United States District Court, N.D. California.
Leslie FRANK, et al., Plaintiffs,
v.
UNITED AIRLINES, INC., Defendant.
No. C-92-0692.

FEB 26, 1997.

ORDER ON DEFENDANT'S MOTIONS

LEGGE, District Judge.

***1** Four motions by defendant are presently before the court for decision. They are defendant's motions: for summary judgment on plaintiffs' class-wide disparate treatment claims; to decertify those class claims; for summary judgment on plaintiffs' age discrimination claims; and for summary judgment on the age discrimination claims of certain opt-in plaintiffs.

I.

There have been extensive prior motions and orders. A brief review of some is necessary in order to define the claims of plaintiffs that are now pending and the scope of the evidentiary record.

Pursuant to stipulation, an order for class certification was entered on April 29, 1994. As a result of numerous motions, this court issued an order on August 16, 1995 ruling on certain issues and defining the issues remaining for trial. This court will not here restate its reasons for the decisions made in that order, but will simply note what those decisions were, because they are necessary to define the present status of this case. The order noted that this case alleges four types of discrimination with respect to defendant's weight program for its flight attendants: [FN1] gender, age, handicap-disability, and race. The court concluded that plaintiffs' gender discrimination claims were barred by res judicata, except for their claims that defendant's weight program has been applied in a discriminatory manner. The court stated that this "as applied" claim must be analyzed under the principles of disparate treatment. The court held that plaintiffs' age discrimination claims were not barred by res judicata. This court then defined plaintiffs' remaining claims as follows (order, pg. 14 lines 15-22):

> FN1. Defendant terminated the weight program in July 1994. It also suspended application of the program from October 1992 to late 1992 or early 1993.

> (1) Gender discrimination insofar as plaintiffs allege that defendant's weight program is applied in a discriminatory manner. The court believes that this must be analyzed under disparate treatment theory. (2) Age and race discrimination, under both disparate impact and disparate treatment analyses. (3) Handicap-disability discrimination under the elements of the [ADA] statute.

That order also made certain procedural decisions and set a further schedule for pretrial proceedings and for trial. On February 6, 1996 this court issued a further procedural order bifurcating and setting trials on the remaining issues. The order also set the first trial for October 1996, and scheduled other pretrial procedures.

The February 1996 order was, however, followed by serious discovery disputes. For purposes of the present motions, the court need only note that a March 1, 1996 order compelled plaintiffs to respond further to defendant's interrogatories and depositions. When plaintiffs did not comply with that order, this court issued an order on May 31, 1996. The court there ordered, in summary, that unnamed class members whose identity had not previously been disclosed to defendant in discovery could not provide testimony at trial, and no evidence of events which occurred to them could be presented at trial.

***2** Defendant then made the motions which are now before the court. Pending resolution of those motions, this court vacated the trial and pretrial dates. [FN2]

> FN2. That vacation was because of these motions, but also because of the court's crowded trial docket of criminal cases and civil cases with a higher priority.

As a result of those prior proceedings, plaintiffs have the following claims remaining:

1. Gender discrimination "as applied," to be analyzed under a disparate treatment theory. This is a class claim.[FN3]

> FN3. The class claims are subject to the evidentiary limitations stated in the order of May 31, 1996.

2. Age discrimination, under both disparate impact and disparate treatment analyses. This is also a class claim.[FN4]

> FN4. Also subject to the evidentiary limitations stated in the order of May 31, 1996.

3. Race discrimination, under both disparate impact and disparate treatment analyses, which is not a class claim.

4. Handicap-disability discrimination, under the ADA and the California FEHA, [FN5] also not a class claim.

> FN5. This court's order of August 16, 1995, omitted reference to the California FEHA.

II.

In the four motions presently before the court, defendant first seeks summary judgment on the class gender and class age discrimination claims. Defendant contends that plaintiffs do not have sufficient evidence of class wide discrimination in the application of defendant's weight program. This motion must meet the standard of Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Second, defendant argues that if there are genuine issues of material fact to preclude such a summary judgment, the class should be decertified. The contention is that the evidence has demonstrated that plaintiffs' claims require individualized case-by-case assessments, primarily on why weight exceptions were or were not granted for each female flight attendant who applied for one. This motion requires a Rule 23 analysis. Third, further as to the age discrimination claims, defendant moves for summary judgment on the grounds that: plaintiffs have no evidence to support their disparate treatment age claims,[FN6] and their disparate impact age claims cannot proceed because of recent case law.[FN7] And fourth, defendant moves for summary judgment on the age discrimination claims of certain opt-in plaintiffs who allegedly suffered no wage losses. This motion is based on the arguments that plaintiffs who were not terminated or removed cannot recover damages, and that there is no claim remaining for declaratory or injunctive relief because defendant has terminated its weight program. The issues in this fourth motion are ones of law.

> FN6. This ground must meet the standards of FRCP and *Celotex.*

> FN7. This ground presents an issue of law.

Extensive briefs and factual records were submitted in support of and in opposition to the motions. The motions were argued over a period of several days, and were submitted for decision. This court has reviewed the very extensive fact records, the moving and opposing briefs, the arguments of counsel, and the applicable authorities.

III.

As stated, this court has previously concluded that the analysis of defendant's weight program for alleged gender discrimination must be an "as applied" analysis. That analysis must be under a disparate treatment theory, which requires a showing of intentional discrimination. Insofar as the age discrimination and race discrimination claims also involve disparate treatment analysis, there must be the same showing of intentional discrimination. In this case, the "as applied" claims have now come down to a question of the grant or denial of weight exceptions to female flight attendants. Plaintiffs now define their "as applied" class discrimination claims as follows (plaintiffs' opposition to defendant's motions, dated July 17, 1996, pages 1 and 7):

> ***3** Plaintiffs sex and age discrimination claims focus on defendant's liability for a pattern and practice of discrimination in the standards and criteria [defendant's] flight surgeons used in evaluating flight attendants for 'weight exceptions.' 'Weight exceptions' or 'medical exceptions' as they were sometimes called, increase the standardized weight

> maximum imposed on all flight attendants .... [D]iscrimination issues[] are raised by preferential treatment of men in the amount and duration of weight exceptions and in the standards used for defining 'medical conditions' which justified weight exceptions.

The parties agree that this is an alleged "pattern and practice" of discrimination against the plaintiff class members on the basis of sex or age. The standard for evaluating such a pattern and practice claim was defined by the United States Supreme Court in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1976). The Court said that in order to prevail in a pattern and practice case, plaintiffs must prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts; *Id.* at 336. Plaintiffs must instead establish by a preponderance of the evidence that discrimination was the company's standard operating procedure --- the regular rather than the unusual practice; *Id.* In order to establish such a prima facie case, plaintiffs must usually rely on a combination of statistical and anecdotal proof. In the presentation of statistical evidence, the disparities must be significant enough to create a "greater likelihood" that any single exception decision was a component of an overall pattern of discrimination; *Id.* at 339-340, n. 20, and 359 n. 45.

Defendant claims that plaintiffs' evidence is insufficient to establish a prima facie case of such pattern and practice discrimination, or at least that the evidence is so individualized that such claims cannot be class claims. This court therefore turns to an analysis of the evidence which plaintiffs have offered.[FN8]

> FN8. A considerable quantity of this evidence, and the parties' discussion of it, was submitted by plaintiffs during the oral arguments on these motions and not in plaintiffs' pre-argument briefs.

1. Statistical evidence.

Plaintiffs submitted statistical evidence prepared by Dr. Richard Drogin, and defendant submitted the statistical report of Dr. Sandy Zabell. Ordinarily, differences between the conclusions of opposing experts would be a subject for trial. However, in this case, plaintiffs' statistical evidence does not satisfy plaintiffs' burden of establishing a prima facie case.

Dr. Drogin's key findings about weight exceptions were, first of all, not based upon a foundation of information which he prepared or even assembled. Rather, they were based upon information compiled and provided to Dr. Drogin by plaintiffs' counsel. The only foundational information which Dr. Drogin reviewed concerned the rate at which flight attendants were "put on weight report." The consequence of being "put on weight report" was not explained to this court. But the court concludes from the little information that is available that the reports were interim listings that in themselves resulted in no discipline to a flight attendant. Even if this conclusion were incorrect, those reports are insufficient to form the foundation for the findings that are relevant to plaintiffs' claims.

***4** Dr. Drogin's statistics regarding weight exceptions only compared the number of male flight attendants receiving exceptions with all male flight attendants, and the number of female flight attendants receiving weight exceptions with all female flight attendants. But those comparisons do not make the key analysis that is important here: that is, whether there was a difference between males and females in the number of exceptions that were *granted* compared with the number *requested.*

Dr. Drogin's statistical analysis also shows that male flight attendants received a larger number of permanent weight exceptions, while female flight attendants received a larger number of temporary weight exceptions. Again however, those numbers do not show the number of such exceptions *granted* compared with the number *requested.*

A statistically proper comparison should be based upon the number of *requests,* since the requests are the bases for defendant taking or denying some action. Plaintiffs do attempt to discuss "requests" in paragraph 13 of Dr. Drogin's report. However, that discusses only the number of men and women, and not the number of *requests.*

Plaintiffs contended at oral argument that because women got more temporary exceptions, they had to apply more frequently and therefore more requests were granted to women. That argument makes an improper leap from the fact that women got more temporary exceptions, to the conclusion that women

had to apply or *could only* apply for temporary exemptions --- which is not supported by any evidence.

On the other hand, Dr. Zabell's report did focus on the number of weight exceptions *granted* compared with the exceptions *requested.* And it was based on data derived from 1,270 flight attendant medical files, with a summary of that data filed with the court. Dr. Zabell concluded that the rate at which female flight attendants were granted weight exceptions exceeded the rate at which male flight attendants were granted weight exceptions --- 89.91% for females and 85.71% for males. As to the permanent weight exceptions requested and granted, Dr. Zabell concluded 88.22% were granted to females and 11.78% were granted to males.[FN9] On the issue of age discrimination, Dr. Zabell's report focused on those over and under the age of forty. She found that 91.23% of the requests for weight exceptions by attendants under 40 were granted, and 89.14% of the requests by flight attendants over forty were granted. She also found that as to the permanent weight exceptions which were granted, 78.24% were to flight attendants over forty and 21.76% were to flight attendants under forty.

> FN9. However, this did not compare grants with requests.

These statistics are devastating to plaintiffs' claims. They show a higher, or at least statistically comparable, percentage of female weight exceptions granted, compared with the percentage of male exceptions. And on the issue of age discrimination, they show an essentially similar rate of granting weight exceptions for those attendants over forty and under forty. As to permanent versus temporary exceptions, overwhelming percentages were granted to women and to persons over forty (although this data did not compare grants with requests). There is, at the very least, an absence of statistical evidence showing any discriminatory pattern and practice. Taken as a whole, the statistics show at least neutrally-enforced policies. As to age, the enforcement has either resulted in a higher number of flight attendants over forty in defendant's flight attendant workforce, or at least has not discriminated against persons over forty.

***5** Plaintiffs of course make certain attacks on Dr. Zabell's report. However, those attacks do not undercut the validity of her statistical conclusions. The key question is whether there is a statistically significant disparity between the granting of weight exceptions to men versus women, and to persons over forty versus persons under forty. Dr. Zabell's statistics make the valid comparisons, and the resulting conclusion is an absence of discrimination, by a standard of no genuine issues under FRCP 56.

2. Flight attendants' medical files.

Plaintiffs make arguments based upon information derived from the medical files, which were produced by defendant to plaintiffs, of each flight attendant who applied for a weight exception. Plaintiffs stated their intention to use a *summary* of the files at trial, under Rule 1006 of the Federal Rules of Evidence.[FN10] Defendant argues that the files are not a proper subject for summary evidence under Rule 1006, but that there must be scrutiny of each individual file. Defendant also argues that individualized use of the files would violate this court's order of May 31, 1996. Defendant is correct, at least in part.

> FN10. Plaintiffs also make reference to twenty-two of the medical files in opposing these motions.

Some information from the files could perhaps be used in a statistically appropriate manner, ignoring for the moment the question of whether the information in each file has to be admissible evidence. But in any event, plaintiffs' statistician did not use those files in these pending motions. Instead, all we have are arguments regarding them by plaintiffs' counsel. And plaintiffs' arguments undercut their assertion that these claims can be handled on a class-wide basis. The information plaintiffs want to use would have to be extracted from each file in order to identify the relevant variables for each attendant. Based upon plaintiffs' arguments, there are numerous variables which would have to come from each medical file: Did the applicant ask for a temporary or a permanent exception? Was the grant of an exception temporary or permanent? How much overweight was each flight attendant? Were body fat percentages used in the calculations? If medication was a reason for the overweight problem, was that temporary medication or permanent medication such as hormones following menopause? What discipline was imposed, if any, for failure to comply with the weight requirements? What standards and criteria were used by each flight

surgeon in each case? What use was made of body build? Was the effect of eating disorders considered? How much of an exception was granted? Were there other reasons for weight problems, or a history of weight problems? Were there other factors in which weight was otherwise beyond the applicant's control?

A mere listing of these considerations raised by plaintiffs compels the conclusion that if the medical file of each flight attendant has to be analyzed, then the claims are individual and not class claims. And in these summary judgment motions, plaintiffs' use of the medical files, which plaintiffs say is for statistical summary purposes, has not in fact been used for that purpose. The individual files do not themselves create any inference of class wide gender or age discrimination. If instead the individual files are to be used by plaintiffs for the cases of individual flight attendants, such use violates this court's order of May 31, 1996. That order directed that at trial there could be "no evidence of events which occurred to specific unnamed class members."

3. The Denenberg arbitration decision.

***6** Plaintiffs cite to a 1988 decision by referee Denenberg in an arbitration between the Association of Flight Attendants and defendant. The issue in that arbitration was whether defendant had improperly administered the medical exceptions to the weight program. Ms. Denenberg concluded that defendant had improperly administered the medical exceptions.

To understand the significance of that decision to the present case, some history has to be recited. Ms. Denenberg's decision was in turn based upon a December 1971 arbitration decision which had created a procedure for processing applications for exceptions to the weight standards. Flight attendants could at that time apply for exceptions on the basis of medical problems beyond his or her control. (For example, body build, medication, or medical recuperation). And there could be exceptions to the weight standards for medical problems which rendered it impossible for a flight attendant to maintain his or her weight below the established maximums. The reason for those provisions was apparently that defendant's weight program had not previously had exceptions for medical reasons. The reasonableness of defendant's weight program was upheld in 1971, with the additions of such exceptions. That is the weight plan which was ruled upon by Judge Pratt in 1979, and was previously discussed in this court's order of August 1995. Judge Pratt's decision resulted in modifications, and as so modified that weight program has been in existence since 1980.

In 1984, Dr. Gary Kohn became the medical director of defendant's flight employees. In 1986 Dr. Kohn issued a number of memoranda attempting to clarify the procedures and standards for weight exceptions. The flight attendants' union took exception to these memos, and that lead to arbitrator Denenberg's decision in 1988.

Arbitrator Denenberg found that although Dr. Kohn's desire for uniformity and scientific precision was understandable, the protocols defined in his memoranda nevertheless represented more stringent standards than those defined in the weight program itself. According to Ms. Denenberg, the appropriate standard was the granting of an exception upon a showing of "good cause." "Good cause" included "a medical problem which is beyond the employee's control." The arbitrator explained that an exception would be in order whenever a medical condition "significantly affected" an employee's weight.

What is the significance of that to the present motions? Plaintiffs argue that despite the Denenberg decision, defendant's numerous flight surgeons (who are the persons responsible for granting or denying the weight exception requests) were instructed and did grant weight exceptions only if weight loss was "impossible." Plaintiffs cite to a memorandum from Dr. Kohn which does use "impossible" and "beyond control" language. His reference to an '% 7Fimpossibility" standard was not consistent with the arbitrator's decision. That memo could raise an inference of discrimination. The "impossibility" language, although incorrect, could be read standing above to be gender neutral. But Dr. Kohn then used an example of post-menopausal women who control their weight with hormone therapy.[FN11] Is that enough evidence of gender discrimination?

> FN11. The record of these motions establishes that most women who applied for exceptions based on hormone therapy received exceptions.

***7** The flight surgeons responsible for granting or

denying exceptions have submitted declarations in which each states that, in evaluating the exception requests, each applied the standards established by the Denenberg decision. Therefore, defendant argues that even if the memorandum from Dr. Kohn is incorrect, the flight surgeons did not mechanically apply an incorrect "impossibility" standard, but rather followed the correct Denenberg standards.

Plaintiffs attempt to counter this evidence by reference to some of the medical files. However, those examples merely show individualized decisions which, right or wrong, were based upon the circumstances of each applicant. They do not show a uniform use of an "impossibility" standard.[FN12] Because of the individualized considerations in each case, it is impossible to draw any class wide conclusions. It is clear however that "impossibility" has not been *the* pattern and practice standard applied by the flight surgeons. Plaintiffs have not demonstrated, even from the medical files, evidence of gender or age discrimination sufficient to establish intentional disparate treatment.

> FN12. Certain of plaintiffs' arguments about the standards used by the flight surgeons are founded only on their general citations to the "Lopez Declaration" for factual support. However, their citation is only to the declaration, and not to any pages or sections. The declaration is approximately four inches thick and includes records of hundreds of weight exceptions given over a period of years.

Are there nevertheless examples of gender or age discrimination in the granting or denial of exceptions which could apply on a class wide basis? The record cited to the court mentions few, if any, comparisons of how men and women with similar types of requests were granted or denied. Dr. Kohn states in his declaration that the flight surgeons who were asked for weight exceptions were required to consider the requests on a case-by-case basis, applying their best medical and clinical judgment to each individual case. They were also expected to use their best individual judgment in determining which, if any, tests and examinations to conduct and how to use and evaluate information from a flight attendant's treating physician.

Class wide, intentional disparate treatment simply does not appear from plaintiffs' record.

4. Other documents of defendant.

Plaintiffs cite the court to other memoranda prepared by personnel of defendant allegedly showing a pattern and practice of discrimination. The court has reviewed each of the memos:

A. A 1986 memorandum from Dr. Kohn. However, this predated the 1988 Denenberg decision and is not relevant to the standards applied by defendant after that decision.

B. A February 8, 1988 letter from the senior labor relations representative of defendant to a representative of the union. This was an attempt to agree upon a standard form of letter to be sent to a neutral doctor serving in a weight exception dispute. Arbitrator Denenberg later adopted the union's requested version of the letter rather than defendant's. But all of that was a good faith attempt to draft a standard letter under the supervision of the arbitrator.

C. An undated memorandum from Judith Hart, in United's Industrial Relations Department, to defendant's flight surgeons. This memorandum discusses possible application of the medical exceptions. There is no indication whether it was before or after the Denenberg decision, but it is apparently an attempt to comply with the "beyond the control" and "significantly effect" standards. It appears to be gender neutral, and its one reference to age does not show discrimination.

***8** D. A July 3, 1989 memorandum to flight surgeons from Dr. Kohn. The major thrust of this memorandum is an attempt for consistency in how the program might be administered.

E. A 1990 memorandum from one flight surgeon to others. The pages to which plaintiffs cite pertain to body fat percentages. This was expressly a draft for consideration among the flight surgeons, and was not adopted.

Plaintiffs have argued extensively about body fat percentages. In a memorandum to the flight surgeons Dr. Kohn discussed body fat percentages of 19% for

men and 25% for women as being comparable. Plaintiffs argue that the 25% for women is more stringent than the 19% for men, that it changes with age, and that their experts will offer different standards based upon present information from national studies. That appears to be another facial challenge to the weight program. But even if is "as applied," that argument does not indicate intentional discrimination. Dr. Kohn explained the method for selection of those percentages in paragraphs 15 and 16 of his declaration. They were based upon the medical literature available at the time. And there is no evidence that those standards, if they were standards, were adopted or applied for any discriminatory purpose. Body fat tests were one part of all of the criteria which the flight surgeons could apply, in their medical judgment, on an individualized basis. The record does not disclose any practice of requiring hydrostatic testing, or any per se application of the percentages. The record also indicates that even under plaintiffs' theory, there was no class-wide effect, because only two women who had hydrostatic fat tests were denied medical exceptions, and both were substantially over the 25% body fat level. Even the suggested testimony by plaintiffs' experts regarding twenty-five per cent being more stringent for women would not, on the record before the court, establish any intentional discrimination either by gender or by age.

F. A group of memoranda, primarily in the early 1980's before the Denenberg decision, regarding "body building" or "body build;" and the deposition testimony of Ms. Hart on this issue. However, Ms. Hart's deposition did not disclose any company policy on those issues. And Dr. Kohn's declaration disclaims any such policy. Under the Denenberg decision, defendant was required to consider "body build," and both men and women were granted such exceptions.

G. A January 25, 1993 memorandum from Dr. Kohn to the flight surgeons. This represented another effort at consistency in the administration of the weight program. The flight surgeons' declarations establish that their methods for decision making were not changed by this memo. They continued to evaluate weight exceptions requests based on individual medical judgment.

H. A November 15, 1993 regulation of United, ¶ H(6). The regulation is ambiguous at best. It discusses age as a factor but does not lead the reader to any conclusion as to how that factor is applied. And the record does not show any intent by defendant to reduce the number of its older workers.

IV.

***9** In reviewing the record of the evidence in these motions, the court finds and concludes that plaintiffs have not presented sufficient statistical or anecdotal evidence to satisfy their initial burden under *Teamsters.*

As ruled previously, defendant's weight program is facially valid and the only remaining gender challenge is "as applied." Evidence of some individuality in the granting of exceptions is not enough to show class-wide discriminatory treatment. It was necessary for defendant to apply the weight program to a very large employee population, spread over numerous venues, and applied by numerous flight surgeons. Uniformity in such circumstances, particularly dealing with such a personal issue as body weight, is impossible. It is inevitable that erroneous, inconsistent, and perhaps even discriminatory decisions were made in certain individual cases.[FN13] Such a large universe of human decision-making is incapable of perfection or total consistency. But what is apparent from the record is that there was no uniformity, or pattern and practice, of applying the weight program or its exceptions in a deliberate, discriminatory fashion against females or persons over a certain age.

> FN13. Individual flight attendants who were denied exceptions had a right to use the grievance procedures under the collective bargaining agreement.

Summary judgment is therefore granted in favor of defendant and against plaintiffs on plaintiffs' class claims of gender and age disparate treatment. The court has previously ruled on plaintiffs' disparate impact gender discrimination claims (Order of August 16, 1995), and discusses below the disparate impact age discrimination claims. Because of this court's rulings on all of these subjects, defendant's motion to decertify the class is also granted.

A question remains as to whether these decisions preclude the named plaintiffs from pursuing individual claims for gender or age discrimination, which

would then be analyzed under the standard of *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). While some of the evidence presented in these motions has mentioned a few of the named plaintiffs, the focus has been on the class and pattern and practice criteria of *Teamsters.* This court has not done an analysis of the claims of the individually named plaintiffs. If necessary, that remains for another day.

V.

Defendant has made two further motions with respect to the age discrimination claims. Defendant argues that there cannot, as a matter of law, be an age disparate impact case (which the court identified as a triable issue in its order of August 16, 1995) because of recent developments in case law. And defendant moves for summary judgment on the age discriminations claims of certain opt-in plaintiffs.

A.

In its August 16, 1995 order, this court assumed that a disparate impact case for age discrimination could be asserted under the ADEA, based on the United States Supreme Court decision in *Hazen Paper Company v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), which left the question open. Since then, several circuit courts have addressed that question, with mixed results.

***10** The Ninth Circuit, in *Mangold v. California Public Utilities Com.,* 67 F.3d 1470, 1474 (9th Cir.1995), acknowledged that a disparate impact theory may no longer be appropriate under the ADEA, but did not decide the question. In the absence of controlling Ninth Circuit authority, this court takes its guide from the Tenth Circuit's decision in *Ellis v. United Airlines,* 73 F.3d 999 (10th Cir.1996). This court does so because that case involved the same weight program of defendant that is at issue here. *Ellis* held that as a matter of law United's weight program did not violate the ADEA under a disparate treatment theory. It also concluded, following a discussion of the ADEA and *Hazen Paper,* that disparate impact claims are not cognizable under ADEA. This court therefore grants summary judgment in favor of defendant and against plaintiffs on this issue.

B.

Because of the court's rulings above, it is not necessary to consider defendant's motion directed to the age discrimination claims of the opt-in plaintiffs who allegedly suffered no wage loss during the limitations period. Because there is no disparate impact case under the ADEA, and because plaintiffs have not demonstrated a prima facie case of disparate treatment, no class-wide age discrimination claims remain.

VI.

The above decisions resolve this case as to the overwhelming majority of the claims. However, some issues remain: (1) The question of whether the named plaintiffs can assert gender discrimination and age discrimination claims, with their claims being analyzed under *McDonnell Douglas.* (2) Individual race discrimination claims, under disparate impact and disparate treatment analyses. And (3) individual handicap-disability discrimination claims under the ADA and the California FEHA.

A status conference will be held on March 21, 1997 at 11:00 a.m. to consider further proceedings on these issues.

IT IS SO ORDERED.