

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,) No. 79-C-4373
)
v.) JOHN A. NORDBERG
) District Judge
SEARS, ROEBUCK AND CO.,)
)
Defendant.)

PLAINTIFF'S FINAL ARGUMENT

I. COMMISSION SALES CLAIMS

A. Legal Framework

1. Disparate Impact v. Disparate Treatment

The EEOC contends that the disparities between expected and actual female hires and promotions are the product of a subjective selection process. Sears has on numerous occasions insisted that this case is thus amenable only to a disparate treatment analysis. We have on several occasions argued that whether an attack on a subjective employment process is regarded as involving disparate impact or disparate treatment is not of consequence. See, e.g., Transcript of Proceedings at 353-56 (October 11, 1982); Plaintiff's Pretrial Brief--Commission Sales Issues at 73 n.33 (Sept. 10, 1984); Plaintiff's Opposition to Defendant's Motion to Dismiss Commission Sales Claim at 13-14 (Feb. 25, 1985).

Whether a subjective employment process should be treated in disparate impact terms has been debated in recent years. See Plaintiff's Pretrial Brief Commission Sales Issues at 73 n.33. The most recent authority squarely treating the matter holds that subjective employment processes are appropriately analyzed in disparate impact terms. See Griffin v. Carlin, ___ F.2d ___, 37 FEP Cases 741, 746 (11th Cir. 1985); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985). This appears to accord with the prevailing law in the Seventh Circuit. Stewart v. General Motors Corp., 542 F.2d 445, 450-51, cert. denied, 433 U.S. 919 (1976).^{1/}

We continue to believe that the characterization of the alleged discrimination as disparate impact or disparate treatment ought not affect the outcome here. Thus, while we think the law requires that the subjective process at issue here must also be examined in disparate impact terms, we confine the main part of this argument to discussing the hiring and promotion claims as if they were amenable only to disparate treatment analysis.

2. Burden of Proof Under Disparate Treatment Analysis

A number of cases have recently discussed the relevance of the Supreme Court's decision in Texas Department of

^{1/} But see Coates v. Johnson & Johnson, 756 F.2d 524, 530 n.4 (7th Cir. 1985), where the Seventh Circuit may have called the continued validity of this aspect of Stewart into question.

Community Affairs v. Burdine, 450 U.S. 248 (1981), a disparate treatment case involving an individual claimant, to a pattern or practice or class action statistical case. See, e.g., Craik v. Minnesota State University Bd., 731 F.2d 465 (8th Cir. 1984); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Vuyanich v. Republic National Bank, 521 F.Supp. 656, 661 (N.D. Tex. 1981), vacated and remanded, 723 F.2d 1195 (5th Cir. 1984).

The Seventh Circuit has very recently addressed the issue in Coates v. Johnson & Johnson, 756 F.2d 524 (1985). In Coates, the Seventh Circuit squarely held that at the liability phase of a pattern or practice case the burden of persuasion rests with plaintiff. This does not, however, suggest that Burdine should be read to at all alter the exacting scrutiny that courts have traditionally applied to defendant's explanations as to why perceived disparities are not the result of discrimination.^{2/} Indeed, the court relied on Judge Sweigert's dissent in Craik v. Minnesota State University Board, supra, 731 F.2d at 487-88. There Judge Sweigert had relied specifically on Teamsters v. United States, 431 U.S. 324 (1977), the case that established the principle that after the plaintiff had established its prima facie statistical case, "[t]he burden then shifts to the

^{2/} See, e.g., DeMedina v. Reinhardt, 686 F.2d 997 (7th Cir. 1982), where, after citing Burdine, the court placed upon the defendant the burden of showing differences in qualifications as part of its rebuttal case.

employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiff's] statistics are either inaccurate or insignificant." Further, quoting Segar v. Smith, supra, 738 F.2d at 1268, the court made clear that "[t]he strength of the evidence the defendant must produce to prevent the plaintiff from carrying the burden of persuasion depends, as in any case, on the strength of the plaintiff's proof." 756 F.2d at 532. In Segar, on the page cited, the court had been emphasizing that where a sound prima facie statistical case had been presented "the strength of the evidence sufficient to meet this rebuttal burden will typically need to be much higher than the strength of the evidence sufficient to rebut an individual's low-threshold McDonnell Douglas showing." 738 F.2d at 1269-70. This was implicitly recognized in Coates as well. 756 F.2d at 533.

In sum, neither Burdine nor the reading of it in Coates materially alters the law as to the type of evidence that will be required of a defendant to explain away a statistical showing of a pattern or practice of discrimination. The burden of persuasion remains with the plaintiff; but absent sound rebutting evidence by the defendant, plaintiff's statistical proof will carry that burden.

B. Hiring Discrimination

1. The EEOC's Statistical Evidence

The female proportions of full and part time commission sales hires for the years 1972 through 1980 are set out in Table 1.3/

TABLE 1
FEMALE PERCENT OF COMMISSION SALES HIRES

Percent Female

<u>Year</u>	<u>Full Time Nationwide</u>	<u>Part Time 4/</u>	
		<u>Four Terr.</u>	<u>Midwestern</u>
1972	9.9	17.3	30.8
1973	17.6	20.7	49.8
1974	22.5	27.9	50.7
1975	31.1	36.8	56.6
1976	31.4	38.7	57.6
1977	32.6	35.0	56.9
1978	36.6	40.3	33.8
1979	40.5	45.1	39.3
1980	30.7	39.9	35.4

(Pl. Exh. 1, Tables 1, 2, 17, 18).

3/ The EEOC's analysis focuses on the period 1973 through 1980 since in order to prevail the EEOC must establish that a pattern of discrimination continued at least subsequent to March 2, 1973, which commences the 180-day period prior to the filing of the commissioner's charge on August 30, 1973. See Section 706(e) of Title VII, 42 U.S.C. §2000e-5(3). However, evidence regarding 1972 is also presented, both because it is relevant background to the subsequent practices (see United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)), and because, should the EEOC establish that the practices continued subsequent to March 2, 1973, back pay liability is available for two years prior to the filing of the charge. See Section 706 (g) of Title VII, 42 U.S.C. §2000e-5(g).

4/ The reasons for separating the part time figures for the Midwestern Territory from those for the Eastern, Pacific Coast Southern and Southwestern Territories have been stated in various places. See, e.g., Pl. Exh. 1 at 10-11; Siskin Rebuttal WT at 31-32.

a. The Application Samples

The statistical analyses conducted by the EEOC's experts represent a substantially more comprehensive effort at examining the effects of possible differences in the characteristics of applicants in different groups than any reported hiring discrimination case. These analyses evaluated Sears' hiring patterns on the basis of two applications samples: the Non-Hired Sample of 33,000 applications from 33 Sears stores around the country, and the Hire Sample of approximately 2,000 applications of persons hired into commission sales positions at approximately 210 Sears stores. The Non-Hired Sample showed that for the period 1973 through 1980 women comprised approximately 61.1% of full time sales applicants and 66.2% of part time sales applicants (65.3% for the Midwestern Territory and 67.2% for the four other territories) (Pl. Exh. 1 at 35, 64, and Tables 4, 19).

Using the applications from the two samples the EEOC's expert, Dr. Siskin, made adjustments for six characteristics that might affect a person's chance of selections: (1) job applied for; (2) age; (2) education; (4) job type experience; (5) sales experience on commission or with a product usually sold on commission; (6) and product line experience. Two analyses were used to make these adjustments--a logit analysis and a multivariate cross-classification analysis.

For full time, the logit analysis and the multivariate cross-classification analysis produced a nationwide 1973-1980

expected female proportion of commission sales hires of 49.5% and 37.2%, respectively (Pl. Exh. Siskin 47, 48 (corrected Jan. 24, 1985)). Given the factors tending to bias downward the expected female proportion of hires in the multivariate cross-classification analysis and the considerably higher figure produced by the logit analysis, it is reasonable to assume that the lowest unbiased estimate of the expected female proportion of full time commission sales hires taking these six characteristics into account is at least 40% (Siskin Rebuttal WT at 40-41).^{5/} There are thus disparities between the actual and expected female proportion of full time commission sales hires nationwide for the years 1973 through 1977 and 1980, for the Eastern Territory in 1973 and 1974, the Midwestern Territory in 1973 through 1977, the Pacific Coast Territory in 1976 through 1978 and 1980, the Southern Territory in 1973 through 1977, and the Southwestern Territory in 1973 through 1978 and 1980. These disparities are set out in Table 2, which is based on 40.3% 1973-1980 nationwide expected female proportion of hires.^{6/}

^{5/} See Siskin Rebuttal WT at 41 n.16 for explanation of an analysis attempting to correct for certain of these biases. That analysis resulted in a nationwide all years estimate of the expected female proportion of full time hires of 39.9%.

^{6/} This analysis by product line is set out in Plaintiff's Exhibit Siskin 49 (Table L to Plaintiff's Proposed Findings of Fact and Conclusions of Law--Commission Sales (PFCS)).

TABLE 2

DISPARITIES BETWEEN EXPECTED AND ACTUAL
FEMALE FULL TIME COMMISSION HIRES AS
ADJUSTED BY MULTIVARIATE CROSS-CLASSIFICATION
ANALYSIS, BY YEAR, NATIONWIDE AND BY TERRITORY

Nationwide

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	4573	33.5	17.6	1532	809	723	22.7
1974	2630	44.6	22.5	1173	593	580	22.8
1975	1785	43.9	31.1	784	555	229	10.9
1976	3113	39.6	31.4	1233	979	254	9.3
1977	2457	43.1	32.6	1059	802	257	10.5
1978	1076	45.1	36.6	485	394	91	5.6
1979	570	42.4	40.5	242	231	11	0.9
1980	345	43.8	30.7	151	106	45	4.9
All Years	16549	40.3	27.0	6669	4469	2200	34.9

Eastern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	1369	30.2	15.0	413	206	207	12.2
1974	735	32.2	22.4	237	165	72	5.7
1975	380	41.1	38.1	156	145	11	1.1
1976	435	25.4	39.0	110	170	-60	-6.6
1977	237	18.5	35.4	44	84	-40	-6.7
1978	90	30.5	43.3	27	39	-12	-2.7
1979	17	43.1	41.1	7	7	0	0.0
1980	18	30.5	22.2	5	4	1	0.5
All Years	3281	30.5	24.9	1001	820	181	6.9

Midwestern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	1293	32.5	22.2	420	288	132	7.8
1974	600	54.4	25.1	326	151	175	14.3
1975	375	41.5	24.0	156	90	66	6.9
1976	439	40.2	28.2	176	124	52	5.1
1977	504	51.4	27.7	259	140	119	10.6
1978	196	38.7	34.6	76	68	8	1.2
1979	39	41.5	28.2	16	11	5	1.6
1980	7	41.5	14.2	3	1	2	1.5
All Years	3453	41.5	25.2	1433	873	560	19.3

(table continued)

TABLE 2 (continued)

DISPARITIES BETWEEN EXPECTED AND ACTUAL
FEMALE FULL TIME COMMISSION HIRES AS
ADJUSTED BY MULTIVARIATE CROSS-CLASSIFICATION
ANALYSIS, BY YEAR, NATIONWIDE AND BY TERRITORY

Pacific Coast

Year	Total	Percent Female		Number Female		Diff.	z
		Exp.	Act.	Exp.	Act.		
1973	---	---	---	---	---	---	---
1974	---	---	---	---	---	---	---
1975	---	---	---	---	---	---	---
1976	914	40.5	25.1	370	230	140	9.4
1977	725	43.7	32.4	317	235	82	6.1
1978	460	51.3	36.7	236	169	67	6.3
1979	326	40.3	35.2	131	115	16	1.8
1980	169	40.4	25.4	68	43	25	3.9
All Years	2594	43.3	30.5	1123	792	331	13.1

Southern

Year	Total	Percent Female		Number Female		Diff.	z
		Exp.	Act.	Exp.	Act.		
1973	804	38.4	13.8	309	111	198	14.4
1974	468	46.9	21.3	219	100	119	11.0
1975	351	49.3	27.3	173	96	77	8.2
1976	506	41.8	27.0	212	137	75	6.8
1977	329	41.7	31.9	137	105	32	3.6
1978	62	45.3	33.8	28	21	7	1.8
1979	2	42.8	50.0	1	1	0	0.0
1980	2	42.8	100.0	1	2	-1	-1.4
All Years	2524	42.8	22.7	1080	573	507	20.4

Southwestern

Year	Total	Percent Female		Number Female		Diff.	z
		Exp.	Act.	Exp.	Act.		
1973	1107	35.4	18.4	392	204	188	11.8
1974	827	47.4	21.4	392	177	215	15.0
1975	679	43.9	32.9	298	224	74	5.7
1976	819	44.6	38.8	365	318	47	3.3
1977	662	45.9	35.9	304	238	66	5.1
1978	268	44.3	36.1	119	97	22	2.7
1979	186	46.3	52.1	86	97	-11	-1.6
1980	149	49.3	37.5	73	56	17	2.8
All Years	4697	43.2	30.0	2029	1411	618	18.2

(Pl. Exh. Siskin 48 (Table H to Pl. PFCS)).

For part time commission sales hiring, the characteristics of the applicants were considerably less significant than for full time. The logit analysis and the multivariate cross-classification analysis only reduced the expected female proportion of hires nationwide from 1973 through 1980 to 63.3% and 56.3%, respectively (Pl. Exh. 1 at 63, Pl. Exh. Siskin 26 (cor. Jan. 24, 1985)). Using the lower figure, there were statistically significant disparities between actual and expected female part time commission sales hires in the Eastern Territory in 1973 through 1975 and 1977 through 1979, in the Midwestern Territory in 1973, 1974 and 1976 through 1980, in the Pacific Coast Territory from 1976 through 1980, in the Southern Territory and Southwestern Territories in 1973 through 1980. These disparities are set out in Table 3.7/

TABLE 3
DISPARITIES BETWEEN EXPECTED AND ACTUAL
FEMALE PART TIME COMMISSION SALES HIRES AS
ADJUSTED BY MULTIVARIATE CROSS-CLASSIFICATION
ANALYSIS, BY YEAR, BY TERRITORY

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	503	52.9	20.6	266	104	162	14.5
1974	412	59.4	28.6	245	118	127	12.7
1975	381	57.8	43.3	220	165	55	5.7
1976	375	26.3	44.5	99	167	-68	-8.0
1977	211	66.2	37.9	140	80	60	8.7
1978	280	60.9	35.3	171	99	72	8.8
1979	123	64.7	44.7	80	55	25	4.7
1980	149	52.0	44.9	77	67	10	1.6
All Years	2434	53.2	35.1	1295	855	440	17.9

7/ This analysis by product line is set out in Plaintiff's Exhibit Siskin 28A and 28B (cor. Jan. 24, 1985) (Table L to Pl. PFCS).

TABLE 3 (continued)

DISPARITIES BETWEEN EXPECTED AND ACTUAL
FEMALE PART TIME COMMISSION SALES HIRES AS
ADJUSTED BY MULTIVARIATE CROSS-CLASSIFICATION
ANALYSIS, BY YEAR, BY TERRITORY

Midwestern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	1771	53.9	49.8	955	882	73	3.5
1974	1358	57.1	50.7	775	689	86	4.7
1975	1235	56.5	56.6	698	700	-2	-0.1
1976	1485	52.1	57.9	774	860	-86	-4.5
1977	1665	60.9	56.9	1014	948	66	3.3
1978	482	55.5	33.8	268	163	105	9.6
1979	582	57.9	39.3	337	229	108	9.1
1980	271	50.2	35.4	136	96	40	4.9
All Years	8849	56.0	51.6	4955	4567	388	8.3

Pacific Coast

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	---	---	---	---	---	---	---
1974	---	---	---	---	---	---	---
1975	---	---	---	---	---	---	---
1976	464	56.0	36.8	260	171	89	8.3
1977	221	61.5	37.1	136	82	54	7.5
1978	316	70.1	44.6	222	141	81	10.0
1979	396	62.8	49.7	249	197	52	5.4
1980	398	56.2	40.7	224	162	62	6.3
All Years	1795	60.7	41.9	1090	753	337	16.3

Southern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	301	61.2	20.2	184	61	123	14.5
1974	437	52.5	29.2	229	128	101	9.7
1975	460	60.0	35.0	276	161	115	10.9
1976	474	57.7	36.4	273	173	100	9.3
1977	291	63.9	32.9	186	96	90	11.0
1978	200	56.2	33.5	112	67	45	6.4
1979	103	54.0	33.0	56	34	22	4.3
1980	134	67.6	34.3	91	46	45	8.3
All Years	2400	58.7	31.9	1409	766	643	26.7

(table continued)

TABLE 3 (continued)

DISPARITIES BETWEEN EXPECTED AND ACTUAL
FEMALE PART TIME COMMISSION SALES HIRES AS
ADJUSTED BY MULTIVARIATE CROSS-CLASSIFICATION
ANALYSIS, BY YEAR, BY TERRITORY

Southwestern

<u>Year</u>	<u>Total</u>	<u>Percent Female</u>		<u>Number Female</u>		<u>Diff.</u>	<u>Z</u>
		<u>Exp.</u>	<u>Act.</u>	<u>Exp.</u>	<u>Act.</u>		
1973	292	56.4	21.2	165	62	103	12.2
1974	231	55.3	23.8	128	55	73	9.7
1975	183	60.5	27.8	111	51	60	9.1
1976	258	56.5	37.5	146	97	49	6.2
1977	169	66.5	31.9	112	54	58	9.5
1978	252	62.3	45.6	157	115	42	5.5
1979	281	61.8	43.0	174	121	53	6.5
1980	259	57.2	38.6	148	100	48	6.0
All Years	1925	59.2	34.0	1140	655	485	22.5

(Pl. Exh. Siskin 80 (cor. Jan. 24, 1985) (Table K to Pl. PFCS)).

b. Other Statistical Evidence

The findings based on the applications samples were supported by other statistical evidence in the form of responses to the Applicant Interview Guides (AIG's). These forms, used in Sears' Southwestern Territory from 1978 through 1980, allowed applicants to rate their skill, interest, and experience regarding various activity categories related to jobs at Sears. The information they provided shows that, while there were differences between the male and female self-evaluations of their interest, skill, and experience for various positions, women nevertheless comprised very substantial proportions of persons with high scores on AIG categories that could be reasonably matched with commission sales product

lines at Sears. Table 4 Sets out the female proportion of full time sales applicants with a combined rating of 15 (highest rating) for four such categories.

TABLE 4

FEMALE PROPORTION OF FULL TIME SALES APPLICANTS RATING THEMSELVES 15 ON APPLICANT INTERVIEW GUIDES

<u>Category</u>	<u>Female Per- cent of 15's</u>
Sell major appliances: Stoves, refrigerators, Freezers, etc.	44.9
Parts, Dept.: stock, catalog, locate. Auto, mechanical	38.5
Sell home improvement jobs: Kitchen, fence, roof, etc.	41.1
Sell hardware, paint, electrical: Technical goods	41.5

(Pl. Exh. Siskin 71).

An analysis using the AIG responses to these categories with the four product lines with which they could be most closely matched resulted in a higher expected female proportion of full time commission sales hires than that yielded by the multivariate cross-classification analysis in three of the product lines and a comparable figure in the fourth. This is shown in Table 5.8/

8/ The methodology by which the figures in Table 5 were developed is explained by Dr. Siskin at Tr. 6356-60.

TABLE 5

COMPARISON BETWEEN EXPECTED FEMALE PROPORTION OF FULL TIME COMMISSION SALES HIRES INTO FOUR PRODUCT LINES BASED ON MULTIVARIATE CROSS-CLASSIFICATION ANALYSIS WITH EXPECTED FEMALE PROPORTION OF FULL TIME COMMISSION SALES HIRES BASED ON APPLICANT INTERVIEW GUIDE ADJUSTMENT FOR EXPERIENCE AND INTEREST

	Expected Percent Female 1973-1980:	
	Multivariate Cross- classification <u>Analysis</u>	Applicant Interview <u>Guide</u>
Appliances	42.4	48.7
Automotive	28.9	51.0
Home Building Materials	32.5	47.4
Home Improvements	43.1	41.5

(Pl. Exh. Siskin 72).9/

The responses to the Applicant Interview Guides thus lend considerable support to the reasonableness of the estimates of the multivariate cross-classification analysis.10/

9/ The multivariate cross-classification analysis figures in Plaintiff's Exhibit Siskin 71 were based on an analysis yielding a 1973-1980 expected female proportion of all full time hires of 38.3%. The comparisons shown in Table 5 would not be materially affected if figures from the multivariate analysis that resulted in a 40.3% figure were used.

10/ For the Home Building Material product line an analysis was conducted with the Applicant Interview Guide responses to the category "Construction: Carpenter, sheetrock: Plumbing, etc.." Even using the responses to this category, the expected female proportion of full time commission sales hires in the product line was comparable to that arrived at in the multivariate cross-classification analysis. See Pl. Exh. Siskin 74.

2. Nonstatistical Evidence

The EEOC's statistical case is supported by evidence regarding two interrelated aspects of Sears' selection process, the highly subjective nature of that process and the testing practices. Courts have consistently recognized that the absence of objective criteria for selection provides a ready mechanism for discrimination and that evidence of the subjective nature of the selection process bolsters a statistical case. See Davis v. Weidner, 596 F.2d 726, 732 (7th Cir. 1979); Stewart v. General Motors Corp., supra, 542 F.2d at 450-51; Nord v. United States Steel Corp., ___ F.2d ___, 37 FEP Cases 1232, 1236 (11th Cir. 1985); Davis v. Califano, 613 F.2d 957, 965 (D.C. Cir. 1982); Carmichael v. Birmingham Saw Works, 35 738 F.2d 1126, 1133 (11th Cir. 1984); Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). In one such case the discriminatory potential of a system that relies on unwritten subjective criteria was recognized specifically with respect to the defendant here. Carroll v. Sears, Roebuck and Co., 708 F.2d 183, 192 (5th Cir. 1983).

The highly subjective nature of the system at issue here cannot be denied. The record is devoid of evidence of written guidelines (except for the testing materials discussed infra) on what qualities to look for in a commission sales candidate. Training of interviewers was minimal. Interviewers were

provided formal training only in the Eastern, Midwestern, and Southern Territories, and even there only sporadically (Ward Dep. at 133, 151, 154); see also Massey Dep. at 70-72). The formal training consisted of instruction on nondirective interviewing techniques, essentially how to ask questions in a manner to encourage applicants to "open up" and talk during a five minute interview (id. at 36, 39). The only other formal training concerned the administration and interpretation of the intelligence and personality tests (id. at 27). The same interviewing and testing course is provided for new personnel interviewers as for checklist personnel managers (id. 43). No formal instruction is provided on what qualities to look for in candidates for various jobs (id. at 48-52) or how to assess prior experience (id. at 63, 75). No training is provided on how to distinguish a good candidate for commission sales or for any other position at Sears (id. at 108, 148). See generally Lopez WT at 14-15.

The laxity of the training program, as described by Sears' agent Bruce Ward, produced in response to a Rule 30(b)(6) deposition notice, was confirmed by Sears' witnesses who presented testimony during trial. Rex Rambo, who has been a store manager or zone manager for the last 13 years (Rambo WT at 2), could remember no training on how to conduct or assess employment interviews (Rambo Tr. at 10-14); the only special training in personnel functions he could remember was on how to fill out new forms and give deficiency interviews (id. at

11-12). The only materials Carolyn Rogers, who held interviewer and other personnel positions in an "A" store for 12 years (Rogers WT at 1), could recall from her training was the application and the testing manual (Rogers Tr. at 12-13).

Persons charged with personnel responsibility were expected to learn the desirable characteristics for commission sales candidates from two sources. One was from observation of those persons presently on the job along with managers' comments as to what types of persons had been successful in the past (Tr. 8806-07 (Graham); Schumm WT at ¶12; Schumm Tr. at 35; Massey Dep. at 51-52; Ward Dep. at 52). The other was from the description of a big ticket salesperson set out in the Retail Testing Manual, the only written description of the desirable characteristics of a commission salesperson in general circulation (Tr. 8729 (Graham); Roger Tr. at 12-13); Massey Dep. at 157-58, 162, 170; Dowd Dep. at 94, 116-17 (Apr. 9, 1982)).

As originally issued in 1953, the Retail Testing Manual described a commission salesperson as a man who "is active and has a lot of drive," possesses "considerable physical vigor," "has a liking for tools," and "likes work which requires physical energy," "carries much of this energy and drive into his selling activities." The description was clearly male-oriented, having been in substantial part based on responses to the Vigorous dimension of the Thurstone Temperament Schedule by an entirely male group of incumbent commission salespersons (Pl. Exh. 105 at 32; Lopez WT at 13; Tr. 8808, 8728-29 (Graham); Bentz Dep. 465)).

Ray J. Graham, Sears' Corporate Director of Equal Opportunity throughout the period at issue in the case, acknowledged the masculine character of the description, stating also that in his view it did describe the characteristics of a desirable candidate for commission sales (Tr. 8729).^{11/} Yet Sears had no evidence that the Vigorous dimension of the Thurstone Temperament Schedule on which the description was in substantial part based was a useful predictor of sales performance; and the available data in fact indicated that performance on the Vigorous dimension was negatively correlated with sales performance (Pl. Stip. C-.139.; Pl. Exhs. 128 at 8, 126 at 38-43; Lopez WT at 16; Tr. at 16043-06 (Lopez); Bentz Dep. at 652-53). Thus, the only written instruction that Sears provided its personnel administrators as to what to look for in a commission sales

^{11/} See Tr. at 8729:

Q. Now does this document on Pages 32 and 33 [of the 1953 Retail Testing Manual, Pl. Exh. 105] describe the characteristics of a good commission sales person?

A. Yes, I would say that is a reasonably good description of the characteristic of a good commission sales person.

Q. And do you know of any other document in general circulation while you were with Sears that sets out a description of the desired characteristics of a big ticket sales person?

A. I don't know of any other written document.

Q. Do you view this as -- the description of the desired characteristics on Pages 32 and 33 as an essentially masculine description?

A. The characteristics are not exclusively masculine. Although our experience indicates that in those years particularly, and I suggest even today on the average, more men possess those characteristics than do women.

candidate was a stereotypically masculine description that Sears had no sound reason to believe in fact provided job-related information.^{12/}

^{12/} There was conflicting testimony as to the how the scores on the Vigorous dimension were used for the selection of men and women for commission salespersons. The testimony of Sears' director of testing, V. Jon Bentz, who oversaw preparation of Sears' testing manuals, indicated that a given raw score was to be given the same meaning for men as for women (Bentz Dep. at 603-04, 666). This was consistent with the testimony of one of Sears' store manager witnesses, James Moore (Moore Tr. at 84-92). It was also consistent with the plain language of the manual (Pl. Exh. 109 at 57; Lopez WT at 6-7). Other Sears witnesses testified that the Adult Profile percentages set out on the last page of the Thurstone Temperament Schedule test booklet provided separate scoring for men and women. Yet, there was no evidence whatever of a written or oral effort to communicate to users that the explicit instruction of the manual were not to be followed; indeed, training for test users sought to "get across the idea that the manual contains all [the user] would need to know..." (Pl. Stip. C-59). Furthermore, the Adult Profile which Sears' witnesses said they relied upon did not provide sufficient information for use of the test score without reference to the recommended scores in the manual (see Pl. Exhs. 109 at 57, 113 at 7; Lopez WT at 9; Tr. at 8736-40 (Graham); Tr. 12707-08 (Biczak)). The raw scores of female hires were lower than the raw scores of male hires; but, depending on the distribution and numbers of hires who were tested, these scores are not necessarily inconsistent with women being less likely to be hired than men with the same raw score. In any event, the female hires were from much higher percentile rankings than the men, a fact, which, if the distribution of persons taking the test is like that in the adult profile, would indicate that the Adult Profile is not in fact the standard used for selection (Siskin Rebuttal WT at 15-16).

The inference to be drawn from the sum of this evidence is not that Sears rigidly applied the same raw score standard for the selection of men and women for commission sales--something the EEOC has not contended--but that the explicit recommendations of the testing manual influenced the judgment of selecting officials in a way that operated to disadvantage female candidates in a substantial number of cases. That Sears' witnesses emphasized that they did not consider the test scores to be important does not mean that there was no such effect. Whether or not these officials deemed the test an important part of the selection process,

(footnote continued)

In these circumstances, the susceptibility of minimally trained interviewers and other personnel administrators to conscious and unconscious bias is obvious, as recognized by the Seventh Circuit in Stewart v. General Motors, supra, and by the other courts of appeals in numerous cases. The testimony reflects those biases at all levels. Mr. Graham not only condoned the masculine description in the testing manual, but expressed a variety of stereotypical attitudes about the capabilities or willingness of women to perform commission sales jobs, for example: that women, who would otherwise be well-suited for work in home furnishings were not interested in the Furniture or Carpeting Division because the rearranging of furniture displays and the lifting of carpet rolls or samples were too physically demanding (Tr. 8246, 8436); that the Sporting Goods Division, which sold such outdoor equipment as golf clubs and tennis rackets, "did not have any appeal generally to women" (Tr. 8430); that going outside to examine customers' tires when "it's snowing or raining or whatever" discouraged women from tire sales (Tr. 8439).

12/ (footnote continued)

the fact is that it was administered to a substantial proportion of the hires before they were hired. Whether or not they relied on it to the full extent that Dr. Lopez testified managers usually tend to rely on such a device (Lopez WT at 10-12), the only purpose a rational employer can have for incurring the expense of administering such devices is that it will allow the results to influence its final decision in a significant portion of the cases where it is used. The reasonable inference here, therefore, is that this patently discriminatory and unvalidated device operated to disadvantage women in an indeterminate, but potentially substantial number of cases.

Other expressed attitudes of Sears' managers were that women were not interested in money 13/ or were more appropriately suited for certain women's product lines. Mr. Rambo testified that with regard to placing women in commission sales he would "work toward those areas [sewing machines and vacuum cleaners] in order to get them into commission sales feeling if we could do that eventually they could go into an automotive area."14/ (Rambo Tr. at 72). Mr. Graham similarly stated that he would be better at selling men's clothes than a woman simply because he wears men clothes (Tr. 8437). On the other, hand Sears assumed all women knew about custom draperies (Tate WT at 10), despite the fact that draperies was a very complex product.14/

Mr. Rambo also stated that unless a woman were to state on her application that she did work on her own home, she would not be asked about commission sales in home improvements

13/ See, e.g., Rambo Tr. at 117 ("a lot of women in the 70's wanted to work part time to get away from children"); Schumm WT at ¶24 ("since Individual Retirement Accounts became popular many female applicants simply want a job paying at least \$2,000") (Ms. Schumm later acknowledged that the number of such women that she actually knew of was ten or less (Schumm Tr. at 64).

14/ Sears' expert Juliet Brudney testified that she found in her study of women in craft jobs in auto centers that personnel offices would not send the women to the auto center because people in the personnel office believed that an inappropriate place for women (Tr. 10110-11). Con Massey, Sears' Southern Territory Personnel Manager testified that there had been opposition by store managers to women working with men's clothing because of beliefs about customer concerns; he also testified that store managers had expressed reluctance to place women in the commission selling of automotive merchandise (Massey Dep. at 92-93).

(Rambo Tr. at 540), presumably on the theory that any woman actually interested would have so stated. Yet applicants Alice Howland and Lura Nader both had done extensive construction and remodelling on their homes although neither stated it on her application (Tr. 16012 (Howland); 16479 (Nader); Howland WT; Nader WT. Indeed, as Dr. Julia Ericksen's data showed almost a quarter of married women share equally or do most of their households' home repairs (J. Ericksen WT at 15). That preconceived notions of what is suitable for women so often are not borne out (see also Tables 4 and 5, supra) is among the reasons the courts have subjected such notions to the most rigorous scrutiny. Cf. Pond v. Braniff Airways, Incorporated, 500 F.2d 161, 166 (5th Cir. 1974); Sprogis v. United Air Lines Inc., 444 F.2d 1194, 1198, (7th Cir.), cert. denied, 404 U.S. 791 (1971); Bowe v. Colgate-Palmolive Company, 416 F.2d 711, 717 (7th Cir. 1969).

It is not, however, merely the attitudes of Sears' store managers and personnel managers that may bias the process. As Ms. Schumm noted, she as personnel manager would never interview an applicant that the interviewer had not recommended (Schumm Tr. at 42). Interviewers were not only subject to the attitudes inherent in the process, as described above, but to their own personal biases as well. Thus, as Lura Nader testified, when she applied at Sears, the interviewer made clear that she believed that outside sales was not proper for a woman (Tr. 16487-90). Carolyn Rogers,

the only witness Sears produced who had been an interviewer and who had herself refused a commission sales position testified at length about how difficult she thought commission selling was, making clear that she thought it unsuited for "women with families." (Rogers Tr. at 64). Expressing skepticism about women's interest in a job of this nature, she explained how she "would let them talk to the personnel manager' only after they had convinced her that they were "really interested." (Rogers Tr. at 69). Yet Kathleen Schumm, for example, as personnel manager never asked her interviewers what they were looking for in a commission salesperson (Schumm Tr. at 34). Thus such biases those interviewers may have brought to the job with them could persist regardless of the subjective good faith of the personnel manager, the store manager, or anyone else at Sears.15/

15/ In its Proposed Conclusions of Law (at 13-14), Sears notes that subjective criteria are not per se unlawful, citing, inter alia, Casillas v. United States Navy, 735 F.2d 338, 344-45 (9th Cir. 1984). We do not contend that they are. But cases such as Casillas have merely rejected that specific contention; they have said nothing to detract from the virtually unanimous recognition among the courts that highly subjective systems are ready mechanisms for discrimination that should be carefully examined.

3. Sears' Defenses

The most notable aspect of Sears' defense is that, while it contended the EEOC's statistical analysis of the Hire and Non-Hired Applicant Samples was deficient in a number of respects, it made no effort to conduct a more refined analysis of its own. The EEOC's analysis was far more thorough than existing law requires. If a more refined analysis would yield a different result the burden is on the defendant to so demonstrate. DeMedina v. Reinhardt, 686 F.2d 997, 1008-09 (D.C. Cir. 1982).^{16/} Sears' failure to present its own analysis in an attempt to demonstrate the validity of any of its contentions about how other factors would affect the result is particularly noteworthy in light of the fact that not only did Sears have the EEOC's complete data base, but also had considerable additional information such as the 18,000 second sides of applications and the wide range of data available in the personnel files of the entire hire sample. The inference to be drawn from Sears' failure to present a more refined analysis is that such analysis would not have

^{16/} Requiring that the defendant demonstrate the significance of the supposed shortcoming of the plaintiff's analysis accords with the principle of placing the burden upon the party with greatest access to the relevant information, which in cases such as these is the defendant employer. See DeMedina v. Reinhardt, *supra*, 686 F.2d 2d at 1008 n.8 and 1009; Segar v. Smith, *supra*, 738 F.2d 1249, 1277 (D.C. Cir. 1984); D. Baldus and J. Cole, Statistical Proof of Discrimination at 194-95 (1980); *cf.* EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 n.5 (4th Cir. 1979).

materially aided its cause, or, as was the highly probable result of the use of the additional 18,000 second sides (see Siskin Rebuttal WT at 40-41), may have strengthened the EEOC's case.17/

Instead of presenting its own analysis of the scientifically drawn application samples, Sears attempted to defend on the basis of the following. First, it relied on the responses identified by Sears' managers responding to the request for information styled "Recruitment 2." But this information was not reliable, and biased in the direction of understating female interest in commission sales (see Siskin Rebuttal WT at 10-13). More important, the majority of persons hired into commission sales did not specifically indicate an interest in commission sales on the application. An expected female proportion of hires based on the female proportion of persons identified as commission sales applicants in Recruitment 2 is therefore clearly inferior to the expected female proportion of hires based on Dr. Siskin's analyses, which controlled for job applied for (see id.; Madden WT at 12).18/

17/ See Neidhofer v. Automobile Ins. Co., 182 F.2d 269, 271 (7th Cir. 1950), where the Seventh Circuit observed:

The rule is well established ...that the failure to produce...[evidencel which under the circumstances would be expected, gives rise to a presumption against the party failing to produce.

18/ Note on next page.

Second, Dr. Haworth relied on external labor force information regarding persons employed in commission sales positions or in certain product lines. Such information is generally inferior to applicant flow information for several reasons. First, it reflects past discriminatory practices. Second, such data shows female representation in such categories at certain points in time, which, as here, is usually somewhat lower than the rate at which women are moving into such positions (see Siskin Rebuttal WT at 17; Madden WT at 14-15; Tr. 10768 (C. Haworth); Tr. 17391-93 (Siskin)). Thus courts have generally regarded applicant flow as the most reliable indicator of a group's representation in the interested and qualified labor force.^{19/}

^{18/} (from preceding page) The tendency for perceptions of one's chances of selection to discourage applying for a position has been specifically recognized by the courts. See Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); DeMedina v. Reinhardt, supra, 686 F.2d at 1009 n.8. While the discussion in such cases have concerned applicants' being discouraged from applying at all, their rationale applies as well to an applicant's reluctance to initially indicate an interest in a particular position. Additionally, there is reason here for women not to specifically indicate commission sales or commission sales products that obtains irrespective of perceptions of discrimination. Simply, women were ready to accept a wider range of jobs, and would see the indication of a specific interest in commission jobs as limiting the range of opportunities that might be offered them. See Tr. 18085 (Madden); Tr. 16019 (Howland). See also Tr. 15888 (J. Ericksen).

^{19/} See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); United States v. City of Fairfax, 629 F.2d 932, 940 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); Hester v. Southern Ry. Co., 497 F.2d 1374, 1379 (5th Cir. 1974); see also Hazelwood School District v. United States, 433 U.S. 299, 308 n.13 (1977).

For positions where prior experience is not required external availability data can at best permit the comparison of Sears' employment practices with those of other employers (Tr. 17391-92 (Siskin), an inquiry of marginal relevance.^{20/} Even for this comparison, however, the work force figures chosen by Dr. Haworth are not supportable. See Siskin Rebuttal WT at 17-18; Madden WT at 14-15; Tr. 17393-401 (Siskin); 17937-39 (Madden); Pl. Exhs. J. Haworth 16A, 16B, Siskin Rebuttal 4, 5).

Third, Sears sought to rely on the Applicant Interview Guide information adjusted according to Dr. Haworth's "normalization" procedure. This procedure does not rank candidates according to how they actually rate their skill, interest, or experience as to a particular activity category, but rather does so according to the difference between an individual's rating on one activity compared with the rating on all other activities. When Dr. Haworth initially presented AIG results information with her original offer of proof, the information was presented much in the manner of that relied upon by Dr. Siskin (although not broken down between full time and part time). See Pl. Exh. Siskin 75; Tr. 6373 (Siskin). Indeed, when deposed regarding that information in the summer

^{20/} As the Seventh Circuit observed in United States v. City of Chicago, 549 F.2d 415, ... (1977), "it is no defense to a charge of discrimination that not everyone else is in compliance with the law."

of 1984 Dr. Haworth testified that the AIG's had not been designed for ranking candidates according to each candidates relative interest among different activities. However, after the EEOC found support in the AIG's (see Pl. Exhs. 70-75), Dr. Haworth introduced the normalization procedure that invariably had the tendency to lower the female proportion of persons with high experience, skill, or interest (see Sears' Exh. 6-GGG, 6-BHH). Dr. Haworth's normalization was not an appropriate procedure for purposes of making comparisons between persons (Siskin Rebuttal WT at 7-8; Madden WT at 13; Tr. 17371-75 (Siskin); Tr. 17931-32; Pl. Exh. Siskin RA 1), and was systematically biased toward reducing estimates of female interest, skill, and experience in the activities studied (Tr. 17373-77 (Siskin); Tr. 18094-95 (Madden) Pl. Exh. Siskin RA 2).21/

21/ Even after "normalizing" the scores, Dr. Haworth chose manifestly inappropriate categories for comparison, such as "Construction: Carpenter, sheetrock: Plumbing, etc..." rather than "Sell home improvement jobs: Kitchen, Fence, Roof, etc." for the Home Building Material product line. Sears' Exh. 6-BHH at 4; Siskin Rebuttal WT at 6-7; Madden WT at 13). In the cases where disparities remained notwithstanding these efforts at finding the lowest possible basis for comparison (home improvements and home building materials), Dr. Haworth dismissed such disparities because "we have already discussed the fact that [they] are areas where you are less likely to find women." (Tr. 13635).

Dr. Wise also attempted to show how the AIG responses should lead to very low expected female proportions of hires. But his illustration in Sears Exhibit 5-6 was based on assumptions that were neither reasonable nor supported by the facts in evidence (Siskin Rebuttal WT at 9-10, see also 36-40; Tr. 17379-84).

Fourth, Sears attempted to show that the lowest performing (in terms of average sales per hour compared with standard sales per hour) 10% of Sears' female hires and promotees had lower sales performance than the lowest performing 10% of its males hires and promotees. Sears' witness Dr. David A. Wise articulated a theory pursuant to which, he contended, such a pattern would be inconsistent with discrimination and consistent only with affirmative action. This argument was flawed in two respects. First, Sears failed to show that there was a pattern of the bottom 10% of women performing better than the bottom 10% of women when similarly situated persons were compared. Sears' most relevant effort to demonstrate such a difference was its Exhibit 6-3-2, which showed performance rates in the first full calendar year in commission sales. This this exhibit failed on its face to show "[t]hat the poorest performing women hires did worse than the poorest performing men hires year after year", as Dr. Wise states (Wise Rebuttal WT at 8), Tr. 17939-41 (Madden); Sears' Exh. 6-3). Dr. Wise acknowledged on cross-examination that for 1973, 1974, and 1975 hires there was no pattern whereby the bottom 10% of female full and part time hires were performing more poorly than the bottom 10% of the male hires (Tr. 18493, 18545). Moreover, Sears chose to present this information without consideration of certain factors that would tend to decrease the female performance rates relative to those of men.

Among these factors was seniority. Seniority was clearly associated with sales performance (Sears' Exh. 6-3-1),

particularly during the first year (Tr. 14457 (J. Haworth)). Yet the data Sears chose to examine permitted the comparison of persons hired late in a year, whose first full year sales performance would be calculated beginning shortly after hire, with persons hired early in the year, whose sales performance would not be calculated until after they had performed the job for a substantial period of time. This would tend to cause women, whose representation among hires and promotions was generally rising from year to year, and within each year, to be evaluated while they had on average served less time as commission salespersons than had the male commission salespersons to whom they were compared. See Pl. Exh. 1, Tables 1 2, 17, 18, 29, 32; Siskin Rebuttal WT 22; Madden WT 18-19; C. Haworth WT at 8; Tr. 17941-43 (Madden)). This factor alone might account for the difference in all cases.22/

22/ Among the other factors tending to increase the difference between male and female performance rates in Sears' Exhibit 6-3-2 that was not related to actual skills of the persons when hired, was the fact that a higher proportion of men than women terminated in the year of hire (Tr. 17943 (Madden); Sears' Exh. 6-LLL)), that Big Ticket and Not Big Ticket were not separated, and that the Chicago and Detroit Groups were not separated in Exhibit 6-3-2 (Siskin Rebuttal WT at 22-23; see Pl. Exh. J. Haworth 38). The latter two factors appear to have been particularly significant for the performance rates of full time hires based on the year end 1974 tapes (relating to 1973 hires). In Sears' Exhibits 6-3-1 both the joining of Big Ticket and Not Big Ticket and the inclusion of the Chicago and Detroit Groups had tended to favor full time males in the bottom 10%; in fact Sears' Exhibit 6-3-4 showed female incumbents outperforming males in both Full Time Big Ticket and Full Time Not Big Ticket in performance rates based on the 1974 tape. See Siskin Rebuttal WT at 22 n.10; Tr. 14445-50 (J. Haworth). This is of particular significance since in Sears' Exhibit 6-3-2 the performance rates from the 1974 tape (reflecting 1973 hires) are the only cases where the bottom 10% of men appear to significantly outperform the bottom 10% of women for full time hires from 1973 through 1975. See Tr. 18488-92 (Wise).

Even if the bottom 10% of men did consistently outperform the bottom 10% of women, Dr. Wise's argument would not hold. It rests on a theoretical assumption about Sears' ability to differentiate among the skills of candidates that is unheard of in selection. Dr. Wise's simulation in Sears' Exhibit 6-5-7 was based on a correlation between predicted performance and actual performance of .99, which is totally unrealistic. When the correlation drops below .90, there is no longer reason to expect that women should be outperforming men in the bottom 10% if there is discrimination. See Table A and B of Wise Rebuttal WT. When the correlation drops to .50, that men substantially outperform women in the bottom 10% is fully consistent with substantial discrimination against women. See Siskin Rebuttal WT Exhibit 1-G at 3. Yet good selection procedures have correlations between actual and predicted performance of .30 and excellent ones have correlations of .50 (Tr. 17407-09 (Siskin); Pl. Exh. Wise R1, R3 at 2). Sears presented no evidence whatever as to the reliability of its selection procedures, and there is no reason to believe that the procedures it actually employed, relying on unstructured interviews without written guidelines and an unvalidated personality test, should approach the virtually astronomical correlations necessary to make Dr. Wise's theory viable.23/

23/ Note on next page.

Fifth, Sears relies on an assortment of testimony as to why women were not interested in commission sales jobs or certain aspects of them. First, it relies on the testimony of various store managers and personnel administrators from various facilities in the EEOC samples who testified about a general lack of interest among women. There are several things to be emphasized about this testimony. In the all its written testimonies and the oral testimonies accompanying certain of them, there is negligible mention of actual female applicants who refused the offer of a commission sales position. The testimonies generally were merely vague, conclusory statements about women's supposed lack on interest in commission sales. They also were based almost entirely on the witnesses' observations of the incumbent female noncommission sales work force, a group that was usually over 85 percent part time. See Pl. Exh. 1, Supp. Tables 8, 9. Thus remarks, for example, that a primary reason for women

23/ (footnote from preceding page) Dr. Wise confessed to having practically no knowledge about Sears' selection procedures save that he assumed that Sears tried to select the best qualified (Tr. 15388 (Wise): Wise Rebuttal WT at 1). His statement that Dr. Siskin questioned the validity of that assumption (Wise Rebuttal WT at 1) is simply not correct. Dr. Siskin has not questioned that Sears tries to hire the best candidate (issues of sex discrimination aside), but only whether it is capable of doing so with the unheard of degree of precision necessary to support Dr. Wise's theory.

It is noteworthy that Dr. Wise has not responded at all to the implications of Siskin Rebuttal WT Exhibit 1-F. This exhibit is not a simulation; rather it demonstrates the error of Dr. Wise's argument based on what actually occurred at Sears. See Tr. 17417-18 (Siskin).

not working in commission sales was that they preferred part time work (Baerg WT at 5; Tate WT at 6), have nothing to do with the hiring claim (nor, in fact, the promotion claims) which considers full and part time applicants separately. In any case, conclusory statements such as these are not the form of evidence that has been accepted to rebut a statistical case. See Carroll v. Sears, Roebuck and Co., 708 F.2d 183, 193 (5th Cir. 1983). Sears' managers statements that they did not discriminate carry no greater weight. See Teamsters v. United States, 431 U.S. 324, 342 n.24 (1977).^{24/}

Sears also relied on the testimony of Drs. Crespi, Rosenberg, C. Haworth, J. Haworth, and Ms. Juliet Brudney who testified that women were not interested in commission sales because they were less economically motivated than men, were less willing to assume risk, less willing to engage in competition, less willing or able to acquire the technical skill necessary in certain commission sales areas, and

^{24/} It would be particularly inappropriate to accept generalized statements as to the lack of female interest where the defendant maintains records of refusals of commission sales offers by women. Sears maintains such records and has throughout the relevant period (Schumm Tr. at 43, 58; Rogers Tr. at 51; Pl. Exh. 247/Def. Exh. 23, 1972 Tab at 19-20, 1973 Tab at 6; Tr. 8867 (Graham)). Yet Sears' Exhibit 25 contained a total of only eight instances where women refused hire into commission sales positions in the Eastern Territory for the entire period for which that Exhibit was compiled (Tr. 17586 (Siskin))

too constrained by home responsibilities. They testified that women's occupational patterns in the past had been a result of women's preferences and that recent trends in patterns at Sears did not reflect the easing or elimination of discriminatory barriers, but were simply results of dramatic changes in women's attitudes in recent years.

The testimonies of the EEOC's experts Drs. Kessler-Harris, Appelbaum, and Julia Ericksen challenge these explanations of why women have not worked in certain jobs. The primary cause for the absence of women in many entry-level occupations is employers' or unions' failure to allow them access (see Kessler-Harris WT; Tr. 16527, 16530 (Kessler-Harris); see also Tr. 18233 (Rosenberg)). The fact that working women have moved into previously all-male occupations when male labor shortages occurred is proof that the women would have been there but for artificial barriers, whether the example is women in auto industry crafts in the 20's, heavy industry during World War II, or the post-war banking industry (Kessler-Harris WT at 6, 9, 10; Tr. 16523-26 (Kessler-Harris)). Defenses Sears puts forward such as women's reluctance to travel to people's homes, their aversion to being outside, or having to occasionally get dirty, their fear of technical matters and all the other stereotypical statements noted earlier in this document, simply do not stand in the light of the historical record (See Kessler-Harris WT).

Dr. Ericksen testified that women who are in the workforce, as opposed to those who are considering entering,

have figured out how they will deal with the problems of home responsibilities. She also brought out that the majority of child care for working women is performed by husbands and relatives, and this is frequently easier to arrange for night work (Tr. 15887 (J. Ericksen)).^{25/}

Dr. Ericksen also provided results of a national survey of working women, not conducted for purposes of defending litigation, which demonstrate that overwhelmingly working women are not risk averse, nor interested in finding low pressure jobs. Rather, they have strong interest in getting ahead, whether they are college educated career women or less well educated, less affluent women (Tr. 15892).

Dr. Appelbaum pointed out that such assumptions about women as intermittency and lack of attachment to the labor force are simply not borne out by the data on women's labor force participation (Tr. 16212-14). She also brought out that the labor force participation of married, as well as single women, is primarily economically motivated, as is demonstrated by Sears' own data, which show that 75 percent of the married noncommission

^{25/} Dr. Ericksen made clear that where women do account for home responsibility is by looking for work closer to home, a phenomenon that suggests that they are more likely to accept job offers made than would men, who do not view the time traveling to work as crucial the way mothers do (possibly because they are paying babysitters for that time). The significance of this for commission sales is that women who apply at Sears probably have fewer options than their male counterparts and would be more likely to accept the job if offered. Sears' contention that women's home roles prevent their participation as commission salespersons are simply unfounded (Tr. 15888).

saleswomen at Sears have husbands with incomes below \$25,000 in 1982 (Appelbaum WT at 19). See also results of Question 16B of the Crespi Timecard Survey (Pl. Exh. Crespi 17), which show that 27% of full time noncommission saleswomen reporting spousal income had husbands who made under \$15,000; an additional 28% of the married group have unemployed husbands. These are not women who are working to neatly supplement the family standard of living or to develop a nest egg; they are women for whom earning income is serious business (Tr. 16241 (Appelbaum)).

Contrary to Sears' assertions, the reason women have always worked is for the income from that work. As Alice Howland stated, "if I am going to work I might as well earn more money than less (Howland WT at 5.). Dr. Presser's work for this case, in showing that the changes in women's attitudes that Cr. Crespi presented as so major to be actually rather modest, (Tr. 17103 (Presser); see Pl. Exh. Presser 2), demonstrates that women did not have to undergo some change in order to want commission sales jobs and to be successful in them. Women who were in the work force in 1973 were committed to earning income and entering jobs when the opportunity to do so arose as they were in 1980.

In sum, the EEOC's rebuttal witnesses refute Sears' claims of dramatic changes in women and women's inability to handle or lack of interest in jobs such as commission sales.

Dr. Madden more specifically testified that after the controls imposed by Dr. Siskin's analysis, the differences in interests between men and women with similar objective characteristics as measured by that analysis would not have

been so great as to materially affect their willingness, relative to men, to accept commission sales positions at Sears (Tr. 17928-29 (Madden)).

In its Proposed Conclusions of Law (at 11), Sears cites five cases in support of its argument that the EEOC's statistics are meaningless because of a failure to consider differences in preference. None of the cases are comparable to the situation here. Malloch v. J. C. Penney, Inc., No. C80-1283R (verbatim transcript) involved a rudimentary effort to establish exclusion of women from commission sales positions based on the argument that they should have been equally distributed among commission and noncommission sales divisions; no similar claim is even pursued here. Eubanks v. Pickens-Bond Construction Co., 635 F.2d 1341, 1350-51 (8th Cir. 1980), was a case where a difference of one promotion (out of seven) over the period in question would have changed the result; the Court's reference in dismissing a claim to the fact that the pool "may have included persons who had no interest in the available foreman positions or who lacked sufficient experience or other legitimate credentials" hardly has significance beyond the facts of that case. Mazus v. Department of Transportation, 629 F.2d 870, 875 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981), was a case where the position in question was highway maintenance worker, and no woman but the named plaintiff had ever applied for such a position. EEOC v. H.S. Camp & Sons,

Inc., 542 F.Supp. 411, 445 (M.D. Fla. 1982), involved a meat packer where there was evidence that women had withdrawn their applications after learning the nature of the work. None of these cases provides useful guidance for the situation here. In Davis v. City of Dallas, 483 F.Supp. 54, 61 (N.D. Tex. 1979), the Court rejected a contention the female proportion of the relevant pool for police officers should be the 38% female proportion of the local civilian labor force, instead holding that the female proportion of the relevant pool for the 1973-1978 period at issue was the 17.5% female proportion of the applicants. To the extent that this decision bears relevance to this case, it would seem not to favor Sears' position. Finally, EEOC v. Mead Food, 466 F.Supp. 1, 23, 4, (W.D. Okla. 1977), involved positions in a bakery for which the shifts started at 3:00 a.m., which involved the driving of heavy trucks and the lifting of heavy trays. The decision does not disclose whether there were any female applicant for the position at all or the relevant pool on which the plaintiff had sought to rely. As with the other cases just cited, the rejection of the plaintiff's claim because of an assumed lack of female interest for the jobs in question has little bearing on this case.

Moreover, here, wherever direct evidence was available, as in the case of the AIG's, while certain differences in interests in products may be observed, the female interest in many areas usually deemed nontraditional was very high. Consider also that Sears' expert Dr. Haworth picked from 100 applications the three that she thought would best illustrate how "it was clear even from the face of the applications in the EEOC's non-hired sample that many female applicants were not interested in commission selling" (Sears' Proposed Findings I.J. No. 21). The two cited applicants that the EEOC could locate soundly demonstrated that Dr. Haworth's surmises were baseless.26/

Thus, except possibly for certain of the extreme situations in the cases cited by Sears, just as courts have placed the burden of rebutting the presumption of equal qualifications beyond minimum objective qualifications upon the party with the greatest access to the relevant information

26/ While we believe that the testimonies of Ms. Howland and Ms. Nader were useful to illustrate in a small way the fallacy of certain of Dr. Haworth's assumptions, she, not the EEOC having singled them out for illustrative purposes, we adhere to previously stated positions about the the lack of necessity and questionable wisdom of encumbering a proceeding of this nature with evidence seeking to show that certain individual persons were specifically discriminated against. See Tr. 32-33; Plaintiff's Opposition to Defendant's Motion to Dismiss Commission Sales Claim at 16 (Feb. 15, 1985). In fact in the questioning of Ms. Howland Sears itself emphasized how little an applicant who is not hired will know about the circumstances of her rejection, including whether there was even a vacancy at the time (Tr. 16023-25). The attention Sears gives to the absence of testimony of actual victims in its Proposed Findings is not warranted.

(see DeMedina v. Reinhardt, supra, 686 F. 2d at 1008 n.8 and 1009; Segar v. Smith, supra, 738 F.2d 1249, 1277 (D.C. Cir. 1984); D. Baldus and J. Cole, Statistical Proof of Discrimination at 194-95 (1980); cf. EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 n.5 (4th Cir. 1979)) the burden of proving that a difference in interest is substantial enough to affect the result belongs with the defendant-employer. This is particularly so here where the plaintiff has already controlled for differences to a greater degree than in any other case of this kind.

Finally, Sears has placed emphasis on the fact that it had an affirmative action program throughout the period at issue. See Sears' Proposed Conclusions of Law at 10. In fact, however, until the implementation of Sears' MAG program after July 1974, there is nothing regarding Sears' affirmative action programs that lends it the least support in this case. The 1970 Program did not even mention the movement of women into commission sales positions. The 1972 program, while setting a 38% long range goal for women in such positions, established no mechanism either to expedite the reaching of that goal by movement at rates in excess of 38%--as in a typical affirmative action program--or even to ensure movement rates approaching 38%. The actual movement rates are the hard evidence in this regard; and the female proportion of full time commission sales hires never reached 38% until 1979. The MAG program, implemented after July 1974,

did specify the obligations of unit managers, which was a marked advance over the earlier programs. The obligation imposed by that program--that one of two positions go to women or minority males--still only directed that 50% of the vacancies go to groups that together generally comprised between 65% and 90% of the sales applicants and 80% and 95% of the noncommission sales work force. The extent to which the terms of the program were fully complied with cannot be fully determined, since Sears successfully resisted EEOC efforts to obtain information for this case on the race of Sears employees. In any event, in the first three full years in which the program was in effect, 1975, 1976, and 1977, women still comprised no more than 32.6% of the full time commission sales hires. Based on the expected female proportion of hires derived from Dr. Siskin's analysis, this reflected discrimination regardless of whether the terms of the MAG program were fully observed.^{27/}

For all of these reasons, the Court should hold that Sears has violated Title VII with respect to the hiring of women into commission sales positions.

^{27/} The fact that Sears heavily recruited women into management trainee positions (see Sears' Proposed Conclusions of Law at 10) is beside the point. This merely reflects an attitude of Sears' corporate management that women were suited for development as managers. In any event, the intentions of Sears' corporate management are not the issue. The question is whether the conscious or unconscious bias of person actually making selections about the abilities of women to perform in commission sales influenced those selections. See Stewart v. General Motors Corp., *supra*, 542 F.2d at 450; Jaysinghe v. Bethlehem Steel Corp., ___ F.2d ___, 37 FEP Cases 817, 818 (7th Cir. 1985).

B. Promotions

1. The EEOC's Statistical Evidence

The female proportions of promotions from full time noncommission sales positions to full time commission sales positions and from part time noncommission sales positions to part time commission sales positions for the years 1973 through 1980 are set out in Table 6.

TABLE 6

FEMALE PERCENT OF COMMISSION SALES PROMOTIONS

Percent Female

<u>Year</u>	<u>Full Time Nationwide</u>	<u>Part Time</u>	
		<u>Four Terr.</u>	<u>Midwestern</u>
1973	29.1	24.3	45.4
1974	37.9	38.1	59.2
1975	47.7	50.7	67.9
1976	51.5	44.6	61.2
1977	43.9	39.4	60.2
1978	48.2	48.8	52.4
1979	42.5	53.9	51.1
1980	47.5	53.4	49.8

(Pl. Exh. 1, Tables 29, 31; Siskin Rebuttal WT, Table 3).

The EEOC's statistical analysis of Sears' promotion practices analyzed movement patterns separately by store aggregating the results by territory (Store Pool Analysis). In order to take into account the possibility that persons within a division might have a better chance of receiving a promotion in that division than would a noncommission salesperson outside the division, in each store the promotions were also analyzed by division, using separate pools for promotions that went to noncommission salespersons in the same

division and those that went to persons outside the division (Division Pool Analysis). The Store Pool analysis resulted in an expected female proportion of promotions nationwide from 1973 through 1980 of 72.7% for full time and 78.7% for part time based on the female representation among noncommission salesworkers in each store (Pl. Exh. 1, Table 30, 32). The Division Pool analysis resulted in expected female proportions of 68.8% for full time and 74.2% for part time (Pl. Exh. 1, Table 31, 34). Although the latter analysis may overstate the adjustment of the expected female proportion of promotions actually due to preference for persons in the division where the promotion takes place as a result of proxy bias (see Pl. Exh. 1 at 86 n.35 and Appendix 3 at 24-29) the results of the Division Pool Analysis are set out in Tables 7 and 8 below.

TABLE 7
DISPARITIES BETWEEN EXPECTED AND ACTUAL FEMALE FULL TIME
COMMISSION SALES PROMOTIONS FROM FULL TIME NONCOMMISSION
SALES POSITIONS USING YEAR-END DIVISION POOL,
BY YEAR, NATIONWIDE AND BY TERRITORY
Nationwide

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	825	70.4	29.1	581	240	341	9.2
1974	1016	65.5	37.9	665	385	280	20.7
1975	732	70.8	47.7	518	349	169	15.1
1976	819	72.8	51.5	596	422	174	14.5
1977	1099	68.4	43.9	752	483	269	20.5
1978	934	68.0	48.2	635	450	185	14.5
1979	419	63.7	42.5	267	178	89	11.2
1980	238	71.8	47.5	171	113	58	9.5
All Years	6082	68.8	43.1	4185	2620	1565	32.9

(table continued)

TABLE 7 (continued)
 DISPARITIES BETWEEN EXPECTED AND ACTUAL FEMALE FULL TIME
 COMMISSION SALES PROMOTIONS FROM FULL TIME NONCOMMISSION
 SALES POSITIONS USING YEAR-END DIVISION POOL,
 BY YEAR, NATIONWIDE AND BY TERRITORY

Eastern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	241	47.3	23.7	114	57	57	12.4
1974	267	57.3	31.5	153	84	69	9.5
1975	214	64.0	46.7	137	100	37	5.9
1976	209	67.9	55.0	142	115	27	4.4
1977	149	61.7	50.3	92	75	17	3.3
1978	169	65.7	51.5	111	87	24	4.2
1979	81	53.1	38.3	43	31	12	3.3
1980	50	70.0	64.0	35	32	3	0.9
All Years	1380	59.9	42.1	827	581	246	16.1

Midwestern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	233	79.4	40.8	185	95	90	16.1
1974	320	73.4	48.8	235	156	79	11.2
1975	187	74.3	52.4	139	98	41	7.5
1976	181	78.5	55.2	142	100	42	8.4
1977	342	72.3	50.0	256	171	84	12.4
1978	172	72.1	38.4	124	66	58	11.8
1979	94	71.3	39.4	67	37	30	8.3
1980	59	67.8	27.1	40	16	24	7.6
All Years	1588	74.7	46.5	1187	739	448	29.6

Pacific Coast

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	---	---	---	---	---	---	---
1974	---	---	---	---	---	---	---
1975	---	---	---	---	---	---	---
1976	20	60.0	20.0	12	4	8	3.9
1977	178	58.4	33.1	104	59	45	8.0
1978	268	60.4	44.0	162	118	44	5.9
1979	90	67.8	48.9	61	44	17	4.2
1980	42	66.7	40.5	28	17	11	3.8
All Years	598	59.7	40.5	365	242	123	11.6

TABLE 7 (continued)
DISPARITIES BETWEEN EXPECTED AND ACTUAL FEMALE FULL TIME
COMMISSION SALES PROMOTIONS FROM FULL TIME NONCOMMISSION
SALES POSITIONS USING YEAR-END DIVISION POOL,
BY YEAR, NATIONWIDE AND BY TERRITORY

Southern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	139	65.5	18.7	91	26	65	12.3
1974	233	61.4	29.2	143	68	75	10.7
1975	198	69.2	38.4	137	76	61	9.9
1976	205	71.2	42.9	146	88	58	9.5
1977	258	67.8	37.6	175	97	78	11.4
1978	125	69.6	54.4	87	68	19	4.0
1979	76	57.9	36.8	44	28	16	4.8
1980	37	78.4	48.6	29	18	11	4.5
All Years	1271	66.9	36.9	850	469	381	24.8

Southwestern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	212	75.9	29.2	161	62	99	17.2
1974	196	68.9	39.3	135	77	58	10.1
1975	133	79.7	56.4	106	75	31	7.1
1976	204	75.5	56.4	154	115	39	7.0
1977	172	73.8	47.1	127	81	46	9.7
1978	200	76.0	55.5	152	111	41	7.4
1979	78	65.4	48.7	51	38	13	4.7
1980	50	80.0	60.0	40	30	10	4.3
All Years	1245	74.3	47.3	925	589	336	24.9

(Pl. Exh. 1, Table 31).

As Table 7 shows, under the Division Pool Analysis there were statistically significant disparities between actual and expected female promotions from full time noncommission sales positions to full time commission sales positions nationwide and in each territory, except for 1980 in the Eastern Territory.

TABLE 8

DISPARITIES BETWEEN EXPECTED AND ACTUAL FEMALE PART TIME
COMMISSION SALES PROMOTIONS FROM PART TIME NONCOMMISSION
SALES POSITIONS USING YEAR-END DIVISION POOL,
BY YEAR, NATIONWIDE AND BY TERRITORY

Nationwide

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	457	82.5	35.9	377	164	213	27.9
1974	656	79.6	49.2	522	323	199	20.4
1975	741	81.1	59.5	601	441	160	15.9
1976	743	78.3	51.7	582	384	198	18.5
1977	1462	80.6	52.4	1178	766	412	28.4
1978	1187	76.9	50.0	913	593	320	22.7
1979	909	76.3	52.8	694	480	214	17.2
1980	645	75.2	52.2	485	337	148	13.9
All Years	6800	78.7	51.3	5352	3488	186	57.6

Eastern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	67	71.6	28.4	48	19	29	8.2
1974	130	70.8	43.1	92	56	36	7.0
1975	127	74.8	49.6	95	63	32	6.7
1976	143	74.8	52.4	107	75	32	6.3
1977	120	74.2	42.5	89	51	38	8.1
1978	169	73.4	54.4	124	92	32	5.8
1979	162	74.7	59.9	121	97	24	4.6
1980	126	76.2	59.5	96	75	21	4.5
All Years	1044	73.9	50.6	772	528	244	17.7

Midwestern

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	251	89.2	45.4	224	114	110	24.8
1974	348	85.6	59.2	298	206	92	15.1
1975	380	87.6	67.9	333	258	75	12.6
1976	317	83.3	61.2	264	194	70	11.4
1977	916	84.4	60.2	773	551	222	21.2
1978	372	82.3	52.4	306	195	111	15.8
1979	360	77.2	51.1	278	184	94	12.5
1980	207	75.4	49.8	156	103	53	8.8
All Years	3151	83.5	57.3	2632	1805	827	42.3

(table continued)

TABLE 8 (continued)

DISPARITIES BETWEEN EXPECTED AND ACTUAL FEMALE PART TIME
 COMMISSION SALES PROMOTIONS FROM PART TIME NONCOMMISSION
 SALES POSITIONS USING YEAR-END DIVISION POOL,
 BY YEAR, NATIONWIDE AND BY TERRITORY

Pacific Coast

Year	Total	Percent Female		Number Female		Diff.	z
		Exp.	Act.	Exp.	Act.		
1973	---	----	----	---	---	---	----
1974	---	----	----	---	---	---	----
1975	---	----	----	---	---	---	----
1976	31	77.4	32.3	24	10	14	6.2
1977	119	73.1	31.1	87	37	50	10.6
1978	304	73.4	47.0	223	143	80	10.6
1979	186	74.7	47.8	139	89	50	8.6
1980	172	73.8	52.9	127	91	36	6.5
All Years	812	73.9	45.6	600	370	230	18.9

Southern

Year	Total	Percent Female		Number Female		Diff.	z
		Exp.	Act.	Exp.	Act.		
1973	54	75.9	20.4	41	11	30	9.6
1974	104	74.0	40.4	77	42	35	8.0
1975	179	73.7	54.7	132	98	34	5.8
1976	175	73.1	39.4	128	69	59	10.4
1977	246	74.4	39.4	183	97	86	12.8
1978	184	75.0	43.5	138	80	58	10.1
1979	84	73.8	54.8	62	46	16	4.1
1980	74	73.0	47.3	54	35	19	5.2
All Years	1100	74.2	43.5	816	478	338	23.7

Southwestern

Year	Total	Percent Female		Number Female		Diff.	z
		Exp.	Act.	Exp.	Act.		
1973	85	74.1	23.5	63	20	43	10.9
1974	74	75.7	25.7	56	19	37	10.0
1975	55	76.4	40.0	42	22	20	6.2
1976	77	75.3	46.8	58	36	22	6.1
1977	61	75.4	49.2	46	30	16	5.0
1978	158	76.6	52.5	121	83	38	7.3
1979	117	78.6	54.7	92	64	28	6.5
1980	66	77.3	50.0	51	33	18	5.6
All Years	693	76.3	44.3	529	307	222	20.4

(Pl. Exh. 1, Table 33).

As Table 8 shows, under the Division Pool Analysis there were statistically significant disparities between actual and expected female promotions from part time noncommission sales positions to part time commission sales positions nationwide and in each territory.^{28/}

^{28/} Although it makes no difference to the analysis presented in Table 8, it should be noted that as with the hiring case, part time nationwide promotion figures may be misleading as a result of the large influence of the Midwestern Territory. (Siskin Rebuttal WT at 31-32). Table 9 therefore sets out the Division Pool Analysis for the four other territories combined.

TABLE 9

DISPARITIES BETWEEN EXPECTED AND ACTUAL FEMALE PART TIME COMMISSION SALES PROMOTIONS FROM PART TIME NONCOMMISSION SALES POSITIONS USING YEAR-END DIVISION POOL, EASTERN, PACIFIC COAST, SOUTHERN, AND SOUTHWESTERN TERRITORIES, BY YEAR

Year	Total	Percent Female		Number Female		Diff.	Z
		Exp.	Act.	Exp.	Act.		
1973	206	72.3	24.3	149	50	99	15.4
1974	308	67.2	38.1	207	117	90	10.9
1975	361	70.4	50.7	254	183	71	8.2
1976	426	70.0	44.6	298	190	108	11.4
1977	546	67.9	39.4	371	215	156	14.3
1978	815	69.7	48.8	568	398	170	13.0
1979	549	72.7	53.9	399	296	103	9.9
1980	438	73.7	53.4	323	234	89	9.7

(Siskin Rebuttal WT Table 3).

2. Nonstatistical Evidence

As with the hiring claim, the promotion claim also is bolstered by the subjective nature of the system. Indeed the observations of the Seventh Circuit in Stewart v. General Motors Corp., 542 F.2d 445, 450 (1976), could in most respects have been specifically stated about this case. Emphasizing, inter alia, the "absence of written guideline delineating the criteria for which they are supposed to be looking," the Court concluded:

... While some subjectivity is inevitable in filling jobs of an executive character, the total lack of objective standards at Broadview could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment. In condemning promotional systems where employees of a minority race have been excluded by a process in which objective standards are lacking, we are in accord with a number of other courts. (Citations omitted.)

See also Carroll v. Sears, Roebuck and Co., 708 F.2d 183, 193 (5th Cir. 1981), where in holding that Sears division manager promotion practices discriminated against blacks the court cited Sears' unwritten, subjective criteria for promotion. While both the Stewart and Carroll decisions noted the fact that the supervisors whose ratings were relied upon were mostly white, the fact that race discrimination rather than sex discrimination is at issue is not germane to the issue of the dangers of subjective employment processes. See Nord v. United States Steel Corp., ___ F.2d ___, 37 FEP Cases 1232 1236 (11th Cir. 1985).

In addition, even though it appears that test scores may have played a less significant role in promotion than in hire (although clearly they did play some role, see Sears' Exh. 25-67), there is no reason to believe that the masculine image of a commission salesperson set out in the Retail Testing Manual had any less influence in the promotion process than in the hiring process.

3. Sears' Defenses

Sears asserted the following defenses to the EEOC's promotion claim. First, Dr. Haworth conducted analyses by division and by product line which resulted in estimations of the expected female proportion of promotions that were roughly 10 percentage points lower than those yielded by the EEOC's Division Pool Analysis. She also made adjustments for age and seniority, which did not materially affect the expected female proportion of promotions. See Sear' Exhibit 6-S-4; Siskin Rebuttal WT at 23-29. Both Dr. Haworth's division and product line analyses treated each contributing division or product line separately, weighted on the basis of its contribution, regardless of whether men or women in a division or product line actually had a better chance of selection than persons in other divisions. This procedure was improper and would be expected to result in the underestimation of the expected female proportion of promotions (Siskin Rebuttal WT at 23-28; Madden WT at 19; Tr. 17418 (Siskin); Tr. 17944 (Madden)). The same criticism applies to Dr. Haworth's use of age and seniority (Siskin Rebuttal WT at 29).

The ultimate result of Dr. Haworth's promotion analysis, however, is simply to demonstrate that the criticisms of Dr. Siskin's promotion analysis (Haworth WT at ¶17), whether well-founded or not, involve matters that would not materially affect the results of that analysis. Had Dr. Siskin expanded his division pool analysis to a product line analysis that treated separately the product line in which the promotion took place, and whether or not he took age and seniority into account, the result should be expected female proportions of full and part time hires and promotions considerably above 60%. See Siskin Rebuttal WT at 28-29; Tr. 17422 (Siskin).

Sears makes the same generalized statements regarding the alleged absence of female interest in commission sales that it did for the hiring claim. These have in large part been responded to with regard to the hiring claim. However, a few additional matters warrant note here. The testimony of Sears' store witnesses were more specifically directed to incumbents than to applicants. However, they were very similar as to the dearth of specificity regarding identifying individuals who refused offers of commission sales positions. Sears' Exhibit 25, which was produced after an extensive search of records in the Eastern Territory (Tr. 12293 (Dowd)), 28a/ produced only 15

28a/ The Promotable Employees form maintained in Sears' Affirmative Action Manual should provide an accurate record of least for full time employees (Pl. Exh. 249, 1973 Tab at 20); see Schumm Tr. at 43).

clearly identified instances of refusals of commission sales positions of the type that are at issue--noncommission to commission from same status--and 85 more that could have been.^{29/} The documentation that Sears has provided thus does not suggest that there is substance behind the generalized assertions of its managers.

Third Sears relies on various surveys, which, it maintains, show that differences in interest account for the disparities shown by Dr. Siskin's analysis. Among these is the 1976 Job Interest Survey. For several reasons, however, this survey should be entitled no weight whatever. The 1976 Job Interest Survey was conducted on July 8 and 9, in 27 stores, located, with the notable exception of the Midwestern Territory, in the cities where the five territorial offices were located. Neither the selection of stores nor of noncommission sales persons within the stores as survey subjects were performed randomly. That judgment other than merely selecting some convenient stores to survey was used is evident in the fact that in the Midwest, the territorial headquarters city, Chicago, was rejected, ostensibly because it had too often been the subject of surveys

^{29/} Two things should be noted about the documented cases of refusals. Without evidence of the male refusals they cannot provide the basis for a statistical refutation of the EEOC's claim. There is ample evidence from the various surveys that sufficient male as well as female employees were not interested in commission sales positions to indicate that such male refusals do exist. Second, even without regard to the number of male refusals there must be a many times greater showing of female refusals to suggest that, even were there no male refusals, female refusals could account for the disparity.

(Tr. 11433-35 (Smith)), and replaced with Milwaukee. Then, Milwaukee stores were supplemented with a Chicago store (Tr. 11434), where Sandra Hagerty, one of the planners of the survey (Hagerty WT at 2), had worked. The Chicago store provided more female respondents than any other store in the survey (Pl. Exh. Smith 6) all of whom responded negatively to the questionnaire (Pl. Exh. 278).30/

The responses Sears relies on to show that women are not interested in commission sales are those to question 3 of the survey form (Sears' Exhibit 254-1), which asked if the respondent wanted the job that had been described in question 2. That description was not a proper description for determining interest in commission sales in general, as the overall thrust of the question was such that the respondent may very well have been responding with his or her willingness to take a job that required the following:

1. "Outside selling - visiting customers' homes to complete sale;
2. Extreme peaks in workloads...on a seasonal as well as daily basis;
3. Specific technical knowledge
 - a)...such as laws regarding building codes
 - b)...Installation and service schedules
 - c) Proposal preparation -specific estimates and proposals sometimes have to be written as part of sales presentation."

(Presser WT, ¶2b at 2; Tr. 17214-18 (Presser)).

30/ It is an imperative of good survey practice that the selection of respondents not be influenced by persons requesting the survey. Hoffman, "Survey Research in the Courts: Is it Legal or Scientific?" Paper Before the American Statistical Association.

This is a description of the general requirements and environment of selling installed home improvements on an outside sales basis. See Tr. 8438 (Graham); Appendix A to Graham WT at 14). This aspect of the survey alone renders it untrustworthy. One cannot properly conduct a survey that invites a certain class of response (i.e., interest in installed home improvements) and then use it to measure the responses to another question that was not asked (i.e. various other big ticket of other commission divisions) (Tr. 17125-26 (Presser)).

A further aspect of the survey also renders it unreliable. The survey was intended as a "trial run" to see what kind of back pay liability Sears would incur if it used this particular definition of commission sales in determining female interest (Tr. 11766 (Hagerty)). If Sears was testing out various language to see how to minimize back pay liability if it were to settle with the EEOC on the pending commissioner's charge, as Ms. Hagerty's testimony suggests, the results of the survey cannot be deemed to fairly reflect the interest in the manner that a proper survey presumably would. (Sears in fact deemed the results achieved through the use of this form worth communicating to the EEOC in an effort to influence its enforcement strategy.) A survey designed to minimize measured female interest hardly qualifies as trustworthy for purposes of this litigation.31/

31/ Note on next page.

The foregoing are only certain of the known flaws in the design or execution of the survey. Because few records were maintained such other failings that may well attend a survey conducted in this manner cannot be known. In any event, on the basis of what is known, its results are unreliable and it should not be used as a defense in this case.

31/ (note from preceding page) Sears produced Dr. Frank Smith to testify to the design of the survey, but he knew very little about it (Tr. Tr. 11596-98, 18732, 18736 (Smith)). Moreover, his testimony was inconsistent and several times changed as a result not of a change of recollections, but on the basis of what he had been told by others. The change of testimony was particularly significant with regard to one quite important matter. During his testimony in March, Dr. Smith stated that "the administrators read through the entire questionnaire with them [the respondents] to make sure they understood exactly what it was we were after and then they were asked to complete the questionnaire question by question." (Tr. 11357-58 (Smith)). Dr. Presser testified that once the objectionable definition of commission sales found in Question 2 of the survey (supra at 53) is read, it taints individual's responses concerning interest in commission sales (Tr. 17153). After Dr. Presser so testified, Dr. Smith provided rebuttal testimony on June 22 that he had not really meant what he had testified on March 21; rather, he now testified, the administrators read through the instructions and the first question, had the individuals fill out the first page and then read the second page to the employees and had them fill out the rest. Why this had to be done for a simple three page questionnaire remains unexplained. Also unexplained is the failure by Sears to come forward to rectify the error until the presentation of Dr. Smith's rebuttal testimony on June 22.

Sears also defends on the basis of responses of persons it identifies as noncommission salespersons in the 1982 National Timecard Special Survey (timecard survey). This survey has a number of methodological problems, including failed coverage in the sample, severely inadequate design of the questionnaire, and administration that precluded both post-survey correction of the design problems and any assessment of the usefulness of the data obtained.^{32/}

First, the initial replacements of stores randomly sampled with other store having different characteristics ^{32/} reduced the coverage of the sample by approximately 12 percent (Tr. 16341 (E. Ericksen)). Given Sears' reported response rates (See Pl. Exh. Valinsky 5) coverage under this survey was further reduced -- to under 50 percent (E. Ericksen WT 3-4; Tr. 16342 (E. Ericksen)). At this level of response, extreme caution must be exercised in extrapolating generalizations about the population that did not respond from the responses of the population that did respond. In light of Sears' testimony as to the types of persons who find commission sales desirable, it appears that the female

^{32/} Sears replaced four stores, three of them because they had unions and Sears did not wish to seek union permission for a survey. Because of this, and because Dr. Valinsky believed the responses of employees in those stores might be different (Tr. 11087 (Valinsky)), Sears decided not to survey these stores. The EEOC acknowledges that Sears' witness Dr. Frank Smith has changed his original testimony on this matter, which original testimony was consistent with Dr. Valinsky's. Dr. Valinsky, who could recall no union unrest (Tr. 11104), has not changed his testimony.

noncommission salespersons who did not respond to the timecard survey may have been more likely to have been interested in commission sales than those who did (E. Ericksen WT 5; Tr. 16339-49 (E. Ericksen)). It is therefore unlikely that this survey adequately reports female interest in commission sales (Tr. 16449, 16453-55 (E. Ericksen)).

Apart from the coverage problem of the sample, the design of the survey itself caused severe problems in identifying noncommission salespersons. The morale surveys conducted by Sears always methodically recorded precise coding of the jobs held by noncommission salespersons (Tr. 18428-9 (Smith)). But in this survey, participants were merely asked "Are you in noncommission sales" (Appendix 4 to Crespi WT, question 13a). This question was not pretested to see if it would identify noncommission salespersons (Pl. Exh. Crespi 19). In fact, the two known authors of questions used in the timecard survey Dr. Smith and Dr. Crespi, both fail to accept responsibility for having written the questions (Id., see also Tr. 11,429-30). Participants in survey planning worked through and communicated with each other largely through counsel with minimal direct contact (see Pl. Exh. Smith 16; Tr. 11,416, 11,430, 11108-109, 18429).^{33/}

^{33/} Presumably counsel played a large role in writing the questions. This is very questionable survey practice. See Hoffman, supra, at 9.

The question produced disastrous results for the identification of noncommission salespersons.^{33/} Twice as many persons identified themselves as "in noncommission sales" as worked as noncommission salespersons in the sampled stores.^{34/} Sears apparently scrambled to find another definition that would salvage the survey, and came up with one in the last days of February 1985 that brought its overall response rate down to 56 percent. See Tr. 16338 (E. Ericksen). For an extensive description of the of the process necessary to arrive at this redefined response rate, see Tr. 13300-15. But the definition remains unacceptable. First, persons who probably were truly in noncommission sales were excluded. Second, persons who were clearly not noncommission sales could survive the redefinition and their responses would remain in the tallies for noncommission sales (Tr. 16344-51

^{34/} When Sears discovered that this was so is unknown. What is known is that the EEOC, despite constant requests, and several court orders over the period of several months, finally discovered through its own efforts and raw data given it under court order, that the "response rate" for full time noncommission salespersons was about 200 percent. Even after the EEOC brought this to the attention of the court, Sears waited three more months before producing its new improved definition of a noncommission salesperson. See Chronology of Sears' Responses to EEOC Requests for Information on Response Rates for National Timecard Nonsupervisory Special Survey of 1982 (March 4, 1985).

^{35/} Burns Roper argues that since there would not be many contradictory responses in a 20-30 person pretest, Sears should be absolved for the inadequacies of its survey. But the text of the survey itself makes clear that noncommission and commission sales were virtually the exclusive focus of the survey, and the only jobs respondents were asked to define themselves by. One would think that something so central to the purpose of the survey, especially a definition that was entirely different than any previously used at Sears for survey work, would have been carefully thought out.

(E. Ericksen)). These persons included assistant division managers, whose careers generally were directed toward checklist management and not commission sales (Schumm Tr. at 10; Tr. 11762-63 (Hagerty)), and quick service cashiers, who accrued personal sales per hour reports, but certainly did not qualify as salespersons (See Tate WT at 5. for comments on the lack of talent for commission sales to be found with the new self-service format and "discontinuation of noncommission salespeople.") Also, among those retained there is a high incidence of contradictory response indicating that the attempt to remedy the poorly executed survey after the fact did not work (E. Ericksen WT at 10-11, Table 1; Tr. 16346-47, 16414 (E. Ericksen); Tr. 17133 (Presser). Sears could have discovered the problem with asking about noncommission sales assignments in this manner through use of a simple pretest; it did not bother to do so (Tr. 17132-33 (Presser)).

The results of the 1982 timecard noncommission survey cannot be reliably used; indications are that those persons responding represent a wide variety of different jobs. This problem is exacerbated by the fact that unit number was not recorded for respondents, so it is impossible to even discover whether error was evenly distributed among the stores or clustered among a few. See Tr. 16339 (Ericksen). The survey cannot even be examined to determine the extent of its statistical reliability, since the decision to not identify unit precludes statistical analysis of the reliability (Tr.

16354). A company may choose for its own purposes to conduct a survey in which cannot be judged as to the confidence with which its estimates are to be treated. However, a court should be rigorous in its approach to survey research, since accepting it benefits the party that chose to be imprecise, but may seriously prejudice others. This survey deserves no deference.

However, if the the survey is to be used for any estimate of female availability for promotion to commission sales, Question 13C clearly is superior to Question 42. Question 13C asks the respondents whether they would accept commission sales jobs if offered. Question 42 asks a respondent to list the three jobs he or she wants to be considered for next. Question 42 requires the respondent not only to report on interest in commission sales but also make a determination about whether there will be openings and whether the respondent will be considered for them. As noted by Dr. Eugene Ericksen, catalog sales units, included in the survey group, are virtually all female, and either are entirely noncommission or entirely commission. Since no opportunities exist within the units, and the units are found primarily in remote rural areas (Tr. 8342 (Graham)), for these women it would be unrealistic to choose commission sales as the job one wants to be considered for next. There are no jobs to be considered for.^{36/}

^{36/} Just a few women answering question 42 differently as to interest in commission sales would have made a difference since only 17 men and 19 women chose commission sales to be considered for next in Question 42 (Tr. 16340 (E. Ericksen)).

Question 13C measures only interest, not perceptions of availability of openings. Since this survey's results are being used to argue interest, question 13C is clearly more appropriate. See Written Testimony of Stanley Presser; Tr.17135-36 (Presser).

Dr. Crespi argued that Question 13C is inappropriate because respondents might say that they would take a job out of fear of being fired should they refuse (Tr. 13069). This is a curious argument given Sears witnesses' testimony that they have continually asked women to take commission sales jobs and that those women refused such offers.37/

If any adjustment is to be made to the expected female proportion of promotions for responses to the 1982 timecard survey, it should be on the basis of the responses to question 13C. This would not materially affect the results of the EEOC's promotion analysis nor the outcome of this case. See Siskin Rebuttal WT, Tables 1-3, at 31 -32.38/

37/ Dr. Haworth's reliance on the Career Aspirations Questionnaire responses in Sears' Exhibit 6A. Only 50 persons of any class expressed interest, including only 4 full time noncommission salespersons. These numbers, drawn from responses over a two-year period, are simply too small to use for any predictive purpose (Tr. 16457 (E. Ericksen)), particularly when no information on overall response rates was provided (E. Ericksen WT at 17).

38/ Even if adjustments were made on the basis of Question 42, there would be statistically significant disparities in 1973 and 1974.

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