

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 10 September 2007**

In the Matter of:

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,  
Plaintiff,

Case No. 2004-OFC-3

v.

TNT CRUST,  
Defendant.

**APPEARANCES:**

Sandra B. Kramer, Esq.  
Theresa Schneider Fromm, Esq.  
For the Plaintiff

Jaime Ramon, Esq.  
Kristin Donahue Dietel, Esq.  
For the Defendant

BEFORE: Thomas M. Burke  
Administrative Law Judge

**ORDER ON LIABILITY**

This matter arises under Executive Order 11246 as amended by Executive Order 11375 and Executive Order 12086 (43 Fed. Reg. 46501) ("Executive Order") and its implementing regulations at 41 C.F.R. Chapter 60. The Executive Order and regulations prohibit employment discrimination by government contractors based on race, color, religion, sex, or national origin. Under Section 202 of the Executive Order, federal contractors must take affirmative action to ensure that discrimination does not occur and to treat applicants and employees during hiring and employment without regard to their race, color, religion, sex, or national origin.

On September 30, 2004, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") filed an Administrative Complaint against TNT Crust ("TNT"), a totally owned subsidiary of Tyson Foods, Inc. with offices in Green Bay, Wisconsin, alleging that TNT violated the Executive Order by discriminating against Hispanic applicants for entry-level laborer positions on the basis of their national origin.

The matter was referred to the Office of Administrative Law Judges for hearing. TNT submitted a motion for summary judgment on July 7, 2006, which was denied on September 20, 2006. OFCCP's motion for summary judgment submitted on August 4, 2006, was denied by order issued on November 3, 2006. A hearing on liability<sup>1</sup> was held on November 14 through November 16, 2006, in Sturgeon Bay, Wisconsin. Both parties were afforded a full opportunity to present evidence and argument. OFCCP and TNT subsequently submitted post-hearing briefs and replies thereto. The Findings of Fact and Conclusions of Law below are based upon a review of the entire record in light of the arguments of the parties, the applicable statutory provisions and regulations, and pertinent precedent.<sup>2</sup>

## STIPULATIONS

The parties have stipulated to the following<sup>3</sup>:

1. TNT is covered by Executive Order 11246, as amended, based on the federal government contracts of its parent corporation, Tyson Foods, Inc.
2. TNT failed to keep applicant records as required by 41 C.F.R. § 60-1.12(a) and 41 C.F.R. Part 60-3.
3. During the review period of July 1, 2001, to December 31, 2001, TNT required that its laborers possess basic English skills.
4. This requirement that laborers possess basic English skills began in 1999 and was discontinued in March of 2002.
5. After TNT instituted its requirement of basic English skills, TNT permitted fifteen employees who either did not possess basic English skills or who TNT was uncertain as to whether they possessed basic English skills to remain working at TNT.
6. The turnover rate in the entry-level laborer position at TNT in 1998 was at least 110 percent.
7. The turnover rate in the entry-level laborer position at TNT for the first six months in 1999 was at least 108 percent.

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<sup>1</sup> A joint motion to bifurcate the issues of liability and damages was granted at the hearing. Tr. at 6.

<sup>2</sup> The documentary evidence admitted at the hearing includes: Plaintiff's exhibits 1-11, 13-29, 31; Defendant's exhibits 1-6, 8, 17-18. The following abbreviations denote references to the record: Tr. – Transcript; JX – Joint Exhibits; PX – Plaintiff OFCCP's Exhibits; DX – Defendant TNT's Exhibits.

<sup>3</sup> Tr. at 7-8. The abbreviation ST with the corresponding number will denote references to the stipulations by the parties.

## FINDINGS OF FACT

TNT manufactures pizza crusts at two plants located in Green Bay, Wisconsin. JX 1; Tr. at 83-84, 351. There are three eight-hour shifts per day at the TNT plants. Tr. at 514. During an eight-hour shift, TNT manufactures from 20,000 to 55,000 pizza crusts. Tr. at 514.<sup>4</sup>

Roger LeBreck has been the president of TNT since August of 1990. Tr. at 497. As president, LeBreck is involved in all aspects of the business, including human resources. Tr. at 498. When he and his investors purchased TNT in 1990, the company employed around 100 individuals, only one of whom was a minority. Tr. at 497-99. By December of 2001, minorities comprised 44% of TNT's workforce. JX 1. At the time relevant to this case, TNT was owned by Iowa Beef Producers ("IBP") and Tyson Foods, who purchased IBP in 2001. Tr. at 516-17. Currently, TNT is owned by Tyson Foods and is publicly held. Tr. at 516.

TNT is required to develop and maintain an Affirmative Action Plan ("AAP") and to update the plan as a result of its status as a contractor of the federal government. The Equal Employment Opportunity Report conducted for the AAP for the period December 1, 2001 to December 31, 2001 shows that TNT had 314 employees as of December 31, 2001. JX 1. At this time, Hispanic employees made up 32.5% of TNT's workforce. *Id.* The entry-level position at TNT during the relevant time period was laborer, either in production or sanitation. *Id.*; Tr. at 352, 507. TNT's AAP states that 155 of its 314 employees (49%) were in laborer positions with 73 of the 155 laborers working in production. JX 1. Hispanics represented 37.4% of TNT's overall laborer workforce. *Id.* The production laborers worked the manufacturing lines in the plants. Tr. at 508. Individuals hired into the laborer positions had the opportunity to be promoted into the production operative positions. Tr. at 364, 507-08; JX 1. The production operative positions include boxer, backup boxer, doughmaker and team leader, and require the ability to read, write, and understand English. Tr. at 364, 424, 518-21, 526-28, 617. TNT did not have in place an "up or out" policy in which employment was terminated if promotion was not attained; promotion was voluntary. Tr. at 461, 537, 565-66. During the six months from June to December of 2001, TNT did not hire any operatives from the outside other than drivers and rehires with previous production line experience. Tr. at 428-33; JX 1.

During the relevant time period, the Employer applied the following seven criteria in considering applicants for hire to the laborer positions: (1) completed job application; (2) previous work experience; (3) length of service at previous employers; (4) rate of pay at previous job; (5) shift selection (with most openings occurring during the second and third shifts); (6) ability to be trained and promoted into semi-skilled and skilled positions; and (7) basic English skills.<sup>5</sup> JX 1; PX 22; Tr. 359. TNT preferred individuals who had a stable work history, with no unemployment for more than three months, for the laborer positions. Tr. at 360-61. TNT did not use Social Security numbers as a screening tool but Social Security numbers on applications that were facially invalid were considered in determining whether an applicant was qualified; per

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<sup>4</sup> TNT makes the pizza crusts for specific customers who have individual recipes and requirements; consequently, over 100 different crust formulas are used. Tr. at 507. The labels, formulas, orders, instructions, and paperwork at TNT are in English, with the exception of box labels for foreign customers. Tr. at 506, 509-10, 526-28, 608. TNT uses around 600 different labels that are placed on the boxes and has around 75 items on its price list. Tr. at 507.

<sup>5</sup> The basic English skills requirement was added in 1999. ST 4.

example Social Security numbers that start with 900 raised red flags because a 900 series does not exist. Tr. at 471; PX 1; PX 21.

TNT experienced growth during the late 1990's. Tr. at 503. To attract job applications, TNT recruited through advertisements in the local newspaper, a free business employment weekly publication, television and a sign on the outside of its premises.<sup>6</sup> Tr. at 352, 457-58. In addition, TNT had a standing order with the Wisconsin Job Center and sent notification letters to agencies in the community that had contact with the minority population. Tr. at 352, 455-57. TNT recruited through a relationship with the refugee immigration and Hispanic services of the Catholic Diocese of Green Bay. Tr. at 352, 457. TNT advertised employment opportunities through flyers at the local church where Spanish masses were held. Tr. at 687. A referral program in which employees were given a bonus for successful referrals was in place at TNT during the relevant time period.<sup>7</sup> Tr. at 457, 459-60. TNT hired directly and through temporary employment agencies. Tr. at 353. At the time in question, TNT averaged forty openings a day and could not meet its hiring needs. Tr. at 373.

TNT's Spanish-speaking employee population began to increase around 1997. Tr. at 422. TNT estimates that by the year 2000, thirty-five percent of its employees did not speak English. DX 5; Tr. at 446-47. TNT's team leaders expressed concern about communication problems to management during their meetings. Tr. at 534-35. TNT used translators to communicate between English-speaking and non-English-speaking employees. Tr. at 420-21, 505-06. TNT also used its bilingual employees as translators, paying them overtime when necessary. Tr. at 421, 435-37, 505. TNT offered Spanish classes for its employees through a local technical college and provided English-as-a-Second-Language ("ESL") classes on at least three occasions at its premises. Tr. at 449-51, 597-98. TNT also referred its employees to local ESL classes. Tr. at 449-51.

Amparo Baudhuin has worked as an accredited immigration counselor for Catholic Charities in the Catholic Diocese of Green Bay for over nine years. Tr. at 683. Her work involves advising clients on immigration law and benefits and helping them to complete paperwork. Tr. at 683-84. She also advises her clients on where to apply for employment. Tr. at 684. In addition, Baudhuin works as a translator and has provided translation services for TNT in the past. Tr. at 686. During the relevant time period, most of her clients were immigrants of Hispanic origin as there was a "great influx" of immigrants to the Green Bay area during the late 1990's and early 2000. Tr. at 684. Other companies in Green Bay, including American Food Groups and Pack-a-Long Packing, also had a large number of Hispanic employees. Tr. at 691-92. Ms. Baudhuin has referred her clients to TNT, including during the year 2001. Tr. at 686-87. Many of her clients wanted to work for TNT because "it was an excellent company to work for." Tr. at 687.

Holly Webster works as a receptionist for TNT. Tr. at 211. Her job duties include receiving applications from applicants. Tr. at 211. During the period at issue, two applications were available to applicants, one in English and one in Spanish. Tr. at 211, 354. The only non-

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<sup>6</sup> According to the notations on the applications and a database of applications kept by TNT, the majority of the applicants were walk-ins rather than referrals from other agencies. Tr. at 90.

<sup>7</sup> The referral program instituted by TNT applied to everyone, not to just its Hispanic employees. Tr. at 142.

English application used by TNT and available to applicants was the Spanish version. Tr. at 211, 222, 354-55, 383. The applicants chose which version to complete and were required to fill out the application on the premises. Tr. at 211, 354. During the relevant time period, Webster was instructed by Candyce Gilmore, TNT's Vice President of Human Resources, to note on the Spanish applications whether the applicants spoke English. Tr. at 211-12, 381. Webster received no special instructions by Gilmore on how to determine whether an individual spoke English. Tr. at 212. Webster received no formal training or certificates and attended no workshops on how to evaluate English proficiency.<sup>8</sup> Tr. at 218. She asked the applicants filling out the Spanish applications "Do you speak English?" and noted on their applications their exact responses to the question. Tr. at 212-16, 223; PX 1-11, 13-14. Generally, she only asked applicants about the ability to speak English and wrote their responses if they completed the Spanish application. Tr. at 216-17. She rarely asked applicants who completed the English application about their English-speaking abilities. Tr. at 217; *see* PX 14.

Candyce Gilmore works at TNT as the Senior Manager of Human Resources. Tr. at 350. Her duties include training, compensation, payroll, benefits, employee relations, enforcing policies, oversight of the application and recruitment processes, and safety management. Tr. at 350. At the time of the review by OFCCP, Gilmore held the position of Vice President of Human Resources for which she was responsible for the same duties listed above. Tr. at 351. As the safety manager, Gilmore receives and reviews every accident injury report and records them in the OSHA log. Tr. at 410-11. She conducts safety analyses required by OSHA or the environmental health and safety compliance department. Tr. at 410-11. According to Gilmore, Webster's role was to make a notation using "the best of her judgment" on the application to give TNT an idea of the level of English skills possessed by the applicant. Tr. at 355. Once an application was completed, it was screened by either Gilmore or Cathy Propson, TNT's human resources coordinator. Tr. at 356; JX 1. Propson was the primary employee who reviewed the applications, scheduled the interviews, and made the hiring decisions with Gilmore's oversight. Tr. at 356.

Juan Flores Robles, who resides in Green Bay, Wisconsin, applied to work in any position at TNT in 2001. Tr. at 19-23. He heard about TNT because he lived in the area. Tr. at 23. Robles received a Spanish application from TNT's receptionist who asked him whether he preferred an English or Spanish version. Tr. at 23. The receptionist did not ask Robles any other questions. Tr. at 23. Robles could not recall whether the receptionist asked him if he spoke English. Tr. at 23. The notation of "speaks English" at the top of his application is not in his handwriting. Tr. at 23; PX 1. The rest of the application is in his handwriting, including the signature. Tr. at 23, 35. On his application, Robles noted that he preferred working the second shift. Tr. at 24. He did not talk with any other employee at TNT concerning his application. Tr. at 24. Robles was not given any type of written test at TNT for English proficiency. Tr. at 24. He was not told that he had to understand English for employment at TNT. Tr. at 24-25. He was not hired by TNT. Tr. at 29.

Robles understands written Spanish. Tr. at 29-30. He understood everything written on TNT's Spanish application. Tr. at 34. On his Spanish application to work at TNT, Robles wrote

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<sup>8</sup> Webster did complete four years of Spanish language classes in high school and a conversational Spanish class offered by TNT. Tr. at 219-20; PX 21.

a Social Security number that was not his own. Tr. at 31; PX 1. When he applied at TNT in 2001, he was not an alien authorized to work in the United States. Tr. at 31-32. Before applying at TNT, Robles previously worked as a cook at the airport for two months in 2001 at a rate of nine dollars per hour, then as a cook at a restaurant for two months at a rate of seven dollars per hour. Tr. at 33-34; PX 1. He was not fired from his job as cook at the airport, but cannot recall his reason for leaving the job. Tr. at 34.

Robles worked for three months at American Foods, a company in the food industry in Green Bay, Wisconsin. Tr. at 25-26. Based on his observations, the majority of the workers at American Foods were Hispanic.<sup>9</sup> Tr. at 27. His employment as a meat cutter at American Foods did not require the ability to speak English. Tr. at 28.

Carlos Guerrero, who resides in Green Bay, Wisconsin, applied for a job in any position at TNT in 2001. Tr. at 38-40. He learned about TNT from a local English newspaper and Hispanic friends who told him that TNT was hiring. Tr. at 39, 50-52. He completed a Spanish application at the company site. Tr. at 39; PX 2. The notation of “a little English” at the top of his application is not in his handwriting. Tr. at 39; PX 2. The receptionist at TNT asked him in English whether he preferred the English or Spanish application and told him in English that he had to complete the application at TNT. Tr. at 40-41, 53. Carlos Guerrero specified on his application a preference for either the first or second shift. Tr. at 41. The Social Security number on his application is his own. Tr. at 44. He was not given a written test for English proficiency. Tr. at 41. He was not told in 2001 that English proficiency was a job requirement. Tr. at 41. TNT did not hire him. Tr. at 43.

Carlos Guerrero worked in the slaughter department at Packer Land, a butcher shop in Green Bay, for about two months in 1999. Tr. at 41-42, 48, 55. Based on his observations, many Hispanics worked at Packer Land. Tr. 42. His Packer Land job did not require the ability to speak English. Tr. at 43. The job did require him to communicate constantly with other employees, which he did in Spanish. Tr. at 55. He did not list his employment at Packer Land on his TNT application because of its short duration. Tr. at 48-49, 57.

Concepcion Guerrero applied for a production job in any position at TNT in 2001. Tr. at 60-61. She completed a Spanish application at the company site. Tr. at 60-61; PX 3. She learned of TNT through a job center and through Hispanic acquaintances. Tr. at 61, 71-72; PX 3. The receptionist gave her the Spanish version of the application and asked her if she spoke English. Tr. at 62. Concepcion Guerrero answered, in English, “a little bit.” Tr. at 62. The notation on her application of “a little English” is not in her handwriting. Tr. at 62; PX 3. She specified on her application a preference for either the first or second shift. Tr. at 62; PX 3. The only employee with whom she spoke at TNT was the receptionist. Tr. at 63. Concepcion Guerrero was not given a written test for English proficiency. Tr. at 63. She was not told that the ability to speak English was a job requirement at TNT. Tr. at 63. TNT did not hire Ms. Guerrero. Tr. at 65.

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<sup>9</sup> Robles worked on the floor with around one hundred workers. He estimates that ninety of the one hundred workers on the floor were Hispanic. Tr. at 29.

Prior to applying at TNT, Concepcion Guerrero worked at American Foods in Green Bay as a meat packer. Tr. at 63-64; PX 3. In her packing section, she worked with thirty other employees. Tr. at 63. She estimates that of the thirty other employees, twenty-eight of them were Hispanic. Tr. at 63-64.

After applying at TNT, Concepcion Guerrero worked at Bay Valley Foods in Green Bay as a pickle packer. Tr. at 64. She worked in a room with one hundred other employees. Tr. at 64. She estimates that eighty-five or ninety percent of these fellow Bay Valley Foods employees were Hispanic. Tr. at 64. The foreman at Bay Valley Foods was able to speak Spanish. Tr. at 66. Neither her job at American Foods nor her job at Bay Valley Foods required the ability to speak English. Tr. at 64-65.

Kyle Gille was hired by TNT in 1987 and has worked as a team leader for the past thirteen years. Tr. at 524-25. He supervises twelve people on his production line, including both operatives and laborers. Tr. at 525-26. During the relevant time period, Gille had non-English speaking laborers on his line. Tr. at 536. He currently has non-English speaking laborers working on his line, and his line does not have a problem with productivity. Tr. at 538-39.

Gerber Gonzalez<sup>10</sup> has worked for TNT for eight years and is currently the third shift coordinator. Tr. at 592, 604. His responsibilities include ensuring that the production lines run smoothly and according to schedule. Tr. at 593. He previously worked as a team leader, dough maker, backup boxer, and laborer for TNT. Tr. at 593-94. He learned about TNT through a newspaper and from Hispanic friends who recommended the company. Tr. at 599. When he first applied to TNT in 1997, Gonzalez did not speak much English. Tr. at 602. In 1999 when he was hired by TNT, Gonzalez spoke little English. Tr. at 602-03. He started as a laborer and was able to perform his duties despite his inability to speak much English. Tr. at 603. Gonzalez took an ESL class offered by TNT and subsequently was promoted to an operative position. Tr. at 603-04. He has participated in the referral program offered by TNT and referred Hispanic applicants. Tr. at 601.

Chris Gillum has been a TNT employee for nine years and has been a backup boxer during the first shift for the past year. Tr. at 607. He began as a laborer and also has worked in the boxer and backup dough-maker positions. Tr. at 609-11. His current responsibilities include ensuring the product boxed meets quality standards and is shipped properly on pallets. Tr. at 607-08. He also labels the boxes. Tr. at 608. Any instruction and product sheets relating to his work that he has received have been in English. Tr. at 609, 611. He believes the ability to understand and read English is important for the position of backup boxer. Tr. at 609-10, 613. To his recollection, no employee was hired directly into the operative positions at TNT. Tr. at 612. During the relevant time period, Gillum remembers working with employees who had limited English-speaking skills. Tr. at 613. He believes that this created communication problems because the non-English speaking employees were unable to understand when he asked them to complete certain tasks. Tr. at 613-14. Gillum currently works with employees at TNT who have limited English-speaking ability. Tr. at 616-17.

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<sup>10</sup> It is noted that during Gonzalez's testimony, TNT's counsel offered to translate for the witness after he stated "I can't express myself that great so." Tr. at 600.

The expressed intent of the minimal English proficiency requirement, instituted in 1999 and terminated in March of 2002, is for laborers to possess minimal English skills sufficient to carry on a conversation.<sup>11</sup> Tr. at 365-66; ST 4. However, the ability to speak and understand English was not necessary to perform the duties of a laborer at TNT. Tr. at 386-87; PX 20. TNT cited promotability, communication, and safety issues as the reasons for requiring basic English proficiency. Tr. at 412-22, 507, 511, 513; JX 1. On February 3, 1998, a TNT employee named Heather Rabideau<sup>12</sup> removed a guard from a piece of equipment without stopping it first and suffered an injury to her pinky finger that required amputation.<sup>13</sup> DX 3; Tr. at 416. The incident report indicates that Rabideau received a written warning for this unauthorized action. DX 3. On July 18, 1998, a TNT employee named Maria Masis Recarte who was on the sanitation crew sprayed an electrical panel without permission, resulting in a safety violation. DX 4; Tr. at 418-19. The incident report suggested placing warning signs in both English and Spanish on the panels. DX 4.

TNT evaluated English language skills of job applicants by the notations found on the applications made by Webster, TNT's receptionist. Tr. at 211-16, 366. Generally, TNT assumed that individuals who completed the English version of the application possessed the required basic English skills. Tr. at 366. After the institution of the basic English requirement, TNT allowed workers from temporary employment agencies to continue working even though TNT did not know whether the workers possessed basic English proficiency. Tr. at 480-81; PX 29. In addition, there were Hmong employees who did not speak English during the relevant time period. Tr. at 387. Finally, employees who did not speak English and worked at TNT prior to the basic English skills requirement were not terminated following the institution of the criterion. Tr. at 462; ST 5.

The investigation of TNT by OFCCP began in May or early June of 2002 when Equal Opportunity Specialist Donald A. Leonard was assigned to conduct a desk audit review of the company. Tr. at 77-78. Leonard received the assignment from his supervisor, District Director Margaret Kraak. Tr. at 79. Leonard reviewed TNT's Affirmative Action Plan for 2001 and its supporting documentation and conducted statistical analyses. Tr. at 78, 80; JX 1.

TNT's AAP<sup>14</sup> for December 31, 2001, through December 31, 2002, pinpointed a problem with the hiring of minorities for laborer positions. JX 1. According to TNT's AAP, minorities were hired at a disproportionately lower rate than non-minority applicants for the laborer positions.<sup>15</sup> JX 1. In determining adverse impact in its AAP, TNT included every individual who applied during the year 2001 regardless of whether the individuals were qualified or met

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<sup>11</sup> TNT performed no studies on how the lack of basic English affected the productivity at the plants before instituting the requirement in 1999. Tr. at 388; PX 20. TNT also did not hire an expert to review the situation before the basic English requirement's institution. *Id.*

<sup>12</sup> Heather Rabideau was an English-speaking permanent employee at TNT. Tr. at 480.

<sup>13</sup> Gilmore testified that Ms. Rabideau called out to another employee to stop the equipment, but the other employee did not understand English. Tr. at 416-17, 481. However, the other employee is not mentioned in the incident report of the accident. DX 3.

<sup>14</sup> TNT's AAP covered both of its plant locations in Green Bay. Tr. at 486.

<sup>15</sup> In determining the available workforce and adverse impact, TNT relied upon the 1990 census because the 2000 census was not yet available. Tr. at 549-50.

TNT's hiring criteria. Tr. at 464-65. The AAP noted TNT's selection criteria, including that of "basic English skills" for laborer positions, a requirement added in 1999. JX 1; ST 4.

Through statistical analysis of TNT's personnel actions, Leonard found an adverse impact for minorities based on an approximate shortfall of thirty-six in the hiring of minorities. Tr. at 80-81. His findings were reviewed by Margret Kraak, his supervisor. Tr. at 148. Initially, the period of review covered January 1, 2001, through December 31, 2001. Tr. at 84-85. However, the review ultimately covered only the six months from July to December of 2001 as TNT had destroyed applications filed during the first six months of 2001.<sup>16</sup> Tr. at 85. During this six month period, TNT received applications from around 1,641 individuals of whom 131 were offered jobs and 115 were ultimately hired. PX 24.<sup>17</sup> Of the 1,641 applicants, 629 (or 38.3%) were classified as Hispanic. PX 24. TNT hired 28 of the 629 Hispanic applicants (or 4.45%) during the six month period. PX 25.

Due to the adverse impact found during the desk audit, Leonard performed a three-day onsite review of TNT in November of 2002. Tr. at 81-82. Kraak attended one of the three days. Tr. at 147. As part of the onsite review, Leonard spoke to Gilmore about TNT's recruitment practices. Tr. at 111. She informed him that TNT sent out letters and participated in job fairs as well as working with the Diocese of Green Bay and offering Spanish classes. Tr. at 111. Leonard never saw proof that the form letters were actually posted. Tr. at 142. In addition, she told Leonard about TNT's practice of paying its employees for successful referrals. Tr. at 112-13. Leonard did not speak to anyone from the Diocese about its involvement with TNT. Tr. at 111. During his interview with a TNT employee, TNT provided an English/Spanish translator due to communication issues that arose. Tr. at 113-14. While on a tour of TNT's facilities, Leonard noticed the presence of signs printed in both English and Spanish throughout the plant. Tr. at 114; *see also* Tr. at 521. He also noted many Hmong employees working at TNT for whom there were no bilingual signs. Tr. at 114.

Based upon the onsite review<sup>18</sup> and the available applications, Leonard concluded that there was disparate treatment and disparate impact against minorities, specifically Hispanic applicants.<sup>19</sup> Tr. at 89. When English-speaking Hispanic applicants were separated from non-English speaking Hispanics, no adverse impact was found against the English-speaking Hispanic applicants while an adverse impact against non-English speaking Hispanic applicants was revealed. Tr. at 131-33. TNT's applicant pool also was refined to consider the applicants who used the English application versus those who used the Spanish application. Tr. at 192. Leonard believed that the applicant flow at TNT was not unusual for Green Bay based upon his conversation with another equal opportunity specialist compliance officer who reported a very high minority, primarily Hispanic, applicant flow in a similar food service company located in

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<sup>16</sup> TNT has stipulated to its failure to keep applicant records for the first six months of 2001. ST 2; Tr. at 7.

<sup>17</sup> The total number of applicants of 1,641 excludes duplicate applications and those who were excluded from Dr. Killingsworth's analyses. Tr. at 310, 324; PX 24. Dr. Aamodt, TNT's expert, based his analyses on 1,643 total number of applicants of whom 629 were Hispanic. DX 8. Dr. Aamodt's data showed 34 Hispanic applicants were either offered employment or hired. *Id.* Dr. Killingsworth's data for how many applicants applied and were hired are given greater weight because he eliminated duplicate applications while Dr. Aamodt provides no indication that he did so.

<sup>18</sup> No Hispanic TNT employees complained of discrimination to OFCCP. Tr. at 183-84.

<sup>19</sup> Kraak, Leonard's supervisor, agreed with his findings. Tr. at 148.

the area. Tr. at 89, 141-42. Based on her years of experience including those as a compliance officer, Kraak concluded TNT's applicant pool was not atypical for the Green Bay area in terms of minority representation. Tr. at 158, 187-88.

At the completion of the review of TNT, a predetermination notice was issued by OFCCP on April 24, 2003. PX 15; Tr. at 148-49. Subsequently, a notice of violations was sent to TNT by OFCCP on June 13, 2003, and a notice to show cause was issued on July 10, 2003, after no conciliation agreement was reached.<sup>20</sup> PX 16; PX 17; Tr. at 150-53.

Burneill Ott has worked for Tyson Foods, TNT's parent company, since October 2001. Tr. at 547. Prior to 2001, Ott worked for IBP starting in 1989. Tr. at 547. Her current position at Tyson Foods is coordinator of Equal Employment Opportunity ("EEO"), Affirmative Action and Immigration, but she has served in the past as the manager and director of those departments. Tr. at 547-48. Her duties include investigating any internal complaints of discrimination or harassment, preparing affirmative action programs and participating in compliance reviews. Tr. at 548. When preparing utilization analysis and availability analysis<sup>21</sup> during the relevant time, her department used the census data in the area, broken down into the nine EEO categories and further divided into specific job groups. Tr. at 549. She became involved in the TNT compliance review by OFCCP in 2002 following the onsite review. Tr. at 548, 553. She became familiar with TNT's hiring, recruiting, and rehiring practices and reviewed the applicant data and the applications. Tr. at 553-54. Ott also communicated with both Leonard and Kraak. She testified that neither Leonard nor Kraak inquired about whether production operatives were hired from the outside. Tr. at 554.

After the onsite review, Ott with Gilmore's assistance, prepared a table of the expanded applicant flow, taking into account each application received during the relevant time period and TNT's hiring criteria of employment for the prior three months, shift preference, and basic English proficiency. Tr. at 557-59; DX 6. Based on her review of the applicant data for the relevant six months in 2001, Ott concluded that white applicants were not the most favored group because Asian-Americans and African-Americans were hired at a higher rate than white applicants. Tr. at 560. She concluded that taking shift preference into account, by looking specifically at the shift for which the applicant applied and was or was not hired, there was no adverse impact against Hispanic applicants. Tr. at 560-61.

Dr. Mark Killingsworth<sup>22</sup> is a professor of economics at Rutgers University. Tr. at 230; PX 24. His specialty is labor economics, and he has written numerous articles on the subject. Tr. at 232-33; PX 24. Dr. Killingsworth<sup>23</sup> was retained by OFCCP to use the available data<sup>24</sup> to

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<sup>20</sup> Attempts at conciliation occurred between the parties from April 2003 until after the issuance of the show cause notice. Tr. at 153.

<sup>21</sup> Ott has taken classes over the years on how to conduct availability analyses and how to use census data. Tr. at 549.

<sup>22</sup> Dr. Killingsworth received a Dr. Phil. and an M. Phil. in economics from University of Oxford in England. Tr. at 232; PX 24. He also earned his bachelor's degree in economics from the University of Michigan. *Id.*

<sup>23</sup> Dr. Killingsworth was found to be an expert witness in labor economics at the hearing on November 15, 2006. Tr. at 233-34.

<sup>24</sup> The available data used by Dr. Killingsworth in his first report included a computerized applicant log prepared by TNT, computerized data files containing information derived from paper job application forms submitted by

analyze national origin differences in hiring by TNT during 2001 with particular attention to the differences between the hiring of Hispanic and non-Hispanic applicants. PX 24. In his first report for OFCCP, Dr. Killingsworth had two basic findings. Tr. at 236; PX 24. First, he found that Hispanic applicants were hired at approximately half the rate at which non-Hispanic applicants were hired.<sup>25</sup> *Id.* The difference was statistically significant at 3.198 standard deviations and characterized by Dr. Killingsworth as “quite large in any sort of ordinary sense of the word.” Tr. at 236-37, 240-41; PX 24-25. He then analyzed the data to determine if there were any factors other than national origin causing the difference in hiring rates. Tr. at 238, 241; PX 24. He used three models which included different sets of variables. Tr. at 241; PX 24. In his second finding, Dr. Killingsworth concluded that no other factors included on the application form that he took into account, either singularly or together, were sufficient to explain the difference in hiring rates between Hispanic and non-Hispanic applicants.<sup>26</sup> Tr. at 238; PX 24. Factors or variables considered by Dr. Killingsworth included: month of application; shift applied for; educational attainment; years of prior work experience; years at most recent previous job; years of prior work experience by occupation category and by industry category; reasons for leaving previous job; and whether still employed at most recent job. PX 24. Table 21 of Dr. Killingsworth’s first report provides a listing of the variables included in his analyses. *Id.*

In all three models used by Dr. Killingsworth to take into account the various variables, the difference between the hiring rates for Hispanics versus non-Hispanics was large and statistically significant. Tr. at 244, 247; PX 24.

**Table 1: Applications for Employment at TNT – By National Origin<sup>27</sup>**

<b>National Origin</b>	<b>Number</b>	<b>Percent of Total</b>
American Indian	101	6.2 %
Asian	87	5.3 %
African-American	116	7.1 %
Hispanic	629	38.3 %
White	708	43.1 %
<b>TOTAL</b>	<b>1641<sup>28</sup></b>	<b>100.00 %</b>

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applicants at TNT, and a computerized data file containing information from the pre-employment application form that usually accompanied the hard-copy job application filed by applicants at TNT. Tr. at 234; PX 24.

<sup>25</sup> For the relevant review period, Hispanic applicants were hired at a rate of 4.45 percent while non-Hispanic applicants were hired at a rate of 8.60 percent. PX 25; Tr. at 240.

<sup>26</sup> Where an applicant submitted more than one application, Dr. Killingsworth included only the first application in his analyses. Tr. at 310. Dr. Killingsworth also excluded from his analyses those applicants who failed the drug screen or did not return TNT’s phone call and applicants who indicated they had spent time in jail. Tr. at 310-11, 316-17; PX 24.

<sup>27</sup> Table 1 is reproduced from Table 1 in Dr. Killingsworth’s first report at PX 24.

<sup>28</sup> Dr. Killingsworth’s total number of applicants shows two fewer applicants than Dr. Aamodt’s data. PX 26; DX 8. The two applicant difference is assumed to be due to Dr. Killingsworth’s omission of the two applications that Dr. Aamodt classified as “other.” *Id.*

**Table 2: Applications for Employment at TNT – By Whether Hired<sup>29</sup>**

Hired or Not Hired	Number	Percent of Total
Not Hired	1526	93.00 %
Hired	115	7.00 %
<b>TOTAL</b>	<b>1641</b>	<b>100.00 %</b>

**Table 3: Applications for Employment at TNT – By National Origin and Whether Hired<sup>30</sup>**

National Origin	Total Applicants	Total Hired	
		Number	Percent
Hispanic	629	28	4.45 %
Non-Hispanic	1012	87	8.60 %
<b>National Origin Difference in Hiring Rates:</b>			
Hispanic/non-Hispanic hiring rate difference		-4.15	
Number of standard deviations		3.198	
P-value		0.001	

Dr. Killingsworth completed a second report in which he reviewed and commented upon the applicant data available to him as well as the findings of TNT’s expert Dr. Michael G. Aamodt. PX 26; Tr. at 255-56. Dr. Killingsworth found that when a variable for English language proficiency was created and assessed, no applicant whose English proficiency was noted, either positively or negatively, on the application was hired by TNT. PX 26; Tr. at 260-61. None of the 265 individuals whose job applications included any written comment about their ability to speak English received a job offer from TNT.<sup>31</sup> PX 26; Tr. at 275. When the applicants whose applications included a notation of English proficiency were removed from the analysis, the results showed no statistically significant difference in hiring rates for Hispanic and non-Hispanic applicants among those who remained. PX 26; Tr. at 261. According to Dr. Killingsworth, this means that having one’s English proficiency assessed was a perfect predictor of whether he/she would be hired. Tr. at 275. With only one exception,<sup>32</sup> every individual whose application included a notation on English proficiency was classified as Hispanic. PX 26; Tr. at 261. Of the 265 individuals whose applications included the comment on English proficiency, all but three used the Spanish version of the application. PX 26; Tr. at 262. Dr. Killingsworth also reviewed the applicant log provided by TNT in which reasons for not hiring

<sup>29</sup> Table 2 is reproduced from Table 5 in Dr. Killingsworth’s first report at PX 24.

<sup>30</sup> Table 3 is reproduced from Table 17 in Dr. Killingsworth’s first report, corrected, at PX 25.

<sup>31</sup> At the hearing, TNT cited an example of an individual who completed a Spanish application in December of 2001 and was hired in March of 2002. Tr. 331-36; DX 17. TNT’s applicant log at DX 17 indicates that the individual possessed English proficiency and that he wrote “some English” on his application. DX 17. However, the individual cited to was hired outside of the review period and in the same month that the English proficiency requirement was terminated. *Id.* In addition, his application was not included in those provided to Dr. Killingsworth, and the applicant log provided to Dr. Killingsworth did not include the column related to English proficiency. Tr. at 401-06.

<sup>32</sup> The surname of the only individual whose application included a notation of English proficiency, but who was not classified as Hispanic, was Valenzuela. PX 26; Tr. at 261-62. This applicant was classified as “white.” PX 26.

applicants were included. PX 26; Tr. at 264. Lack of English proficiency was not listed as a reason for rejecting any of the applicants. PX 26; Tr. at 264.

Dr. Killingsworth’s second report also included a review of the analyses conducted by Dr. Aamodt. PX 26. According to Dr. Killingsworth, Dr. Aamodt took into account several of the same variables and found that taking these variables into account could not explain the difference in hiring rates for Hispanic and non-Hispanic applicants. PX 26-27; Tr. at 257. Dr. Killingsworth encountered problems in trying to reconstruct and evaluate Dr. Aamodt’s analyses because the audit trail and computer programming were not provided. Tr. at 265-67, 659. According to Dr. Killingsworth, the analyses conducted by Dr. Aamodt in which he included English proficiency as a variable is in error because the variable of English proficiency is a “perfect predictor” of the outcome. Tr. at 270; PX 27. Dr. Killingsworth believes that English proficiency is a perfect predictor because it is a variable for which applicants are either hired or not hired. Tr. at 271. Including a perfect predictor as a variable renders the results useless. Tr. at 271-72.

**Table 4: Notations of English Proficiency on Job Applications<sup>33</sup>**

<b>Notation of English Proficiency</b>	<b>Number</b>	<b>Percent of Total</b>
Blank entry (no assessment)	1,334	82.04 %
a little English	26	1.60 %
a litle English	1	0.06 %
a llittle English	1	0.06 %
does speak English	7	0.43 %
does speake English	2	0.12 %
doesn’t speak English, understand some	1	0.06 %
litle English	2	0.12 %
litle	1	0.06 %
Little English	1	0.06 %
litle English	61	3.75 %
no English	1	0.06 %
no English	118	7.26 %
no much English	1	0.06 %
pretty good English	1	0.06 %
some English	23	1.41 %
some English (~40%)	1	0.06 %
speak English	3	0.18 %
speak a little English	1	0.06 %
speak a little, understand most	1	0.06%
speakes English	3	0.18 %
speaks English	1	0.06 %
speaks English	5	0.31 %

<sup>33</sup> Table 4 is reproduced from Table 2.3 in Dr. Killingsworth’s second report at PX 26.

speaks a little English	1	0.06%
speaks a little understands most English	1	0.06 %
very little English	27	1.66 %
vey little English	1	0.06 %
<b>TOTAL</b>	<b>1,626</b>	<b>100.00 %</b>

**Table 5: Outcome for Applicants with a Notation of English Proficiency on Application<sup>34</sup>**

<b>Category</b>	<b>Number</b>	<b>Percent of Total</b>
Received Job Offer	0	0.00 %
Did not Receive Job Offer	265	100.00 %
<b>TOTAL</b>	<b>265</b>	<b>100.00 %</b>

**Table 6: Applicants with a Notation of English Proficiency on Application  
By National Origin<sup>35</sup>**

<b>National Origin</b>	<b>Number</b>	<b>Percent of Total</b>
White	1 <sup>36</sup>	0.38 %
Hispanic	264	99.62 %
<b>TOTAL</b>	<b>265</b>	<b>100.00 %</b>

**Table 7: Applicants with a Notation of English Proficiency on Application  
By Version of the Application Form<sup>37</sup>**

<b>Version of Application Form</b>	<b>Number</b>	<b>Percent of Total</b>
English-language form	3 <sup>38</sup>	1.13 %
Spanish-language form	262	98.87 %
<b>TOTAL</b>	<b>265</b>	<b>100.00 %</b>

Dr. Michael Aamodt<sup>39</sup> is a professor of industrial psychology at Bradford University in Virginia and is a consultant. Tr. at 618, 620. His field involves the application of psychology to the workplace to study how employees are selected, motivated, and evaluated. Tr. at 618-19. Dr. Aamodt also develops tests and selection methods for hiring and performance appraisal instruments and conducts salary equity analysis to ensure equal compensation. Tr. at 621. His

<sup>34</sup> Table 5 is reproduced from Table 2.4 in Dr. Killingsworth's second report at PX 26.

<sup>35</sup> Table 6 is reproduced from Table 2.5 in Dr. Killingsworth's second report at PX 26.

<sup>36</sup> The single applicant classified as "white" whose application received a notation of English proficiency had a surname of Valenzuela. PX 27; Tr. at 261-62.

<sup>37</sup> Table 7 is reproduced from Table 2.6 in Dr. Killingsworth's second report at PX 26.

<sup>38</sup> The three individuals who used the English version of the application and received a notation of English proficiency were classified as Hispanic. PX 26.

<sup>39</sup> Dr. Aamodt holds a PhD and MS in psychology from the University of Arkansas. DX 18.

work requires statistical analysis to compute adverse impact, to run correlations to validate tests, and to study the effects of minimum qualifications. Tr. at 619.

Dr. Aamodt<sup>40</sup> was retained by TNT through DCI Consulting, a consulting company, to conduct an analysis of applicant data. Tr. at 622. He used an applicant data set provided by TNT<sup>41</sup> to analyze whether there was an adverse impact in hiring and if any adverse impact could be explained by whether the applicant was coded as possessing basic English skills.<sup>42</sup> Tr. at 623-24; DX 6. He wrote a report detailing his analyses and findings. Tr. at 624; DX 8. When all 1,643 applications for the relevant period were considered, Dr. Aamodt found an adverse impact against Hispanic applicants with a standard deviation of 3.14. DX 8; Tr. at 628.

**Table 8: Adverse Impact Analysis of the Entire Data Set<sup>43</sup>**

<b>Ethnicity / National Origin</b>	<b>Number of Applicants</b>	<b>Number Hired / Offered<sup>44</sup></b>	<b>Selection Ratio</b>	<b>Standard Deviation</b>
White	708	71	10.03	
Hispanic	629	34	5.41	3.14
African American	116	15	12.93	-0.95
Native American Indian	101	9	8.91	0.35
Asian	87	16	18.39	-2.36
Other	2	0	0	n/a
<b>TOTAL</b>	<b>1643<sup>45</sup></b>	<b>145</b>	<b>8.83</b>	

From the complete applicant pool, Dr. Aamodt took out those applicants who were not eighteen, who were not eligible for rehire, who did not complete the application process, who did not return phone calls, or who did not appear for the interview and then used the remaining pool of 1,545 applicants to determine adverse impact. DX 8; Tr. at 630. He found an adverse impact still existed against Hispanic applicants with a standard deviation of 3.12. DX 8; Tr. at 631. He further refined the pool to take out applicants with JISS visas, leaving 1,524 applicants. DX 8; Tr. at 631. For this pool, an adverse impact remained against Hispanic applicants with a standard deviation of 2.99. DX 8; Tr. at 631. He refined the pool again to remove individuals

<sup>40</sup> Dr. Aamodt was found to be an expert witness in industrial psychology at the hearing on November 16, 2006. Tr. at 620.

<sup>41</sup> Dr. Aamodt did not have the paper job application forms, instead using the applicant log created and provided by TNT. DX 8; DX 18; Tr. at 235-36, 654, 664. Consequently, he had no information on prior work history or education of the applicants. Tr. at 235. In addition, he relied upon TNT's coding of whether an applicant possessed basic English skills because he was not provided the actual applications with the notations. Tr. at 664-67. He did have a more extensive version of the applicant log than did Dr. Killingsworth. Tr. at 235.

<sup>42</sup> Dr. Aamodt also looked at the hiring of operatives in the year 2004 and found that of the 26 operatives hired, 25 of them were promotions from laborer positions. DX 8; Tr. at 641. He did not use the data for 2001 because it was never provided to him. Tr. at 659-60. Dr. Aamodt concurred that the group of people for 2001 would be completely different than that for 2004. As the relevant period is 2001, this finding for 2004 is of little probative value.

<sup>43</sup> Table 8 is reproduced from Table 1 of Dr. Aamodt's report at DX 8.

<sup>44</sup> Dr. Aamodt classified applicants as hired/offered "if they had been hired, were offered a job but failed the drug screen, were offered the job but refused the job offer, or were offered the job but did not show up for the first day of work." DX 8.

<sup>45</sup> See FN 31, *supra*.

who wanted only first shift, leaving 1,345 applicants. DX 8; Tr. at 631. An adverse impact still existed against Hispanic applicants with a standard deviation of 2.42.<sup>46</sup> DX 8; Tr. at 632. In his next analysis, Dr. Aamodt removed from the entire data set those applicants who were coded as not possessing basic English skills, leaving 1,400 individuals. DX 8; Tr. at 635, 655. He found no adverse impact against Hispanic applicants for this refined group. DX 8; Tr. at 635, 638. He concluded that the basic English requirement was driving the adverse impact and, when the requirement was accounted for, the adverse impact went away. Tr. at 635, 672. In the applicant data set he used, there were no notations that particular applicants were rejected because they lacked English proficiency. Tr. at 658.

Dr. Aamodt also conducted logistic regression analyses<sup>47</sup> to try to determine if applicants' Hispanic origin was related to hiring decisions after accounting for TNT's hiring criteria. DX 8; Tr. at 636. In the first logistic regression analysis, he controlled for shift preference, application completeness, three month stay at previous job, and previous experience and found that being Hispanic was still significant and still affected the hiring decision. DX 8; Tr. at 639-40. In the second logistic regression, he added the criteria of basic English skills and found that being Hispanic no longer affected the hiring decision. DX 8; Tr. at 640. In the third logistic regression, he controlled only for basic English skills and found that being Hispanic did not affect the hiring decision. *Id.*

Upon analyzing the availability data for Hispanics in the Green Bay area, Dr. Aamodt concluded that the percentage of Hispanic applicants at TNT (38.3%) greatly exceeded the availability of Hispanic laborers in the Green Bay area. DX 8; Tr. at 674-75. To determine the availability of Hispanic laborers, Dr. Aamodt relied upon the 1990 and 2000 census. *Id.* In 1990, the availability of Hispanic laborers in Green Bay was 0.86% according to the MSA data. DX 8. In 2000, the MSA data showed the availability of Hispanic laborers to be at 9.7%. DX 8; Tr. at 675.

Dr. Aamodt reviewed the two reports written by Dr. Killingsworth. Tr. at 637. He found that Dr. Killingsworth reached the same conclusion that if applicants who were coded as not possessing basic English skills were removed from the pool, no adverse impact existed. Tr. at 638.

## CONCLUSIONS OF LAW

### *Legal Framework*

Executive Order 11246, as amended, and its implementing regulations, codified at 41 C.F.R. Chapter 60, prohibit discrimination by covered government contractors against employees and applicants for employment on the basis of race, color, sex, religion or national origin. The

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<sup>46</sup> Dr. Aamodt found that if two white applicants were coded as Hispanic instead, then an adverse impact would not exist for this group. DX 8; Tr. at 632-33. He maintained that the result for this group was statistically significant, but not practically significant. Tr. at 634-35, 672.

<sup>47</sup> In each logistic regression analysis, Dr. Aamodt looked at the results for both the pool of official applicants and the pool of applicants with those requesting first shift only and those with J1SS visas removed. DX 8.

Executive Order has the force and effect of law. See *OFCCP v. Univ. of Calif.*, Case No. 78-OFCCP-7, at 33-34 (Sec’y Sept. 4, 1980); *OFCCP v. St. Regis Corp.*, Case No. 78-OFCCP-1, at 96 (ALJ Dec. 28, 1984); *United States v. New Orleans Public Serv.*, 553 F.2d 459, 465 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978). Furthermore, the Executive Order’s implementing regulations have the force and effect of law so long as they are not unlawful or plainly unreasonable or inconsistent with the underlying authority. See *OFCCP v. Prudential Ins. Co.*, Case No. 80-OFCCP-19, at 11 (Sec’y July 27, 1980); *Univ. of Calif.*, Case No. 78-OFCCP-7 at 34; *St. Regis Corp.*, Case No. 78-OFCCP-1, at 96. The parties have stipulated that TNT is covered by the Executive Order based on the federal government contracts of Tyson Foods, Inc., TNT’s parent company. ST 1.

OFCCP argues that TNT had in place selection and hiring policies which discriminated against Hispanic applicants during the period of July 1, 2001, through December 31, 2001. Therefore, this case is analogous to a pattern or practice action prosecuted by the government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in contrast to cases involving individual allegations of discrimination brought by employees. *Dep’t of the Treasury v. Harris Trust & Sav. Bank*, Case No. 1978-OFCCP-2, at 4 (ALJ Dec. 22, 1986). Cases interpreting Title VII, while not necessarily binding authority for administrative proceedings under the Executive Order, do supply guidance in analyzing allegations brought by the government. *Id.*; *OFCCP v. Burlington Indus., Inc.*, Case No. 1990-OFC-10, at 15 (ALJ Nov. 2, 1991).

Two avenues exist for proving employment discrimination – disparate treatment and disparate impact. *Int’l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 (1977); *St. Regis Corp.*, Case No. 78-OFCCP-1, at 97. Either theory may be applied to a particular set of facts. *Teamsters*, 431 U.S. at 335. Both theories involve a burden shifting formula in which the plaintiff first must establish a prima facie case of discrimination that the defendant then must rebut. See *Segar v. Smith*, 738 F.2d 1249, 1286 (D.C. Cir. 1984). In these pattern or practice actions, the plaintiff typically uses statistical evidence to show a disparity between the percentage of the protected class hired or employed compared to the general pool of applicants or employees. See *Segar*, 738 F.2d at 1273-74; *OFCCP v. Greenwood Mills, Inc.*, Case No. 89-OFC-39, at 3 (Sec’y Nov. 20, 1995).

Under disparate treatment, “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Teamsters*, 431 U.S. at 335 n. 15. Disparate treatment requires the plaintiff to prove discriminatory intent. *Id.* The intent may be established by raising an inference of a discriminatory motivation. See *id.* at 358. A disparate treatment pattern and practice case involves three steps of burden shifting.<sup>48</sup> First, the plaintiff must establish by a preponderance of the evidence that discrimination was the employer’s standard and regular procedure. *Id.* at 336; *Burdine*, 450 U.S. at 253; *Harris Trust*, Case No. 1978-OFCCP-2, at 4. This initial burden requires plaintiff to produce evidence sufficient to create an inference that the challenged employment policy was based on illegal discrimination. *Teamsters*, 431 U.S. at 358.

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<sup>48</sup> While the burden of producing evidence shifts, the burden of persuasion in a disparate treatment case remains at all times with the plaintiff. *Texas Dep’t of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Segar*, 738 F. 2d at 1267, 1270.

A prima facie case of intentional discrimination may be established by statistical evidence. *Id.* at 339; *see also Segar*, 738 F.2d at 1267; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *United States v. County of Fairfax, Virginia*, 629 F.2d 932, 939 (4th Cir. 1980); *Harris Trust*, Case No. 1978-OFCCP-2, at 4. The Supreme Court in *Hazelwood* stated that “[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”<sup>49</sup> 433 U.S. at 307-308 (1977) (citing *Teamsters*, 431 U.S. at 339). If the statistics focus on the relevant labor pool, an inference may be raised where the disparity reaches a statistically significant level.<sup>50</sup> *See Segar*, 738 F.2d at 1278. Courts have generally followed statisticians in finding that statistics are significant at two or three standard deviations. *Harris Trust*, Case No. 1978-OFCCP-2, at 23; *see also Hazelwood*, 433 U.S. at 309 n. 14; *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977); *Segar*, 738 F.2d at 1283 (finding that statistics at the 0.05 level, or two standard deviations, are sufficient to support an inference of discrimination).

If the plaintiff establishes its prima facie case of disparate treatment, the burden of production shifts to the defendant for rebuttal. *See Segar*, 738 F.2d at 1267-68. The defendant can rebut the prima facie case in two different ways. *Id.* The defendant may attack the methodology and significance of the plaintiff’s statistics, showing that a disparity does not exist. *Id.* at 1268. When using this approach, the employer must show that the plaintiff’s statistics are flawed. *Teamsters*, 431 U.S. at 360. As the Supreme Court explained, “statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” *Id.* at 340. In *Bazemore v. Friday*, the Supreme Court explained that whether a challenged analysis “carr[ies] the plaintiffs’ ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant.” 478 U.S. 385, 400 (1986). Alternatively, the defendant must provide a legitimate, nondiscriminatory reason for the observed disparity. *Teamsters*, 431 U.S. at 360 n. 46; *Segar*, 738 F.2d at 1267-68; *OFCCP v. Interstate Brands Corp.*, Case No. 1997-OFC-6, at 26 (ALJ July 19, 2000). “The nondiscriminatory explanation must cast sufficient doubt on the plaintiff’s proof to permit the trier of fact legitimately to decline to draw an inference of discrimination from that proof.” *Segar*, 738 F.2d at 1269. At the very least, the defendant must make a “clear and reasonably specific showing” through admissible evidence that the disparity is explained by a nondiscriminatory reason. *Id.* at 1268.

While a satisfactory explanation by the defendant squelches the previously drawn inference, the plaintiff’s evidence may be considered to determine whether the defendant’s explanation is a pretext for discrimination. *Segar*, 738 F.2d at 1269. Under this third and last stage of the burden shifting, the plaintiff in a disparate treatment case is given the opportunity to prove by a preponderance of the evidence that the articulated reason was not the true reason

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<sup>49</sup> As the court in *Palmer v. Schultz* explains, there are three possible explanations for a statistical disparity. 815 F.2d 84, 90-91 (D.C. Cir. 1987). First, the disparity may be caused by unlawful discrimination, as the plaintiff alleges. *Id.* Second, the disparity may be created by a legitimate, nondiscriminatory cause, such as a missing variable. *Id.* at 91. Third, the disparity may be the result of chance. *Id.*

<sup>50</sup> As the court in *Segar v. Smith* explained, “[s]tatistical significance is a measure of the probability that the outcome of a statistical analysis would have occurred by chance: The lower the probability that the observed outcome could have occurred by chance, the stronger the inference of discrimination that can be drawn from the data.” 738 F.2d at 1282.

behind the challenged employment practice, but merely a pretext. *Burdine*, 450 U.S. at 253, 256; *Segar*, 738 F. 2d at 1269; *Burlington Indus.*, Case No. 1990-OFC-10, at 18. A plaintiff may prevail “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Burdine*, 450 U.S. at 256 (citation omitted).

A case of discrimination also may be established by a showing of disparate impact. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Disparate impact does not require proving discriminatory intent on the part of the employer. *Teamsters*, 431 U.S. at 335. The challenged employment practices are facially neutral, but produce a negative impact for a protected class. *Id.* at 335. “[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). A pattern and practice disparate impact case also involves three steps of burden shifting. *See Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). First, the plaintiff must show that a facially neutral employment practice causes a significant discriminatory impact on a protected class. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). Statistics may be used to show that a facially neutral practice denies a protected class the equal opportunity to be hired for a particular position. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979).

Disparate impact cases brought by the OFCCP that challenge facially neutral selection procedures are governed by the Uniform Guidelines on Employee Selection Procedures (“Uniform Guidelines”) at 41 C.F.R. Part 60-3.<sup>51</sup> The Uniform Guidelines “are designed to provide a framework for determining the proper use of tests and other selection procedures.” 41 C.F.R. § 60-3.1(B). A selection procedure is defined as:

Any measure, combination of measures, or procedure used as a basis for any employment decision . . . includ[ing] the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

41 C.F.R. § 60-3.16(Q). Thus, a “selection procedure” is defined broadly and does not have to be a traditional test. Any hiring procedure used to measure or evaluate an applicant qualifies as a selection procedure under the Uniform Guidelines. *OFCCP v. Priester Constr.*, Case No. 1978-OFCCP-11, at 102 (Sec’y Feb. 22, 1983). The Uniform Guidelines require validation if a selection procedure results in an adverse impact on a protected class. 41 C.F.R. § 60-3.1(B). Adverse impact is defined as “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate . . . .” 41 C.F.R. § 60-3.4(D). The Uniform Guidelines define selection rate as “[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected.” 41 C.F.R. § 60-

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<sup>51</sup> The Uniform Guidelines went into effect in 1978 and have the force and effect of law for purposes of the applicable Executive Order. *See OFCCP v. Priester Constr.*, Case No. 1978-OFCCP-11, at 104-05 (Sec’y Feb. 22, 1983); *USDOL v. St. Regis Corp.*, Case No. 1978-OFCCP-1, at 96-97 (Sec’y March 2, 1994).

3.16(R). Thus, the guidelines require the employer in this case to look at the number of applicants of a protected class hired from the applicant pool.<sup>52</sup>

In disparate impact cases, the defendant can rebut a prima facie case in two ways. *Segar*, 738 F.2d at 1267-68. The defendant can attack the plaintiff's statistics by showing a disparity does not exist in the same manner as under the disparate treatment theory. *Id.* Second, a defendant can demonstrate that the challenged practice has a "manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. According to the Supreme Court in *Griggs*, "[t]he touchstone is business necessity," and a facially neutral qualification must "bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 431.

Under the Uniform Guidelines, a selection procedure that results in an adverse impact must be validated according to the guidelines or it will be considered discriminatory. 41 C.F.R. § 60-3.3(A). The job relatedness and business necessity of a selection procedure resulting in adverse impact are proven through validation of the procedure in accordance with the provisions of the Uniform Guidelines. *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 100; *see also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1371-72 (5th Cir. 1974) (failure to validate high school diploma requirement found to render requirement invalid); *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985) (a presumption of discrimination may only be rebutted if procedures causing disparity are validated); *Davis v. City of Dallas*, 483 F.Supp. 54, 58-59 (N.D. Tex. 1979) (defendant could not show selection process to be job related because it failed to validate). Three methods of validation are provided by the Uniform Guidelines: criterion, content, and construct validity. 41 C.F.R. § 60-3.14. Failure to validate a selection procedure that causes an adverse impact under the Uniform Guidelines is a violation of the Executive Order. *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 114; *see also Johnson*, 491 F.2d at 1371.

If the defendant meets its burden of production and persuasion by showing that the facially neutral practice is job related, the plaintiff has the opportunity to demonstrate that other selection procedures exist that would serve the defendant's legitimate business interest without causing an adverse impact. *Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329. In other words, the plaintiff must show that the selection procedure was a pretext for discrimination. *Id.*

### ***OFCCP's Prima Facie Case – Disparate Treatment***

OFCCP argues that TNT intentionally treated Hispanic applicants differently from non-Hispanic applicants for entry-level laborer positions on the basis of their national origin. To establish its prima facie case under disparate treatment, OFCCP must put forth sufficient evidence to raise an inference of discrimination. *Teamsters*, 431 U.S. at 358. OFCCP has put forth statistical evidence showing a significant disparity between the percentage of Hispanics hired and the percentage of Hispanics in TNT's applicant pool for the relevant period. PX 24-26.

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<sup>52</sup> The Uniform Guidelines use the second method of statistical analysis described in *Equal Employment Opportunity Commission v. Navajo Refining Company* by determining whether a larger percentage of minority applicants are eliminated by a test or selection procedure. *See* 593 F.2d at 990.

As detailed in the Findings of Fact, *supra*, OFCCP's expert, Dr. Killingsworth, conducted three separate analyses in which he found that the hiring rate for Hispanic applicants compared to that of non-Hispanic applicants exceeded 2.4 standard deviations.<sup>53</sup> PX 24, 25; Tr. at 236-37, 240-41, 244, 247. Dr. Killingsworth controlled for nondiscriminatory variables to ensure that they were not causing the disparity. PX 24, 25. These variables included shift preference, month of application, prior work experience, education, reasons offered for leaving previous job, duration of previous job, average duration of prior employment, and wage at previous job. PX 24.

OFCCP has proffered sufficient statistical evidence to raise an inference of discrimination. The statistical analyses conducted by Dr. Killingsworth all produced a disparity exceeding 2.4 standard deviations. Most courts agree with statisticians that statistics at two or three standard deviations are significant. *Harris Trust*, Case No. 1978-OFCCP-2, at 23; *see also Hazelwood*, 433 U.S. at 309 n. 14; *Castaneda*, 430 U.S. at 496 n. 17; *Segar*, 738 F.2d at 1283. In addition, OFCCP's statistical evidence eliminated the most common nondiscriminatory explanations for the disparity, as required by *Segar*. 738 F.2d at 1274. By taking into account multiple variables, Dr. Killingsworth's analyses compared similarly qualified applicants.<sup>54</sup> PX 24. Furthermore, the statistical evidence focuses on the proper group for comparison by using the applicant flow data. *See Segar*, 738 F.2d at 1274. The methodology and explanatory power of OFCCP's statistical analyses are sufficient to raise an inference of discrimination and, thereby, establish a prima facie case of disparate treatment. *See id.*

Furthermore, TNT's inconsistent use of its assessment of English proficiency strengthens OFCCP's showing of disparate treatment. *See Honeywell*, Case No. 77-OFC-3, at 6 (employer's defense for requiring prior experience rejected in part because the employment requirement was not applied to all applicants). When Dr. Killingsworth reviewed the available applications for the relevant period, he found that of the 265 applications for which English proficiency was noted, all but one of the applicants were classified as Hispanic. *See Table 6, supra*; PX 26. The one exception had the surname Valenzuela. *Id.* In addition, 262 of the 265 applicants whose English proficiency was assessed used the Spanish version of the application. *See Table 7, supra*; PX 26. Notably, the three individuals who used the English application and had their English proficiency assessed were classified as Hispanic. *Id.* TNT had other non-English speaking minorities who applied during the relevant time. Tr. at 461. The non-English speaking minority applicants included Russian, Polish, and Hmong. Tr. at 387, 461-62. TNT's Vice President of Human Resource, Candyce Gilmore, testified that TNT had Hmong employees at the relevant time who did not speak English. Tr. at 387; *see also* Tr. at 114. TNT's applicant flow shows that 87 Asians applied for laborer positions during the relevant time and that the Asian group experienced the highest selection rate. PX 24; DX 8. Yet, not a single non-Hispanic minority applicant had his/her English proficiency assessed. PX 26. Finally, the assessment itself determined that an applicant would not be hired. PX 26; Tr. at 260-61. At least

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<sup>53</sup> At the end of his first report for OFCCP, Dr. Killingsworth summarized his findings as follows: "Based on the analyses described in this report, I conclude that there is very strong statistical evidence that, during the second half of 2001, Hispanics were less likely to receive employment offers or to be hired by TNT than were non-Hispanics *with similar characteristics*. These national origin differentials in hiring and in employment offers are sizable in the ordinary language sense, and *are highly significant in the statistical sense*. Thus, these analyses provide very strong statistical evidence of job-offer and hiring discrimination adverse to Hispanic applicants for employment at TNT, in the sense in which these terms are used by economists." PX 24 (emphasis added).

<sup>54</sup> See discussion of variables considered by Dr. Killingsworth at p. 11, *infra*.

twenty-two applicants received positive notations of English proficiency, including “does speak English,” “pretty good English”, and “speaks English,” but were not hired. PX 26. The evidence demonstrates that TNT focused exclusively upon Hispanic applicants when assessing English proficiency. This evidence supports an inference of disparate treatment by showing that TNT treated Hispanic applicants less favorably in singling them out for assessment. *See Teamsters*, 431 U.S. at 335 n. 15.

### ***OFCCP’s Prima Facie Case – Disparate Impact***

To establish discrimination by disparate impact, OFCCP must show that the facially neutral employment practice of requiring and assessing minimal English proficiency had a significantly discriminatory impact. *See Teamsters*, 431 U.S. at 335; *Teal*, 457 U.S. at 446; *Watson*, 487 U.S. at 987. Disparate impact may be established through statistics showing a disproportionately adverse effect in hiring rates for minority and non-minority applicants. *Segar*, 738 F.2d at 1267-68; *see Beazer*, 440 U.S. at 584. OFCCP proffered the statistical analyses and testimony of its expert, Dr. Killingsworth. *See* PX 24-26; *Tr.* at 230-96. As discussed above, Dr. Killingsworth conducted three analyses, taking into account nondiscriminatory variables, and found a significant adverse impact against Hispanic applicants at a standard deviation exceeding 2.4 for each analysis. PX 24; PX 25; *Tr.* at 236-37, 240-41, 244, 247. Dr. Aamodt also found adverse impact against Hispanic applicants in all four of his analyses.<sup>55</sup> DX 8; *Tr.* at 628, 631-32. In the four analyses conducted by Dr. Aamodt, the standard deviation exceeded 2.4. DX 8. Thus, both experts’ analyses show a statistically significant disparity of over two standard deviations when multiple non-discriminatory variables are taken into account. *See Harris Trust*, Case No. 1978-OFCCP-2, at 23; *see also Hazelwood*, 433 U.S. at 309 n. 14; *Castaneda*, 430 U.S. at 496 n. 17; *Segar*, 738 F.2d at 1283. OFCCP has established a prima facie case of disparate impact.

OFCCP also argues that the evaluation of basic English skills conducted by TNT’s receptionist is a selection procedure that resulted in an adverse impact and that TNT failed to validate the procedure as required under the Uniform Guidelines. *See* 41 C.F.R. § 60-3.3(A).

OFCCP must establish that the assessment of English proficiency by TNT’s receptionist qualifies as a selection procedure under the Uniform Guidelines. The Uniform Guidelines “apply to tests and other selection procedures which are used as a basis for any employment decision,” including hiring. 41 C.F.R. § 60-3.2(B). It is undisputed that TNT required basic English skills for its entry-level laborers during the period at issue. ST 3, 4. Both Candyce Gilmore, the Vice President of Human Resources, and Holly Webster, the receptionist, testified that Webster was responsible for making a notation of applicants’ basic English proficiency on their applications. *Tr.* at 211-16, 355, 381. Webster assessed applicants’ English proficiency by

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<sup>55</sup> Notably, TNT’s own AAP identified an adverse impact against minority employees. JX 1. In addition, in the AAP, TNT speculated that the adverse impact might be due to its basic English requirement for laborer positions. *Id.* Despite TNT’s awareness of the disparity and its possible cause, TNT made no attempt to validate the process by which it assessed English proficiency. *Tr.* at 388; PX 20.

asking them, “Do you speak English?” and noting their responses.<sup>56</sup> Tr. at 212-16, 223; PX 1-11, 13, 14. However, Webster generally completed this assessment for only those applicants who used the Spanish application. Tr. at 216-17.

Despite its informality and subjectivity, the assessment of English proficiency conducted by Webster qualifies as a selection procedure under the Uniform Guidelines. The use of an informal selection procedure like TNT’s is anticipated by the Uniform Guidelines, which provide, in pertinent part:

When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

41 C.F.R. § 60-3.6(B)(1). The Uniform Guidelines’ broad definition of “selection procedure” specifically includes informal assessments provided that they are used as a basis for employment. 41 C.F.R. § 60-3.16(Q); *see Honeywell*, Case No. 1977-OFCCP-3, at 6. The Equal Employment Opportunity Commission (“EEOC”) specifically addresses English proficiency requirements in its Guidelines on Discrimination Because of National Origin. 29 C.F.R. § 1606.6. Under the EEOC’s Guidelines, fluency-in-English requirements are classified as “selection procedures [that] may be discriminatory on the basis of national origin.” 29 C.F.R. § 1606.6(b). As TNT required basic English skills and the possession of this requirement was determined by the notation on the application, the assessment made by Webster though informal and unscored was used as a basis for employment. Therefore, OFCCP has shown that the assessment of English proficiency performed by TNT qualifies as a selection procedure under the Uniform Guidelines.

Second, OFCCP must show that this selection procedure resulted in an adverse impact on Hispanic applicants. Under the Uniform Guidelines, adverse impact is determined by comparing the selection rate of the protected class to that of the most favored group. 41 C.F.R. 60-3.4(D). Selection rate is “[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected.” 41 C.F.R. 60-3.16(R). Adverse impact is found when the protected class is selected at a rate less than eighty percent of the rate of the highest selected group. 41 C.F.R. 60-3.4(D). During the relevant period, Asian applicants had the highest selection rate of 18.39%. *See* Table 8, *supra*; DX 18. Eighty percent of this selection rate is 14.712%. Therefore, under the Uniform Guidelines, adverse impact may be found for any group selected by TNT at a rate of less than 14.712%. *See* 41 C.F.R. 60-3.4(D). Hispanic applicants were selected at a rate of 5.41% according to Dr. Aamodt’s data and 4.45% according to Dr. Killingsworth’s data. *See* PX 25; DX 8. Even if the selection rate for white applicants is used instead, an adverse impact would be found as they had a selection rate of less than eighty percent of 10.03%, or 8.024%, as compared with Hispanic applicants with the selection rate of, at the most, 5.41%. Thus, OFCCP has shown adverse impact against Hispanic applicants under the Uniform Guidelines.

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<sup>56</sup> This assessment procedure was confirmed by the three witnesses who testified about their experiences applying for laborer positions at TNT during the period at issue. *See* Tr. at 25-65.

### *TNT's Rebuttal – Challenges to OFCCP's Statistical Proof*

One way TNT can rebut OFCCP's prima facie case of both disparate impact and treatment is to show that flawed OFCCP statistical evidence created an appearance of disparity that does not in fact exist. *See Teamsters*, 431 U.S. at 360; *Segar*, 738 F.2d at 1267-68. As stated by the court in *Trout v. Lehman*, "the most effective way to rebut a statistically based prima facie case is to present more accurate statistics." 702 F.2d 1094, 1102 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984). A defendant who argues that excluded variables caused the disparity "must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims." *Segar v. Civiletti*, 508 F.Supp. 690, 712 (D.D.C. 1981), *aff'd in part and vacated in part*, 738 F.2d 1249 (1984), *cert. denied*, 471 U.S. 1115 (1985). TNT attacks OFCCP's statistics through the introduction of its own statistical analyses and testimony of its expert, Dr. Aamodt, as well as by arguing that OFCCP's statistics are insignificant in light the percentage of Hispanic employees in TNT's workforce.

TNT proffered the report and testimony of its own expert, Dr. Aamodt, in response to OFCCP's statistically-based case. At the outset, it is noted that Dr. Aamodt found a statistically significant adverse impact at greater than 2.4 standard deviations against Hispanic applicants in his three analyses.<sup>57</sup> DX 8. Nevertheless, TNT argues that its statistical analyses conducted by Dr. Aamodt are more accurate because shift preference of the applicants is taken into account. Shift preference was a selection criteria considered by TNT during the relevant time because most of the openings occurred during the second and third shifts. JX 1; Tr. at 360. However, TNT's argument that OFCCP's statistical analyses failed to account for shift preference is unsupported. Dr. Killingsworth did make shift preference a variable in his analyses.<sup>58</sup> PX 24; Tr. at 308. He found that shift preference did not explain the disparity against Hispanic applicants in hiring rates. Tr. at 308-9. TNT's argument also fails because its own expert, Dr. Aamodt, did not run a separate analysis focusing on only shift preference, but used shift preference as an additional variable. DX 8. Like Dr. Killingsworth, Dr. Aamodt found that a statistically significant adverse impact remained against Hispanic applicants even when shift preference was considered. DX 8; Tr. at 631-32.

TNT contends that no disparity is found when the English proficiency of the applicants is taken into account. In his report, Dr. Aamodt conducted an analysis using only the applicants who were coded as possessing basic English skills to try to determine whether an adverse impact remained against Hispanic applicants. DX 8. Dr. Aamodt found that no adverse impact existed when the applicants who were coded as not speaking English were removed. DX 8; Tr. at 638. However, this approach by Dr. Aamodt removes from consideration the facially neutral employment practice that is being challenged by OFCCP. A disparate impact case challenging a facially neutral employment practice would be impossible to prove if those applicants who do

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<sup>57</sup> It is noted that at the hearing TNT's expert Dr. Aamodt testified that a standard deviation higher than 1.96 is significant. Tr. at 644.

<sup>58</sup> TNT mischaracterizes Dr. Killingsworth's testimony when it argues that he did not consider shift preference. While Dr. Killingsworth did not do a separate analysis focusing upon just shift preference, he did include shift preference as a variable in all three analyses. PX 24; Tr. at 308-10. Dr. Killingsworth was asked, "Did your analysis sir, take into consideration shift work?" He answered, "Yes. . . taking a count [sic] of the shift people said they were interested in, did not change my conclusion that there was a large statistically significant difference in hiring rates that was adverse to Hispanics." Tr. at 308.

not possess the challenged requirement were taken out of the equation. The disparate impact avenue of proving discrimination seeks to prohibit employers from using seemingly neutral employment practices “invidiously to discrimination on the basis of race or other impermissible classification.” *Griggs*, 401 U.S. at 431. Removing the applicants who do not possess English proficiency would be akin to removing applicants who do not meet a height requirement in a gender discrimination case. Including the challenged job practice as a variable would effectively dismantle the theory of disparate impact. *See Anderson v. Zubieta*, 180 F.3d 329, 342 (D.C. Cir. 1999).

TNT argues that the adverse impact against Hispanics was not practically significant when applicants who requested first shift only were removed from the analysis.<sup>59</sup> DX 8; Tr. at 632. Dr. Aamodt conducted such an analysis and testified that a switch of the ethnicity of two applicants from white to Hispanic would have caused the standard deviation to drop below two. Tr. at 632. According to Dr. Aamodt, this result from a switch of two means that the disparity is not practically significant, although it remains statistically significant.<sup>60</sup> Tr. at 632. He stated that his reliance of the concept of practical significance comes from the questions and answers to the Uniform Guidelines published in the Federal Register on March 2, 1979. Tr. at 647; PX 31. However, the Uniform Guidelines contemplate only a switch of one individual. *See* 44 Fed. Reg. 11,996 at 11,999 (March 2, 1979). The answer to Question 21 printed in the Federal Register states, in pertinent part:

Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from adverse impact against one group to a situation in which that group has a higher selection rate than the other group.

*Id.*; *see also* PX 31. Thus, the answer only refers to situations in which a switch of one would result in the protected group actually having a higher selection rate rather than where a switch of one would result in a standard deviation under two. *See* 44 Fed. Reg. 11,996 at 11,999 (March 2, 1979); Tr. at 650. Additionally, the answer begins, “If the *numbers of persons* and the difference in selection rates *are so small* that it is likely that the difference could have occurred by chance . . . .” 44 Fed. Reg. 11,996 at 11,999 (March 2, 1979) (emphasis added). The number of applicants here of 1,643 is not small enough to justify switching one applicant to a different group.<sup>61</sup> *See* Tr. at 650. In addition, the switch of one concept applies only to the Uniform Guidelines and not to general disparate treatment and disparate impact cases. For the reasons above, TNT’s argument that no practical significance exists when only applicants who did not request first shift are considered fails to undermine the integrity of OFCCP’s statistical methodology. *See Segar*, 738 F.2d at 1268.

TNT further contends that OFCCP’s statistical showing of disparity is insignificant because the percentage of Hispanics in TNT’s workforce at the relevant time exceeded their availability in the labor market. TNT relies upon the 1990 census for market availability data to

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<sup>59</sup> Dr. Aamodt also removed from this calculation those employees who had a J1SS visa. He testified that the parties agreed to remove those who possessed a J1SS visas from the calculations. Tr. at 631.

<sup>60</sup> As noted above, Dr. Aamodt testified that a standard deviation above 1.96 is statistically significant. Tr. at 644.

<sup>61</sup> Dr. Aamodt admitted that a group of 1,643 is not a small group. Tr. at 650.

show that Hispanics were not underrepresented in TNT's workforce. JX 1; DX 8. However, courts generally prefer use of applicant flow data over census data because the former narrows the group to those who want the job in question and focuses the inquiry on how the employer treated those who actually applied. *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1287 (5th Cir. 1994); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 165 n. 38 (N.D. Cal. 2004). TNT also confuses the issue. OFCCP's case is not based upon the composition of TNT's workforce at the relevant time. Instead, OFCCP argues that TNT discriminated against Hispanics in its hiring of new employees to fill laborer positions. Therefore, the relevant inquiry is whether the selection rate for Hispanic applicants was significantly lower compared to other applicants in the applicant pool. See *County of Fairfax*, 629 F.2d at 940-41; *Navajo Refining Co.*, 593 F.2d at 990; *Douglas & Lomason Co., Inc.*, 26 F.3d at 1287; 41 C.F.R. § 60-3.4(D).

The Supreme Court has made it clear that a balanced workforce does not excuse discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978); see also *Trailways, Inc.*, 530 F. Supp. at 59; *Greenwood Mills*, Case No. 89-OFC-39, at 6. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco*, 438 U.S. at 579 (emphasis in original). The fact that TNT had a higher percentage of Hispanic employees than the census indicates were available does not give TNT a get-out-of-liability-free card for discriminating against later Hispanic applicants. See *Teal*, 457 U.S. at 445; *Trailways, Inc.*, 530 F. Supp. at 59. Each applicant to TNT is guaranteed an equal opportunity of employment even though the percentage of the applicant's national origin may be represented at TNT. See *Furnco*, 438 U.S. at 579; *Greenwood Mills*, Case No. 89-OFC-39, at 8 ("nondiscrimination law requir[es] equal opportunity for each and every individual applicant, regardless of whether members of the applicant's sex or race are already proportionally represented in the workforce"). Therefore, TNT's argument as to its workforce makeup at the relevant time does not undermine the strength of OFCCP's statistical evidence.

For the reasons discussed above, TNT has failed to undermine OFCCP's statistical evidence by showing that the methodology or significance thereof is flawed. Consequently, TNT must rebut OFCCP's prima facie showing of disparate treatment and impact in order to avoid liability for the disparity shown through OFCCP's statistical evidence.

### ***TNT's Defense to Disparate Treatment – Legitimate, Nondiscriminatory Reasons for Disparity***

As TNT has failed to discredit OFCCP's statistical methodology, TNT now must rebut OFCCP's prima facie case of disparate treatment by putting forth evidence showing that the disparity is caused by legitimate, nondiscriminatory factors. *Teamsters*, 431 U.S. at 360 n. 46; *Segar*, 738 F.2d at 1267-68; *Interstate Brands Corp.*, Case No. 1997-OFC-6, at 26. The plaintiff does not have the burden of ruling out the possibility that legitimate, non-discriminatory factors are responsible for the statistical disparity when establishing disparate treatment through statistical evidence. *Palmer*, 815 F.2d at 91 n. 6 (citing *Segar*, 738 F.2d at 1276). The court explained that "as long as a plaintiff's statistical analysis has properly defined the pool of eligible

candidates, by accounting for ‘minimum objective qualifications,’ the burden then shifts to the defendant to introduce evidence of a legitimate, nondiscriminatory explanation if the analysis reveals a statistically significant disparity.” *Id.* TNT argues that the disparity was caused by nondiscriminatory factors that made the rejected applicants unqualified, including shift preference, lack of English proficiency, invalid Social Security numbers, and reasons for leaving previous employment.

As discussed, *supra*, TNT has failed to show that shift preference caused the disparity because the disparity still existed after both OFCCP and TNT’s experts took shift preference into account. *See* PX 24; DX 8. In addition, TNT’s expert, Dr. Aamodt, did not run a separate analysis focusing on only shift preference, but made it an additional variable in looking at the disparity according to national origin. DX 8. TNT cannot show that shift preference was the cause of the disparity by simply arguing that a nondiscriminatory factor was to blame. *See Bazemore*, 478 U.S. at 403-04 n. 14. To prevail, TNT had to provide supporting evidence showing how the factor actually caused the disparity, a required step TNT did not undertake. *Palmer*, 815 F.2d at 101.

TNT argues that the disparity is caused by the lack of English proficiency of the rejected applicants. Dr. Aamodt excluded those applicants who were coded as not possessing basic English proficiency and found no disparity existed. DX 8. However, as the English proficiency assessment is the very discriminatory business practice at issue, it cannot be a nondiscriminatory factor as well. Also, Dr. Aamodt’s approach of removing those applicants coded as not possessing basic English skills fails to take into account the evidence showing that any notation of English, whether positive or negative, meant that an applicant would not be hired. *See* DX 8; PX 26. As explained by Dr. Killingsworth, the variable of basic English skills is a perfect predictor because those applicants whose English was assessed were not hired. Tr. at 270-75. Thus, lack of English proficiency cannot be used as a nondiscriminatory explanation for the disparity when it is the business practice at issue. Including basic English skills as a variable only serves to establish that it is a barrier to employment at TNT. *See Berger v. Iron Workers Reinforced Rodmen*, 843 F.2d 1395, 1418 (D.C. Cir. 1988).

TNT also contends that the three rejected applicants who provided anecdotal evidence at the hearing were not hired for legitimate, non-discriminatory reasons. TNT asserts that Robles was not hired because he provided a false Social Security number on his application. *See* Tr. at 31-32; PX 1. TNT’s Vice President of Human Resources, Candyce Gilmore, testified that Robles’ Social Security number would have raised a red flag because it was facially invalid. Tr. at 471. However, she also testified that she could not remember looking at the application at the time Robles applied, and TNT has no record of the reasons for his rejection. *Id.* In addition, TNT admitted that Social Security numbers were not used as a screening tool during the relevant time. PX 21. Therefore, the argument that Robles was not hired because of his invalid Social Security number is conjecture. Next, TNT argues that Carlos Guerrero was unqualified because he did not list enough work experience, he did not have recent employment, and he left his prior job to go to Mexico. *See* PX 1; Tr. at 46, 48-49. According to Gilmore, leaving a prior job to go to Mexico was a red flag for TNT because previous employees had left their TNT jobs abruptly without notice to return to their countries. Tr. 473-74. Gilmore testified that Concepcion Guerrero would have been rejected for the same reason as well as her lack of employment in the

previous three months. Tr. at 474-75; *see* PX 3. However, Gilmore could not remember whether Concepcion Guerrero received an interview despite the red flags on her application. Tr. at 475-76.

Ms. Gilmore's testimony as to why all three applicants may have been rejected five years ago is merely retrospective conjecture. Gilmore did not screen every application. Tr. at 356. Instead, Cathy Propson, TNT's human resources coordinator who did not testify, was the primary employee responsible for reviewing applications and making the hiring decisions. Tr. at 356; JX 1. In addition, during the review, Leonard found instances of minorities and non-minorities who were hired despite their incomplete applications. Tr. at 95. Notably, two of the rejected applicants had prior work experience in food-manufacturing plants. Tr. at 41-42, 48, 55, 63-64. Finally, possible reasons why these three applicants may have been rejected do not explain why the other two hundred plus applicants who received a notation of English proficiency were denied employment. *See* PX 26.

TNT has failed to make a "clear and reasonably specific showing" with its evidence that the disparity was caused by any of its proffered nondiscriminatory reasons. *See Segar*, 738 F.2d at 1268. The shift preference of applicants does not explain the disparity as both Dr. Killingsworth and Dr. Aadmodt still found a statistically significant adverse impact against Hispanic applicants when shift preference was taken into account. PX 24; DX 8; Tr. at 308-10, 631-32. TNT's proffered reasons why the rejected applicants were otherwise unqualified is speculative and unsupported. Finally, TNT's argument that the lack of English proficiency caused the disparity is, of course, true as the validity of the English proficiency requirement is the issue. Therefore, TNT's explanations cannot be found to "cast sufficient doubt" on OFCCP's proof to rebut the inference of discrimination. *See Segar*, 738 F.2d at 1269.

### ***Disparate Treatment – Pretext***

Assuming, *arguendo*, that TNT had rebutted successfully OFCCP's prima facie case of disparate treatment, the burden of production would shift back to OFCCP to show that the proffered explanations for the disparity are pretext for discrimination. *Burdine*, 450 U.S. at 253, 256; *Segar*, 738 F. 2d at 1269; *Burlington Indus.*, Case No. 1990-OFC-10, at 18. For the following reasons, it is found that OFCCP would meet this burden if required.

TNT did not apply the English skills requirement or its assessment to every applicant. PX 26. As discussed, *supra*, 264 of the 265 applicants who received a notation of English proficiency were classified as Hispanic, and the one exception had a surname of Valenzuela. PX 26. TNT did not assess the English proficiency of its Hmong, Polish, or Russian applicants. Tr. at 387, 461-62; PX 26. In addition, of the 265 applicants who received an English proficiency assessment, 262 used the Spanish application. PX 26. The three applicants who used the English application, but received an English skills notation, were Hispanic. *Id.* Candyce Gilmore, TNT's Vice President of Human Resources, testified that Webster only asked Hispanic applicants if they spoke English. Tr. at 381. The application of the basic English skills requirement and assessment on only Hispanic applicants negates TNT's nondiscriminatory explanations for the disparity. *See Honeywell*, Case No. 77-OFC-3, at 6 (employer's defense for

requiring prior experience rejected in part because the employment requirement was not applied to all applicants). TNT's exclusive focus on Hispanic applicants for its basic English proficiency requirement meets the very definition of disparate treatment – treating applicants of a protected class less favorably than non-minority applicants. *Teamsters*, 431 U.S. at 324, 355 n. 15. Even if TNT had made a “clear and specific showing” of nondiscriminatory reasons for rejecting the Hispanic applicants, its explanations would have been found pretextual given its targeted application of the basic English skills requirement. *See Segar*, 738 F.2d at 1268; *Honeywell*, Case No. 77-OFC-3, at 6.

### ***TNT's Defense to Disparate Impact – Business Necessity***

As OFCCP has established a prima facie case of disparate impact, the burden of persuasion and production now shift to TNT to prove that the minimal English proficiency requirement had a verifiable relationship to successful performance of the laborer position.<sup>62</sup> *See Griggs*, 401 U.S. at 431-32; *Segar*, 738 F.2d at 1267. TNT proffers three business concerns that necessitated requiring the possession of basic English skills: communication, safety, and promotability.

TNT argues that the inability of its laborers to communicate in English created a business hardship that could only be relieved by instituting the requirement of basic English skills. TNT estimates that 35% of its employees could not speak English in 2000. DX 5; PX 22; Tr. at 446-47. Concerns about the inability to communicate were voiced by TNT's team leaders in management meetings. Tr. at 534-35. According to TNT, communication between employees in English was required for the performance of job duties, receiving directions and guidance from supervisors, understanding required safety and policy training,<sup>63</sup> participation in production meetings, and discussion of daily production needs. PX 22; Tr. at 419-20.

However, the evidence in the record does not support a finding that communication issues required laborers to possess basic English skills, and TNT does not seriously argue that the communication between laborers and with supervisors must be in English. TNT's own witness, Gerber Gonzalez, testified that he spoke barely any English when he first began working for TNT as a laborer. Tr. at 602. He also testified that he was able to perform his duties as a laborer even though he spoke so little English. Tr. at 603-04. Although he started at TNT with barely any ability to communicate in English, he was able to work his way to higher positions. Tr. at 604-05. In addition, Gilmore admitted that the ability to speak English was not required for performing the duties of laborer. Tr. at 386-87; PX 20. She testified that the requirement was added to increase the number of people who were promotable to the operative positions. Tr. at 384. Furthermore, Kyle Gille, TNT's witness and a team member, testified that he currently has

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<sup>62</sup> At the hearing and in its post-hearing briefs, TNT appears to believe that OFCCP had an obligation to investigate its proffered defenses. Tr. at 484, 490-93; *Def. Post-Hearing Brief* at 17, 27; *Def. Reply Brief* at 2-3, 7. TNT goes so far as to argue that OFCCP is precluded from challenging TNT's promotability defense for requiring basic English proficiency because OFCCP did not investigate or dispute TNT's promotion practices during the investigation. *Def. Post-Hearing Brief* at 17. However, the case law is clear that the defendant bears the burden of proving its own defense in disparate impact cases. *Segar*, 738 F.2d at 1267.

<sup>63</sup> Notably, TNT's OSHA training was conducted in both Spanish and English. Tr. at 521.

non-English-speaking workers on his production line and that his line does not have any productivity problems. Tr. at 538-39.

TNT's argument that the ability to speak English was necessary for communication reasons also is weakened by evidence showing that other food-production companies in Green Bay did not require the ability to speak English. Robles testified that his work as a meat cutter for American Foods in Green Bay did not require the ability to speak English. Tr. at 27. Similarly, Carlos Guerrero's work at Packer Land, a butcher shop, did not necessitate basic English proficiency, and Concepcion Guerrero testified that her work at two Green Bay food-manufacturing companies, American Foods and Bay Valley Foods, did not require the ability to speak English. Tr. at 7, 43. Finally, TNT's AAP only mentions promotability as the reason behind the basic English skills requirement. JX 1.

TNT has not met its burden of proving job relatedness due to the lack of any concrete evidence demonstrating the relationship between communication in English and successful performance of laborer duties as well as the testimony showing that communication in English was not required.

TNT argues that the temporary requirement of minimal English proficiency was necessitated by safety concerns following two accidents. TNT argues that the accidents involved Hispanic, non-English speaking employees. PX 22. The first safety incident occurred in February of 1998 when an English-speaking, permanent TNT employee, Heather Rabideau, removed a safety guard on a running machine and subsequently injured her finger leading to its amputation. DX 3; Tr. at 416, 480. TNT claims that Rabideau called out to a non-English speaking employee to stop the machine. Tr. at 416. However, the accident report for the incident makes no reference to any involvement of a non-English-speaking employee in the incident. DX 3. The report states that the accident occurred because Rabideau failed to follow company policy. *Id.* In addition, according to TNT, the employee to whom Rabideau called out was a temporary employee. Tr. at 416. By TNT's own admission, its criteria did not apply to temporary employees, so a minimal English requirement at this time would not have had any effect on the outcome of Rabideau's mistake. *See* Tr. at 373-74, 379.

The second incident occurred when a non-English speaking employee, Maria Masis Recarte, sprayed an electrical panel with water after receiving a warning in English not to do so. DX 4; Tr. at 416- 19. Ms. Recarte's action could have lead to an electrical fire. DX 4. On the incident report, no mention is made of Ms. Recarte's lack of English causing the incident. DX 4. In addition, the incident report does not suggest requiring basic English skills of all employees.<sup>64</sup> The incident report suggested putting up bilingual warning signs around the electric panel. DX 4.

TNT has not offered sufficient evidence to establish a manifest relationship between safety concerns and the basic English skills requirement. Neither of the reports for the two incidents mentions a non-English speaking employee or cites inability to speak English as a

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<sup>64</sup> The safety incident with the electrical panel was not reported to OSHA because it was not of a severe enough nature requiring a report. Tr. at 178. Because the incident was not reported to OSHA, OFCCP could not verify it with anything outside of TNT's own documentation. Tr. at 178-79.

cause. DX 3, 4. TNT's AAP does not cite safety as a reason for the institution of the basic English skills requirement. JX 1. TNT has not established business necessity due to safety concerns.

TNT also argues that minimal English proficiency was required for laborer positions because TNT promoted to the operative position from its laborer pool. TNT contends that during the relevant period, the company was experiencing a dearth of promotable laborers because the higher operative positions required English proficiency and 35% of its workforce did not speak English. See JX 1; DX 5; PX 22; Tr. at 364-65, 446-47, 518-21, 526-28, 617. Prior experience on a production line was required for the operative positions, and nearly all of the operatives during the relevant time were promoted from the laborer positions. JX 1; Tr. at 364, 424, 428-33, 507-08.

The Uniform Guidelines contemplate situations where selection procedures are used to choose applicants who will meet requirements for higher positions when such promotion is likely. The applicable provision provides, in pertinent part:

If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level.

41 C.F.R. § 60-3.5(I). The Supreme Court addressed the question of using selection procedures in anticipation of filling higher positions, and endorsed the EEOC's Guidelines at 29 C.F.R. § 1607.5(I), which are nearly identical to the Uniform Guidelines. *Albemarle Paper Co.*, 422 U.S. at 434. Thus, the Uniform Guidelines approach is applicable to disparate impact cases in general as well as to cases in which the OFCCP is a party.

OFCCP does not question TNT's argument that English proficiency is required for production operative positions.<sup>65</sup> However, the provision is found not to apply in this case for two reasons. First, TNT did not have an up-or-out policy in which laborers would be terminated if they did not achieve promotion. Tr. at 163, 461, 537, 565-66. A laborer could remain a laborer if he/she so chose. *Id.* Second, while TNT has offered evidence showing operatives who were promoted from laborers, it did not offer evidence showing that a majority of laborers would become operatives within a reasonable time. See 41 C.F.R. § 60-3.5(I). The turnover rate at TNT during the relevant time was so high that few laborers remained long enough to be promoted. ST 6, 7; Tr. at 481-82. Therefore, TNT has not put forth sufficient evidence showing that the practice of promoting laborers to operatives was so established as to necessitate requiring basic English proficiency of the laborer applicants.

Taking into account the burden of rebutting a prima facie pattern or practice case, TNT has not established that the minimal English requirement had a "demonstrable relationship to successful performance" of the laborer position. *Griggs*, 401 U.S. 432; *Segar*, 738 F.2d at 1269-70; *Honeywell*, Case No. 77-OFC-3, at 5.

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<sup>65</sup> Operatives need to be able to read, write and understand English because TNT uses over 100 different crust formulas and around 600 labels. Tr. at 507. The labels, formulas, orders, instructions, and paperwork at TNT are all in English, with the exception of box labels for foreign customers. Tr. at 506, 509-10, 526-28, 608.

Moreover, as OFCCP has established adverse impact against Hispanic applicants under the Uniform Guidelines, the selection procedure causing the adverse impact, namely the assessment of basic English proficiency, is considered discriminatory because it was never validated. 41 C.F.R. § 60-3.3(A); Tr. at 388; PX 20. TNT's defenses discussed above concerning communication, safety, and promotability issues are not applicable when considering violation of the Uniform Guidelines because business necessity and job relatedness are proven through validation under the regulations. *See St. Regis Corp.*, Case No. 1978-OFCCP-1, at 100; *see also Johnson*, 491 F.2d at 1371-72 (failure to validate high school diploma requirement found to make requirement invalid); *Griffin*, 755 F.2d at 1528 (a presumption of discrimination may only be rebutted if procedures causing disparity are validated); *Davis*, 483 F.Supp. at 58-59 (defendant could not show selection process to be job related because it failed to validate).

### ***TNT's Defense to Violation of Uniform Guidelines – Atypical Pool***

TNT argues that it was not required to validate its selection procedure because its minority recruitment efforts resulted in an atypical pool of applicants, bringing into play an exception to adverse impact found in the Uniform Guidelines. The Uniform Guidelines contemplate situations where selection rate differences may not signify adverse impact:

Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

41 C.F.R. § 60-3.4. The defendant claiming an atypical pool bears the burden of showing that its recruitment efforts created a pool of unqualified applicants, thus explaining the disparity in selection rates.<sup>66</sup> *Davis*, 483 F.Supp. at 58; *County of Fairfax*, 629 F.2d at 940.

If this exception to adverse impact applies in this case, TNT would not have been required to validate its English proficiency evaluation procedure because no adverse impact would exist. TNT offered the following evidence of its specialized recruitment.<sup>67</sup> First, TNT

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<sup>66</sup> TNT appears to believe that it is OFCCP's burden to disprove that TNT's applicant pool was atypical. *Def. Reply Brief* at 2. TNT argues that OFCCP failed to investigate its recruitment efforts. *Id.* As with any defense to a prima facie showing of disparate impact, the defendant bears the burden of proving its applicant pool was atypical. *See Segar*, 738 F.2d at 1267. Requiring the defendant to show that the recruiting attracted unqualified applicants is logical because if the additional applicants' qualifications were similar to those of the defendant's usual applicants, no statistically significant disparity in selection rate should be found. *See County of Fairfax*, 629 F.2d at 940 ("We cannot assume that blacks and women attracted by an affirmative action plan are more likely to be unqualified than white males who apply.").

<sup>67</sup> In support of its argument of an atypical applicant pool, TNT offers evidence of recruitment efforts that cannot be found to be aimed at attracting minorities. Rather, these were general recruitment efforts that could attract both non-minority and minority applicants. The general recruitment programs included an employee referral program, the posting of a sign on the outside of the plant, maintaining a standing order with a temporary employment agency, use of calling cards, and advertisements in local newspapers and on television. JX 1; PX 22; Tr. at 456-60, 500-01. For example, TNT's employee referral program in which employees received a bonus for successful referrals applied to all TNT employees, not just to its Hispanic workforce. Tr. at 142, 457, 459-60. Therefore, the referral program was not a specialized recruitment aimed at increasing minority applications.

maintained a relationship with the Catholic Diocese of Green Bay and its refugee immigration and Hispanic services. Tr. at 352, 356-57, 686-87. Amparo Baudhuin, who worked for the Catholic Diocese of Green Bay, referred her clients to TNT. Tr. at 686-87. Second, TNT recruited by placing flyers in the local church where Spanish masses were held. Tr. at 687, 692. Third, TNT sent notification letters to community agencies that worked with the local minority population.<sup>68</sup> JX 1; PX 22. Fourth, TNT argues that its reputation in the community as an excellent employer drew increased numbers of Hispanic applicants through word-of-mouth. See Tr. at 687. TNT contends that the above recruitment efforts increased the percentage of Hispanic applicants in its applicant pool.

The evidence does not show that TNT's applicant pool was atypical for Green Bay during the relevant time. As TNT points out, the plants are located in a Hispanic area of Green Bay. Tr. at 458, 599-600, 688. Thus, many Hispanic applicants probably applied at TNT because it was close to their homes and because vacancies were announced by a sign placed on the outside of the plant, and not by special recruiting on TNT's part. Tr. at 458. TNT's Vice President of Human Resources, Candyce Gilmore, testified that the primary source of recruitment was by word-of-mouth. Tr. at 457. In addition, the Green Bay area experienced a large growth in the Hispanic population in the late 1990's. Tr. at 502, 684. TNT's President, Roger LeBreck, pointed to the two large meat packing companies in Green Bay for the reason the Hispanic population grew. Tr. at 502. The three rejected applicants who testified all related their employment with local food-manufacturing plants in Green Bay that had a majority of Hispanic employees. Tr. at 27, 42, 63-64. Accordingly, other food-manufacturing companies in Green Bay also had high percentages of Hispanic employees and applicants. See Tr. at 89, 141-42, 692.

More importantly, even if TNT had shown its applicant pool to be unusual for the Green Bay area, it would have to show that the specialized recruitment drew unqualified applicants. See *Davis*, 483 F.Supp. at 58; *County of Fairfax*, 629 F.2d at 940. TNT has offered no evidence showing that the increased numbers of Hispanic applicants were unqualified for the laborer positions.<sup>69</sup> TNT's arguments that the three rejected applicants who testified were unqualified are merely conjecture as Gilmore could not remember if she looked at Robles' application or whether Concepcion Guerrero received an interview. Tr. at 471, 475-76. The review revealed instances of minorities and non-minorities who were hired despite incomplete applications. Tr. at 95. Given that the position at issue is entry level, the qualifications required were not high or specialized. TNT has not shown that the applicants brought in through its recruitment efforts lacked the qualifications for its entry-level laborer position.

Like the court in *County of Fairfax*, *supra*, the undersigned cannot assume that the Hispanic applicants recruited by TNT's affirmative action programs were less qualified than other applicants – TNT must prove that they were unqualified. 629 F.2d at 940. As TNT has failed to do so, the exception for atypical applicant pool provided in the Uniform Guidelines does not apply. The Uniform Guidelines clearly specify that a selection procedure resulting in

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<sup>68</sup> TNT worked with the following local agencies: Refugee, Migration and Hispanic Services, Vision for Race Unity, United Migrant Opportunity Services, Family Services, Multicultural Center of Green Bay, Green Bay Hmong Women's Organization, and Southeast Asian Community Center. JX 1; PX 22.

<sup>69</sup> As discussed, *supra*, TNT's argument that the applicants' lack of basic English proficiency made them unqualified fails because the basic English skills requirement is the challenged business practice at issue.

adverse impact will be considered discriminatory unless it is validated according to the Uniform Guidelines' provisions or unless the defendant proves its pool to be atypical. 41 C.F.R. § 60-3.3(A), 3.4(D). Therefore, it is found that TNT violated the Uniform Guidelines by failing to validate a selection procedure that caused an adverse impact on Hispanic applicants.

### *Disparate Impact – Pretext*

Assuming, *arguendo*, that TNT had established the business necessity of its minimal English proficiency requirement, OFCCP would have the opportunity to demonstrate that alternative, non-discriminatory methods existed that would achieve TNT's business interests. *Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329. OFCCP would be able to meet this burden for the following reasons.

If communication, safety, and promotability were bona fide concerns, TNT could have achieved its need of minimally English-proficient employees by adopting and validating a test for English proficiency that was standard, measurable, and applicable to all applicants. *See Dothard*, 433 U.S. at 332. Instead, TNT used a subjective process of determining English proficiency and applied it exclusively to Hispanic applicants.<sup>70</sup> *See* Table 6, *supra*; PX 26. Furthermore, the evidence of Spanish and ESL classes held by or encouraged by TNT demonstrates the alternative means of achieving English proficient and/or bilingual employees without creating an adverse impact. *See* Tr. 449-50, 597-98. Through its own evidence, TNT has shown that it was possible to hire non-English speaking employees and provide them with the skills TNT argues were required for the operative positions. Tr. at 602-04. In addition, the use of translators was a non-discriminatory means of resolving any safety or communication concerns. Tr. at 420-21, 435-37, 505-06. Thus, OFCCP has demonstrated that alternative, non-discriminatory options were available to TNT to achieve its business interests. *See Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 329.

Any argument of the necessity of the English proficiency requirement is negated by the clear fact that not a single applicant whose English received a positive assessment was hired. PX 26. The only explanations offered for not hiring the English-speaking Hispanic applicants were retrospective conjectures about why the three testifying applicants may not have been qualified. Due to TNT's demonstrated need of laborers during the relevant time, there is no non-discriminatory explanation for failing to hire a single Hispanic applicant whose English was assessed positively.<sup>71</sup> *See* ST 6, 7; Tr. at 373, 503. What remains is the conclusion that the actual notations, positive or negative, did not matter. As Dr. Killingsworth explained, "the people whose English language ability was assessed, have a probability of zero of being hired." Tr. at 275. Because applicants who received positive notations were not hired and their rejection

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<sup>70</sup> As noted above, the one applicant who was classified as non-Hispanic, but who received a notation of English proficiency, had the surname Valenzuela. PX 26.

<sup>71</sup> The applications received during the relevant time and reviewed by Dr. Killingsworth show 22 applicants who received a clearly positive notation of English skills. PX 26. Such positive notations included "does speak English," "pretty good English," and "speaks English." *Id.* Both LeBreck and Gimore testified that proficiency in English was not required. Tr. at 365-66, 518-21. TNT was looking for laborers who could communicate on a very basic level. *Id.* Based on their testimony, the 24 applicants who received notations of "some English" also would be included in the pool of those who met TNT's minimal English requirement. *See* PX 26.

has not been explained adequately by non-discriminatory reasons, OFCCP has established by a preponderance of the evidence that the minimal English proficiency requirement was pretextual.

### **CONCLUSION**

For the above-stated reasons, it is found that OFCCP has shown by a preponderance of the evidence that TNT intentionally discriminated against Hispanic applicants during the relevant period from July to December of 2001. *See Burdine*, 450 U.S. at 252. TNT has failed to attack successfully the methodology or significance of OFCCP's statistical evidence showing a significant adverse impact against Hispanic applicants. TNT arguments that legitimate, non-discriminatory factors explain the statistical disparity are unsupported by evidence and insufficient to carry its burden in rebutting OFCCP's prima facie case of disparate treatment.

It is also found that TNT discriminated against Hispanic applicants in utilizing a facially-neutral selection criteria and procedure that resulted in an adverse impact. *See Teamsters*, 431 U.S. at 335. TNT has failed to establish that the minimal English requirement was demonstrably related to legitimate business necessities. *See Griggs*, 401 U.S. at 431-32. Furthermore, TNT has failed to show that its applicant pool was atypical due to recruitment efforts resulting in unqualified Hispanic applicants. TNT's failure to validate a selection procedure that resulted in adverse impact for Hispanic applicants violated the Uniform Guidelines and the Executive Order. *See* 41 C.F.R. § 60-3.3(A); *St. Regis Corp.*, Case No. 1978-OFCCP-1, at 114; *Johnson*, 491 F.2d at 1371.

Accordingly, it is recommended that Defendant TNT Crust be held to have discriminated against Hispanic applicants in hiring for entry-level laborer positions on the basis of their national origin.

Jurisdiction will be retained by the undersigned Administrative Law Judge for the remedy phase of the case. The parties shall confer and jointly submit a proposed schedule for the adjudication of damages within thirty days of receipt of this decision.

### **DECISION**

Defendant TNT Crust discriminated against Hispanic applicants in hiring for entry-level laborer positions within the meaning of and under coverage by Executive Order 11246.

**A**  
THOMAS M. BURKE  
Administrative Law Judge