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## I. INTRODUCTION

### A. History of the Case

The Equal Employment Opportunity Commission (EEOC) has stated that its pre-lawsuit investigation of Sears, Roebuck and Co. (Sears) was the "largest . . . most extensive . . . most exhaustive investigation . . . ever undertaken under Title VII." Plaintiff's Opposition to Renewed Motion to Consider Reserved Ground for Dismissal at 3-4 (Aug. 24, 1982). Its trial expenditures for outside consultants alone have been so large that they may result in the unpaid furlough of the EEOC's 3,100 employees. Cost Overrun in Massive Sears Case May Result in Furloughed EEOC Workers, BNA, Daily Labor Report at A-8,-9 (June 13, 1985).

When filed in 1979, this "pattern or practice" lawsuit included 42 distinct allegations of nationwide sex discrimination. Sears Exh. 46; Plaintiff's Answers and Objections to Defendant's First Set of Interrogatories at 15-21 (Jan. 7, 1980). By 1984, it included only two. Final Statement of Issues (Apr. 16, 1984).

Based solely on statistics, both claims changed as the EEOC's outside consultants manipulated data.<sup>1</sup> Even during trial, the EEOC's case was "constantly evolving," presenting Sears with a "moving target." Tr. 2909, 4083 (statements of the Court).

Although it allocated tremendous resources to contriving statistics which would appear to be the "expected result of a regularly followed discriminatory

1. Tr. 5290, 5381, 5423-24 (Siskin) (post-suit development of commission sales claim). See, e.g., Commission Decision No. 77-21 at 163 (Apr. 19, 1977) (6 "C" codes); Statement of Issues (Apr. 7, 1982) (24 "C" codes); Revised Statement of Issues (Oct. 15, 1982) (dropped nine "C" codes; added eight "C" codes and 41 "Hay" codes); Letter from Gerald D. Letwin to Pamela S. Horowitz (Nov. 9, 1982) (added 20 "Hay" codes); Letter from Gerald D. Letwin to Pamela S. Horowitz (Dec. 6, 1982) (added 12 "Hay" codes); Letter from Gerald D. Letwin to Pamela S. Horowitz (Feb. 19, 1983) (dropped 21 "Hay" codes; added 17); and Letter from Gerald D. Letwin to Pamela S. Horowitz (Aug. 17, 1983) (dropped one "Hay" code, added one); Final Statement of Issues (Apr. 16, 1984) (51 job codes).

policy," the EEOC was unable to produce even one victim or prove the occurrence of even one discriminatory "employment decision, during the period in which the [alleged] discriminatory policy was in force . . . , made in pursuit of that policy." Teamsters v. United States, 431 U.S. 324, 360-61 n.46, 362 (1977).

### B. Credibility

Lacking witnesses to facts, the EEOC relied almost exclusively on expert witnesses' interpretations of unreliable, abstract statistics based upon unreasonable, unproven assumptions. In contrast, Sears produced witnesses to facts that contradicted the EEOC witnesses' unproven assumptions. Sears' expert witnesses' opinions were reasonably based on those proven facts.

Dr. Joan Haworth, who performed statistical analyses for Sears, is an expert in labor economics who gathered extensive information about Sears before conducting her analyses. She based her analyses on those facts -- not unproven assumptions.

Dr. Bernard Siskin, a statistician who developed the EEOC's entire case, had no expertise in labor economics and no direct substantive knowledge of Sears or retailing. His analyses were based upon unreasonable assumptions about Sears' employees, applicants, jobs, and the ways in which Sears functions.<sup>1</sup>

Jon Laking, a former member of Hay Associates, testified for the EEOC based upon his confidential work on Hay Associates' Sears project. His work for Sears was so unsatisfactory that he was removed from the project at Sears' request

1. As in a recent case in another court, Dr. Siskin made "assumption[s] . . . barren of record support," "excluded salient variables even though he knew of their importance," "compounded his sins by overreaching . . . to explain away results which did not support [his client's] theory of the case," and offered "testimony . . . reminiscent of the monition of the Cheshire Cat: 'It doesn't matter which way you go . . . . You're sure to [get somewhere] if you only walk long enough.'" Chang v. University of Rhode Island, 606 F.Supp. 1161, 1207 (D.R.I. 1985).

after only a year. Eventually he became the only Hay Associates partner before or since to be forced to leave Hay Associates.

Sears witness Ian Sym-Smith was the architect of Hay Associates' work for Sears. His knowledge and memory were both superior to Mr. Laking's.

EEOC expert historian Dr. Alice Kessler-Harris took the position that numerical differences between men and women in an employer's workforce can only be explained by sex discrimination by that employer. She made such overreaching statements as, "Where opportunity has existed, women have never failed to take the job offered." Kessler-Harris Written Testimony ¶6; see also Tr. 16,547 (Kessler-Harris) ("in general [the] statement is correct" that "every woman has never failed to take any job offered").

Sears' expert historian Dr. Rosalind Rosenberg offered the reasonable opinion that numerical differences between men and women in an employer's workforce can occur in the absence of discrimination by that employer. Rosenberg Written Rebuttal Testimony ¶ 1.

EEOC expert labor economist Dr. Janice Madden undermined whatever credibility she might otherwise have had by opining that female applicants to Sears had used the "strategy" of maximizing their chances of getting commission sales jobs by not mentioning their interest in commission sales when applying, Tr. 18,078-79 (Madden), and that a sales applicant's prior method of compensation (commission or wages) is irrelevant to the applicant's qualifications for or interest in commission sales at Sears. Tr. 18,024-25 (Madden).

Both Dr. Kessler-Harris and EEOC expert economist Dr. Eileen Appelbaum unreasonably maintained that men and women were equally interested in selling either men's or women's clothing. Tr. 16,316-18 (Appelbaum); Tr. 16,559-60 (Kessler-Harris). They thus took issue even with Dr. Siskin, who "just made the assumption that if [applicants] were male and they asked for clothing they were asking for male clothing, and if . . . female [and they] asked for clothing they

were asking for female clothing." Tr. 4379-80 (Siskin).<sup>1</sup>

EEOC expert psychologist Dr. Felix Lopez suggested "[a]n alternative selection process that would better serve the employer's needs," such as the proprietary system that he once purveyed to Montgomery Ward -- a system that he never validated with respect to any commission sales positions at Ward that might be analogous to those at Sears, and that Ward eventually rejected because it was too cumbersome and unwieldy. Lopez Written Testimony ¶ 17; Tr. 16,127-29 (Lopez). Disparaging statements he made about Sears, based solely on his "experience" with other companies, were contradicted by Sears witnesses with first-hand knowledge, as well as by statistical evidence and Dr. Lopez himself.<sup>2</sup>

To give answers favorable to the EEOC, several EEOC experts had to contradict their own writings. Dr. Kessler-Harris, for example, made a number of statements as a witness that conflicted with her statements as a historian. See Rosenberg Written Rebuttal Testimony passim & Appendix A. EEOC expert sociologist Dr. Stanley Presser thought that there was "not enough evidence to show convincingly" that a statement in his book was generally true. Tr. 17,193 (Presser). EEOC expert sociologist Dr. Eugene Ericksen had "[no] basis" to answer the question whether married women are more likely than married men to use noneconomic criteria in accepting jobs, until confronted with an article he had co-authored with his wife. Tr. 3196-97 (E. Ericksen). His wife, EEOC expert sociologist Dr. Julia Ericksen, also wrote in a 1977 issue of Social Problems, "Recent research on women in work has emphasized that, for the majority of women,

1. Dr. Siskin also contradicted other EEOC rebuttal witnesses by stating that commission selling is not "nontraditional" for women. Tr. 17,524 (Siskin). Compare, e.g., Tr. 16,590 (Kessler-Harris).

2. Dr. Lopez initially testified that Sears' use of a dual scale to equalize certain test scores of males and females, and Sears' giving little weight to testing when selecting commission salespersons, was "implausible." He later changed this testimony, admitting that he had misconstrued the data supplied him by the EEOC. Tr. 16,070-74, 16,085-96, 16,097-134 (Lopez).

going to work creates role conflict between the demands of the job and those at home and that the home role requirements are expected to take precedence." Confronted, she testified, "Actually, I don't think that anymore. . . . I think it was an overstatement." Tr. 15,981-82 (J. Ericksen).<sup>1</sup>

In short, Sears' witnesses were more credible and more knowledgeable than the EEOC's witnesses who, in their overreaching, contradicted themselves, each other, and common sense.

### C. Affirmative Action

Ray J. Graham, Sears' Director of Equal Opportunity from 1968 to 1980, embodied the sincerity and depth of Sears' commitment to equal opportunity, a commitment that existed long before Sears knew it was going to be charged by the EEOC. His testimony, corroborated by dozens of other present or former Sears employees, established that Sears' standard operating procedure both before and during the period in question was affirmative action on behalf of women.

In addition to proving that it engaged in affirmative action on behalf of minorities, women, veterans, and other protected groups in all areas of the company under a multitude of laws and government policies, Sears produced detailed examples of its specific efforts to encourage women to enter commission sales. Its store witnesses recounted numerous such examples.<sup>2</sup> Sears witness

1. Dr. Ericksen also testified that when wives are employed, their husbands are "considerably less likely to move long distances." J. Ericksen Written Testimony ¶ 5(f). The article Dr. Ericksen cited for that testimony actually concluded that "[a] working wife reduces her husband's long distance migration by a rather small amount," and that "migration of husbands interferes substantially with the formulation and achievement of clear occupational goals among women." See Rosenberg Written Rebuttal Testimony ¶ 12a.

2. E.g., Mihalovich Written Testimony ¶¶ 18-20; Balistee Written Testimony ¶¶ 7, 26-28, 32; Tate Written Testimony ¶¶ 21, 37, 40; Arnold Written Testimony ¶¶ 15-16; Rutherford Written Testimony ¶¶ 15, 20-21, 26; Rollins Written Testimony ¶¶ 4-5; Biczak Written Testimony ¶¶ 10, 13, 24-27, 30, 32, 37; Valdez Written Testimony ¶¶ 6, 18; Rambo Written Testimony ¶¶ 14, 21-24(a), 26; Schumm

Thomas Dowd personally collected hundreds of documented instances of attempts in the Eastern Territory to hire and promote women into commission sales vacancies. Sears Exh. 25.

During each of the years 1973-80, Sears recruited and hired a far greater proportion of female management trainees -- those employees who would be promoted to checklist positions -- than the female proportion of the civilian labor force or the female proportion of college graduates. Sears Exhs. 255-58. Throughout the relevant period, Sears' promotion rates for women in checklist positions exceeded those for men. Sears Exh. 6-28; Sears J. Haworth Pay Exh. 15.

Sears' witnesses specifically testified that they had never set or recommended the level of compensation of any Sears employee by considering the sex of that employee, did not know of or have knowledge of any other person at Sears doing so, and never violated, in any way, Sears' affirmative action program with respect to sex, but that those very few Sears employees who had were forced to leave the company. Tr. 13,943-44 (Givan); Tr. 14,716-17 (Sanders); Tr. 14,933-34 (Moore); Tr. 14,985-86 (Atkinson); Tr. 15,023-24 (Strauss); Tr. 15,101-02 (Johns); Tr. 14,838-39 (Bacon); Tr. 14,875-76 (Harmon).

The existence of Sears' comprehensive and effective affirmative action program is the antithesis of a pattern or practice of sex discrimination. It directly controverts the EEOC's claim that purposeful discrimination against

Written Testimony ¶¶ 10, 15, 25, 27; Toland Written Testimony ¶¶ 19, 23-25, 30; Wheeler Written Testimony ¶¶ 17, 21-23; Maddy Written Testimony ¶¶ 16, 19, 22, 34, 38; Byrum Written Testimony ¶¶ 13, 15, 28, 29; Blake Written Testimony ¶¶ 3, 13, 14; Teehee Written Testimony ¶¶ 18, 21, 23; Hallmark Written Testimony ¶¶ 20, 21; Howie Written Testimony ¶¶ 9, 17, 19; George Written Testimony ¶¶ 5, 10, 17-19; Truitt Written Testimony ¶¶ 17, 18; Moore Written Testimony ¶¶ 17, 19; Bays Written Testimony ¶¶ 5, 16, 17; Rogers Written Testimony ¶¶ 3, 16; Sule Written Testimony ¶¶ 7, 11, 17, 21; Baerg Written Testimony ¶ 12; Batchelor Written Testimony ¶¶ 4, 18; Tr. 11,802, 11,807-11, 11,816-17, 11,845, 11,365. (Balistee); Tr. 12,232-33, 12,270-71 (Tate); Tr. 12,439-40, 12,445, 12,453, 12,494 (Valdez); Tr. 12,528-29, 12,533-34, 12,539-41, 12,546-47, 12,566 (Mihalovich); Tr. 12,583-85, 12,596, 12,600 (Rutherford); Tr. 12,661-65, 12,669-70, 12,682-83 (Biczak); Tr. 12,894-96, 12,902, 12,918-19 (Rollins); Rogers Deposition at 62.66-67, 96-97 (Oct. 19, 1981).

women was Sears' standard operating procedure. Coser v. Moore, 739 F.2d 746, 751 (2d Cir. 1984); see Coates v. Johnson & Johnson, 28 Empl. Prac. Dec. (CCH) ¶ 32,664 at 25,037-38 (N.D.Ill. 1982), aff'd, 756 F.2d 524 (7th Cir. 1985).

## II. COMMISSION SALES

### A. Summary of Facts

Sears' hiring and promotion results reflect its affirmative action efforts. The "disparities" the EEOC presented were the product of its assumptions that male and female applicants and employees were equally interested in and qualified and available for commission sales positions. The EEOC's principal witness, Dr. Siskin, admitted that the assumptions were false. Sears FOF J37-39.

#### 1. Sears Engaged in Vigorous Affirmative Action Efforts

As early as 1968 when, as EEOC witness Carol A. Watkins testified, "the government was not yet interested in the problems of the employment of women," Sears had an affirmative action program for both women and minorities which included commission sales. Sears FOF D(1)2.<sup>1</sup> Sears instituted a centralized, company-wide, step-by-step affirmative action program in April 1970 and, in 1971, added full-time executives, whose special responsibility was affirmative action for women, to equal opportunity staffs in headquarters and the territorial offices. Sears FOF D(1)8, D(1)9.

1. In early 1968, Sears created the position of an Equal Opportunity Director reporting directly to the Vice President, Personnel and Employee Relations, and appointed Ray Graham as Director. Sears FOF D(1)1. In the fall of 1968, Sears developed and distributed to all units a questionnaire for use in its affirmative action program. One of the four pages of the questionnaire was devoted to women and specifically asked managers about the movement of women into commission sales. Sears FOF D(1)4. After the questionnaires were returned in late 1968, Sears began to implement a company-wide affirmative action program requiring store managers to factor the race, sex, and national origin of applicants and employees into every employment decision. Sears FOF D(1)5.

Shortly after A. Dean Swift became President of Sears in February 1973 and before Sears had any knowledge that it would be singled out by the EEOC, Mr. Swift called a conference of Sears' top 250 executives for the first time in 23 years. The meeting, held on May 21, 1973, was unprecedented because its purpose was to discuss the personal accountability of line managers for affirmative action. Sears FOF D(2)1. The most important outgrowth of the May 1973 meeting was the Mandatory Achievement of Goals (MAG) Plan. Sears FOF D(2)2.

To meet Sears' long-range goals for timecard jobs, the MAG Plan instituted an input ratio of 50 percent, requiring managers to fill one out of every two openings with women or minority men. When jobs were vacated by women or minorities, the MAG plan required replacement-in-kind. Sears FOF D(2)2. The MAG Plan was being implemented in all facilities by the summer of 1974. Sears FOF D(2)4.

From corporate headquarters to the grass roots level, Sears took its affirmative action requirements seriously.<sup>1</sup> Sears FOF D(2)4, D(2)5. Group and territorial executives carefully monitored each store's MAG compliance. Regularly scheduled personnel meetings always included a discussion of affirmative action, and store visits included a review of the store's progress. Sears FOF D(2)6.<sup>2</sup>

Sears' affirmative action requirements were a primary consideration in filling any job opening, including commission sales. During the entire period

1. Sears has spent a massive amount of time and energy promoting and achieving equal employment opportunity. The total cost to the company probably exceeds \$100 million. By 1977, Sears had spent more than \$20 million alone on the administrative costs of maintaining its affirmative action program. Sears FOF D6.

2. To deviate from MAG requirements, managers had to submit Good Faith Efforts forms to the territorial office setting forth the reason for the deviation, what had been done to locate a candidate, why such a candidate could not be located, and why it was essential that the opening be filled by a non-MAG candidate. Deviation requests were rarely granted. Sears FOF D(2)11.

1973 through 1980, Sears engaged in genuine and affirmative efforts to interest and place women in commission selling positions. Sears FOF D(2)10, D(4)1.

Sears' task was not an easy one. As witnesses with extensive personnel experience at Sears retail units during the time period at question testified, far more men than women applicants and employees were interested in and willing to accept commission sales jobs. Sears FOF L(3)1, L(3)2.<sup>1</sup> Sears' managers continually tried to persuade reluctant women -- even those only marginally qualified -- to consider commission selling as well as other non-traditional jobs. Sears FOF D(4)4-5. Commission sales vacancies were sometimes left unfilled until a woman who was willing to accept the job could be located. Sears FOF D(4)3. Women expressing an interest in commission sales were given priority over men for commission sales openings. Sears FOF D(4)2.

Many managers reported that they had interviewed every woman in the store and found not one who was willing to sell big ticket merchandise. Sears FOF D(4)6. Thomas Dowd, Personnel Director for the Sears' Eastern Territory, introduced, by the EEOC's counts, 680 documented cases in the Eastern Territory<sup>4</sup> alone where women either refused commission sales offers or indicated a lack of interest in commission sales positions.<sup>2</sup> Tr. 17,576-77 (Siskin); Sears Exh. 25; Sears Siskin Rebuttal Exh. 1.<sup>3</sup>

1. The ratio between the number of male and female applicants interested in commission sales was at least 8 or 10 to 1. Sears FOF L(3)3.

2. The documented cases Mr. Dowd presented were by no means the only instances of women turning down or expressing a lack of interest in commission sales positions in the Eastern Territory. Tr. 12,319-20 (Dowd).

3. The EEOC's own investigation turned up examples of women who were reluctant to take commission sales jobs, as illustrated in the case of Mary Nellie Parks, one of the 35 charging parties on whose behalf the EEOC originally filed this lawsuit. At least as early as July 1972, Sears began a series of attempts to get Ms. Parks, a Division 9 (Hardware) employee, to sell hardware on a commission basis. Although Sears initially convinced Ms. Parks to accept despite her personal reservations, she asked to be and was placed back in noncommission sales because she disliked the pressure of commission selling and preferred the

Unusual efforts were taken to support women who had been convinced to try commission sales. Sears FOF D(4)8. Managers purposely deviated from sound personnel practices by asking women to accept promotions to commission sales on a trial basis and offering to let them return to their old jobs if they did not like commission selling. Sears FOF D(4)7. Any weight normally accorded tests was diminished or eliminated entirely by affirmative action efforts on behalf of women.<sup>1</sup> Sears' stores lost sales because they retained poorly performing commission saleswomen in order to meet affirmative action requirements. Sears FOF D(4)6.

security and guaranteed income of noncommission selling. Again in 1973 and in 1975, Ms. Parks was offered commission sales jobs. She refused. Sears FOF L(3)22.

1. Tests were a minor consideration in commission sales selection. In many cases, they were not a factor at all. See generally Sears FOF G. Dr. Siskin admitted that "testing in the . . . disparate impact type situation doesn't appear to be the situation here." Sears FOF G4.

Despite extensive evidence to the contrary, Dr. Lopez found "implausible" the testimony of Sears managers that Sears employed a dual scale for men and women when evaluating the Thurstone Temperament Schedule (TTS). Lopez Written Testimony ¶ 9. After having time to reconsider his testimony over the lunch break, Dr. Lopez offered the oxymoron that Sears was "obviously sticking to a uniform standard" but "bending the standard to a little extent to hire more women." Tr. 16,085-86 (Lopez).

In discussing the fact that the mean scores on the "Vigorous" dimension of the TTS were significantly higher for men than for women -- a fact consistent with Sears' evidence that a dual scale was used -- both Dr. Siskin and Dr. Lopez stressed that the percentiles were higher for the female mean score than for the male mean. Siskin Written Rebuttal Testimony ¶ 6; Tr. 16,086 (Lopez). But, in light of the fact that the percentiles had been established in 1950 or earlier, it is likely that, relative to men, women in the 1970s would score higher than they did in 1950, given that most of the questions concerned sports, outdoor activities, and tools. See Lopez Written Testimony ¶ 5 (setting forth the 20 questions on Vigorous dimension); Tr. 16,106-07 (Lopez); Tr. 17,517-18 (Siskin).

Apart from the fact that witnesses with first-hand knowledge contradicted him, see Sears FOF G5-G14, Dr. Lopez's assertion that Sears managers relied "almost exclusively" on the TTS is belied by the statistics cited in his written testimony. They show that at least 29.3 percent of the full-time and 42.3 percent of the part-time commission sales hires were not tested at all before they were hired. Even tests taken before the date of hire may not have been administered before the hiring decision. See Sears FOF G6, G10, G11. Dr. Siskin conceded that the true percentage of tests given after the date of hire was even greater because his figures counted tests given during the month, but after the date, of hire. Tr. 17,515-16 (Siskin).

Several reasons were consistently expressed by female applicants and employees as to why they were not interested in commission sales:<sup>1</sup> (1) fear or dislike of the competitive, "dog-eat-dog" atmosphere of most commission sales divisions; (2) discomfort or unfamiliarity with most product lines sold on commission at Sears, or preference for product lines sold in noncommission divisions;<sup>2</sup> (3) fear of being unable to compete, being unsuccessful and losing their jobs; (4) fear of nonacceptance by customers in such traditionally male-oriented divisions as hardware (Division 9), automotive (Division 28), installed home improvements (Divisions 32, 42, 64, and 65), and tires (Divisions 94 and 95); (5) distaste for the type of selling they believed was required in commission divisions; (6) preference for noncommission sales jobs; (7) preference for "keeping busy" and dislike of the relatively slower customer traffic in most commission divisions; (8) the overall belief that the increased earnings potential of commission selling was not worth the additional responsibilities,

1. Because the character, complexity, and price of the merchandise differed sharply between commission and noncommission sales divisions at Sears, there was a vast difference between commission and noncommission selling. Sears FOF F2. The 1982 National Timecard Nonsupervisory Special Survey showed that, according to both noncommission and commission salespersons, commission sales required more selling skills, experience, enthusiasm, and product knowledge than did noncommission selling and that commission selling required the salesperson to spend more time with a customer discussing the merchandise and traveling to customers' homes than did noncommission selling. Sears FOF L(1)51.

While noncommission salespeople always had the guarantee of a regular salary, commission salespersons' earnings depended to a substantial degree on the amount of merchandise sold. Sears FOF F6, F7. Commission salespersons constantly worked under the pressure they placed upon themselves to enhance their earnings, the pressure from outside competition, and the pressure from competition within their own divisions. Graham Written Testimony, App. at 3. They worked more nights than noncommission salespeople and often worked on Sundays. *Id.* at 3; Sears FOF F11. In some divisions, they worked in a customer's home at the customer's convenience. Graham Written Testimony, App. at 3.

2. Among applicants specifying a general interest in sales on their applications, women tended to prefer the noncommission softlines divisions such as fashion, jewelry, cosmetics, and apparel. Men were more likely to prefer the commission hardlines divisions such as hardware, automotive, sporting goods, and the more technical lines. Sears FOF L(3)4.

problems, pressure, and uncertainty. Sears FOF L(3)19.<sup>1</sup>

During the 1970's, few women had experience in home improvement selling and few were willing to make the investment necessary to gain expertise in that area.<sup>2</sup> Particular problems for women were the technical nature of the job; licensing requirements, the competition, the expectations of customers, and the

1. The experience of Sears managers in attempting to recruit women for commission sales jobs is not surprising. As Juliet Brudney, a writer and consultant on women's employment issues, testified, many women perceived commission sales as requiring a cutthroat competitiveness, preventing the friendships with colleagues that women made and valued in traditional work. Women who had worked in commission sales reported that it was necessary to develop a "toughness" in order to be successful, a trait unappealing to many women. According to Ms. Brudney, many women lacked confidence that they could succeed at commission selling, and many women expressed a reluctance to sell products that required mechanical and/or technical knowledge. Many women preferred the security of a steady salary to the risk of selling on commission and were reluctant to make sales calls at the home of someone with whom they had had no prior contact or personal connection. In Ms. Brudney's opinion, women generally would prefer selling noncommission products such as apparel, housewares, or accessories and would be less interested in selling products such as fencing, refrigeration equipment, or commercial and truck tires. Sears FOF L(3)11, L(3)12.

Based on the National Survey Data Search Project, Dr. Crespi concluded that: (1) men were more likely than women to be interested in sales jobs where there was a high degree of competition among salespersons or a chance of making more money but a risk of losing the jobs if they did not sell enough; (2) men were more likely than women to be motivated by the pay of a job rather than by the nature of the job and whether they liked it; (3) men were more likely than women to be interested in jobs that involved working nights or weekends; and (4) men were much more likely than women to be interested in selling automotive products, hardware, plumbing and heating, photographic products, tractors, and fencing--products typically sold on a commission basis at Sears. Sears FOF L(1) 19.

Dr. Rosalind Rosenberg testified that historically, men and women generally have had different goals and aspirations regarding work and that these differences, though in many instances diminishing, persist into the present. Sears FOF L4.

2. Training is a "constant" that continues throughout a commission salesperson's career. Tr. 11,512 (Reddington). The training required for commission sales positions varies depending on the salesperson and the product line. For example, the National Bath and Kitchen Association recommends that those who sell installed home kitchens have two years of training before they are allowed to sell independently. Tr. 12,093-94 (Michaels). Even a salesperson with a proven success record in selling shoes required six months of training to sell "elementary" installed home improvements. Tr. 12,157-58 (Michaels). Approximately two years of additional training were required before the salesperson could successfully sell complicated systems. Tr. 12,159 (Michaels).

need to sell outside the store. Sears FOF L(3)6. Women often disliked Division 45 (Men's Clothing) because of the need to take personal measurements of men. Sears FOF L(3)9.

Women were also much less interested than men in exchanging a lower but steady salary for the mere possibility of higher wages and were especially unwilling to take that risk under the "draw versus commission" system in effect until 1977. Sears FOF L(3)14. Women were relatively unwilling to work the evening and weekend hours required in most commission sales jobs, in many instances because of their home responsibilities. Sears FOF L(3)15.<sup>1</sup>

The testimony of Sears officials was corroborated not only by evidence about the characteristics of women in the labor force, but also by overwhelming evidence about the characteristics of applicants and employees at Sears. For example, according to the EEOC's own analysis, women constituted over 60 percent of the "sales" applicants but only 23 percent of the persons whose applications indicated a preference for commission sales. Compare EEOC Commission Sales Report at 20, 55 with Plaintiff's Exh. 14 at 1-2 (corrected June 7, 1985); see Plaintiff's Exh. Siskin Rebuttal 2A.<sup>2</sup> Data collected by the EEOC during its pre-

1. Even Dr. Siskin admitted that he would expect women to be more likely than men to decline commission sales jobs because of child care responsibilities or the need to accommodate their spouses' schedules. EEOC expert Dr. Eugene Ericksen conceded that "many married women would have more constraints [on their labor market activity] than similar married men." Sears FOF L(3)17. EEOC expert Dr. Julia Ericksen agreed that many working women with family responsibilities face a "double bind." Tr. 15,926-30, 15,939 (J. Ericksen) Similarly, Sears expert Dr. Rosenberg testified that the great majority of working women over the last century and a half have shaped their work around family life while men have shaped their family life around their work. Sears FOF L3 (supp.). Dr. Crespi testified that married working women still assume principal responsibility for childcare and housework, and experience conflicts between their responsibilities to their families and to their jobs. Sears FOF L(1)11, L(1)12. Even in 1980, working women were more likely than working men to consider their families, marriages, or children when making a variety of work decisions. Sears FOF L(1)12.

2. For both men and women, Dr. Siskin found that applicants who specifically indicated a preference for commission sales on their applications

suit investigation revealed that the female percentage of commission sales applicants was far lower than the female percentage of noncommission sales applicants -- 14.9 percent vs. 67.8 percent. Sears FOF M34. The Applicant Interview Guide data collected by certain Sears stores in 1978-80 also showed great differences between the interests of men and women. Males were disproportionately interested in job activities usually associated with commission sales positions at Sears. Females were disproportionately interested in activities usually associated with noncommission sales. Sears FOF M36; accord Tr. 17,457-58 (Siskin).

Four separate surveys -- the 1976 Job Interest Survey, Sears' routine morale surveys, the 1982 National Timecard Nonsupervisory Special Survey, and the responses to Career Aspirations Questionnaires administered at the stores in the EEOC's non-hired applicant sample in 1982-83 -- demonstrated that noncommission salesmen were much more likely than noncommission saleswomen to be interested in commission sales. Sears FOF L(1)43, L(1)54, M55(a); Smith Written Testimony § IIA, IIC(2); Tr. 11,323-24 (Smith). Although the EEOC attacked the methodology underlying three of the four surveys,<sup>1</sup> EEOC expert Dr. Stanley Presser testified

had a higher probability of being selected than those who did not. He acknowledged that his finding was consistent with the testimony of Sears officials that interest was an important consideration in the selection process. Tr. 17,474-75 (Siskin); see, e.g., Sears FOF F(2)1 (in selecting applicants, Sears managers looked for, among other things, expressions of interest in commission selling or in selling products sold on commission).

1. The EEOC never seriously questioned the design, administration, or analysis of the morale surveys.

Although much was made at trial about the definition of noncommission salespersons employed in the National Timecard Nonsupervisory Special Survey, (NTNSS) the testimony of EEOC expert Dr. Eugene Ericksen buttressed its reasonableness. Sears FOF L(1)12 (supp.). EEOC expert Dr. Presser acknowledged that even in the Panel Study of Income Dynamics (PSID), a well known survey conducted by the Survey Research Center at the University of Michigan, difficulties were encountered in defining the "family unit" despite the fact that the PSID was pre-tested. Tr. 17,189-219 (Presser).

Dr. Presser claimed that the 1976 Job Interest Survey was untrustworthy in three respects: sample selection, administration, and questionnaire design. Presser Written Testimony ¶ 2. His attack on the sample selection was premised on the assumption that all judgment samples are untrustworthy. Tr. 17,140 (Presser), a position contradicted by Dr. Eugene Ericksen, the EEOC's own

that the chances that four surveys would find essentially the same result by accident was very slim -- only 6.25 percent. Tr. 17,196 (Presser).

Several of the EEOC's rebuttal experts suggested that women's expressed lack of interest in commission sales was colored by a lack of opportunity, or the perception of a lack of opportunity. See, e.g., J. Ericksen Written Testimony ¶ 9; Madden Written Testimony ¶ 2; Kessler-Harris Written Testimony ¶ 11; Appelbaum Written Testimony ¶¶ 9, 10. But, even if there were some truth to the proposition that women's job preferences are shaped by their perception of their opportunities in general,<sup>1</sup> it would have no explanatory power here given Sears'

sampling expert. Tr. 3130-52 (E. Ericksen). Moreover, Dr. Presser's contention that the distribution of certain characteristics among respondents in the sample differed from the distribution in the population was without force because, when appropriate adjustments were made, the percentages of men and women "definitely" interested in commission sales were essentially unchanged. Smith Written Rebuttal Testimony ¶ 3; Sears Smith Rebuttal Exh. 2. In light of Dr. Smith's clarification of his original testimony, Dr. Presser himself retracted his criticisms about the survey's administration. Tr. 17,147-48, 17,152 (Presser); Smith Written Rebuttal Testimony ¶¶ 1, 2. Finally, Dr. Presser attacked the design of the questionnaire, insisting that the description of big ticket selling on the second page of the survey turned Question 3 into a measure of interest in particular big ticket jobs rather than in big ticket jobs in general. His criticism was based largely on ephemeral concerns and the implicit assumption that noncommission salespeople did not know anything about commission sales. See Tr. 17,158-61, 17,208-18 (Presser). In any event, Dr. Presser admitted that Question 1 of the survey had no defects. Like Question 2, the results of Question 1 demonstrated that noncommission salesmen were much more likely than noncommission saleswomen to be interested in commission sales. Tr. 17,152-53 (Presser).

The EEOC's criticisms of the use of Career Aspirations Questionnaires (CAQ) were also unfounded. Dr. Eugene Ericksen's most strident criticism -- a criticism launched without reading Dr. Joan Haworth's testimony -- was based on a misunderstanding of what Dr. Haworth had actually done. See Tr. 16,385-87 (E. Ericksen). Dr. Siskin's contention that it was "not appropriate" to combine the full-time and part-time CAQ responses ignored the similarity in results between the CAQs and the NTNSS. Compare Siskin Written Rebuttal Testimony (Commission Sales) ¶ 12 at 32 with Sears FOF M55(a)-(b); Sears FOF M26 (supp.). Dr. Siskin's claim that the part-time CAQ figures were "suspect" given that the proportion of respondents expressing an interest in commission sales was smaller in the CAQs than in the NTNSS ignored the difference in question wording between the two. Compare Siskin Written Rebuttal Testimony (Commission Sales) ¶ 12 at 32 with Tr. 17,375 (Siskin).

1. The argument that women have rushed into nontraditional jobs given the opportunity is incorrect. See generally Written Rebuttal Testimony of Dr. Rosalind Rosenberg.

stringent affirmative action efforts to recruit and encourage women to take commission sales jobs. See Tr. 13,462-63 (Crespi).<sup>1</sup>

Furthermore, the EEOC's "explanation" for the differences in men's and women's interest in commission sales was undercut by the interpretation of Sears' survey evidence offered by the EEOC's experts. According to EEOC experts Drs. Presser and Madden, Question 13c of the National Timecard Nonsupervisory Survey is a better measure of interest than Question 42 because the latter, but not the former is potentially colored by a perception of a lack of opportunity in commission sales. See Written Testimony of Stanley Presser ¶ 7; Madden Written Testimony ¶ 23; Tr. 18,057-63 (Madden).<sup>2</sup> But, like Question 42, Question 13c itself shows that women were far less interested than men in commission sales. Sears FOF L(1)54.

2. Sears' Hiring and Promotion Results Reflect its Affirmative Action Efforts

Despite conflicting affirmative action requirements<sup>3</sup> and the fact that women were less interested than men in commission sales, Sears' results in hiring and promoting women into commission sales are impressive. In 1968, women were approximately 8 percent of Sears' commission sales workforce. By

1. Dr. Kessler-Harris and Dr. Madden conceded as much. See Tr. 16,566 (Kessler-Harris); Tr. 18,098 (Madden).

2. Indeed, EEOC expert Madden went so far as to claim that Question 42 -- "[M]ark the three Timecard assignments that you want to be considered for next." -- was functionally equivalent to asking respondents what job they thought they would have next. Tr. 18,059-62 (Madden). Curiously, Dr. Madden distinguished between questions asking respondents what they aspire to and what they are likely to get at her deposition. Tr. 18,059-62 (Madden).

3. While Sears was working to increase and maintain female representation in its workforce, it simultaneously was concentrating on recruiting, hiring, and promoting minorities and members of other protected groups. Sears FOF E1. According to Dr. Siskin, the figures he had seen reflected Sears affirmative action efforts on behalf of minorities. Tr. 17,556 (Siskin). Pursuant to government policy, Sears made special efforts on behalf of veterans. More than 40 percent of male commission sales hires between 1978 and 1980 were veterans, and male veterans, including Vietnam era veterans, were more than twice as likely as male non-veterans to be hired into commission sales. Sears FOF C12, C13.

1980, women were 27.8 percent. From 1973 to 1980, women's share of hires and promotions into commission sales grew steadily. During this period, Sears never hired fewer than 20 percent females into full-time commission sales and 37 percent females into part-time commission sales in any year. Sears hired as many as 40 percent females into full-time commission sales and as many as 52 percent females into part-time commission sales. The female proportion of promotions from noncommission to full-time commission sales positions was never lower than 40.4 percent and was as high as 58.3 percent. The female proportion of promotions from noncommission to part-time commission sales positions exceeded 50 percent in every year from 1974 through 1980. Sears FOF D4, M6, M11.

The EEOC's chief expert, Dr. Siskin, attributed the upward trend in female representation in commission sales at Sears throughout the 1970s to the company's affirmative action plan, and admitted that affirmative action efforts are antithetical to the existence of a pattern or practice of discrimination. Sears FOF D(4)9.<sup>1</sup>

Sears affirmative action efforts are reflected in the characteristics of its commission sales workforce. Among commission sales hires, commission salesmen were more likely than commission saleswomen to have had previous experience related to commission sales. Sears FOF M16, M21; Crespi Written Testimony ¶ 38. Among commission sales promotions, commission salesmen were more likely

1. The EEOC lamely attempted to denigrate Sears' affirmative action efforts through the testimony of Dr. Lopez. Dr. Lopez relied heavily upon his "observation and involvement with . . . plans" at other companies. Lopez Written Testimony ¶ 21. He conceded that his experience had been limited to the area of recruiting and had "exclude[d] the determin[ation of] what is an equitable rate of participation." Tr. 16,132 (Lopez). Revealing his lack of understanding of affirmative action at Sears, Dr. Lopez claimed that in the "early years there wasn't that much movement in terms of the changes in the percentage of women in Big Ticket jobs" at Sears. Tr. 16,132 (Lopez). But, according to the EEOC's own figures, the female percentage of full-time commission sales hires increased from 9.9 percent in 1972 to 17.6 percent in 1973. EEOC Commission Sales Report at 13-14. From what little he knew about Sears' MAG plan, he was "impressed" by it and thought it had "teeth." Tr. 16,129, 16,132, 16,174 (Lopez).

than commission saleswomen to have had prior commission or big ticket sales experience. Crespi Written Testimony ¶ 38.

Sales performance data -- data that reflect not only measured attributes related to sales ability, but also characteristics related to sales ability that are not accounted for or not easily measured in a statistical analysis<sup>1</sup> -- also reflect Sears' affirmative action hiring and promotion efforts. Among both commission sales hires and promotions, commission salesmen had higher sales performance rates than commission saleswomen. Sears FOF M31.<sup>2</sup> That the least successful male commission sales hires and promotions had higher sales performance rates than the least successful female commission sales hires and promotions year after year is especially significant. Such a pattern would have occurred only if more qualified men had been passed over consistently in favor of less qualified women. If Sears had been concerned only with maximizing sales, it would have substituted men with higher sales potential for women. Sears FOF M32; Wise Written Rebuttal Testimony (Commission Sales) ¶¶ 4, 6, 11; Tr. 18,448 (Wise); see Sears FOF M4 (supp.).

Sears' affirmative action efforts are also reflected in comparisons of its female commission sales hiring rate to reasonable estimates of female availability. The female percent of commission sales hires exceeded such estimates based on Sears' refined applicant flow data and on publicly available data from the University of Michigan's Panel Study of Income Dynamics (PSID) and the Department of Commerce's Income Survey Development Program (ISDP). Sears FOF

1. Sears FOF M26.

2. The difference was not a function of seniority. Sears FOF M29. Although EEOC expert Dr. Madden argued that Sears Exhibit 6-3-2 (comparing sales performance rates of top, average, and poorly performing commission sales hires and promotions) was biased against women because the exclusion of hires who terminated within a year "selected out the poor performing men," Tr. 17,944 (Madden), she was obliged to repudiate her testimony on cross-examination. Tr. 18,044-45 (Madden).

M43-44; FOF M17-19 (supp.).

Year	Percent Female Commission Sales Hires	Percent Female Available for Commission Sales
1973	28.0%	14.9%
1976	39.8	29.3
1979	42.9	31.3 - 38.7

Sears Exh. 6-E-3.<sup>1</sup> In those product lines for which reasonable benchmarks were available, the female percent of commission sales hires was consistent with or exceeded the benchmarks. Sears FOF M45-48.<sup>2</sup>

In the promotion area, controlling for interest alone completely eliminates

1. Dr. Siskin criticized the use of the PSID and the ISDP data reflecting the female composition of the commission sales workforce as benchmarks by claiming that "the method of payment, commission, . . . is a very[,] at best[,] tangential aspect of the jobs in question," commission selling jobs at Sears. Tr. 17,395 (Siskin). Dr. Madden went even further, arguing that an applicant's prior method of compensation was irrelevant to either preference or qualifications. Tr. 18,025 (Madden). But, Dr. Siskin's own testimony rebutted both his and Dr. Madden's contentions. Dr. Siskin admitted that his own analysis revealed that commission sales experience increased an applicant's chances of being hired and that "experience in commission sales . . . should be correlated with . . . success on the job." Tr. 17,434-35 (Siskin). And he testified that "the person that sold commission sales before[,] big ticket item probably much [more]--those people . . . surely are asking for commission sales positions." Tr. 17,497 (Siskin). Furthermore, he maintained that, in the promotion context, product line aversion was not a major reason for women turning down commission sales jobs. Tr. 17,589-90 (Siskin).

2. On rebuttal, Dr. Siskin criticized the use of external measures of availability such as Census data or the data from the PSID and ISDP, claiming that "[g]enerally applicant flow is superior . . . unless there is reason to believe that the applicant flow has been skewed by recruitment practices, which is not the case here." Siskin Written Rebuttal Testimony (Commission Sales) ¶ 7 at 15. But, during his original cross-examination, he acknowledged that applicant flow data is questionable when there are ambiguities concerning what jobs the applicants were really for. Tr. 5328-29 (Siskin). Such is the case here. Sears FOF M33, M17-19 (supp.).

the "disparities" the EEOC presented in both its full-time and part-time analyses for the 1973-80 period. Sears FOF M55.

	Full-Time Promotions	Part-Time Promotions
EEOC "Expected" Female Proportion of Promotions to Commission Sales	68.8%	74.2%
EEOC "Actual" Female Proportion of Promotions to Commission Sales	43.1	51.3
EEOC "Expected" Adjusted for Results from 1982-83 Career Aspirations Questionnaires	40.9	47.4
EEOC "Expected" Adjusted for Results from the National Timecard Non-Supervisory Special Survey	40.1	53.6
EEOC "Expected" Adjusted for Results from the 1976 Job Interest Survey	19.4	---

Sears Exh. 6-S-5.<sup>1</sup>

The data from the National Timecard Nonsupervisory Special Survey and Career Aspirations Questionnaires is especially revealing. It reflects that, despite the marked changes in women's attitudes that took place during the 1970s,<sup>2</sup>

1. The results based upon the National Timecard Nonsupervisory Special Survey actually overestimate the "expected" female proportion of promotions. They do not take into account that the measure of employee interest in the survey, Question 42, may overstate the interest of noncommission saleswomen to a greater extent than the interest of noncommission salesmen or that, among noncommission salespersons interested in commission sales, noncommission salesmen were more likely than noncommission saleswomen to have prior commission sales or big ticket experience and were better educated than noncommission saleswomen. Sears FOF L(1) 59n.1; Tr. 13,078-79 (Crespi).

2. The changes were especially rapid in the early 1970s, Sears FOF L(1)1 (supp.), and were due in large measure to a convergence of economic, social, legal, and ideological events. See C. Haworth Written Rebuttal Testimony passim.

noncommission salesmen at Sears were still approximately three times as likely as noncommission saleswomen to be interested in commission sales positions as late as 1982. Sears FOF M55(a)-(b). In the early 1970s, women's interest in commission sales -- then characterized by the draw vs. commission system -- was even lower.<sup>1</sup> Sears FOF L(2)5-6 (experience of Sears officials), FOF L(1)59 (expert opinion of Dr. Crespi based on the National Survey Data Search Project, the National Timecard Nonsupervisory Special Survey, and the characteristics of commission selling prior to 1977); cf. Tr. 5025-(Siskin) (women moving into nontraditional positions throughout the 1970s). As the 1976 Job Interest Survey -- a survey administered while the draw versus commission system was still in place, 6 years prior to the administration of the National Timecard Nonsupervisory Special Survey -- reflects, men were almost ten times as likely as women to be interested in commission sales in the middle of the 1970s. Sears FOF M55(c); Sears Smith Rebuttal Exh. 2.

### 3. The EEOC's Statistical Case Rested Upon Unreasonable Assumptions

Unlike Sears, the EEOC presented a purely statistical case.<sup>2</sup> Lacking

1. Although in her written testimony, EEOC expert Dr. Eileen Appelbaum stated that some other "watershed event" -- the Commissioners' charge against Sears -- had caused increasing numbers of women to enter commission sales jobs at Sears, Appelbaum Written Testimony ¶ 10, she admitted at trial that changes in women's labor force participation nationwide were a result of a "convergence of events, economic, legal, and ideological." Tr. 16,308 (Appelbaum). Her "watershed" theory is disproved by the evidence in this case. The trend in the female percentage increase in commission sales hires prior to and after the August 30, 1973 Commissioner's charge was the same as the trend for the 1972 to 1976 period. C. Haworth Written Rebuttal Testimony ¶ 21.

2. In a desperation move apparently designed to make its "cold numbers [come] convincingly to life." Teamsters v. United States, 431 U.S. 324, 339 (1977), the EEOC called as rebuttal witnesses two women, Alice G. Howland and Lura L. Nader. Both had applied to Sears stores in 1978 and had not been hired. Both were unquestionably not "victims" of discrimination.

Ms. Howland applied to a Sears store in Erie, Pennsylvania, indicating that she preferred full-time work. Tr. 16,020-22. 16,024 (Howland). The store had no full-time openings when she applied. In fact, between approximately 1976 and 1985, the store filled only one full-time commission sales opening with an outside hire. West Written Testimony ¶¶ 3. 4. Because the store was not looking

witnesses with substantive knowledge about Sears, the EEOC rested its claims on the assumptions that male and female applicants and employees were equally interested in and qualified and available for commission sales positions. Although the EEOC purported to "adjust" its labor market estimates in its hiring analysis to account for obvious nondiscriminatory factors, it simply fell back on its original unreasonable assumptions whenever it lacked or chose to ignore relevant information. Sears FOF J8. The EEOC's promotion analysis was even cruder than its hiring analysis.

To inflate the importance of the EEOC's statistics, Dr. Siskin stressed the degree of statistical significance, often referring to "astronomical" odds against the observed results having occurred by chance. See, e.g., Tr. 4223, 4495, 4509 (Siskin). But, the EEOC's "astronomical" figures were simply the by-product of using false assumptions, combining hiring and promotion figures from hundreds of stores, and miscalculating the "Z" statistics in its hiring analyses. Sears FOF J68-73; see Tr. 5207 (Siskin).<sup>1</sup>

Although the first page of Dr. Siskin's report states that his firm "was for full-time applicants, male or female, it is likely that Ms. Howland's application was never even processed. Id. at ¶ 4.

Ms. Nader, on the other hand, applied to a store in Columbus, Ohio, where there were full-time openings -- she responded to an ad for drapery sales. Tr. 16,481 (Nader). Although she testified that she felt "[Sears wasn't] going to give [the drapery sales job] to a female," Tr. 16,482-83 (Nader), two women who had applied to the store on the same day as Ms. Nader were hired into full-time commission sales positions in the drapery division. Gallahue Written Rebuttal Testimony ¶ 4; Tr. 16,483-85 (Nader); Sears Nader Exhs. 1, 2.

1. On rebuttal, Dr. Siskin no longer contended that the Z-statistics the EEOC presented in its hiring analysis reflected the likelihood that the EEOC "disparities" could have occurred by chance. Siskin Written Rebuttal Testimony (Commission Sales) ¶ 9. Instead, Dr. Siskin made essentially a legal argument to justify ignoring the fact that the female proportion of "sales" applicants relied upon by the EEOC was only an estimate based upon a sample. Compare Sears FOF J69 and Tr. 18,478-79 (Wise) with Tr. 17,404 (Siskin) (referring to "various Supreme Court cases"). See also Tr. 4928-29 (the court addressing Dr. Siskin) ("you're a witness, you're not the attorney for the Government and you don't want to try to get yourself intermingling [the] two roles even though I know in your case it would be very easy to do both").

retained . . . to determine whether [Sears'] hiring and promotion practices . . . disproportionately excluded women from commission selling positions," EEOC Commission Sales Report at 1 (emphasis added), Dr. Siskin never identified a single policy or practice that caused the so-called disparities to which he testified. Tr. 5241-42 (Siskin).

According to Dr. Siskin, there was "something in the process" adverse to women. But, in Dr. Siskin's terminology, that "process" included the varied interests and preferences of the applicants and employees themselves. Tr. 4816 (Siskin). As Dr. Siskin testified, the "term 'selected' [in his analysis] does not imply a decision necessarily on the part of Sears alone. Selected . . . means Sears selected him, the person turned down the job, whatever it is." Tr. 4228-29 (Siskin).

Dr. Siskin acknowledged that "subjectivity" was inevitable in the selection of salespersons. Tr. 17,412 (Siskin).<sup>1</sup> He conceded that Sears selected applicants on the basis of performance-related criteria. He viewed characteristics such as prior commission sales experience and product knowledge as "correlated with . . . success on the job," found that persons with such characteristics were significantly more likely to be hired into commission sales than persons without such characteristics, and admitted that men were more likely than women to have characteristics associated with success in commission selling. Tr. 17,434-37 (Siskin).<sup>2</sup>

1. Among the EEOC's witnesses, only Dr. Lopez suggested an alternative system -- the one he designed for Montgomery Ward. He claimed that his system would be both "objective" and superior but could produce no evidence that his system either led to the hiring of better salespeople or more women than the selection procedures used by Sears. To the contrary, Dr. Lopez indicated that Montgomery Ward abandoned using his "objective" system of selection because it was too cumbersome and unwieldy for the retail jobs involved. Tr. 16,128-29 (Lopez); see Tr. 16,111-29 (Lopez).

2. Based upon a review of certain materials provided to him by the EEOC, Dr. Lopez, on the other hand, concluded that Sears was essentially using a random

a. The EEOC's Statistical Evidence: Hiring

The EEOC defined the female proportion of commission sales applicants as the female proportion of "sales" applicants in its non-hired applicant sample.<sup>1</sup> See EEOC Commission Sales Report at 19.<sup>2</sup> Although Dr. Siskin admitted that there was no one labor market for all commission sales jobs, that it was "incorrect to aggregate applicants for different jobs," that an applicant need not have expressed an interest in commission sales to be included in his pool, and that the use of applicant flow data is questionable when there are ambiguities concerning what jobs the applicants were really applying for, Tr. 5064, 5320-21, 5328-29 (Siskin), he attempted to justify the EEOC's definition by claiming that "anybody who walks in the door and applies for a sales job at Sears, Roebuck is an applicant for all sales jobs at Sears Roebuck essentially, and they're applying for commission sales jobs." Tr. 4191-92 (Siskin); accord Tr. 4246 (Siskin) (responding to question from the Court).

The EEOC's initial hiring analyses simply compared the female proportion of "sales" applicants to the female proportion of commission sales hires. The hiring process, but could not explain why, if that was so, Sears was so successful. Tr. 16,123-26 (Lopez).

1. This definition was formulated by the EEOC and Dr. Siskin in a self-confessed state of ignorance immediately after the EEOC switched the focus of its claim from assignment to hiring. Tr. 5424-26 (Siskin). Dr. Siskin admitted that his main sources of substantive information about Sears at that time were the Commission Decision No. 77-21 and discussions with EEOC counsel. Tr. 5545-46 (Siskin). EEOC counsel, in turn, had stated to Sears only a few weeks earlier that before the EEOC could "determine the most appropriate labor market statistics for presenting [its] claims," it would need to know "the actual duties performed in a job classification or job group." Tr. 5543-44 (Siskin) (citation omitted).

2. Dr. Siskin's pool was a "statistical estimate". Tr. 5204 (Siskin). No Sears manager ever had the chance to draw from the pool Dr. Siskin estimated in order to fill a commission sales position. Tr. 5204 (Siskin). Although Dr. Ericksen's method of selecting the commission sales hire sample "was intended to facilitate comparisons between non-hired applicants and employees" at the same stores, Plaintiff's Exhibit Ericksen 4 at 1; Tr. 3334 (Siskin), Dr. Siskin's analyses made no such comparisons. Tr. 5561-62 (Siskin).

probative value of these comparisons rested entirely upon the EEOC's assumptions "that men and women in the pool were equally qualified for and interested in commission sales positions." Sears FOF J33-35; EEOC Commission Sales Report at 43.

Dr. Siskin admitted that the EEOC's underlying assumptions that "males and females are equally qualified and interested were not true." Tr. 4934

(Siskin).<sup>1</sup> As Dr. Siskin explained in another case and reiterated here:

"Anyone who has examined labor force data would not expect males and females to be equally represented in the various EEO-1 categories. It is well known that female labor force participation, to a great extent, reflects qualifications, skills, and preferences and is different in the various EEO-1 categories. Any comparisons made without recognition of this obvious fact and without consideration of the relevant labor force and/or skill mix of employees is absolutely meaningless."

Tr. 5267-68 (Siskin) (citation omitted). And, as Dr. Siskin testified, neither Census Bureau figures, common sense, nor his own analyses supported his assumptions of equal interest and qualifications. Sears FOF J38; see Tr. 17,542-43 (Siskin).

Once Dr. Siskin even partially relaxed the EEOC's initial assumptions by adjusting the analysis for certain information that he and his staff had coded,<sup>2</sup> the EEOC's results changed dramatically. The EEOC's estimate of the "expected"

1. The EEOC also admitted, in an internal EEOC manual, that males and females have differing characteristics relevant to selling. Sears FOF J36. Even Dr. Madden, who claimed that differences in the reported preferences of males and females were irrelevant in this case, Madden Written Testimony ¶ 1, conceded that there "may well be . . . differences" in the preferences of male and female "sales" applicants. Tr. 18,052 (Madden).

2. Dr. Siskin did so by conducting logit and multivariate cross-classification analyses. Sears FOF J40. In all such analyses, if variables are poorly specified or defined, or if important variables are left out altogether, the results may lead one to the wrong conclusion. Tr. 5620-22 (Siskin). As Dr. Siskin admitted, "garbage in, garbage out." Tr. 5622 (Siskin).

Dr. Siskin described the multivariate analysis as the EEOC's "ultimate analysis." Restrictions the EEOC imposed on the logit analysis but not the multivariate analysis virtually assured that the former would lead to a smaller adjustment than the latter. Sears FOF J41-43.

proportion of female full-time commission sales hires for the period 1973-80 fell from 61.1 percent to 37.2 percent.<sup>1</sup> Sears FOF J44.<sup>2</sup> For the Eastern Territory, Dr. Siskin's adjusted analysis virtually eliminated the "unadjusted" disparity for the entire period in question.<sup>3</sup> Had the case focused solely on full-time hires for the 1976-1980 time period, Dr. Siskin admitted that the parties would not even be before the Court. See Tr. 4501-02 (Siskin).<sup>4</sup>

1. Dr. Siskin admitted that even his estimate of the actual female hiring rate (27.0 percent) was subject to measurement error. Tr. at 6122-25 (Siskin).

Although Dr. Siskin made much of the differences between the EEOC's and Sears' methods of counting commission sales hires and promotions, see Siskin Written Rebuttal Testimony (Commission Sales) ¶ 1, he acknowledged that, in percentage terms, the results of both methods "are roughly the same and are not changing any conclusions." Tr. 17,441-42 (Siskin); accord Sears FOF M9 (supp.). He admitted that EEOC expert Dr. Madden's contention that Sears' counting method rendered its analyses "invalid" was false from "a pragmatic viewpoint." Compare Madden Written Rebuttal Testimony ¶ 11 with Tr. 17,442-43 (Siskin).

2. According to Dr. Siskin's latest approximation, "the expected female proportion of hires that would result from a more refined multivariate cross-classification analysis would be at least 40%." Siskin Written Rebuttal Testimony (Commission Sales) ¶ 16 at 38. Dr. Siskin's "more refined multivariate cross-classification analysis" would apparently ignore such mundane facts as the difference between the percentages of male and female applicants with driver's licenses. See Tr. 17,603-13 (Siskin). The EEOC previously acknowledged that a driver's license was a minimum requirement for certain commission selling positions. Sears Siskin Rebuttal Exh. 3-A. If the fact that male applicants were more likely than female applicants to have driver's licenses were taken into account, the female proportion of "sales" applicants would fall by approximately 3.5 percent. J. Haworth Written Rebuttal Testimony (Commission Sales) ¶ 19.

3. See Plaintiff's Exhibit Siskin 78 (corrected Jan. 24 1985). Only in 1973 and 1974 did Dr. Siskin's analysis reveal a statistically significant disparity adverse to women. In four years, the disparity was adverse to men. The EEOC already has waived any claim that Sears "discriminated against women with respect to full-time commission sales hires in the Eastern, Midwestern, and Southern Territories during the years 1979 and 1980." Final Pretrial Order at 12 (Nov. 9, 1984).

4. Calculating the Z-scores correctly, the differences the EEOC presented were not statistically significant at the two standard deviation level from 1976 through 1980 or at three standard deviation level in 1975. See Tr. 14,559 (Wise); Sears Exh. 5-4. Dr. Siskin's contention on rebuttal that the "pattern" was more important than the yearly results falsely assumed that the yearly calculations were independent. Compare Tr. 17,405-06 (Siskin) with Tr. 18,479-80 (Wise).

Yet, even the EEOC's "adjusted" analyses failed to take into account the fact that men and women who applied to Sears and checked the "sales" box were likely to have different interests. Sears FOF J19, J48.<sup>1</sup> Instead, Dr. Siskin sought to minimize the importance of the EEOC's assumption of equal interest by making two further assumptions. First, he assumed that females' lack of interest in products such as auto accessories and home building materials would disappear once women learned that commission sales positions were potentially more lucrative than noncommission sales positions. Sears FOF J49.<sup>2</sup> Second, he assumed that regardless of their interest, women were as likely as men to accept a commission sales job offer when faced with the alternative of not being hired at all. Id.

Dr. Siskin's assumption that women's preferences were ruled by their wages finds no credible support in the record.<sup>3</sup> Indeed, as Dr. Eugene Ericksen testified, married women, for example, are more likely than married men to choose

1. Ironically, the one exception to Dr. Siskin's coding rules demonstrates how inadequate they were. Among the applicants who indicated an interest in selling clothing on their applications, Dr. Siskin assumed that male applicants were interested in men's clothing and female applicants in women's clothing. See Tr. 4379-80 (Siskin). But, among the applicants who simply checked the "sales" box, Dr. Siskin's analysis is premised on the assumption that male and female applicants were equally likely to be interested in both men's and women's clothing. See Tr. 4246-47 (Siskin).

2. Cf. Tr. 17,569 (Siskin) ("[I]n noncommission there is very little difference in salary rate. I would expect, therefore, product preference to be very dominant"). Initially, Dr. Siskin portrayed applicants to Sears as basically ignorant of the difference between commission and noncommission sales. Tr. 4191 (Siskin). But, on cross-examination, Dr. Siskin was forced to admit that applicants "generally know" that "selling on commission generally earns more than selling as a cashier" and that applicants know that Sears sells a variety of different products. Tr. 5127-28, 5680 (Siskin); see also Tr. 17,520 (Siskin) ("Most people would have some indications that certain types of big ticket items are probably sold on commission.").

3. Sears FOF J50: see also Sears FOF L(1)14-15, L(1)19(d)-(f) (findings from the National Survey Data Search Project).

jobs on the basis of noneconomic criteria. Tr. 3196-97 (E. Ericksen).<sup>1</sup> Dr. Siskin's assumption that women were as likely as men to accept a commission sales job if faced with the prospect of not being hired at Sears ignores the realities of the labor market. Applicants to Sears were not faced with the alternative of commission sales jobs at Sears or the soup lines. Many applied while still employed or when Sears stores were also filling noncommission positions; others obviously had job opportunities elsewhere. Sears FOF J51.<sup>2</sup>

Even if Sears were the employer of last resort, and even if Dr. Siskin's assumption of equal willingness to accept were true, it would be irrelevant, for no employer--least of all Dr. Siskin--would hire persons without considering their interest in the job. See Tr. 4972 (Siskin).<sup>3</sup> As Dr. Siskin put it, "[T]here is a big difference between [saying an applicant would accept a job] and saying that's tremendous interest, because, you know, there is interest and there is interest." Tr. 4248-49 (Siskin).<sup>4</sup>

1. Dr. Siskin himself testified that the primary reason for working is not, on average, the same for men and women. Tr. 5151 (Siskin). Married men, for example, are more likely than their wives to be the primary breadwinners. Id. And because of the tax structure, the prospect of increased earnings may mean more in economic terms for a man than a woman. Tr. 5151-54 (Siskin).

2. Dr. Siskin had "not thought of the fact [that some applicants] could continue to remain employed where they were." Tr. 4977 (Siskin).

3. Interest is essential to the ability to sell. It facilitates sales training and enables a salesperson to be persuasive. Sears FOF L3.

4. Through Dr. Siskin, the EEOC presented results of its analysis of Applicant Interview Guide forms filled out by full-time applicants to certain stores in Sears' Southwest Territory during the 1978-80 period. Combining data from these forms with the percent of hires with and without product line experience from the EEOC coding of the nationwide sample of full-time commission sales hires for the period 1973-80, Dr. Siskin testified that differences in applicant interest would not explain the disparity between the EEOC's "expected" and "actual" proportions of female full-time commission sales hires in four product lines.

The EEOC's analysis was flawed. First, the EEOC failed to take into account the fact that persons are likely to inflate their experience and interest when completing applications. Second, the EEOC manipulated the data in an arbitrary manner on the basis of its coding of the sample of commission sales hires.

In addition to ignoring the differing interests of the applicants, the EEOC's adjusted analyses failed to take into account numerous relevant differences in their prior work experiences. Sears FOF J55-62. For example, the EEOC's analyses ignored the amount or length of the applicant's prior work experience. Sears FOF J61. Although Dr. Siskin testified that age, a variable included in the EEOC's analysis, "tends to be correlated with amount of work [experience]," he acknowledged that "it tends to have a bias against males." Tr. 4274-75 (Siskin).

Generally, the more information the EEOC coded and analyzed, the lower its estimate of the "expected" female percentage of hires tended to be. Sears FOF J63. But, even if all the available information from the applications had been captured in the EEOC's analysis, differences between men and women applicants not reflected on the applications would be important in understanding commission sales hiring at Sears. Sears FOF M23-24. Even if such differences had been relatively small on average, the "disparities" the EEOC presented would disappear. Sears FOF M25; see Sears FOF M5 (supp.); Tr. 18,470 (Wise).<sup>1</sup>

By relying solely on the applications, the EEOC's analyses ignored factors as obvious as the differences in the everyday nonwork experiences of male and female applicants. Sears FOF J64.<sup>2</sup> It also ignored a "[w]hole slew of factors"

Third, the EEOC relied on inappropriate items from the Applicant Interview Guide to represent its automotive and home building materials product lines. Fourth, the EEOC failed to recognize that female interest in nontraditional employment increased during the period 1973-80. Sears FOF J53.

1. Although the EEOC may have been willing to limit its analysis to the applications, it was impossible for Sears to make a commission sales hiring decision on the basis of the application alone. An applicant's qualifications could only be assessed during the interview. Sears FOF F(2)3-4. Ms. Holland, for example, noted that little could be gleaned about her preferences from the face of her application. Tr. 16,023-24 (Holland).

2. Data from national surveys demonstrate that the nonwork experiences of men and women were quite different. Sears FOF L(1)11-17. Even the browsing interests of men and women were not the same. Men, more than women, enjoyed browsing in hardware, sporting goods, auto supply, and stereo/hifi stores -- the

such as assertiveness, dominance, leadership, and interest (other than on the face of applications) that were important in hiring commission salespersons. Sears FOF J65-66.

The absurdity of the EEOC's assumption that the applicants it considered the same were "similarly situated" was vividly demonstrated in the area in which Dr. Siskin considered the assumption to be strongest.<sup>1</sup> According to Dr. Siskin, the following two hypothetical applicants for an opening in Division 42 (Plumbing and Heating) would be considered the same for purposes of the EEOC's multivariate analysis.

Applicant A: An 18 year old with one year of college, who checked "sales" but expressed a preference for cosmetics or clothing sales to the interviewer, and whose work experience consisted of a six-month part-time job selling primarily self-select, over-the-counter items for a lumber supply store and selling Mary Kay cosmetics for three months to classmates, friends, and relatives.

Applicant B: A 24-year old college graduate who had previously worked for Sears in Division 42 on a commission and noncommission basis, who had been an outside salesperson and assistant manager of a plumbing and heating firm, and who expressed a preference for installed home improvement sales at the interview.

Tr. 17,601, 17,620 (Siskin); Sears Siskin Rebuttal Exh. 2. Although "obviously one [of the two hypothetical applicants] is more qualified than the other," Tr.

type of stores that sell products commonly sold on a commission basis at Sears. Sears FOF L(1)17; Graham Written Testimony, App. A-III. Data from the EEOC's own non-hired applicant sample also show that male and female applicants had different nonwork experiences. The post-1973 Sears application form asked the applicant, "What experience or training have you had other than your work experience, military service and education? (Community activities, hobbies, etc.)." The information from this portion of the application revealed that male applicants were much more likely than female applicants to have a background in areas relevant to commission sales. For example, male applicants were more likely than female applicants to have a background in automotive, building, or mechanical/technical areas. Female applicants were more likely than male applicants to describe experience and training in home furnishing/decorating and clothes/fashions. Sears FOF M35.

1. Siskin Written Rebuttal Testimony (Commission Sales) ¶ 2 at 6; Tr. 4580-31 (Siskin).

18,056 (Madden); accord Tr. 17,601-02 (Siskin), and although males, on average, were more likely to have had the characteristics of the more qualified applicant, Tr. 17,620-21 (Siskin), the EEOC's claim rests on the assumption that such applicants are fungible.

Confronted with relevant differences between men and women at every turn, the EEOC adopted a last-minute strategy of trying to erase even the differences its own analyses had revealed. It presented "expert" testimony that female applicants may have concealed their relevant experience from Sears. Tr. 16,606-07 (Kessler-Harris). It asked the Court to believe that women who asked for noncommission sales jobs were in fact really employing a clever sales technique for "maximizing" their chances of being hired into commission sales. See Tr. 18,078-81 (Madden).

Their irrelevance aside, such contentions, like the EEOC's underlying assumptions themselves, defy common sense.

b. The EEOC's Statistical Evidence: Promotion

The EEOC's promotion claim was even more inartfully contrived than its hiring claim. It rested entirely on the assumptions that male and female noncommission salespersons were equally interested in and qualified and available for commission sales positions. Sears FOF J88. No effort was made to test the reasonableness of these assumptions by comparing the characteristics of male and female noncommission sales employees. Sears FOF J89; Tr. 17,573 (Siskin).<sup>1</sup>

1. Dr. Siskin attempted to justify his failure to do so with two makeweight arguments. First, he contended that because a 1980 Sears study showed that "female salespersons on average receive slightly higher overall performance ratings than male salespersons," taking "overall performance ratings into account [something that was not possible for Dr. Siskin given that the ratings were not on the computer tapes] should not affect the expected female percentage of commission sales promotions." EEOC Commission Sales Report at 78 n.30. But, Dr. Siskin also admitted that, even in the absence of the 1980 Sears study -- a study whose conclusions he just "skimmed" -- he would not have attempted to obtain and use the performance ratings. Tr. 6208-10 (Siskin). He acknowledged that ratings gauge only employees' performances in their current jobs. for example, selling

Although Dr. Ericksen selected and Dr. Siskin and his staff coded a sample of persons who had "transferred" to commission sales, the EEOC did not use this sample in its analysis. Tr. 5534-35 (Siskin). Dr. Ericksen also selected a sample of persons hired into noncommission sales positions, another sample that Dr. Siskin and his staff coded. This sample, apparently selected with the EEOC's "assignment" claim in mind, also could have been used to compare at least some of the characteristics of the men and women who became part of the EEOC's "pool" for promotion to commission sales. It, too, was not used. Tr. 5531 (Siskin). Had EEOC expert Dr. Madden conducted the EEOC analysis, she would have investigated the prior experience of persons promoted from their applications or other data. Tr. 18,057 (Madden).

The evidence presented by the EEOC in support of its promotion claim was characterized chiefly by what Dr. Siskin did not do, did not know, and could not conclude. For example, Dr. Siskin did not even know whether the disparities between the EEOC's "expected" and "actual" female promotion rates were concentrated in certain divisions -- for example, the automotive and installed home improvements divisions. Tr. 6200-02 (Siskin).<sup>1</sup>

candy, rather than their potential to perform in other jobs, for example, selling installed plumbing and heating systems. Tr. 6183 (Siskin). He acknowledged that a low performance rating in one division may merit more weight than a high performance rating in another division, Tr. 6206-08 (Siskin), that non-selling aspects of sales jobs were more important in noncommission than commission sales, Tr. 6183-84 (Siskin), and that sales per hour figures were higher for men than women, Tr. 6208 (Siskin).

Second, Dr. Siskin contended that it "was not necessary to control for seniority because examination of the data shows that seniority is not positively correlated with the probability of being promoted." EEOC Commission Sales Report at 78 n.30. According to Dr. Siskin's "logic," seniority, if anything, should "improve" a person's chance of being promoted. Tr. 5523-24 (Siskin); see also Tr. 17,574 (Siskin) ("Theoretically it should be a monotonically increasing function.") Yet, he also testified that after someone accepted a "noncommission sales position and worked for a period of time," the chance that he or she would accept a commission sales job would decrease, a hypothesis consistent with his finding that "the more seniority you had the less likely you were to be promoted, generally." Tr. 5274, 5523 (Siskin).

1. They were. See Sears FOF M54 (analysis expanding EEOC model show that

The EEOC's most sophisticated promotion analysis -- its "year-end division pool" analysis -- controlled for but one factor -- the extent to which promotions occurred within the same division. This was done to take into account "the possibility that a non-commission salesperson in a division where a promotion was made had a greater chance of receiving that promotion than a non-commission salesperson outside that division." Sears FOF J90; EEOC Commission Sales Report at 5. The analysis, in addition to failing to take into account the fact that noncommission salesmen were far more interested than noncommission saleswomen in commission sales,<sup>1</sup> underestimated the impact of the very factors it attempted to measure. Sears FOF J91-93.

#### B. Summary of Law

Having alleged a pattern or practice of discrimination, the EEOC had to prove the existence of a deliberate company policy to exclude women from commission sales that was regularly followed as Sears' standard operating procedure. Teamsters v. United States, 431 U.S. 324, 335 n.15, 336, 360-61 & n.46, 362 (1977).

product lines that contributed most heavily to EEOC "disparity" were Automotive, Home Building Materials, and Men's Apparel).

1. Tr. 4814-15 (Siskin); Tr. 13,074-77 (Crespi). Dr. Siskin adjusted the figures from EEOC's analysis for the results to Question 13c of the National Timecard Nonsupervisory Special Survey and, although the EEOC "disparity" was reduced significantly, Dr. Siskin testified that it was not eliminated entirely. Siskin Written Rebuttal Testimony (Commission Sales) ¶ 12 at 28; compare EEOC Commission Sales Report at 86, 95 (unadjusted EEOC "short fall" of 1565 full-time and 1560 part-time female promotions) with Siskin Written Rebuttal Testimony ¶ 12 at 29 (adjusted EEOC "short fall" of 749 full-time and 925 part-time female promotions). But, Question 42 is the better, more direct measure of interest because it focuses solely on respondent's interest. Tr. 13,068 (Crespi). Question 13c, on the other hand, deals not only with interest but with other factors as well. Tr. 13,068-69 (Crespi). For example, in addition to persons actively interested in commission sales, respondents answering "yes" to Question 13c include persons who were not interested in any other job at all. See Roper Written Rebuttal Testimony ¶¶ 3, 4. In any event, both Questions 13c and 42 overstate the degree of female interest in commission sales. See Sears FOF L(1)59 n.1; Tr. 13,065-67, 13.446-47 (Crespi).

The EEOC attempted to establish a presumption of the existence of such a policy with circumstantial evidence in the form of statistics. Cf. id. at 360-61 n.46 ("[T]he Government's suits . . . commonly involve[] proof of the expected result of a regularly followed discriminatory policy. In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result.").<sup>1</sup>

The evidence presented thus is properly analyzed under the disparate treatment model of Title VII. Id. at 335-36 n.15. See, e.g., United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713 n.1 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567, 575 & n.7 (1978); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14, 806 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 & n.6 (1974).<sup>2</sup>

1. "Courts . . . have created presumptions in cases where either (1) B would be a permissible inference from A, but not the only permissible one, or (2) B would not even be a permissible inference from A." F. James & G. Hazard, Civil Procedure § 7.9, p. 255 (2d ed. 1977) (emphasis original), cited in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981).

2. A pattern or practice case simply "is one form of disparate treatment case." C. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts § A.IV.A.1 at A-9 (Federal Judicial Center rev. ed. 1984). See Teamsters v. United States, 431 U.S. at 335 n.15, 336. Going beyond the form of a disparate treatment case that alleges isolated, sporadic acts of purposeful discrimination occurring within a company, a pattern or practice case alleges a regularly followed company policy of purposeful discrimination. Id. at 335 n.15, 336, 360-61 & n.46, 362.

The EEOC "made no suggestion on the record of a Griggs-type objectively imposed practice having a discriminatory effect" with respect to either checklist pay or commission sales. EEOC v. IBM Corp., 583 F.Supp. 875, 903 (D.Md. 1984). See also Coates v. Johnson & Johnson, 756 F.2d 524, 530 n.4 (7th Cir. 1985); Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795, 800-01 (5th Cir. 1982); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 n.10 (4th Cir. 1980); Yugas v. Libbey-Owens-Ford Co., 562 F.2d 496, 500 (7th Cir. 1977), cert. denied, 435 U.S. 934 (1978); Waters v. Furnco Construction Corp., 551 F.2d 1085, 1089-90 (7th Cir. 1977), rev'd on other grounds, 438 U.S. 567, 575 & n.7, 576 n.8 (1978). Instead, it sought an inference that any particular pay, hiring, and promotion decision was made in pursuit of a policy of purposeful discrimination. Teamsters v. United States, 431 U.S. at 359, 362.

Under Section 707 of Title VII, 42 U.S.C. § 2000e-6(a), the EEOC alleged

The EEOC retained the burden of persuasion throughout. Texas Department of Community Affairs v. Burdine, 450 U.S. at 253, 255 nn.8 & 10 (citations omitted); Fed.R.Evid. 301 ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."). See also Coates v. Johnson & Johnson, 756 F.2d 524, 532 (7th Cir. 1985) ("at the liability stage of a pattern or practice suit, the plaintiff always bears the burden of persuasion with respect to discrimination"); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 660 F.2d 1217, 1224 (7th Cir. 1981) ("The burden of persuasion in proving classwide discrimination remains on the plaintiffs . . .").

To succeed in meeting its burden, the EEOC had to persuade the Court that its explanation of the circumstantial evidence it presented either was more likely, or was more credible, than the explanation articulated by Sears. United States Postal Service Board of Governors v. Aikens, 460 U.S. at 716; Texas Department of Community Affairs v. Burdine, 450 U.S. at 256.

Specifically, the EEOC had to persuade the Court, by a preponderance of the evidence, that the true, factual explanation for the results of the statistical comparisons it made was a regularly followed policy of Sears to exclude women from commission sales. Teamsters v. United States, 431 U.S. at 336, 360-61 & n.46, 362.

Sears' only burden was to articulate a clear and reasonably specific non-discriminatory explanation of the EEOC's circumstantial evidence. E.g., Texas

"resistance to . . . rights secured by" Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). Final Pretrial Order, Stipulation A-8. It did not allege any violation of rights secured by Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), the provision interpreted by the Supreme Court as authorizing disparate impact claims. Griggs v. Duke Power Co., 401 U.S. at 426 & n.1.

Department of Community Affairs v. Burdine, 450 U.S. at 258. There were no particular limits on the type of evidence Sears could use. Teamsters v. United States, 431 U.S. at 360 n.46.

The Court's duty is to decide, in light of the parties' differing burdens, which party's factual explanation of the EEOC's circumstantial evidence it believes. United States Postal Service Board of Governors v. Aikens, 460 U.S. at 715-17. Neither statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other. Coates v. Johnson & Johnson, 756 F.2d at 533.

"Proof of discriminatory motive is critical" to an EEOC pattern or practice claim. Teamsters v. United States, 431 U.S. at 335 n.15. Under Title VII, discriminatory motive is "as much a fact as anything else." United States Postal Service Board of Governors v. Aikens, 460 U.S. at 716-17, quoting Edginton v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885). See also Anderson v. Bessemer City, 105 S.Ct. 1504, 1508 (1985) ("a District Court's finding of discriminatory intent in an action brought under Title VII . . . is a factual finding"); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace."); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (question for "trier of fact . . . [whether] the defendant intentionally discriminated against the plaintiff"); Teamsters v. United States, 431 U.S. at 335 (citation omitted) ("The ultimate factual issues are thus simply whether there was a pattern or practice of . . . disparate treatment and, if so, whether the differences were . . . '[sexually] premised.'").

The EEOC's calculations of statistical hiring and promotion "disparities," and its conclusion that it had made comparisons that had statistical and practical significance, were based on unreasonable and unproven assumptions that there were no relevant differences between men and women in the hiring and pro-

motion "pools" it utilized.

It was established by Sears' witnesses that differences in job preferences and interests between men and women constituted the most significant determinant of the sexual distribution of men and women in commission and noncommission sales and in the various commission divisions.

The EEOC's failure to take applicants' and employees' preferences and interests into consideration rendered its statistics meaningless. Malloch v. J.C. Penney, Inc., No. C80-1283R, verbatim transcript at 5 (statistics unpersuasive which failed to account for applicants' preferences for noncommission or commission sales); Eubanks v. Pickens-Bond Construction Co., 635 F.2d 1341, 1350-51 (8th Cir. 1980) (plaintiff's statistics unpersuasive; "pool" may have included persons with no interest in positions, and no individual testified to denial of promotion); Mazus v. Department of Transportation, 629 F.2d 870, 875 (3d Cir. 1980) (plaintiff's statistics did not show females actually interested in position), cert. denied, 449 U.S. 1126 (1981); EEOC v. H.S. Camp & Sons Inc., 542 F.Supp. 411, 445 (M.D.Fla. 1982) (statistics unpersuasive which, inter alia, failed to consider women's relative lack of interest in job); Davis v. City of Dallas, 483 F.Supp. 54, 61 (N.D.Tex. 1979) ("women were not during the relevant period interested in police work in the same proportion as were men"); EEOC v. Mead Food, 466 F.Supp. 1, 3, 4 (W.D.Okla. 1977) ("testimony of witnesses . . . clearly established and common practical knowledge tells us that certain work . . . is not attractive to females"; 80 percent of the employer's jobs "do not attract female workers").

The EEOC's approach to its commission sales claim resembled the plaintiffs' approach in Malloch v. J.C. Penney, Inc., No. C80-1283R, verbatim transcript (W.D.Wash., Feb. 20, 1984). In Malloch, as in this case, the plaintiffs' expert failed to take into account the fact that many more women than men preferred the merchandise and financial security of non-commission selling. See id. at 4-5.

Commission selling is not a job per se; specific commission sales positions involve specific product lines. Men and women had very disparate interests in commission sales product lines such as installed plumbing and heating, roofing, fencing, hardware, and automotive products -- product lines in which the EEOC found the greatest "disparities." Such "disparities" were the expected result of nondiscriminatory hiring and promotion. See Malloch v. J.C. Penney, Inc., verbatim transcript at 4 ("Either by training or prior experience or just as a matter of likes and dislikes, many women preferred working with the fashion side of the store rather than in areas such as appliances, stereos or carpets.").

Because the EEOC employed an unreasonable assumption of equal occupational interests among applicants and employees, it compared "apples to oranges," and the resulting "disparities" it calculated are meaningless. Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235, 1258 (7th Cir. 1980).

Even if it had not made meaningless comparisons, "statistics demonstrating that chance is not a more likely explanation are not by themselves sufficient to demonstrate that [sex] discrimination is the more likely explanation." Malloch v. J.C. Penney, Inc., No. C80-1283R, verbatim transcript at 3, (W.D. Wash., Feb. 20, 1984), quoting Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 553 (9th Cir. 1982).

Therefore, in the liability stage of a pattern or practice case, the plaintiff usually attempts to prove that discriminatory acts actually occurred and that victims of the alleged policy actually existed, by producing evidence of specific instances of the alleged discrimination. E.g., Coates v. Johnson & Johnson, 756 F.2d at 532 & n.6 (citation omitted). In this trial, the EEOC did not prove the occurrence of even one discriminatory act or the existence of one victim.

The United States Court of Appeals for the Seventh Circuit has stated:

We find very damaging to plaintiffs' position the fact

that not only was their statistical evidence insufficient, but that they failed completely to come forward with any direct or anecdotal evidence of discriminatory employment practices by defendants. Plaintiffs did not present in evidence even one specific instance of discrimination. There was no individual to testify how defendant discriminated against him.

Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 660 F.2d 1217, 1225 (7th Cir. 1981) (emphasis added). See Coates v. Johnson & Johnson, 28 Empl. Prac. Dec. (CCH) ¶ 32,664 at 25,036 (N.D.Ill. 1982) ("None of the individual class members, or other of plaintiff's witnesses, identified or was able to testify about any policy or practice of defendants which discriminated against Negro employees . . . ."), aff'd, 756 F.2d 524 (7th Cir. 1985). Accord, EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 643, 646 (4th Cir. 1983) ("We also think the absence of other [than statistical] evidence of discrimination should be considered . . . , just as the presence of other evidence of discrimination should be considered in arriving at the same conclusion"; "This [case included] . . . less of a presentation of oral testimony in support of a pattern of discrimination than that found wanting in Ste. Marie v. Eastern R. Ass'n., 650 F.2d 395, 405-406 (2d Cir. 1981) . . . or, in Goff v. Continental Oil Co., 678 F.2d 593, 597 (5th Cir. 1982)") (quoting Roman v. ESB, Inc., 550 F.2d 1343, 1350 (4th Cir. 1976)), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond, 104 S.Ct. 2794 (1984); Valentino v. United States Postal Service, 674 F.2d 56, 68-69 (D.C.Cir. 1982) ("Generally . . . class action plaintiffs offer a combination of statistical proof and individual testimony of special instances of discrimination . . . . [T]he court's evaluation is aided by testimony recounting the personal experience of class members . . . . And when the statistical evidence does not adequately account for 'the diverse and specialized qualifications necessary for [the positions in question],' strong evidence of individual instances of discrimination becomes vital to the plaintiff's case") (citations omitted); Allen v. Prince George's County, 538

F.Supp. 833, 853 (D.Md. 1982) (pattern or practice action "singularly weak in that it included such a small number of black witnesses"), aff'd, 737 F.2d 1299 (4th Cir. 1984). Cf. Teamsters v. United States, 431 U.S. at 338-39 (40 individual victim-witnesses brought "cold numbers" to life).

The EEOC's unexplained failure to produce or identify any representative victim or act of discrimination gives rise to a presumption that the alleged victims did not exist and the alleged discriminatory acts did not occur. "The rule is well established . . . that the failure to produce . . . [witness testimony] which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it." Neidhoefer v. Automobile Ins Co., 182 F.2d 269, 271 (7th Cir. 1950) (citations omitted).

The man in charge of the EEOC's administrative prosecution of Sears from 1973 to 1977 had "affiliat[ed] himself with a network of organizations concerned with 'targeting' Sears for Title VII violations . . . , includ[ing] a massive search for victims." EEOC v. Sears, Roebuck and Co., 504 F.Supp. 241, 250 (N.D.Ill. 1980) (emphasis added).

It would have been natural for victims to have made assertions supportive of the EEOC's highly publicized claims if victims had existed. This is relevant to the Court's consideration of the merits, because "[a] failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact." 3A Wigmore, Evidence § 1042, at 1056 (Chadbourn rev. 1970) (emphasis deleted).

The failure of supposed victims to complain amounts, in effect, to an assertion by them of the non-existence of discrimination. Id.

The EEOC attacked the freedom to exercise subjective judgment in selecting commission salespeople. Yet, as its own witness, Felix Lopez, demonstrated, it is difficult to imagine how subjective judgments could be eliminated in selecting commission salespersons. See Malloch v. J.C. Penney, Inc., No. C80-1283R,

verbatim transcript at 4; Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d at 1277. Dr. Siskin put it this way: "We are talking about a difficult thing to measure, an ability to sell, which is a very difficult subjective evaluation." Tr. 17,412 (Siskin). As recognized by Judge Rothstein in the Malloch case, it is appropriate to use subjective criteria in selecting commission salespersons. Malloch v. J.C. Penney, Inc., No. C80-1283R, verbatim transcript at 4.

The notion that subjectivity, per se, in any way violates Title VII by now has been thoroughly discredited by the Supreme Court. Title VII "was not intended to 'diminish traditional management prerogatives.'" Texas Department of Community Affairs v. Burdine, 450 U.S. at 259 (citation omitted) (reversing Fifth Circuit decision which had required employers, in effect, to use objective criteria for employment decisions). See, e.g., Uncle Ben's Inc. v. Johnson, 451 U.S. 902 (1981) (vacating and remanding, for reconsideration under Burdine, a similar Fifth Circuit class action); Furnco Construction Co. v. Waters, 438 U.S. at 578 ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."). McDonnell Douglas Corp. v. Green, 411 U.S. at 803-04 (subjectivity legitimate).

As recently stated by the Ninth Circuit, "Title VII is the law's promise that employment decisions will not be based on non-permissible discriminatory criteria, not that subjective criteria will be eliminated." Casillas v. United States Navy, 735 F.2d 338, 344-45 (9th Cir. 1984) ("Title VII is not a civil code of employment criteria").

The EEOC also attacked one dimension of one particular test administered to some sales applicants. This simply highlighted the weakness of its statistical case, for the EEOC produced no evidence that that test or any other Sears test was designed, intended, or used to discriminate, or that any test or testing

policy or practice resulted in the rejection of any woman who sought a commission sales position.

In sum, the EEOC produced no convincing evidence that the more likely explanation of the results of its commission sales hiring and promotion comparisons was a regularly followed policy of purposeful discrimination by Sears, rather than nondiscriminatory reasons such as differences between the preferences and qualifications of male and female applicants and employees.

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