IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8885

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, on its
own behalf and on behalf of
others similarly situated,

Plaintiff-Appellant,

v.

CITY OF SAN ANTONIO,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-89-CV-1131)

(August 25, 1994)

Before KING and BENAVIDES, Circuit Judges, and LEE, District Judge.[*]

PER CURIAM:[**]

Plaintiff-appellant, the National Association of Government Employees on behalf of six incumbent and past Hispanic female employees of the respondent (hereinafter referred to as the

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[*] District Judge of the Southern District of Mississippi, sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

"plaintiffs"), appeals from a combination of pretrial orders and a judgment after a non-jury trial denying all relief on claims for race and gender discrimination against the City of San Antonio, Texas (the "City"). Finding no reversible error in the court below, we affirm its judgment.

I. Background

The plaintiffs claim to have been aggrieved by certain sexual and/or ethnic discriminatory pay, classification, and promotion practices engaged in by the City. Employing both disparate impact and disparate treatment theories under Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), the plaintiffs claim that they have been denied promotional opportunities, employment opportunities, and equal wages. Under the disparate impact model, the plaintiffs argue that an antiquated job classification structure and unjustifiable degree and education requirements have disproportionately affected their protected class with regard to pay. In their own words, the plaintiffs claim that "Hispanic female employees are locked into lower-paying positions due to the operation of a job classification system which includes qualifications for higher-paying jobs which are not job-related and which disparately impact [] Hispanic, females." The plaintiffs also sought recovery under 42 U.S.C. § 1981 in the court below.

The district court denied class certification on August 26, 1991. It also denied the plaintiffs' motion to reopen discovery

in light of the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act"). Both sides then agreed to have the case heard by the magistrate judge.

The City filed a motion for partial summary judgment as to the plaintiffs' Title VII claims which arose prior to June 8, 1987, as well as to the Equal Pay Act and section 1981 claims. The magistrate judge granted the partial summary judgment and severed certain age discrimination claims brought by plaintiff Oralia Sanchez ("Sanchez"). The remaining claims were tried to the magistrate on August 2 and 3, 1993.

At trial, the plaintiffs introduced statistical reports compiled by their expert, Dr. Phyllis Rueckert ("Rueckert"), tending to show that, during the period of time at issue, Hispanic females were severely underrepresented in the higher-salaried positions of City office and were overrepresented in the lower-paying clerical positions. Dr. Rueckert testified that approximately 15% of the City employee population was both Hispanic and female. Her study indicated that Hispanic females were paid lower salaries in the City's EEO[1] employment categories except for "Office & Clerical." Further, half of the Hispanic females employed by the City were in the Office and Clerical category, which had the lowest EEO median salary. Dr. Rueckert pointed out that Hispanic females were severely underrepresented in certain job categories, specifically the Protective Services,

[1] EEO refers to the standard Equal Employment Opportunity occupational and professional job classifications.

Skilled Craft, and Service Maintenance categories. With respect to hiring, Dr. Rueckert could find no discrimination against Hispanic females considering the fact that Hispanic females constituted fifty percent more of the City's female employees than all other females combined.

In a supplemental study, Dr. Rueckert took a test sampling of City employees to compare educational levels of Hispanic females to others, and the study indicated that the education of Hispanic females was not significantly different from other City employees. Dr. Rueckert's ultimate conclusion was that Hispanic females were paid lower salaries because of ethnicity and sex, but not necessarily because of differences in education.

Each of the individual plaintiffs testified as to her experience with the City's employment practices. Plaintiff Gloria Reyes ("Reyes") alleged that she was denied promotion to Personnel Specialist II and denied reclassification of her Personnel Specialist I position based upon the actual duties she performed. In responding to an interrogatory asking her to "state what higher level positions you were denied on the basis of your sex and national origin," Reyes answered "not applicable," presumably because the person chosen for the promotions sought by Reyes, Mary Guzman, was also a Hispanic female.

Aurora Garza ("Garza") complains that she was originally denied employment as a Right of Way Agent II and that the City instead hired a white male for the position. The City claimed

that the white male had oil and gas experience and was thus more qualified; however, the job announcement did not list oil and gas experience as either a requirement or preference. Garza also complained that she was given an oral examination during her interview for the position which was discriminatory in nature. Although Garza was later promoted to Right of Way Agent II, she claims that she was assigned administrative duties and other higher-level responsibilities "without proper title or compensation." Finally, Garza testified at trial that she earned less in the Right of Way II position than she had in her previous post.

Maria Gomez ("Gomez") claimed that, although she was an Administrative Assistant I, she performed the duties of an Administrative Assistant II, and despite recommendation by her supervisor, was never reclassified)) apparently as a result of her lack of a college degree.

Christine Sosa ("Sosa") complained that she spent forty to fifty percent of her time performing the duties of a Personnel Specialist I even though her title was Secretary I. Sosa admitted having been demoted from a position as an executive secretary for the City Council following a citizen complaint and that she did not receive any promotions following her demotion. She argues that a City job study recommended that her job be reclassified to a higher level, but that recommendation was never adopted by the City.

Mary Elena Rodriguez ("Rodriguez") was the Executive Secretary to the Director of Personnel from 1981 through 1989. She applied for a promotion to Personnel Specialist II, and, although she was recommended for, and selected by, the Director of Personnel for the position, the City Manager's office overruled the director at least partially due to her lack of a college degree, which was a job requirement. Rodriguez admits that her individual claim is barred by her failure to pursue litigation within ninety days after she received a right to sue notice from the Equal Employment Opportunity Commission ("EEOC").

Finally, Sanchez, a Clerk Typist I between 1984 and 1991, complained that she applied for, but was denied, numerous promotions. Sanchez affirmatively stated however, that neither her sex nor her national origin were responsible for her failure to receive promotions. As noted above, her age discrimination claims were severed from this suit.

The plaintiffs additionally proffered evidence that the City had undertaken a "self-study" in 1986 via its consultants, Ralph Anderson & Associates, to identify, and propose solutions for, perceived problems in hiring, promotional, and job classification practices (the "Anderson report"). In that study, the City's consultants concluded that the City's then existing classification plan was inadequate and that the City needed to reclassify many of its positions and/or increase pay scales accordingly. According to the plaintiffs, the City has failed to correct the identified deficiencies in its job classification

system, and this failure has aggrieved them. The magistrate concluded that, although the City had implemented some of the advised changes, it had not fully remedied the situation.

The magistrate judge discredited the plaintiffs' statistical proof as unreliable, reasoning that the plaintiffs' expert omitted variables "too significant to be ignored." Thus, he concluded, "[T]he Plaintiffs' statistical evidence does not establish that there is adverse impact against Plaintiffs or Hispanic females in general." He further determined that, in light of the plaintiffs' own proof that there was only an insignificant difference between the education level of Hispanic females and other City employees, the City's degree and education requirements "would not substantially impact the Hispanic female employees." Finally, the magistrate judge concluded that the individual plaintiffs had failed to carry their burden of persuading that they had been victimized by sexual and/or racial discrimination. He specifically concluded that the City's classification problems were based on "economics," not race or gender. Accordingly, the magistrate judge entered a take-nothing judgment in favor of the City on November 22, 1993. The plaintiffs timely filed a notice of appeal on December 20, 1993.

II. Analysis

A. Standard of Review

Because the post-June 8, 1987, Title VII claims were tried to the court below, we defer to its findings of fact unless shown by the evidentiary record to be clearly erroneous. Anderson v.

City of Bessemer City, 470 U.S. 564, 573 (1985). That is, as long as the court below applied the appropriate legal standards, we will not reverse its factual determinations unless, based upon the entire record, we are "left with the definite and firm conviction that a mistake has been committed." Id. If the lower court's account of the evidence is plausible in light of the record viewed in its entirety, we will not disturb it)) even if convinced that had we been sitting as trier of fact, we would have weighed the evidence differently. Id. at 573-74. Where, as here, a magistrate judge tries the case with the consent of the parties, his factual determinations of are entitled to the same deference given a district judge sitting as trier-of-fact. Carter v. South Central Bell, 912 F.2d 832, 841 (5th Cir. 1990) (citing Lockette v. Greyhound Lines, Inc., 817 F.2d 1182, 1185 (5th Cir. 1987)), cert. denied, 111 S. Ct. 2916 (1991).

By contrast, conclusions as to the applicable legal standards are reviewed de novo. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 73 (5th Cir. 1993).

B. Evidence As To Disparate Impact

Chief among the errors asserted by the plaintiffs is the magistrate judge's alleged erroneous construction of their evidence of discriminatory impact. According to the plaintiffs, the court below erred in discrediting the statistical evidence they amassed reflecting a historical overconcentration of Hispanic women in the lower-salaried positions. They argue that

this evidence, together with the other evidence of record, was sufficient to make out a prima facie case that the City's seemingly neutral employment standards operated more harshly upon their protected class than upon others. The City's failure to introduce any countervailing analysis of its own, the plaintiffs reason, is dispositive of the disparate impact issue.

As stated previously, the plaintiffs argue that two different City employment practices disproportionately impacted Hispanic females)) the maintenance of an outdated and unrepresentative classification structure and unjustifiable educational requirements. At base, the reclassification claims are causes of action for pay discrimination. The plaintiffs' theory is that, by failing to reclassify their positions to reflect the actual duties performed, the City was able to keep the plaintiffs on a lower payscale than others similarly situated. The educational requirements were claimed to have prevented Hispanic females from obtaining promotional opportunities. The magistrate was not persuaded that either practice had a disparate impact upon the plaintiffs and accordingly held for the City.

1. Classification

a. statistical evidence

The plaintiffs' statistical analyses regarding discrimination in the City's classification system was the crux of their disparate impact case. The magistrate judge considered this evidence to be wanting:

> [T]he variables omitted from Dr. Rueckert's statistical analysis evidence are too significant to be ignored. Plaintiffs' statistical analysis evidence, presented through their expert, Dr. Phyllis Rueckert, is seriously flawed in that it does not account for significant variables, resulting in an analysis and conclusions that are not reliable.

The magistrate concluded that the City satisfactorily demonstrated the failings of the plaintiffs' statistical evidence through cross-examination of Dr. Rueckert and so was not required to present its own statistical analysis explaining the import of the variables it argued were missing. The plaintiffs argue that the magistrate's conclusion in this regard is impermissible in light of the Supreme Court's decision in Bazemore v. Friday, 478 U.S. 385 (1986).

In Bazemore, the 4-H Club and related services providers of the North Carolina Agricultural Extension Service (the "Extension Service") came under attack for perpetuating salary disparities and other discriminatory employment practices between black and white agents after the passage of the Civil Rights Act of 1964. 478 U.S. at 391-92 (Brennan, J., joined by all other Members of the Court, concurring). The trial court ruled in favor of the Extension Service, based upon its finding that the plaintiffs had failed to carry their burden of proof as to discrimination. Id. at 392-93. Highly relevant to the district court's conclusion was its refusal to accept the plaintiffs' experts' statistical evidence as proof of discrimination, finding that the experts had not included "a number of variables the court considered relevant." Id. at 397-98. The decision was affirmed by the

court of appeals, similarly refusing even to consider the statistical evidence. Id. at 399. The Supreme Court disagreed because, in its view, the failure to include certain variables went to the weight of the evidence, not to its admissibility. Id. at 400 ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors `must be considered unacceptable as evidence of discrimination.'") (quoting Bazemore v. Friday, 751 F.2d 662, 672 (4th Cir. 1984)). The Court concluded that a regression analysis should be viewed in light of all of the evidence developed by both plaintiffs and defendants under the specific context presented to determine whether the plaintiffs have carried their burden of proving discrimination by a preponderance of the evidence. Id. The Court thus determined that the trial court erred in refusing to consider the regression analysis evidence as probative and compounded its error by impermissibly failing to consider whether the variables it claimed were missing from the plaintiffs' statistical studies "were included in the evidence in other respects." Id. at 404 n.15.

The critical flaw in the plaintiffs' reliance upon Bazemore is their erroneous assumption that a trier-of-fact may not discredit a statistical analysis in coming to its ultimate resolution of the fact issues. We agree with the magistrate judge that Bazemore does not require a defendant to compile its

own statistical analyses to counter those of the plaintiffs. Rather, a defendant can successfully discredit the plaintiffs' own evidence and show that it does not meet the requisite prima facie case of showing a disparate impact or that it does not carry the ultimate burden of proof on discrimination, which remains with the plaintiffs at all times. E.g., Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 660 (1989); E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292, 301-03 (7th Cir. 1991).[2]

We find that the trial court acted in accordance with the directive of Bazemore by evaluating the statistical analysis in light of the entire record and weighing Dr. Rueckert's findings in view of the lack of certain variables it considered to be "too significant to be ignored." See, e.g., Miniature Lamp Works, 947 F.2d at 301. Additionally, the court below specifically determined that the missing variables were not explained elsewhere in the evidentiary record as it was instructed to do by Bazemore.[3]

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[2] Further, we note that the City did more than point to holes in the plaintiffs' statistical theories; it affirmatively proved up several explanations for the wage disparities through cross-examination of the plaintiffs' expert.

[3] The plaintiffs also assail the magistrate judge's application of the burden of proof requirements of Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), a promotion-based case, to its pay discrimination claims. They contend that the relevant authority is Bazemore. Because we find that the trial court properly applied Bazemore, we need not explore this argument further.

Moreover, the magistrate did not clearly err in discrediting Dr. Rueckert's statistical analysis. As discussed above, the study failed to take into account applicant flow in reaching the conclusions it did. As Dr. Rueckert acknowledged at trial, the number and types of applicants would necessarily have a marked impact upon the predominance of any demographic unit in a given job category. For example, with respect to the Protective Services category (police and firemen) where Hispanic women were found to be severely underrepresented, Dr. Rueckert agreed that the applicant pool would presumably be largely made up of males in light of the physical requirements of the jobs. The shortage of women applicants would undoubtedly affect the number of women hired. Additionally, Dr. Rueckert did not consider prior training, experience, entry level status, or tenure in her contemplation. However, she acknowledged that these missing variables would be relevant to any findings from the study. Moreover, the plaintiffs' records indicated that there had been an increase in the percentage of Hispanic women in the more highly-compensated posts during the five years prior to litigation. Dr. Rueckert agreed that the more recent entry of Hispanic women into these positions would explain, at least in part, the difference between their wages and those of longer-tenured employees. We agree with the court below that the failure to consider the effect of these uncontested circumstances sheds doubt upon the plaintiffs' expert's ultimate conclusion of adverse impact. See Wards Cove, 490 U.S. at 654-55 (finding that

a statistical analysis showing racial stratification within an Alaskan salmon cannery which failed to take into consideration the "qualified labor population" was not sufficient to constitute a prima facie case of disparate impact discrimination); cf. Trevino v. Holly Sugar Corp., 811 F.2d 896, 902-04 (5th Cir. 1987) ("Because plaintiffs' analyses failed to take into account significant factors other than national origin (or race) that may have contributed to the results, their statistical evidence alone does not compel the conclusion that a pattern or practice of discrimination was demonstrated by a preponderance of the evidence."). It is axiomatic that a statistical analysis is only as reliable as the assumptions beneath it.

The court below then looked to the remainder of the evidentiary record and concluded that the other evidence adduced by the plaintiffs did not overcome the shortcomings of the statistical analyses. For example, the magistrate judge found that the Anderson report did not support the plaintiffs' case. Although that report identified numerous problems with the City's classification scheme)) particularly demonstrating that hundreds of employees were performing work for which they should have been compensated on a higher scale)) the magistrate held that the Anderson report had absolutely no probative value as to whether the system disparately affected Hispanic female employees.

Our decision in Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983), does not compel a different result. The plaintiffs would have us read Carpenter as holding that

evidence of substantial segregation and over-concentration of a protected class into lower echelon jobs is virtually dispositive of a disparate impact claim. See Carpenter, 706 F.2d at 624 ("Stratification through overrepresentation of protected groups in the lower portions of the workforce has routinely been held actionable under Title VII, if resulting in decreased employment opportunities."). They argue that the magistrate wholly failed to evaluate their evidence of stratification and discriminatory impact in this regard. We disagree. In Carpenter, we approved the use of statistical evidence as proof of a claim that a certain employment practice disparately impacted protected classes of black and female employees by showing that the protected classes were overconcentrated in lower-paying positions. Id. at 622-23. One of the practices identified as causing the disparate effect was the retention of educational requirements not tied to the jobs. Id. at 618. In any analysis of Carpenter, however, the procedural posture must not be overlooked. Specifically, in Carpenter, the district court had found as a matter of fact that the plaintiffs established a prima facie case of disparate impact. This finding was based upon the statistical evidence of racial and/or gender stratification, as well as anecdotal and other evidence. We held that the district court's finding, in light of the totality of the evidence, was not clearly erroneous. Id. at 623. By contrast, in the instant case, it is the magistrate's determination that the plaintiffs

failed to show disparate impact which we review under the highly deferential standard.

Further, and of significance to this case, was our observation in Carpenter that an employer defendant may "attack the plaintiff's case by showing the total unacceptability of the plaintiff's statistical proof." Id. at 621-22 (internal quotations and citation omitted). Thus, Carpenter cannot be read to suggest that racial or gender stratification in a workforce compels a conclusion of actionable discrimination absent a business justification; rather, the plaintiff must sustain his or her prima facie burden of showing a connection between the complained of employment practice and the dissimilar effect upon minorities and other workers. Indeed, elsewhere in Carpenter and in connection with a complaint that certain rules regarding retirement benefits which affected hourly workers differently from salaried employees, we observed that

> the plaintiffs do not set forth an unlawful employment practice merely by proving that more women and blacks are affected by a rule than are white men. The plaintiffs must also show that application of the standard has a disparate effect on protected and unprotected groups. . . . The happenstance that the group to which a rule applies is comprised mostly of women and blacks does not give rise to Title VII liability, even under disparate impact analysis.

Id. at 629-30 (citations omitted). The decision as to whether the employment practice at issue)) e.g., the classification system)) treated similarly situated employees differently, and in doing so, impacted minorities more adversely than others, was committed to the magistrate in his role as finder of fact. As

discussed earlier, we will not disturb the magistrate's finding that it did not.

b. anecdotal evidence

The magistrate additionally found that the anecdotal evidence as to the experiences of the individual plaintiffs did not support a finding of racial and/or sexual discrimination. In his view, each of the instances of alleged discrimination could be explained by nondiscriminatory reasons. For example, Sosa claimed to have been denied promotion and/or reclassification between 1986 and 1989, but admitted that she received a disciplinary demotion in 1986 based upon a citizen complaint and that, prior to that incident, she had received several promotions. Rodriguez was denied a position as a Personnel Specialist II in part because she lacked the degree requirement, and she failed to show that the decision was based upon any other reason. Further, her claims of "constructive termination" were found by the magistrate to have been contradicted by her own testimony that she subsequently sought to be reinstated by the City. Reyes unsuccessfully applied for the position of Personnel Specialist II on three occasions; however, the record shows that the position was filled with a Hispanic female on one occasion, that she did not have the requisite experience for the job on the second try, and that the position was not filled on the third. In fact, in response to an interrogatory asking "what higher level positions [she] was denied on the basis of [her] sex and national origin," she answered "Not applicable." Gomez did not

apply for any promotions during the period at issue. Finally, Sanchez testified that her claims were actually based upon age, rather than sex or national origin.[4] There being evidence in the record to support these conclusions, we will not reverse the magistrate's findings as clearly erroneous.

c. conclusion

Upon review of the record as a whole, we do not find clear error in the magistrate's construction of the evidence or his ultimate conclusion that the evidence failed to show that the faults of the City's classification and pay system had a disparate impact upon Hispanic females. Rather than disregarding Dr. Rueckert's study, the district court carefully evaluated it and gave cogent reasons for finding it to be unpersuasive. The plaintiffs' arguments on appeal are essentially a disagreement with the trial court as to its reading of the evidence presented, but, as discussed above, we are not free to disregard the factual findings of the court below absent clear error. The magistrate applied the correct legal principles, and, as we are not left with the "definite and firm conviction that a mistake has been committed," we will not disturb his findings of fact. Anderson, 470 U.S. at 573.

2. Educational requirements

The plaintiffs use the same statistical analysis addressed above to support their additional theory that unnecessary

[4] Garza's claims will be discussed in greater detail infra at section II.C.

education and degree specifications served to prevent Hispanic women from obtaining promotions. However, as discussed above, the magistrate's finding that Dr. Rueckert's disparate impact study was severely flawed also casts doubt on this theory. Moreover, Dr. Rueckert testified that there was no significant difference in the educational levels of female Hispanics and the other City employees[5]; instead, the plaintiffs introduced evidence as to the educational background of Hispanics and Hispanic women generally. In the face of these circumstances, it would be difficult to conclude that any educational requirements adversely impacted Hispanic females more than other employees.[6]

C. Disparate Treatment

For some unexplained reason, the plaintiffs only assert clear error with respect to the magistrate judge's findings as to intentional discrimination against plaintiff Garza. As noted above, Garza applied for a position as Right of Way Agent II in June of 1987 and was interviewed by a panel of three persons, including Oscar Serrano ("Serrano"), who administered an oral

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[5] Indeed, the plaintiffs argue in their brief to this court that their expert "specifically ruled out education as a variable explaining the lower Hispanic female salaries."

[6] The plaintiffs offer the testimony of Dr. Rueckert to show that education had a direct and positive correlation to higher pay for others, but no such impact upon Hispanic females. In other words, education resulted in a higher salary for others, but not for the protected group. The magistrate concluded that the lower salaries for Hispanic women could be explained by the fact that many had only recently entered the higher-salaried positions at issue and would presumably be paid less than more tenured employees. As noted above, there is some evidence in the record, including the admission of Dr. Rueckert, to support this construction of the facts.

examination. Richard Nelson ("Nelson"), a white male, was selected for the job. Serrano testified that he believed Nelson was better qualified for the position because he had more experience in negotiations and more technical knowledge.

Garza subsequently reapplied for a Right of Way II position in March of 1988 and received the job, but did not receive a pay increase. Although an outside consultant has concluded that Garza is not currently allocated to the proper job class, she has not been reclassified. The City claims, and the magistrate found, that "[t]he situation has not been corrected because of the cost involved."

The plaintiffs contend that Garza established a prima facie case of promotion discrimination based upon her sex and race in showing that she applied and was qualified for a position and that the post was given to a white male. The burden then shifted to the City to provide a legitimate, non-discriminatory reason for selecting the white male. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993). The plaintiffs counter that the reason given)) that Nelson was more qualified due to his oil and gas experience)) is pretextual, offering several pieces of evidence in support of their theory. First, they intimate that it was inappropriate for the City to consider the oil and gas experience since it was neither a listed requirement or preference for the position. They point to a City policy that prohibits the use of any requirements or preferences not included in the job announcement. Second, they direct our attention to

evidence that one of the selecting officials for the first Right of Way II position sought by Garza, William Toudouze ("Toudouze"), held a bias against women serving as Right of Way agents, believing that women generally did not have the right temperament for the job. The plaintiffs' alleged evidence of bias was a statement by Serrano that "[i]f [Toudouze] did [make any comments about women], at least, they were only veiled in that, at one point, he told me that he didn't feel that they had the right temperament." Contrary to the plaintiffs' view, this statement does not conclusively show that Garza was denied the promotion opportunity on the basis of her sex. Rather, there was testimony that Garza was not considered to be qualified for the position at the time of her first attempt to obtain it. Moreover, Toudouze himself hired Garza for the Right of Way II position only a few months later in March of 1988.

After considering all of the evidence, the magistrate was not persuaded that the decision not to promote Garza in June of 1987 was based upon illegitimate factors, and accordingly, found that Garza failed to carry her ultimate burden of proving discrimination. St. Mary's 113 S. Ct. at 2747-49. As noted above, we defer to this finding of fact unless clearly erroneous. We observe, as did the magistrate, that Garza was eventually hired for the same position within a few months and that she would not have received a pay increase even if she had received the position on the first try. Moreover, as noted above, Serrano testified that Nelson, the white male selected, was better

qualified for the position due to skills and technical knowledge he acquired while working in the oil and gas industry. Serrano's bias in favor of that experience is not surprising, as he himself had fifteen years in that industry and stated that his rapid advancement in the City's ranks was due to his background. We also note that the City's alleged failure to follow its own hiring policy)) i.e., of considering only requirements and job preferences contained in the job announcement)) is not dispositive of the issue. See Risher v. Aldridge, 889 F.2d 592, 597 (5th Cir. 1989) ("[A]n agency's disregard of its own hiring system does not of itself conclusively establish that improper discrimination occurred or that a nondiscriminatory explanation for an action is pretextual."). In sum, the magistrate apparently believed the City's explanation and found that the plaintiffs failed to carry their ultimate burden of proof. There is at least some evidence of record to support his finding, and, therefore, we are not free to displace it.

With respect to the oral "examination," Serrano testified that it was "nothing more than a list of questions that we had prepared . . . so that we would be totally fair with everybody, so that we wouldn't ask one question to one person and then forget and not ask it to another." He stated that all of the questions were directly related to the position of Right of Way Agent II. In fact, Garza herself testified that the questions related to real estate issues and that she subsequently learned that she had "done the best on the test." Under the

circumstances, we cannot find that the magistrate clearly erred in determining that "there is no evidence the oral exam of which Ms. Garza complains was discriminatory."

Finally, with respect to the reclassification claim, the magistrate found that "[e]ven if Ms. Garza is performing duties beyond that of a Right of Way Agent II as she contends, there is no evidence that the City's failure to reclassify her is based on anything other than economics." Once again, we are mindful of the magistrate's determination that the plaintiffs failed to show that the failings of the reclassification system adversely affected Hispanic females to a greater degree than others. As there is evidence to support the economics defense, the magistrate's finding is not clearly in error. Consequently, Garza's individual claim also fails.[7]

[7] The plaintiffs obliquely reference International Union, United Auto., Aerospace and Agric. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991), for the proposition that "[t]he extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender." They reason that this statement renders impermissible and unlawful the City's defense that economics precluded reclassification of Garza's position. We disagree. Johnson Controls involved a policy against employing fertile women for certain jobs which might result in exposure to lead. Id. at 192. The policy at issue was gender-based on its face, and the Court concluded that it could not stand. Id. at 211. The above-quoted statement was made in response to Johnson Controls' argument that, absent such a policy, it could be subjected to numerous, costly tort claims from mothers bearing lead-poisoned children. Id. at 209-11. By contrast, in the instant case, the City proffered a defense that it could not reclassify positions generally. The City did not claim, and the plaintiffs failed to show, that these economics had bearing upon the positions of Hispanic women alone.

D. Refusal To Certify Class

The plaintiffs next complain of the district court's refusal to certify them as a class under Federal Rule of Civil Procedure 23. We review its decision for an abuse of discretion. Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101, 1104 (5th Cir. 1993). As we have affirmed the lower court's denial of relief on the individual claims, we must also affirm the denial of class certification. See Trevino, 811 F.2d at 906 (observing that "[w]hen an employee's individual claim of employment discrimination is properly dismissed, the employee no longer has a nexus with the membership of the purported class" and holding that the unsuccessful employee was not a proper representative for the putative class); accord Burke v. United States, 480 F.2d 279, 281 (9th Cir.), cert. denied, 414 U.S. 913 (1973).

E. Retroactivity of the 1991 Act

The plaintiffs argue that the magistrate erroneously granted partial summary judgment against them on their section 1981 claims based upon the Supreme Court's holding in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). According to the plaintiffs, this decision was legislatively overruled by section 101 of the 1991 Act, which took effect before the magistrate judge entered the summary judgment order. The plaintiffs acknowledge, however, that their argument in this regard depends upon the 1991 Act being given retroactive effect. Since the time they filed their brief, the Supreme Court has definitively refused to apply section 101 of the 1991 Act retroactively. See

Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1519-20 (1994). As the plaintiffs' action was filed in August of 1989, prior to the passage of the Act, their invocation of section 101 is in vain.

The plaintiffs also contend that they were entitled to a jury trial on their Title VII claims via retroactive application of the 1991 Act. However, the Supreme Court's companion decision in Landgraf v. USI Film Products makes it clear that section 102 of the Act, which authorizes a jury trial, is similarly not to be applied retroactively. 114 S. Ct. 1483, 1505-06 (1994). Its decision is dispositive of the plaintiffs' argument in this regard.

F. Denial of Reopening of Discovery

The plaintiffs also contend that the trial court abused its discretion in denying their motion to reopen discovery in light of the 1991 Act. Specifically, they contend that section 105(a) of the Act,[8] which reduces the burden of proof in a disparate impact case, should have been applied retroactively to their

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[8] That section provides as follows:

> With respect to demonstrating that a particular employment practice causes a disparate impact . . . the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, ***except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.***

Pub. L. 102-166, § 105(a), 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000(e)-2(k)(1)(B)(i)) (emphasis added).

case. According to the plaintiffs, "[t]he refusal to reopen discovery precluded [them] from obtaining the discovery necessary to establish that the promotion decision-making process was not capable of separation for analysis, therefore the refusal to reopen discovery was in error." While neither Landgraf nor Rivers definitively disposes of the retroactive effect of section 105, we seriously doubt that section 105 would be any more retroactive than sections 101 and 102. However, even if we assume arguendo that section 105 were to be applied retroactively, we cannot conclude that the district court abused its discretion in denying the plaintiffs' motion to reopen. First, discovery had been closed for almost nine months at the time the plaintiffs requested reopening, and, prior to its close, the parties had had one and one-half years of unlimited discovery. Further, except for a general description of the 1991 Act's change in burden of proof, the plaintiffs did not indicate to the trial court how the 1991 Act would render the prior discovery inadequate or what additional information they sought to obtain through reopened discovery. Under these circumstances, we cannot find that the district court abused its discretion in refusing to give the plaintiffs additional time for discovery. See Williamson v. United States Dep't of Agric., 815 F.2d 368, 373 (5th Cir. 1987) (holding that control of discovery is committed to the sound discretion of the district court and that we will reverse its discovery rulings only if they are arbitrary or clearly unreasonable).

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.