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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JEFF D. PAIGE, Plaintiff, v. STATE OF CALIFORNIA; CALIFORNIA HIGHWAY PATROL, Defendants.	No. CV 94-0083 CBM (CTx) FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This action, which has been in litigation for ten years, involves the serious allegation that the California Highway Patrol (CHP) maintained a promotional process that discriminates against officers based on race. The matter before the Court is the claim of disparate impact in promotions and assignments, the Honorable Consuelo B. Marshall, Chief Judge, presiding.

Upon consideration of all the evidence admitted in this case, the Court has no alternative but to enter judgment in favor of Defendants with respect to the claim of disparate impact.[1]

I. BACKGROUND

The California Highway Patrol ("CHP") has six sworn peace officer classes: traffic officer, sergeant, lieutenant, captain, assistant chief, and deputy chief. Pursuant to California Vehicle Code § 2251, the CHP has a closed promotional system and promotes only from within. In order to be eligible for promotion, an officer must pass an examination. The promotional examinations for supervisory positions are offered approximately every two years, and the years are staggered so that the examinations for certain positions are given in even numbered years and the examinations for other positions are given in odd numbered years.

Plaintiff Jeff D. Paige, who is African-American, was employed by the CHP for over thirty years. When asked at trial why he joined the CHP in 1966, he responded: "[t]he CHP was a prestigious organization, and it was an honorable profession, and I thought I could do some good if I joined the patrol and help people. I also felt the Highway Patrol would allow me to promote and provide for

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[1]It is not clear to the Court whether Plaintiff Paige is continuing to assert his individual disparate impact claim. However, for the same reasons that the class has not met its burden of demonstrating disparate impact, Paige's individual claim of disparate impact must be denied. The Court finds that Paige took the sergeant's exam four times before being promoted, that he took the lieutenant's exam twice before being promoted, and that he took the captain's exam four times without ever being promoted to captain. The Court appreciates how Plaintiff must feel given the number of times he took these exams and the fact that he was never promoted to captain. But it is the duty of the Court to apply the law to the evidence admitted in this case.

my family." Paige took the sergeant's exam for the first time in 1968 and did not pass. He took it again in 1970 and did not pass. He took the exam for a third time in 1972 and did not pass. He passed the sergeant's exam in 1974 but was not promoted because he was ranked too low on the eligibility list. In 1976, he passed the exam again but was not promoted until 1978 due to his low rank on the eligibility list. Paige became eligible to take the lieutenant's exam in 1981. He took the exam that year and passed but was not promoted because of his rank on the eligibility list. He took the exam in 1983, passed and was promoted to lieutenant two years later. By 1983, Paige had a bachelor's degree, an AA degree, a master's degree and a teaching credential. In 1988, Paige took the captain's exam for the first time and passed but was not promoted because he ranked too low on the list. He took the exam again in 1990 and passed but was not promoted. In 1992 he took the exam for a third time and passed but was not promoted. On May 28, 1993, Paige filed his charge of discrimination with the Equal Employment Opportunity Commission. In June 1993, Paige was informed that his job responsibilities would be changed and that he would no longer be in charge of the shooting team personnel. On October 19, 1993, Paige was informed that he would be transferred to a different location. On October 22, 1993, Plaintiff was removed from two committee assignments. On October 25, 1993, Plaintiff received a performance evaluation with ratings lower than those of the previous year. In early December 1993, Chief Gomez threatened to take Paige's state vehicle away from him.

On January 5, 1994, Paige filed this lawsuit alleging that the promotional process of the CHP had a discriminatory impact on non-white officers in violation of Title VII of the 1964 Civil Rights Act. The Court certified a class consisting of "all past, present and future non-white sworn employees in the California Highway Patrol who have been, are, or will be discriminated against with regard to the terms and conditions of their employment because of their race, including the

denial of job assignments, transfers, promotions and other benefits of an effective affirmative action program as the result of the operation of current practices." Plaintiffs' claims included discrimination against Paige as an individual and against the class based on disparate impact and disparate treatment theories, as well as illegal retaliation against Paige. In August 1994, after the Complaint was filed, Paige was transferred from the headquarters of the CHP's southern division to Santa Fe Springs. That same month, Paige took the captain's exam for the last time. He passed the exam but was not promoted. Paige retired from the CHP in July 1996.

On March 29, 1995, this Court denied Defendants' motion for summary judgment and granted partial summary judgment for the Plaintiffs on their disparate impact claim, finding that the Plaintiffs had established that the CHP's promotion policy is a continuing violation of Title VII. The Ninth Circuit reversed, finding that this Court had erred in using an external pool to determine whether the CHP's promotion practices had a disparate impact. The Circuit found that the use of an internal pool was appropriate unless there was evidence of a practice that deterred non-white, non-supervisory employees from seeking promotion. *See Paige v. State of California,* 102 F.3d 1035 (9th Cir. 1996); *Paige v. State of California,* 1996 U.S. App. LEXIS 33426, No. 95-56669, 1996 WL 740839 (9th Cir. Dec. 20, 1996) (unpublished memorandum disposition).

Upon remand, this Court ordered additional discovery and again granted partial summary judgment for Plaintiffs, finding use of an external pool appropriate in this case. The external pool included peace officers from other jurisdictions as part of the comparative pool to be considered against the actual pool of CHP promotions. Defendants appealed, and the Ninth Circuit found the use of an "external pool" erroneous under the circumstances. *See Paige v. State of California,* 291 F.3d 1141 (May 31, 2002), *cert. denied, California v. Paige,* 537 U.S. 1189, 154 L. Ed. 2d 1021, 123 S. Ct. 1256. The Circuit remanded for use of

an "internal pool," that is, the actual pool of promotional applicants as the comparison group. *Id.* at 1147. The Ninth Circuit found that Plaintiffs could treat all minorities as one group, that they could aggregate data from various written examinations, and that it was appropriate to admit pre-liability period data in this case. *Id.* at 1148-49. *See also Paige v. State of California,* 2002 U.S. App. LEXIS 14463 (amending opinion of May 31, 2002). The Circuit further found that Defendants had failed to meet their burden of showing that the promotional process is "job related." 291 F. 3d at 1150.

Pursuant to Fed. R. Civ. P. 42(b), the trial of this matter was bifurcated into Stage I (liability to the class and to Plaintiff Paige individually) and Stage II (equitable relief and damages). The Stage I trial was held as (a) a jury trial on the issues of defendants' liability to the class on a theory of disparate treatment and to plaintiff Paige individually on theories of disparate treatment and retaliation; and (b) a court trial on the issue of defendants' liability to the class on a theory of disparate impact. On November 3, 2003, the jury found Defendants not liable to the class or to Paige individually on a theory of disparate treatment. The jury found in favor of Paige on his retaliation claim, but awarded no damages after hearing the presentation of evidence on damages. At the close of trial, Defendants are the State of California and the California Highway Patrol.

The Court must now decide Defendants' liability to the class and to Paige on a theory of disparate impact. On December 8, 2003, the parties submitted proposed findings of fact and conclusions of law. On December 22, 2003, Defendants submitted revised proposed findings of fact and conclusions of law. On February 17, 2004, Plaintiffs submitted additional authority in support of their proposed findings and conclusions. Defendants filed a response to this additional authority on March 12, 2004. The Court requested supplemental proposed findings of fact on June 15, 2004, specifically requesting: (1) any record references to the underlying data supporting the testimony of Plaintiffs' expert

regarding disparate impact during the 300 day limitations period; (2) any evidence that the sample size of the data pertaining to the limitations period was too small to demonstrate disparate impact during this period; (3) any record references (either testimony or admitted exhibits) supporting the underlying data or analyses supporting the testimony of Defendants' expert that any disparity in promotions during the liability period, excluding all promotions made after the liability period, was not statistically significant. The parties submitted their supplemental findings of fact, as well as objections to each other's supplemental findings, in late June 2004. Upon consideration of the testimony and documentary evidence received in this case, the Court's evaluation of the demeanor and credibility of the witnesses, and the Proposed Findings of Fact and Conclusions of Law submitted by the Parties, the Court makes the following findings:

II. FINDINGS OF FACT

A. The CHP's Promotional Processes

In order to apply for promotion to the rank of sergeant or lieutenant with the CHP, candidates must first take a scored written examination. Generally, the written exam consists of a multiple choice test. However, the 1992 sergeant test also included an essay component. If an individual receives a passing score on the written exam, he or she is scheduled for an oral interview. A panel scores the applicant on the oral interview. The scoring appears to be by consensus, as the evidence indicates generally identical scoring by the panelists. The written and oral scores are each weighted at 50% to tabulate a final score. A rank-ordered eligibility list is created based on the combined written and oral scores. Promotions are made based on the ranking of individuals on the eligibility list.

Promotions to captain, assistant chief and deputy chief are based entirely on an oral interview, although the captain examination includes a written "in-basket" performance test and the others do not. The "in-basket" exam is a written exam where the applicant writes answers to hypothetical problems that they may

confront in their future employment. The "in-basket" component is scored by the interview panel, but it is not assigned a weight in the final score. As with the exams for sergeant and lieutenant, officers are promoted in the order in which their names appear on the ranked eligibility list.

The eligibility lists for promotional examinations were issued in August 1990 and 1992 (sergeant examinations), October 1991 and September 1993 (lieutenant examinations), December 1990 and October 1992 (captain examinations), October 1990 and 1992 (assistant chief examinations), and October 1991 and 1993 (deputy chief examinations). These promotional eligibility lists were in effect for all or a portion of the liability period, which extended from August 1, 1992 to May 28, 1993, the 300-day period before the EEOC complaint was filed. Additional lists were in effect for each supervisory rank prior to the commencement of the liability period.

B. Plaintiffs' Prima Facie Case of Disparate Impact

At the time this lawsuit was filed, 1,099 out of 5,579 sworn officers at the CHP were nonwhite. Of 917 CHP supervisors, 101 were nonwhite. Eighty-eight percent of all sergeants were white, eighty-nine percent of lieutenants were white, eighty-nine percent of captains were white, ninety-five percent of the assistant chiefs and ninety-three percent of the deputy chiefs were white. These numbers alone do not prove disparate impact in promotions and other benefits of employment.

In order to establish a prima facie case of disparate impact, Plaintiffs present statistical analyses by their expert, Mr. Richard Biddle. On September 10, 2003, the Court found that pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993), this witness's testimony would assist the trier of fact to understand the evidence or determine the facts that may be in issue in the case. The Court found that Mr. Biddle was qualified to testify as an expert and that Defendants' disagreement with Mr.

Biddle's methods went to the weight and not the admissibility of this testimony.

Mr. Biddle testified that he analyzed the data for two time periods. First, Mr. Biddle analyzed all promotional tests in effect from 1988 to 1994. Second, Mr. Biddle, analyzed eight exams that "touched on" (resulted in promotions during) the 300-day limitations period: the 1990 and 1992 sergeant exams, the 1991 lieutenant exam, the 1990 and 1992 captain exams, the 1990 and 1992 assistance chief exams, and the 1991 deputy chief exam. Mr. Biddle testified that he did not include data from the 1993 lieutenant list (in effect from September 30, 1993 to September 30, 1995) and the 1993 deputy chief list (in effect from October 26, 1993 until October 26, 1995) because promotions based on these lists did not commence until after the EEOC complaint was filed in May 1993, and the majority of promotions occurred after the lawsuit was filed.

Mr. Biddle analyzed the effects of the promotional process on all nonwhites as a group, rather than analyzing each minority group separately. Mr. Biddle testified that he performed his statistical analyses using data from the State Personnel Board ("SPB") as well as "corrected" data from the State Controller's Office ("SCO") for the years 1990 through 1993.[2] He testified that he reached the same conclusion regarding disparate impact using both sets of data. For the years 1988, 1989, and 1994, Mr. Biddle testified that he relied only on reports from the State Personnel Board because Defendants did not provide him with the corrected racial data for these years. Prior to 1992, the SPB reports included data in which

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[2]The SCO data included only "bottom-line" selection data (i.e. the number of persons in each racial group who applied for a particular position and the number promoted); it did not include data for each component of the exam (e.g. the number of persons in each group who passed the written test or the number of persons who were actually selected from the eligibility list). This is significant because "a Title VII plaintiff does not make out a case of disparate impact by showing that 'at the bottom line' there is *racial imbalance* in the workforce." *Wards Cove Packing Co. v. Antonio,* 490 U.S. 642, 751, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). Rather, "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.*

some applicants for promotion within the CHP identified themselves as "other" instead of specifying their race. In some of his analyses that included the pre-1992 data, Mr. Biddle analyzed the data by first presuming that the "others" were nonwhite and second, by excluding the "others" altogether.

For most of his analyses, Mr. Biddle used two statistical methods: (1) a single pool method of analysis using the Fisher Exact Probability test and the binomial test; and (2) a multiple pool method of analysis using the Multiple Events Exact Probability Test ("MEEP"). With regard to the aggregate of all eight tests "touching" on the liability period, Mr. Biddle found a standard deviation of 2.18 using single pool analysis. Mr. Biddle did not calculate the standard deviation on all eight tests using multiple pool analysis.

With regard to the sergeant and lieutenant written exams that "touched on" the liability period, Mr. Biddle testified that the 1990 sergeant written exam, the 1992 sergeant written exam, and the 1991 lieutenant written exam showed adverse impact individually and when combined. Specifically, for the 1990 sergeant written exam, Mr. Biddle found a standard deviation of 2.49 without "others" and 2.82 with "others." For the 1992 sergeant written exam, he found a standard deviation of 2.39 without "others" and 2.14 with "others." For the 1990 and 1992 sergeant written exams combined, he found a standard deviation of 3.52 using single pool analysis. He did not testify as to the standard deviation using multiple pool analysis. For the 1990 sergeant, 1992 sergeant, and 1991 lieutenant written exams combined, he found a standard deviation of 3.62 using single pool analysis and 2.12 using multiple pool analysis.

Mr. Biddle also found disparate impact based on analyses that included pre-liability period data. For the 1988 sergeant written test, Mr. Biddle found a standard deviation of 3.14, excluding those who identified themselves as "other." He did not testify as to the standard deviation with "others." Mr. Biddle's analysis of the 1988, 1990, 1992, and 1994 sergeant written tests combined indicated that

21.8% of the applicants were nonwhite, while 19.1% of those who passed were nonwhite. According to Mr Biddle, this disparity produced a standard deviation of 4.46 using the single pool approach and a standard deviation of 3.35 using multiple pool analysis. When Mr. Biddle combined all sergeant and lieutenant written exams for 1988 through 1994, excluding "others," he found a disparity in the promotions of 4.84 standard deviations using single pool analysis and 4.17 using multiple pool analysis. When he included those who identified themselves as "other," he found a standard deviation of 3.14 using single pool analysis and 3.56 using multiple pool analysis. Mr. Biddle also analyzed the combined effect of all sergeant and lieutenant written exams for the period 1989 through 1994, excluding "others," finding a disparity of 3.6 standard deviations using single pool analysis and 3.12 without "others" using multiple pool analysis. When he analyzed these same tests including those who identified themselves as "other," Mr. Biddle found a standard deviation of 2.86 standard deviations using single pool analysis and 2.96 using multiple pool analysis. In analyzing the sergeant and lieutenant written tests for the period 1990 through 1994 without "others," Mr. Biddle found a standard deviation of 3.43 (using single pool analysis) and 3.18 (using multiple pool analysis). When he included "others," Mr. Biddle found the disparity to be 3.07 (using single pool analysis) and 3.02 (using multiple pool analysis).

Mr. Biddle also analyzed the combined effect of all sergeant, lieutenant, and captain written exams during the period 1988 through 1994. He found that 20.4% of those who took the test were nonwhite while 17.9% of those who passed the test were nonwhite. He found that the standard deviation of this disparity was 5.04 using the single pool approach and 3.17 using multiple pool analysis.

With regard to the overall impact of all of fifteen promotional processes from 1988 through 1994 (including four sergeant exams, three lieutenant exams, three captain exams, two assistant chief exams, and three deputy chief exams), Mr.

Biddle testified that 20.1 % of the overall number of applicants for the fifteen promotional exams were nonwhite and only 14.6% of those promoted were nonwhite. He found that this disparity resulted in a standard deviation of 3.1 standard deviations using single pool analysis and 2.28 standard deviations using the multiple events approach.

With regard to the disparity between those placed on the eligibility list and those actually promoted, Mr. Biddle found that 19.5% of those placed on the rank-ordered list for sergeant were nonwhite but only 14.5% of those actually promoted to sergeant were nonwhite. Mr. Biddle found this to be a standard deviation of 2.29 using single pool analysis and 2.05 using multiple pool analysis. Mr. Biddle did not testify as to the time period for this analysis or the specific exams that he included in his analysis.

Plaintiffs also presented evidence that the State Personnel Board ("SPB") reports on CHP promotional examinations indicated an adverse impact on nonwhite groups. The reports indicated that in some cases, the selection rate of certain racial groups was less than 80% of the selection rate of the group passing at the highest rate. This is known as a "four-fifths rule" or "80% rule" violation" under the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"), 29 C.F.R. § 1607, *et seq.* In other instances, the disparities were more severe, with certain nonwhite group selection rates at 60% of the dominant race.

Plaintiffs also offered anecdotal testimony in support of their claims that whites were promoted at a rate higher than the rate of promotion of nonwhites. This testimony included witnesses who applied for promotions multiple times and were not promoted. Plaintiffs relied exclusively on anecdotal evidence to support their claim of disparate impact as to assignments. Plaintiffs presented testimony that there existed "coveted" assignments within the CHP and receipt of these assignments may assist an officer in receiving a promotion. Clyde Lockley

testified that, in his opinion, he observed that those officers in "fast track" or "coveted" assignments were still overwhelmingly non-minority during the period 1990-92. Leslie Fritz Gomez also testified that he observed very few minority officers in those coveted positions. Ronald Casey testified that during the late 80s and early 90s, he observed very few minority officers in those positions. Representative Plaintiff Paige also testified that he had one of these coveted positions and he was removed from that position.

C. Defendants' Rebuttal Evidence

Defendants presented their own statistical analyses of the CHP's promotional practices through their expert witness, Dr. Michael Ward. The Court heard and considered Dr. Ward's qualifications and the analyses he conducted in this case and found Dr. Ward qualified to testify as an expert in the field of statistics and labor economics. Dr. Ward analyzed data from two time periods. First, he considered all promotions from eligibility lists in effect for any period of time between August 1, 1992 (commencement of liability period) and December 31, 1993 (immediately before lawsuit was filed), including promotions made from such lists before the beginning of the liability period and after the end of the liability period. Second, he considered promotions made from eligibility lists in effect between August 1, 1992 and December 31, 1993, *excluding* all promotions that were made after the lawsuit was filed. The second time period included promotions made after the filing of the EEOC complaint but before the filing of the lawsuit, which were excluded by Mr. Biddle (i.e. promotions from the eligibility lists for the 1993 lieutenant exam and the 1993 deputy chief exam). Dr. Ward testified that the amount of data from the ten examinations "touching on" the liability period was sufficient to perform the statistical tests.

Dr. Ward relied on four sources of information in performing his analysis: (1) the Civil Service history segment file, obtained from the State Controller's officer, which provided the information as to who was promoted at what time; (2)

the "current only" file, also obtained from the State Controller's office, which provides race and ethnic identifiers; (3) the certification list file from the State Personnel Board, which identifies who is eligible to be promoted off of each promotion list; and (4) another file from the State Personnel Board which shows who applies for each examination. Dr. Ward testified that he did not believe that Plaintiffs' expert used the same electronic data used in his analyses. Dr. Ward testified that he was able to reproduce Mr. Biddle's results and found errors in Mr. Biddle's analyses stemming from his use of different data.

The test used by Dr. Ward in conducting his analyses was the multiple events exact probability test (MEEP). This test uses a "multiple pools" approach which permits the results of one sergeant examination to be combined with another sergeant examination without assuming that all applicants for the first exam were also applicants for the second exam. In comparing his analysis to the single pool methodology used by Mr. Biddle, Dr. Ward testified that the single pool approach has now been rejected by statistical experts and replaced by the multiple events method. He testified that the single pool approach is not accurate because it treats applicants for each selection event as if they were applicants for all the selection events being analyzed.

Dr. Ward compared the minority officers who applied for promotion to the minority officers selected for promotion.[3] He did this for each minority group individually, as well as for all minority groups combined. However, Dr. Ward testified that if the criterion for aggregating the different minority groups into a single "non-white" group is that the pass rates and selection rates must be the same for each minority group, then the criterion is not met because the difference in the rates of promotion for members of each minority group were statistically

[3]Dr. Ward never compared the white rate of promotion to the nonwhite rate of promotion.

significant in all but three or four of his analyses. Dr. Ward also testified that if the criterion for aggregating different written exams was that the pass rates are approximately the same, then the criterion is not met because the difference in pass rates for the different written examinations was statistically significant. Dr. Ward agreed with Mr. Biddle that differences in outcomes are statistically significant above 1.96 standard deviations.

With regard to the second time period that he analyzed (which excluded all promotions made after the filing of the lawsuit), Dr. Ward testified that none of the individual examinations showed statistically significant shortfalls in promotions for any minority group, for all minority groups combined, or for all examinations combined. Dr. Ward did not testify about the standard deviations that he found for any of these analyses.

With respect to the first time period, which included promotions from any of the exams touching on the liability period, including promotions made before and after the liability period, Dr. Ward analyzed the data for Hispanics, African-Americans, Asians, American Indians, and all minority groups combined. Dr. Ward testified that any difference between the expected and actual rate of promotion of Hispanic officers was not statistically significant for the 1990 sergeant exam, the 1992 sergeant exam, the 1991 lieutenant exam, and the 1993 lieutenant exam. For the 1990 sergeant exam, he found that there 11.19 Hispanic officers were expected to be promoted by chance and that 7 were actually promoted. This produced a standard deviation of 1.31, which is not statistically significant. For the 1992 sergeant exam, he found that 13.34 Hispanics were expected to be promoted and 12 were actually promoted, a difference that he said was not significant, although he did not testify as to the standard deviation. For the 1991 lieutenant exam, he found that 3.13 Hispanic officers were expected to be promoted and four were actually promoted, which results in a positive (but not significant) standard deviation. For the 1993 lieutenant exam, 4.38 Hispanic

officers were expected and 7 were actually promoted, which is a positive (but not significant) standard deviation. He also provided the underlying data for some of these exams.[4] For the two captain examinations, two assistant chief examinations, and the two deputy chief examinations during the liability period, Dr. Ward testified that those exams were very close to being neutral for Hispanic officers. He also testified that for two or three of the exams, no Hispanics applied, so these exams were "noninformative." When Dr. Ward added up all the differences in the promotions of Hispanic officers in these promotional processes (including promotions made before and after the end of the liability period) using a multiple events exact probability, he found that 34.56 Hispanic officers were expected to be promoted and 33 were actually promoted, which produces a standard deviation of only .20.

Dr. Ward performed this same analysis for African-Americans as a group in each of these ten promotional processes. He testified that he did not find statistical significance in the difference between the rate at which African Americans apply and the rate at which they are promoted on any of the ten promotional processes individually. For the 1990 sergeant exam, he found a standard deviation of 1.07 between the number of African-American applicants and promotees (2.95 African-Americans were promoted out of an expected number of 6.95). He did not testify as to the standard deviation for the 1992 sergeant exam, but stated that there was a shortfall of 2.98 African-American officers, which was not a statistically significant difference. For the 1991 lieutenant exam, he testified that there was a standard deviation of .95 for African-Americans (corresponding to a shortfall of 1.47 officers). For the 1993 lieutenant

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[4]With respect to the 1990 sergeant exam, Dr. Ward testified that 508 whites and 67 Hispanics applied. Of these, 89 whites and 7 Hispanics were promoted. With respect to the 1992 sergeant exam, Dr. Ward testified that 414 whites and 74 Hispanics applied. Of these, 76 whites and 12 Hispanics were promoted. With respect to the 1991 lieutenant exam, 121 whites and 10 Hispanics applied. Of these, 76 whites and 12 Hispanics were promoted.

exam, he found a standard deviation of .22 (corresponding to a shortfall of .8 officers). With regard to the 1990 captain exam, he found that there were 1.81 more African-American officers promoted than expected, which produced a positive (but not significant) standard deviation. With regard to the 1992 captain exam, he found a shortfall of less than one person, which produced a standard deviation of .12. For the 1990 assistant chief exam, he testified that one African-American applied and that person was promoted. For the 1993 deputy exam, one African-American was selected and only .58 were selected, which produced a positive (but not significant) standard deviation. When Dr. Ward aggregated the ten promotional exams (including promotions made before and after the liability period), he found that the standard deviation for African-Americans was 1.41, which is not statistically significant.

Dr. Ward combined Asians, Pacific Islanders, and Filipinos into one "Asian" group, based on the EEOC definition of this race group. With respect to Asians, Dr. Ward testified that none of the ten promotional processes individually resulted in statistically significant deviations. He found a small shortfall of Asians on the sergeant exams, a small surplus on the lieutenant exams, and almost no deviation from chance on the two captains exams. Similarly, when he aggregated the ten exams (including promotions made before and after the liability period), he found that the difference between the number of Asians in the applicant pool and the number promoted was not statistically significant.

With regard to American Indian and "other" minority officers, Dr. Ward found no statistically significant difference in the number promoted on any of the ten exams individually or when all ten exams were aggregated (including promotions made before and after the liability period). He testified that this groups was "statistically uninteresting" because there were so few from the group who applied for supervisory positions. Only five members of this group applied for any supervisory position, and none were selected.

Dr. Ward also performed an analysis for each of the ten promotional processes combining all of the minority groups. Dr. Ward found for each exam that the difference between minorities applying for promotions and those being promoted was not statistically significant. With respect to the 1990 sergeant exam, he found a standard deviation of 1.92, which he testified is not statistically significant. He also provided the underlying data for this exam.[5] Dr. Ward did not testify about the standard deviation for the 1992 sergeant exam. He testified that the standard deviation for the 1991 lieutenant exam is zero. He further testified that the standard deviations for the 1990 captain, the 1992 captain, and the 1990 assistance chief exams were all positive, indicating that *more* minorities were promoted than expected by chance. With respect to the 1992 assistant chief exam and the 1991 deputy exam, Dr. Ward testified that no minorities were selected but this was not statistically significant. He indicated a standard deviation of zero for the 1992 assistant chief exam and did not testify about the standard deviation for the 1991 deputy exam. With respect to the 1993 deputy exam, Dr. Ward testified that one nonwhite applied and was promoted but that also was not statistically significant. Dr. Ward's conclusion was that no individual exam showed a disparate impact on nonwhites in promotions and that the aggregate of all ten exams also showed no disparate impact on nonwhites.

In addition to analyzing the rate at which nonwhites were promoted, Dr. Ward analyzed the rate at which members of various minority groups applied for supervisory positions. He testified that with regard to the 1990 sergeant exam, the number of African-American expected to apply was 27.5 but 41 actually applied. He found that this resulted in a *positive* standard deviation of 2.60, indicating that many more African-Americans applied than predicted by chance. With regard to

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[5]According to Dr. Ward, 508 whites and 127 nonwhites applied for promotion to sergeant in 1990. Of these, 89 whites and 13 nonwhites were promoted. In other words, nonwhites comprised 20% of the applicant pool but only 12.7% of those promoted.

the 1992 sergeant exam, Dr. Ward testified that the number of African-Americans expected to apply was 22.85, but 39 actually applied, which resulted in a *positive* standard deviation of 3.31, which again indicates that many more African-Americans applied than predicted by chance. Dr. Ward testified that for each of the ten exams except the exams for assistant chief and deputy chief, more African-Americans applied than expected. With respect to the exams for assistant chief and deputy chief, the expected number applied. As for the number of Hispanics who applied for promotion, Dr. Ward found that the number of applicants was slightly more than expected and was not statistically significant. With respect to Asians, Dr. Ward testified that significantly more Asians applied than expected, resulting in a *positive* standard deviation of 2.33. Based on these statistics, Dr. Ward concluded that there were no internal barriers to nonwhites applying for promotion within the CHP.

Defendants also attempt to rebut Plaintiff's case by identifying various problems with Mr. Biddle's data and analyses. Dr. Ward testified that Mr. Biddle's aggregation of data from before the liability period with data within the liability period does not provide useful information about what actually occurred during the liability period. Dr. Ward also criticized the underlying data upon which Mr. Biddle relied because, prior to 1992, the race data in the SPB reports had not been corrected and contained omissions. Furthermore, Dr. Ward testified that the data utilized by Mr. Biddle was inaccurate because it indicated a 100% pass rate on the 1990 sergeant written test and the 1991 lieutenant written test. With regard to the 1994 lieutenant exam, Dr. Ward testified that the data used by Mr. Biddle was incomplete because it did not include promotions made after Decembe 12, 1994.

When asked about "four-fifths rule" (i.e. "80 percent rule") violations, Dr. Ward testified that he did not test for any such violations in his analysis of the CHP promotions data. However, he noticed some such violations in reviewing the

CHP's bottom line hiring reports. Dr. Ward testified that he did not find these violations of statistical importance. On cross examination, based on his own data, Dr. Ward acknowledged that four-fifths rule violations existed for the 1990 sergeant exam (17.5% of white applicant were promoted, as compared to only 9.8% of African-American applicants), the 1992 sergeant exam (18.36% of white applicants were promoted, as compared to only 10.26% of African-American applicants), the 1991 lieutenant exam (zero African-Americans were promoted), and the 1992 assistant chief exam (zero African-Americans and zero Hispanics were promoted). Dr. Ward also acknowledged that there were no African-American or Asian applicants for the 1992 assistant chief exam and the 1991 deputy chief exam.

Defendants also presented evidence regarding the job-relatedness of the promotional processes in order to rebut the evidence presented by Plaintiff. Defendants offered Dr. William Donnoe as an expert witness in employment testing and test validation. The Court found Dr. Donnoe qualified as an expert in employment testing and test validation without objection from Plaintiffs. Dr. Donnoe testified about how a job analysis for a promotional process is performed. According to Dr. Donnoe, the organization conducting the job analysis first selects subject matter experts who identify the job tasks and the skill sets required for those tasks. After those lists are compiled, a second-group of subject matter experts (usually upper-level management) review the lists to make sure that all the key points have been covered. Once these lists are approved, rating scales are developed to determine how important a task is for the job or how frequently the task is performed. Based on a compilation of the ratings, the experts determine which tasks are most important and which tasks should or should not be tested. The experts then review and confirm that the knowledge, skills, and abilities required for the task have been firmly established and recommendations are made regarding the type of exam that should be given.

Dr. Donnoe performed the 1984 job analysis that sets forth the tasks required of each CHP supervisory rank except deputy chief and the knowledge, skills, and abilities required. The 1984 job analysis was used in developing all of the exams (except deputy chief) used in Mr. Biddle's and Dr. Ward's analyses. Dr. Donnoe testified that he reviewed the complete documentation for the 1992 sergeant test, including the job analysis and the actual test, and concluded that the test was job-related. Dr. Donnoe based his conclusion on the fact that the test was reviewed a couple times before it was administered. He also testified that there was a post-exam evaluation, and the test was scored in an appropriate manner. Defendants also introduced evidence regarding the 1990 sergeant's exam and 1993 lieutenant exam, including exam bulletins, job specifications and critical class requirements, internal examination planning documents explaining the process that was followed, oral interview questions and suggested responses, and examination booklets containing the actual tests.

Dr. Donnoe testified that he was unaware that the CHP Commissioner had recommended in 1991 that an updated validation study for the sergeant's classification be performed. The CHP Commissioner had indicated that a validation study would be conducted prior to the next sergeant's exam. Dr. Donnoe testified that the Commissioner's concern about the currentness of the 1984 job analysis did not affect his opinion that the 1992 sergeant's exam was job-related and content valid.

III. CONCLUSIONS OF LAW

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, prohibits discrimination by employers in their employment practice. The Act provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color . . . or national

origin." 42 U.S.C. §2000e-2(a)(1). In addition, Title VII makes it unlawful to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color . . . or national origin." 42 U.S.C. §2000e-2(a)(2). The purpose of the Act is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971). "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. Thus, disparate impact claims under Title VII challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

A. Whether Plaintiff Establishes a Prima Facie Case of Disparate Impact

In order to establish a prima facie case of disparate impact under Title VII, a plaintiff must show "a *significant* disparate impact on a protected class *caused* by a *specified, identified employment practice* or process." *Stout v. Potter*, 276 F.3d 1118, 1121-22 (9th Cir. 2002) (emphasis added). A prima facie case of disparate impact is "usually established by statistical evidence showing that 'an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants.'" *Stout*, 276 F.3d at 1122, *quoting Robinson v. Adams*, 847 F.2d 1315,1318 (9th Cir. 1988). The statistical evidence must be 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." *Watson v. Fort Worth Bank & Trust*, 487

U.S. 977, 994 (1988). While there is no rigid mathematical formula, the "statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Id.* at 994-95. The significance or substantiality of a practice is judged on a case by case basis. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990). Proof that a specific employment practice has a significant discriminatory impact must be by a preponderance of the evidence. *See Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1338 (9th Cir. 1987).

In evaluating the significance and substantiality of the data in the present case, the Court finds that it is proper to consider aggregated data from the various supervisory positions because the promotional processes are sufficiently similar and aggregation of data is more probative than subdivided data. *See Paige,* 291 F. 3d at 1148. The Court also finds that it is proper to consider data aggregated across different minority groups because the aggregated data is more probative. *Id.* at 1148-49; *see also Eldredge,* 833 F.2d at 1340, n. 8 (finding that, in general, "the plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies") (quoting D. Baldus and J. Cole, Statistical Proof of Discrimination, §7.0-7.2 (1980 & 1986 Supp.)). Moreover, in deciding whether the CHP's employment practices and processes had a disparate impact on nonwhites, the Court must compare the group that enters the process (e.g. the number of nonwhites who applied for promotions) with the group that emerges from the process (e.g. the number of nonwhites actually promoted). *See Paige v. California*, 291 F.3d 1141, 1145, 1147-48 (9th Cir. 2002).

While a plaintiff must show significant disparate impact during the liability period, data from the pre-liability period may constitute relevant background evidence. *See National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 118-19, 153 L. Ed. 2d 106, 122 S. Ct. 2061, 2072 (2002), *aff'g in part and*

rev'g in part Morgan v. AMTRAK, 232 F.3d 1008 (9th Cir. 2000) (holding that a plaintiff may not recover for pre-liability acts that are reasonably related to acts that occurred during the liability period and thereby invalidating the "continuing violation" doctrine applied previously by the Ninth Circuit); *Lyons v. England*, 307 F.3d 1092, 1110 (9th Cir. 2002) (holding that the plaintiffs' pre-limitations period claims were time-barred even though they flowed from a company-wide or systematic discriminatory practice).[6] In the present case, the Court finds that Plaintiff may supplement evidence of significant disparate impact during the liability period with statistical data from the pre-liability period since Defendants' employment practices remained similar over a period of time.[7] *See Paige v. California*, 2002 U.S. App. LEXIS 14463 (July 18, 2002) (amending the opinion of May 31, 2002);[8] *Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991) (allowing plaintiffs in a Title VII disparate impact case to aggregate results from multiple promotional exams because "courts have repeatedly looked at trends from past examinations to see if the total pass rates showed evidence of discrimination"); *Eldredge*, 833 F.2d at 1339 n. 7 (finding data in a Title VII

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[6]Both *Morgan* and *Lyons* left unanswered the question of whether a plaintiff would be precluded from bringing "a class-wide pattern-or-practice claim based on a series of discrete acts, including for example, separate incidents of an employer's failure-to-train and failure-to-promote the plaintiff because of his membership in a protected class." *Lyons*, 307 F. 3d at 1107 n.8; *see also Morgan*, 122 S. Ct. at 2073 n. 9 (noting that the Court "had no occasion [] to consider the timely filing question with respect to 'pattern -or-practice' claims brought by private litigants").

[7]It is also appropriate to consider pre-liability period data when the sample size of the data pertaining to the liability period is too small to be reliable. *See* 28 C.F.R. § 50.14 at § 4(d) (1977). However, Plaintiffs provided no evidence indicating that the size of the data touching on the liability period was too small to be probative. Moreover, Defendants' expert testified that the data touching on the liability period was sufficiently large to perform the statistical tests. Therefore, the Court finds that the sample size of the data pertaining to the liability period was large enough to be reliable.

[8]After amending its opinion in *Paige* to remove all reference to the continuing violation doctrine, the Ninth Circuit still found it appropriate to consider pre-liability data in this case. Thus, the Ninth Circuit's amended opinion in *Paige* is consistent with *Morgan* and *Lyons*.

disparate impact case "more complete and reliable" when aggregated over nine years than when shown year-by-year). The Court further finds that evidence of significant disparities during the liability period, coupled with evidence of significant disparities during the pre-liability period, may be used to demonstrate that the disparities are substantial enough to raise an inference of causation during the liability period. *Cf. Lyons*, 307 F.3d at 1110-11 (finding that in a case of disparate treatment, "appropriate background evidence will be evidence that, when combined with evidence of the employer's present conduct, 'gives rise to an inference of unlawful discrimination'").

Thus, the first issue the Court must examine is whether Plaintiffs present evidence showing statistically significant disparities between the number of nonwhites who applied for promotions and the number of nonwhites promoted during the liability period. As a preliminary matter, the Court finds that it was proper for Plaintiffs' expert to exclude data from the eligibility lists for the 1993 lieutenant exam and 1993 deputy chief exam since these exams resulted in promotions after the filing of the EEOC complaint and may well have reflected curative measures. *Cf. Gonzales v. Police Department, City of San Jose*, 901 F.2d 758, 761-62 (9th Cir. 1990) (finding post-liability period data demonstrating promotion practices occurring after the filing of the lawsuit irrelevant because "[c]urative measures simply do not tend to prove that a prior violation did not occur"). With respect to the aggregate of the eight remaining exams touching on the liability period, Plaintiffs' expert found a standard deviation of 2.18 using single pool analysis. Mr. Biddle did not testify as to the standard deviations he would find applying multiple pool analysis to these eight promotional processes.[9]

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[9]Nor did Plaintiff offer any evidence showing that the result would be statistically significant if a few more nonwhite officers had been promoted. *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273, n.4 (9th Cir. 1981) (finding that statistics are less trustworthy when minor numerical variations in the outcome of a given employment practice would produce

In many of Mr. Biddle's other analyses, the standard deviation produced by the multiple pools was lower than that produced by the single pool analysis. Yet Plaintiffs presented no evidence that the standard deviation for all exams touching on the liability period would have been significant (i.e. greater than 1.96) using multiple pools analysis. The Supreme Court has found that standard deviations "greater than two or three" render suspect a hypothesis that the disparity is due to chance. *See Castaneda v. Partida,* 430 U.S. 482, 496, 51 L .Ed. 2d 498, 97 S. Ct. 1272 (1977); *Hazelwood School District et al. v. United States,* 433 U.S. 299, 309, 312 n. 17, 53 L Ed. 2d 768, 97 S. Ct. 2735 (1977). In both *Castaneda* and Hazelwood, however, the racial discrepancies indicated standard deviations well-above two or three. *See Castaneda,* 430 U.S. at 497 (finding discrepancies of 12 and 29 standard deviations); *Hazelwood,* 433 U.S. at 309 (finding discrepancies of 5 and 6 standard deviations). In the present case, the standard deviation of 2.18 is very close to the threshold for significance, which both parties' experts agree is generally accepted as 1.96 standard deviations. Although standard deviations greater than 1.96 are technically significant, the Ninth Circuit has found that "[c]ourts should be 'extremely cautious' of drawing any inferences from standard deviations in the range of 1 to 3." *Gay v. Waiters' & Dairy Lunchmen's Union,* 694 F.2d 531, 551 (9th Cir. 1982). Therefore, although a disparity of 2.18 standard deviations is considered statistically significant, the Court finds that it is not sufficiently substantial to infer causation. *Cf. Waisome v. Port Authority of New York and New Jersey,* 948 F.2d 1370 (2nd Cir. 1991) (upholding the district court's decision that a disparity of 2.68 standard deviations in the rates at which black and white candidates passed a written examination was not sufficiently substantial to

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significant percentage fluctuations).

show disparate impact, although it was statistically significant).[10]

Moreover, the Court does not find any evidence in the record providing the underlying data or the calculations that support Mr. Biddle's conclusion of 2.18 standard deviations. Even after the Court issued a supplemental request specifically requesting that Plaintiffs reference evidence in the record pertaining to the underlying data that permitted Mr. Biddle to reach this conclusion, Plaintiffs failed to reference any such data in the voluminous record. Without the supporting data, the Court finds that Plaintiffs' statistical evidence is unreliable and gives little weight to Mr. Biddle's testimony regarding his conclusion that the promotions had a disparate impact on nonwhites during the liability period. *See Contreras*, 656 F.2d at 1272 (finding that the court's use of statistical evidence "is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn") (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 92 S. Ct. 447, 30 L. Ed. 2d 367 (1971)). The Court therefore finds that Plaintiffs have failed to make

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[10]In cases where other Circuits have found disparate impact based on statistical evidence, the evidence generally indicated standard deviations much greater than three. *See, e.g., Emmanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990) (finding that the army's use of performance awards had a disparate impact on blacks where there was a standard deviation of 4.9 between the number of blacks expected to received awards and the number of blacks who actually received them); *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999) (finding 5.44 standard deviations sufficient to establish a prima facie case for disparate impact); *Anderson v. Douglas & Lomason*, 26 F.3d 1277 (5th Cir. 1994) (finding it "abundantly clear" that plaintiff had made a prima facie case for disparate impact where standard deviations were greater than 8); *Hameed v. International Assn of Bridge*, 637 F.2d 506 (8th Cir. 1980) (finding a prima facie case of disparate impact where the difference between the number of blacks expected to be admitted to the program and the number actually admitted was 5.5 standard deviations); *cf. Waisome v. Port Authority of N.Y. & N.J.*, 948 F.2d 1370 (2nd Cir. 1991) (upholding the district court's finding that a standard deviation of 2.68 between the rate at which black and white officers passed the written exam for promotion to sergeant was not a sufficiently substantial disparity to make a prima facie case of disparate impact); *but cf. Anderson v. Zubieta*, 180 F.3d 329, 339-40 (D.C. Cir. 1999) (finding that disparities ranging from 2.46 to 4.6. standard deviations were sufficient to establish a prima facie case of disparate treatment or disparate impact).

a prima facie case for disparate impact based on the aggregate of all exams in the liability period.

Plaintiffs' expert also performed various analyses specific to the written exams for sergeant and lieutenant that resulted in promotions during the liability period. As set forth above in the findings of fact, Mr. Biddle found standard deviations between two and three for the 1990 and 1992 sergeant written exams individually. He found standard deviations greater than three for these two written exams combined, as well as for the 1990 sergeant, 1992 sergeant and 1991 lieutenant written exams combined. Plaintiff properly supplemented this evidence with data from the pre-liability period. Plaintiff's expert found standard deviations greater than three or four for the 1988, 1990, 1992, and 1994 sergeants written tests combined.[11] He also found standard deviations greater than three or four for all sergeants and lieutenants exams that resulted in promotions between 1988 and 1994. For the same tests in the period 1989 through 1994, he found standard deviations greater than two or three. While these standard deviations may suggest significant disparities during the liability period caused by the written exams for sergeant and lieutenant, the Court gives them little weight since Plaintiffs failed to provide any of the underlying data or calculations that support these statistical results. The Court therefore finds that Plaintiffs have failed to state a prima facie case of disparate impact with respect to the written exams for sergeant and lieutenant.

With regard to the exams for captain, assistant chief and deputy chief touching on the liability period, Plaintiffs' expert did not testify about the disparity between the performance of whites and nonwhites on these tests, either

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[11]To the extent that the 1994 data includes promotions after the liability period, the Court finds that any "curative" measures reflected in the data would only decrease the level of significance and therefore do not render the data less probative of disparate impact during the liability period.

individually or combined. In other words, the analyses that include the data regarding promotions for captain, assistant chief and deputy chief also include data regarding promotions for sergeant and/or lieutenant. For the reasons stated above, Plaintiffs have failed to show disparate impact for all eight exams combined. Plaintiffs have not provided any evidence indicating that a different conclusion would be reached if the promotions for captain, assistant chief, and deputy chief exams were considered separately from the promotions for sergeant and lieutenant.

The violations of the EEOC "four-fifths rule" identified by Plaintiffs are not sufficient to establish a prima facie case for disparate impact. This rule is merely a "rule of thumb," not a substitute for showing significant statistical disparities from which causation may be inferred. *See Clady v. County of Los Angeles,* 770 F.2d 1421, 1428 (9th Cir. 1985). Moreover, the four-fifths rule has been "sharply criticized by courts and commentators. *Id.*

With regard to the disparity between the number of nonwhites placed on the eligibility list for a supervisory position and the number of nonwhites actually promoted, the Court finds that Plaintiffs again failed to provide the underlying data supporting Mr. Biddle's conclusions. Furthermore, even if the Court had the underlying data to support these conclusions, the Court finds that a standard deviation of 2.05 (using the multiple pool approach) or 2.29 (using the single pool approach) is not substantial enough to infer causation. *See Gay,* 694 F.2d at 551.

Plaintiffs also failed to present statistical evidence indicating internal barriers for nonwhites in applying for supervisory positions. The court finds that the anecdotal evidence presented by Plaintiffs is not substantial enough to find disparate impact with respect to this employment practice, especially in light of the statistical evidence presented by Defendants that frequently indicated more minorities applying for supervisory positions than expected by chance.

The Court further finds that the anecdotal evidence presented by Plaintiffs

with regard to assignments is not substantial enough to show disparate impact. The nonwhite witnesses who testified, including Plaintiffs' own witness, stated that they were *not* subject to any discrimination in assignments, and that they received the "coveted" assignments they sought. Plaintiffs presented no statistical evidence to show discrimination in assignments. Therefore, the Court finds that Plaintiffs have failed to establish a prima facie case of disparate impact with respect to any of the employment practices challenged in this case.

B. Rebuttal of Plaintiffs' Prima Facie Case

If a reviewing court were to disagree with this Court's decision that Plaintiffs fail to state a prima facie case of disparate impact, the Court would need to reach the issue of whether Defendants have rebutted Plaintiffs' prima facie showing. Once the burden shifts to Defendants, they must (1) either discredit plaintiff's statistics or proffer statistics of their own showing that no disparity exists; or (2) produce evidence that the challenged practice is job-related for the position in question and consistent with business necessity. *See Rose,* 902 F.2d at 1424 (9th Cir. 1990).

First, Defendants attempt to discredit Plaintiffs' statistical evidence by presenting evidence that the data used by Mr. Biddle indicated a 100% pass rate for the 1991 lieutenant test and the 1990 sergeant test. The Court finds that the SPB data included in Exhibit 281A does indicate a 100% pass rate on these tests and therefore raises serious questions about the reliability of the data in this Exhibit. However, Mr. Biddle's testimony that the standard deviations on the sergeant written tests for 1990, 1992, and 1994 combined were greater than three or four suggests that he was not using data showing pass rates of 100% for two of these written tests. Without the underlying data used by Plaintiff, the Court cannot properly address any of Defendants' specific challenges to this data. With respect to Defendants' argument that Mr. Biddle used incomplete data for his analysis of the 1994 sergeant exam, the Court has already indicated that it was

appropriate for Mr. Biddle to exclude promotions made after the filing of the EEOC complaint.

Defendants also attempt to rebut Plaintiffs' evidence by presenting their own statistical evidence. The court gives little weight to Dr. Ward's conclusion that there were no statistically significant disparities for all minorities combined during the second time period (which excluded promotions made after the filing of the lawsuit) because he did not provide the underlying data or the standard deviations that support this conclusion. Furthermore, the second time period analyzed by Dr. Ward included promotions made after the filing of the EEOC complaint, which the Court finds inappropriate. With regard to his analysis of the individual exams, Dr. Ward only provided the underlying data supporting his conclusion of no disparate impact on nonwhites for the 1990 sergeant exam. In response to the Court's response for supplemental information, Defendants failed to reference any exhibits or testimony providing the underlying data for the second time period analyzed by Dr. Ward. The Court therefore finds Dr. Ward's statistical conclusions unreliable for the same reason that it finds Mr. Biddle's conclusions unreliable.[12]

The Court is also concerned that Dr. Ward indicated that he did not test for any 80% violations in his statistical analyses although he noticed some such violations. Although "four-fifths rule" violations do not demonstrate statistically significant disparities, they nevertheless challenge Defendants' position that there was no discrimination during the liability period. During cross-examination, Dr. Ward acknowledged "four-fifths rule" violations on several of the exams touching on the liability period. Thus, the Court finds that Defendants' statistical evidence fails to rebut Plaintiffs' evidence.

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[12]While Dr. Ward did provide underlying data for several of his analyses involving discrete racial groups, such as Hispanics and African-Americans, the Court has already determined that it is more probative to aggregate the minority groups in this case.

Next the Court considers whether, if the evidence supports a prima facie case, Defendants rebut the prima facie case by showing that the promotional processes during the liability period were job related and consistent with business necessity. In determining if a selection procedure is "job-related," the Court follows a three-step process: (1) the employer must specify the trait or characteristic that the selection device is being used to measure; (2) the employer must show that the trait or characteristic is an important element of work behavior; and (3) the employer must demonstrate by "professionally acceptable methods" that the selection device is "predictive or significantly correlated" with the element of work behavior identified in the second step. *See Assoc. of Mexican-American Educators v. State of California*, 231 F.3d 572, 585 (9th Cir. 2000). In response to the presentation of evidence of job relatedness and business necessity, a plaintiff has the opportunity to indicate alternatives that would have a less discriminatory effect (or no effect at all) and still serve the defendant's legitimate interests in "efficient and trustworthy workmanship." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

The Court finds that Dr. Donnoe's testimony did not sufficiently demonstrate that each of the challenged promotional processes during the liability period were job related and consistent with business necessity. Although Dr. Donnoe testified that he reviewed materials that enabled him to reach his conclusion that the 1992 sergeant exam was job-related, he was not aware that, before the 1992 exam was given, the Commissioner of the CHP had ordered a new job analysis for the sergeant exam. The Commissioner had further ordered that the sergeant exam be more job-related. Since Dr. Donnoe failed to account for the Commissioner's intention to update the job analysis for the 1992 sergeant exam and to change the exam itself, the Court gives his testimony little weight. Moreover, the Court finds that it is not clear from Dr. Donnoe's testimony that the 1984 job analysis supported the type of exam (weighted multiple choice and

written test) which was given for the 1992 sergeant exam.

With respect to the 1990 and 1993 sergeant exams, Defendants indicate in their Proposed Findings of Fact and Conclusions of Law that certain exhibits entered into evidence, when considered together, demonstrate that these exams are job-related. This evidence describes the format of the exams; the instructions given to those who designed the exams; the steps taken to develop the exams; the scoring of the exams; the general subject areas covered by the exams; the link between each question on the 1993 sergeant's exam and the knowledge, skills and/or abilities the question was intended to test; the level of difficulty of the questions; post-exam evaluations; the final results of the exams; and the eligibility lists. While this evidence identifies the specific information and/or skills that the exams were used to measure, the Court finds that the evidence does not show that the information and/or skills tested are an important element of work behavior or that the exams are "predictive or significantly correlated" with an element of work behavior. In other words, Defendants have failed to establish that the exams are related to an applicant's performance as a CHP officer. Moreover, to the extent that Defendants rely upon a 1984 job analysis to support their contention that these exams were job related, the Court finds that the 1984 job analysis fails to demonstrate that exams administered in 1990-1993 were job related and consistent with business necessity at the time that they were administered. The Court therefore finds that, if Plaintiffs' evidence supports a prima facie case, Defendants have failed to rebut a prima facie case of disparate impact based on job-related promotional processes consistent with business necessity.

CONCLUSION

Since Plaintiffs fail to establish a prima facie case of disparate impact with respect to the class and Plaintiff Paige, the Court finds in favor of Defendants on the disparate impact claims. Assuming, however, that Plaintiffs did establish a

prima facie case, the Court finds that Defendants failed to rebut a showing a of disparate impact.

IT IS SO ORDERED.

DATE: November 1, 2004

CONSUELO B. MARSHALL

United States District Court

SCANNED