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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

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21 RACHEL HUTCHINS, KELVIN SMITH,
SR., and KEN STEVENSON, on behalf of
22 themselves and all others similarly situated,

23 Plaintiffs,

24 v.

25 FEDEX EXPRESS, a Delaware
corporation,

26 Defendant.
27
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Case No. C 03-2659 SI; C 03-2878 SI

CLASS ACTION

**NOTICE OF MOTION, MOTION, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Date: January 14, 2005

Time: 9:00 a.m.

Courtroom of the Honorable Susan Illston

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that, on January 14, 2005, at 9:00 a.m., Plaintiffs will
4 move this Court for an order:

5 (1) Certifying two classes under Fed. R. Civ. P. 23(a) and 23(b)(2):

6 (a) a “Minority Employee Class” comprising all African-American and
7 Latino Handlers, Freight Handlers, Material Handlers, Checker/Sorters, Customer Service
8 Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers,
9 Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service
10 Assurance Agents, Truck Control Agents, Trace Representatives, Input Auditors, Team Leaders,
11 and Dispatchers working in FedEx’s Western Region, which includes the states of Alaska,
12 Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, part of
13 Texas, Utah, Washington, and Wyoming, during the period October 17, 1999 through the date of
14 judgment in this action, for claims of employment discrimination on the basis of race in
15 evaluation, promotion, compensation, and discipline in violation of Title VII of the Civil Rights
16 Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. § 1981 (1996), and, for
17 those class members working, or who worked, in California, the California Fair Employment and
18 Housing Act; and

19 (b) an “African American Lower-Level Manager Class” comprising all
20 African-American Operations Managers in FedEx’s Western Region, which includes the states of
21 Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon,
22 part of Texas, Utah, Washington, and Wyoming, during the period October 17, 1999 through the
23 date of judgment in this action, for claims of employment discrimination on the basis of race in
24 evaluation, compensation, and discipline in violation of Title VII of the Civil Rights Act of 1964
25 (both disparate impact and disparate treatment), 42 U.S.C. § 1981, and, for those class members
26 working, or who worked, in California, the California Fair Employment and Housing Act;

27 (2) appointing Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel
28 Hutchins, Kelvin Smith, Sr., and Ken Stevenson as Class Representatives of the Minority

1 Employee Class;

2 (3) appointing Derrick Satchell and Kalini Boykin as Class Representatives of
3 the African American Lower-Level Manager Class; and

4 (4) appointing the law firms of Lief, Cabraser, Heimann & Bernstein, LLP;
5 Schneider & Wallace; the Law Offices of John L. Burris; the Law Offices of Michael S. Davis;
6 the Law Offices of Waukeen Q. McCoy; and the Law Offices of Kay McKenzie Parker as Class
7 Counsel, pursuant to Fed. R. Civ. P. Rule 23(g), of both the Minority Employee Class and the
8 African American Lower-Level Manager Class.

9 Plaintiffs' motion is based upon (1) this Notice of Motion, Motion, and
10 Memorandum; (2) Statistical Analysis of Race and Ethnic Patterns in Federal Express Workforce
11 by Richard Drogin, Ph.D.; (3) the Expert Report of William T. Bielby, Ph.D.; (4) Report on the
12 Basic Skills Tests and Their Use by Federal Express by Nita R. French, Ph.D.; (5) the
13 Declarations of the Proposed Class Representatives; (6) the Declarations of Eighteen Class
14 Members; (7) the Declaration of Chimène I. Keitner (attaching deposition transcript excerpts,
15 alphabetically by deponent, and FedEx documents); (8) the Declaration of Nirej S. Sekhon;
16 (7) the Declarations of the Proposed Class Counsel; (9) any argument of counsel as may be
17 presented at the class certification hearing; and (10) the pleadings and files in this action.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
NOTICE OF MOTION AND MOTION	i
MEMORANDUM	1
I. INTRODUCTION	1
II. STATEMENT OF FACTS	4
A. Minorities At FedEx Are Relegated To The Most Physically Demanding, Lowest Paid, Jobs.....	4
B. FedEx Has A Culture Of Hostility To Minorities.....	5
C. FedEx’s Operations Are Uniform.....	8
D. FedEx Is Centralized and Hierarchical.	9
E. FedEx’s Employment Policies and Practices Are Uniform.....	9
F. FedEx’s Policies and Practices Discriminate Against Minorities.....	10
1. FedEx’s Promotion Policies And Practices Are Discriminatory.	11
a. FedEx Discriminates Against Minorities with Respect to Promotions from “Casual” to “Permanent” Status.	11
b. FedEx Discriminates Against Minorities with Respect to Promotions to More Desirable Permanent Hourly Positions.	13
i. FedEx Requires Passage of a “Skills” Test that It Knows Has Adverse Impact.....	13
ii. FedEx’s Discriminatory Performance Evaluation System Causes Under-Promotion.	16
iii. FedEx’s Biased Discipline System Causes Under- Promotion.	18
iv. FedEx’s Requirement of Manager Approval to Apply for Promotion Is Arbitrary, Subjective, and Discretionary, and Causes Under-promotion, As Does Manager Discretion in Selections Among Candidates “Approved” to Apply.	19
c. FedEx Discriminates Against Latinos with Respect to Promotions from Hourly Positions to Operations Manager.	21
i. FedEx Selects Managers Using a Highly Discretionary Process Rife With Opportunities for Biased Decision-Making.....	22
ii. FedEx’s Discriminatory Performance Evaluation and Discipline Systems Block Minorities from Promotions into Management.	24
2. FedEx Discriminates Against Minority Employees and Lower Level Managers with Respect to Compensation.	24
G. FedEx’s Discrimination Is Uniform And Pervasive.	26
III. ARGUMENT.....	26
A. This Case Meets The Requirements Of Rule 23(a).	27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

	<u>Page</u>
1. The Classes Are Numerous.....	27
2. The Classes Share Common Questions of Fact and Law.	27
a. The Employment Policies and Practices of FedEx’s Western Region are Uniform and Uniformly Arbitrary, Subjective, and Discriminatory.....	29
b. Consistent Patterns of Under-Promotion, Under- Compensation, and Overdiscipline Raise Common Questions of Law and Fact.....	29
c. Plaintiffs’ Disparate Impact and Disparate Treatment Theories Raise Common Issues of Fact and Law.....	30
3. The Named Plaintiffs’ Claims Are Typical.	31
4. The Proposed Class Representatives and Class Counsel Are Adequate.	32
B. The Liability Phase of this Case and the Remedial Phase for Declaratory, Injunctive and Equitable Relief Should be Certified Under Rule 23(b)(2).	33
IV. CONCLUSION.....	35

TABLE OF AUTHORITIES

Page

CASES

1		
2		
3		
4	<u>Adams v. Pinole Point Steel Co.,</u>	
	65 FEP Cases (BNA) 774 (N.D. Cal. 1994)	29
5	<u>Albemarle Paper Co. v Moody,</u>	
	422 U.S. 405 (1975)	14, 31
6	<u>Amchem Prods. v. Windsor,</u>	
	521 U.S. 591 (1997)	33
7	<u>Armstrong v. Davis,</u>	
	275 F.3d 849 (9th Cir. 2001)	26
8	<u>Barefield v. Chevron U.S.A., Inc.,</u>	
	44 FEP Cases (BNA) 1885 (N.D. Cal. 1987)	29, 31, 32
9	<u>Barefield v. Chevron U.S.A., Inc.,</u>	
	48 FEP Cases (BNA) 907 (N.D. Cal. 1988)	33
10	<u>Bazemore v. Friday,</u>	
	478 U.S. 385 (1985)	30
11	<u>Bouman v. Block,</u>	
	940 F.2d 1211 (9th Cir.), <u>cert. denied</u> , 502 U.S. 1005 (1991)	27
12	<u>Butler v. Home Depot,</u>	
	1997 WL 605754 (N.D. Cal.) at *6	11, 30
13	<u>Butler v. Home Depot,</u>	
	Case No. C 94-4335 SI, Order of Jan. 25, 1996, 1996 WL 421436 (N.D. Cal.)	passim
14	<u>Caridad v. Metro-North Commuter R.R.,</u>	
	191 F.3d 283 (2d Cir. 1999), <u>cert. denied</u> , 529 U.S. 1107 (2000)	27, 29
15	<u>Dukes v. Wal-Mart Stores, Inc.,</u>	
	222 F.R.D. 137 (N.D. Cal. 2004)	26, 29, 30
16	<u>EEOC v. General Tel. Co.,</u>	
	885 F.2d 575 (9th Cir. 1989), <u>cert. denied</u> , 498 U.S. 950 (1990)	30
17	<u>Eisen v. Carlisle & Jacqueline,</u>	
	417 U.S. 156 (1974)	27
18	<u>General Tel. Co. v. Falcon,</u>	
	457 U.S. 147 (1982)	27, 29, 31
19	<u>Gotthardt v. Nat'l R.R. Passenger Corp.,</u>	
	191 F.3d 1148 (9th Cir. 1999)	34
20	<u>Griggs v. Duke Power Co.,</u>	
	401 U.S. 424 (1971)	31
21	<u>Hanlon v. Chrysler Corp.,</u>	
	150 F.3d 1011 (9th Cir. 1998)	27, 31
22	<u>Harriss v. Pan Am. World Airways, Inc.,</u>	
	15 FEP Cases (BNA) 1640 (N.D. Cal. 1977)	27, 32, 33
23	<u>Hazelwood Sch. Dist. v. U.S.,</u>	
	433 U.S. 299 (1977)	11, 25, 30
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES S

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

In re United Energy Corp. Solar Power Modules Tax Shelter Investors Sec. Litig.,
122 F.R.D. 251 (C.D. Cal. 1985)33

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977)30

Molski v. Gleich,
318 F.3d 937 (9th Cir. 2003)33, 34

Penk v. Oregon Bd. of Higher Educ.,
816 F.2d 458 (9th Cir. 1987), cert denied, 484 U.S. 853 (1987)30

Probe v. State Teachers’ Ret. Sys.,
780 F.2d 776 (9th Cir. 1986)34

Reeb v. Ohio Dept. Rehab.,
221 F.R.D. 464 (S.D. Ohio 2004)29

Robidoux v. Celani,
987 F.2d 931 (2d Cir. 1993).....27

Salinas Roadway Express,
735 F.2d 1574 (5th Cir. 1984)34

Savino v. Computer Credit, Inc.,
172 F.R.D. 346 (E.D.N.Y. 1997), aff’d, 164 F.3d 81 (2d Cir. 1998)27

Sav-On Drug Stores v. Superior Court,
Opinion No. S106718, Aug. 26, 200426

Staton v. Boeing,
313 F.3d 447 (9th Cir. 2002)31

Stender v. Lucky Stores,
803 F.Supp. 259 (N.D. Cal. 1992)11, 29, 30

Wagner v. Taylor,
836 F.2d 578 (D.C. Cir. 1987)30

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989)14

Washington v. Davis,
426 U.S. 229 (1976)31

Wofford v. Safeway Stores, Inc.,
78 F.R.D. 460 (N.D. Cal. 1978)30

STATUTES

42 U.S.C. § 2000e-2(k)(1)(A)(ii)31

OTHER AUTHORITIES

29 C.F.R. § 1607.3(B).....14

Advisory Committee Note to Rule 23(b)(2)33

TREATISES

Newberg on Class Actions
§ 3.05 at 233 (4th ed. 2002)26, 27

1 MEMORANDUM

2 **I. INTRODUCTION**

3 FedEx Express (“FedEx”) prides itself on its speedy, on-time delivery of letters
4 and parcels throughout the world. When it comes to providing equal opportunity for its African-
5 American and Latino employees, however, FedEx fails to deliver at all.

6 African Americans and Latinos (“Minorities”) who work for FedEx find their
7 progress stalled at the lowest levels of the company hierarchy. They experience discrimination in
8 every aspect of their workplace, including performance evaluation, promotion, compensation, and
9 discipline. Although FedEx has policies that purport to guarantee fair and equal treatment, the
10 actual implementation of the policies depends on arbitrary, discretionary, and subjective
11 decisions, rife with stereotyping and racial bias. FedEx does not systematically monitor its
12 selection procedures for reliability, consistency, or adverse impact. When adverse impact is
13 detected, FedEx takes no steps to identify non-discriminatory alternatives. The result is a
14 segregated workplace where Minority workers do the laborious entry-level jobs of lifting, sorting,
15 loading, and unloading mail and packages, but fail to advance into more lucrative, satisfying, and
16 less physically taxing positions such as courier and management positions.

17 At FedEx, Minorities make up approximately 56% of “Handlers” — the workers
18 who load and unload freight — but Minorities hold only approximately 29% of Operation
19 Manager positions and only approximately 23% of Senior Manager positions at the company,¹
20 even though management positions are predominantly filled from within the Company’s
21 workforce.² FedEx’s promotion system is infected with bias. That bias is fostered by (1) a “tap
22 on the shoulder” system of selection for promotion to many jobs; (2) a multiple choice “skills”
23 test, passage of which is required for certain high level hourly positions, that FedEx concedes has
24

25 ¹ See Statistical Analysis of Race and Ethnic Patterns in Federal Express Workforce by Richard
26 Drogin, Ph.D. (“Drogin Rpt.”) at ¶ 14, Tbl. 3.

27 ² See Garcia at 27:23-29:5, Keitner Decl., Ex. 10; Speroff 7/22 at 30:2-16, Keitner Decl., Ex. 25;
28 FedEx People Manual § 4-5, Candidate Selection—Hourly Positions (noting that “FedEx Express
has a systematic means of selecting candidates for hourly positions within the Corporation for
promotions and transfers”), Keitner Decl., Ex. 35.

1 `statistically significant adverse impact;³ and (3) promotion eligibility requirements that are tied
2 to performance evaluation scores and discipline records, even though the performance evaluations
3 and discipline systems are arbitrary, discretionary and subjective, and have an adverse impact on
4 Minorities that is highly statistically significant.⁴

5 The uncontrolled discretion and bias in FedEx's performance evaluation and
6 discipline systems also infects FedEx's compensation system. Because compensation is tied to an
7 employee's performance evaluation scores and discipline records, and because those systems
8 adversely affect Minorities, Minority employees and lower level managers are paid substantially
9 less than their similarly-situated white colleagues — even colleagues performing the same jobs,
10 in the same facility, and with the same seniority.

11 This action is brought on behalf of two classes of African-American and Latino
12 employees in FedEx's Western Region to remedy and obtain redress for FedEx's discriminatory
13 policies and practices during the period October 17, 1999 through the date of judgment: the
14 "Minority Employee Class" and the "African American Lower-Level Manager Class." FedEx's
15 Western Region is comprised of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana,
16 Nevada, New Mexico, Oregon, part of Texas, Utah, Washington, and Wyoming.⁵

17 The "Minority Employee Class" consists of Minority hourly employees in the
18 following positions: Handler, Freight Handler, Material Handler, Checker/Sorter, Customer
19 Service Agent, Courier, Swing Driver, Ramp Transport Driver ("RTD"), Ramp Area Driver,
20 Shuttle Driver, Dangerous Goods Agent, Information Agent, Operations Agent, Ramp Agent,
21 Service Assurance Agent, Truck Control Agent, Trace Representative, Input Auditor, Team
22 Leader, and Dispatcher. The Minority Employee Class is suing to stop FedEx's policies and
23 practices of (1) providing Minority Employees with disproportionately fewer promotions to
24

25 ³ See Hater at 78:4-22, Keitner Decl., Ex. 12; Draft Memo from Hater to Taylor, 7/19/1994,
26 Keitner Decl., Ex. 43; Drogin Rpt. at ¶¶ 49-52; Report on the Basic Skills Tests and Their Use by
Federal Express by Nita R. French, Ph.D., in Support of Plaintiffs' Motion for Class Certification
("French Rpt.") at 17.

27 ⁴ See Drogin Rpt. at ¶ 34.

28 ⁵ See Van Galder at 11:1-14, Keitner Decl., Ex. 27.

1 Checker-Sorter, Courier and other driving positions, and Operations Manager than fair and equal
2 treatment would provide; (2) compensating Minority Employees less for the same work than their
3 similarly-situated non-Minority counterparts; and (3) disciplining Minority Employees more
4 frequently and more harshly for the same occurrences than their non-Minority counterparts.

5 The second class, the “African American Lower-Level Manager Class,” consists
6 of African-American managers below the level of Senior Manager. These employees receive
7 lower compensation, including less pay for the same work, and more and harsher discipline than
8 their non-Minority counterparts.

9 Both classes assert claims under Title VII of the Civil Rights Act of 1964,
10 42 U.S.C. § 2000(e) et seq. for disparate treatment and disparate impact, and under 42 U.S.C.
11 § 1981. Class members working, or who worked, in California also bring claims under
12 California’s Fair Employment and Housing Act, Government Code § 12940 et seq.

13 In support of class certification, Plaintiffs rely on (1) deposition testimony,
14 declarations, and charges of discrimination by the named plaintiffs; (2) eighteen declarations from
15 current and former FedEx employees; (3) FedEx documents and the testimony of FedEx’s
16 corporate representatives; (4) the report of Richard Drogin, Ph.D., a statistician who identifies the
17 statistically significant disparities in FedEx’s compensation, evaluation, promotion, and discipline
18 decisions; (5) the report of William Bielby, Ph.D., a sociologist who explains how racial
19 stereotypes infect FedEx’s human resources processes; and (6) the report of Nita French, Ph.D.,
20 an industrial organizational psychologist, who explains that FedEx’s requirement of passage of
21 the race-biased “Basic Skills Test” for promotion to several key jobs is not justified.⁶ This
22 evidence demonstrates a pattern of under-promotion, under-compensation, and overdiscipline of
23 Minority Employees and African American Lower-Level Managers throughout FedEx’s Western
24 Region. The result of FedEx’s discriminatory policies and practices is that Minority Employees
25 disproportionately occupy low-paid, physically demanding hourly positions and the few who do
26 progress to driver and management positions are compensated less than similarly-situated whites.

27
28 ⁶ Proposed Class Counsel also submit declarations regarding their adequacy.

1 Class certification is appropriate pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2).
2 All of the prerequisites to a class action in Rule 23(a) — numerosity, common questions,
3 typicality, and adequacy — are satisfied. The Minority Employee Class has thousands of class
4 members and the African American Lower-Level Manager Class has several hundred members.
5 Common issues include whether FedEx’s uniform promotion, compensation and discipline
6 policies have disparate impact on Minority employees and lower level managers; whether
7 FedEx’s discrimination is intentional; and whether the pattern and practice of under-promotion,
8 under-compensation, and overdiscipline of Class members violates the employment
9 discrimination laws. The proposed class representatives are members of the classes they seek to
10 represent and have claims that are typical of other class members. They will adequately represent
11 the classes, and have retained counsel who, collectively, have the resources and experience to
12 represent the Class effectively.

13 Certification is appropriate under Rule 23(b)(2) because this suit seeks meaningful
14 declaratory and injunctive relief.⁷ The primary goal of this litigation is to alter FedEx’s
15 performance evaluation, job posting, promotion, compensation, and discipline policies and
16 practices so that FedEx delivers equal employment opportunities to its Minority employees and
17 lower level managers as well as it delivers packages and letters to its customers.⁸

18 **II. STATEMENT OF FACTS**

19 **A. Minorities At FedEx Are Relegated To The Most Physically Demanding,** 20 **Lowest Paid, Jobs.**

21 The cold statistics show that Minority Employees at FedEx are consigned to
22 hourly labor — they perform the more physically demanding, lower paid work of loading and

23 ⁷ As it did in Butler v. Home Depot, Case No. C 94-4335 SI, Order of Jan. 25, 1996, 1996 WL
24 421436 (N.D. Cal.), the Court should bifurcate the case into liability and relief phases. As in
25 Butler, the first phase, certified under Rule 23(b)(2), would “address liability and relief applicable
26 to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable
27 for punitive damages.” Id. at *1. After a finding of liability in Phase I, the Court should grant
28 declaratory and injunctive relief, and equitable relief such as back pay. The Court can decide
after the liability phase whether the compensatory damages phase should be certified under Rule
23(b)(3), with notice and an opportunity to opt out.

⁸ See Declarations of: Kalini Boykin at ¶ 2; Derrick Satchell at ¶ 2; Valerie Brown at ¶ 2; Rick
Gonzales at ¶ 2; Rachel Hutchins at ¶ 2; Kelvin Smith, Sr. at ¶ 2; and Ken Stevenson at ¶ 2.

1 unloading packages, but are underrepresented in the less physically taxing, better paying, driver
2 and management positions. At each step up the promotions ladder, the percentage of Minorities
3 drops. (Drogin Rpt. at ¶¶ 12-14.)

4 Among hourly positions, the positions with the highest percentages of Minorities
5 are the Handler, Freight Handler, and Material Handler positions — the three lowest paid
6 positions in the Company. (Drogin Rpt. at ¶ 14, Table 3.) The representation of Minorities
7 among the higher paid Courier and Ramp Transport Driver positions drops by almost half.
8 Although approximately 56% of Handlers are Minorities, only approximately 30% of Couriers
9 are Minorities. (Id.) The drop-off in the percentage of African Americans is particularly
10 dramatic: although approximately 35% of Handlers are African American, only approximately
11 13% of Couriers are African American. (Id.)

12 For Latinos, the drop continues into the management ranks. Latinos comprise
13 approximately 17% of Couriers, but only 8.5% of Operations Managers, the lowest management
14 position. (Id.)

15 **B. FedEx Has A Culture Of Hostility To Minorities.**

16 At the root of the statistical disparity between FedEx’s Minority employees and
17 non-Minority employees is a mix of conscious and unconscious racial bias and stereotypes. The
18 company’s sophisticated exterior masks a culture of hostility towards minorities and disregard for
19 workplace segregation and FedEx’s legal obligations. A lack of meaningful standards,⁹ controls
20 and monitoring allows those racial biases and stereotypes to infect FedEx’s performance
21 evaluation, discipline, promotion, and compensation systems.

22 Known as the “ole boys network” or “the country club,” the management of
23 FedEx’s Western Region engages in behaviors that have long since been deemed unacceptable in
24 our society. High ranking FedEx officials, including Mike Pigors, the current Vice President for
25 FedEx’s Western Region of the AGFS Division — and the FedEx officer responsible for diversity
26 in the region (Shannon Brown at 73:8-75:5, Keitner Decl., Ex. 3), have repeatedly, and openly,

27 _____
28 ⁹ Although FedEx has written personnel policies that touch upon a variety of subjects, those
policies leave large amounts of discretion to local managers.

1 used racial slurs.¹⁰

2 Those racial slurs were not isolated comments: they reflect a corporate culture,
3 and open unwritten policy at FedEx of hostility toward Minorities. Not only were the senior
4 FedEx officials who made those slurs never disciplined for making them, but a manager who
5 challenged his superiors about their use of such terms was warned that supporting Minorities
6 would be harmful to his career at FedEx. (Snyder at 52:25-56:16, Keitner Decl., Ex. 24.) When
7 former Southern California Managing Director Michael Snyder questioned whether such
8 language was appropriate, he was derided by Mr. Rebholz, his boss, as a “nigger lover.” (Id. at
9 54:12-24.) Mr. Rebholz then counseled Mr. Snyder about FedEx’s culture and what he needed to
10 do to fit in:

11 Q. When Mr. Rebholz made these types of comments, did you say
12 anything to him or react in any way to indicate whether you
approved or disapproved of him?

13 THE WITNESS: Yes, I reacted.

14 MR. ROOT: In what manner?

15 A. Challenging him to that thought process and whether it was
16 appropriate.

17 Q. When you did that, how did Mr. Rebholz respond?

18 A. I remember on one occasion he called me a “nigger lover.” I
recall that pretty specifically. He explained --

19 _____
20 ¹⁰ Mr. Pigors referred to African Americans as “niggers.” Snyder at 75:3-8. At the time,
21 Mr. Pigors was Vice President of the Western Region of DGO. See also Rogers at 114:2-115:11,
719:8-19, Keitner Decl., Ex. 23, in which Mr. Rogers, a FedEx Senior Manager, testifies that Mr.
22 Pigors intentionally and dismissively called him “boy” during a senior managers meeting in late
2000.

22 Tim Wertner, who is currently a Managing Director for FedEx’s Los Angeles/Inland Empire
23 District, the largest in the Western Region, also referred to African Americans as “niggers.”
Snyder at 86:18-20. When asked about the statements, Mr. Wertner testified that he could “not
24 recall.” Wertner at 256:2-257:18, Keitner Decl., Ex. 28. Jerome Rogers testified that Mr.
25 Wertner made known his views that African Americans are inferior to whites. Rogers at 311:25-
313:9, 459:10-464:15, 766:14-768:11. Mr. Wertner also served as a Managing Director of the
Bay Area Metro District during the Class period.

26 David Rebholz, currently FedEx’s Executive Vice President of Operations repeatedly called
27 African Americans “niggers” when he was Operations V.P. of FedEx’s Western Region in the
1990s. Mr. Rebholz now reports directly to FedEx CEO David Bronczek. Accordingly to Mr.
28 Snyder, Ted Weise, who was President and CEO of FedEx during part of the class period,
repeatedly referred to blacks as “niggers.” Snyder at 56:22-59:7.

1 MR. COHELL: Objection, form of the question. Go ahead.

2 THE WITNESS: -- his rationale and how the company was, and
3 that I was going to need to get used to that and understand if I
4 wanted to have a career.

5 * * * *

6 Q. BY MR. ROOT: You mentioned in your testimony that he
7 explained to you the way things were at FedEx. And I am asking
8 you what specifically he said in that regard.

9 THE WITNESS: I understand the question. To the best of my
10 recollection, that it was a southern boy mentality in upper
11 management and you had to fit in, something along those lines. I
12 don't remember the specific quotes. But kind of coaching me and
13 counseling me that -- trying to make a stand on minorities' behalf
14 was inappropriate.

15 Q. BY MR. ROOT: And by "inappropriate," did you understand
16 him to mean harmful to your career at FedEx?

17 A. Yes, I understood that's -- I think that's what he was trying to
18 tell me.

19 (Snyder at 54:12-56:16, Keitner Decl., Ex. 24.) That testimony about FedEx's culture is
20 confirmed by a statement by long-time FedEx HR advisor Sam Haskins in a human resources
21 document produced by FedEx and dated June 2, 1992 that "[i]f any adverse impact [in manager
22 hiring] indeed exists, it's probably due to Federal Express culture and management hiring
23 practices" (Memo, Haskins to Pollard, 6/2/1992, Keitner Decl., Ex. 50) and by Mr. Haskins'
24 explanation of that statement in his August 31, 2004 deposition testimony that in the 90s "we
25 were very much predominantly [a] white male management population, and that was our hiring
26 practice."¹¹

27 Where, as here, a company has a history of racial bias in its corporate culture, that

28 ¹¹ Haskins at 11:23-12:19, Keitner Decl., Ex. 11; see also Darrell Kato, former Managing Director
of the Coastal District, at 60:23-62:12, 130:22-140:2, Keitner Decl., Ex. 16 ("The managing
directors within the western region were considered to be a good ol' boys network.").

The culture of hostility to Minorities is manifested in other ways as well. Members of the
overwhelmingly Caucasian senior management of FedEx make no secret of their desire not to
work with Minorities. See Snyder at 54:12-56:16. The hiring process allows the exclusion of
Minorities from certain interviews. See, e.g., Kato at 124:6-125:24. On rare occasions when
Minority Employees are promoted into management, they are referred to as "tokens," Snyder at
53:25-54:2, and excluded from group e-mails and other company communications. Rogers at
768:17-770:1, Keitner Decl., Ex. 23.

1 bias is likely to continue unless the company takes strong affirmative steps to eliminate the biased
2 culture. FedEx has taken no such steps. Instead, FedEx fails to comply with its legal obligations
3 to monitor adverse and impact and turns a blind eye to the adverse impact that permeates its
4 evaluation, promotion, discipline and compensation systems. As a result, the discriminatory
5 corporate culture described by Mr. Rebholz and Mr. Haskins helps to explain the statistical
6 disparities that currently pervade FedEx's Western Region. (Bielby Rpt. at ¶¶ 40-41.)

7 Racial bias infects every aspect of the FedEx workplace, including evaluation,
8 promotion, compensation, and discipline. Feeding on the atmosphere established by senior
9 management, and given human resources systems that permit application of discretionary
10 decision-making without guidelines or controls, local managers resort to stereotypes and biased
11 attitudes when making evaluation, promotion, compensation, and discipline decisions. (Id. at
12 ¶ 42.)

13 **C. FedEx's Operations Are Uniform.**

14 Throughout the Western Region, and indeed throughout the United States,
15 FedEx's operations are uniform. FedEx's distribution facilities and its workplace systems are
16 standardized. Different facilities have largely the same categories of employees, and the job
17 duties of those employees are the same. (See Van Galder at 45:16-46:9, Keitner Decl., Ex. 27;
18 Garcia at 35:13-23, Keitner Decl., Ex. 10.) The job of a Handler is the same in Alaska as it is in
19 Hawaii. (Van Galder at 48:12-15, 56:1-9, 60:2-17.) The job of a Courier is the same in Seattle as
20 it is in Phoenix. An employee transplanted from Portland, Oregon to Los Angeles, California to
21 Reno, Nevada to Spokane, Washington could make a seamless transition. As a result, employee
22 transfers between facilities not only occur (see Fifer at 40:11-17, Keitner Decl, Ex. 9), but are
23 encouraged by the Company for Managers. (See, e.g., Van Galder at 56:10-57:14; Fifer at 76:23-
24 77:7.)

25 Uniformity is more than just a feature of FedEx's operations — it is a requirement.
26 FedEx goes to great lengths to ensure consistency in its operations. (Cioffi at 89:9-17, Keitner
27 Decl., Ex. 5.) Only through uniformity and consistency can FedEx ensure proper service to its
28 worldwide customers. (Moses at 32:17-33:18, Keitner Decl. Ex. 18.)

1 **D. FedEx Is Centralized and Hierarchical.**

2 FedEx has two operational Divisions in the Western Region: Air Ground Freight
3 Services (“AGFS”) and Domestic Ground Operations (“DGO”). The DGO Division includes the
4 Couriers who drive the familiar trucks and interact most frequently with the public. The AGFS
5 Division is responsible for air transport of packages after they are collected by DGO, as well as
6 for delivery of large and heavyweight packages. (See Van Galder at 27:25-28:8, Keitner Decl.,
7 Ex. 27.)

8 FedEx is also divided into geographical Regions. The FedEx Regions are headed
9 by Vice Presidents of Operations for each Division. The Vice President of the Western Region
10 for AGFS is Michael Pigors, who has referred to African Americans as “niggers.” (Snyder at
11 75:3-8, Keitner Decl., Ex. 24.)

12 Regions are divided into Districts, which are headed by Managing Directors who
13 report directly to the Vice Presidents of Operations. The Managing Director of DGO for the
14 LA/Empire District is Tim Wertner, who also has referred to African Americans as “niggers.”
15 (Id. at 86:18-20.)

16 The Districts are comprised of individual distribution/service centers in the DGO
17 division, and of “organizations” in AGFS, which may correspond to a single facility or to set of
18 operations within a larger airport based facility. Both service centers and organizations are run by
19 Senior Managers, who report directly to the Managing Directors. Senior Managers supervise
20 Operations Managers, the lowest management positions. The Vice Presidents of Operations, the
21 Managing Directors, and the Senior Managers form the senior management ranks of the
22 Company. The chains of command in the Western Region, as in all FedEx Regions, run directly
23 to FedEx corporate headquarters in Memphis. The Executive Vice President of Operations is
24 David Rebholz, who has made it clear that the “southern boy mentality in upper management”
25 will exclude anyone who speaks up on behalf of Minorities. (Id. at 52:25-56:16.)

26 **E. FedEx’s Employment Policies and Practices Are Uniform.**

27 All personnel policies, procedures, and forms are produced by and disseminated
28

1 from FedEx's corporate headquarters in Memphis.¹² Included among FedEx's standardized
2 personnel materials are the People Manual (a comprehensive guide to uniform, mandatory
3 policies and procedures); Best Practices guides for AGFS and DGO; a uniform, corporate-wide
4 Legal manual; and uniform materials for employee orientation, training, and evaluation.¹³

5 Personnel decisions about hiring, evaluation, promotion, discipline, and
6 compensation of hourly employees are primarily made by Operations Managers, who report to
7 Senior Managers. Personnel decisions regarding Operation Managers are primarily made by
8 Senior Managers.

9 When making these personnel decisions, local managers operate within a system
10 that applies uniformly throughout FedEx, not only in the Western Region, but nationwide. Local
11 managers use the same forms, administer the same tests, and apply the same policies throughout
12 the Western Region.¹⁴

13 FedEx's policies regarding promotion, compensation, evaluation, and discipline
14 are set forth in the People Manual. The People Manual policies apply companywide.¹⁵ No
15 officers or managers in the Western Region have authority to alter or deviate from these policies.
16 (Van Galder at 90:16-91:6, Keitner Decl., Ex. 27; Garcia at 9:1-8, Keitner Decl., Ex. 10.) Those
17 policies include the eligibility requirements for promotion and the formulas for setting
18 compensation.

19 **F. FedEx's Policies and Practices Discriminate Against Minorities.**

20 Statistical analysis of FedEx's employment policies and practices establishes that
21 FedEx discriminates against Minority employees with respect to promotions, compensation,
22 evaluations, and discipline, and against African American Lower-Level Managers with respect to

23 ¹² See, e.g., Speroff 7/22 at 22:7-26:7, Keitner Decl., Ex. 25; FedEx People Manual—Publication
24 Information, Keitner Decl., Ex. 31 (indicating that all amendments to the People Manual shall be
made by the CEO).

25 ¹³ See, e.g., Van Galder at 85:1-88:12, Keitner Decl., Ex. 27; McQueen at 92:6-93:16, Keitner
Decl., Ex. 17.

26 ¹⁴ See, e.g., McQueen at 92:6-93:16; Garcia at 9:1-8, Keitner Decl., Ex. 10; Fifer at 13:3-14:14,
27 Keitner Decl., Ex. 9; Speroff 7/22 at 22:7-23:16, Keitner Decl., Ex. 25.

28 ¹⁵ See, e.g., Buchanan at 20:2-20:5, Keitner Decl. Ex. 4 (referring to the People Manual as a
FedEx manager's HR "Bible"); Presnoples at 11:24-12:11, Keitner Decl., Ex. 21.

1 evaluations, compensation, and discipline. With respect to each of these employment practices,
2 these disparities adverse to Minorities are highly statistically significant, and could not have
3 occurred by chance. (See Drogin Rpt. at ¶¶ 21-66.) These statistical disparities are so powerful
4 that they not only establish the *prima facie* case for a disparate impact claim, see Hazelwood Sch.
5 Dist. v. U.S., 433 U.S. 299, 307-8 (1977), but form a basis for inferring intentional
6 discrimination, see Butler v. Home Depot, 1997 WL 605754 (N.D. Cal.) at *6; Stender v. Lucky
7 Stores, 803 F.Supp. 259, 332-34 (N.D. Cal. 1992).

8 **1. FedEx's Promotion Policies And Practices Are Discriminatory.**

9 **a. FedEx Discriminates Against Minorities with Respect to**
10 **Promotions from "Casual" to "Permanent" Status.**

11 FedEx's pattern of discrimination begins from the moment employees are hired. A
12 new hire can receive either a permanent or "casual" position; "casual" employees do not have
13 regular work schedules, receive no benefits, and do not have access to the FedEx intranet, which
14 contains on-line personnel and training materials, including the on-line Job Change Application
15 Tracking System (JCATS) through which permanent employees apply for promotions.
16 (Williamson at 12:1-13:16, Keitner Decl., Ex. 29; Fifer at 19:2-25, Keitner Decl., Ex. 9.)
17 Upgrading from casual to permanent is considered a promotion.¹⁶ Permanent full-time positions
18 provide greater stability, more prestige, and quicker promotion to other jobs within FedEx.

19 Minority "casual" employees are treated far worse than similarly situated whites
20 with respect to promotions to permanent positions. A statistical analysis of promotions from
21 casual to permanent, controlling for originating job, geographic location, and time in job reveals
22 statistically significant disparities adverse to both African Americans and Latinos. (Drogin Rpt.
23 at ¶¶ 21-31.) Focusing on the move from casual Handler to permanent Courier — the most
24

25 ¹⁶ Although one corporate deponent described the placement of a "casual" employee into a
26 permanent position as an external hire, suggesting that "casual" employees are somehow outside
27 the company, see Huffer at 79:3-22, Keitner Decl., Ex. 15, the company's own databases confirm
28 casuals are in fact employees of FedEx. The FedEx computer system contains casual employees
in the payroll data and identifies the names of casual employees moving to a permanent position
with the "P" code used for promotions. See Drogin Rpt. at n.6. Regardless of what this job move
is called, Minorities fare worse.

1 common path for promotions into the Courier position¹⁷ — similarly establishes dramatic
2 disparities adverse to Minorities.¹⁸

3 Of all of FedEx’s employees, casual employees are the least protected. They have
4 the least job security; they have no health care security; and they have no regular schedules. Of
5 particular relevance to this case, they have no meaningful protection from racial discrimination,
6 and cannot make use of FedEx’s internal procedures for handling race discrimination
7 complaints.¹⁹

8 Unlike permanent employees, casual employees are not permitted to apply for
9 positions using FedEx’s computerized job application system. (Williamson at 12:1-20, Keitner
10 Decl., Ex. 29; Huffer at 78:18-79:2, Keitner Decl., Ex. 15; Garcia at 23:10-12, Keitner Decl., Ex.
11 10.) They are not privy to the information about job postings contained in that system. (Id.) As a
12 result, permanent positions filled from the pool of “casual” employees are filled in part by
13 managers inviting certain employees to apply — a “tap-on-the-shoulder” process. (Garcia at
14 19:16-22:18; see also Huffer at 34:21-35:1, 46:6-25, 54:5-55:16; Hesser at 48:9-14, 50:12-24,
15 Keitner Decl. Ex. 14; Presnoples at 131:6-14, Keitner Decl. Ex. 21.) As Professor Bielby, the
16 immediate past President of the American Sociological Association explains, such processes are
17 susceptible to the influences of racial stereotyping and “in-group favoritism” by white
18 managers.²⁰

19 Managers are not systematically trained on how to select among casual applicants.
20 (Buchanan at 133:18-135:10, Keitner Decl., Ex. 4; Huffer at 60:21-62:10, Keitner Decl. Ex. 15.)
21 Accordingly, a Manager who chooses among casual employees has almost unfettered discretion
22 — even more than a Manager choosing among permanent employees. As Professor Bielby
23 explains, such arbitrary, discretionary and subjective decision-making often is infected by racial

24
25 ¹⁷ Of the persons promoted into Courier positions during 1999-2003, approximately 70% were
promoted from the Handler and Freight Handler jobs. Drogin Rpt. at ¶ 22.

26 ¹⁸ Id. at ¶¶ 21-26, 31 (for the years 1999-2003, the statistical disparity is -4.49 standard deviations
for African Americans; -4.34 standard deviations for Latinos).

27 ¹⁹ Dandridge at 27:4-29:7, Keitner Decl. Ex. 7 (GFT policy applies to permanent employees).

28 ²⁰ See Expert Report of William T. Bielby, Ph.D. (“Bielby Rpt.”) at ¶¶ 4, 8, 20-23, 33, 42.

1 stereotypes and results in biased outcomes. (Bielby Rpt. at ¶¶ 8, 15-39, 42.) That is what
2 happens at FedEx.

3 **b. FedEx Discriminates Against Minorities with Respect to**
4 **Promotions to More Desirable Permanent Hourly Positions.**

5 Handler jobs are the most physically demanding and lowest paid jobs at FedEx.²¹
6 Accordingly, moving from Handler jobs to less physically taxing, higher paid, hourly positions
7 such as Checker/Sorter and Courier and Ramp Transport Driver is desirable.

8 A statistical analysis of the JCATS data²² establishes that both African American
9 and Latino employees are selected for promotion at rates materially lower than similarly situated
10 whites. This under-promotion is statistically significant with respect to both African Americans
11 and Latinos.²³

12 A statistical analysis of all moves from Handler to Checker/Sorter, from Handler
13 to Courier, from non-Handler to Courier, and from Handler to Material Handler, including moves
14 that do not appear in the JCATS data, confirms that Minorities are under-promoted. The
15 disparities are highly statistically significant.²⁴

16 At least three mechanisms of discrimination contribute to these disparities: (1) a
17 biased “skills” test; (2) biased performance evaluations; and (3) a biased discipline system.

18 **i. FedEx Requires Passage of a “Skills” Test that It Knows**
19 **Has Adverse Impact.**

20 To be promoted from Handler or other low level hourly positions into Courier,

21 ²¹ Checkers/Sorters are paid more than Handlers, and Couriers and Ramp Transport Drivers are
22 paid more than Checkers/Sorters. Drogin Rpt. at ¶ 14, Tbl. 3.

23 ²² The JCATS data are supposed to include all promotions of permanent hourly employees at
24 FedEx.

25 ²³ Drogin Rpt. at ¶¶ 46, 48 (-7.19 standard deviations for African Americans; -4.74 standard
26 deviations for Latinos).

27 ²⁴ Drogin Rpt. at ¶¶ 21-31 (finding statistical disparities adverse to African Americans during the
28 period 1999-2003, of -6.42 standard deviations as to promotions from Handler to Courier [-4.49
from Casual Handler to Permanent Courier and -4.59 from Permanent Handler to Permanent
Courier], -7.75 standard deviations from non-Handler to Courier, -3.37 from Handler to
Checker/Sorter, -11.34 from Handler to Material Handler; finding disparities adverse to Latinos
as to promotions from Handler to Courier of -4.43 standard deviations from Casual Handler to
Permanent Courier, and -3.72 standard deviations from any Handler position to Permanent
Courier.)

1 Ramp Transport Driver, or Service Agent positions, a FedEx employee must pass a group of tests
2 known as the Basic Skills Tests (“BST”).²⁵ FedEx concedes that the BST has statistically
3 significant adverse impact.²⁶ The adverse impact of the BST is extraordinarily large. For
4 example, the BST disqualifies almost two-thirds of African Americans who apply for the Courier
5 job; the pass rate is less than one-half the pass rate for white applicants.²⁷

6 Although FedEx claims the BST is a valid predictor of performance, Dr. Nita
7 French, an industrial organizational psychologist who has reviewed all of the materials relating to
8 the supposed validation of the BST, has concluded that FedEx’s use of the BST is not justified.²⁸
9 In addition, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs has
10 found that the BST has adverse impact and is not valid.²⁹ Despite being aware that the BST has
11 statistically significant adverse impact, FedEx has disregarded its legal obligation under the 1978
12 Uniform Guidelines on Employee Selection Procedures (“Uniform Guidelines”) to monitor
13 adverse impact³⁰ and to explore alternatives that have less adverse impact.³¹

14 ²⁵ See General BST Information, Keitner Decl., Ex. 39.

15 ²⁶ Hater at 78:4-79:13, Keitner Decl. Ex. 12; see also Drogin Rpt. at ¶¶ 49-52 (finding disparities
16 so significant that the probability of them occurring by chance is “essentially zero”).

17 ²⁷ Hater at 85:1-86:5, Keitner Decl. Ex. 12; see Draft Memo from Hater to Taylor, 7/19/1994,
18 Keitner Decl., Ex. 43.

19 ²⁸ See French Rept. at 15, 18.

20 ²⁹ Hater at 51:13-53:23; OFCCP Letter of 6/29/2000, Keitner Decl., Ex. 42.

21 ³⁰ Hater at 79:4-82:9. The Uniform Guidelines require employers to maintain records that
22 disclose the impact of tests, such as for BST, upon employment opportunities of “persons
23 identified by race, sex, or ethnic group.” 29 C.F.R. § 1607.4(c). “Adverse impact determinations
24 should be made at least annually...” 29 C.F.R. § 1607.15.A(2). The Supreme Court has
25 underscored the importance of these recordkeeping requirements. Wards Cove Packing Co. v.
26 Atonio, 490 U.S. 642, 657-58 (1989)

27 ³¹ Hater at 82:10-83:3; see French Rpt. at 18. It is a legal duty for an employer to explore
28 whether there is an alternative selection practice or an alternative use of a selection practice that
has less adverse impact provided that the alternative is substantially equally predictive of job
performance. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3(B)
(an employer should “make a reasonable effort to become aware of . . . alternative procedures”
with less adverse impact, and that “[w]here the user is shown an alternative selection procedure
with evidence of less adverse impact and substantial evidence of validity of the same job in
similar circumstances, the user should investigate it to determine the appropriateness of using or
validating it. . . .”). Accordingly, even if an employer demonstrated the validity of a test, the use
of the test is unlawful if the plaintiff shows that the employer failed to implement an effective
alternative selection device that would have a lesser adverse impact. Albemarle Paper Co. v
Moody, 422 U.S. 405, 425 (1975); 42 U.S.C. § 2000e-2k(1)(A)(ii).

1 FedEx has also failed to demonstrate that Service Agent, Courier, and Ramp
2 Transport Driver candidates who pass the BST perform better on the job than those who fail.
3 (See French Rpt. at 14-15.) FedEx concedes that many skills not tested on the BST are important
4 for these jobs; the BST measures only 16 of the 66 skills identified by Subject Matter Experts as
5 important to the job of Courier. (Hater at 154:10-157:25, Keitner Decl., Ex. 12; see French Rpt.
6 at 9.)

7 The BST prevents a huge percentage of Courier candidates from obtaining Courier
8 positions even though these candidates would successfully complete the mandatory Courier
9 training course. Of 102 Couriers who took the BST and Courier training in a pilot study, 96
10 candidates passed training, but only 52 candidates passed the BST. (Id. at 267:16-272:10; see
11 Validation of BST With Courier and Service Agent Training Performance, p. 7, Keitner Decl.,
12 Ex. 41.) Because this was a pilot study only, the 44 candidates who failed the BST but passed
13 Courier training went on to work as Couriers. Had the BST requirement been in place at that
14 time, 44 out of 102 Courier candidates would have been excluded from this promotional
15 opportunity even though almost all of them were able to pass training. The inability of the BST to
16 predict success on the job was underscored by Melody Weaver-Thomas, a DGO training
17 manager, in a March 6, 2000 memo in which she calculated Courier and Service Agent training
18 pass/fail rates and concluded that the “basic skills test implemented in November 1996 has not
19 shown a significant change in pass/fail rates in training programs,” meaning that the BST
20 requirement has not improved the job performance of courier trainees. (Id. at 92:8-97:8; Memo
21 from Weaver-Thomas to Distribution, 3/6/2000, Keitner Decl., Ex. 44; see French Rpt. at 6.)

22 FedEx has retained the BST requirement in the face of evidence that its use
23 confers little operational benefit while causing enormous adverse impact. (See Drogin Rpt. at
24 ¶¶ 49-52; French Rpt. at 18.) The BST requirement applies uniformly to all Service Agent,
25 Courier, and Ramp Transport Driver candidates in the Western Region and, indeed, nationwide.
26 The harm to Minorities caused by FedEx’s unjustified use of the BST gives rise to a paradigmatic
27 class claim for injunctive relief.

1 criticized the performance ratings. For example, in the ASPIRE Follow-up Criterion Validation
2 Report for 2003, Brooks categorically described the “limitations” of the performance ratings.³⁶

3 Part of the problem is that the performance evaluation forms require the evaluation
4 of subjective criteria such as “teamwork,” lack of complaining (which listed as an indicia of
5 “teamwork”), “professionalism,” and neatness.³⁷ But even more problematic is the lack of
6 guidelines, controls, and monitoring to ensure that the subjective criteria are used in the same way
7 by different managers, and by the same manager with respect to different employees, so that the
8 evaluations are consistent and reliable and stereotypes and biases are controlled. (See Bielby
9 Report at ¶¶ 26-29.)

10 Although the evaluation forms give guidelines, the guidelines are only illustrative.
11 (Perry at 119:22-126:3, Keitner Decl., Ex. 19.) Different managers consider different things. (Id.
12 at 126:4-128:13.) A Senior Manager testified that he did not apply the criteria the same way from
13 employee to employee. (Id. at 131:1-135:3.) Because FedEx does not define the terms on
14 evaluation forms (id. at 119:22-126:3), adequately train managers about how to use them reliably
15 (id. at 124:17-126:3, 139:7-140:2), or monitor their use to ensure that they are being used reliably
16 and consistently (id. at 117:24-119:8), they have been infected by the influence of racial
17 stereotypes (id. at 118:3-119:8, 136:12-139:16).³⁸

18 FedEx has made no systematic effort to determine whether its performance
19 evaluations, which have a direct influence on compensation, eligibility for promotion, and
20 applicant ranking for promotions, are consistent, reliable, and accurate measures of job

21 _____
22 performance review ratings are characterized by “negative skew and restricted variance.” FedEx
23 has not produced, and its industrial psychologists are not aware of, any study conducted to
24 determine the reliability, consistency, or validity of performance reviews. See Hater at 303:7-12,
25 Keitner Decl. Ex. 12; Brooks at 26:7-22, Keitner Decl., Ex. 2.

26 ³⁶ PR400175-76, Keitner Decl., Ex. 49; see also Validations of Assessments for the First-Level
27 Manager Jobs at Federal Express (1998), p. 18, Keitner Decl., Ex. 48, indicating the “common
28 perception within the company that performance review ratings are inflated and some times lack
accuracy,” a perception that Dr. Brooks confirmed in deposition. Brooks at 83:3-84:5.

³⁷ See Individual Progress Discussion Form, Keitner Decl., Ex. 37; Courier OLPR, Keitner Decl.,
Ex. 38.

³⁸ See Bielby Rpt. at ¶¶ 26-29; see also Declarations of Boykin at ¶¶ 12-16; Satchell at ¶¶ 9-11;
James at ¶¶ 14, 15, 18, 23; Haynes at ¶¶ 25-27, 30, 34.

1 performance, and whether they have adverse impact.³⁹ FedEx's failure to comply with its legal
2 obligations to determine whether its evaluation system has adverse impact further illustrates its
3 pervasive culture of disrespect for Minorities and disregard for the law.

4 **iii. FedEx's Biased Discipline System Causes Under-**
5 **Promotion**

6 The People Manual also provides that an employee with an active discipline
7 warning letter or performance reminder is not eligible for promotion.⁴⁰ Warning letters can also
8 be taken into account in performance reviews, even after the warning letter is no longer active.⁴¹
9 Online counselings, which remain on FedEx's PRISM system indefinitely, can also be taken into
10 account in performance reviews.⁴² As described above, performance reviews impact eligibility
11 for promotion. An unsatisfactory performance review in turn automatically results in the issuance
12 of a performance reminder letter.⁴³ Thus, performance reviews and discipline are intertwined,
13 such that bias entering into any of these decisions contaminates each of the others and
14 reverberates through the employee's FedEx career.

15 Because FedEx's disciplinary system is racially biased, Minorities are
16 disproportionately ineligible for promotion due to discipline issues. A statistical analysis of
17 FedEx's discipline system establishes that Minorities are disciplined far more frequently than
18 whites.⁴⁴ The overdiscipline of both African Americans and Latinos is extremely statistically

19 ³⁹ See Hayward at 50:3-51:12, Keitner Decl. Ex. 13 (no study of adverse impact), 83:1-11 (same),
20 141:25-142:20 (no monitoring of how performance reviews actually used), 145:19-148:10 (no
21 systematic training of managers), 149:8-151:1 (no systematic auditing to detect potential
22 problems), 164:6-166:4 (little guidance provided on how to apply scale of 1-7), 175:12-177:15
23 (no coherent plan for how to deal with adverse impact if detected), 180:15-183:1 (no follow-up to
ensure consistency in ratings), 206:13-212:17 (no written guidelines on how to interpret and
apply performance categories other than forms themselves), 222:25-224:17 (no studies done to
determine whether stereotypes affect performance reviews).

24 ⁴⁰ See People Manual § 4-5, Candidate Selection—Hourly Positions, Tbl. 1, p. 181, Keitner Decl.,
Ex. 35. A warning letter is active for one year. See People Manual § 2-5, Acceptable Conduct, p.
25 54, Keitner Decl., Ex. 32. A performance reminder is active for six months. See People Manual
§ 2-50, Performance Improvement, p. 86, Keitner Decl., Ex. 33.

26 ⁴¹ See People Manual Policy § 2-50, p. 86; Speroff 7/23 at 169:18-173:25, Keitner Decl., Ex. 26.

27 ⁴² See Speroff 7/23 at 153:6-17, 171:24-173:21.

28 ⁴³ See People Manual Policy § 2-50, pp. 86-87.

⁴⁴ Drogin Rpt. at ¶¶ 53-55, Tbl. 22 (22.49 standard deviations for African Americans and 4.38

1 significant.⁴⁵

2 Although the discipline policy provides certain examples of behavior that would
3 warrant a warning letter, those behaviors are not exhaustive, but simply illustrative.⁴⁶ (Buchanan
4 at 149:22-151:11, Keitner Decl, Ex. 4.) Managers have wide discretion in deciding what
5 behavior should be disciplined and how severely it should be disciplined. For example, there are
6 no guidelines to restrict manager discretion in deciding whether to discipline an employee
7 informally, without creating a record, or through an online counseling, which can be considered
8 as part of the employee's file for performance review and promotion purposes.⁴⁷ Nor are there
9 guidelines that determine when an employee should receive verbal discipline versus a warning
10 letter. (See Speroff 7/23 at 115:4-119:25, Keitner Decl., Ex. 26.) Moreover, different managers
11 exercise this discretion differently, and the same managers exercise discretion differently from
12 case to case. (See, e.g., Perry at 119:22-128:22, Keitner Decl., Ex. 19.) Such arbitrary,
13 subjective, and discretionary decision-making is susceptible to the influence of racial stereotypes.
14 (See Bielby Rpt. at ¶¶ 22, 30, 32-33.) That is what happens at FedEx.

15 iv. **FedEx's Requirement of Manager Approval to Apply**
16 **for Promotion Is Arbitrary, Subjective, and**
17 **Discretionary, and Causes Under-promotion, As Does**
18 **Manager Discretion in Selections Among Candidates**
19 **"Approved" to Apply.**

20 FedEx's requirement that an employee's current manager approve the employee's
21 application for promotion provides yet another entry point for uncontrolled discretion in FedEx's
22 promotion practices. This approval functions as the initial gateway to promotion: without it, an
23 employee's application may not be forwarded to the hiring manager, and as a result the employee
24 standard deviations for Latinos).

25 ⁴⁵ Id. at Tbl. 5 (less than 1 chance in 10⁸⁸ for African Americans and far less than 1 in 10,000
26 chance for Latinos). There is also substantial anecdotal evidence of Minorities receiving
27 disproportionately harsh and more frequent discipline. See Declarations of Mitchell McCoy at
28 ¶¶ 11-12; Griffin at ¶ 12; Canela at ¶ 8.

⁴⁶ See People Manual § 2-5; see Speroff 7/23 at 92:12-94:22, Keitner Decl., Ex. 26.

⁴⁷ See Speroff 7/23 at 137:19-143:7; 153:6-17. Note that online counselings cannot be challenged
by employees through the Guaranteed Fair Treatment ("GFT") process, and there are no other
mechanisms for employees to dispute their fairness. See id. at 156:17-157:10. Nor does FedEx
have mechanisms to ensure that managers apply online counselings consistently. See id. at
157:11-18.

1 cannot be considered for the open position. (See Speroff 7/22 at 110:18-111:15, Keitner Decl.,
2 Ex. 25.)

3 While approval to apply is supposed to be granted if an employee meets the
4 minimum performance review and disciplinary record requirements to be eligible for promotion
5 (See id. at 53:19-55:7), in reality managers have complete discretion to approve or not approve an
6 employee's application for any reason. For instance, a manager can disapprove an application
7 because he or she finds that the employee fails to meet the "minimum acceptable standards" in a
8 "significant area of performance," even though the employee has no active disciplinary records
9 and is otherwise eligible for promotion. There are no guidelines for managers regarding what
10 constitutes such a "significant area of performance" or what the "minimum acceptable standards"
11 are. (See id. at 64:6-22, 70:15-20.) When pressed for an example, FedEx's Managing Director of
12 Human Resources for AGFS stated that an employee might be disapproved if they had an
13 undetermined number of absences shy of the number that would instigate formal discipline; how
14 close to the limit they would have to be, he could not say. (See id. at 72:1-73:17.) Such vague
15 and subjective criteria are prone to influence by racial bias and stereotypes. (See Bielby Rpt. at
16 ¶¶ 36-37.)

17 Moreover, managers are not required to record their reasons for disapproving an
18 employee's application (id. at 70:15-71:25, 74:8-13), nor does FedEx conduct any monitoring or
19 review of manager disapprovals for consistency or adverse impact, unless an employee files a
20 GFT.⁴⁸

21 Given the ample discretion permitted to managers in making the approval
22 decision, the lack of minority representation in management ranks, and the company culture of
23 hostility to minorities, it comes as no surprise that statistical analysis shows that far more white
24 employees than Minorities are approved to apply for management positions despite having active
25

26 ⁴⁸ See id. at 100:18-102:18. Despite its virtually exclusive reliance on the employee-initiated
27 GFT process as a replacement for monitoring employment decisions, FedEx has no written
28 definition of what "Guaranteed Fair Treatment" actually means. See Dandridge at 29:8-30:22,
Keitner Decl. Ex. 7.

1 discipline letters on file.⁴⁹ Under FedEx policy, such letters should render an employee ineligible
2 for promotion, but this policy is selectively enforced, to the disadvantage of Minorities.

3 Excessive discretion similarly enters into FedEx's procedures for awarding
4 promotions among approved applicants. FedEx's written policy dictates that applicants for
5 promotion be divided into two priority groups according to their current job and full-time or part-
6 time status, and that those candidates in the second priority group may only be considered if there
7 is no one in the first priority group. (People Manual § 4-5.) FedEx policy further dictates that it
8 select for promotion the candidate with the highest Credit Equivalency Value or "CEV" score, a
9 rating calculated according to a formula that takes into account an employee's time in station and
10 recent performance reviews. (*Id.*) Despite the system set forth in its policies, however, in
11 practice FedEx allows any hiring manager to pick any job applicant, regardless of CEV ranking
12 or priority group. (Williamson at 54:16-55:9, Keitner Decl., Ex. 29.) A hiring manager who
13 deviates from policy and picks lower ranked applicants is not required to obtain approval from
14 higher managers, and FedEx does not monitor or review compliance with these promotions
15 policies. (Speroff 7/22 at 72:11-16, Keitner Decl., Ex. 25; Williamson at 122:9-19, 123:11-19.)

16 This managerial discretion works to the disadvantage of Minorities. Statistical
17 analyses show that far more Minorities with higher priority or higher CEV scores are passed over
18 in favor of lower-ranked white employees than vice versa.⁵⁰ Again, the presence of discretion
19 and lack of monitoring has adverse impact on Minorities. (See Bielby Rpt. at ¶¶ 36, 38-39.)

20 c. **FedEx Discriminates Against Latinos with Respect to**
21 **Promotions from Hourly Positions to Operations Manager.**

22 The Courier job is the stepping stone to the entry-level management job of
23 Operations Manager. (Drogin Rpt. at ¶ 21.) Although approximately 17% of Couriers are
24 Latino, only 8.5% of Operations Managers are Latino. A statistical analysis of promotions from
25 hourly positions to Operations Manager establishes a statistically significant under-promotion of
26 Latinos. (*Id.* at ¶ 32 (-4.06 standard deviations for 1999-2003).) This statistical disparity results

27 ⁴⁹ Drogin Rpt. at ¶ 39.

28 ⁵⁰ Drogin Rpt. at ¶¶ 41-42.

1 from the highly discretionary system used to select Operations Managers, and the impact of race-
2 biased performance evaluation scores and discipline records on promotion decisions. (See Bielby
3 Rpt. at ¶¶ 9-42.)

4 i. **FedEx Selects Managers Using a Highly Discretionary**
5 **Process Rife With Opportunities for Biased Decision-**
6 **Making.**

7 Since 1998, FedEx has used the “ASPIRE” program to select first-line managers in
8 both AGFS and DGO. (Brooks at 19:17-25, Keitner Decl., Ex. 2.) This multi-step process,
9 developed primarily by FedEx in-house industrial psychologist David Brooks, allows hiring
10 managers to exercise a high level of discretion and creates multiple opportunities for racial
11 stereotypes to influence how managers rate candidates.

12 Aspiring managers must complete an “ASPIRE to Management” class as a pre-
13 requisite to entering the ASPIRE program. (*Id.* at 33:7-19.) An employee cannot attend these
14 classes without his or her manager’s permission. (*Id.* at 33:25-34:10.) Thus, an employee’s
15 current manager has effective veto power over whether or not that employee can even attempt to
16 apply for manager positions. In addition, an employee’s manager must sign off on the
17 employee’s successful completion of four development classes. (*Id.* at 36:1-37:18.) FedEx has
18 produced no evidence of studies conducted or steps taken to guard against adverse impact in this
19 enrollment process. (*Id.* at 40:3-13.)

20 The hiring manager selects the candidates for a panel interview. There are no
21 guidelines in place for determining how many candidates to interview; the only restriction is that
22 the manager cannot select a candidate with a lower score on the five initial components⁵¹ than
23 another candidate without also selecting the latter.⁵²

24 ⁵¹ The components of a candidate’s pre-interview “screening” score are: the Professional
25 Employment Test (PET), a standardized cognitive ability test; the Peer Leadership Assessment
26 (PLA), completed by employees chosen by the candidate’s manager; a score for Position Specific
27 Knowledge (PSK) and for Other Related Experience (ORE); and the Management Profile (MP).

28 ⁵² The components have nominal weights on the ASPIRE score sheet. Brooks at 110:13-112:3;
see FedEx’s New Process for Selecting Managers, p. 5, Keitner Decl., Ex. 46. However, FedEx
admits that the different standard deviations of the scores in these five areas lead to actual weights
that are, in fact, quite different. Brooks at 118:11-122:5. The PET, which has the greatest
adverse impact, *id.* at 121:20-122:5, also has the highest standard deviation, *id.* at 118:11-16,
giving it a disproportionately high actual weight in the current formula.

1 The PLA’s utility in predicting success in management is purely conjectural:
2 FedEx has not produced evidence regarding the development of the items on the PLA form and
3 has not verified its measurement properties. (Brooks at 90:1-92:17; see PLA Forms, Keitner
4 Decl., Ex. 47.)

5 The PSK and ORE are similarly spurious. There is no requirement in the ASPIRE
6 process that anyone ever review the hiring manager’s determination of the PSK and ORE for a
7 particular opening. (Brooks at 50:25-52:3.) Candidates complete application forms without
8 knowing what PSK and ORE the hiring manager is seeking (Id. at 61:24-62:5); if a hiring
9 manager chooses to advise a particular candidate of these requirements or is already familiar with
10 a candidate’s experience, that candidate can enjoy a huge advantage in the application process.
11 Moreover, hiring managers are not trained on how to evaluate PSK and ORE. (Buchanan at
12 142:2-146:1, Keitner Decl., Ex. 4.) Together, PSK and ORE nominally make up almost 50% of
13 an ASPIRE candidate’s screening score. (Brooks at 60:16-61:17.) However, FedEx cannot claim
14 on the basis of its existing studies that the PSK and ORE scores are reliable or valid. (Id. at
15 107:19-109:9.)

16 The ASPIRE interview process is rife with opportunities for discrimination. First,
17 there is no mandatory calibration training to ensure reliability and consistency in interview scores.
18 (Buchanan at 105:9-108:24.) The hiring manager chooses who will sit on an interview panel
19 (Brooks at 69:17-70:2), and there is no requirement that an HR representative participate in the
20 interview process. (Id. at 77:16-78:14.) FedEx is aware that steps can be taken to reduce or avoid
21 adverse impact in interviews (Id. at 17:4-16), but it has not taken these steps.

22 FedEx has never studied the racial or ethnic composition of ASPIRE interview
23 panels (Id. at 71:20-25.) The hiring manager is supposed to select the highest-scoring candidate
24 (id. at 68:22-69:12), but FedEx has produced no evidence that this is how the process actually
25 works. FedEx has also disregarded its legal obligation to keep records on the adverse impact of
26 the ASPIRE process and has no system in place for doing so. (Id. at 107:13-18, 129:1-131:1,
27 137:14-143:5.) FedEx’s own study of ASPIRE in 1998 strongly suggests that ASPIRE has
28 adverse impact on both African-American and Hispanic applicants. (Id. at 104:22-107:12; see

1 Validation of Assessments for the First-Level Manager Jobs at Federal Express, p. 25, Keitner
2 Decl., Ex. 48.) FedEx tracks packages all over the world, but it does not track adverse impact
3 against its own employees, as required by law.

4 FedEx has disregarded its legal obligation to monitor the adverse impact of
5 ASPIRE and to identify alternative selection procedures that afford equal opportunity to Minority
6 employees. In addition, FedEx's own follow-up studies with respect to ASPIRE's validity show
7 dwindling correlations between ASPIRE scores and job performance. (Brooks at 123:23-128:2;
8 ASPIRE Follow-Up Criterion Validation Report for 2003, Keitner Decl., Ex. 49.)

9 ii. **FedEx's Discriminatory Performance Evaluation and**
10 **Discipline Systems Block Minorities from Promotions**
11 **into Management.**

12 In addition to the above hurdles, FedEx employees cannot apply for management
13 positions if they have an active warning letter on file. (Brooks at 23:6-24, Keitner Decl. Ex. 2.)
14 FedEx has done no studies to establish the consistency or reliability of its disciplinary processes,
15 or to determine whether such processes have adverse impact when used as selection criteria. (Id.
16 at 23:25-24:11.) Manager candidates must also meet minimum performance review
17 requirements, which also have not been validated. (Hater at 303:7-12, Keitner Decl., Ex. 12;
18 Brooks at 26:7-22.) In fact, as indicated above, FedEx's own industrial psychologists doubt the
19 accuracy of FedEx's performance reviews in evaluating job performance. The highly significant
20 adverse impact of discipline and performance evaluation at FedEx permeates the operations
21 manager selection process.

22 2. **FedEx Discriminates Against Minority Employees and Lower Level**
23 **Managers with Respect to Compensation.**

24 FedEx's Minority employees and lower-level Managers are paid less than non-
25 Minority employees and lower-level Managers. They are paid less both by virtue of the fact that
26 they hold lower paid positions, and because even when they and comparable whites hold the same
27 positions, work in the same geographic locations, and have the same seniority, Minorities are paid
28 less. The disparities in compensation within job arise from the impact of FedEx's race-biased
evaluation and discipline systems on compensation.

1 The People Manual provides that compensation is determined by a formula tied
2 directly to performance evaluations (and indirectly to discipline, since discipline affects
3 performance evaluations).⁵³ Thus, compensation is also part of the feedback loop through which
4 performance evaluation and discipline echo: because Minorities are overdisciplined, they get
5 lower performance evaluations; and because Minorities receive lower performance evaluation
6 scores, they receive lower compensation.

7 Each year an employee gets a percentage raise based on performance evaluation.
8 As a result, the effect of overdiscipline and lower evaluations of Minorities is cumulative. (See
9 Bielby Report at ¶ 15.) The gap grows each year.

10 Because of the impact of FedEx's race-biased evaluation and discipline systems on
11 its compensation system, Minority employees and lower level managers at FedEx are paid less
12 than non-Minorities at both the hourly and salaried levels throughout the Western Region, even
13 when relevant non-discriminatory factors are considered. For example, the results of statistical
14 regressions on hourly pay rates for African American hourly employees show that African
15 Americans were paid significantly less per hour than white employees in every year, 1999-2004,
16 even after accounting for seniority, part time/full time status, casual/permanent status, job title,
17 and facility. The results are highly statistically significant for each year studied, ranging
18 from -8.38 standard deviations to -9.61 standard deviations. Drogin Rpt. at ¶ 59.) These
19 disparities are many times greater than the legal threshold of two standard deviations. (See
20 Hazelwood School Dist. v. United States, 433 U.S. at 311, n.17 (1977). The probability of such
21 disparities occurring by chance is approximately one chance in 100 billion.

22 Similarly, the results of statistical regressions on the hourly pay rates for Latino
23 hourly employees show that Latino hourly employees were paid significantly less per hour than
24 white employees in every year, 1999-2004, even after controlling for job, seniority, status, and
25 geographic location. The results are highly statistically significant, ranging from -4.91 standard
26 deviations in 2002 to -7.07 standard deviations in 1999. (Drogin Rpt. at ¶ 60.) The probability of

27 _____
28 ⁵³ See People Manual § 3-10, Merit Hourly Pay Administration, Tbl. 1, p. 112, Keitner Decl.,
Ex. 34.

1 such disparities occurring by chance ranges from approximately one chance in one million to a
2 less than one chance in one hundred million. (Id. at Tbl. 5.)

3 The story is similar with respect to pay disparities in the salaries of lower-level
4 Managers. The results of regressions on the monthly salaries of lower-level Managers show
5 statistically significant disparities adverse to African Americans in every year studied. The salary
6 disparities range from -2.4 standard deviations in 1999 to -3.5 standard deviations in 2001. (Id. at
7 ¶ 61.) The underpayment in monthly salary for African American lower-level managers ranged
8 from \$83.78 per month in 1999 to \$185.74 per month in 2004. (Id.)

9 **G. FedEx's Discrimination Is Uniform And Pervasive.**

10 In sum, the statistical evidence, the documents, and the testimony all establish the
11 same thing: FedEx discriminates against Minority Employees throughout the Western Region
12 with respect to promotions, compensation, performance evaluation, and discipline, and against
13 African American Lower-Level Managers throughout the Western Region with respect to
14 compensation, performance evaluation, and discipline. (See Drogin Rpt., passim, and Statement
15 of Facts, supra.)⁵⁴

16 **III. ARGUMENT**

17 Class actions are an important tool for remedying employment discrimination.
18 See, e.g., Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142 (N.D. Cal. 2004) (“This
19 anniversary [of the U.S. Supreme Court’s decision in Brown v. Board of Education] serves as a
20 reminder of the importance of the courts in addressing the denial of equal treatment under the law
21 wherever and by whomever it occurs.”). Since the requirements of Rules 23(a) and (b)(2) are
22 satisfied here, class certification is appropriate in this case.⁵⁵

23 ⁵⁴ The map attached to the Declaration of Nirej S. Sekhon in Support of Plaintiffs’ Motion for
24 Class Certification as Ex. 1 shows that the plaintiffs in this case are not alone. Hundreds of
25 African Americans and Latinos throughout the Western region have complained of FedEx’s race
discrimination.

26 ⁵⁵ This Court is accorded broad discretion in determining whether class treatment is appropriate.
27 Dukes, 222 F.R.D. at 143; Armstrong v. Davis, 275 F.3d 849, 872, n.28 (9th Cir. 2001); see also
28 the California Supreme Court’s recent decision in Sav-On Drug Stores v. Superior Court, Opinion
No. S106718, Aug. 26, 2004 (affirming that “Any valid pertinent reason stated will be sufficient
to uphold the [class certification] order.”). Although the Court is required to undertake a
“rigorous analysis” to determine whether the case satisfies the Rule 23 requirements, the Court

1 **A. This Case Meets The Requirements Of Rule 23(a).**

2 **1. The Classes Are Numerous.**

3 Rule 23(a) requires that the class be so numerous that joinder of all class members
4 is impracticable. The precise number of class members need not be known prior to certification.
5 See Newberg on Class Actions § 3.05 at 233-35 (4th ed. 2002) (hereinafter, “Newberg”); see also
6 Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) (“Courts have not required evidence of
7 exact class size or identity of class members to satisfy the numerosity requirement.”); Harriss v.
8 Pan Am World Airways, Inc., 15 FEP Cases (BNA) 1640, 1652 (N.D. Cal. 1977).

9 Here, the Minority Employee Class has several thousand members. (See Drogin
10 Rpt. at ¶¶ 13-16.) The African American Lower-Level Manager Class has several hundred
11 members. (Id.) Such a number satisfies any standard of impracticability. See Newberg § 3.05 at
12 247 (“as few as 40 class members should raise a presumption that joinder is impracticable”).

13 **2. The Classes Share Common Questions of Fact and Law.**

14 The commonality requirement of Rule 23(a) examines the group characteristics of
15 the class as a whole and seeks to determine whether the class shares common questions of fact or
16 law. The commonality requirement should be “construed permissively.” Hanlon v. Chrysler
17 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Not all questions of law or fact need to be common;
18 rather, the test applied is qualitative, not quantitative, and requires only one significant common
19 issue to warrant certification. Savino v. Computer Credit, Inc., 172 F.R.D. 346, 352 (E.D.N.Y.
20 1997), aff’d, 164 F.3d 81 (2d Cir. 1998). Only a “minimal” showing of commonality is required;
21 where class members share a common legal issue but not common facts, or vice versa,
22 commonality is satisfied. Hanlon, supra, 150 F.3d at 1020. This case involves numerous
23 common issues of both fact and law. Plaintiffs raise “a common legal issue, discrimination
24 against [Minorities], and a common factual problem, discrimination as applied” by FedEx.
25 Bouman v. Block, 940 F.2d 1211, 1232 (9th Cir.), cert. denied, 502 U.S. 1005 (1991).

26
27 _____
28 may not engage in an assessment of the merits at this stage. General Tel. Co. v. Falcon, 457 U.S.
147, 161 (1982); Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974); Caridad v. Metro-
North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000).

1 FedEx's policies regarding promotion, compensation, discipline, and performance
2 evaluation are all governed by the "People Manual," which applies throughout the Western
3 Region.⁵⁶ The forms and procedures used for personnel decisions are the same throughout the
4 Western Region.⁵⁷ The race-biased BST is used throughout the Western Region. Promotion
5 decisions are based on race-biased performance evaluations and discipline records throughout the
6 Western Region. Compensation decisions are tied to race-biased performance evaluations and
7 discipline records throughout the Western Region. Statistical analyses establish that FedEx's
8 policies and practices have an adverse impact on Minorities throughout the Western Region with
9 respect to compensation, promotion, performance evaluation, and discipline.

10 Common questions of fact include the following: (1) whether the FedEx work
11 force is segregated by race with respect to job categories; (2) whether FedEx's promotions,
12 compensation, discipline and evaluation policies and practices in the Western Region are
13 arbitrary, subjective, and discretionary and thus susceptible to discriminatory application by
14 predominantly non-Minority managers; (3) whether FedEx denies Minorities equal promotional
15 opportunities; (4) whether FedEx's compensation system has an adverse impact on Minorities;
16 (5) whether FedEx's performance evaluations are race-biased; (6) whether FedEx's discipline
17 system is applied unfairly to Minority employees and African American Operations Managers;
18 (7) whether the Basic Skills Test has been properly validated; (8) whether performance reviews of
19 Minority employees are based on subjective criteria that admit racial stereotyping and bias; and
20 (9) whether FedEx's adverse treatment of Minorities is intentional.

21 The class claims will also raise common legal issues, including: (1) whether
22 FedEx's under-compensation, under-promotion, and overdiscipline of Minorities constitutes
23 adverse impact in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the
24 California Fair Employment and Housing Act ("Cal. FEHA"); (2) whether FedEx's conduct
25 constitutes adverse treatment in violation of Title VII, § 1981, and Cal. FEHA; (3) whether

26 ⁵⁶ See, e.g., Buchanan at 20:25-21:5, Keitner Decl., Ex. 4; Presnoples at 11:24-12:11, Keitner
27 Decl., Ex. 21.

28 ⁵⁷ See, e.g., McQueen at 92:6-93:16, Keitner Decl., Ex. 17; Garcia at 9:1-8, Keitner Decl., Ex. 10;
Fifer at 13:3-14:14, Keitner Decl., Ex. 9; Speroff 7/22 at 22:7-23:16, Keitner Decl., Ex. 25.

1 FedEx's conduct can be justified as a "business necessity," or can be replaced by a less
2 discriminatory alternative, see Stender v. Lucky Stores, 803 F.Supp. 259, 319-23, 331-36 (N.D.
3 Cal. 1992); and (4) what injunctive relief is appropriate to remedy FedEx's discriminatory
4 practices.

5 a. **The Employment Policies and Practices of FedEx's Western**
6 **Region are Uniform and Uniformly Arbitrary, Subjective, and**
7 **Discriminatory.**

8 Common questions of fact arise in this case because the personnel policies and
9 structure of FedEx's Western Region are uniform and centralized. (See Bielby Rpt. at ¶¶ 8-14.)
10 The facilities in which employees work are virtually identical. The departments, jobs, and
11 management structure are the same in all facilities and all districts across the region. Promotion,
12 evaluation, discipline, and compensation of employees all follow uniform policies and procedures
13 and require use of uniform personnel forms. Common facts such as these support class
14 certification. See Dukes, 222 F.R.D. at 145-49; Adams v. Pinole Point Steel Co., 65 FEP Cases
15 (BNA) 774 (N.D. Cal. 1994); Thornberry v. Delta Air Lines, 30 FEP Cases (BNA) 520, 524
16 (N.D. Cal. 1978); Reeb v. Ohio Dept. Rehab., 221 F.R.D. 464, 477 (S.D. Ohio 2004).

17 In addition, the uniform policies and procedures uniformly allow arbitrary,
18 subjective, discretionary, and biased decision-making. Non-Minority managers make evaluation
19 and disciplinary decisions based on arbitrary, subjective, and discretionary criteria that give free
20 reign to racial stereotypes and biases. (See Bielby Rpt. at ¶¶ 8, 15-42.) FedEx's lack of controls
21 and absence of monitoring to ensure Equal Employment Opportunity is uniform throughout the
22 Western Region. (Id. at ¶¶ 25-35.) This type of uncontrolled and unmonitored discretionary
23 decision-making raises common questions of fact and is a well-recognized basis for class
24 certification. Falcon, 457 U.S. at 159 n.15; Caridad, 191 F.3d at 291-92; Dukes, 222 F.R.D. at
25 149; Butler v. Home Depot, 1996 WL 421436 (N.D. Cal.) at *3; Adams, 65 FEP Cases at 781;
26 Barefield v. Chevron U.S.A., Inc., 44 FEP Cases (BNA) 1885, 1888-90 (N.D. Cal. 1987).

27 b. **Consistent Patterns of Under-Promotion, Under-Compensation,**
28 **and Overdiscipline Raise Common Questions of Law and Fact.**

Common issues of fact also arise out of plaintiffs' showing of region-wide patterns

1 of under-promotion, under-compensation, and overdiscipline. These consistent patterns raise
2 common factual issues with respect to the significance of the statistical evidence, and FedEx's
3 promotional standards and job assignment patterns. They also raise common legal issues as to the
4 inference of discrimination that may be drawn from the existence of such segregation. Bazemore
5 v. Friday, 478 U.S. 385, 400-04 (1985); Hazelwood School Dist. V. United States, 433 U.S. 299,
6 307-13 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40
7 (1977); Dukes, 222 F.R.D. at 154-60; Butler v. Home Depot, Inc., 1997 WL 605754 at *6 (N.D.
8 Cal. 1997); EEOC v. General Tel. Co., 885 F.2d 575, 579-82 (9th Cir. 1989), cert. denied, 498
9 U.S. 950 (1990).

10 c. **Plaintiffs' Disparate Impact and Disparate Treatment Theories**
11 **Raise Common Issues of Fact and Law.**

12 Plaintiffs have alleged both disparate impact and disparate treatment theories.
13 Under both theories, numerous common issues of fact and law underlie the discrimination claims
14 of the class as a whole.

15 In proving their case, Plaintiffs will present statistical data and anecdotal evidence
16 that brings "the cold numbers convincingly to life," International Brotherhood of Teamsters v.
17 United States, 431 U.S. 324, at 339, expert testimony from expert sociologists and industrial
18 organization psychologists, and testimony and documents regarding FedEx's policies and
19 practices. The evidence on which Plaintiffs will rely is common to the classes as a whole. The
20 inferences drawn from Plaintiffs' statistical proof and anecdotal evidence will be common to the
21 claims of all class members and will raise common legal issues. Butler, 1996 WL 421436 at *3;
22 Wagner v. Taylor, 836 F.2d 578, 592-93 (D.C. Cir. 1987); Penk v. Oregon Bd. of Higher Educ.,
23 816 F.2d 458, 463-64 (9th Cir. 1987), cert denied, 484 U.S. 853 (1987); Wofford v. Safeway
24 Stores, Inc., 78 F.R.D. 460, 481 (N.D. Cal. 1978).

25 Litigation of defendant's "business necessity" defense will also give rise to
26 common issues. See Stender, 803 F.Supp. at 321-22. Once Plaintiffs have established the
27 disparate impact of an employment practice such as use of the BST in promotions decisions, use
28 of performance evaluations in promotions and compensation decisions, or the use of discipline

1 records in promotions and compensation decisions, the burden of proof shifts to the defendant to
2 show that the challenged practice, despite its disparate impact, “bear[s] a demonstrable
3 relationship to successful performance of the jobs for which it was used.” Griggs v. Duke Power
4 Co., 401 U.S. 424, 431 (1971). The defendant must show that the employment practice is
5 “predictive of or significantly correlated with important elements of work behavior which
6 comprise or are relevant to the job or jobs for which candidates are being evaluated.” Albemarle
7 Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Under Title VII, the demonstration of “some
8 rational basis for the challenged practices” is not enough. Washington v. Davis, 426 U.S. 229,
9 246-47 (1976). “It is necessary, in addition, that they be ‘validated’ in terms of *job*
10 *performance.*” Id. at 247 (emphasis added).

11 Even if FedEx were able to satisfy its burden with respect to job-relatedness and
12 business necessity of employment practices with disparate impact, plaintiffs will be able to
13 demonstrate the existence of alternative employment practices with less disparate impact within
14 the meaning of Title VII. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Albemarle at 425. The evidence and
15 arguments about less discriminatory alternatives raise common factual and legal issues.

16 **3. The Named Plaintiffs’ Claims Are Typical.**

17 The typicality necessary to satisfy class certification is that the named plaintiffs
18 “possess the same interest and suffer the same injury as the class members.” Falcon, 457 U.S. at
19 156. Typicality is satisfied when the claims of the class representatives and those of the class
20 arise out of the same legal or remedial theory and when representative parties advance the
21 interests of the class members by advancing their own self-interest. Barefield, 44 FEP Cases at
22 1890. “Typicality” exists if the claims of the named plaintiffs are “reasonably coextensive” with
23 those of absent class members; there is no requirement that their claims be identical. Hanlon v.
24 Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Nor is it necessary that every named
25 plaintiff have suffered every form of discrimination challenged by the case. Rather, plaintiffs
26 need only show that in the aggregate, they cover the waterfront of abuses alleged. Staton v.
27 Boeing, 313 F.3d 447, 466 (9th Cir. 2002). Courts recognize that typicality overlaps with
28 commonality, and thus much of the discussion regarding that requirement is germane to typicality

1 also. See Barefield, 44 FEP Cases at 1890; Harriss, 15 FEP Cases at 1649.

2 The eight proposed class representatives are members of the classes they seek to
3 represent. They allege that they, and class members, were discriminated against in connection
4 with denial of promotional opportunities (as to the hourly employee class), adverse treatment with
5 respect to compensation, and unfair and harsh discipline. (Consolidated Amended Complaint
6 ¶¶ 58-162.) The eighteen class member declarants claim that they were the victims of the same
7 discriminatory practices by FedEx managers at facilities throughout the Western Region. The
8 claims asserted by plaintiffs individually involve the same discriminatory employment practices
9 with respect to evaluation,⁵⁸ promotion,⁵⁹ compensation,⁶⁰ and discipline⁶¹ complained of by and
10 on behalf of class members. Accordingly, the typicality requirement is satisfied. Butler at *3.

11 The declarations, charges of discrimination filed with state and federal agencies,
12 and internal complaints of discrimination of class members,⁶² and deposition testimony of the
13 class plaintiffs evidence a systematic pattern and practice of discrimination against Minority
14 Employees in FedEx's Western Region in connection with employment decisions, and
15 demonstrate that the experiences of the class representatives are typical. Both the named
16 plaintiffs and the class members have a common interest in seeking an injunction to change the
17 unlawful aspects of FedEx's personnel system.

18 **4. The Proposed Class Representatives and Class Counsel Are Adequate.**

19 Rule 23(a)(4) sets forth the adequacy requirement for class certification. It is
20 comprised of two elements: (1) the representative party's attorney must be qualified, experienced,
21 and generally able to conduct the litigation; and (2) the interests of the plaintiffs must not be

22
23 ⁵⁸ Class member declarants who have experienced discrimination in performance evaluations
include: McCray at ¶ 13; Akins at ¶ 8.

24 ⁵⁹ Class member declarants who have experienced discrimination in promotion include: Patterson
at ¶ 12; Steel at ¶¶ 12-15; Hoiland at ¶ 15; Latin at ¶ 12.

25 ⁶⁰ Class member declarants who have experienced discrimination in compensation include:
26 Olmos at ¶¶ 5-6; McCray at ¶ 9; Foreman at ¶ 9.

27 ⁶¹ Class member declarants who have experienced discrimination in discipline include: Mitchell
McCoy at ¶¶ 11-12; Griffin at ¶ 12; Canela at ¶ 8.

28 ⁶² See Sekhon Decl., Ex. 1.

1 antagonistic of those of the class. In re United Energy Corp. Solar Power Modules Tax Shelter
2 Investors Sec. Litig., 122 F.R.D. 251, 257 (C.D. Cal. 1985); see also Lerwill v. Inflight Motion
3 Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978); Harriss, 15 FEP Cases at 1649.

4 Both elements of the adequacy requirement are satisfied here. Plaintiffs have
5 retained counsel with the requisite expertise and resources to pursue this case. See Declarations
6 of James M. Finberg, Guy Wallace, John L. Burris, Michael S. Davis, Waukeen Q. McCoy, and
7 Kay McKenzie Parker. In addition, both the class and the named plaintiffs share an interest in
8 eradicating discrimination in FedEx's Western Region against its African-American and Latino
9 employees.

10 **B. The Liability Phase of this Case and the Remedial Phase for Declaratory,**
11 **Injunctive and Equitable Relief Should be Certified Under Rule 23(b)(2).**

12 Rule 23(b)(2) was added to class action procedure specifically to reach cases of
13 this type, i.e., to “facilitate the vindication of civil rights through the class action device.”
14 Barefield v. Chevron U.S.A., Inc., 48 FEP Cases (BNA) 907 (N.D. Cal. 1988). See Amchem
15 Prods. v. Windsor, 521 U.S. 591, 614 (1997) (“Civil rights cases against parties charged with
16 unlawful class-based discrimination are prime examples” of cases where Rule 23(b)(2)
17 certification is appropriate.); Advisory Committee Note to Rule 23(b)(2) (“Illustrative [of cases
18 properly certified under Rule 23(b)(2)] are various actions in the civil rights field”). Certification
19 under Rule 23(b)(2) is appropriate where, as here, meaningful declaratory and injunctive relief is
20 sought. Fed. R. Civ. P. 23(b)(2); Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003);
21 Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 163-64 (2d Cir. 2001).

22 Plaintiffs seek declaratory and injunctive relief that would apply to and benefit the
23 class as a whole. The injunctive relief plaintiffs seek includes orders, among other things:
24 (1) permitting “casual” employees to apply for, and view the posting of, jobs on the Job Change
25 Application Tracking System; (2) eliminating passage of the BST as a requirement for
26 promotions into Courier and Ramp Transport Driver positions, and instead focus on the training
27 for those positions; (3) modifying the performance evaluation criteria and monitoring
28 performance evaluations to ensure that they are reliable and consistent and have no adverse

1 impact; and (4) modifying the discipline criteria, and monitoring the discipline system, to ensure
2 that discipline is applied consistently.

3 In addition, plaintiffs seek forms of equitable monetary relief available under
4 Rule 23(b)(2), including back pay and front pay. Gotthardt v. Nat'l R.R. Passenger Corp., 191
5 F.3d 1148, 1152-55 (9th Cir. 1999). Such monetary equitable relief does not defeat class
6 treatment under Rule 23(b)(2). See, e.g., Probe v. State Teachers' Ret. Sys., 780 F.2d 776 (9th
7 Cir. 1986); Salinas Roadway Express, 735 F.2d 1574, 1576 (5th Cir. 1984); Butler, 1997 WL
8 605754 at *5; see also 42 U.S. C. § 2000e-5(g) (1994).

9 In Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003), the Ninth Circuit held that
10 (b)(2) class actions can include claims for monetary damages as long as such damages are not the
11 predominant relief sought. In making this determination, it is not the potential size of the
12 damages award that is at issue; rather, courts are directed to examine the “specific facts and
13 circumstances of each case,” and attempt to ascertain the “intent of the plaintiffs in bringing suit.”
14 Id. at 947, 950. In Molski, the court found the injunctive relief sought by the class plaintiffs to
15 be the primary relief at issue. Id. at 950.

16 Here, the evidence shows that plaintiffs’ primary focus is obtaining effective
17 injunctive relief to end discrimination and engender positive change.⁶³ This change would be
18 significant. The Class Representatives hope to transform the promotion, compensation,
19 evaluation and discipline systems at FedEx so that instead of hindering equal employment
20 opportunity, they ensure it. Although punitive damages and compensatory damages are sought in
21 this case, they are not the primary relief sought. Accordingly, the liability phase and a remedial
22 phase for declaratory, injunctive and equitable relief should be certified under Rule 23(b)(2).
23 After those phases, the Court can determine whether to certify a phase regarding compensatory
24 damages, and the amount and allocation of punitive damages, under Rule 23(b)(3), with notice
25 and an opportunity to opt out. Butler, supra, 1997 WL 605754 at *5-6.

26
27
28 ⁶³ See Declarations of: Kalini Boykin at ¶ 2; Derrick Satchell at ¶ 2; Valerie Brown at ¶ 2; Rick
Gonzales at ¶ 2; Rachel Hutchins at ¶ 2; Kelvin Smith, Sr. at ¶ 2; and Ken Stevenson at ¶ 2.

1 **IV. CONCLUSION**

2 FedEx has become a staple of modern American life. The time has come for
3 FedEx to acknowledge the promises of equal opportunity it makes to employees in its employee
4 manual — and to deliver.

5 Because this case meets all of the requirements of Rules 23(a) and 23(b)(2), this
6 Court should certify both the Minority Employee Class and the African American Lower-Level
7 Manager Class, and set this case for a liability phase trial.

8
9 Dated: September 10, 2004

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