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7
8 HONORABLE EDWARD F. SHEA

9
10 IN THE UNITED STATES DISTRICT COURT
11 IN AND FOR THE EASTERN DISTRICT OF WASHINGTON
12 AT YAKIMA

13 EVA A. RAMIREZ) NO. CV-07-3044-EFS
14)
15 Plaintiff,)
16)
17 v.) EVA RAMIREZ'S MEMORANDUM
18) IN RESPONSE TO DEFENDANT'S
19) MOTION IN LIMINE TO BAR
20 OLYMPIC HEALTH MANAGEMENT,) PLAINTIFF'S EXPERT REPORT
21 SYSTEMS, INC., a Washington)
22 Corporation,)
23)
24 Defendant.)
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33 I. FACTS

34 Lori Geddes is a Professor of Economics at Eastern Washington
35 University (EWU) in Cheney, Washington. (Declaration of Lori Geddes in
Opposition to Defendant's Motion to Bar Plaintiffs' Expert Report, hereinafter
"Dec. of Geddes," ¶ 1).¹ She has expertise in the field of mathematical

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¹ Ms. Ramirez will refer to Ms. Geddes' Statistical Analysis Report, dated
3/31/08, as her "Report" and the Addendum to Statistical Analysis Report, dated

1 economics. (Dec. of Geddes, ¶ 3). Ms. Geddes has been a professor at EWU
2 since 2002. (Dec. of Geddes, ¶ 1). Eva Ramirez has retained Ms. Geddes as an
3 expert to categorize and calculate the leads that Ms. Ramirez received and to
4 project how many leads she should have received. (See Report and Addendum,
5 Document 139-2 and 139-3). Ms. Geddes reviewed Ms. Ramirez's Complaint,
6 Olympic's Answer, Defense and Affirmative Defenses. (Dec. of Geddes, ¶ 6).
7 Ms. Geddes also has reviewed Defendant's Initial Disclosures, OHM 1-01657;
8 its Fourth Supplemental Disclosure Statement, OHM 2700 to OHM 2933 and
9 five depositions from the case including Ramirez's and Borth's. (Dec. of
10 Geddes, ¶ 6).

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12 On February 13, 2009, Ms. Geddes filed a report that listed to percentage
13 of total sales and leads for each agent in the Yakima, Washington, office for the
14 months from April – October, 2006. (Document 139-2). According to Ms.
15 Geddes' Report, Ms. Ramirez "received only 12% of the leads for the month [of
16 July] even though she had the highest percentage of sales in June with
17 approximately 25%." (Document 139-2, 14).

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19 Olympic had a Sterling Leads Management Program that applied to the
20 Yakima office in 2006. (Dec. of Montoya, filed 2/27/09, ex. 2 to Eva
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6/10/08, as her "Addendum." The "Document" references are to the court
document number.

1 Ramirez's Statement of Material Facts in Opposition . . . , ex. 5 thereto; Dep. of
2 Borth, 196: 4-20). According to the policy, leads consisted of destiny leads or
3 direct response leads (DRL). (Statement of Material Facts, filed 11/20/08,
4 Document 95-8; Dec. of Montoya, filed 2/26/09, ¶ 2; Dep. of Borth, ex. 10).²
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6 The destiny leads consisted of gold call list, turning 65 leads, lapse leads, and
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8 value added leads. (Document 95-8, 230).
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11 The direct response leads consisted of response cards received as a result
12 of a lead generation mailing or telephone solicitation campaign, either Kramer,
13 Target, Western Resource or Sterling mailings. (Document 95-8, 230). The
14 direct response leads also included hot leads that resulted from "other marketing
15 contact including senior publication and newspaper responses [.]" (Document
16 95-8, 230). Other sources of hot leads included "telephone inquiries, referrals
17 from physician offices or government offices, or inquiries directed to our
18 website. These leads will be available for thatching daily." (Document 95-8,
19 230).
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27 The Sterling Leads Management Program that Ms. Borth said applied in
28 2006 stated:
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31 **Distribution of Direct Response Leads**
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33 ² The Sterling Leads Management Program document will hereinafter be cited
34 as "Document 95-8," followed by the court's page number.
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1 The distribution of Direct Response Leads (DRL) is to be
2 tightly managed with producers receiving the bulk of the
3 DRLs. Leads will be assigned based on the agent's
4 previous month's activity. A log sheet will be provided
5 to assist you in making assignments and managing lead
6 inventory.

7 **Distribution Requirements**

8 1-11 net health sales = 1 DRL per sale up to 11 per
9 month 12-15 net health sales = 9 DRLs per week up to
10 36 per month 16+ net health sales = 12 DRLs per week
11 up to 48 per month

12 **Bonus leads will be earned for Life sales**

13 1 net life sale per month = 1 DRL per week = 4 bonus
14 leads per month

15 2 net life sales per month = 2 DRLs per week = 8 bonus
16 leads per month

17 3 net life sales per month = 4 DRLs per week = 16
18 bonus leads per month

19 4 net life sales per month = 6 DRLs per week = 24
20 bonus leads per month
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23 (Document 95-8, 230; Dec. of Montoya, filed 2/27/09, ex. 5, Dep. of Borth,
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25 196:4-16)

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27 According to Ms. Borth, the Sterling Leads Management Program Policy
28 was in place in Yakima in 2006. (Dec. of Montoya, filed 2/21/0, ex. 5, Dep. of
29 Borth, 196:4-9). Ms. Borth said that she could have overridden the policy but
30 she did not. She stated, "I mean – and the reason why I state that is that it is a
31 great system in which to follow, and so each one of my offices follow it." (Dec.
32 of Montoya, filed 2/27/09, ex. 5; Dep. of Borth, 196:12-16). She was required
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1 to follow the policy in 2006. (Dec. of Montoya, filed 2/27/09, ex. 5; Dep. of
2 Borth, 196:17-18).
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4 Based on Ms. Ramirez's June sales, she should have received the highest
5 percentage of leads in July. She did not, however.
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8 After Olympic produced Agent Commissions Statements that showed the
9 sales information, Ms. Geddes prepared an addendum to her report. The
10 Addendum stated that it was clear that the majority of Ms. Ramirez's reports
11 were to clients with Hispanic sounding surnames. (Defendant's Brief in Support
12 of Motion in Limine, ex. B, Document 139-2, 2). Ms. Geddes noted that Ms.
13 Ramirez received fewer leads than she should have received if she was
14 receiving only Hispanic leads and received few, if any non-Hispanic leads.
15 (Defendant's Motion In Limine, ex. B, Document 139-3, 23).
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22 Ms. Geddes noted that the more valuable call-in, hot and walk-in leads
23 were not equally distributed, nor seemed to be distributed to the DLR policy.
24 (Defendant's Motion in Limine, ex. B, Document 139-3, 23). In estimating
25 how the unequal distribution affected Ms. Ramirez, Ms. Geddes performed a
26 "regression analysis test to estimate the expected number of sales based on the
27 total number of leads and the number of presentations made for the office
28 between the months of May and September, 2006." (Defendant's Motion in
29 Limine, ex. B, Document 139-3, 23).
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1 Ms. Geddes noted that 71% of all of Ms. Ramirez's commissions
2 appeared to come from Hispanics. (Defendant's Motion in Limine, ex. 13,
3 Document 139-3, 24). The next highest percentage of sales to people who
4 appeared to be Hispanic were to George Moro at 11%. (Defendant's Motion in
5 Limine, ex. B, Document 139-3, 24). Table 3A of Ms. Geddes showed that Ms.
6 Ramirez received six, call-in, hot, and walk-in leads from April 2006 to
7 September 2006. Conversely, Shawna Young received 17. Walt Moro
8 received 13. (Defendant's Motion In Limine, ex. B, Document 139-3, 25-26).

9 Ms. Geddes indicates that Ms. Ramirez potentially lost 71 sales because
10 of the lack of leads she received. (Defendant's Motion in Limine, Ex. B,
11 Document 139-3, 27). She used the actual number of leads and the
12 presentations from May to obtain that number. (Defendant's Motion in Limine,
13 ex. B, Document 139-3, 27).

14 15 16 17 18 19 20 21 22 23 24 **II. ARGUMENT**

25 26 **A. Ms. Geddes' testimony is admissible.**

27 Ms. Geddes' analysis regarding the leads Ms. Ramirez received and
28 should have received and projected sales is admissible.

29 Fed. R. Evid. 702 states:

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33 If scientific, technical or other specialized knowledge
34 will assist the trier of fact understand the evidence, or to
35 determine the fact in issue, the witness qualified as an
expert by knowledge, skill, experience, training or

1 education may testify thereto in the form of an opinion or
2 otherwise, if (1) the testimony is based upon sufficient
3 facts or evidence, (2) the testimony is the product of
4 reliable principles and methods, and (3) the witness has
5 applied the principles and methods reliably to the facts of
6 the case.
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8 In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149(1999), the court held that
9 the *Daubert*³ gate keeper function applies to the testimony of experts who do
10 not purport to testify on the bases of scientific principles.
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13 Statistics may constitute competent proof of unlawful discrimination.
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15 See, e.g. *International Brotherhood of Teamsters v. United States*, 431 U.S.
16 324, 339 (1977). Furthermore, statistics by themselves may establish a *prima*
17 *facie* case under Title VII. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977);
18 see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Dothard*, the
19 United States Supreme Court refused to reverse a District Court decision that
20 allowed generalized national statistics to help female plaintiffs show that
21 Alabama's minimum height and weight qualifications for correction officers
22 were discriminatory. 433 U.S. at 330. Additionally, even if statistics do not
23 independently establish a *prima facie* case, they may assist a Plaintiff in
24 evaluating whether an employer's articulated reason for the action taken is
25 pretextual. *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985).
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35 ³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

1 As the Ninth Circuit stated in *Diaz*, “statistical evidence is
2 unquestionably relevant in a Title VII disparate treatment case. Statistical
3 information is helpful in establishing a *prima facie* case ‘despite the fact that [it]
4 may not be directly probative of any of the four specific elements set forth by
5 *McDonald Douglas.*” *Id.* at 1362 (quoting *Lynn v. Regents of Univ. of*
6 *California*, 656 F.2d 1337, 1342-43) (9th Cir. 1981). “A plaintiff is . . . entitled
7 to use statistical evidence to show that a defendant’s articulated discriminatory
8 reason for the employment decision in question is pretextual.” *Diaz*, 752 F.2d
9 1363. *See Donald Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) *cert.*
10 *denied*, 459 US 823 (1982). As the *Diaz* court stated:

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Statistical data is relevant because it can be used to establish a general discriminatory pattern in an employer’s hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue. In some case, statistical evidence alone may be sufficient to establish a *prima facie* case.

Diaz, 752 F.2d 1363; *see O’Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866 (9th Cir. 1982) (“[s]tatistical data is one way to establish a *prima facie* case.”) (additional string citations omitted).

“Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a tell-tale sign of purposeful discrimination; absent

1 explanation, it is ordinarily to be expected that nondiscriminatory hiring
2 practices will in time result in a workforce more or less representative of the
3 racial and ethnic composition of the population in the community from which
4 employees are hired.” *International Brotherhood of Teamsters v. United*
5 *States*, 431 U.S. 324, 340 n.20 (1977).
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9 In many cases “the only available avenue of proof is the use of racial
10 statistics to uncover clandestine and covert discrimination by the employer or
11 union involved.” *United States v. Ironworkers Local 86*, 443 F.2d 544, 551
12 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971). Accordingly, in *Diaz*, the Ninth
13 Circuit reversed a District Court’s dismissal of Diaz’s case because another
14 Mexican/American was promoted to the job to which Diaz claimed he should
15 have been promoted. *Id.* at 1358.
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19 Federal Courts routinely allow the regression analysis that Ms. Geddes
20 used as a method to prove discrimination. “A multiple aggression analysis
21 attempts to reveal relationships between explanatory variables and a dependent
22 variable.” *Morgan v. United Parcel Serv. of America, Inc.*, 380 F.3d 459, 466
23 (8th Cir. 2004) (citing *Daniel L. Rubinfeld*, Reference Guide on Multiple
24 Regression, in Federal Judicial Center, Reference Manual on Scientific
25 Evidence 181 (2nd ed. 2000)). Explanatory variables those factors that one
26 expect to influence the dependent variable and for which the regression
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1 controls. *Id.* As noted in *Rubinfeld, supra*, “discrimination cases using multiple
2 regression analysis are legion.” *Rubinfeld, supra* at n.5. The Ninth Circuit has
3 specifically accepted regression analysis. *Equal Employment Opportunity*
4 *Comm’n v. Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 577 N.3 (9th Cir. 1989).
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8 Olympic fails to make any reasonable, good faith argument to exclude
9 Ms. Geddes’ testimony. Instead, it makes the conclusory statement that her
10 reports are not based on “sound methodology.” (Brief in Support of Motion in
11 Limine, 3:8).⁴ As Judge Oliver Wagner noted in *Lara Urbina v. Carson*, 2007
12 Westlaw 2814652 (E.D. Cal. 2007), “conclusory hyperbole is not a substitute
13 for law.”
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19 **B. Ms. Ramirez expert’s opinions are admissible under Fed. R.**
20 **Evid. 403.**
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22 Olympic fails to offer any logical basis for excluding Geddes opinions
23 under Fed. R. Evid. 403. Fed. R. Evid. 403 states, “no relevant, evidence may
24 be excluded if its probative value is substantially outweighed by the danger of
25 unfair prejudice, confusion of the issues, or misleading the jury, or by
26 consideration of undue delay, waste of time, or needless presentation of
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33 ⁴ Olympic even engages in a gratuitous attack on Ms. Geddes by claiming her
34 report is “fabricated.” (Brief in Support of Motion in Limine, 7:6-7).
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1 cumulative evidence.”⁵ “Evidence is not ‘prejudicial’ merely because it is
2 harmful to the adversary.” S.P. Saltsberg, M. Martin, D. Kapra, *Federal Rules*
3 *of Evidence Manual*, Section 403.02(3) (9th Ed. 2006). In *Hemmings v.*
4 *Tidyman’s Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002) (An Eastern District of
5 Washington Case), the Ninth Circuit addressed the defendant’s claim that a
6 statistical study regarding gender in promotions should be excluded because it
7 lacked probative value and prejudiced the jury.” The Ninth Circuit noted that
8 District Courts enjoy wide latitude in applying Fed. R. Evid. 403. *Id.*
9 *Tidyman’s* attacked the probative value of the statistical evidence on the
10 grounds that the statistician “used an inappropriate comparison pool [.]” and that
11 he “did not account for variables such as individual skills and preferences.” *Id.*
12 The Ninth Circuit rejected both challenges. *Id.*

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22 The plaintiff’s expert in *Tidyman’s* was a statistician who used a
23 regression analysis. *Id.* at 1183. The defendant in *Tidyman* argued that because
24 the statistical study did not eliminate all of the possible legitimate,
25 nondiscriminatory factors that it should not be admitted. *Id.* at 1188. The

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⁵ Although the Ninth Circuit is ripe with cases that allow statistical evidence in a
Title VII case to prove discrimination, the only case that Olympic can cite to
exclude the testimony is *United U.S. v. Ramirez-Robles*, 386 F.3d 1234, 1246
(9th Cir. 2004), a criminal case involving the exclusion of a polygraph test.

1 *Tidyman's* court rejected the argument by stating, "in *Bazemore* the Supreme
2
3 Court addressed the precise question presented by *Tidyman's* appeal: If a study
4 fails to account for all variables, how should a court treat the study? Justice
5
6 Brennan, writing for the court, explained that '[n]ormally, failure to include
7
8 variables will affect the analysis' probativeness, not its admissibility.'" *Id.*
9
10 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)). As the Supreme Court
11
12 noted in *Bazemore*, "it is clear that a regression analysis that includes less than
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14 'all measurable variables' may serve to prove a plaintiff's case." 478 U.S. at
15 400 (Brennan J.).

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17 Olympic provided the documents that showed the leads and sales of the
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19 Yakima office. From the documents that Olympic provided and the deposition
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21 testimony of Olympic's current and former employees, Ms. Geddes concluded
22
23 that the leads that Ms. Ramirez received could not be explained by any neutral
24
25 factor. Olympic fails to challenge any of Ms. Geddes' facts or her opinions.
26
27 Instead, it argues that Ms. Geddes will not offer a factual basis for her "naked
28
29 assertion that a lead will materialize into a sale. . . ." (Brief in Support of
30
31 Motion in Limine, 9:21). Olympic seems to be arguing that no one will be able
32
33 to reasonably estimate that any sales will result from referrals. Therefore, Ms.
34
35 Geddes' opinions are not relevant.

1 As Olympic's own witnesses, such as Ms. Borth, have testified in their
2 depositions, leads are the basis for agents selling product. Without leads, they
3 cannot sell product. Mary Thomas and others have testified that the call-in,
4 walk-in and hot direct response leads are more valuable than other types of
5 leads. Ms. Ramirez did not receive the number of leads she should have
6 according to Olympics own policy. Even a review of the Monthly Leads
7 Management Register shows Ms. Ramirez did not receive the same number of
8 call-in and walk-in leads as others. (Dec. Of Hinckley, filed 10/28/08, ex. 8,
9 Document 71-9, 135, OHM 132).

16 Ms. Ramirez is not required to show an exact amount of damage, only
17 the likelihood that she was damaged. Unrealistic exactitude is not required in
18 the computation of lost pay, and uncertainties in determining what a victim
19 would have earned absent the violation are resolved against the employer. *See*
20 *e.g. Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).
21 "[I]t suffices for the trial court to determine the amount of back wages as a
22 matter of just and reasonable inference.'" *Id.* (quoting *Anderson v. Mt. Clemens*
23 *Pottery Co.*, 328 U.S. 680, 687-88 (1946)). A court's difficulty in computing
24 the exact amount of back pay is not a defense to back pay awarded to a victim
25 of discrimination. *See Bowe v. Colgate Palmolive Co.*, 489 F.2d 896, 9004 (7th
26 Cir. 1973); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 186 (D.C. Cir. 1974)

1 (The demand for back pay is not in the nature of a claim for damages, but rather
2
3 an integral part of the statutory equitable remedy to be exercised by the court.).

4 Olympic offers no rational criticism of Ms. Ramirez's expert. Its shrill
5
6 claim that Ms. Geddes' report is "mildly, confused, indeed fabricated []" is
7
8 insufficient to deny admission of Ms. Geddes' testimony.

9 10 **III. CONCLUSION**

11 Based on the above, Ms. Ramirez respectfully requests that the court
12
13 deny the Defendant's Motion in Limine.

14
15 Respectfully submitted this 27th day of February, 2009.

16
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