qualified and put his name on the hiring list for a department. Ultimately, the department interviewed and hired that applicant.

3. A department screened the résumé of a referred African-American job applicant, but she was not given full credit for her master's degree. A white applicant for the same job was given full credit for master's work that was not yet completed.

   The same African-American applicant had previously applied for a job before her master's was completed. Unlike a competing white applicant, she received no credit for any of her post-graduate work. In yet another application process, this same African-American was denied any credit for her completed master's degree but some for her undergraduate degree or extensive job experience. Even though her point total on the department screening-device was higher, a white man with a lower point total was offered the job. (Woods).

4. Some hiring files contained African-Americans' résumés but not the screening-device used to score or evaluate them. Notes relating to why the African-American candidate was not offered a position referred to factors not included in the screening criterion. (Wells).

5. In some cases, résumés of African-Americans were marked to highlight spelling and grammatical errors. (Parker).

6. An African-American seeking promotion within the State employment system submitted résumés noting her past experience with the State and computer skills. On two separate identical screening-devices, she received different scores in each of these categories. The same screener authored the contradictory devices. Additionally, the applicant was not given the credit to be accorded a person already a State employee. (Lewis).

7. An African-American applicant, with State experience, sought promotion. His résumé resulted in the highest score of all the referred applicants. He was not interviewed, although a white applicant was. The reasons listed for not offering the minority an interview seemed to be contradicted by the contents of his résumé. The screening-device gave him no credit on certain criteria, although his résumé indicated pertinent experience. This same African-American applicant was denied an interview for a second position even though he again had the highest score of all applicants whose résumés were screened.

   In another instance where the same African-American applied for a position, a white applicant was hired after sending an e-mail to the decision-maker reminding him they attended the same church. This class representative has been a long-time State employee. During his tenure, he has secured both contract transfers under union rules and promotions.[21] He did not question those employment decisions. In his testimony regarding the position for

[21] DAS is not involved in contract transfers unless no incumbent seeks the job, in which case DAS would post it.

which he was not hired, he did not question the screening-device questions but opined he should have been given a higher score. (Brown).

8. An experienced private-sector applicant sought a position with the State after having been retired several years. While accorded high scores in several categories on the screening-device, they were on topics given less weight than those on which others scored higher. The résumés of the applicants' primarily white competitors did not demonstrate experience commensurate with the relative scores. This class representative had been retired and out of his field for more than seven years when he sought a job with the State. His field of vocation is one which changes constantly and rapidly as technology is quickly evolving. He conceded that nothing on his résumé disclosed his race. He also conceded he was given insider information about the job for which he applied before it had been publicly announced. He then had a friend, who was already a State employee, hand deliver his résumé to the decision-maker rather than following the practices and policies of the merit-based employment system. (Zanders).[22]

9. An African-American State employee sought a transfer/promotion to a job advertised to go to the most senior applicant. She was the only person seeking that transfer and, as a consequence, was the most senior applicant. She was interviewed but not given the job. The explanation as to why she did not get the job referred to a criterion in the interview questions not included in the PDQ or job description. The applicant was interviewed by three decision-makers who all gave her identical scores. (Traywick).

10. An African-American State employee sought promotion within the agency. She met minimum qualifications and was interviewed. Another applicant who was white was offered the position but declined. The position opening was then canceled. Interview notes of both the white and black applicants are similar, although the black candidate was described as having trouble answering questions. This class representative testified that the hiring process was "fair" and "fairly evaluated her qualifications" for those jobs for which she was hired. She was hired for one of these jobs over another African-American who is also a class representative. She only questioned the process relating to the job she was not given. (Hall).

11. A class representative applied for two identical positions in a department. She was one of two people on the hiring list. The white applicant received one of the promotions. It appears the other one was not filled. The job offer was

[22] The Court makes note of Mr. Zanders' action because it is an example of a class representative seeking an employment advantage by working "outside the system." Much was made during the trial of the impropriety of a white job applicant reminding the manager who interviewed her that the two of them attended the same church. The Zanders scenario is important for several reasons. First, because it demonstrates that it is a trait of *human nature*, not *racial difference*, that people seeking employment will take advantage of any opportunity for self promotion. Secondly, it is important because Plaintiffs used the "church member" working outside the system to infer that this type of impropriety happens frequently with non-minority applicants. Mr. Zanders' situation could form the basis for a similarly fallacious conclusion about all the class representatives or class members.

made after the African-American sent a follow-up e-mail after the interview containing spelling and grammatical errors. Neither the PDQ or job description mentioned those criteria as conditions of promotion. (Clark).

12. A department had two positions to fill. The applicant's wife heard DAS supervisors mention his race and surmising that he was attempting to posture for legal action. One of the persons hired for the position sought by the class members submitted his résumé after the closing date for applications. The African-American was ultimately interviewed and hired notwithstanding a background check that indicated some criminal record. In his opinion, the other men who were hired were not competent, and he believed one of them was being paid more than he was. This class representative quit the State job he obtained three months after he was hired. He had wanted a night shift but was assigned to days. It was his opinion that overt racism, as compared to implicit bias, came into play in his employment situation. (Greene).

13. One class representative testified he had applied for between 15 and 20 State jobs and had been interviewed for two of them but not hired. During this same time period, he applied for employment in the private sector too and received no interviews. He conceded he may not have been the most qualified applicant for the State jobs. He did not identify any particular employment of the State that treated him unfairly because of his race. (Simmons).

14. The final class representative who testified has been a long-term State employee. She has been given merit pay increases and has been promoted at least three times. While she felt some interviewers reacted differently to her, and her race and speech have been a barrier, she does not think African-Americans should be evaluated differently due to their education, spelling or grammar. (Couch).

B. Social Science

1. Dr. Greenwald

Plaintiffs' social science evidence was presented through the testimony of two psychology professors from the University of Washington: Dr. Anthony Greenwald and Dr. Cheryl Kaiser.

Dr. Greenwald's field of study is "implicit social cognition," a subspecialty of cognitive and social psychology. He introduced this phrase in an article he co-authored in 1995 in *Psychological Review*, a theoretical journal of the American Psychological Association. As compared to "overt bias" or conscious, intentional preference for one race over another, Dr.

Greenwald chose to examine "implicit bias," also known as hidden or unconscious bias. Implicit bias, according to Dr. Greenwald, is a person's automatic preference for one race over another – a state of racial inclination which is manifested without the person's slightest appreciation that they are acting upon it. He opines that a substantially larger number of people have implicit bias as compared to explicit bias and do not intend to discriminate "but unthinkingly they may discriminate without recognizing that they are doing that." Dr. Greenwald opines that persons who demonstrate overt or explicit bias might also exercise implicit bias of which they are not aware.

In an attempt to obtain empirical data to support his theory of implicit bias, Dr. Greenwald invented the "Implicit Association Test." He first published data concerning this test in 1998. The purpose of the test, in the context of this case, is to measure the automatic preference for whites relative to blacks.

The IAT is a computer-based test that requires a subject to associate a verbal or visual stimulus viewed on a monitor with either "pleasant" or "unpleasant" words. The computer then measures the relative response time to complete the associations. In the context of race, the subject was required to associate either famous white or black Americans with either pleasant or unpleasant words. First experimenting on himself, and finding his response times were different depending upon whether he was associating one race or the other with pleasant words, he concluded the test had potential validity. Over time the IAT was applied to other social categories such as age or gender.

Dr. Greenwald concluded, based on his use of the IAT, that all persons, to some degree, have an "automatic preference" for one race or another which is unknown to them. Other researchers have since done testing relating to implicit bias regarding race.

Dr. Greenwald opines that most groups tested showed a 70 percent automatic preference for whites over blacks. He notes that unconscious bias leads to discrimination particularly in subjective decision-making.

His conclusions are founded on what experts denote as a "meta-analysis." In such a practice, one combines a large collection of studies testing a similar hypothesis. The person drawing the ultimate conclusion ignores the differences between the various studies and merely aggregates the results. The practice is sometimes used in medical trials. Dr. Greenwald's most recent meta-data study relating to implicit bias was conducted in 2009. And while he sought verification of whether the IAT was predictive of judgments, only a portion of the meta-data related to racial issues. The goal of using meta-analysis through the aggregation of multiple studies testing common hypotheses is to increase the numbers and hopefully the validity of the conclusion. The weakness of this approach is that unknown and/or unexplained variables in each study might affect the ultimate conclusion because all the underlying tests are not standardized.

Dr. Greenwald concedes that this meta-analysis is not based on specific acts of decision-making. He also concedes that a person's preference for one race over another on the IAT would not necessarily result in prejudicial behavior. He specifically refused to offer any opinion that implicit bias of Iowa managers caused any difference in the hiring of whites and blacks in the hiring system of the State of Iowa. At best, he extrapolates from meta-data because there are no IAT measures for the Iowa managers. Meta-analysis only allows conclusions as to correlation, not causation.

There are no IAT scores resulting from Iowa testing. No Iowa employment managers or decision-makers have taken the IAT. Dr. Greenwald's opinions assume that the general conclusion, based on his meta-analysis, would also apply to Iowa. He believes the "evidence is strongly presumptive" of Iowa managers and decision-makers being implicitly biased. He

concedes there is no "actual empirical data that could establish it." He did not review any of the hiring files in this case, nor any discrete specific employment decisions relating to any class members.

He describes the assertion that implicit bias affected Iowa decision-makers in this case as a possibility:

> [I]t is plausible that implicit bias is a cause of discrimination in the State of Iowa, but I will qualify that by saying that I regard that as a plausible hypothesis that is worth trying to test.

He cannot rule out other "race-neutral" causes for the statistical imbalance in the State's hiring system.

Under Dr. Greenwald's opinion, even in the best-case scenario, with the screening manual followed, bias could still unconsciously invade the process. In his view, even concerted training would not necessarily preclude unconscious bias. He advocates for vigilant "accounting" of decision-making in the employment process.

He is critical of the State lumping together different minorities for purposes of affirmative action reporting. He concedes that as a statistical expert, the Iowa merit employment process can be separated to individually analyze each step of the process.

2. Dr. Kaiser

Dr. Cheryl Kaiser is a colleague of Dr. Greenwald. She is an associate professor of psychology who studies "stereotyping and prejudice" and their effects on decision-making. She views implicit bias as pervasive and considers all persons to fall within a spectrum having polarities of explicit bias and limited implicit bias. A corollary to this is that when a person expects to be the subject of discrimination, their perception of bias is increased. She opines that in "ambiguous situations," where one is uncertain as to the reason for another's conduct, the decision-maker resorts to their implicit bias to "fill in the gap." In other words, in the absence of

a complete set of facts, a person makes assumptions about another based on unconscious bias for or against the race of the person whose actions are under review. This is sometimes referred to as "fundamental attribution error," and means attributing a person's situation to an assumed personality trait rather than to a cause unrelated to their personality.

Dr. Kaiser holds the view that implicit bias is so pervasive that any merit-based employment system merely serves to legitimize inequality. This is because the system gives the perception of being fair when, in fact, the inevitable presence of implicit bias dictates that it cannot be.

An ancillary to fundamental attribution errors is the concept of "differential weighting." This concept holds that a decision-maker in a subjective context will rely on criteria more commonly associated with the race *toward* whom they have implicit bias and rely less on criteria associated with the race *against* whom they have an implicit bias.

Dr. Kaiser lauds training and accountability as a means of reducing implicit bias on attribution errors in the hiring process. She notes that the State system contemplates recordkeeping and accountability, which if more extensively exercised, in her view, would have a positive effect on reducing the implicit bias in the State system.

Dr. Kaiser believes that every assessment in the decision-making of hiring and promotion is "potentially subject to subjectivity." Even résumés of applicants that do not state their race include racial cues, including name, address, school, major area of study, work history, social organizations, and interests.

C. Statistics

1. Dr. Killingsworth

Plaintiffs' statistical expert was Dr. Mark Killingsworth, a professor of labor economics at Rutgers University. He was retained to study the employment practices of Iowa State

government with regard to racial differences in hiring and pay. His analyses sought to determine a mathematical relationship between a given outcome and specific given factors. His work in this case was based upon employment data supplied by the State.

The two primary statistical procedures he employed in reaching his opinions were conventional and probit regression analysis. A regression analysis seeks to predict or forecast how a dependent variable might change based upon changes in one or more independent variables. The probit analysis differs primarily in that the dependent value in that context may only have one of two values.

Dr. Killingsworth created mathematical models, utilizing what he considered to be relevant variables from data in the State's hiring process, to forecast whether certain factors in that process correlated with the race of an applicant ultimately hired for a specific job.

Taking data from the different stages of the hiring process, including that of several, though not all, of the departments, he concluded that there was a statistically significant disparity between the percentage of black applicants hired by the departments and the percentage of white applicants hired. He compared only applicants who had been referred to the agencies deemed by DAS to meet the minimum qualifications for the job classification.

Utilizing his probit analysis, he concluded that the probability of obtaining such disproportionate hiring percentages between the races, in a racially neutral environment, was between 4 in one million to 2 in one billion. He also concluded while the 80% rule was not violated at the referral stage, all other stages of the hiring process failed to meet that threshold. This finding was generally consistent with the CPS report.

He opined that African-Americans do less well in the referral of applications, are less likely to be interviewed and less likely to be hired. Those who are hired have lower salaries within a given job title or are hired for job titles that pay less than others. However, when he

controlled for specific jobs, he found no significant difference in starting salary. Finally, he opined that African-Americans, once hired, were treated differently in performance evaluations. He did not, however, test whether performance evaluations impacted the employee's pay.

Dr. Killingsworth approached the data from a variety of perspectives and in his modeling included or excluded different variables. His analytical models can be analyzed by the different steps of the hiring process, different years, departments, and EEO category. He could limit his models by new applicants or incumbent State employees, initial pay, and performance evaluations. One permutation of the data was to reverse the race of the applicants, leaving all other variables the same, and rerunning the analysis. This resulted in a 40 percent increase in the probability of an African-American referred applicant being hired.

Dr. Killingsworth analyzed only applicants who had been referred to departments on hiring lists. This was done in light of a pattern, witnessed by several experts, that African-Americans follow a different job application protocol than whites. African-Americans tend to file more applications for a wider spectrum of job types, even if they know or suspect they may be only marginally qualified. There was evidence of a tendency to apply for jobs for which they were clearly overqualified. Either practice can skew the statistics because it generates a significant disparity between the number of applications and the number of hires based on the "shotgun" approach.

Dr. Killingsworth sought to avoid this anomaly by focusing exclusively on referred applicants, thus utilizing DAS's initial screening as a baseline and assuming the agency was correct in identifying applicants with minimum qualifications. This reduces the initial problem generated by differing application practices between the races, but does not ameliorate it completely. This is because the hiring process is a distillation of a minimally qualified applicant pool to a "specific job skill set" pool. In other words, an applicant regardless of race might apply

for and be minimally qualified for numerous postings with a common job classification, but have the requisite skill set for fewer specific jobs within that general classification. Dr. Killingsworth's analysis is also affected by the fact that more than one African-American may have been competing for the same job.

Finally, Dr. Killingsworth, like Dr. Greenwald, did not render an opinion that specific acts or omissions by the State caused the disparity in percentages of hiring of whites versus blacks. He noted that statistics can only establish a relationship between an event and a result, which he termed correlation.

2. Dr. Miller

Dr. Robert Miller is a professor of applied economics at Carnegie Mellon University in the Business School. His work entails applying large data sets to economic models. Much of his research is in the field of labor economics. His work in this case was the result of collaboration with Dr. Jay Kadane, a professor of statistics, and Dr. Michael Finegold, both of whom are associated with the Department of Statistics at Carnegie Mellon.

Dr. Miller was presented two tasks: 1) analyze Dr. Killingsworth's reports and findings, and 2) examine the employment outcomes in Iowa State government to determine if African-Americans are systemically disadvantaged. He found Dr. Killingsworth's reports incomplete, lacking important variables in his regressions and his conclusions not well-founded. Dr. Miller did not find a systemic factor regarding race that was determining wages, promotions or hiring in an overall sense.

Dr. Miller reached several specific findings based on a review of Plaintiffs' expert's models and running statistical models of his own:

1) There was no significant systemic difference between wages paid to African-Americans, whites, or other races. This conclusion was reached by running Dr. Killingsworth's regressions with and without what he had defined as

"tainted" variables, and by adding a variable that identified how long a person had worked for the State, an "experience variable."

2) After one year's tenure with the State, there was no significant difference in the probability that an African-American would be promoted than a white person. That was also true after three years' tenure. These calculations specifically differentiated between incumbents and new hires.

3) Applicant job search behavior is different between the races. This is significant because both the *applicant* and *employer* affect the hiring process through their combined behaviors. Taking into account age and education, African-Americans apply for more positions than whites and tend to withdraw from the hiring process more frequently after being engaged in it. These varying approaches rest on a mindset of either the *applicant* narrowing the job opportunities by discretely applying for fewer specific jobs or by the *applicant choosing to let the system* inform them as to which job might provide the employment opportunity.

4) The State's merit-based hiring and promotion system is capable of separation for analysis – the most obvious being the three stages of the process. Dr. Miller's statistical analysis focused on the applicants, not the applications, as was the case with Dr. Killingsworth.

5) The probability of an African-American afforded an interview and being hired was no different than that of whites, where the same applicant, regardless of race, was afforded more than one interview.

6) In stage one of the application process, African-Americans are more likely to have their applications rejected. This is a product of applicant job search behavior, i.e. submitting more applications. This also resulted in African-Americans *having more referrals per applicant* than whites.

7) With regard to step two, the application to interview stage, the statistical significance of the race variable differs between the departments. Dr. Miller combined all the small departments into one for his analysis. For one-third of the departments, the probability of an African-American receiving an interview was lower than whites. In the other two-thirds of departments, the probability of interview was not significantly adverse to African-Americans, and in several departments the probability was higher for African-Americans than whites. Dr. Miller opines, based on this analysis, that the "referral to interview" stage is not the same systemically or across the various departments. He concludes from this that either the processes in the departments are different or the effects of a common process are leading to different results.

8) When stage two is statistically analyzed based on the *applicant*, not the application, the probability of a person receiving at least one referral getting at least one interview depends on the applicants being considered. African-

Americans with the same backgrounds as whites had a lower probability of being granted at least one interview. If, however, this probability is projected for the restricted set of applicants (the class representatives), there was no statistically significant difference.

9) African-Americans entered the State workforce at pay rates lower than whites. This was due to African-Americans applying for jobs that were a pay grade lower. To this extent the initial pay being lower was attributable to the "applicant choices." These choices may well be driven by the applicants' knowledge or history as to what type of job might be "appropriate" for them.[23]

10) African-Americans are hired in higher percentages in public-service jobs than equivalent jobs in the private sector. While this does not mean that the State employment system is discrimination-free in its hiring practices, it does demonstrate that it does better than private industry.

D. State Employees

Both parties tendered present or former employees of DAS or departments to establish the knowledge, action or inaction of the State regarding the stated policy of equal opportunity in employment. Some of this testimony was presented live, some by deposition. Plaintiffs offered this evidence as proof of the State's "abdication" of its legal duty to prevent racial discrimination in the hiring and promotion process. The State offered this evidence as proof of less-than-perfect efforts to achieve the goals of the law. The substance of this evidence is outlined in Section IV, The Merit Employment System.

VI. Findings

Plaintiffs' claim is unique. The alleged discriminatory employer is the executive branch of a State government. The alleged discriminatory practice is systemic rather than particularized.

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[23] This is consistent with a job search behavior of obtaining any job just to "get in the door" regardless of qualification or over qualification with the hope or expectation of later achieving a level of work truly commensurate with abilities.

The starting pay rate for a new employee may depend on their education and experience and may be higher than the base starting pay. This is called an "advanced appointment rate." These are rare, about 4 percent of hires. They must be approved by DAS upon agency request, but DAS does not specifically audit this assessment by hiring managers.

And the claim is based on omission rather than commission. There is no legal precedent for a claim pleaded in exactly this way.

A. *Uses* a Particular Employment Practice

To prevail, Plaintiffs must prove the State 1) uses 2) a particular employment practice 3) that causes 4) a disparate impact on the basis of race. 42 U.S.C. § 2000e(k)(1)(A) and the Iowa Civil Rights Act. The class claim is: "Disparate impact or adverse impact discrimination with respect to hiring and promotion decisions and/or unequal terms and conditions of employment associated with those decisions under Title VII and the Iowa Civil Rights Act arising from subjective, discretionary decision-making permitted by the State's *abdication* of statutory or regulatory responsibilities and obligations *and/or failure to follow* its own policies."

Title VII § 2000e-2(k) states that an action may be brought against an employer who "*uses* a particular employment practice that causes a disparate impact." The Iowa Civil Rights Act has no such specific language relating to disparate impact claims. However, the analysis is generally the same. See *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission,* 453 N.W.2d at 517.

The State maintains that because Plaintiffs' complaint is one of inaction, abdication and "failure to follow," this is tantamount to a claim of "failure to use." In the State's view, "failure to use" is the antithesis of "uses" and cannot be the basis for a claim under the law. Reading the statute in this narrow context would lead to absurd consequences, certainly not intended by their authors. Under the State's interpretation, the executive branch could simply curtail *all* efforts toward equal opportunity in government employment without legal consequence. In the Court's view, this parsing of the statutory language is too stringent. The word "uses" is employed to emphasize that it is the *employer's decision-making* that is subject to scrutiny and no more. The "uses" argument proposed by the State is not reasonable in this context.

B. *Abdication* and Failure to Follow Policies

Plaintiffs' class claim is premised on omission, not commission — either the State "abdicated" its duty or "failed to follow" policies intended to promote equal employment opportunities to African-Americans. The former is an absolute; the latter a matter of degree that could be interpreted to mean that *virtually nothing* was done by the State to comply with statutory mandates.

"Abdicate" is derived from the Latin word "abdicatus" or "abdicare," meaning to "disown, disavow or reject." Its most pertinent root is "abdicare magistratu," meaning to renounce office. Abdication, in common usage, connotes a complete and absolute resignation of authority and duty, particularly relating to a sovereign. Abdication has not been proven, for during the class period the State did take *some* action in conformity with statutory policies.

The phrase "failure to follow its own policies" as used in the class claim might also be interpreted as an absolute. If so, it is subject to the same infirmity as the claim of abdication. The Court does not view the claim in that light. Plaintiffs were cognizant of various actions of the State during the claim period that were intended to, and in all likelihood did, foster the aspirational goals of equal opportunity in the government workforce.

The legal question here is more subtle than an absolute; it is "whether the employer has done enough."[24] To view Plaintiffs' claim in any other way would have ended the trial with the first testimony of DAS employees relating to what they did. This is not a case of intention, good or bad, but of consequence of conduct and evaluating whether reasonable and adequate efforts have been made to comply with the law to prevent disparate impact upon a protected class.

While the parties may debate the quality and level of effort expended by State agencies regarding Title VII and the Iowa Civil Rights Act, some actions *were* taken. This litigation is

[24] *Rowe v. General Motors Corp.*, 457 F.2d at 355.

about whether that effort was legally sufficient. To the extent the word "abdication" was used in the class claim as hyperbole, to emphasize the degree of frustration of the class members with the State's effort, it is surplusage. To the extent it was intended as a legal claim of complete or total inaction by the State to exercise a legal duty, it fails based on this record. The phrase "failure to follow" policies means insufficient effort to the degree that it caused disparate impact.

C. Plaintiffs' Alternative Theories

1. Failure to Follow Policies as a Particular Employment Practice

The pertinent threshold question is, "What is a particular employment practice?" The drafters of the laws governing this action, while defining many things, have not defined this phrase.

Plaintiffs first assert the complete decision-making process, demonstrating a consistent pattern of omissions in failing to follow the law, is "one employment practice." The State asserts that the State system is not "one employment practice" because the components within that system can be discretely evaluated.

Plaintiffs' unique argument has limited precedent. Three cases are cited as authority: *Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259 (N.D. Cal. 1992), *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008), cert. denied, 555 U.S. 881 (2008), and *Iowa Civil Rights Commission v. Woodbury County Community Action Agency*, 304 N.W.2d 443 (Iowa App. 1981).

Stender is a federal trial ruling. Plaintiffs contend it stands for the proposition that failure to follow set procedures is, in and of itself, a particular employment practice for purposes of a disparate impact claim. That is not the holding of the case. The *Stender* court concluded, based on *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989), that it need not "pinpoint particular aspects" of an employment process where six factors were present: 1) a promotion system pervaded by

lack of uniform criteria, 2) subjective and variable criteria, 3) discretionary placements and promotion, 4) "failure to follow set procedures," 5) absence of written policies or justification for promotional decisions and 6) the inability to separate the elements of the process for analysis. *Stender v. Lucky Stores, Inc.*, 803 F.Supp. at 335.

No court has cited *Stender* or *Allen* for the proposition that failure to follow set policies is an employment practice. The one case, cited by Plaintiffs, that has addressed the *Stender-Allen* "pinpoint" practice language is the Fifth Circuit *McClain* case. However, *McClain's* reference to *Stender's* holding relates to the question of separating the employment process for purposes of analysis and *does not* define a failure to follow stated employment policies to be a particular employment practice. The *McClain* and *Stender* courts each concluded that the elements of the respective employment processes before them were not capable of separate analysis.

The final case cited by Plaintiffs in support of this theory of liability is *Woodbury*. This is an Iowa Court of Appeals decision that predates not only the other cases cited by Plaintiffs, but the leading United States Supreme Court cases relating to disparate impact claims in class-action suits. *Woodbury* is distinguishable from the instant case for several reasons.

Woodbury was not a class-action suit and involved only one complainant. It dealt neither with statistical evidence, social science opinions nor the greater question of separability of the decision-making process for analysis. This latter issue is not only pivotal to the case at bar, but was a condition precedent to the findings of the other cases cited by Plaintiffs.

The true holding of *Woodbury* is that a disparate impact claim cannot be based on "one isolated incident of alleged improper procedure." *Iowa Civil Rights Commission v. Woodbury County Community Action Agency,* 304 N.W.2d at 450. Thus, the single incident of *Woodbury* is at odds with the Plaintiffs' claims of systemic and repetitious incidents of improper procedures.

Finally, the *Woodbury* case was prosecuted primarily as a disparate treatment, rather than disparate impact, claim.

Even assuming for the sake of Plaintiffs' argument that the components of the decision-making process in this case are not capable of being separated, Plaintiffs have failed to provide legal authority for concluding that "abdication of statutory or regulatory responsibilities and obligations and/or failure to follow its own policies" is a particular employment practice as that term is used in disparate impact class claims prosecuted pursuant to Title VII and the Iowa Civil Rights Act.

2. Separate Analysis of a Particular Employment Practice

Federal law, though not defining "a particular employment practice," makes clear that it is distinct from the "decision-making process." 42 U.S.C. § 2000e-2(k)(1)(B)(i). One is a component of the other. Thus, the process, or the employment system, encompasses one or more employment practices. Only if the components that make up the whole are so indistinguishable, or "not capable of separation for analysis," can the *process itself* be deemed an "employment practice." *Id.*

Iowa has no comparable statutory language; however, given the Iowa Supreme Court's reliance on federal precedent regarding disparate impact claims, the Court concludes the same analysis would pertain to a claim under Iowa law.

The answer to the question, "What is a particular employment practice?" depends exclusively on the separability or inseparable connection between the parts of the employment system. Answers to such questions are contingent upon the facts of any given case. Plaintiffs carry the burden of demonstrating the inseparability of the employment system components for analytical purposes. Failing this, they have not proven a necessary element of their claim.

a. Parties' Positions

Plaintiffs argue in the alternative that the various steps of the decision-making process are inseparable for purposes of analysis. They note that the State's system has "integrated and intertwined" policies. For example, the State's affirmative action program and the Applicant Screening Manual are intended to jointly eliminate discrimination in the hiring process.

Secondly, Plaintiffs point out that throughout the process there are "downstream effects" of decisions at one stage that may have impact at a later stage. They argue that a statistical snapshot of the system at one point will not demonstrate this "ripple" effect.

Third, Plaintiffs believe that the State system includes both objective and subjective evaluations of job applicants which are so closely interrelated in reaching the ultimate decision to hire or promote that they cannot be independently examined.

Finally, Plaintiffs argue the "steps" of the State's hiring process cannot be separated for analysis because DAS does not have the necessary records to determine if any particular step causes adverse impact to a protected class.

The State argues that the analysis of the merit hiring system can easily be focused on parts of the decision-making process because one can 1) address merely the conduct of DAS as compared to the agencies, 2) analyze the separate stages of the process independently, 3) analyze the conduct of the separate departments and 4) analyze the process from beginning to end focusing on just one specific job to be filled and comparing all the applicants at each stage of the process.

b. Separability

Courts are concerned about the question of separate analysis because they seek to identify the particular cause of disparate impact. If a specific cause is identified, a more clear remedy can

be crafted, and the probability of fostering race-neutral employment is increased. If the source of the problem is too diffuse, remedial action is less likely.

The labor economists for both parties ran their regressions in separate models based on the different stages of the hiring process. The Court is mindful of the dangers inherent in too great a reliance on statistics in a case of this nature. But several general observations can be drawn from the manner in which they were prepared.

The percentage of minorities in the Iowa workforce in general, and in State government in particular, presents some significant problems with statistical analysis. Indeed, in the past, the question of aggregating minority groups for affirmative action analysis has been debated. So the question of statistical significance of any of the findings of either expert must be viewed in that light.

Dr. Killingsworth was capable of separating data for the referral stage, the interview stage, and the hiring stage for African-Americans as compared to whites over a period of years. His work permits a fact finder to analyze the departments of the executive branch in each of those years at each of those stages. This charting of State data allows a fact finder to compare the various departments and draw important conclusions as to how the individual departments compare to each other at the various stages. While he elected not to begin his analysis at the application stage, the data available would permit this. And it could be used to track applicant flow from that first stage to the hiring of one applicant for the specific job opening in any given department – including the progress of each applicant through the various stages and examining the particular screening-devices used. He was also able to separate the data according to EEO category. In one table he compared the number of African-American managers (termed administrators on the chart) in State employ. He separated this data for the years 2001, 2007, 2008 and 2010.

Dr. Miller, in running his regressions and reaching his conclusions, emphatically stated that from the standpoint of statistical analysis, the various stages of the process can be separated.

Dr. Greenwald, the primary social science expert for the Plaintiffs, conceded that one could analyze each step of the hiring process as if it were "the only step occurring." In particular, he noted that one "could determine whether or not there was bias at each one of the independent stages" of the hiring process.

Dr. Kaiser testified at length about racial cues in written résumés that might give rise to implicit bias as compared to issues that might arise from a separate stage — the interview.

In addition to the experts in labor economics and social science finding the data capable of separate analysis, CPS, the independent consulting agency, was also able to analyze the hiring system by individual components.

Finally, the hiring files themselves permit a focused view of the different screening-devices and practices in referral, interview or hiring of applicants for any given job between the departments.

The State's data — its recordkeeping — while not perfect, was sufficient for both Dr. Killingsworth and Dr. Miller to conduct their analyses. The presence in the record of their models and opinions dispels the argument that the State's recordkeeping is such that it precludes anything but a "systemic employment practice."[25]

There is no question that the components of the State's merit employment system are interconnected. Different services and publications of DAS are intended to foster the goals of statutory directives for equal opportunity in the workplace. This fact does not mean that the process cannot be examined part by part as compared to the whole. For example, although the Applicant Screening Manual could be used in conjunction with the affirmative action laws, that

[25] This does not, of course, explain why, given all this data held by the State, it did not on a regular basis review it, as did these experts, with an eye toward measuring impact.

does not present an analysis limited exclusively to the manner in which DAS personnel officers instruct managers on the use of the manual – in formulating screening-devices for referral for interviews or in formulating interview questions. The present record permits that type of scrutiny.

The State's system has both objective and subjective components. Each can be clearly delineated. And they are not so confused so as to prevent Plaintiffs from honing in on one particular employment practice and constructing their case upon it. The issue is not whether subjective or objective decisions take place and are interrelated. The issue is whether one can be evaluated without evaluating the other. The record here permits that type of analysis.

Plaintiffs argue there is a cumulative or downstream effect inherent in the process that demands it be analyzed as a whole. Even were this true, the fact that one errant practice compounds a problem at a later stage of the process does not prevent investigation of either the earlier or later separate stage or practice.

Given this record, and the vast amount of data available which has been organized, scrutinized and delineated by the experts, one is drawn to the inescapable conclusion that one can focus on any number of discrete employment decisions made as individual, separable, identifiable particular employment practices.[26]

It is Plaintiffs' burden to either identify the offending particular employment practice or demonstrate that the components of the process cannot be analyzed separately. In this case, Plaintiffs elected to pursue a theory of recovery based upon proving that the State's merit-based

[26] One example of the separability of the process is the "second résumé screen" that had been utilized by some departments. It was a particular employment practice that was evaluated, determined to be inappropriate, and curtailed at the suggestion of DAS. Similar refinement of the hiring process by focusing on the inappropriate use of "spelling and grammar screening" is another example of DAS having addressed a particular employment practice. The record reflects not only the ability to focus on these particular employment practices but when and which separate agencies responded to the suggested changes by DAS.

hiring system, its employment "decision-making process" was "not capable of separation for analysis." It can be, and was, through the evidence in this trial, separated for analysis.

The record does not support a complete and absolute failure to follow statutory employment policies, though it does show inconsistency in results among the numerous agencies. The "entire hiring process" is not a particular employment practice. To that extent, the claim under the Iowa statute fails factually.

Because the State system can be dissected into numerous decision-making stages among numerous independent agencies of the executive branch, it is distinguishable from *McClain* and *Stender*. *Woodbury* is distinguishable on its facts as not being a class claim and was not based on statistical regression analysis.

Plaintiffs' theories of liability are premised upon a systemic challenge to the State's employment process. To do so, they must prove either: 1) the "failure to follow policies" is a "particular employment practice," and/or 2) the process's components could not be separately analyzed such that a particular employment practice need not be identified. The former theory fails as a matter of law; the latter as a matter of fact.

Plaintiffs have failed to meet their burden of proof under Title VII, 42 U.S.C. § 2000e-2(k)(1)(B)(i). Further, as the Iowa Civil Rights Act does not have a provision, like the federal law, that permits a broad challenge to the decision-making process as a whole, Plaintiffs were required to specifically prove a particular employment practice that caused a disparate impact. They elected not to do so; instead, seeking to convince the Court that an absolute failure to exercise statutory and regulatory authority, system-wide, was itself a particular employment practice.

Plaintiffs have failed to prove an actionable particular employment practice.

D. Causation

Assuming arguendo that Plaintiffs have proven an actionable particular employment practice, they would have to establish causation of disparate impact.

1. Failure to Follow Policies

Plaintiffs' initial argument in this respect is: *If* the State policies are intended to eliminate disparate impact and *if* different bottom-line statistical hiring disparities exist between the races, *then* failure to follow policies must be the cause. Even assuming disparate impact, this argument rests on the Plaintiffs' primary position of complete, absolute failure to follow policies. That is not substantiated by the record. And if this failure was statewide and system-wide, one would expect disparate outcomes to result in all agencies at all stages of the process. That is not the case either.

If, as Plaintiffs argue, the "failure to follow" practice is pervasive and causes disparate impact, why does the statistical modeling of these experts reveal better success rates for African-Americans than whites among the different agencies as between the different stages of the hiring process? If the cause of systemic disparate impact is the "failure to follow" policy, one should not find significant "black advantage" throughout the data among the various departments.

The "but for" causation argument is not supported by the record.

2. Statistics

The record shows that in the aggregate there is a statistical disparity between the percentage of minimally qualified blacks who are hired by the State as compared to their white counterparts. Courts recognize that "[t]he evidence in these "disparate impact" cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Watson,* 487 U.S. at 987. Plaintiffs' burden goes beyond merely showing statistical disparities in the employer's workforce. As a condition precedent, they must identify a

specific employment practice that is challenged. *Watson,* 487 U.S. at 997. In the words of the *Watson* Court, Plaintiffs:

> must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.

Watson, 487 U.S. at 994 -995.

Nor is the court obligated to assume that Plaintiffs' statistical evidence is reliable. *Watson,* 487 U.S. at 996. "[T]he defendant is free to attack the probative weight of that [statistical] evidence, to point out fallacies or deficiencies in the plaintiff's data or statistical techniques, and to adduce countervailing evidence of its own." *Watson,* 487 U.S. at 979. The United States Supreme Court has held it is "completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." *Watson,* 487 U.S. at 992. The over-reliance on statistical evidence in disparate impact cases presents the danger of public employers resorting to quotas in an effort to preclude such claims, a proposition which itself could be offensive to the Constitution. *Watson,* 487 U.S. at 992 – 993.

Dr. Killingsworth, whose statistical computations were the bulwark of Plaintiffs' case, did *not* opine that a particular employment practice (however that might be defined) caused different outcomes in the hiring and promotions of African-Americans. Nor could he say whether the differences in outcomes that he found were the result of objective or subjective decision-making, which is the premise of implicit bias. His opinions also did not account for or exclude explicit bias or intentional discrimination. Nor did he correlate any of his findings to any particular screening-device.

As he was not familiar with the policies of the State regarding hiring and promotion, he could not tie his numerical outcomes to any particular policy. This included the inability to causally connect his findings with a failure to maintain certain documents in hiring files or use of a second resume screen.

Dr. Killingsworth viewed the "hiring process" to be an employment practice. To that extent, he is in accord with Plaintiffs' theories of liability: Failure to follow set policies *is* an employment practice or the process cannot be separated for analysis.

Though disinclined to do so, Dr. Killingsworth did perform statistical analysis of various stages of the employment process and conceded that if the hiring practices of the departments were different, they must be analyzed separately.[27] In examining his models delineated according to years, stages of the hiring process and executive departments, two things are immediately apparent: Some of the departments fail the 80% rule at one or all the stages; and at many stages in many departments there is what Dr. Killingsworth termed a "black advantage," i.e., where African-Americans fared better than whites in being referred on a hiring list, being granted an interview and in being hired. (Ex. NY pp. 32-43).

Dr. Killingsworth was also able to separate the data according to EEO category. In one table he compared the number of African-American managers (termed administrators on the chart) in State employ. He separated this data for the years 2001, 2007, 2008 and 2010. The conclusion to be drawn from this analysis is that the percentage of African-American managers in the State system has increased at a much larger rate than whites over that time.[28]

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[27] The record, of course, shows that the departments use varying hiring practices.

[28] Plaintiffs' Exhibit 429F demonstrates that from 2001 to 2010, the percentage of African-American managers in the State system increased by 96%. During that same period, the percentage increase of white managers was only 69%. But the difference in percentage increases is stark during the period of 2007 to 2010. During this period the percentage increase in black managers is 37%, while the percentage increase in white managers is only 1%. During this latter period the percentage increase of African-Americans is significant, while the percentage of white managers remains virtually constant.

Cross-examination disclosed that courts in the past have questioned his outcomes because of reliance on aggregated data rather than statistical opinions based on a separate analysis of a particular step in a process. And at least one court noted his findings were "indicative" of something but not "linked" to any action of the Defendant.

That is exactly the case here. Dr. Killingsworth's bottom-line differing outcomes are not anchored to any identifiable employment practice, act or omission of the Defendants. While consistently stating he rendered no opinion as to the cause of the differing outcomes, he offered an opinion regarding probabilities which was, in fact, an opinion that the cause of the different outcomes was a process that was not racially neutral. This opinion too is based on bottom-line computations including a class-wide analysis for the whole class period.

Simply stated, there is no causal link between Dr. Killingsworth's aggregated findings and State conduct.

The *Wal-Mart* Court noted the inherent problem with reliance on global statistics in establishing causation when more specific information is available. A departmental disparity cannot itself establish a uniform disparity throughout the whole system any more than a disparity at a global level can establish a disparity in a given department. *Wal-Mart,* ___ U.S. ___, 131 S. Ct. at 2555.

The more discrete statistical analysis of the different process steps among the agencies done by Dr. Miller mitigated against the sweeping conclusions drawn from bottom-line figures. Among the different departments, blacks had less opportunity for interviews in some, about the same in some and higher probabilities in others. There was no significant difference in opportunity for interviews among the class representatives as compared to whites. And there was no statistical disadvantage to blacks in the interview to hiring stage.

These findings dovetail with Dr. Killingsworth's modeling showing differing outcomes, not always adverse to blacks, throughout the system, at differing stages in different departments. If a systemic employment practice were causing disparate adverse impact to a protected class, this variance among the agencies and steps would not be expected. This is particularly true where advantages for minorities are seen throughout the data set.

In large part, Plaintiffs' causation argument stems from the 80% rule. CPS noted this rule was breached, as did Dr. Killingsworth. This is an evidentiary rule, the breach of which alerts the Court to a serious problem and prompts an inquiry as to whether the inference of adverse impact is justified. As noted by the *Watson* Court, this is not determinative of adverse impact and has been subject to judicial scrutiny. *Watson,* 487 U.S. at 995. The Killingsworth models that demonstrate a breach of the 80% rule among the State agencies at differing employment steps and years also show that blacks were advantaged at differing stages in different departments over the same time frame.[29] From this, the Court concludes that the cause for disparity in percentages is not systemic but parochial to the agencies. It was clear from the record that some departments were more proactive in exercising best practices, in part due to the frame of mind of the individual managers in those departments. And some agencies had a different ratio between their objective and subjective employment decisions. Plaintiffs did not identify why certain agencies had differing outcomes. The causes could be anything as egregious as explicit bias or as benign as extremely specific job requirements.

The evidence of the breach of the 80% rule, while disconcerting, is counterbalanced by other evidence: Blacks did better than whites in the employment process in certain departments at different hiring steps and there was parity in hiring after interview as noted by Dr. Miller, and

[29] Exhibit NY became the focus of cross-examination not only because it demonstrated black advantage scattered throughout the State's employment system, but because Dr. Killingsworth did not include this table in his written reports.

Dr. Killingsworth noted the steadily increasing percentage of black managers in the State system as compared to whites.

While highly critical of the hiring process, particularly the screening-devices and questionable validity of some, the class members who testified did not assert that they were the most qualified applicant for the job or jobs they sought but did not obtain.

Varying outcomes between the departments and stages of the process invites localized scrutiny for causation, which was not evidenced in the record. The evidence of the four-fifths rule, taken in context with the other evidence in the case, does not carry Plaintiffs' burden on the issue of causation.

Even assuming that State wide failure to follow equal opportunity employment policies is a particular employment practice and some, but not all, departments have different bottom-line referral, interviewing and hiring percentages for African-Americans than whites, there is no expert opinion of a causal link. At best, it has been described as a "correlation" or "untested theory." It is upon these statistics that Plaintiffs' causation argument is premised.

Plaintiffs' statistical evidence is insufficient to prove causation.

3. Implicit Bias

Plaintiffs seek to bridge the gap between disparate racial outcomes and discretionary subjective decision-making through reliance on implicit bias. Discretion accorded to lower-level supervisors can be the basis for a disparate impact claim, but the mere fact that a discretionary system produces a bottom-line racial disparity is not enough. A specific employment practice must be identified as the culprit. *Wal-Mart,* ___ U.S. ___, 131 S. Ct. at 2556. Delegated discretion without a specific employment practice, even supported by adverse outcomes in ultimate hiring statistics, will not suffice. *Id.* at 2555 - 2556.

Implicit bias, according to Plaintiffs' experts, is inchoate to the human condition. All persons hold unconscious bias, to some degree, on any number of issues, including race. Plaintiffs concede that neither subjectivity nor implicit bias can ever be eliminated completely from an employment system.

Subjective discretion in decision-making alone is not a bad thing. "It is also a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.'" *Wal-Mart,* __ U.S. __, 131 S. Ct. at 2554 citing *Watson,* 487 U.S. at 990. This is because many qualities of a good employee, well suited to executing the specific functions of a particular job, might not be discerned through purely objective, standardized testing.

As the *Watson* Court observed:

> Some qualities-for example, common sense, good judgment, originality, ambition, loyalty, and tact-cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling. Because of these difficulties, we are told, employers will find it impossible to eliminate subjective selection criteria and impossibly expensive to defend such practices in litigation.

Watson, 487 U.S. at 991- 992. The Court also noted that employers, rather than the courts, are the experts in structuring business practices, and should refrain from interfering unless statutorily ordered to do so. *Watson,* 487 U.S. at 999.

Dr. Greenwald conceded that he would not use the phrase "implicit bias" in writing a scientific article. How, then, should it import more gravamen in a court of law? Implicit bias does not mean prejudice, but merely reflects attitudes. More pointedly, he offered no empirical data regarding Iowans and implicit racial bias, did not opine that the Killingsworth bottom-line figures were caused by implicit racial bias and offered a causal link as an "untested hypothesis."

Even more significant is the fact that neither he nor Dr. Kaiser offered a reliable opinion as to how many, or what percentage, of the discretionary subjective employment decisions made by managers or supervisors in the State employment system were the result of "stereotyped thinking" adverse to the protected class. The closest Dr. Greenwald came to such an opinion was extrapolating data from an internet based site relating to the IAT. From the uncontrolled responses to this website he opined that 70 to 80% of respondents in the United States had an "automatic preference for whites." This was not a "representative sampling by research design." It did not require the respondent to give demographic information. It was a weighted data set. And in his words "it could be representative of the United States."

Dr. Greenwald has "relatively little data" about how the IAT has been applied in Iowa, and based on the internet data is "assuming" the percentages would be the same for this State. In fact, he has no representative data for the State of Iowa, no representative data for employees of the State of Iowa and no representative data for managers or supervisors working in the executive branch. When initially asked if he could render an opinion with "scientific certainty" on this issue he provided a convoluted answer and then stated he had forgotten the question. When asked again, he responded, "I would be willing to bet *if* a study were done" the percentage would be about 75%.

Both social scientists seem to operate from the assumption that every three out of four subjective discretionary employment decisions made in the State's hiring process were the result of, or tainted by, an unconscious state of mind adverse to African-Americans. The Supreme Court has noted this is a fatal flaw in the proof of a social scientist in a case of this nature and is "worlds away from 'significant proof'" that an employer "operated under a general policy of discrimination." *Wal-Mart,* ___ U.S. ___, 131 S. Ct. at 2554. In legal parlance, this is an opinion of conjecture, not proof of causation.

The implicit bias evidence does not prove causation.

4. Disparate Impact

The discussion regarding causation is premised on the presumption that disparate impact exists. This conclusion, based on Plaintiffs' statistical experts' opinions, has not gone unchallenged in this record. Dr. Miller, having run his own regressions, in some cases with variables different from Dr. Killingsworth, reached conclusions indicating that there was no disparate impact regarding wages, promotion or probability of securing an interview.

He also noted that African-Americans tended to apply for lower-level jobs. This was consistent with the anecdotal evidence from several of the class members. They testified that public employment is viewed as desirable, and therefore, the key was to "get a foot in the door." One way to do this would be to obtain any job with the State, regardless if the applicant were overqualified, and then seek promotion or transfer once "in the system."

The record reflects that African-Americans fare better in the public-service than in the private-employment sector. Public-service in Iowa employs a larger percentage of African-Americans than the private sector. And while this admittedly does not mean there is not discrimination in both sectors, it is evidence that there is less in public employment. Could the cause of that disparity in favor of minorities in public employment be caused by a merit-based employment system? That is as reasonable a conclusion to be drawn from this record as any other.

Finally, when the merit system is analyzed using a "restricted set" of applicants, in this case the class representatives, there is no evidence of disparate probability for interviews.

VII. Conclusion

This case, much like *Wal-Mart,* involves Plaintiffs and a "multitude of different jobs," at different levels, held "for variable lengths of time," in numerous different departments, with a

"kaleidoscope of supervisors (male and female)," subject to a variety of hiring approaches contingent upon the goals and duties of the various agencies. "Some thrived while others did poorly. They have little in common but their [race] and this lawsuit." *Wal-Mart,* ___ U.S. ___, 131 S. Ct. at 2557.

Based upon the record evidence, the Court concludes that Plaintiffs have failed to prove by a preponderance of the evidence that subjective, discretionary decision-making, permitted by the State's abdication of statutory or regulatory responsibilities and obligations and/or failure to follow its own policies, caused disparate impact or adverse impact discrimination with respect to hiring and promotion decisions and/or unequal terms and conditions of employment associated with those decisions under Title VII and the Iowa Civil Rights Act.

Judgment is entered for Defendants. Costs are assessed to Plaintiffs.

IT IS SO ORDERED this 17th day of April, 2012.

ROBERT J. BLINK, JUDGE
Fifth Judicial District of Iowa

Original filed.