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**Issue Date: 21 January 2010**

Case No.: 1997-OFC-16

In the Matter of:

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

v.

BANK OF AMERICA,  
Defendant

**RECOMMENDED DECISION AND ORDER**

On November 24, 1993, the Regional Director of the OFCCP in Atlanta notified the President and Chief Executive Officer of NationsBank in Charlotte, North Carolina that its Charlotte facility had been selected for compliance review under Executive Order No. 11246 (30 Fed. Reg. 12319), as amended by Executive Order No. 11375 (32 Fed. Reg. 14303), and Executive Order No. 12086 (43 Fed. Reg. 46501)(hereinafter “Executive Order 11246”), Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (2002), and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §§4211-4212 (2000). Together, these statutes and regulations require that government contractors and subcontractors (1) treat their employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran; and (2) take “affirmative action” to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran. The OFCCP conducts compliance reviews periodically to determine whether covered government contractors are in compliance with the affirmative action and nondiscrimination requirements of those laws and their implementing regulations. *See* 41 C.F.R. §60.

Initially, the Regional Director requested that the Defendant submit its Affirmative Action Program, along with other documentation. Without objection, NationsBank submitted the requested information, and OFCCP subsequently conducted an on-site review in April 1994. The OFCCP found that NationsBank had violated Executive Order 11246 by discriminating against minority applicants for entry level positions. On October 19, 1994, the OFCCP notified NationsBank of its finding.

Shortly thereafter, the OFCCP initiated additional compliance reviews at NationsBank's offices in Tampa, Florida and Columbia, South Carolina. NationsBank objected and refused to comply with the review of those facilities. In March 1995, NationsBank filed an action in the U.S. District Court for the Western District of North Carolina, seeking injunctive relief, alleging that the OFCCP's selection of the Tampa and Columbia Facilities violated the Fourth Amendment's protection against unreasonable searches. In February of 1997, NationsBank amended its complaint, adding an allegation that OFCCP's selection of the Charlotte facility also violated the Fourth Amendment. The District Court granted NationsBank's request for a preliminary injunction, thereby precluding OFCCP from bringing an enforcement action against NationsBank. The U.S. Court of Appeals for the Fourth Circuit subsequently granted summary judgment to OFCCP, thereby vacating the District Court's preliminary injunction, stating that NationsBank had to first exhaust its administrative remedies.

The OFCCP then filed an Administrative Complaint demanding that NationsBank comply with Executive Order 11246 or risk debarment. Newly-named Bank of America moved for summary decision, contending that OFCCP violated the Fourth Amendment when it selected and searched its Charlotte facility for compliance review.<sup>1</sup> On August 25, 2000, Administrative Law Judge Richard Huddleston issued a Recommended Decision granting the Bank's motion for summary decision. Judge Huddleston concluded that OFCCP's selection of the Charlotte facility was not based on an administrative plan containing neutral criteria, and was arbitrary and unconstitutional.

The OFCCP filed exceptions to the Recommended Decision with the Administrative Review Board (hereinafter "Board"). On March 31, 2003, the Board reversed Judge Huddleston's decision and remanded to the Office of Administrative Law Judges for further proceedings, concluding that the record presented genuine issues of material fact. *OFCCP, Department of Labor v. Bank of America*, No. 00-079 (Mar. 31, 2003). The case was subsequently assigned to me.

On August 11, 2004, I issued a Recommended Decision and Order on Cross-Motions for Summary Judgment, granting the OFCCP's Motion for Partial Summary Judgment, and denying the Bank's Motion for Summary Decision. In that Decision and Order, I found that as a matter of law the Bank's decision to provide OFCCP with the requested documents and access to its Charlotte facility was unequivocal and unconditional, and was uncontaminated by duress or coercion. As a result, the Bank's consent to the compliance review was voluntary under *Schneckloth v. Bustamonte*, 412 U.S. 18 (1973). Because the Bank consented, OFCCP's actions were removed from the requirements of the Fourth Amendment. Consequently, and as the Board held in its decision, any further consideration of whether OFCCP selected the Bank based on neutral criteria—i.e., the "reasonableness" inquiry under *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) and *United States v. Mississippi Power & Light Co.*, [NOPSI II], 638 F.2d 899 (5<sup>th</sup> Cir. 1981)—was unnecessary, and the OFCCP was entitled to partial summary judgment on the issue of the Bank's Fourth Amendment challenge to its selection for review.

The Bank filed Exceptions to my recommended order, and the OFCCP filed a motion to

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<sup>1</sup> Hereinafter, the Defendant will be referred to as "the Bank."

dismiss the interlocutory appeal. The Bank filed a response to the OFCCP's motion, as well as a motion requesting that I certify my recommended order for interlocutory appeal. On October 14, 2004, I issued an Order denying the Bank's request for certification for interlocutory appeal. On December 17, 2004, the Board rejected the Bank's interlocutory appeal, and remanded the case for adjudication.

The parties proceeded to conduct discovery, and the hearing was held on October 15, and 16, 2008, in Charlotte, North Carolina, and on March 3 and 5, 2009, in Washington, D.C.<sup>2</sup> At the hearing I admitted Plaintiff's Exhibits (PX) 1 through 17, Defendant's Exhibits (DX) 1 through 112, and 114, Joint Exhibits (JX) 1 through 29, and Administrative Law Judge Exhibits (ALJX) 1 through 8.<sup>3</sup>

At the hearing on October 15, 2008, the OFCCP filed a Motion to Amend the Administrative Complaint to specifically allege that the Bank failed to hire African-American applicants for certain entry level clerical and administrative positions based on their race. The original complaint alleged that the Bank failed to hire "minority applicants for certain entry level clerical and administrative positions based upon their race, in Charlotte, North Carolina." In addition, the OFCCP sought to clarify that the entry level positions at issue were "entry level teller, clerical and administrative positions, and certain positions in the lines of progression for these positions." On November 13, 2008, I issued an Order granting the OFCCP's Motion, finding that it was within the scope of the OFCCP's original complaint, and merely served to more specifically name the groups involved in the suit. The Bank argued that the OFCCP was trying to extend its review well beyond 1993, and that its claim was limited to the 1993/1994 compliance review, and could not extend beyond the 1994/1995 notices of violation or the 1997 Administrative Complaint. I found that allowing the OFCCP to amend the complaint would not make this argument moot, and that it would be addressed in the Decision and Order on the merits.<sup>4</sup>

On July 13, 2009, I issued an Order admitting Defendant's Exhibit 124 and Joint Exhibit 30. In addition, although Plaintiff's Exhibits 19 and 20 were not included in my Order, I specifically allowed Dr. Crawford, the OFCCP's expert, to revise his data supporting his Table 0 (PX 19), as well as his analysis (PX 20), after it became apparent at the March 2009 hearing that Dr. Haworth, the Bank's expert, had formed an opinion that Dr. Crawford's Table 0 contained errors, but the Bank had not disclosed this to the OFCCP. I have considered these exhibits as part of the record.

The OFCCP submitted an opening brief on September 22, 2009, and the Bank submitted an opening brief on September 21, 2009; the Plaintiff submitted a responsive brief on October 22, 2009, and the Bank submitted a responsive brief on October 21, 2009; both parties submitted reply briefs on November 5, 2009.

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<sup>2</sup> At the parties' request, the hearing was bifurcated, with the issue of liability to be decided first, and then, if necessary, the appropriate remedies.

<sup>3</sup> The Bank attached to its Opening Brief the Plaintiff's Answer to Defendant's Fourth Set of Interrogatories, designating it as "Exhibit A," and referring to it in the Brief as "Exhibit 29." However, as the Plaintiff has pointed out, there is no such exhibit in the Joint Exhibits, Defendant's Exhibits, or Plaintiff's Exhibits.

<sup>4</sup> The OFCCP filed its First Amended Administrative Complaint on October 16, 2008; the Bank filed its Answer on November 26, 2008.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>5</sup>**

Defendant, Bank of America, formerly NationsBank, is a government contractor under the terms of Executive Order 11246 and the implementing regulations.<sup>6</sup> As a result, the Bank is subject to periodic compliance reviews conducted by OFCCP. Since the late 1980's, the Department of Labor has implemented and developed a program of "corporate management reviews" to ensure compliance with Executive Order 11246.

On November 24, 1993, OFCCP issued a Notice of Compliance Review (hereinafter "scheduling letter") to Mr. Hugh McColl, President and CEO of the Bank, notifying him that the Charlotte facility, located at One NationsBank Plaza, had been selected for compliance review under Executive Order 11246 and the applicable regulations. The scheduling letter outlined the phases of the compliance review, and included a request that the Bank submit its Affirmative Action Program in order to begin the initial desk audit, which was designed to prepare for the onsite review. On or about November 24, 1993, Compliance Officer James Howard, OFCCP, was assigned to review the Bank for compliance with Executive Order 11246.

The review, which involved a corporate management review and a review of personnel activity, began with a desk audit review of the Bank's Affirmative Action plan and supporting documentation. The period of the review was from January 1, 1993 through December 31, 1993. In response to the scheduling letter, the Bank submitted the material requested by OFCCP without objection in late March, 1994.

After the desk audit, Mr. Howard, and Ms. Carol Gaudin, OFCCP Regional Director, Mr. Jerome Geathers, OFCCP Area Director, and Mr. Paul Deavers, OFCCP Assistant Area Director, performed a five day onsite review of the Bank. Following the onsite review and the analysis of applicant data, OFCCP issued a Notice of Violation on October 19, 1994, and a Revised Notice of Violation on June 29, 1995, charging that the Bank discriminated in its hiring practices against minorities in four EEO job groups in the administrative/clerical category: 5A1, 5A2, 5C, and 5F2. In 1993, job group 5A2 consisted of prime time tellers, part time tellers, and full time tellers. In 1993, job group 5F2 consisted of several clerical and administrative positions, including data entry operators, account clerks, and remittance processing specialists (or "lockbox" specialists).

The Bank denied that it had discriminated in its hiring practices, and notified the OFCCP on July 10, 1995, that it would not sign a proposed Conciliation Agreement submitted by OFCCP. On August 17, 1995, OFCCP sent the Bank a Notice to Show Cause, which allowed for an additional period of time to resolve the matter before referring it for enforcement. Although the OFCCP and the Bank attempted to resolve the matter from October 1994 to January 1996, they were not able to reach an agreement about the OFCCP's allegation that the

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<sup>5</sup> I have relied on the Stipulation of Facts submitted by the parties on September 10, 2008, as well as my findings in previous Orders, specifically, my August 11, 2004 Recommended Decision and Order on Cross Motions for Summary Judgment.

<sup>6</sup> Bank of America is a depository of government funds and an issuing and paying agent of U.S. Savings Bonds.

Bank discriminated in its hiring practices against minorities in 4 groups, including 5A2 and 5F2, in 1993.

The parties' Stipulation of Facts reflects that in calendar year 1993, Ms. Teresa Simmons and Ms. Donna Craddock, recruiters for the Bank, recruited individuals for many positions in several job groups, including the 5A2 and 5F2 job groups at the Bank's Charlotte headquarters and other Charlotte locations and banking centers. The positions included prime tellers, part time tellers, full time tellers, and clerical and administrative positions including data entry operators, account clerks, and remittance processing specialists, or lock box specialists.

On receipt of a requisition from a hiring manager, the recruiters advertised positions. When an application was hand-delivered, the recruiters' assistants had the applicant complete an EEO form, or "tear-off sheet," to identify the applicant's race and gender. The assistants then forwarded the applications to the recruiters, without the tear-off sheets. The assistants entered the information from the tear-off sheets on the applicant flow log.

The recruiters reviewed the applications, identified suitable candidates, performed initial interviews, and made sure that suitable candidates were administered any assessments or tests required for the positions for which the candidates expressed interest. If the recruiter concluded that the candidate was a good fit for the needs of the hiring manager, the applicant interviewed with the hiring manager, who made the decision as to whether to hire the applicant. If selected for hire, an applicant underwent a drug test.

Applicants who were disqualified for hire as a result of a credit check were coded as "RC" on the 1993 Applicant Flow Log by the recruiters' assistants. The assistants entered the code "RH" on the 1993 Applicant Flow Log for applicants disqualified by "hours not compatible" with the position.

For the years between 2002 and 2005, the positions that were in the 5A2 and 5F2 groups became part of EEO job groups 5A and 5B. During this time period, the Bank hiring managers initiated requisitions for positions they needed to fill, and submitted them to the recruiters.<sup>7</sup> A computer program assigned a number to each requisition. The Bank advertised the job openings in newspapers and on the Bank's website. Candidates could apply online for specific open position. They could also express interest in a position without applying for a particular job opening, by submitting a resume by mail or delivering it in person. The resume was scanned into the Bank's database, where it could remain without being associated with a particular job opening.

If an applicant applied for a specific position and passed the initial assessment, the application was associated with a specific requisition number, as ultimately reflected on the Applicant Flow Log. The recruiter conducted an eligibility screening, which was a set of questions to ensure that the applicant was eligible to be hired, specifically, whether the applicant could work in the United States without being sponsored. Eligible candidates completed an assessment of skills, if required by the position.

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<sup>7</sup> Neither Ms. Craddock nor Ms. Simmons was working as a recruiter during this time period.

After a candidate was associated with a particular position, the Bank asked the candidate to complete an applicant acknowledgement form, identifying race and gender. The eligible applicants who passed a skills assessment were then interviewed by a hiring manager. The hiring manager discussed the interviews with a recruiter; either the hiring manager or recruiter could check references before making an offer. The Bank did not perform a drug screen during the 2002 through 2005 time period.

### ***ISSUES***

Whether the OFCCP has established a *prima facie* case that the Bank intentionally discriminated against African-Americans when hiring for entry-level teller, clerical, and administrative positions in 1993 and 2002-2005.<sup>8</sup>

If so, whether the Bank has met its burden to rebut the OFCCP's statistical analysis by showing that it is inaccurate or inadequate, or by proving that statistical disparities resulted from legitimate nondiscriminatory factors.

### ***TESTIMONY***

#### **Theresa Simmons**

Ms. Simmons, who testified at the hearing, is currently a benefits product manager for the Bank. She started in 1991 as a mortgage loan processor, and in 1993, was working as a recruiter in Charlotte, North Carolina. Ms. Simmons is African American. Ms. Simmons and Ms. Donna Craddock were responsible for recruiting for the position in 5A through 5F in 1993. Ms. Simmons was primarily responsible for recruiting for tellers, while Ms. Craddock was responsible for recruiting for the jobs in 5F2. These positions did not all require the same skills or kinds of experience; they also involved different shifts.

According to Ms. Simmons, she received a job requisition from the manager; she reviewed it, and then placed an advertisement, typically in the Charlotte Observer on Wednesdays and Sundays. She also posted opportunities with the EEOC. Persons who were interested came in and completed an application. An administrative assistant tore off the attachment with EEO information, and gave her the application to review. Ms. Simmons testified that the first time she learned an applicant's race was when he or she came in for an interview. She never tried to deduce an applicant's race by school, residence addresses, organizations, or any other attribute. Nor did she try to steer African Americans or minorities to particular jobs. She reviewed the applications against the criteria in the requisition.

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<sup>8</sup> In its Pre-Hearing Submission, the Bank phrased the issue as involving a claim of discrimination against "all minority candidates" applying for these positions in 1993. However, in my November 13, 2008 Order, I allowed the OFCCP to amend the complaint to specifically allege that the Bank failed to hire African-American applicants for certain entry level clerical and administrative positions based upon their race. The original complaint alleged that the Bank failed to hire "minority applicants for certain entry level clerical and administrative positions based upon their race, in Charlotte, North Carolina." The Bank also argues that the claim of intentional discrimination against "all" minority candidates in the 2002-2005 time period is not properly before the Court.

Ms. Simmons testified that in reviewing the applications, she considered a number of factors, including previous employment and reasons for leaving, conviction of a crime, job hopping, and nepotism. Her next step after reviewing the applications was a credit check, and the scheduling of assessments such as ten-key tests. Within about ten days, she set up interviews, and then gave her recommendations to the hiring manager. Finally, an applicant had to undergo a drug test before hire.

Ms. Simmons stated that she reviewed the applicants' credit reports. If an applicant did not pass the credit check, he or she was given an opportunity to explain. Otherwise, they were disqualified from hire. She stated that she has never discriminated against an African American or minority candidate for any of the jobs for which she recruited, nor has Ms. Craddock.

Ms. Simmons acknowledged that the credit checks were discontinued at some point. She stated that there were no set hard and fast rules on how to use the disposition codes. Although she agreed that some of the colleges or universities on the applications, and the associations listed, provided an indication of race, she stated that she did not use that type of information to screen applicants, nor did Ms. Craddock.

Ms. Simmons testified by deposition on December 13, 2006 (JX 24). She testified that in 1993, she was responsible for hiring tellers, administrative assistants, and other support and clerical positions. Her training was on the job; she had previous experience before she worked for the Bank. She reviewed the requisitions, posted the job internally, ran ads, reviewed and screened applications, interviewed, and referred applicants to the manager.

If an applicant passed her screening, and then the credit check, they were asked to come in for an interview. If an applicant successfully completed the interview, she passed him or her to the manager. If an applicant was selected for hire by the manager, they underwent a drug test, and if they passed, they were made an offer. Typically, an applicant was only considered for one position at a time.

#### Donna Carpenter Craddock

Ms. Craddock testified by deposition on February 26, 2009 (DX 123). At that time, she worked as a recruiter at Wells Fargo Home Mortgage; she is Caucasian. Ms. Craddock began working for the Bank in 1987 as an administrative assistant in Charlotte. In 1992, she became a recruiter. In 1993-1994, Ms. Craddock was recruiting for a number of positions, including accounting clerks, auditors, document support specialists, funds management specialists, group leaders, loan documentation specialists, loan processors, support specialists, support associates, data entry operators, proof operators, and remittance processing specialists. These jobs were located in downtown Charlotte.

According to Ms. Craddock, the positions were not advertised or hired for by job group; they did not have the same type of duties, skills, or shifts. Ms. Craddock identified several requisitions, describing the duties, and the hours of the positions, as well as advertisements for the positions.

Ms. Craddock stated that a person who responded to an advertisement would come to the Bank, complete an application and give it to the receptionist, who sorted the applications by recruiter based on the job. The receptionist tore off the bottom sheet, which contained race information; these sheets were not sent to the recruiters. Ms. Craddock first learned the race of an applicant when he or she came to the office for an interview. She stated that she did not try to figure out an applicant's race by looking at his or her address, educational background, organizations he or she belonged to, or any other attribute reflected on the application. She did not try to steer African-American applicants to a particular kind of job or job title.

Once she received the applications, Ms. Craddock reviewed them to determine if the applicant should be called in for an interview. She reviewed when the applicant was available to work, salary, job history, and skill sets. She testified that someone who appeared to be a "job hopper" would not be an attractive candidate. Applicants were interviewed in her office, for about thirty minutes. At that time, any assessments, such as computer skills or ten-key skills, were performed. It was her understanding that credit checks and fingerprinting were done due to bonding requirements. Once a person was sent to the hiring manager, there was a drug test, and a credit check was done. The hiring manager made the final hiring decision.

According to Ms. Craddock, it was generally maybe ten days from the time she received a requisition, until selection of an applicant. She testified that a credit check was done after selection for interview. The credit report was generated by Kim, the coordinator, who sent it along with the application for her review. She stated that she did not use credit scores; she did not know whether they existed back in 1993.

Ms. Craddock was shown JX 9, a letter from Charles Speth to Jerome Geathers, dated March 30, 1995. She stated that it was consistent with her recollection of what she was looking for in the credit reports. Ms. Craddock stated that she applied the criteria consistently, regardless of the race of the applicant. If an applicant had problems with their credit, it did not automatically disqualify them for a job. The Bank notified such applicants of the problems; she had candidates contact her to talk about their credit reports. If an applicant failed the credit check and could not provide an adequate explanation, the application was declined, with a disposition code of RC.

Ms. Craddock stated that she tried to apply the disposition codes, including the RH code, fairly, regardless of the race of the applicant. She identified a number of applications, and indicated her understanding of the positions the applicants were seeking, and whether they would be a good fit for the position.

Ms. Craddock stated that she did not intentionally discriminate against any African-American or minority applicants. She stated that she was engaged to an African-American male.

Ms. Craddock acknowledged that there was no threshold score that had to be met for an applicant to pass the screening process; it was not an automatic disqualifier. An applicant had the opportunity to discuss and explain any issues that arose with a credit check, but there were no guidelines for the recruiters on how to handle these discussions. According to Ms. Craddock, the bonding requirement applied to all of the Bank's employees; there were no additional bonding or



insurance requirements for tellers. She did not recall if there was any change to the Bank's bonding requirements between December 1993 and April 1994.

Ms. Craddock was asked about the language on the application, stating that unless an applicant's background met surety company and Federal Deposit Insurance Corporation Standards, the Bank would not be able to offer employment. She did not recall what the FDIC standards were, although she knew it had something to do with bonding. She was not aware whether the standards required a certain type of credit history or score.

According to Ms. Craddock, there were no guidelines, or any type of training, on how to apply the disposition codes.

Ms. Craddock identified an application by Ms. Cassandra Medley (DX 2), and acknowledged that the notation "Also it may be considered for remittance process or processing," which is the lockbox position, was written by someone at the Bank. She agreed that Ms. Medley did not express an interest in this position. According to Ms. Craddock, some applicants were considered for a position for which they did not express an interest. She also stated that there was some interchangeable use of the disposition codes.

Tammy Rohr

Ms. Rohr, who testified at the hearing, is the event monitoring manager of the customer account access monitoring department; she has worked for the Bank for 16 years. Her first job was as a recruiting assistant, working with Ms. Simmons. She testified that the tear off sheet was removed before the application went to the recruiter, who first knew the race of the applicant at the interview.

Jodi Bryant

Ms. Bryant, who testified at the hearing, is the Senior Vice President of Workforce Compliance and Diversity. She started in 1978 as a financial auditor at Barnett, which merged with NationsBank in 1998. She testified that the tellers and other administrative personnel at Barnett were required to be bonded, which was a standard practice in the financial industry. According to Ms. Bryant, from 2002 through 2005, the Bank had 58 recruiters, approximately 30 percent of whom were minorities. There were no efforts to screen applicants by residence, school, or membership in organizations, or to steer candidates to particular positions.

Ms. Bryant also testified by deposition on December 13, 2006 (JX 28). She testified that in 2002, a person who wished to apply for a position would submit a resume, which was scanned into a database. There was also an online process for submitting resumes. According to Ms. Bryant, a person was considered an applicant once they met the basic qualifications for a particular open position, passed an assessment, if applicable, and moved on to the interview stage. A resume stayed in the database six months.

A manager who had an opening asked the recruiter to identify persons in the database with the required skills. A requisition could be for more than one person, called a hub

requisition. Many times, the recruiter contacted the persons to see if they were interested in applying for the open position. Ms. Bryant stated that if a person made it to the applicant flow log, they would have met the minimum basic qualifications for the position.

At this point, the hiring manager conducted interviews, and made the decision about whom to hire for the position. However, just being listed on the applicant flow log did not guarantee an interview; the manager might only want to see the top twenty candidates, which they could pick by obtaining information from the persons who applied, and asking questions so that he and the recruiter could rank the individuals.

Once the hiring manager made the hiring decision, a background check was done, as well as drug testing and reference checks.

Ms. Bryant testified that the overall hiring process was “pretty similar” from 2002 to 2005.

Penny Miller Dietz

Ms. Dietz testified by deposition on December 14, 2006 (JX 29). At that time, she worked for the Bank as a staff manager supporting campus recruiting efforts. She had worked with the Bank since August 1994. She worked as a recruiter for about three years, starting in about 2000. In her role as a recruiter, she was responsible for a group referred to as change management; she also recruited for a group called relationship management, the finance organization, and the quality and productivity organization. She occasionally recruited for nonexempt positions, including executive administrative assistants, or administrative assistant positions.

Ms. Dietz discussed a document setting out the core process for recruiting during the 2002-2005 period, and the steps of the hiring process. The first step was for a candidate to submit a resume by mail, internet, or walk-in. The resume was scanned into a database, where it could remain for years. The hiring manager initiated a requisition, which was submitted to the staffing division; this would be Ms. Dietz, as a recruiter. According to Ms. Dietz, more than one job could be filled from a single requisition; this was referred to as a “hub requisition,” which represented multiple openings. There was no way to tell, looking at the applicant flow logs, which ones were hub requisitions, and which were not. Once a requisition was filled, it was no longer open; requisitions could remain open for several years, until the right candidate was found.

According to Ms. Dietz, when the recruiter queried the database to find candidates with matching skills for a requisition, the length of time that the resume had been in the database did not have any impact on the selection process. A person who sent in a resume for a specific job that was posted would be considered for that job, but because the resume was scanned into the general database, the person could come up as a match for other opportunities. The recruiter established a pool of candidates with the appropriate skills, and then conducted a “hire eligibility screening,” which was a set of questions to ensure that the candidates were eligible to work in the country without sponsorship.

For specific jobs, such as the teller position, there were required assessments, which would be the first time that the recruiter would have the opportunity to find out the applicant's race and gender. Candidates who passed the assessment were interviewed by the hiring manager. The hiring manager then followed up with the recruiter to debrief on the interview. Although the recruiters asked the hiring manager to complete a debrief form, it was not always done. The next steps would be either to extend an offer, or communicate to the candidate that they were not a fit for the position. For a successful applicant, there were no further steps; the Bank did not use a drug screen. According to Ms. Dietz, references might be requested and checked at the end of the process, before an offer was extended, by the recruiter or the hiring manager; it was not a standard step. Once an offer was extended, a background check was done, to look for criminal history.

According to Ms. Dietz, a person who submitted a resume became an applicant when associated with a specific job requisition; they were then reported on the Bank's applicant flow log. She testified that if the job required assessments, the person was considered to be an applicant when he or she went through the assessment; if there was no assessment, the person was considered to be an applicant when he or she interviewed for a specific job. Ms. Dietz stated that, looking at the disposition codes on the applicant flow log, it was not possible to tell which applicants were interviewed. The applicant flow log reflects the date the resume went into the system (date applied), and the disposition date, or the date that the process ended for the applicant.

James E. Howard

Mr. Howard, who testified at the hearing, is a Compliance Officer at OFCCP, U.S. Department of Labor; he has worked there for 34 years. Mr. Howard audits federal contractors' affirmative action programs for adherence to the executive order. He examines affirmative action programs, and does personnel activity and compensation analysis regarding indications of disparities with respect to minorities and women. Mr. Howard has performed up to 600 compliance reviews; he does about 15 to 20 a year.

Mr. Howard was assigned to conduct a corporate management review on the Bank; the date of the Affirmative Action Plan was 1994, which would reflect personnel activity in 1993. Mr. Howard was the primary compliance officer.

According to Mr. Howard, the purpose of a corporate management review is to identify a glass ceiling for minorities and women. It involves an analysis of hiring, and review of applicant data, not unlike regular reviews of Affirmative Action Plans. The Bank submitted personnel activity data for 1993 involving hires, terminations, and promotions.

Mr. Howard testified that the Affirmative Action Plan is designed to identify areas of the workforce where minorities or women may not be represented, and a plan of action for improvement. After Mr. Howard reviews it, he enters the information on an impact ratio worksheet, which breaks the information down for all job groups. Referring to the Bank's Affirmative Action Plan, he stated that Column A showed the job groups, and Column B showed

the lowest percentage of applicants to hires, with respect to minorities and non-minorities. The impact ratio worksheet showed 27 job groups. He entered the information, and performed the calculations. On the chart, there were four groups circled, with standard deviations of two or more, which were an indicator that something other than chance was at work. These job groups were 5A1, 5A2, 5C, and 5F2.

Mr. Howard stated that he would normally request an explanation for the selection process; he would ask for a log, the applications of those hired and not hired, and a description of the selection process. The Bank provided an applicant flow log, and copies of applications for the hires and non-hires, as well as job descriptions. Mr. Howard interviewed recruiters and persons involved in the selection process, and some branch managers.

Mr. Howard stated that disposition codes were used on the applicant flow log to indicate the action taken with respect to each applicant. For example, the disposition code "RC" meant that an applicant was rejected because his or her credit rating did not meet a certain number.

Once the four areas with standard deviations of two or more were identified, Mr. Howard tried to identify areas in the application process where minorities were rejected at a higher rate; "RC" was one of these job codes. Mr. Howard received data from the Bank about the application of the credit check, but no specific information as to how it was applied to each applicant. He requested the name of the company that did the credit search, and asked what would be acceptable credit.

Mr. Howard stated that normally, if a criterion is shown to be a business necessity, it is accepted as a valid criterion. In his opinion, if this criterion was uniformly applied and bona fide, it would be acceptable; however, the Bank would need to show that persons with poor credit are a risk for performing the duties of the job. Mr. Howard did not try to determine if there was a business necessity for use of the credit check, or if it was a valid criterion. There was no indication in the information provided by the Bank that there was an effort to validate the results of the credit check.

According to Mr. Howard, in 1993, there were still pockets of predominantly white and black areas in Charlotte; the inner city was pretty much all black. He also stated that there were a number of historically black colleges in the area.

Mr. Howard testified that the information provided by the Bank after the impact ratio analysis did not change OFCCP's position on the statistical disparities in the four identified job groups. According to Mr. Howard, there were no issues with respect to the Bank's availability or utilization numbers. With respect to job group 5F2, the utilization numbers showed that the Bank hired more African American candidates than expected from the availability numbers. With respect to job group 5A2, in comparing utilization to availability numbers, there was a shortfall of 1.3.

Mr. Howard stated that he was onsite on more than one occasion, and the review took two to three weeks. In his interviews with recruiters, he was not concerned about discriminatory intent in the hiring process; he did not think the recruiters were using location information to

discriminate against minorities or African Americans. Nor was there any evidence that the recruiters used any other factors to try to discern the race of job applicants.

Mr. Howard identified a survey sent to the minority candidates from 1993 who were not hired. Four hundred and thirty three letters were sent, and there were one hundred ninety responses. Mr. Howard discussed the survey responses, as well as the survey feedback form, with a standard deviation analysis.

Mr. Howard identified the letter sent to the Bank, listing the violations and remedies (JX 11). Job groups 5A1 and 5A2 were no longer at issue.

Mr. Howard also discussed the applicant flow log (JX 13). He noted that it did not provide any information on the requisitions, or the location of the jobs. Based on the information obtained from the Bank during the compliance review, he was not able to determine the particular job an applicant was rejected for, or what requisitions were related to each applicant on the flow log. There was no way to determine if the Bank rejected an applicant for reasons related to location, and there were no specific job descriptions.

Mr. Howard identified a letter sent to the Bank on May 18, 1994 requesting specific information on job descriptions and qualification requirements for some of the job groups (JX 3). Mr. Howard stated that he sought information for five job groups, and only looked at the applicant flow log and applications, and interviewed recruiters and examined disposition codes for those groups. He had no basis to know whether the hiring process was the same for the other job groups. He did not recall receiving any information from the Bank about the results of its assessment of applicant skills, and thus had no way to assess the validity of the application of this assessment for the 1993 applicants.

According to Mr. Howard, there was no analysis performed based largely on the feedback from the survey, and the applicant's beliefs about the reasons for rejection were not significant; he could not tell if an applicant should be in the pool for analysis based on his or her beliefs about the reason for rejection.

Mr. Howard testified that he did the best he could with the information provided by the Bank. He had no way to determine if all rejected applicants were qualified, and a comparison of applications with particular jobs was not possible. He approached the analysis from a job groups perspective, viewing the disposition codes to determine which code caused the greatest impact on minority hiring.

Mr. Howard testified by deposition on March 1, 2007, on designation by the OFCCP to answer questions relating to the case (JX 23). Mr. Howard agreed that it was appropriate for the recruiters to consider an individual candidate's work experience, as well as salary history and computer skills, geographical location, and shift preferences, in making decisions about who to interview. He also stated that, although the Bank advised that it was normally nine to ten days from application to decision, in some cases the time period exceeded that time frame, and thus, he did not remove any applicants from the analysis pool for that reason. In addition, because the Bank in fact hired applicants who did not indicate a shift preference, he did not take any

candidates out of the pool on that basis. Mr. Howard concluded that the Bank did not uniformly apply the shift preferences requirement, so these applicants were kept in the pool.

Mr. Howard stated that there was no evidence that the Bank intentionally discriminated against any individual candidate in the 1993 hiring period.

Mr. Howard was asked about the application of the credit check in 1993, and he stated that if the Bank's credit check policy was bona fide, and was uniformly applied, applicants who were disqualified for credit problems should not be considered as part of the analysis.

Mr. Howard testified that a questionnaire was sent to minority applicants who were not hired in 1993, in part because there were conflicts with respect to the actions taken with some of the applicants, and the use of the disposition codes.

Mr. Howard discussed his preparation of the adverse impact ratio analysis.

#### Cassandra Medley Ingram

Ms. Ingram works for Wachovia Bank as a supervisor in the fraud area; she has been with Wachovia for ten years. At the hearing, she testified that in 1993, she had been in banking for thirteen years; she applied for four to six positions at the Bank. At the time, she was a high speed currency processor for the Federal Reserve, and she thought she would be a good fit for a teller position. She filled out an application, and mailed it with her resume. She did not hear from the Bank, and she followed up with the personnel department to let them know she was still interested. She was never called in for an interview or assessment.

Ms. Ingram received a questionnaire from OFCCP (PX 6). On her questionnaire, she stated that she was not interviewed for a job at the Bank. She reported that she specified on her application that she was willing to accept any other job they were willing to hire her for; she did not specify a salary, but stated that it was negotiable. She also stated that she called the Bank at least six to ten times for about two and a half months to let them know she was still interested in a job. She never received anything from the Bank telling her why she was not hired.

#### Bryant Vinson Jackson

Mr. Jackson has worked for three years for the U.S. Postal Service as a letter carrier. He testified at the hearing that in 1993, he went to the Bank's facility downtown to complete an application for a position as a data entry clerk. He had heard from a friend that the Bank was hiring. At the time, Mr. Jackson had worked for three years with the Navy in the medical field; he was qualified to use computers, and to input information. He did not hear back from the Bank, and was not called in for an interview.

Mr. Jackson completed a questionnaire from OFCCP (PX 5). On it, he stated that he would have accepted the entry level wage rate, or a wage rate lower than what was on his application. He indicated that he was not required to state a salary preference in filling out his application. Mr. Jackson contacted the Bank three times to inform them that he was still

interested in the job, and in fact, although he had relocated to South Carolina, he was still interested in job opportunities with the Bank.

Cathy Gilchrist

Ms. Gilchrist is a registered nurse. She testified at the hearing that she applied for a position as a weekend lock box operator with the Bank in 1993. At the time, she planned to be in nursing school. She had worked with NationsBank a few years earlier as a lock box operator, and had previous jobs with ten key data entry requirements. Ms. Gilchrist received a call to come in for an interview, and believed that she had the job. She testified that she did not say anything during the interview to indicate that she was not interested in weekend hours. She received a letter notifying her that she had been rejected for the position because of her credit history; she did not remember being offered the opportunity to explain her credit history.

Attached to Ms. Gilchrist's application is a form titled "Departmental Interview," with comments on her application, including "not sure about weekend hours," and a notation that she interviewed with Michael Summer (PX 14).

David L. Crawford, Ph.D.

April 16, 2008 Sworn Statement

Dr. Crawford provided a written report in October 2008 (PX 1), which was superseded by a report dated January 30, 2009, in which he incorporated and updated his previous report (PX 15). Dr. Crawford is a labor economist, who received his B.A. in economics from the University of North Carolina in 1971, and his M.S. and Ph.D. degrees in economics from the University of Wisconsin in 1975 and 1979. Dr. Crawford is currently the President and Founder of Econsult Corporation, which provides economic and statistical consulting for private firms and government agencies. He is also an Adjunct Professor of Management at The Wharton School, University of Pennsylvania. He has held numerous positions on government commissions, and has served as a faculty member at the University of Pennsylvania and Rutgers University. Dr. Crawford attached a list of his presentations and workshop papers.

Dr. Crawford described labor economics as a sub-discipline of economics that focuses on labor markets, including the demand for labor, the supply of labor, behavior of employers and employees, employment, earnings, employment discrimination, labor unions, and human capital. His professional qualifications and curriculum vitae are set out in his sworn statement.

Dr. Crawford was retained by the U.S. Department of Labor to examine job applicant data provided by the Bank, to determine whether the Bank's 1993 selections for job groups 5A2 and 5F2 were race-neutral, and whether the Bank's 2002-2005 selections for job group 5A were race-neutral.

In his Summary, Dr. Crawford stated that his analyses of the 1993 data provided by the Bank showed that its selections of applicants for positions in job groups 5A2 and 5F2 were not race-neutral. He reported that, based on the racial compositions of the two pools of applicants,

race-neutral hiring would have yielded approximately 148 African-Americans, 52 more than were actually hired. When measured in standard deviations, the shortfall was 6.9. According to Dr. Crawford, the statistical significance of the shortfall implies that it is extremely unlikely to have occurred by chance.

Dr. Crawford stated that when the hiring process was broken into two steps, the selections of applicants for interviews, and the selections of interviewees for job offers, the Bank's selection of applicants for interview also were not race-neutral. Based on the racial composition of the two pools of applicants, race neutral selection would have yielded approximately 294 African-Americans, 60 more than were actually selected for interview. When measured in standard deviations, the shortfall was 6.1; the statistical significance of this shortfall implies that it is extremely unlikely to have occurred by chance.

In the second step of this two-step hiring process, Dr. Crawford determined that the Bank's selections for positions in job groups 5A2 and 5F2 from the pool of interviewees were not race-neutral. Based on the racial composition of the two pools of interviewees, race neutral selection would have yielded approximately 105 African-Americans, 18 more than were actually offered in jobs. The shortfall measured in standard deviations was 3.4, and the statistical significance of the shortfall implies that it is very unlikely to have occurred by chance.

Dr. Crawford indicated that although it was possible to conduct alternative analyses that incorporate controls for the position being filled, it may not be appropriate, because the Bank had some control over the assignment of the applicants to positions. But even so, after controlling for position, the Bank's selections among the 1993 applicants for positions in job groups 5A2 and 5F2 were still not race-neutral. Dr. Crawford reported that, based on the racial compositions of the 41 pools of applicants, race-neutral hiring would have yielded approximately 127 African-Americans, 29 more than were actually hired. This shortfall was 4.3 measured in standard deviations, and the statistical significance of the shortfall implies that it is extremely unlikely to have occurred by chance.

In addition, after breaking this alternative analysis of the hiring process into two steps, selections of applicants for interviews and selections of interviewees for job offers, after controlling for position, the Bank's selections among the 1993 applicants for interview were still not race-neutral. Based on the racial compositions of the 38 pools of applicants, race-neutral hiring would have yielded approximately 277 African-Americans, 43 more than were actually interviewed. This shortfall was 4.5 measured in standard deviations, and the statistical significance implies that it is extremely unlikely to have occurred by chance.

Dr. Crawford reported that, in the second step of the two-step hiring process, based on the racial compositions of the 29 pools of interviewees, race-neutral hiring would have yielded approximately 97 African-Americans, 10 more than were actually selected, which measured in standard deviations, was 2.1, a shortfall that would have occurred by chance with a probability of 1.76%. Dr. Crawford stated that this result did not diminish the very strong significance of the overall result, that after controlling for position, the Bank's selections among 1993 applicants for positions in job groups 5A2 and 5F2 were not race-neutral. It was only in the last step of the process that the shortfall came close to the two standard deviation benchmark, and the statistical



significance of the overall shortfall of offers from the pools of applicants implies that it is extremely unlikely to have occurred by chance.

After analyzing the data for 2002-2005, Dr. Crawford concluded that the Bank's selections among the applicants for positions in job group 5A were not race-neutral. Based on the racial compositions of the four pools of applicants, defined by year, race-neutral hiring would have yielded approximately 171 African-Americans, 24 more than were actually hired. The shortfall was 4.0 measured in standard deviations, and the statistical significance implies that it is extremely unlikely to have occurred by chance.

Dr. Crawford stated that, after controlling for position, the Bank's selections for positions in job group 5A were still not race-neutral, and that, based on the racial compositions of the 16 pools of applicants, defined by year and position, race-neutral hiring would have yielded approximately 171 African-Americans, 24 more than were actually hired. This shortfall was 4.1 measured in standard deviations. According to Dr. Crawford, this shortfall was not affected by the addition of controls for position. The statistical significance of the shortfall implies that it is extremely unlikely to have occurred by chance.

Dr. Crawford described the data provided by the Bank on which he based his analyses. He was provided with applicant logs for 1993, and for 2002-2005; he understood that the Bank did not retain applicant data for the years 1994-2001. Dr. Crawford stated that the Bank retained some actual applications from 1993, but the Bank provided so few applications of successful applicants that he was unable to use data from the applications to analyze hiring decisions. After his October 10, 2008 testimony, Dr. Crawford received additional applications that allowed him to explore position and schedule preferences as reported by applicants or described by the Bank's employees.

Dr. Crawford stated that the 1993 applicant flow log tracked applicants for positions in job groups 5A1, 5A2, 5B, 5C, 5D0, and 5F2. He focused on job groups 5A2 and 5F2, and excluded applicants for positions in the other job groups from his analyses. There were 2,331 Caucasian and African-American applicants for positions in the 5A2 and 5F2 job groups; he excluded 21 applicants who applied in 1992.

Dr. Crawford also excluded all applicants with disposition codes "RD," which refers to applicants rejected after a drug test, and "RR," which refers to applicants rejected after a reference check, from his analyses. The sample included 2,310 Caucasian and African-American applicants, 269 of whom were offered positions with BOA.

Dr. Crawford did not exclude applicants with the "RC" code, meaning that they were rejected after a credit check, for a number of reasons. He stated that the percentage of applicants who were given the RC code was significantly higher for African-Americans than for Caucasians, 11.5% versus 6.6%, a difference of 4.1 standard deviations. The Bank did not provide any study of the validity of credit ratings as a predictor of job performance at the Bank, and its responses to interrogatories indicated that it had not investigated the issue. According to Dr. Crawford, the review of credit reports, as described in the record, was highly subjective. There was no surviving data that would allow one to determine if the screening of credit reports

was done uniformly across racial groups.

According to Dr. Crawford, there is disagreement in the research community as to whether credit scores are biased against minorities, that is, whether minorities and non-minorities with the same objective characteristics are assigned the same credit scores. Thus, even if the reports were screened uniformly, the use of the reports may have injected a bias against African-Americans into the hiring process.

Finally, Dr. Crawford noted that in 1994, the Bank stopped using applicants' credit reports in the employment process.

Dr. Crawford did not exclude applicants with the RH code, signifying that the applicant's requested hours were incompatible with the position. He noted that the percentage of applicants who were given the RH code was significantly higher for African-Americans than for Caucasians, 29.3% versus 6.4%, which was a difference of 14.7 standard deviations. In addition, a questionnaire completed by Ms. Donna Craddock, a 1993 Bank recruiter, revealed that the RH code was not used consistently.

According to Dr. Crawford, further evidence of inconsistent use of this code came from his recent examination of the full-time/part-time and shift preferences on the available applications for 5A2 and 5F2 positions. He identified five groups of applicants within the 5A2 group: those who mentioned an interest in full-time work, those who mentioned an interest in part-time work, those who mentioned an interest in first shift, those who mentioned an interest in second shift, and those who mentioned an interest in third shift. Some applicants were in more than one group, such as an applicant who mentioned interest in both full-time and part-time work. Dr. Crawford stated that in every one of these five interest groups, African-Americans were more likely to be assigned the RH code, as reflected in his Table 0. Dr. Crawford repeated his analysis with the 5F2 group, and obtained the same result. He stated that the RH code did not appear to be consistently applied across racial groups.

Dr. Crawford noted that Dr. Haworth, the Bank's expert, argued that applicants with the RH code should be excluded from the analysis of the Bank's hiring decisions. He stated that it was important to understand that this exclusion is tantamount to an assumption that the RH code was applied in a uniform way that did not put African-American applicants at a disadvantage. Dr. Haworth felt it was appropriate to exclude these applicants because she believed that there was no evidence that the RH code was applied in a non-uniform way. Thus, she accepted the testimony of Bank personnel that the RH code was used in a uniform way, and testified that "If when you control for the RH and it does not show a large change in the percent African-American that is adverse to them then there is no reason to believe that they would have been disproportionately rejected for their hours schedule." According to Dr. Crawford, this claim is simply wrong. Thus, as he reported, the percentage of applicants given the RH code was significantly higher for African-Americans than for Caucasians. Excluding applicants with the RH code lowers the African-American percentage to 47.6%. While Dr. Haworth may not think that is a large difference, when applied to 288 hires, the difference implies roughly a 19 person reduction in the number of expected black hires.

Thus, Dr. Crawford did not see any basis for the assumption that the RH code was uniformly applied in a race-neutral fashion. In his opinion as a labor economist, it was not appropriate to exclude applicants with the RH code from the analysis of the hiring decisions of the Bank, so he did not do so.

Dr. Crawford described the methodological framework of his analysis of the 1993 data. He used a multiple pools exact test, which allowed him to examine the extent to which the pattern of selections from several pools was consistent with race-neutral selections from those pools. Dr. Crawford explained that selections were race-neutral if they were made from different race groups in approximately equal proportions, for example if the proportion of African-Americans selected is approximately equal to the proportion of Caucasians selected.

Dr. Crawford stated that in the 1993 applicant flow log data, there were two groups of applicants: those considered for positions in the 5A2 group, and those considered for positions in the 5F2 group. Based on the numbers of African-American and Caucasian applicants in each group, and the number of offers made to each group, Dr. Crawford was able to compute the number of African-Americans in each group who would have been expected to receive offers if selections were race-neutral. He indicated that, by summing the expectations across the two groups, he could compute the number of African-Americans who would have been expected to receive offers, in the two groups combined, if selections were race-neutral.

Dr. Crawford stated that it was important to note that the actual number of African-Americans offered positions was very unlikely to exactly match the expected number, and just because the actual number was lower than the expected number, one could not jump to the conclusion that there was a statistically significant departure from race-neutrality. The important question was whether the pattern of differences was such that it would have been unlikely to occur by chance if selections were actually race-neutral. In the language of statistics, the question of statistical significance is whether the difference between the actual and expected numbers of African-Americans selected is large enough to conclude that the difference did not occur by chance.

Dr. Crawford discussed the frequently used benchmarks for statistical significance in discrimination litigation. He also discussed the multiple pools exact test, which he described as a widely accepted method for computing statistical significance, or the probability that a pattern of selections from pools could have occurred by chance. He stated that, unlike tests for single groups, the multiple pools exact test combines information for multiple groups or pools to test for overall bias across several groups of applicants, while taking account of the composition of each group and the number of actual selections from each group.

According to Dr. Crawford, the most important feature of the multiple pools exact test is that it allows one to test for a pattern of departures from race-neutrality across groups. He stated that tests based on single groups can be misleading, because they are based on fewer observations, and thus have less power, or ability to detect actual departures from race-neutrality. Dr. Crawford stated that before the development of the multiple pools exact test, it was possible to suppress the statistical significance of departures from neutrality by disaggregation into multiple groups. With the multiple pools test, when disaggregation is appropriate, it need not

suppress statistical significance, because it takes patterns across groups into account.

As part of his analysis of the 1993 data, Dr. Crawford prepared Table 1a, which displays the expected number of African-Americans who would have been selected for each job group if the selections from each group were race-neutral, which is approximately 148; only 98 African-Americans were actually selected. Applying a multiple pools exact test to the data in this table, Dr. Crawford determined that the departure from race-neutrality was statistically significant, and at 6.9 standard deviations, was well beyond the standards typically applied by the courts in employment litigation.

Dr. Crawford also conducted a single pool test for job groups 5A2 and 5F2. The departure from race-neutrality was statistically significant for both groups, with 4.0 standard deviations for group 5A2, and 5.5 standard deviations for group 5F2.

In an effort to further explore the racial pattern of selections, Dr. Crawford broke the selection process into two steps, the decisions to interview applicants, as shown on Table 1b, and the decisions to offer positions to interviewees, as shown on Table 1c. Applying a multiple pools exact test to the data in Table 1b, he determined that the departure from race-neutrality was statistically significant, and equivalent to a difference of approximately 6.1 standard deviations. Applying the multiple pools exact test to the data in Table 1c, Dr. Crawford determined that the departure from race-neutrality was statistically significant, at a difference of approximately 3.4 standard deviations.

According to Dr. Crawford, it was not clear that one should analyze the data by disaggregating by job code. In some cases, applicants did not apply for particular positions, and the Bank determined the position for which it would consider those applicants. Hypothetically, an employer could allocate certain types of employees to job codes for which few hires were anticipated. He felt that Dr. Haworth's repeated insistence that any analysis of hiring by the Bank must control for the job for which each applicant was considered reflected her unfounded assumption that all decisions made by the recruiters were race-neutral.

Dr. Crawford also noted that in some case persons were considered for more than one job, so the sorting by job code may not be completely meaningful. Finally, Dr. Crawford characterized as "demonstrably false" Dr. Haworth's claim that 72.5% of the hired employees for whom there were applications were hired into the job to which they applied and 93.5% of applicants for whom there were applications indicated a job preference on their applications. He noted that the "preferences" of many applicants were described in handwriting that was clearly different from that on the rest of the application, and many so-called preferences use language very unlikely to be used by the applicants themselves. It was reasonable to deduce that many applicants left this field blank, or responded in general terms, and that many specific entries were made by the recruiters or other Bank personnel. Clearly the entries in the applications could not be viewed as reports of applicants' preferences, and Dr. Haworth's claims that a substantial majority of successful applicants were hired into jobs for which they applied must be dismissed.

Dr. Crawford set out the numbers of Caucasian and African-American applicants for positions in job groups 5A2 and 5F2 in his Table 2a. Applying a multiple pools exact test, he

determined that the departure from race-neutrality was statistically significant at 4.3 standard deviations.

Dr. Crawford's Table 2b sets out the numbers of Caucasian and African-American applicants for positions in each of the 38 job codes shown in Table 2a, and the numbers of Caucasians and African-Americans who were interviewed. Applying a multiple pools exact test to this data, he determined that the departure from race-neutrality was statistically significant, at 4.5 standard deviations.

Table 2c contains the numbers of Caucasians and African-Americans who were interviewed, and the number of interviewees who were offered positions. Applying a multiple pools exact test to this data, Dr. Crawford determined that the departure from race-neutrality was statistically significant, at 2.1 standard deviations, slightly beyond the standard typically applied by the courts in employment litigation. He felt that the result did not diminish the very strong significance of the overall result that, after controlling for position, the Bank's selections among the 1993 applicants for positions in job groups 5A2 and 5F2 were not race-neutral. It was only in the last step of the process that the shortfall came close to the two standard deviation benchmark, and the overall process from application to selection fell well short of race-neutrality.

Dr. Crawford reported that the 2002-2005 applicant logs reflected 2,370 applicants, for positions in job groups 5A and 5B. He excluded all applicants for positions in job group 5B, because it was his understanding that it did not contain entry-level positions. He also excluded all applicants with missing disposition codes, and with certain disposition codes. The sample selected for analysis totaled 731 applicants.

Dr. Crawford set out his data on Table 3, which reflects that the expected numbers of African-Americans who would have been selected if the selections from each group were race-neutral was 171 over the four year period; only 147 African-Americans were actually selected. Applying a multiple pools exact test to this data, he determined that the departure from race-neutrality, controlling for year, was statistically significant, with a standard deviation of 4.0.

In order to determine the impact of disaggregating the analysis into position, Dr. Crawford conducted another multiple pools exact test after sorting the applicants into 16 groups defined by the year of the application and the position for which the applicant was considered. He determined that departure from race-neutrality was statistically significant, at 4.1 standard deviations.

#### August 27, 2008 Deposition Testimony

Dr. Crawford testified by deposition on August 27, 2008 (DX 110). He described his understanding of the recruitment process, stating that there was some ambiguity about when the recruiters became aware of the race of the applicants during the 1993 time period. There was some suggestion, particularly in Dr. Haworth's report, that the tear sheet was not always removed from the application before it was reviewed by the recruiter.

With respect to the hours criteria, there was information that applicants who indicated they wanted part time or full time were excluded from part time opportunities, but included for full time opportunities. There was also an indication from at least one of the recruiters that some people who were excluded for incompatible hours were not recorded as excluded for that reason, but as no position available.

In performing his analysis, Dr. Crawford removed applications with the RR and the RD codes from the data pool. It was his judgment that these codes, for failed drug test and negative reference checks, clearly represented a legitimate reason to exclude an applicant from consideration. With respect to the RC code, it was his understanding that if the recruiter made a judgment that the credit report showed problems, the applicant would be excluded from further consideration. He had seen no evidence that a credit check was a valid predictor of job success in the jobs at the Bank. He did know that African Americans were disproportionately excluded because of credit checks.

After reviewing criticisms by Dr. Haworth, Dr. Crawford looked at the race distribution of different disposition codes, and the proportion of African Americans excluded on the basis of those codes. He stated that African American applicants were disqualified on the basis of schedule preferences on a disproportionate basis; the proportion of African Americans excluded was much higher than the percentage of African American applications.

Dr. Crawford stated that it was possible, but unlikely, that the credit and hours codes would explain the shortfalls, noting that after Dr. Haworth took those codes out, she still found shortfalls in one of the categories. He suspected that if they were removed from his analysis, they would not completely explain the shortfalls.

According to Dr. Crawford, he did not have any information that the recruiters used the credit information in a biased way. He saw some evidence of subjectivity in the use of that data that could create an opportunity for bias to be inserted. He noted that at least one of the recruiters talked vaguely about significant unpaid debts, without any notion of what was significant, while in the rest of the questionnaire they were much more precise about numeric thresholds. There appeared to be some subjectivity.

Dr. Crawford stated that there was evidence that the hours disposition code was used inconsistently, with one of the recruiters indicating that the disposition code “no position available” was viewed as substitutable for many other codes, including the hours codes. There was a question in his mind as to whether that code was recorded on a consistent basis. The hours mismatch code was disproportionately used for African American applicants.

Dr. Crawford testified that separating applications and requisitions into separate pools based on timing may not matter to the results at all, if the race mix of applicants is fairly uniform over the year. If one had very specific policies that were applied uniformly, one could break up the analysis into smaller pools. Dr. Haworth’s analysis suggested that the race mix of applicants was probably fairly uniform over the year. He did not believe that Dr. Haworth defined meaningful periods, because she took applications from seven days, stating that it was the median number of days observed in the data. According to Dr. Crawford, that means that more

than 50% of the applications are more than seven days away, so it is inappropriate to truncate the seven days as Dr. Haworth did.

### Hearing Testimony

Dr. Crawford also testified at the hearing on March 3 and 5, 2009. He testified that with respect to the 1993 hiring process, his principal source of data was the applicant log; he also reviewed the deposition testimony of Ms. Craddock and Ms. Simmons. According to Dr. Crawford, he had no basis on which to accept or reject their testimony, but he did not think it was necessarily true that they did not know the race of a candidate when they received an application. He noted that Dr. Haworth's report suggested that in some cases, the tear off sheet may have been on the application until it was reviewed by the recruiter, and there may have been opportunities to obtain information about race from the application.

Dr. Crawford never saw any documentation of what was necessary to pass the credit check, which was part of the screening process. If a recruiter determined that an applicant did not satisfy the credit check, that applicant did not pass through the process.

Dr. Crawford explained that he performed his analysis by job group, noting that in some cases, the applicant did not apply for a particular position, and the Bank decided the position for which it would consider the applicant. Hypothetically, the Bank could allocate certain types of employees to job codes for which few hires were anticipated; in other words, there could have been steering, although Dr. Crawford did not claim that there actually was. There were numerous instances where a person was considered for a job for which they did not indicate interest, and some persons were considered for more than one job.

Dr. Crawford testified that Dr. Haworth's claim that 72.5% of the hired employees indicated a job preference on the application was "demonstrably false." He stated that on many occasions, it appeared that what the applicant put on the application was overwritten by another person, and was not an expression of the applicant's preference. The job an applicant was considered for could not be matched to something the applicant put on the application.

Dr. Crawford stated that, by Dr. Haworth's notion of a match, her conclusion that at least 72.5% of the time there was a match was supported. But he felt that it was inappropriate to say that people were given their preferences in job considerations. He noted that Dr. Haworth treated applications with "considered for" written on the application as if these were preferences indicated by the applicant, while he did not count those applications. In many cases, information on the application was clearly not written by the applicant, and what was "demonstrably false" was that this information indicated the preference of the applicant.

Dr. Crawford testified that there was no evidence that Ms. Craddock or Ms. Simmons used addresses, or attendance at historically black colleges, to identify or screen applicants, and he never said that they did. What he said was that it was possible to draw inferences about race from this information

According to Dr. Crawford, the job title was a potentially tainted variable in this case,

and it was not appropriate to control for it in the analysis. Nor did his analysis control for timing, that is, when the application was actually received and when the job might be available. He did not exclude applicants who were disqualified for the credit check, or for hours and shift preference.

Dr. Crawford performed an analysis controlling for timing. It was necessary to make a judgment about how to analyze the data, and Dr. Crawford felt that using one week intervals was too small a time period. He used a month plus a week approach only because Dr. Haworth aggregated up to months plus a week; he stated that there was no perfect way to view the data.

According to Dr. Crawford, it is not necessarily the labor economist's goal to more closely resemble the process actually followed by the recruiters.

Dr. Crawford testified that, accepting Dr. Haworth's assumptions, two things are incorrect in her analysis. First, she tested the two individual groups, 5A2 and 5F2, separately. Second, she did not explore what she explored in an earlier draft, a third set of lines on her graph that showed the entire process from application to offer. The data suggest that if one looked at application to offer, there would be a fairly strong result.

Dr. Crawford stated that the credit check should not be used in the analysis because, among other reasons, it was subjectively applied. He did not see any specifications or criteria to be used in doing the credit check, or any documentary evidence or testimony about the criteria for review of the credit check. He also excluded the hours criteria, because it was not applied consistently. He pointed to Ms. Craddock's statement, that if an applicant applied for a position, and the hours and salary were not acceptable, she might code the application as "no position available."

In 2002-2005, the recruiting and selection process was different, with a high degree of automation and computer selection; there were different jobs and disposition codes. Dr. Crawford analyzed a single job group, 5A, testing whether there was a statistically significant departure from race neutrality. Although it was possible to attach a particular candidate to a particular requisition, as Dr. Haworth did, he did not think it was appropriate to control for requisition. Nevertheless, he performed such an analysis, although he did not put it in a table; the shortfall of African Americans was reduced.

In analyzing the 1993 data, Dr. Crawford sorted the data from the applicant log into two job groups, 5A2 and 5F2. He computed the number of African American hires expected if the hiring from the group of applicants in the job group had been race neutral, and then computed the difference between the expected and actual number of African American hires. He then applied a multiple pools exact test, which determines the probability that one would observe a total shortfall across the two groups as large as was actually observed. The resulting percentage, which was very small, reflected that it was extremely unlikely that there would have been shortfalls of the actual magnitude that resulted from race neutral decisions. He converted that probability to a standard deviation, which is the form preferred by the courts.

According to Dr. Crawford, the multiple pools exact test is the best available test to



answer the question of whether the pattern of hiring across the two job groups was consistent with race neutral decisions. The test looks at the pattern of shortfalls and tests the hypothesis that they could have been generated by race neutral choices.

Dr. Haworth did not analyze the data in the same way for 1993, although she used a multiple pools test in other tables. For 1993, Dr. Crawford put the data into two groups, and performed a multiple pools test across both groups. Dr. Haworth looked at the two groups individually, but did not test the pattern across the two groups. In his Table 2 series, Dr. Crawford added controls for job title. Although he felt this was not appropriate, he anticipated that it would be a disputed issue, and thought it would be useful to show the impact of controlling for job title. What concerned him about controlling for job title was that the recruiters had control over who was considered for what job titles; it was a variable subject to the control of the Bank. He was trying to see if the choices made by the Bank were in fact race neutral.

According to Dr. Crawford, if you control for the job, you are in effect saying that you are willing to assume that all of the assignments to jobs for which people were going to be considered were done in a race neutral fashion, and he did not see a basis for that assumption. But even controlling for job position, he still found shortfalls in the hiring of African Americans. The overall shortfall was smaller, but still statistically significant.

Dr. Crawford stated that, if he assumed that Dr. Haworth was correct, that 72.5 % of the hires for whom they had applications were hired into the job for which they applied, this reinforced his opinion that the recruiters had control over job assignments. It means that 27.5 % were not considered for the jobs for which they applied, and suggests that one should not be controlling for job title.

According to Dr. Crawford, the timing of the applications does not have a lot of impact on the statistical results. His analysis controlling for timing, in Table 5, using a multiple pools test, broke up the applicants into time periods during which the applications were submitted, and used an algorithm very similar to that used by Dr. Haworth. Performing a multiple pools test across the 24 groups, the overall shortfall was between 48 and 49, with a standard deviation of 6.6.

Dr. Crawford discussed the sources for the discrepancy between his results and those of Dr. Haworth. He felt that the question of whether applicants who had rejection codes of RC or RH should be included in the analysis had a substantial impact; Dr. Haworth excluded them, and he did not. He also stated that controlling for job title had a fairly substantial impact. Dr. Crawford included applicants rejected for credit checks, because the RC code was applied more frequently to African Americans than to Caucasians. He asked if there was a study available documenting the validity of the credit ratings as a predictor of job performance, and was told that there was no such job study. It was clear to him that the review of the credit reports was highly subjective, with no specifications about what thresholds had to be met for what indicators.

Dr. Crawford stated that there was no surviving data that could be reviewed to see if the screening of credit reports was done uniformly across racial groups; it was his understanding that

the credit reports were not retained. He noted that there was some concern in the research community that the use of credit checks or credit scores could impart some racial bias. The Bank stopped using credit reports in 1994. He felt that it was appropriate to include these applicants because he was trying to evaluate the choices made by the Bank, and he did not have data that would allow him to test if the credit code was applied in a neutral fashion. If he excluded applicants with this code, he would be starting out by trusting the decisions the recruiters made, and assuming that they were necessarily race neutral, which is what he was trying to test.

For the 2002-2005 period, Dr. Crawford knew the numbers of Caucasian and African American applicants and hires, and could compute the shortfalls based on what would be expected from race neutral decisions. He then tested across the four years to see if the shortfalls could have emerged by chance from race neutral choices. The standard deviation was 4. Controlling for job title, as shown in his table 4, resulted in a standard deviation of 4.1.

Unlike the earlier data, where he could determine who was interviewed, and break down the hiring process into selection for interview, and selection for hire, with the later data, there was no indication of which applicants were interviewed. According to Dr. Crawford, breaking down the parts of the process gives insight into which parts created the problems. In his analysis of the 1993 data, he found that there was a significant shortfall from application to interview, and interview to hire.

#### Revised Table 0

By letter dated March 26, 2009, Dr. Crawford submitted Plaintiff's Exhibit 19, a Revised Table 0, to replace the Table 0 in his January 30, 2009 written testimony. He stated that the corrections on the table addressed errors revealed in his hearing testimony. The corrections required a minor change in paragraph 27 of his written testimony, and he enclosed a revised paragraph 27 (PX 20). According to Dr. Crawford, none of the changes caused him to alter his decision not to exclude observations with the RH code from his analyses, or any of his conclusions in his written testimony.

#### May 11, 2009 Deposition Testimony

Dr. Crawford testified by deposition on May 11, 2009 (DX 124). He discussed the errors that he corrected in his Table 0, which fell into two categories. The first involved a large number of records where he failed to key in data from the applications; he went back through all of the applications, and entered the data from the applications.

The second category of corrections involved the logic of the computer program used to process the data. The trial testimony showed inconsistencies in the way data was coded, and the programs were not written to deal with the different coding. He went back and changed the coding so it would deal with every contingency in the data.

Dr. Crawford then re-ran the programs, and produced results reflected in Revised Table 0. Otherwise, his testimony remained the same. As with his original Table 0, Dr. Crawford reported five categories of shift preference – full time, part time, first shift, second shift, and

third shift. His Table 0 did not include preference categories of weekend hours and some overtime required, or temporary employment.

Dr. Crawford was asked about a number of applications with apparent coding errors. He stated that it was unlikely that these errors, out of over 2,000 observations, would have much impact on his results as shown in Table 0.

Dr. Crawford looked at the pattern of assignment of the RH code for the lock box position, in relation to the preference for weekend work. He determined that 62 percent of the Caucasians considered for the lock box job never mentioned weekends on their applications, while an almost identical percentage of African Americans who were considered for the lock box job did not mention weekend preferences. Among the applicants who did not mention weekend preferences but were considered for the lock box job, the incidence of the RH code was 5 percent for Caucasians and 57 percent for African Americans.

Dr. Crawford stated that his conclusions on the original Table 0 and those reached on the Revised Table 0 were almost exactly the same.

Joan G. Haworth, Ph.D.

August 1, 2008 Report

Dr. Haworth is a labor economist and econometrician; she has an A.B. in Economics from Stanford University, and two Masters degrees and a Ph.D. in Economics from the University of Oregon. She was a tenured faculty member of the Department of Economics at Florida State University for more than twenty years, retiring in 1989. Dr. Haworth also served as a visiting Associate Professor at George Mason University, and an instructor in Economics at the University of Oregon. Her resume includes a list of her publications and research papers, as well as her professional presentations. Dr. Haworth is currently a Director at ERS Group, a consulting firm that does research on economic issues.

Dr. Haworth was asked to comment on Dr. Crawford's April 16, 2008 report, and she prepared a report dated August 1, 2008, entitled "Economic and Statistical Analyses of Hiring Decisions in 1993 and in the Period from 2002 through 2005 for Selected Job Groups." (DX 109). In preparation, Dr. Haworth reviewed the programming materials prepared by Dr. Crawford's firm, other materials he reviewed, and other documents and information available to her. In her executive summary, Dr. Haworth stated that Dr. Crawford's analyses relied on 1993 data that was inaccurate and incomplete, because he used scanned data that was not completely edited and corrected. The data were corrected and used by her group in conducting their analyses.

According to Dr. Haworth, Dr. Crawford's analyses fail to consider the actual hiring process and the characteristics of applicants that affect their candidacy. His analyses also commit "the statistical fallacy" of combining selected job groups and applying the usual standard deviation criteria, while ignoring the Bank's hiring decisions in many other job groups.

Dr. Crawford's analyses of the 1993 hiring decisions showed that there were no statistically significant differences in the number of African-Americans hired into the two job groups from among those selected for interview; all of the differences he identified came from the selections for interviews from the applications, which did not contain racial identification.

Dr. Haworth noted that in excluding the applicants with schedule requirements that were incompatible with the available positions, or the RH code, and those who failed the credit check, or the RC code, and comparing the racial composition of the qualified candidates with the composition of those interviewed for available positions, the results were different between job group 5F2 (administrative) and job group 5A2 (teller). According to Dr. Haworth, the actual number of African-American candidates interviewed for the administrative positions was greater than predicted by their presence in the application pool, and the predicted number of African-American interviews was greater than the actual number interviewed for the tellers, with a shortfall between 2 and 3 standard deviations.

Dr. Haworth stated that when factors related to the hiring process, such as the timing of the applications relative to the interviews, are considered, the difference between the actual and predicted number of African-American interviews is reduced for the teller position.

Because the administrative job group had a statistically significant difference favoring African-Americans selected for job interview, while the teller job group did not favor African-Americans and was less than 2 standard deviations after controlling for the timing of applications, there was a lack of support for the allegation that there was a systematic practice that resulted in decisions adverse to African-Americans in the selection process.

In addition, when the part-time/full-time status of the position was considered, the distribution of the differences between the actual and predicted number of African-American offers was not evenly distributed by status. She stated that

The outcome that is -1.99 standard deviations is among Teller offers for which we lack information to determine the part-time/full-time status of the opening. However, known information suggests that if we knew the desires of each applicant, the requisition to which each applicant was interested in applying including the part-time/full-time status of the opening, the differences found for the Teller job may be further reduced.

For the 2002-2005 time period, Dr. Haworth noted that the selection process was based on requisitions, and did not, as assumed by Dr. Crawford, have the same racial composition among the applicants for each of the requisitions.

Dr. Crawford excluded all non-Caucasian minorities in his analysis except for African-American applicants, despite the fact that applications were reviewed without regard to race or ethnicity, and all racial/ethnic groups were potential candidates. She claimed that Dr. Crawford's analysis failed to include two disposition codes that identified offers made to applicants, BRCO and CROJ, and he failed to exclude applicants who withdrew as identified by disposition codes WD04 and BRNR.

Considering the offers, and excluding candidates who withdrew, Dr. Haworth determined that when the racial composition of the qualified candidates applying for each requisition was compared to the composition of those interviewed, the difference between the actual and predicted number of African-American offers was less than five offers in each job group over the four year period, or approximately 1.2 offers each year. This result was not statistically significant among the entry level administrative jobs, but was statistically significant among the teller jobs. But if only one more African-American received an offer for a teller position during the four year period, the remaining shortfall would not have been statistically significant. In addition, this shortfall with respect to the hiring of African-American tellers was confined to requisitions seeking part-time tellers.

Dr. Haworth stated that during this time period, many of the requisitions requested bilingual candidates, and as a result, the distribution of the hiring by race and ethnicity is statistically significantly different by the type of requisition. Minority non-African American candidates were statistically more likely to be selected for these positions.

According to Dr. Haworth, overall, “minority” candidates were approximately 42.3% of all the 1993 candidates and received approximately 41.6% of all offers. During this period, minority candidates were approximately 50.9% of all candidates, and received approximately 47.7% of all offers. The shortfalls were less than five people over the entire four year period, with an average of 1.2 people per year, for each of the two job groups.

Dr. Haworth noted that Dr. Crawford’s analyses of the selection process for job groups 5A2 and 5F2 led him to conclude that the hiring decisions in these two job groups combined were not race neutral, and that the results were not consistent with chance. Her analyses of the same two subsets of hiring decisions produced different results, largely because she took into account objective, job-related factors that were clearly part of the decision process. She also stated that obtaining one statistically significant adverse result when more than 30 job groups were reviewed during the original OFCCP audit had a probability of about 5%, and thus was consistent with race-neutral hiring decisions at the Bank.

Dr. Haworth described the 1993 hiring process at the Bank, including the application process, and the procedures followed by Ms. Craddock and Ms. Simmons. She also described the hiring process for the 2002-2005 period. She felt that the available data from the applicant flow log permitted her to exclude people who withdrew from the process, either explicitly or implicitly, or whose schedule or credit (in 1993) resulted in their being screened out. Dr. Haworth stated that ideally, an analysis of hiring would control for the factors considered during the selection process, for example, it would include the requisition to which each applicant applied, but this information was not available. She noted that for 1993, she was limited to a subset of requisitions that could be used to identify a few characteristics for some of the openings. She stated that as long as the characteristics that could not be measured were distributed similarly among minorities and non-minorities, the inability to consider those factors would not bias the measure of racial/ethnic differences.

Dr. Haworth stated that Dr. Crawford’s 1993 database was incorrect, resulting in incorrect analyses. It appeared the applications were scanned, a process that often requires

additional editing. Here, misread documents resulted in incorrect race identifications for applicants, incomplete information on interviews, and errors in job group assignment. Although Dr. Crawford found and corrected some of the errors, his database for 1993 omitted 6% of all applications coded “W” in the applicant flow log. In addition, the application and disposition date fields were incorrect or left black in about 4.5% of the applicant records that could have been included in his analysis, and about 3% of the interview dates and 3% of the disposition codes had values different from the dates and codes on the applicant flow log.

In addition, Dr. Haworth determined that a small subset of the 2002 to 2005 requisitions were for positions outside the Charlotte NC MSA, which she removed from her analysis.

Dr. Haworth noted that the percent of minorities among applicants varied among the different job categories in 1993, even among the two job groups, and because the predicted proportion minority of those hired varied by job title, it was important to control for the job applied for in the analysis of the hiring decisions. She also noted that job openings were advertised based on the requisitions of the hiring managers in 1993, and applicants applied to these openings. She stated that a hiring model should control for job to be consistent with the hiring process.

Dr. Haworth agreed with Dr. Crawford that candidates who withdrew from the hiring process should not be considered as part of the qualified pool. However, she also felt that candidates with schedules that were not compatible with the job opening should be removed as viable candidates, as well as a candidate who sought employment in a particular location, but the requisition was not for that location. She also felt that candidates who failed the credit check should not be included, noting that Mr. Howard, the OFCCP investigator, conceded that it was reasonable for the Bank to reject people who failed the credit check.

Dr. Haworth noted that while there were disposition codes to identify applicants with incompatible hours (RH) and those who failed the credit check (RC), there was insufficient information in 1993 to identify applicants who sought a position in a specific location. Thus, her analysis excluded applicants who were rejected because of a failed credit check or hours incompatibility, but not applicants who might have had incompatible geographic preferences.

Dr. Haworth used the minority composition of the remaining applicants for each job to predict the minority composition of the hires into that job during the year. Her minority results were in Appendix C. In response to Dr. Crawford’s analyses, she reported her results using a candidate population that excluded all minorities except African-American. According to Dr. Haworth, however, this is not the way hiring decisions were made, and all eligible candidates, regardless of race, were evaluated during the decision-making process.

In her analysis of the 1993 hiring process for tellers and entry level administrative jobs, Dr. Haworth reported that the selection rate of African-American candidates for the administrative jobs was greater than the rate predicted by their presence in the 1993 candidate pool, while the selections for teller were filled with African-American candidates at a lesser rate, which was a combination inconsistent with a race-based selection process in filling entry level positions. In addition, given the differences in the composition of each job, the shortfalls were

isolated to a few jobs in these job groups.

Dr. Haworth noted that there were two separate decisions in the hiring process – the decision to interview, and the decision to hire from among those interviewed. Her analysis of the decision to interview candidates showed that the overall statistically significant result with respect to tellers appeared to occur at one of the initial stages of the hiring process, when the recruiters identified the candidates who would be interviewed by the managers. The decision to interview candidates was largely determined by a review of the applications, which did not contain race information. Thus, while the difference in the African-American proportion selected for interview for a teller position was statistically significant, it could be the result of job-related qualifications on the application but not described in the applicant log, or it could also be the result of differences in the timing of applications throughout 1993.

According to Dr. Haworth, once the candidates were selected for interview, there were no statistically significant differences between the number of offers made to African-American candidates, and the number predicted by their presence in the interview pool. These results showed that the differences between the selection rates of African-American and Caucasians for teller positions could be isolated to the decision to interview.

Dr. Haworth concluded that both the interview decisions, and the offer decisions for the administrative positions from among the applicants who did not withdraw, did not fail the credit check, or have incompatible hours, were race-neutral, and inconsistent with a race-based decision process.

Dr. Haworth noted that in preparing his analyses, Dr. Crawford assumed that all applicants were considered for each hiring event, so that a person who applied in December 1993 would be included in the analysis of hiring events in January 1993. While she noted that there was insufficient information to determine who applied to each requisition, Dr. Haworth determined that the median length of time between the application dates and interview dates was 7 days in 1993. Using this information, she prepared an alternative analysis of the decision to interview, to account for the timing of the applications. This analysis compared the composition of the interviews in a month for a job to the composition of those who applied in the month and last week of the previous month.

The shortfall in selections for interview among the tellers, and the excess of these selections among the administrative interviews, are each smaller than three standard deviations, with the teller shortfall less than two standard deviations. When timing is considered, the number of African-American teller and administrative interviews is consistent with, or exceeds the predicted numbers shown in her Table 2.

Dr. Haworth noted that each of the job openings could have different characteristics, including the part-time/full-time status. She acknowledged that there was not sufficient information to properly examine the hiring process by identifying who applied to each requisition, and/or who was seeking only part-time or only full-time positions.

According to Dr. Haworth, more than 60% of the administrative job group requisitions

had part-time or full-time information available, as did over 70% of the teller jobs. As set out in her Table 3, over 80% of these teller positions that were filled, and that had the part-time/full-time information available, specified that the job was a part-time job, and over half of the administrative positions that were filled, and that had the information available, showed that the jobs were part-time.

Using this data, Dr. Haworth separated her analyses of offers into those receiving offers for part-time, and those receiving offers for full time positions. She indicated that, since the proportion of job offers that were part-time varied by job title, the job group's weighted percent of African-Americans varies among the three part-time status categories – part-time, full-time, and unknown. Dr. Haworth concluded that this resulted in a re-distribution of the shortfalls or excesses, as shown in her Table 4.

Applicants for teller jobs filled with part-time hires appeared to be less likely to be African-American than applicants applying for jobs that were full-time or for which the status was unknown. In contrast, the proportion of African-American candidates for administrative positions was greater for part-time positions than for full-time positions. Considering these factors, the differences between the actual and predicted number of African-American offers became more consistent with a chance occurrence for both jobs.

According to Dr. Haworth, it is clear that when objective criteria are considered, there are no statistically significant differences adverse to African-American applicants for the administrative jobs. She concluded that with respect to the teller jobs, the differences appeared to occur when the decisions to interview candidates were made, which were determined without the race of the candidates being known to the recruiter. In addition, the differences are reduced when the timing of the applications and interview are considered.

Dr. Haworth concluded that the data showed that there was not a pattern of adverse race-based decision making in the hiring of individuals for these job groups. Her analysis found that the administrative job group did not have statistically significant differences from a race-neutral process, and that the difference in the teller interview selection decisions could be the result of geographic or other factors that were not able to be considered in the analysis. Since the same recruiters screened the candidates for teller and administrative positions, the difference in results seemed more likely to support the contention that other factors affected the decision than that the decisions were race-based.

According to Dr. Haworth, the “usual criteria” for identifying statistically significant results must be modified when as here, there are many different comparison groups. The two job groups were part of a 33 job group that was audited by the OFCCP. Dr. Haworth claimed that, in the employment setting, it was not unusual for an employer making race-neutral selections from among applicants to produce shortfalls in making selections from 33 pools, such that the largest of the shortfalls is in excess of two standard deviations. She examined the records of applicants and offers for only 2 job groups, which were being examined “precisely” because they exhibited shortfalls. Her analysis found one job group, tellers, that had a shortfall that was greater than 2 standard deviations, which is what would be expected if the shortfalls were normally distributed in a race-neutral setting. Such a result would, by conventional standards, be consistent with the



results expected of a non-discriminating employer. Thus, it was not a fair test of the employer's practices to identify the one instance in which the largest shortfall occurred, and then subject it to the two standard deviation threshold. Dr. Haworth felt that the two standard deviation threshold was too small for such circumstances, and that the correct equivalent threshold was some larger number whose magnitude depended on the number of pools.

Dr. Haworth stated that principles of statistical analysis demonstrate the statistical fallacy of inferring that an employer discriminated just because there is one job group among 33 with disparities favoring non-minorities, in one of the two decision steps, that is between 2 and 3 standard deviations. Even this result was before considering applicant characteristics described in each requisition. The randomness of these events also made examining the standard deviations of the combination of two unusual job groups inappropriate, which was especially true when the two job groups had quite diverse results. She claimed that while Dr. Crawford produced only the inappropriately combined measure of statistical significance, which reflected the combination of job groups 5A2 and 5F2, while she produced the results for each job group separately, as is appropriate.

Dr. Haworth stated that Dr. Crawford presented a simpler analysis for the 2002-2005 hiring decisions, by restricting the analysis to the overall result of offers made from among candidates applying for jobs in each job group each year, instead of separately analyzing the interview decisions and the offer decisions. Dr. Crawford also produced an analysis of offers made to candidates for these jobs, restricting the pool to those applying to the relevant requisition, and then aggregating those results by job group. She stated that examining the candidates who applied for the same requisition was the appropriate method, since it was the way the hiring decisions were actually made.

Dr. Haworth generally agreed with Dr. Crawford's exclusions of applicants with different disposition codes, but determined that it was inappropriate to exclude two disposition codes for applicants who had been given offers, BRCO and CROJ. She also noted that Dr. Crawford did not remove some applicants with disposition codes that indicated they withdrew from the hiring process, while removing others that withdrew with different codes.

Dr. Haworth made these adjustments, and analyzed the offer decisions for each job group, distinguishing the applications for a specific requisition for each position. These results are set out in her Table 5. The differences between the actual and predicted number of African-American selections for the two job groups were each less than five individuals during a four year period. In this analysis, there was a measure of geographic preference, because she controlled for requisition, and found, as she hypothesized for the 1993 period, that the results are close to race-neutral when the requisition characteristics are considered in the analysis. Neither of these results was greater than 3 standard deviations, and the change of one person in the teller offers would result in a difference of less than 2 standard deviations, which was consistent with what she found among the administrative offers.

As in 1993, there was a difference in the proportion of African-American applicants for jobs that were part-time compared to full-time. The difference among tellers, as shown on her Table 5, was almost entirely among the part-time positions. According to Dr. Haworth, the

offers made during 2002-2005 were race-neutral for full-time and non-specified teller positions. However, the part-time teller offers had a shortfall of less than 5 people, between 2 and 3 standard deviations. The offers for all types of entry-level administrative positions were race-neutral.

Dr. Haworth noted that Dr. Crawford did not include all of the applicants in his analyses, but restricted it to a comparison between African-American and Caucasian applicants. But during this period, the non African-American minority hires had some advantage if they were fluent in Spanish or possibly some other language. Based on the data she set out on her Table 7, it was clear that non African-American minority candidates were likely to be more successful than other candidates when the requisition included a request for proficiency in a language in addition to English, and the distribution of hires filling requisitions with bilingual preferences was statistically significantly different. She felt that her analysis provided further support for preparing the analysis by requisition, since they were not fungible with respect to location, language preferences, and part-time/full-time status, among other characteristics. Dr. Crawford's combination of all candidates, merely distinguishing them by year of application, was clearly inappropriate and contrary to the hiring process.

Up to this point in the analysis, it was seen that offers for teller positions were less likely to be filled by African-American applicants than predicted by their presence in the applicant pools, although taking timing and location into account reduced that difference, which appeared to be primarily a shortfall among part-time tellers. But for entry-level administrative and teller positions in 2002-2005, taking into account the requisition for which the applicant was considered, there was little difference for African-American candidates between predicted and actual number of offers.

Dr. Haworth noted that non African-American minority applicants in 1993 added about 5% to the share of non-Caucasian applicants for the teller positions, and about 3.5% to the non-Caucasian applicants for administrative positions; there was a similar increase among the entry-level administrative jobs in 2002 when all minorities are considered. But in 2002-2005, the share of non-Caucasian teller applicants increased by almost 20% when non-African-American minority candidates were included. These results are set out in her Table 9.

In summary, Dr. Haworth stated that Dr. Crawford used an analytical database for 1993 that was contaminated by incorrect race identifications and incorrect dates. He assumed that the racial composition of the applicants would be the same regardless of when during the year the hiring decisions were made. He also ignored the hiring process that generally selects applicants for interviews who applied shortly after the position was posted. Dr. Crawford assumed that the racial composition of applicants for part-time teller positions was the same as that of applicants for full-time teller positions. He also assumed that language preferences on the requisitions would not affect the racial composition of successful applicants. And despite the lack of information about the geographic location of a position, he assumed that he could use the same racial composition for every teller position in 1993, regardless of where it was located.

According to Dr. Haworth, her analysis showed that these assumptions were not correct, and biased the results. None of the analyses she conducted showed a difference between the

actual and predicted number of African-Americans that was greater than 3 standard deviations, and most were very close to or less than 2 standard deviations.

Dr. Crawford also assumed that he could conclude that the hiring process was racially biased, despite examining only 2 of the 33 job groups audited by the OFCCP in 1993. But as discussed in her report, the likelihood of one of those 33 job groups having a difference of 2 to 3 standard deviations was 5% or more, and she found only one job group of the two Dr. Crawford examined that had a difference slightly more than 2 standard deviations, when all of the relevant factors were not incorporated into the analysis.

Dr. Haworth stated that her analysis did not incorporate all relevant factors, and that there are characteristics, such as the geographic location of positions filled in 1993, that cannot be incorporated due to a lack of data. The 1990 Census data show that the percentage of African-Americans among tellers was lower in the Charlotte MSA than within the city of Charlotte, suggesting that “uptown” locations would have a higher percentage of African-Americans among applicants, while locations further out would have a lower percentage. In 2002-2005, when she had a measure of geographic preference in the data, as well as other requisition characteristics, the shortfalls were close to race-neutral, consistent with the hypothesis that geography would affect the results of the analyses if that data was available in 1993.

Dr. Haworth stated that Dr. Crawford “assumed that analyzing African-American successes would be a whole picture as to the hiring process of BoA in this matter.” But African-American applicants were not compared solely to Caucasian applicants by the Bank, but were always part of a larger pool that included other non African-American minorities considered by the Bank. During 2002-2005, Dr. Crawford failed to consider the language preferences of some requisitions, while her analysis showed that the teller positions often had a language preference, for which some minorities may have had an advantage.

Dr. Haworth’s analysis of minority interviews showed that, like African-American interviews, more minorities were offered jobs in administrative positions in 1993 than were predicted, but somewhat fewer teller positions. Over 2002-2005, the difference between the number of offers to minorities and the number predicted was less than 5 people in each job group. After consideration of the part-time/full-time status, the shortfall in minority selections into teller and administrative positions was less than 4 people in every category. These results would not generally be regarded as race-based by federal agencies, when the selection of one more or one fewer minority would result in no statistically significant differences.

Dr. Haworth concluded that the data did not support an allegation that there was a race-based hiring decision-making process in 1993 or 2002-2005 for these job groups, and the differences that can be identified are the result of small numbers of decisions, or factors that are not available to be measured.

#### September 12, 2008 Deposition

Dr. Haworth testified by deposition on September 12, 2008 (PX 9). She described a problem she discovered in Dr. Crawford’s backup material, after she reviewed his deposition, in

paragraph 28, where he stated that the statistical significance was .0173 percent, when the backup material showed that it was 1.73 percent. She also discussed her understanding of the hiring process as used by Ms. Craddock and Ms. Simmons. It was her understanding that most of the recruiting was done in 1993 requisition by requisition.

Dr. Haworth testified that, while it might have been quite possible in the 1960s and 1970s, and the early 1980s, to hypothesize race from an address or school, the schools had been desegregated for some time, and by 1993 that would not be a very accurate way to try to hypothesize about race.

With respect to the application of the credit check criteria in 1993, Dr. Haworth assumed it was uniformly applied, because she did not see any evidence to the contrary. With respect to the RH code, she could not match what hours the applicants were seeking with the job requirements, because she did not have the applications in sufficient quantity. She did not have the information to link the application with the requisition; her restriction for hours was all based on the RH disposition code. She acknowledged that there was no way to independently judge whether the RH code was uniformly applied, but there was sworn testimony that it was used by the recruiters when the hours were incompatible. She also stated that, controlling for the RH code, if there is not a large adverse change in the percent of African-Americans, there is no reason to believe that they would have been disproportionately rejected for their hours schedule.

Dr. Haworth described her understanding of the 2002-2005 hiring process, in which the applications were stored, and the recruiters identified applications that met the requirements of the requisition, and then began their screening. The process from this point was the same as in 1993.

In analyzing the 1993 data, Dr. Haworth looked at each job separately because she knew what job people applied for, and what was recorded in the applicant flow log. Based on her knowledge of the process, if an applicant did not make it to the interview stage, the application was returned to the receptionist with the disposition code, and the receptionist put the information on the applicant flow log. Her understanding was that the information about the job the applicant was seeking was what was written on the application.

According to Dr. Haworth, if the recruiters intentionally tried to put applicants in slots for which they did not have a chance of being hired, she would have expected to see a much more significant difference than is shown in 5A2 and 5F2. The differences did not seem to her to be indicative of intention. She felt that it was indicative that something else was going on, and that timing had a lot to do with it, but there was no evidence that it was the result of intentional activity, unless someone was willing to testify that they meant to do it. She acknowledged that if there were any race biases in the assignments to particular requisitions by the recruiters, her analysis that controls by requisition would not detect it.

December 15, 2008 Written Testimony

Dr. Haworth submitted written testimony dated December 15, 2008 (DX 114). Using the

1993 data that was available to her and to Dr. Crawford, she calculated the number of African-American applicants for each job at issue within a relevant time frame, who would be expected to be interviewed for the positions in a race-neutral decision-making process, and found that the expected number was statistically no different than the number actually interviewed.

In addition to Dr. Crawford's failure to properly analyze the process by which the hiring decisions were made, there were two reasons for the differences in the results for the 1993 interview selections for job groups 5A2 and 5F2. Dr. Crawford did not limit his comparisons to people who applied to the same job, and included applicants who applied throughout the year, instead of those who applied near the time that the jobs were filled.

Dr. Haworth stated that in his direct testimony, Dr. Crawford modified his data, and attempted to show that these two reasons did not change his results, and that these two factors either should not be considered or do not matter, but did not support his opinion because he did not produce an analysis that properly adjusted for job and timing simultaneously, as she did.

According to Dr. Haworth, an analysis of selections should properly model the actual decision-making process to the extent possible. As she noted in her report, applications are not reviewed until a requisition is submitted by the managers; the requisition specifies the job available and its requirements, and the selection process begins at that time. Dr. Haworth did not have complete requisition information for each of the applications in 1993, and she approximated the process by considering people who applied for a particular position at the time the position was being filled.

In his direct testimony, Dr. Crawford presented a revised analysis of applications to jobs in job group 5A for 2002-2005. For this period, they actually had the requisition and applicant information for each requisition, and thus an analysis that controls for requisition should provide useful information in determining whether the selection decisions were consistent with a race-neutral process. Dr. Crawford's requisition analysis had a programming or data error that resulted in combining several requisitions together, so that his analysis was not accurate. Otherwise, he should reach the same results as she did, which are a difference of less than 5 offers to African-American applicants for tellers, and a similar difference for the remaining administrative jobs over the four year period.

Although this difference was statistically significant for the tellers, it was sufficient small that it would have become insignificant if one more offer during the four year period had been made to an African-American, and under federal guidelines, would generally not be regarded as race-based by the OFCCP or the EEOC.

Dr. Haworth set out her summary of her analyses for 1993. She noted that Dr. Crawford combined a full year of applications, but that there was no reason to believe that grouping all of the applicants within a job group into a single pool for the entire year would produce the same results as considering applicants in a timeframe relevant to when the positions were actually filled. She claimed that Dr. Crawford's analyses were erroneously constructed – unlike her analysis, his 1993 timing analysis did not control for job, and did not analyze the decision to consider a person for interview. Rather, his 1993 timing analysis examined application to offer,

and combined all jobs even though they had different availability rates.

Dr. Haworth claimed that it was clear from the applicant data that African-American and Caucasian applicants applied, and hiring decision were made, at different points in time depending on the job, and ignoring that information results in a faulty and biased analysis.

Dr. Haworth felt that Dr. Crawford's statement, that one should not control for position because the Bank had some control over the assignment of applicants to position was "pure speculation," because there was no evidence that the recruiters did such mis-allocation. Dr. Haworth examined the applications that appeared to correspond to the applicant flow chart, and her analyses of the 1993 data showed that 72.5% of the hired employees for whom there were applications were hired into the job to which they applied. Almost all of the applicants, or 93.5%, indicated a job preference on their application, and she was aware of no evidence that the job preferences were not considered by the recruiters.

Dr. Haworth also compared the job preferences on the applications to the job listed on the applicant flow chart for those not offered jobs. Dr. Crawford indicated that three of these jobs had few selections, and a higher concentration of African-American applicants. Dr. Haworth stated that 97% of those without offers indicated interest in these jobs on their applications; these three jobs accounted for 1.9% of all offers, but 11% of all applicants, and apparently were desirable to many applicants even though there were few offers. Other jobs with more hires also had many African-American applicants.

The racial composition of applications for the 25 jobs in 5F2 was not at all similar, and varied from 0% to 100% African-American, and thus the availability was not the same for each of the jobs filled. Because the likelihood of being hired into each of these jobs is different from one job to another, and the racial composition differs, Dr. Crawford's failure to control for job produced an inaccurate result.

Again, Dr. Haworth stated that when the job for which applicants applied, and the date they applied are taken into account in analyzing the selections for interview, there was no statistically significant difference between the number of African-American applicants who were selected for interview and the number predicted by their presence in the applicant pool.

Dr. Haworth discussed her analysis of the 1993 hiring process for job groups 5A2 and 5F2, stating that it was important to note that there was a negative difference for job group 5A2, but a positive difference for job group 5F2. It would be misleading to combine the difference for an "offset," as described by Dr. Crawford. It is difficult to establish a pattern of selection adverse to African-Americans when the selection process used for decision in one group produces an opposite result from the favorable result derived from the same selection process in the other group. While Dr. Crawford's results could not be parsed into separate job groups based on the information in his tables that controlled for job, her analysis produced a different result in the two job groups.

Dr. Crawford stated at the end of his analysis by job that while the statistical significance was smaller, the overall process from application to selection fell well short of race-neutrality.

Dr. Haworth claimed that Dr. Crawford never analyzed the “overall process.”

Dr. Haworth noted that the selections for interview in 1993 was where Dr. Crawford found the largest statistically significant differences. But she thought that his analysis was flawed because he compared an applicant pool that would not all be considered for an interview to a subset of the people who were considered for an interview. She noted that he included in the “interviewed” group only those with an interview date, and removed offers without an interview date, as well as others who were interviewed; he then compared this narrower set of interviews to all of the applicants, as if there had been no screening process before setting up the interviews.

Dr. Haworth disagreed with Dr. Crawford’s statement that the exclusion of applicants with disposition codes of RC and RH was the principal source of the very large discrepancies between their results. Dr. Crawford admitted in his deposition that he had no evidence to prove that the recruiters were untruthful, or that they applied different standards to different groups.

Dr. Haworth did not think it was a reasonable practice to ignore a selection factor, such as the RC code, solely because it was possessed by one group more than another; she felt that Dr. Crawford’s hypothesis that using credit scores may have injected a bias against African-Americans was a hypothesis without a foundation. The objective measures used in developing credit scores were facts considered by the Bank to be relevant to the jobs they were filling. There was no reason to believe that the “objective criteria” were not uniformly applied to the applicants, and the fact that the Bank stopped using credit reports in 1994 was not a reason to use a model that did not capture the decision-making process in 1993.

Dr. Haworth criticized Dr. Crawford’s decision that he could not exclude applicants who were rejected because their hours were incompatible, disposition code RH, because the percentage of African-American applicants with that disposition code was higher than the Caucasian applicants. If African-American applicants were more likely to have the RH code, it could simply reflect that they applied for jobs with more stringent hour requirements. In addition, it was only by combining all jobs and job groups together that Dr. Crawford was able to say that African-American applicants were more likely to be rejected for incompatible hours. She concluded that the distribution of the proportion of applicants who received the RH code was nearly identical between African-American and Caucasian applicants, with the exception of one job group. She also took issue with Dr. Crawford’s statement that he was not aware of any reason to expect differences in work schedule preferences between African-Americans and Caucasians, referring to research of work patterns of men and women by race.

Noting that Dr. Crawford hypothesized that addresses on the applications could have supported inferences by the recruiters about race, and implied that the information might have biased their decisions to select applicants for interview, Dr. Haworth stated that Ms. Simmons testified that she did not select applicants for possible interviews based on race, or try to discern race from information on the application. Further, if this hypothesis were true, she would expect to see a highly significant result comparing the racial composition of applicants to those who were identified by recruiters for possible interview, but this was not the case.

Dr. Dr. Crawford separated his analysis into two steps, as did she. However, the

selection process included more than two steps. Based on Ms. Simmons' testimony, the process began with a review by the recruiter for the requisitioned job, to find applicants with the skills required by the hiring manager, and whose stated preferences for hours, location, and salary matched the requirements for the job. The applicant was then called in for an interview, and any required tests. Next, a credit check and sometimes a reference check was done before the manager interview.

Dr. Haworth's analysis showed that the actual number of African-American applicants considered for interview with the hiring manager was not statistically significantly different from the predicted number for either group 5A2 or 5F2.

Dr. Haworth also examined the decision to offer from those interviewed by the managers. Most of the applicants considered for interview by the recruiter but not interviewed by the manager failed the credit check. The number of African-American applicants who were made offers from this pool was consistent with a race-neutral decision process.

Dr. Haworth concluded that the difference between Dr. Crawford's analysis and hers was a result of his failure to model the actual decision-making process, and to consider the job applied for and timing of the applications. His assumptions that the racial composition did not vary by week, and that the job preferences described by the applicant were ignored by the recruiters in identifying people for interviews produced an analysis based on assumptions that were improper and erroneous. In addition, he merely hypothesized that the disposition codes were influenced by the race of the applicants. When such false assumptions are not made, the selections for interview and the offers among those interviewed are consistent with a race neutral decision making process.

With respect to the 2002-2005 data, Dr. Haworth stated that job applied for and timing of the application were both important, and should be simultaneously considered; analyses that control only for position do not properly reflect the actual selection process. Dr. Crawford's analysis contained an error, resulting in an analysis that did not control for all of the requisitions individually, and if he prepared his analysis properly, his results would have been similar to hers.

Dr. Crawford continued to use an incomplete and inaccurate 1993 database; his 2002-2005 database still included locations outside North Carolina, and assigned the wrong requisition number to several sets of applications. Dr. Haworth felt that Dr. Crawford's new tables were no more accurate than the tables in his first report.

Dr. Crawford's results show a large number of standard deviations because his model does not reflect the selection process, and he analyzes larger pools of applicants and decisions which, without other intervening factors, leads to standard deviations larger for any given difference. It was also important to recognize that statistical significance is only a measure of the likelihood that an estimate of the difference could have occurred by chance, given the model; it does not indicate if the estimate is reliable.

Dr. Haworth also stated that a finding of two job groups that are statistically significant out of the 26 job groups analyzed by Mr. Howard does not generalize to Dr. Crawford's



conclusion that the overall hiring process was not race-neutral.

Dr. Haworth stated that the map used by Dr. Crawford to illustrate the racial composition of the Charlotte area was not sufficiently accurate to be useful. She discussed the locations of the Bank's banking centers in 1993, and the expectations as far as commuting distances. The map only strengthened her contention that in order to capture all of the intricacies of the very complex labor market outcomes, the empirical model should control for the job for which applicants applied and the timing of applications and open requisitions, as her model did.

Using 1990 census data, Dr. Haworth calculated they showed that more African-American applicants were offered jobs than would be predicted based on their composition in these jobs in the Charlotte area.

### Hearing Testimony

Finally, Dr. Haworth testified at the hearing on March 5, 2009. She again stated that she thought it was inappropriate to combine the two job groups for analysis, because they had different recruiters and the jobs had different characteristics. She discussed the database for Dr. Crawford's Table Zero, stating that on looking at the applications, there was a very large number that were not coded with preferences, when there was information on the application expressing a preference.

Dr. Haworth acknowledged that she did not have the information to directly determine how the recruiters applied the credit reports, but she could do it indirectly. She agreed that her removal of applicants with the RC code assumed that this code correctly identified people whose credit would not meet the requirements of the surety and the FDIC.

Dr. Haworth discussed the use of the "RL" code, for lacking essential skills. She left these applicants in the pool, and assumed that use of the code was neutral. She acknowledged that it was possible to apply this code subjectively; when she sees a difference between African Americans expected to be hired, and the number actually hired, all she can say is that there is a difference. It could be because they lacked essential skills at a greater rate, or because of racially defined actions by the recruiters; she could not distinguish. By leaving these applicants in, it assumes that the fact that they lacked essential skills did not affect whether they were hired. It is testing to see if hiring decisions were race neutral, even if not controlled for lack of essential skills.

Dr. Haworth stated that it was not fair to conclude that for 27.5% of the applications, the stated job preference did not match the job the applicant was considered for. Some of the applications were not recorded as a match because on the face of the application there was not a match; but she had not exhausted all possible matches. If the recruiters had a bias, and African Americans were overassigned to some jobs for which they expressed no preference, she would expect to see the result in the selections for hire, because people who are assigned to a job for which they have no preference are less likely to accept the position, and thus there would be a higher rejection rate for African Americans. In her analysis, she took what applicants were considered for and determined, whether they preferred this position or not, whether they were

successful at a rate that would have produced race neutral results.

Dr. Haworth was asked whether, given that there was an exercise of judgment or control by the recruiters in matching applicants to certain jobs where there is no detectable preference expressed by the applicant, it was possible to detect a race bias by the recruiter in the assignment if the analysis controlled for job title. She did not know whether the analysis could detect a race bias. She took the job that was recorded in the flow log as the job the person was being considered for, and if there was racial bias in that determination, it would be built into the data.

According to Dr. Haworth, “practical significance” is a term commonly used by labor economists to discuss situations where there is statistical significance, but it over-emphasizes the real value of the difference. In this case, for example, if three people were changed, the standard deviation would be less than two.

### ***DOCUMENTARY EVIDENCE***

In addition to the exhibits discussed above, the parties submitted the following.

#### **Joint Exhibits**

1. The Bank’s January 1, 1994 Affirmative Action Plan.
2. November 24, 1993 selection letter to Hugh L. McColl.
3. May 18, 1994 letter from Jerome Geathers to Larry McCray.
4. October 19, 1994 letter from Carole Gaudin to Hugh L. McColl, the “Notice of Violation.”
5. November 4, 1994 letter from Jerome Geathers to Charles Speth.
6. November 30, 1994 letter from Jerome Geathers to Charles Speth.
7. February 10, 1995 letter from Jerome Geathers to Charles Speth.
8. March 30, 1995 letter from Charles Speth to Jerome Geathers.
9. May 25, 1995 memorandum from Jerome Geathers to Carol Gaudin.
10. June 29, 1995 letter from Carol Gaudin to Charles Speth, the “Revised Notice of Violation.”
11. August 17, 1995 Notice to Show Cause.
12. Exemplar EEO Forms (tear off sheets) from 1993.
13. 1993 Applicant Flow Log for 5A2 and 5F2 job groups.
14. Job Descriptions 1993.
15. List of Hires by Job Group Job Code 1993.
16. Questionnaire of Teresa Simmons dated March 9, 1995.
17. Questionnaire of Donna Craddock dated March 16, 1995.
18. Declaration of Teresa Simmons dated July 23, 2008.
19. In CD/electronic form, applications and/or applicant data from 1993 candidates who were hired, and who were not hired.
20. October 5, 1994 letter from Jerome Geathers to unsuccessful candidates.
21. Programming materials and electronic files supporting the report of David L. Crawford, Ph.D. in CD/electronic form.
22. Programming materials and electronic files supporting the report of Joan G.

- Haworth, Ph.D. in CD/electronic form.
23. March 1-2, 2007 deposition of James Howard with exhibits.
  24. December 13, 2006 deposition of Teresa Simmons with exhibits.
  25. In CD/electronic form, 2002-2005 Applicant Flow Data, 2002-2005 Flow and requisitions, and 2002-2005 Requisitions for job groups 5A and 5B.
  26. Applicant Flow Process.
  27. Lists of disposition codes.
  28. December 13, 2006 deposition of Jodi Bryant with exhibits.
  29. December 14, 2006 deposition of Penny Miller Dietz with exhibits.
  30. Additional job applications from 1993.

Plaintiff's Exhibits

1. Testimony of Dr. Crawford.
2. Dr. Crawford's curriculum vitae.
3. Impact Ratio Analysis by OFCCP.
4. Application of Bryant Jackson.
5. Questionnaire by Bryant Jackson.
6. Questionnaire by Cassandra Medley.
7. Excerpt of applications from Joint Exhibit 19.
8. Excerpt of applications from Joint Exhibit 19.
9. Deposition of Dr. Haworth.
10. Application of Cassandra Medley dated January 13, 1993, Trust Group, 3432 through 3435.
11. Application of Cassandra Medley dated January 13, 1993, Trust Group, 1593 through 1596.
12. Application of Cassandra Medley, dated January 13, 1993, Gateway Center Services Com., 21023 through 21026.
13. Application of Cassandra Medley dated January 13, 1993, Discrepancy Specialist, 3292 through 3295.
14. Application of Cathy Gilchrist dated June 4, 1993, Lockbox weekend, 4270 through 4275.
15. January 30, 2009 report by Dr. Crawford.
16. Updated Exhibit 1 to Dr. Crawford's testimony.
17. Programming materials and electronic files supporting Dr. Crawford's January 30, 2009 report, in CD/electronic form.
18. Spreadsheet "Check Hires."<sup>9</sup>
19. Dr. Crawford's Revised Table 0.
20. Correction to Dr. Crawford's January 30, 2009 Report.

Defendant's Exhibits

1 through 102: Exemplar Applications from Job Groups 5A2 and 5F2 in 1993.

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<sup>9</sup> At the hearing on March 3, 2009, I advised the parties that I would reserve a ruling on this exhibit, as well as Defendant's Exhibit 113. As these exhibits were not subsequently admitted into the record, I have not considered them.

103. Exemplars of redacted OFCCP questionnaires completed by applicants in 1994.
104. Unredacted questionnaire completed by Bryant Jackson.
105. Unredacted questionnaire completed by Cassandra Medley.
106. Exemplar of advertisements placed in Charlotte Observer during 1993.
107. Exposition of Dr. Crawford's Analysis, Table 2c and Table 4.
108. Backup Data/Analysis from Dr. Crawford's Data and Analysis, Table 2c and Table 4.
109. Expert report by Dr. Joan Haworth.
110. August 27, 2008 deposition of Dr. Crawford.
111. Backup Data/Analysis from Dr. Crawford's January 30, 2009 written testimony.
112. Backup Data/Analysis from Dr. Haworth's December 15, 2008 written testimony.
113. Chart regarding paragraph 46 of Dr. Crawford's January 30, 2009 written testimony.
114. Dr. Haworth's December 15, 2008 written testimony.
115. Backup data for Dr. Crawford's Chart 1.
- 116 through 118: Backup data for Dr. Crawford's Table 2C
119. Backup data for Dr. Crawford's Table 4.
120. Underlying analysis for Table 0.
121. First page of coding chart underlying Table 0.
122. HBCU applications.
123. February 26, 2009 deposition of Donna Craddock.
124. May 11, 2009 deposition of Dr. Crawford.

### ***LEGAL FRAMEWORK***

In a case involving actions brought under Executive Order 11246, the legal standards developed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. Code Section 2000e, which provides that it is unlawful for an employer to discriminate against any individual with respect to employment based on an individual's race, are applicable. The plaintiff has the burden of establishing a prima facie case of discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Proof of discriminatory intent is required, but this proof can be based on circumstantial evidence, including statistical evidence. An unlawful motive may be inferred from a showing of a disparity between class members and comparably qualified members of a minority group. *Hazelwood, supra*, 433 U.S. at 307. A prima facie case of a pattern or practice of discrimination may be entirely statistical. *Hazelwood, supra*; *OFCCP v. Greenwood Mills, Inc.*, No. 89-OFC-39, slip. Op. at 21-2, 45 (Secretary, 1995).

A statistical disparity in the treatment of minorities may have one of the following three explanations: 1) it is the product of unlawful discriminatory animus; 2) there is a legitimate nondiscriminatory cause; and 3) it may be the product of chance. *Palmer v. Schulz*, 815 F.2d 84, 91 (D.C. Cir. 1987). If the disparity is large enough, that is, if the probability that it resulted from chance is small enough, a court will infer that the disparity is the result of unlawful animus. *Hazelwood, supra*, 433 U.S. at 307-8. In *Hazelwood, supra*, the Supreme Court held that a disparity of two or three standard deviations<sup>10</sup> is sufficient to establish a prima facie case of

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<sup>10</sup> The Bank argues that "merely" producing statistical evidence of standard deviations greater than two or three generally is not sufficient to establish a prima facie case of discrimination. Bank's Reply Brief at 2-3.

unlawful discriminatory animus.<sup>11</sup>

If the plaintiff establishes a prima facie case, the burden shifts to the employer to rebut it by showing that the plaintiff's statistical evidence is inadequate. *Greenwood Mills, supra*, slip. op. at 22. The employer can do this by attacking the plaintiff's statistical methods, or by showing that the disparity resulted from a legitimate non-discriminatory factor. *Palmer v. Schultz, supra*, at 99. If the employer proffers evidence that the disparity was the result of a legitimate non-discriminatory factor, the plaintiff can prevail by showing that the factor was a pretext for unlawful discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993).

### *Prima Facie Case*

OFCCP has charged that the Bank intentionally treated African-American applicants for certain entry-level teller, clerical, and administrative positions differently from Caucasian applicants, and thus the OFCCP's allegation is one of disparate treatment.

With respect to the year 1993, Dr. Crawford, the OFCCP's expert, found statistically significant shortfalls between the actual and expected number of African-American hires by the Bank in two job groups, 5A2 and 5F2, which resulted in standard deviations of 6.9 for the period of application to offer, 6.1 for the period of application to interview, and 3.4 for the period of interview to offer.

Dr. Crawford also found, when controlling for job, that there were statistically significant shortfalls between the actual and expected number of African-American hires, resulting in standard deviations of 4.3 for the period of application to offer, 4.5 for the period of application to interview, and 1.76 for the period of interview to offer.

In analyzing the hiring data for the 2002 through 2005 time period, Dr. Crawford found a standard deviation of 4.3; even disaggregating into groups by year and position, he found a standard deviation of 4.0.

I find that the OFCCP has established a prima facie case of unlawful disparate treatment by the Bank in connection with applicants for entry level positions in 1993, and for the years 2002 through 2005.

### *The Bank's Rebuttal*

The burden now shifts to the Bank to show either that the OFCCP's statistical analysis is inadequate, or that the disparity was caused by a legitimate non-discriminatory factor. The Bank

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Unfortunately, the cases cited by the Bank do not support its broad statement.

<sup>11</sup> The Bank argues that the OFCCP fails to satisfy its burden where it fails to proffer sufficient anecdotal evidence of intentional discrimination, citing to *Goff v. Continental Oil Co.*, 678 F.2d 593, 597 (2<sup>nd</sup> Cir. 1982), and that in order to establish a pattern of practice of racial discrimination, the OFCCP must produce statistical evidence showing significant disparities between similarly situated evidence, **and** must produce other evidence, such as testimony about specific incidents of discrimination, citing to *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 470 (8<sup>th</sup> Cir. 1984). Bank's brief at 29-30. This is not a correct statement of the law, nor is it supported by the Court's decision in *Craik*.

argues that the OFCCP's statistical analysis is "divorced from reality," and ignores or is contradicted by the undisputed factual record. The Bank also argues that the OFCCP's anecdotal evidence of alleged discrimination shows that its hiring practices were based on legitimate, non-discriminatory factors.

The Bank argues that Dr. Crawford's analysis was based on a faulty empirical model that ignored the actual hiring process, and failed to account for the Bank's legitimate, non-discriminatory factors. According to the Bank, Dr. Crawford made no attempt to model the actual hiring process, and purposely ignored the actual hiring process in his analysis. As an example, the Bank claimed that although he was well aware that each of the approximately 50 job titles in job groups 5A2 and 5F2 required different skills, hours, shifts, and duties, Dr. Crawford never studied the qualifications for the individual positions, or analyzed whether candidates were qualified for the positions for which they applied.

However, as the OFCCP has pointed out, and as both Dr. Crawford and Dr. Haworth acknowledged, there was no data available with respect to the criteria that the Bank claims Dr. Crawford failed to incorporate into his analysis.<sup>12</sup> These criteria included the hours applicable to a particular job, the applicant's relevant work history, nepotism, the applicant's salary history and requests, whether the applicant possessed the required typing and computer skills, job location, and the stability of the applicant's history.

The Bank's expert, Dr. Haworth, admitted that, without the job requisitions, it was not possible to know the specific position for which a candidate was considered and rejected, and thus it is not possible to compare a candidate's preference for hours or shifts with the position for which the candidate was considered and rejected. The data provided on the applicant flow log did not connect an applicant to a particular requisition, and thus does not permit an analysis of how the criteria of the hours and shift applicable to a particular job were actually used during the hiring process.

Nor, as acknowledged by Dr. Haworth, was there sufficient data about the geographic locations of the specific positions to include job location as a criterion in a hiring analysis, and she did not do so either. Because there was insufficient data regarding the Bank's treatment of applicants' salary requests, testing or review of typing or computer skills, analysis of past job stability, and nepotism issues, neither Dr. Crawford nor Dr. Haworth performed an analysis accounting for these criteria, other than accounting for the use of the "RH" and "RC" disposition codes.<sup>13</sup>

None of the criteria identified by the Bank as omitted from Dr. Crawford's analysis (and presumably Dr. Haworth's as well) are reflected in available, objective data: there is no data to show how the Bank assessed the applicants' hours and shifts preferences, their "relevant work

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<sup>12</sup> The Bank's insistence on the need to incorporate "measurable criteria" notwithstanding, there was not sufficient data to assess whether applicants failed to meet disqualifying factors other than credit or hours; Dr. Haworth, who left all of these applicants in her pool for analysis, also presumed that they met the basic criteria for the positions they applied for, and did not perform an analysis accounting for these "relevant" criteria.

<sup>13</sup> Thus, but for the exclusion of applicants with the RC or RH codes, the same "unqualified" applicants were included in Dr. Haworth's pool.

experience,” the application of the nepotism policy, salary history or requests, computer and typing skills, job locations, and past job stability. Dr. Crawford did not “refuse to incorporate these criteria into his analysis;” the Bank did not provide the data to permit him to do so. I agree with the OFCCP, that it is misleading for the Bank to claim that Dr. Crawford failed to incorporate data that the Bank knows does not exist, as acknowledged by Dr. Haworth, either expressly, or by not incorporating any such criteria in her analysis. Nor has the Bank pointed to any evidence that would make these factors available for use by either Dr. Crawford or Dr. Haworth in a statistical analysis.

The Bank argues that Dr. Crawford attempted “to justify his failure to model the actual hiring process” by relying on his belief that the recruiters may have injected bias into the hiring process, perhaps by discerning an applicant’s race from information on the application, such as home address, educational background, or professional and community activities. This is a blatant misrepresentation of Dr. Crawford’s testimony and analysis. Dr. Crawford stated repeatedly that he had no evidence one way or the other to suggest that either Ms. Simmons or Ms. Craddock attempted to discern the race of an applicant from the application. Dr. Crawford’s claim was only that race information was *available* to the recruiters before they actually met the applicant, a distinction that the Bank repeatedly ignores.

The Bank argues that Dr. Crawford’s analysis is based on erroneous assumptions and flawed methodology, and that he ignored the Bank’s actual hiring process, and adopted assumptions that combine data involving multiple different jobs with differing qualifications and availabilities, and contrary to the undisputed evidence, assumed that all candidates had the same relative qualifications and applied for, and were considered by the Bank, for all jobs in the job groups at issue at the same time. In contrast, the Bank argues, Dr. Haworth took into account non-discriminatory explanations for an applicant’s disqualifications, and any alleged disparities in the challenged employment actions.

According to the Bank, the most fundamental difference between Dr. Haworth’s analysis and Dr. Crawford’s analysis is that Dr. Haworth “modeled” the actual hiring process for the 1993 and 2002-2005 data. But although it repeats this theme throughout its written arguments, the Bank has not defined what it means to “model the actual hiring process,” or cited to any authority that provides such a definition. Thus, the Bank described the steps in the hiring process used by Dr. Haworth in reviewing the data, but did not explain how her understanding of these steps affected her analysis or evaluation of the hiring data, or helped her to account for “legitimate, non-discriminatory factors” applied by the Bank in making hiring decisions. Moreover, Dr. Crawford had the same understanding of the steps involved in the Bank’s hiring process as Dr. Haworth, and contrary to the Bank’s claim, he also recognized that “multiple decision makers were involved in a multiple-step hiring process” for the 1993 positions. (Bank’s Brief at 48). The record clearly reflects that, like Dr. Haworth, Dr. Crawford was aware of the steps in the decision making process. And although the Bank states that in order to “model” the sequential hiring decisions, Dr. Haworth first analyzed selection data from application to interview, and then from interview to offer, Dr. Crawford also analyzed the selection data from application to interview, and from interview to offer.

In short, it is not at all clear what the Bank claims is the “process-based analysis”

performed by Dr. Haworth, but not by Dr. Crawford. The repetition of this theme, that Dr. Crawford did not “model the hiring process,” while Dr. Haworth did, without pointing to any substance to either define or support such a theme, does not make it any more persuasive. Indeed, it appears that the main differences between the analysis by Dr. Crawford and Dr. Haworth are, not that Dr. Haworth “modeled” the actual hiring process and Dr. Crawford did not, but that Dr. Haworth excluded applicants from her analysis that Dr. Crawford included. Or, as Dr. Crawford stated, the Bank’s argument comes down to Dr. Haworth’s insistence that any analysis of the Bank’s hiring should start with the unfounded assumption that all actions taken by the recruiters were race-neutral, by removing applicants with certain disposition codes from the analysis.

### ***Removal of disposition codes from the analysis***

The Bank argues that by removing from her analysis applicants with disposition codes RR (rejected for reference), RD (rejected for drug test), RC (rejected for credit), and RH (rejected for incompatible hours), Dr. Haworth properly took into account legitimate, non-discriminatory factors used during the hiring process, thus ensuring that her analysis contained only “qualified” applicants. Dr. Crawford did not exclude applicants with the RH and RC disposition codes.<sup>14</sup>

Dr. Crawford testified at length about his reasons for including applicants with the RC disposition code. On his analysis of the impact of the credit check, Dr. Crawford concluded that the percentage of applicants given the RC code was significantly higher for African-Americans than for Caucasians. Similarly, the distribution of the RH code by race showed that this disqualifying factor was disproportionately applied to African-Americans seeking jobs in all hours categories. As Dr. Crawford testified, the Bank provided no information to suggest that the application of the credit check was done in a neutral fashion; indeed, there was no evidence of *any* criteria used by the recruiters in the application of this disposition code.<sup>15</sup>

In its Response Brief, the Bank argues that there is “ample and undisputed evidence regarding how the credit checks were performed and the RC code was applied.” Bank’s Response Brief at 5. Apparently, this “ample and undisputed evidence” consists of the “unimpeached and un rebutted” sworn testimony of Ms. Simmons and Ms. Craddock, who testified that they applied this criterion consistently regardless of the applicant’s race. Unfortunately, neither recruiter offered any information as to what the criteria consisted of, or what were the guidelines, if any, that they followed in applying it. Nor is there any documentary evidence of how this criterion was applied.<sup>16</sup>

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<sup>14</sup> Contrary to the Bank’s repeated claim, Dr. Crawford did not testify that he left “unqualified” candidates in his applicant pool. Rather, he stated that he left in applicants that the Bank concluded were not qualified for the credit or hours criteria, a distinction that the Bank ignores.

<sup>15</sup> Although Mr. Speth represented to the OFCCP that there were certain criteria used in reviewing credit reports in his March 30, 1995 letter, Ms. Craddock testified only that these were “consistent” with her recollection of what she was looking for in the credit reports. She also testified that there were no guidelines or training on how to apply the disposition codes.

<sup>16</sup> Indeed, Dr. Haworth acknowledged that there was no information available to “directly” determine how the recruiters applied the credit reports.



The Bank argues that, contrary to Dr. Crawford's claim that the review of credit reports by the Bank was highly subjective, Ms. Simmons and Ms. Craddock applied objective factors, as set out in a March 30, 1995 letter from Charles Speth to Jerome Geathers. But while these criteria may have been supplied by the Bank in response to the OFCCP's request during the investigation, *neither Ms. Simmons nor Ms. Craddock testified that they applied these factors during the credit check*, as claimed by the Bank. See Bank's Response Brief at 44, fn. 19. It is unclear what criteria they actually used, and since there are no written records to reflect how they were applied, including the credit reports themselves, it is not possible to recreate the recruiters' decisions to apply the RC code, in order to verify that it was uniformly applied. Again, Dr. Crawford determined that the RC disposition code was applied disproportionately to African-American applicants; because there was no basis for an assumption that it was assigned in a race-neutral fashion, he did not exclude these applicants from his analysis.<sup>17</sup>

Because the impact of the credit check disproportionately affected African-American applicants, and there was no information to show that its application was neutral, Dr. Crawford could not assume that it was applied in a race-neutral fashion, and he properly included applicants with this code in his analysis. In contrast, Dr. Haworth, by excluding applicants with this disposition code, assumed that the credit check was applied in a race-neutral fashion. Thus, while Dr. Crawford, by leaving applicants with the RC code in his analysis, tested whether there was bias in the application of this criterion, Dr. Haworth's analysis, which left these applicants in the analysis, and thereby assumed that this criterion was applied in a race neutral fashion, could not detect bias in the use of the criteria.

The Bank argues that the testimony by Mr. Howard, the OFCCP investigator, supports its claims that Dr. Crawford's analysis of the job data is flawed. This argument is misplaced at best, and blatantly mischaracterizes Mr. Howard's testimony. For example, the Bank points to Mr. Howard's testimony that the Bank had the right to use credit scores in making hiring decisions. Clearly, Mr. Howard so testified. But confirming that the Bank had the *right* to use certain criteria in making hiring decisions is not the equivalent of saying that the Bank *actually applied* those criteria in a neutral fashion, something that Mr. Howard clearly did not say. Mr. Howard did no evaluation, and offered no opinion as to whether the RC disposition code was applied in a race-neutral fashion; indeed, there was no reason for him to do so, as he did not perform the statistical analysis of the job hiring data on which the OFCCP relies.

The relevant question is whether there was a basis for an assumption that the RC code was applied by the recruiters in a race-neutral fashion. Dr. Crawford, who considered the disproportionate impact of this code on African Americans, as well as the fact that the Bank provided absolutely no criteria or guidelines as to how these disposition codes were applied, concluded that, under these circumstances, he could not assume the codes were applied in a race-neutral fashion, and he included applicants with these disposition code in his analysis.<sup>18</sup> In

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<sup>17</sup> The Bank argues that Dr. Crawford's conclusion that it was appropriate not to consider applicants who did not pass the drug test (RD), even though he believes that African-Americans are more likely than Caucasians to fail a drug screen, is contradictory to his position with respect to the credit check. There was no evidence presented that that the RD disposition code, which is an objective criterion applied to applicants who successfully negotiated the interview process, had a disproportionate impact on African-American applicants *in this particular case*.

<sup>18</sup> Contrary to the Bank's argument, Dr. Crawford did not make a "conjecture" about the possible injection of bias into the recruitment process. Rather, he kept applicants with RC and RH codes in his pool for analysis because it

contrast, Dr. Haworth assumed that these disposition codes were applied in a race-neutral fashion, despite the evidence that they had a disproportionate impact on African-American applicants. Dr. Haworth cited to studies purportedly showing that measures of credit differ by race, and on average, African-Americans do not fare as well as Caucasians. But she did not offer any opinion on whether the credit check used by the Bank was valid, or a business necessity.

The Bank itself did not conduct any validation study of the credit check, or provide any proof that credit ratings were a valid predictor of job performance at the Bank. The Bank argues that credit checks were related to bonding of Bank employees, but has not even suggested that there was any link between credit reports and any surety or bonding requirements. Thus, Dr. Haworth's testimony that financial institutions routinely use credit checks in the bonding process and to screen persons considered for employment, or that the Bank informed candidates that they had to meet surety or bonding requirements, or that credit checks and bonding requirements were a common financial industry practice in 1993, is simply not relevant. Nor is it relevant that "the OFCCP never disputes that the credit checks were related to the bonding of Bank employees." Bank's Response Brief at 47. There is simply nothing in the record that even tends to show that an acceptable credit report (however that is defined) is a prerequisite for bonding or surety requirements. Indeed, the Bank discontinued its use of the credit check in April 1994, and there is no suggestion that any bonding requirements changed.

The OFCCP's argument that the credit check was unreliable, or a tainted variable, in part because of its adverse impact on African American applicants, does not convert the OFCCP's case to a disparate impact theory. Rather, as Dr. Crawford testified, his inclusion of these candidates was an attempt to structure his analysis to determine if there was bias in the selection process. The fact that, as Dr. Crawford determined, the application of this code had a significant adverse impact on African American applicants supports his reasons for refusing to incorporate this tainted and unreliable variable. In the circumstances of this case, omitting applicants with the RC code from the analysis, as Dr. Haworth did, assumed that this code was applied in a race neutral fashion, when that was the very purpose of the analysis. The Bank did not establish that the credit check was related to job performance, or provide any records or information on which such a determination could be made.<sup>19</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

As noted by the OFCCP, Dr. Haworth testified that it was appropriate to retain applicants in the pool who were screened out because they lacked essential skills, because that is "what we're checking, is whether that's where it was that people were dropped disproportionately if they were African-American. So I left people in even if they were said to lack essential skills, because that's what I'm trying – that part I'm trying to test." Dr. Haworth also indicated that this hiring decision could not be recreated and tested to see if it was uniformly applied, and that it contains both subjective and objective elements. OFCCP's Brief at 41.

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was not possible to determine, one way or the other, if there was bias in the assignment of these codes.

<sup>19</sup> As the Court stated in *Griggs, supra*, "What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.* at 9

The same rationale applies to the applicants with a disposition code of RC. As noted by Dr. Crawford, the purpose of the evaluation was to examine the hiring choices made by the Bank, and he did not have the data to test whether the credit code was applied in a neutral fashion. Dr. Crawford was reluctant to exclude applicants with the RC code, because this would mean starting out by trusting the decisions the recruiters made, and assuming that the code was applied in a race neutral fashion. In contrast, Dr. Haworth, by excluding these applicants, “assumed the question to be answered,” which was whether the hiring decisions were race-neutral.

The Bank also argues that Dr. Haworth’s analysis models the actual hiring process because she included applicants who were rejected with a disposition code of “RH,” for incompatible hours or shifts. Again, while Dr. Haworth incorporated this criterion, which she considered legitimate and non-discriminatory, Dr. Crawford determined that this criterion had a disproportionate impact on African-American applicants, and thus he excluded these applicants from his analysis.<sup>20</sup> The Bank has provided no evidence to suggest that this disproportionate effect was due to legitimate or non-discriminatory reasons, and thus the OFCCP has established that these factors are not properly considered in a statistical analysis of the Bank’s hiring practices.<sup>21</sup>

The Bank takes issue with the OFCCP’s argument that there is no written record that would allow recreation of the recruiters’ decisions to disqualify applicants because of incompatible hours, stating that the OFCCP ignored “undisputed, unimpeached and unrebutted record evidence.” Bank’s Response Brief at 6. Again, the “record evidence” on which the Bank relies is the testimony by Ms. Simmons and Ms. Craddock that they assigned disposition codes without regard to an applicant’s race, and made every effort to assign those disposition codes fairly. But again, this argument misses the point. As Dr. Crawford testified, the RH code was applied disproportionately to African-American candidates; it was also not applied in a uniform fashion. There is no *written record* (other than the transcript of the recruiters’ “record” testimony) that permits this hiring decision to be recreated and tested to determine if it was uniformly applied in a race neutral fashion, and thus, Dr. Crawford did not exclude applicants with the RH code. In contrast, by excluding these applicants, Dr. Haworth relied on the testimony by Ms. Simmons and Ms. Craddock, essentially assuming that their assignments of this code were race neutral, when there was no data available to test whether this code, which had a disproportionate impact on African-American applicants, was applied in a uniform and race-neutral fashion.

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<sup>20</sup> Dr. Crawford’s Revised Table 0 shows how this code was distributed, by comparing its distribution across racial groups, with the applicants’ expression of interest in full time, part time, first, second, and third shift positions. He concluded that African American applicants were more likely to be assigned the RH code, especially in the 5F2 group. Dr. Haworth concluded that the distribution of the RH code in 1993 was not uneven, with the exception of the Remittance Process Specialists III. However, she did not compare the work schedule preferences expressed by the applicants with the rate of assignment of the RH code, as Dr. Crawford did, and she removed a large group of applicants (the Remittance Process Specialists III).

<sup>21</sup> In addition, as the OFCCP has noted, the “RH” code was not uniformly applied; in some instances when an applicant’s hours were not compatible with the job, the applicant was coded “RO” (Other), “RA” (No position available), “RQ” (More qualified selected), or “RI” (Did not sell self well in interview).

Indeed, the disparities in the assignment of these two disposition codes are striking. Dr. Crawford concluded that the RC code was assigned to 11.5% of the African American applicants, and 6.6% of the Caucasian applicants, a difference of 4.1 standard deviations. The RH code was even more disproportionately applied to African American applicants. Dr. Crawford found that in the 5F2 job group, 35% of African Americans seeking full time work were assigned the RH code, compared to 1% of the Caucasian applicants. While 5% of the Caucasian applicants seeking part time work were assigned the RH code, 41% of the African American applicants were assigned this code. Of the African Americans seeking first shift, 35% received the RH code, compared to 1% of Caucasians; 36% of African American applicants seeking second shift jobs were assigned the RH code, compared to 3% of Caucasians; and 34% of the African American applicants seeking third shift positions were assigned the RH code, compared to 4% of Caucasians.

In the 5A2 job group, 11% of the African American applicants who expressed interest in full time work were assigned the RH code, while 6% of the Caucasian applicants received that code. Of the African American applicants who expressed an interest in part time work, 14% were assigned the RH code, while 11% of Caucasian applicants were assigned this code. Of the African American candidates who were interested in first shift positions, 11% received the RH code, compared to 9% of Caucasian applicants; 11% of the African American applicants interested in second shift jobs received the RH code, compared to 6% of the Caucasian applicants.

According to Dr. Haworth, she did not find uneven distribution of the RH code among African American and Caucasian applicants in 1993, except for the Remittance Process Specialist III jobs. However, she did not compare the work schedule preferences indicated by the applicants with the rate at which African-Americans and Caucasians were assigned the RH code, as Dr. Crawford did, but referred to labor economic research on the work patterns of men and women by race. See DX 114, paragraph 27.

In its Response Brief, the Bank argues that Dr. Haworth's alternative analysis of the 1993 hiring data showed no discrimination. Bank's Response Brief at 73. Dr. Haworth's results are shown in her Table 2. According to the Bank, Dr. Haworth tested from application to interview, including applicants with disposition codes of RC or RH, and from interview to hire, and concluded that the data did not show disparate treatment of African American candidates. However, as the OFCCP has pointed out, while Dr. Haworth may have included applicants who failed the credit check, she did not include the numerous applicants with the RH disposition code. In addition, she adjusted for timing.

The Bank has presented no evidence that the disproportionate effect of these criteria on the African American applicants was due to legitimate or non discriminatory reasons. I find that the OFCCP presented sufficient statistical evidence to show that applicants with the RC and RH disposition code had no place in a proper statistical analysis of the Bank's hiring in 1993.

***Dr. Crawford's aggregation of data across job groups and titles***

The Bank argues that Dr. Crawford's decision to aggregate the 1993 data, and his

analysis of that data by “lumping together” both job groups and all of the individual job titles distorts the “true results” of the Bank’s hiring process. Bank’s Brief at 36.<sup>22</sup> The Bank argues that Dr. Crawford abdicated his professional responsibilities, and merely did as he was instructed by the OFCCP in combining job groups and titles. In fact, Dr. Crawford testified that he was asked by the OFCCP to look at the data for the two groups in 1993, and the data from 2002-2005, and determine if there was a departure from race neutrality. The choice of how to test, and what to control for was his, and he received no direction about what tables he should include in his report, or what he should put in his tables.

In response to Dr. Haworth’s analysis, Dr. Crawford performed an analysis of hiring in 5A2 and 5F2 by sorting these applicants into 38 job groups as defined by the job title of the position for which the applicant was considered. In this analysis, Dr. Crawford found statistically significant shortfalls between the actual number of African-American hires, and the expected number of African-American hires, with standard deviations of 4.3 for the period from application to offer, 4.5 for the period from application to interview, and 2.1 for the period from interview to offer.<sup>23</sup>

However, in performing his analysis, Dr. Crawford used a “multiple pools exact test,” which, according to Dr. Crawford, allowed for examination of the extent to which the pattern of selections from several pools is consistent with race-neutral selections from those pools. According to Dr. Crawford, this allows for testing for a pattern of departures from race neutrality across groups, which is critical, because tests based on single groups can be misleading; they are based on fewer observations, and have less ability to detect actual departures from race neutrality. The multiple pools exact test accounts for differences across job groups, and shows whether the pattern of selection from the pools occurred by chance.<sup>24</sup>

In arguing that Dr. Crawford’s use of the multiple pools exact test was inappropriate, the Bank cites to *Anderson v. Westinghouse Savannah River Company*, 406 F.3d 248 (4<sup>th</sup> Cir. 2005). However, that case involved an individual allegation of discrimination, and the expert’s analysis was based on job groups with numerous and diverse jobs. The Court in that case found that the job titles were not similar to that sought by the plaintiff. But in this case, the jobs involved were all entry level, in a certain geographic location, and did not require specialized knowledge or skills, and the hiring process and criteria were similar for all of the jobs.

The Bank argues that Dr. Haworth performed a “process-based analysis,” because she controlled for the actual job title for which candidates submitted applications and were considered for employment. According to the Bank, Dr. Haworth performed her analysis based

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<sup>22</sup> Contrary to the Bank’s claim, Mr. Howard did not testify that it is inappropriate to combine two or more job groups when analyzing hiring data. Bank’s Brief at 36; Tr. 142.

<sup>23</sup> I do not credit the Bank’s suggestion that Dr. Crawford’s analysis of the 1993 and 2002-2005 job data by title in his back up analysis, but his decision not to report it by job title in his report, is “particularly suspicious.” Bank’s Brief at 37. As Dr. Crawford testified, he reported this data in aggregated form because it was appropriate to combine the information from the two groups. He did not list the forty one individual job titles in his report because it would have produced a ponderous table (Tr. 450-456).

<sup>24</sup> Dr. Haworth accepted the multiple pools test as appropriate, except where one group has a statistically positive result, and one has a statistically negative result. She also performed a multiple pools test, but excluded applicants with the RH and RC disposition code.

on the “undisputed fact” that the varied job titles required different skill sets, hours, salaries, schedules, locations, and qualifications, and that the recruiters and hiring managers attempted to match the requirements to the individual jobs they were trying to fill. But as both Dr. Crawford and Dr. Haworth acknowledged, requisition information was not available for 1993.<sup>25</sup>

In addition, the Bank’s argument ignores the fact that the recruiters routinely considered and rejected applicants for jobs for which they expressed no interest. Although Dr. Haworth assumed that an applicant expressed interest in a position because his or her name was associated with the position on the job, the job to which an applicant was connected on the applicant flow log was not necessarily a job that the applicant expressed interest in.<sup>26</sup> Rather, in many cases, the recruiters made that assignment on the applicant flow log. Thus, because the 38 job groups in 1993 cannot be considered as groups determined by the applicants’ preferences, controlling for job title cannot detect bias in the job title assignment. Indeed, Dr. Haworth acknowledged that if there was any race bias in the assignments of applicants to requisitions by the recruiters, her analysis controlling by requisition would not detect it.<sup>27</sup>

As Dr. Crawford testified, numerous applications reflect that someone other than the applicant wrote on the application that the applicant was considered for a position for which the applicant did not express interest on the application. Dr. Crawford explained that fragmenting the analysis of the data by job results in subgroups that the Bank manipulated, because these subgroups do not include only applicants who expressed interest in a particular job. The recruiters had control over who was considered for which job title, and thus it is a variable subject to the Bank’s control. According to Dr. Crawford, if one controls for job, one is willing to assume that the job assignments were done in a race neutral fashion; controlling for job title cannot detect bias in the job title assignment.<sup>28</sup>

Nevertheless, Dr. Crawford performed an analysis by job group for 1993, and concluded that, in each step of the hiring process, as well as overall, there were statistically significant shortfalls in the selection of African American applicants.<sup>29</sup> Indeed, Dr. Crawford concluded that the probability of finding such shortfalls in two of the 14 job groups in 1993 was 1 in

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<sup>25</sup> Contrary to the Bank’s claim, Mr. Howard did not contradict Dr. Crawford’s claim that there was insufficient information to connect an applicant with a particular requisition, and thus it was not possible to determine the timing of each application. More importantly, Dr. Haworth agreed with Dr. Crawford.

<sup>26</sup> Dr. Haworth examined approximately 200 *offers* with applications, representing less than ten percent of all Caucasian and African-American applicants in 1993, and determined that 72.5 percent were hired into the job for which they applied. Of course, this also means that 27.5 percent were not hired into the job for which they applied. Moreover, Dr. Haworth did not compare the applicant flow log with the job the applicant listed on the application to determine if the unsuccessful applicants were rejected for jobs for which they applied.

<sup>27</sup> Nor is it relevant that Dr. Crawford acknowledged that he had no evidence of steering by the recruiters. Bank’s Brief at 50.

<sup>28</sup> Contrary to the Bank’s claim, Dr. Crawford did not testify that only 2.4% of the total application pool would not be considered a “match” under his analysis. See Bank’s Response Brief at 35. A review of the transcript clearly shows that Dr. Crawford did not agree with this statement, but testified only that he agreed with the *arithmetic calculations by counsel* – i.e., that 60 out of 2,439 was 2.4 percent. Tr. 410-411.

<sup>29</sup> Again, I do not find, as suggested by the Bank, that Dr. Crawford’s decision to include this alternate analysis in his backup data, but not in the body of his report, is “suspicious,” or an attempt to “hide” that analysis. As the OFCCP has pointed out, the Bank’s expert did not report such information in her tables, whether controlling for job, job and timing, or requisition.

2,740,000, or 5.1 standard deviations.

The Bank argues that the jobs in the 5F2 job group required different qualifications and skills, but has presented no evidence that the Bank itself actually segregated applicants by types of qualifications, job experience, or skill. The Bank considered applicants for jobs for which they did not express an interest, thus showing that the Bank itself did not treat applicants as falling into distinct pools defined by the type of job being sought.

With respect to the 2005 hiring process, Dr. Crawford concluded that he could not control for requisition or job group, noting that applicants could submit a resume without applying for a particular job. The resume stayed in the Bank's database until a recruiter connected it to a job opening. Thus, the recruiter had control over the assignment of applicants to job titles, and controlling for requisition results in subgroups directly manipulated by the Bank, as its recruiters matched the resumes to the requisitions. Again, however, Dr. Crawford analyzed the sixteen groups by year and position for which the applicant was considered, and determined that there was a statistically significant shortfall (4.1 standard deviations) from race neutrality.

Dr. Haworth also performed a multiple pools analysis on the 2002-2005 data, which she reported by the teller and entry level administrative group, but not overall. Her analysis reflected a standard deviation of -2.06 for the teller group, and -1.80 for the entry level administrative group. She acknowledged that the results could be combined to test the overall results for the 5A job group, which was more than two standard deviations; she did not show this result.

### *Controlling for the timing of the applications*

The Bank argues that Dr. Crawford's analysis is flawed because it fails to account for the timing of the applications, and is based on the assumption that a person who submitted an application in December 1993 was a viable candidate for a position that the Bank advertised for and filled eleven months earlier, in January 1993. According to the Bank, Dr. Crawford ignored the "undisputed fact" that the life of an application was quite short, and they "generally" were reviewed and acted upon shortly after submission by the candidates, with requisitions "generally" filled within ten days from receipt by the recruiters.

Dr. Crawford concluded that controlling for the timing of applications was not informative, because the data showed that the percentage of African-American applicants in the teller group was steady across 1993, without significant fluctuation.<sup>30</sup> Although he agreed that Dr. Haworth's bar graph showing the number of African-American applicants by week for certain jobs was "not inaccurate," he testified that the relevant inquiry was whether the percentage of African-American applicants varied over time, as opposed to the actual numbers of African-American applicants.

But again, in response to Dr. Haworth's criticisms, he performed a timing analysis, which was similar to that used by Dr. Haworth.<sup>31</sup> Thus, Dr. Crawford created pools of applicants who

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<sup>30</sup> In addition, because there was insufficient evidence to connect an application with a particular requisition, it was not possible to determine the timing of each application.

<sup>31</sup> If, as argued by the Bank, Dr. Crawford failed to model the actual hiring process, and his grouping of the

applied within a given month combined with applicants in the ten previous days, while Dr. Haworth created pools of applicants who applied within a given month combined with applicants in the seven previous days. Both Dr. Haworth and Dr. Crawford testified that these methods are not perfect; but the preferred method, which would tie applications to particular requisitions, could not be done because this data does not exist for 1993.<sup>32</sup>

The timing of the applications for jobs available in 1993 cannot be recreated, because the requisition data does not exist; both experts performed alternative best approximations to account for timing. Even controlling for time, Dr. Crawford concluded that there was a significant standard deviation, at 6.6, between the actual and expected number of African-American hired.

Clearly, Dr. Crawford did not “refuse” to control for timing; he explained why such an analysis was not helpful, but in any event, when he did control for timing, he again found a significant standard deviation between the actual and expected number of African-Americans hired by the Bank.

Dr. Haworth analyzed the overall hiring process from application to offer, and found a standard deviation of -2.94 in job group 5A2, and a standard deviation of +1.07 in job group 5F2, which she set out in her Table 2. However, the Bank’s claim that “Thus, even when timing is ignored, as Dr. Crawford did, the results of the hiring process (from application to offer) demonstrate that the Bank did not discriminate against African American candidates” is misplaced – contrary to the Bank’s claim, Dr. Haworth excluded the numerous applicants with the RH disposition codes, and she adjusted for timing.

Again, I find that the Bank’s use of Mr. Howard’s testimony to support its claim that there is no evidence that it intentionally discriminated against any African-American applicant is disingenuous, and mischaracterizes the record. Thus, the Bank states that “the OFCCP admitted that the Bank’s AAP, hiring process and reasons for disqualifying candidates were legitimate, and not based on any discriminatory motive,” and “agreed that the screening criteria utilized by Ms. Simmons and Ms. Craddock were based on legitimate factors.” Bank’s Brief at 25-26. These claims appear to be an attempt to draw the focus away from the actual issue here, which is not whether the Bank had a legitimate “hiring process,” or whether the reasons for disqualifying candidates or the screening criteria were based on legitimate factors, but whether the Bank *used* these criteria consistently, and in a race neutral fashion, in the hiring process. This is a distinction that the Bank consistently ignores.

Thus, it is irrelevant that Mr. Howard “admitted” that there is no evidence that the recruiters discriminated against any candidate based on race, or that Ms. Simmons is African-American, and Ms. Craddock is engaged to marry an African-American. Nor is it relevant that Dr. Crawford “conceded” that he has no evidence to support his “supposition” that the recruiters may have tried to discern the race of the applicant from the application. Dr. Crawford made it clear, numerous times, that he considered it possible to derive the race of an applicant from

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applicants “dampened” the results, this criticism would apply equally to Dr. Haworth’s analysis.

<sup>32</sup> The Bank’s argument that Dr. Crawford’s analysis with timing is flawed because he acknowledged that an applicant could possibly be counted twice, thus dampening the true picture, is misleading. This same claim applies to the timing analysis used by Dr. Haworth.



information on the application, but he did not claim that the recruiters did so.<sup>33</sup> As the OFCCP has argued, it does not allege that particular individuals made discrete, biased decisions, but that bias pervaded the Bank's hiring practices. These allegations are against the Bank, not individual decision makers for discrete acts of discrimination.

As the OFCCP has argued, this is a pattern and practice case, and the race of the recruiters is irrelevant. The issue is whether the processes and procedures used by the Bank to hire into entry level positions unlawfully and unfairly excluded African American applicants.<sup>34</sup>

In its Response Brief, the Bank persists in its reliance on actions and testimony by Mr. Howard regarding the investigative phase of this proceeding. Thus, the Bank argues that reading the OFCCP's Brief, "it is as if the OFCCP's own compliance officer, James Howard, does not even exist." Bank's Response Brief at 2. It is correct that Mr. Howard was the OFCCP's main investigator in this case, and conducted the five-day on-site review. It is also true that Mr. Howard is the OFCCP's designated agency representative, and in that position, he testified for 278 pages and about ten hours in a discovery deposition conducted by the Bank's counsel.

It is disingenuous to claim, as the Bank does, that the OFCCP has decided to "ignore" Mr. Howard's testimony. Clearly Mr. Howard played an important role in the process that led to the OFCCP lodging these charges against the Bank. But the OFCCP bases its claims on the analysis performed by Dr. Crawford, not investigative results obtained by Mr. Howard.<sup>35</sup> And again, it is a blatant misrepresentation to state that Mr. Howard acknowledges "over and over again that the Bank's hiring was based on legitimate, non-discriminatory criteria applied in a race neutral manner, and that the OFCCP has no evidence that Bank of America intentionally discriminated against any African-American candidate for employment." Bank's Response Brief at 3.

### *Anecdotal evidence of intentional discrimination*

The Bank argues that the OFCCP may not rely on its statistical analysis alone, but must also proffer anecdotal evidence of specific instances intentional discrimination. According to the Bank, the OFCCP has not offered any anecdotal evidence of discrimination for 2002-2005, and has not offered sufficient evidence of specific instances of discrimination for 1993. The Bank's argument is premised on a mis-statement of the applicable law. The Supreme Court has 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. *International Brotherhood of Teamsters*, 431 U.S. 324, 339 (1977); *Hazelwood*, *supra*, 97 S.Ct. at 2741. As noted by the OFCCP, the Supreme Court has held that "as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail." *Bazemore v. Friday*, 106 S.Ct. 3000, 3009 (1986). Indeed, the cases

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<sup>33</sup> Thus, there was nothing for Dr. Crawford to "recant," when he testified that he never said the recruiters tried to discern the race of a candidate from the application. See Bank's Brief at 27.

<sup>34</sup> The Bank cites to *Fletcher v. Phillip Morris USA, Inc.*, for the proposition that a claim of discrimination is unlikely where the decisionmaker is a member of the same protected class. However, this case involved an individual claim of disparate treatment, not a pattern or practice claim.

<sup>35</sup> By way of analogy, if this were a criminal matter, Mr. Howard's investigation and results would be the arrest warrant. However, the actual charging document is Dr. Crawford's analysis.

relied on by the Bank for its argument that the OFCCP is required to proffer a certain amount of anecdotal evidence do not support that claim.

Particularly egregious is the Bank's misrepresentation of the findings in *Ste. Marie v. Eastern R. Assoc.*, 650 F.2d 395 (2<sup>nd</sup> Cr. 1981). According to the Bank, in that case, the plaintiff "relied on" statistical evidence and the testimony of two alleged victims of discrimination, and the Court held that "[w]hile the definition of a pattern or practice is not capable of a precise mathematical formulation, more than two acts will ordinarily be required." Bank's Opening Brief at 46. The Bank's attempt to suggest that the Court in that case required *both* statistical and anecdotal evidence of discrimination in a disparate treatment case is disingenuous and misleading. In fact, the Court in that case found that the plaintiffs' statistical evidence did not establish a prima facie case of discrimination. Having rejected the statistical evidence, the Court found that two alleged incidents of discrimination would be insufficient to support the inference of a routine or regular practice of discrimination. However, the Court's findings do **not** stand for the proposition, as advanced by the Bank, that in addition to its statistical evidence, the OFCCP must proffer anecdotal evidence of discrimination.

Nor, contrary to the Bank's claim, does the Court's decision in *EEOC v. Western Electric Co., Inc.*, 713 F.2d 1011 (4<sup>th</sup> Cir. 1983), stand for the proposition that the OFCCP must submit persuasive anecdotal evidence in addition to its statistical evidence in a disparate treatment case. In that case, the EEOC's complaint, under the ADEA, involved a claim that older supervisors were selected for demotion disproportionately, and secondly, that sixteen individual supervisors were selected for demotion because of their age. The Court found that the EEOC's statistical expert admitted that there was no statistically significant difference between the number of supervisors in that age group who were actually demoted, and the number which would have been expected to be demoted, and thus the district court erred in finding a prima facie case of "pattern and practice" discrimination against that group, a finding that the EEOC conceded on appeal. With respect to the sixteen individual claimants, the Court concluded that, even assuming that the EEOC established a prima facie case with respect to each of the sixteen individuals, the employer established a legitimate business reason for demotion with respect to each of the sixteen individuals, and thus the district court erred in finding employment discrimination with respect to these sixteen individual claimants. Nothing in the Court's opinion supports the Bank's claim that anecdotal evidence is required in addition to statistical evidence in a disparate treatment case.

Moreover, in claiming that the testimony offered by the three unsuccessful applicants demonstrates that it rejected their applications for legitimate, non-discriminatory reasons, the Bank misrepresents the testimony by these three applicants.

The OFCCP presented the testimony of Ms. Cassandra Medley, whose application was rejected on the grounds that her salary requirements were too high. Yet Ms. Medley stated on her application that her salary requirements were "negotiable."<sup>36</sup> Ms. Medley applied for a trust group position, but was considered for a lockbox position. The applicant flow log reflects that Ms. Medley was disqualified with the codes RA (No position available), and RQ (More qualified

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<sup>36</sup> I do not find it particularly relevant, as the Bank argues, that Ms. Medley acknowledged that her salary *history* was well above the salary of the job in question.

selected).

Ms. Cathy Gilchrist applied for a position as a weekend lock box operator in 1993. She testified that she sought this position, which required weekend work, because she was in nursing school during the week, and she wanted to work on the weekends. Yet in its brief, the Bank claims that Ms. Gilchrist expressed concern about working weekend hours. The applicant flow log reflects that Ms. Gilchrist was disqualified for incompatible hours (RH). The Bank's notes attached to Ms. Gilchrist's application include a comment of "not sure about weekend hrs;" from the context, it appears that these notes reflect someone's review of Ms. Gilchrist's application. There is nothing to indicate that this is something Ms. Gilchrist said during her interview.

Ms. Gilchrist testified that she did not recall discussing any credit issues during her interview; the Bank claims that she advanced in the hiring process after adequately explaining her "credit issues" to the recruiter. The Bank's notes attached to Ms. Gilchrist's application indicate that she had a "small cr problem," and after the notation indicating that she had an interview with Michael Summer, stated that she had a "weak rsp to teamwork questions."

Mr. Bryant Jackson applied for a job as a data entry clerk in 1993. Although the Bank argues that he was a "job hopper," because he worked in different jobs in different states, the applicant flow log reflects that he was actually disqualified for incompatible hours (RH). Mr. Bryant testified that he applied for the hours of the position that he saw advertised.

I find that, standing alone, the testimony of Ms. Medley, Ms. Gilchrist, and Mr. Jackson does not establish that the Bank engaged in a pattern or practice of discrimination. But I also find that their testimony provides a real-life example of Dr. Crawford's conclusions that applicants were considered for positions for which they did not express interest, and that the assignment of the RC and RH codes was not reliable.

But in any event, contrary to the Bank's claim, it is well established that, while proof of a discriminatory motive is a necessary element of a disparate treatment case, statistics can establish a prima facie case, even without a showing of specific instances of overt discrimination. *See U.S. v. Fairfax County, VA*, 629 F.2d 932, 939 (4<sup>th</sup> Cir. 1980), citing *Hazelwood, supra*, 433 U.S. at 307-308; *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4<sup>th</sup> Cir. 1975).

### ***Comparison of hiring to availability in the external workforce***

The Bank points to Dr. Haworth's comparison of its hiring practices for job groups 5A2 and 5F2 with "availability" statistics in the Charlotte metropolitan statistical area for 1993, and her conclusion that the Bank hired more African-American candidates than would be predicted. However, it is well established that the applicant flow data, which documents the actual labor pool relevant to the hiring decisions at issue, is "highly relevant evidence of an employer's labor market." *U.S. v. Fairfax County, VA*, 629 F.2d 932, 940 (4<sup>th</sup> Cir. 1980)(citing *Hazelwood, supra*, 433 U.S. at 308 (1977)). Whether Dr. Haworth found that the Bank's hiring practices met or exceeded the "benchmark" availability in the Charlotte MSA is not relevant; rather, the relevant analysis is how the Bank treated African-American applicants versus Caucasian applicants in the job groups at issue in the applicant pool used by the Bank.

### *Application of Legal Presumption*

The OFCCP argues that, pursuant to 41 C.F.R. Section 60-1.12(e), the Bank was required to preserve all records relating to its hiring practices for at least two years. In addition, the Bank was on notice, as of November 1993, that the OFCCP would conduct a compliance review of the Bank's employment practices, including its hiring practices, as provided for in the regulations and Uniform Guidelines. The regulation provides that when a compliance evaluation has been initiated, all personnel and employment records as described in the regulation are relevant until the OFCCP makes a final disposition of the evaluation. The failure to preserve complete and accurate records constitutes noncompliance, and where the contractor has destroyed or failed to preserve records as required, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor. 41 C.F.R. Section 60-1.12(a), (e).

The OFCCP argues that this regulation requires the Court to presume that the missing data would not lessen the statistical disparity calculated by the OFCCP. The OFCCP states that the Bank did not retain applications, other applicant data, interview notes, and other records of applicants from 1994 through 2001, as required by the regulations, and there is no suggestion or evidence that the Bank's failure to preserve these records was due to circumstances outside the Bank's control.

Curiously, the Bank argues that 41 C.F.R. Section 60-1.12 applies only to records made or kept on or after December 22, 1997. It is not at all clear how the Bank came to this conclusion. Title 41 C.F.R. Section 60.1.7 sets out the reporting requirements for federal contractors; this subsection was last amended on December 22, 1997. However, Section 60-1.12, which sets out the *record retention* requirements for federal contractors, contains no language even suggesting that it applies only to records made or kept on or after December 22, 1997. The Bank has offered no explanation for its proposed interpretation of the regulations.

The Bank also argues that, because the OFCCP's original notice of selection was "limited" to its 1993 personnel activity, the period of its original review was from January 1, 1993 through December 3, 1993, and the notices of violation were "limited" to its review of its 1993 personnel activity, it had no obligation to retain personnel records for the period from 1994 through 2001.

I find that the Bank's arguments are convoluted, at best, and similar to previous arguments that this Court has rejected. In my March 2, 2005 Order regarding discovery motions, I noted that in the Administrative Complaint, the OFCCP alleged that the Bank discriminated against minorities in filling certain positions in three job groups at the Bank's Charlotte facility, *from at least January 1, 1993*. The Bank argued that, since the OFCCP's Administrative Complaint was premised on the audit it performed of the Bank's practices in 1993, it was not entitled to documents or information relating to subsequent years. According to the Bank, the scope of this litigation was limited, and the OFCCP had no administrative probable cause to search the Bank's records for evidence of any alleged continuing violations where it first had not established any existing violations as of the year 1993, and where it had not followed proper investigatory and conciliatory procedures. In my Order, I stated that

As the Court in *U.S. v. IBM, supra*,<sup>37</sup> has indicated, an administrative agency does not need probable cause or a warrant to serve an investigatory subpoena. But even setting that concept aside, the Defendant's argument must be rejected. The Administrative Complaint clearly alleges violations "since at least January 1993," which I find to be an allegation of ongoing violations. The fact that the basis for the Administrative Complaint was the information provided by the Bank for the year 1993 does not lead to the conclusion that the Plaintiff may only charge the Defendant with violations in 1993. The Plaintiff is simply not limited to alleging violations for the year 1993; nor, as the Defendant suggests, is the Plaintiff limited to the information and documents provided by the Defendant in the compliance review and audit.

Nor is it relevant that the OFCCP did not engage in the conciliation process for any period other than 1993. I addressed a similar argument by the Bank in my March 2, 2005 Order, noting that the Bank argued that, because the OFCCP had not conducted investigations or made findings, or conciliated for periods after 1993, the Bank's hiring practices after this date were irrelevant and discovery was not warranted. I noted that similar issues have been addressed in other cases before Administrative Law Judges, who have reasoned that separate conciliation efforts for each additional period would be impractical and inefficient; since the case was already in litigation, additional conciliation regarding continuing unlawful conduct would be futile; and evidence of later conduct is relevant because it was challenged in the complaint.

In this case, after conducting its on-site review of the Bank's 1993 hiring practices, the OFCCP first issued a Notice of Violation on October 19, 1994. After attempting to resolve the matter for approximately a year and a half, the OFCCP filed its administrative complaint on July 18, 1997. Clearly, the OFCCP initiated a compliance evaluation of the Bank in 1993, and the Bank was required to retain *all* personnel and employment records as described in the regulation until the OFCCP made a final disposition of the evaluation. Clearly, the Bank did not retain such records for the years between 1993 and 2002, nor has it offered any justification for its failure to do so.

Based on the Bank's failure to retain records as required by law for the years between 1993 and 2002, and the complete lack of any justification for this failure, I find that the missing data would not lessen the statistical disparities calculated by Dr. Crawford, the OFCCP's expert witness.

### ***CONCLUSION***

The Bank's argument that the OFCCP is claiming that the recruiters, Ms. Simmons and Ms. Craddock, are racists who secretly mined applications to identify and discriminate against African-American applicants, and that they will lie under oath on any subject not supportive of the OFCCP's claims, is overblown and sensationalist, and attempts to shift the focus of the analysis away from the actual issues in this case.<sup>38</sup> It is not relevant that Ms. Simmons and Ms.

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<sup>37</sup> *U.S. v. IBM*, 83 F.R.D. 97 (S.D.N.Y. 1979)

<sup>38</sup> Apparently because the OFCCP has responded that it is not in fact making such a claim, the Bank argues in its

Craddock recruited and the Bank hired many applicants who attended historically black colleges or universities, or who were members of African-American organizations, or that Ms. Simmons is African-American, or Ms. Craddock is engaged to marry an African-American.<sup>39</sup> Nor was Dr. Crawford “confronted” with their testimony, and then “quickly retreated” to admit he had no evidence that this happened.

The OFCCP is not required to show that each applicant was the victim of the Bank’s discriminatory policies, but must only establish a prima facie case that such a policy existed.<sup>40</sup> *International Brotherhood of Teamsters v. United States et al.*, *supra*; *Segar v. Smith*, *supra*. I have found that the OFCCP has established its prima facie case based on Dr. Crawford’s statistical analysis. The burden then shifts to the Bank to show that the OFCCP’s proof is either inaccurate or insignificant. The Bank cannot rebut this statistical evidence merely by arguing that its decisions were legitimate or nondiscriminatory. *See International Brotherhood of Teamsters v. United States et al.*, 431 U.S. 360, n. 46. Rather, the Bank must show that the pattern or practice of discrimination established by the OFCCP’s statistical evidence does not exist, either by successfully attacking Dr. Crawford’s statistical method, or by showing that all of the statistical disparities he discovered can be explained by non-discriminatory factors. The Bank cannot meet its burden by arguing that certain actors, in this case the recruiters, did not intend to discriminate. A finding of ulterior motives is not a prerequisite to a finding of intentional discrimination. *See OFCCP v. Greenwood Mills, Inc.*, 1989-OFC-39, at 13.

In challenging Dr. Crawford’s results, the Bank must do more than point out alleged imperfections in his study. In this case, the Bank did not establish that any alleged coding errors had an impact on Dr. Crawford’s results, including those in Revised Table 0. Indeed, although Dr. Haworth discussed what she felt were inaccuracies in Dr. Crawford’s database, she did not indicate that they had any impact, and agreed that his corrections did not significantly alter his 1993 analysis. As the Supreme Court stated, a plaintiff in a Title VII case need not prove discrimination with scientific certainty; his or her burden is to prove discrimination by a preponderance of the evidence, and a statistical analysis that includes less than all “measurable variables” may prove a plaintiff’s case. *Bazemore v. Friday*, 478 U.S. 385 (1986).

I find the Bank’s suggestion that the OFCCP has engaged in fifteen years of exhaustive discovery in order to bring its case to be particularly misleading. Bank’s Response Brief at 80. As the Bank is well aware, the hearing and ultimate disposition of this case were delayed for a number of years while the Bank pursued its unsuccessful Fourth Amendment challenge to the OFCCP’s on-site review, a challenge the Bank continued to pursue without success in a more recent audit. *See, OFCCP v. Bank of America*, 2003-OFC-3 (May 22, 2007) (Administrative Law Judge Jeffrey Tureck’s Recommended Order Enforcing On-Site Review).

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Reply that the OFCCP has now “abandoned” this allegation.

<sup>39</sup> As the Supreme Court has stated, an employer’s nondiscriminatory treatment of some minorities or women does not immunize or exonerate that employer from findings of discrimination against other minorities or women. Irrespective of the form taken by the discriminatory practice, an employer’s treatment of other members of the plaintiffs’ group can be of little comfort to the victims of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978), citing *International Brotherhood of Teamsters*, *supra*, 431 U.S. at 342.

<sup>40</sup> The Bank’s argument that the OFCCP alleges that it violated the Executive Order by discriminating against all African American candidates is overdrawn and simplistic.

The Bank's overly dramatic claim that the OFCCP is requiring it to engage in quota-based hiring requirements, in violation of the Equal Protection Clause and all federal anti-discrimination laws, including Executive Order 11246, blatantly misstates the applicable law, and reflects a deliberate disregard for the rationale underlying statistical analysis as a basis for charges of discrimination. Bank's Response Brief at 81. In this regard, the Bank's reliance on the Supreme Court's decision in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009) is completely misplaced. In that case, the City of New Haven, Connecticut, was sued for intentional discrimination by refusing to certify results of a promotional examination, based on its belief that using the results could have a disparate impact on minority firefighters. The Court stated that

[b]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." *Id.* at 2661.

The Court found that fear of litigation alone could not justify the City's reliance on race, to the detriment of individuals who passed the examinations and qualified for promotions. The Court noted that Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation," but it has also prohibited employers from taking adverse employment actions "because of" race. The Court stated that

Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination.

*Id.* at 13. The Supreme Court has recognized the validity of both disparate treatment and disparate impact challenges to workplace employment decisions. The facts in this case do not remotely suggest that the Bank is being forced to violate one provision in the name of compliance with the other.

The Bank's citation to *Coates v. Johnson & Johnson*, 756 F.2d 524 (7<sup>th</sup> Cir. 1985) in its Reply Brief, in a discussion of the Bank's obligation on rebuttal, is especially puzzling. In *Coates*, the Court held that when a defendant offers statistics using an allegedly biased factor in an attempt to rebut the plaintiff's prima facie case, the plaintiff has the burden of persuading the factfinder that the factor is biased. The Court in that case stated:

A defendant that uses a possibly biased explanatory factor to show that inclusion of the factor changes the result of the plaintiffs' analysis has effectively met its burden of production within the meaning of *Teamsters*. See *Trout v. Lehman*, 702 F.2d at 1102 ("[T]he most effective way to rebut a statistically based prima facie case is to present more accurate statistics."). By including the factor and showing that the statistics no longer indicate discrimination, the defendant responds to the particular proof used by the plaintiffs to establish their prima facie case and thus raises a genuine issue of fact as to

whether the apparent disparate treatment is in fact due to discrimination.

*Id.* at 544-545. It is not at all clear how the Court's findings apply to this case, where the Bank has attempted to rebut the OFCCP's prima facie statistical case, not by including any additional factors, but by **excluding** a large number of applicants (those assigned the RC and RH disposition codes) from the pool for analysis. Nor is the OFCCP required to prove that "the challenged employment practice is a mere pretext for discrimination," or that "the Bank's hiring system allowed or encouraged its recruiters and hiring managers to discriminate **and that the Bank's recruiters and hiring managers actually did discriminate.**" Bank's Reply Brief at 5-6 (emphasis in original). The "pretext" analysis, used in individual discrimination and disparate impact claims, is not applicable here, where the OFCCP is not challenging a specific action or policy.

I find that the OFCCP has established by a preponderance of the evidence that there was a disparity between African American and Caucasian candidates in selection rates for entry level administrative positions in 1993 and 2002-2005, and that this disparity was caused by an unlawful bias against African Americans. The OFCCP has relied primarily on its statistical evidence, as presented by Dr. Crawford, and supported by anecdotal evidence from three unsuccessful applicants. Although the Bank argues that the OFCCP must show a disparity of more than three standard deviations before an inference of discrimination is permissible, this is not consistent with the weight of legal authority, which recognizes no such ironclad rule.

Thus, the Supreme Court has recognized that "[a]s a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that [the disparity] was random would be suspect to a social scientist." *Castaneda v. Partida*, 430 U.S. 482, 497 (1977); *Hazelwood*, *supra*, 433 U.S. at 309.

Dr. Crawford, who analyzed the applicant flow data provided by the bank, concluded that the Bank's selections for positions in job groups 5A2 and 5F2, for the 1993 time period, were not race-neutral, with a shortfall between the expected number of African American hires and the actual number of 6.9 standard deviations. For the 2002-2005 time period, he concluded that the Bank's selections for the 2002-2005 time period were not race neutral, with a shortfall between the expected number of African American hires and the actual number of 4.0 standard deviations.

### RECOMMENDED DECISION

Based on the foregoing, I find that the OFCCP has shown by a preponderance of the evidence that the Bank intentionally and unlawfully discriminated against African-American candidates in hiring into entry level positions in 1993, and in 2002-2005. The Bank has failed to successfully attack the methodology or significance of OFCCP's statistical evidence showing a significant adverse impact against African-American applicants, or that the statistical disparities are explained by legitimate, nondiscriminatory factors, and thus has not carried its burden to rebut the OFCCP's prima facie case of disparate treatment.<sup>41</sup>

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<sup>41</sup> Even if I were to disregard the OFCCP's anecdotal evidence of discrimination, I would still conclude that Dr.



Accordingly, it is hereby recommended that Defendant Bank of America be found to have discriminated against African-American applicants in hiring for entry-level positions in 1993, and 2002-2005, on the basis of their race.

I will retain jurisdiction of this matter 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.

SO ORDERED.

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LINDA S. CHAPMAN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file exceptions (“Exception”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s recommended decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. § 60-30.28.

Even if no Exception is timely filed, the administrative law judge’s recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See* 41 C.F.R. § 60-30.27.

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Crawford’s testimony is more than sufficient to meet the OFCCP’s burden of proof.

