

**UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA**

<b>JANET D. LEWIS,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>3:06-cv-00053-JWS</b>
	)	
<b>vs.</b>	)	<b>ORDER AND OPINION</b>
	)	
<b>MICHAEL B. DONLEY, Secretary</b>	)	<b>[Motions at docs. 150, 153, 174, and</b>
<b>of the United States Air Force; the</b>	)	<b>183]</b>
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**I. MOTIONS PRESENTED**

At docket 150, defendants Michael B. Donley and the United States of America (the “government”) move for summary judgment on plaintiff Janet D. Lewis’ disparate impact claims at counts III and IV. Because the court already dismissed counts III and IV as duplicative of counts I and II,<sup>1</sup> the court construes the government’s motion as seeking summary judgment of Lewis’ disparate impact theories supporting counts I and II.<sup>2</sup> At docket 166, Lewis opposes the motion. The government replies at docket 177. The government also moves at docket 153 for partial summary judgment on Lewis’ discrimination theory pertaining to the selection of the new director of the Sitka Center. At docket 167, Lewis opposes the motion. The government replies at 182. At

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<sup>1</sup>Dockets 140 and 144-45.

<sup>2</sup>See *Golden v. Local 55 of Intern. Ass'n of Firefighters*, 633 F.2d 817, 820-21 (9th Cir. 1980).

docket183, the government also moves for leave to file additional factual materials in support of its reply brief at docket 182. Lewis opposes the motion at docket 188. The government replies at docket 194.

Finally, Lewis moves at docket 174 for guidance on whether Lewis' Merit Systems Protection Board ("MSPB") appeal should be briefed and decided before a jury trial, and to request that the agency file the administrative record with the court. At docket 179, the government responds to the motion. Lewis replies at docket 187.<sup>3</sup> Oral argument was not requested and would not assist the court.

## **II. BACKGROUND**

Lewis was an employee of the United States Air Force, 3rd Wing, at Elmendorf Air Force Base ("Elmendorf" or "EAFB") in Anchorage, AK. Lewis is African-American. Lewis worked in the Child Development Center Program ("CDC") on Elmendorf and, in March 2002, she was transferred into the position of director of the Katmai Child Development Center. During 2002 and 2003, the Air Force built a new child care center, the Sitka Center. Immediately after the Sitka Center opened, the Katmai Center was closed for one year in order to complete renovations. At a January 14, 2003 staff meeting, Lee Tomlinson, chief of the Pacific Command Air Force services, and Susan Fallon, the CDC program manager, announced that they would be taking applications for the directorship of the Sitka Center. On March 12, 2003, Lewis saw the job announcement for the Sitka Center directorship position, and she applied. On May 9, 2003, Albert Bartz, family member services director, and Fallon conducted an interview of Lewis for the Sitka Center directorship. On May 23, 2003, Bartz selected Mary Barkley, a Caucasian employee of the Child Care Center, for the directorship. Lewis filed a complaint with the Equal Employment Office of the Air Force on September 2, 2003, alleging illegal racial discrimination in the selection of Barkley over herself.

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<sup>3</sup>Additional briefing addressing the appropriate contents of the Administrative Record and the MSPB appeal will be addressed in a separate order.

## A. Selection Process

Lewis first asserts a claim for discrimination arising from Bartz' selection of Barkley for the Sitka Center directorship. Internal applicants for the Sitka Center directorship vacancy were entitled to self-nominate for the vacancy between March 12 and March 25, 2003.<sup>4</sup> According to Bartz, the selection process involved two steps: screening of civilian referral briefs and a formal interview process.<sup>5</sup> The Randolph Air Force Base personnel department forwarded the internal and external applications to Bartz on April 17, 2003.<sup>6</sup> Lewis disputes that the applications came from Randolph, contending that Tomlinson arranged for the applications to be routed through his home base, Hickam Air Force Base.<sup>7</sup> Although there is evidence in the record that Tomlinson did review the applications,<sup>8</sup> the record reflects that the applications were routed from Randolph to Bartz.<sup>9</sup> After receiving the applications, Bartz contacted Fallon to help formulate the evaluation process, which involved a point system for evaluating experience levels, education, and performance and other awards.<sup>10</sup> The referral brief review process was approved by the Civilian Personnel Office.<sup>11</sup> The points were compiled in a central document - Annette McLamb, an African-American, accumulated the most points, Lewis the second most (34.5), and Barkley the third most (33.3).<sup>12</sup>

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<sup>4</sup>Docket 153, Exhibit B at 29.

<sup>5</sup>Docket 153, Exhibit B at 3-4.

<sup>6</sup>Docket 153, Exhibit D at 1.

<sup>7</sup>Docket 167 at 4-5.

<sup>8</sup>Nancy Veasey, a Child Development Assistant, testified in an EEO interview that the selection lists were sent to Tomlinson and that one of Tomlinson's employees was a friend of Barkley, suggesting favoritism on the part of Tomlinson. Docket 167, Exhibit 12 at 7.

<sup>9</sup>Docket 153, Exhibit D at 1. The applications were sent to Bartz by Julia Hoggard, whose e-mail address originates from Randolph. *Id.*

<sup>10</sup>Docket 153, Exhibit F at 26.

<sup>11</sup>Docket 153, Exhibit B at 7.

<sup>12</sup>Docket 153, Exhibit F at 26.

McLamb declined the opportunity to interview.<sup>13</sup> However, McLamb states in an affidavit filed in support of Lewis' opposition brief that, upon expressing her interest in applying for the Sitka Center directorship, Tomlinson discouraged her from applying, and told her that she was not qualified.<sup>14</sup>

The parties agree that there were some errors in the referral briefs, but the government contends that it is the employees' responsibility to ensure the accuracy of the briefs.<sup>15</sup> Lewis contends that she attempted to make the appropriate corrections to her referral brief, but was prevented from doing so by a computer system glitch.<sup>16</sup> Lewis contends that Fallon helped Barkley edit her referral brief two months prior to the selection,<sup>17</sup> and that Barkley was awarded a higher referral brief score - 33.3 - than she deserved. Fallon concedes that Barkley's referral brief score should have been one point lower - 32.3 - but does not discuss whether she assisted Barkley in correcting her referral brief.<sup>18</sup> Moreover, Lewis claims that Barkley was given credit for running the Part Day Preschool Program, while Lewis was not given credit for performing the same task. Fallon's testimony reveals that this assertion is correct, but claims that the information was not counted because it was not a part of the referral brief.<sup>19</sup> Lewis further contends that Fallon voluntarily edited the referral briefs of other white employees, alleging that there was a double standard for minorities and Caucasians in this regard. In addition to the above allegation regarding Fallon's correction of Barkley's

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<sup>13</sup>Docket 153, Exhibit B at 7.

<sup>14</sup>Docket 167, Exhibit 13 at 1-2. Lewis alleges that this fact assists in establishing Tomlinson's character as a racist. Docket 167 at 11. Lewis also alleges that Tomlinson purposefully discouraged McLamb from applying because he knew she was more qualified than Barkley, and that Tomlinson's bias accounts for the lengthy period of time between the job announcement and the interviews. *Id.*

<sup>15</sup>Docket 153, Exhibit E at 2.

<sup>16</sup>Docket 167, Exhibit 1 ¶ 13.

<sup>17</sup>*Id.* ¶ 14.

<sup>18</sup>Docket 153, Exhibit F at 12.

<sup>19</sup>Docket 167, Exhibit 14 at 2-3.

referral brief, Lewis claims that Fallon helped Trina Pauley, a white employee, fix her referral brief to reflect the appropriate level of education.<sup>20</sup>

For the second stage of the evaluation process, Bartz and Fallon created 24 interview questions that related to four areas of experience necessary for the Sitka Center directorship: financial, personnel, program, and “other.”<sup>21</sup> The questions related to various levels of “knowledge, skills and abilities” - KSAs - listed on the position’s core personnel document.<sup>22</sup> Fallon and Bartz also agreed that the questions would be weighted on a scale of 1 to 3, with 3 being the highest.<sup>23</sup> The Civilian Personnel Office approved these criteria and interview questions prior to the interviews.<sup>24</sup> After determining that McLamb was no longer available for the position, Bartz decided to interview Lewis and Barkley.<sup>25</sup> The interviews took place on May 9, 2003.<sup>26</sup> Fallon and Bartz took separate notes on the candidates’ performances, and separately assigned scores to their answers.<sup>27</sup> Bartz claims that he weighted the answers on the basis of level of experience, articulation, confidence, and demonstrated knowledge.<sup>28</sup>

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<sup>20</sup>Docket 167, Exhibit 16 ¶ 8. The government moves for leave to file addition pages of the deposition of Fennis Baker-Waters, director of the Denali CDC, in order to establish that it would have been normal for Fallon to assist Pauley in correcting her referral brief. Docket 183, Exhibit B. Lewis does not object to the inclusion of these additional pages, and argues that these additional excerpts establish that Fallon’s assistance was indeed not normal, but derived from a desire to install a Caucasian as assistant director of Sitka Center. Docket 188 at 3.

<sup>21</sup>Docket 153, Exhibit B at 6.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 7.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 7-8.

Fallon combined and averaged her interview scores with the scores assigned by Bartz.<sup>29</sup> Lewis was awarded 52 by Bartz and 44 by Fallon, for an average of 48 points.<sup>30</sup> Combined with her scores from the referral briefs, Lewis was awarded 82.5 total points.<sup>31</sup> Barkley was awarded 67 interview points by Bartz and 64 by Fallon, for an average of 65.<sup>32</sup> Combined with her score from the referral brief, Barkley was awarded 98.3.<sup>33</sup> Assuming Barkley should have had a referral brief score of 32.3, her total score would have been 97.3.<sup>34</sup> In any event, Barkley was selected for the Sitka Center directorship at the conclusion of the interview process.<sup>35</sup> Lewis contends that both the subjective and objective scoring schemes were “highly questionable” because the candidates’ educational backgrounds were not properly weighted against their interview responses.<sup>36</sup> For instance, Lewis claims that one year of experience directing a child care center would yield a candidate 5 points, while a candidate might earn 6 points for answering two out of 24 questions in a favorable manner.<sup>37</sup> Moreover, Lewis claims that Barkley “does not even meet the educational requirements” because Barkley’s degree is in “elementary, middle and secondary education,” while Lewis has a degree in “early childhood education.”<sup>38</sup> Given the disparity in educational qualifications, Lewis argues

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<sup>29</sup>Docket 153, Exhibit F at 6.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>Docket 167 at 7.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

that Bartz and Fallon were forced to give greater weight to the subjective scoring criteria in order to justify hiring Barkley.<sup>39</sup>

Lewis also claims that the interview was contrary to Family Member Services policy. Specifically, Lewis claims that the interview panel should have comprised three qualified individuals, one of whom would have been Fennis Baker-Waters, the African-American director of the Denali Child Development Center.<sup>40</sup> Baker-Waters stated in an affidavit that she was surprised that she was not asked to take part in the interview for the Sitka Center directorship and again when Fallon and Barkley were interviewing for an assistant director.<sup>41</sup> Bartz claims that he did not select Baker-Waters for the panel because she had expressed her preference for Lewis prior to the selection process and did not select Ms. Chelley Correa, a qualified Caucasian, because she harbored ill feelings toward Lewis.<sup>42</sup> When confronted by Baker-Waters about the impropriety of having a two-member selection panel for the assistant directorship position, Fallon and Barkley permitted her to sit on the panel.<sup>43</sup> Indeed, Lewis points to one piece of evidence showing that three member panels were used to select other CDC employees, including Trina Pauley for the Sitka Center assistant directorship, Lisa Dalton as training and curriculum specialist, Marlin Smith as youth sports director, and Holly Warners as assistant director of the Denali program.<sup>44</sup> The government claims that no regulation mandated Bartz, who was making his first selection, to hold interviews at all.<sup>45</sup> The only requirement was that the interviews had to be conducted in the same way, and that

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<sup>39</sup>*Id.* at 8.

<sup>40</sup>Docket 167, Exhibit 16 at 1-2.

<sup>41</sup>Docket 167, Exhibit 16 at 1-2.

<sup>42</sup>Docket 153, Exhibit B at 27. Baker-Waters denies that she expressed her preference for Lewis prior to the selection process. Docket 167, Exhibit 6 at 1.

<sup>43</sup>Docket 167, Exhibit 16 at 2.

<sup>44</sup>Docket 167, Exhibit 22.

<sup>45</sup>Docket 153, Exhibit D.

members of the interview panel had to be at least equal in rank to that of the position being filled.<sup>46</sup>

Lewis further claims that her actual interview was a sham because Bartz left during the interview to take phone calls.<sup>47</sup> Barkley also stated that Bartz left during her interview to take phone calls.<sup>48</sup> As a result, Lewis claims that her interview was flawed and, in addition, claims that Bartz's interview notes reflect responses that she did not give because the notes recounted events that had not happened at the time of the interview.<sup>49</sup> The government responds that Barkley's answers to the interview questions showed a greater command of the skills necessary for the position, and that Bartz and Fallon each explained their scores sufficiently.<sup>50</sup> For instance, the government claims that both Bartz and Fallon were unimpressed by Lewis' answer to the question regarding her biggest challenge, which Lewis claimed was the budget.<sup>51</sup> Rather, Barkley's answer to the same question - that her biggest challenge would be achieving accreditation without the assistance of the director (i.e., Bartz) - was viewed as "more impressive."<sup>52</sup> The government contends that a perusal of the answers and scores from

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<sup>46</sup> *Id.*

<sup>47</sup> Docket 167 at 8-9.

<sup>48</sup> Docket 153, Exhibit K; docket 167, Exhibit 38 at 1.

<sup>49</sup> Docket 167, Exhibit 1 ¶ 16, Exhibits 26-27. Lewis claims that although her interview answers, given on May 9, 2003, show that she claimed "Denali accreditation" among her experiences, she did not participate in such accreditation until well after the interview, having received her assignment to work on Denali accreditation in June 2003. Docket 153, Exhibit F at 37. In the late-filed affidavit of Anthony Raas at docket 183, the government contends that the Denali accreditation took place prior to Lewis' interview. Docket 183, Exhibit A at 2. Lewis opposes the motion for leave to file the affidavit on hearsay grounds. Docket 188. The court will address this motion in the context of the discussion of the merits of the motion at docket 153.

<sup>50</sup> Docket 153 at 11-12.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *Id.* at 11-12.

the interviews reveals that Barkley was the better qualified candidate.<sup>53</sup> Lewis disputes this point, arguing that Fallon told Lewis “less than a month before the interview” that her budget reports looked “soooo good.”<sup>54</sup>

Finally, Lewis claims that Tomlinson improperly inserted himself into the hiring process for the Sitka directorship, and recommended to Bartz that he should hire Barkley over Lewis.<sup>55</sup> Lewis claims that Tomlinson harbored a racial bias against Lewis and a grudge over alleged false statements made by Lewis in a 2002 inspection report,<sup>56</sup> and that Tomlinson concealed his bias by expressing his desire in January 2003 to keep the child care teams together.<sup>57</sup> Lewis interprets Tomlinson’s “keep the Katmai team together” comment as indicative of his intent to keep the African-American employees, including Gena Walker, Lewis’ African-American subordinate, in the Katmai Center, while opting to employ only Caucasian employees in the Sitka Center.<sup>58</sup> Tomlinson testified that he intended to keep Lewis at the Katmai Center because a move to the Sitka Center would be a lateral one, and not considered a promotion.<sup>59</sup> Although the evidence shows that Tomlinson recommended to Bartz that Barkley be selected over Lewis, Fallon testified that Tomlinson did not make his preference known to her.<sup>60</sup> Bartz later attempted to conceal Tomlinson’s preference for Barkley.<sup>61</sup>

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<sup>53</sup>*Id.* at 12.

<sup>54</sup>Docket 167, Exhibit 29 at 1.

<sup>55</sup>Docket 167 at 2.

<sup>56</sup>Docket 153, Exhibit A at 196.

<sup>57</sup>Docket 167 at 3.

<sup>58</sup>Although Lewis does not allege that Fallon is a racist, she does allege that Fallon was unduly influenced by Tomlinson’s expressed desire to keep the Katmai employees together, which Lewis reads as a desire to keep African-American employees in the Katmai Center. Docket 153, Exhibit A at 250-51.

<sup>59</sup>Docket 153, Exhibit C at 001880.

<sup>60</sup>Docket 153, Exhibit C at 001876 and Exhibit J at 001803.

<sup>61</sup>See Docket 167, Exhibit 4 at 1 and Exhibit 12 at 3.

## B. Alleged Disparate Impact

Lewis asserts claims for disparate impact in hiring and promotion practices and disparate impact in segregation. Lewis generally alleges that the Family Member Services division has, over a period of years, morphed from a diverse organization to one in which only Caucasian employees flourish. Lewis asserts that, prior to Bartz's installation as director, Family Member Services used three member hiring panels to select employees for GS-5 positions and above.<sup>62</sup> In 2002 and 2003, the Denali and Katmai centers were the only two child care facilities, and they were each run by African-American women and staffed by a mix of Caucasian and African-Americans. According to Lewis, the racial makeup of management was 57% Caucasian and 43% minority in 2002.<sup>63</sup> However, after Bartz took over as director and the Sitka Center opened, Lewis claims that the hiring process was altered to ensure that only Caucasian employees were chosen to lead and staff the Sitka Center, while African-American employees were relegated to the newly-renovated Katmai Center. The government contends, on the other hand, that in 2004, after the Katmai center reopened, Fallon polled the Sitka employees and asked them to select the center to which they would like to be assigned. Indeed, Barkley states in an affidavit that some African-American employees were permitted to remain at the Sitka Center after the Katmai Center renovations were completed.<sup>64</sup> Walker, Lewis' assistant, was the only African-American employee who was directed to remain at Katmai, and only because there were no

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<sup>62</sup>Docket 166 at 2.

<sup>63</sup>Docket 166 at 2-3 and Exhibit 3 at 1-2. Lewis also cites to a joint report of the U.S. Census Bureau and Equal Employment Opportunity Commission in support of her claim of disparate impact. Docket 166 at 3-4. The government contends that the report is out of date, unrelated to Lewis' claim, and unexplainable without an expert witness. Docket 177 at 2-5. Moreover, the government contends that Lewis failed to produce the report during discovery. *Id.* Because it would be inappropriate to consider stale statistical evidence that was not produced during discovery, Lewis' request for judicial notice is denied. Moreover, even if this evidence were appropriate to consider, the court does not see how evidence that the child care center applicant pool is nearly 80% Caucasian helps Lewis' case. *See infra.*

<sup>64</sup>Docket 150, Exhibit B at 1.

available positions at the GS-7 level at the new Sitka Center.<sup>65</sup> Lewis contends that she was also directed to return to Katmai, as was Rose Adams, a Pacific Islander.<sup>66</sup>

During 2004, the directors of the Katmai, Sitka, and Denali centers were permitted to compete for applicants among a pool of individuals, whose race was not identified. On occasion, directors from two centers would bid for a single employee on one day. For instance, Barkley and Lewis both selected Cynthia Inman (Caucasian) on the same day, and Inman was permitted to select her center of choice.<sup>67</sup> Inman selected Sitka on her own.<sup>68</sup> However, Lewis claims that she had selected Inman to work at Katmai, and that Bartz and Fallon changed the rules to allow Inman to work at Sitka.<sup>69</sup> Furthermore, Lewis complained in 2004 that Lori Peterson (Caucasian) was assigned to Sitka after Peterson had elected to go to Katmai.<sup>70</sup> However, the government contends that Lewis failed to complete the paperwork necessary to ensure Peterson's transfer on time, and Peterson therefore returned to the pool of available applicants.<sup>71</sup> After Peterson returned to the pool, Sitka selected her.<sup>72</sup> However, once it became known that Peterson wanted to go to Katmai, Fallon permitted Lewis to select her again, and Peterson went to Katmai.<sup>73</sup>

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<sup>65</sup>*Id.*

<sup>66</sup>Docket 166, Exhibit 3 ¶ 8. In any event, Lewis claims, the working conditions at Katmai were difficult for African-Americans, citing one example of a transfer request submitted by Sharon Lewis. Docket 166, Exhibit 14.

<sup>67</sup>Docket 150, Exhibit H at 5-6.

<sup>68</sup>*Id.*

<sup>69</sup>Docket 166, Exhibit 3 ¶¶ 14-15.

<sup>70</sup>Docket 150, Exhibit I at 2.

<sup>71</sup>Docket 150 9; *see also id.*, Exhibit G.

<sup>72</sup>Docket 150, Exhibit J at 002628.

<sup>73</sup>*Id.* at 002632.

By 2007, when Lewis was terminated, Caucasian employees had been selected for each management position in Family Member Services. According to the government, Kathie DeShasier, a Caucasian, replaced Bartz as director.<sup>74</sup> Lewis contends that DeShasier was instrumental in changing the racial makeup of the child care centers. At the Sitka Center, Barkley was replaced in 2005 by Peggy Buchanon (Caucasian), who was subsequently replaced by Loretta Morgan (Caucasian).<sup>75</sup> At the Katmai Center, Lewis was replaced by Lisa Dalton (Caucasian), who was subsequently replaced by Tymira Apling (Caucasian).<sup>76</sup> The government contends that DeShasier did not know Apling's race prior to hiring her.<sup>77</sup> At the Denali Center, DeShasier hired Anthony Raas (Caucasian) to replace Baker-Waters (African-American). The government claims that DeShasier did not know Raas' race prior to hiring him.<sup>78</sup> Finally, DeShasier also filled two managerial positions at the Family Child Care Center with Caucasians.<sup>79</sup> Eventually, one of those managers left, and DeShasier replaced her with an African-American, Juwam Middleton.<sup>80</sup> Lewis claims that Middleton was merely transferred from the Denali Center to Family Child Care and, therefore, argues that DeShasier did not herself hire a single African-American employee.<sup>81</sup>

### **C. Procedural History**

On March 8, 2006, Lewis filed her complaint with this court. After two years of motion practice, Lewis filed her third amended complaint on July 9, 2008. Lewis' third

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<sup>74</sup>Docket 150 at 6.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 7

<sup>77</sup>*Id.* Lewis contends that, in some instances, the director would have been able to infer the races of eligible candidates because the second page of the candidate referral certificates indicate the races of the candidates on the certificates themselves. Docket 166, Exhibit 11.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 8.

<sup>81</sup>Docket 166 at 5.

amended complaint included ten claims: counts I and III address disparate treatment and impact in hiring and promotion pursuant to 42 U.S.C. § 2000e-2(a)(1). Counts II and IV address disparate treatment and impact in segregation pursuant to 42 U.S.C. § 2000e-2(a)(2). Because Lewis may advance any of the theories which support a claim of racial discrimination - including disparate treatment and impact - under a single claim, the court dismissed counts III and IV *sua sponte*. Count V addresses retaliation pursuant to 42 U.S.C. § 2000e-3(a). The court has already dismissed Lewis' retaliation claim to the extent it claims retaliation based on a September 19, 2005 letter written by Colonel Scotty Lewis.<sup>82</sup> Count VI alleges that Lewis was unlawfully removed from employment under 5 U.S.C. § 7702. Lastly, Counts VII through IX, which this court dismissed at docket 140, sought to establish that defendants negligently and intentionally caused her emotional distress and that defendants negligently supervised their employees. Finally, Lewis seeks punitive damages in count X.

Pending before the court are four motions. First, the government moves for partial summary judgment on Lewis' disparate treatment theories of discrimination as they pertain to the selection of Mary Barkley to fill the position as director of the Sitka Center, reasoning that Lewis has presented no evidence of a racially-motivated selection criteria.<sup>83</sup> Second, the government moves for leave to supplement the factual record supporting its reply brief at docket 182.<sup>84</sup> Third, the government moves for summary judgment on Lewis' disparate impact theories of discrimination on the ground that Lewis has failed to identify a racially neutral practice that results in disparate racial impact in hiring, promotion, or segregation or present any statistical data supporting such a theory.<sup>85</sup> Finally, Lewis moves for guidance on whether this court should decide the appeal of the MSPB proceedings before conducting a jury trial on Lewis'

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<sup>82</sup>Docket 140.

<sup>83</sup>Docket 153.

<sup>84</sup>Docket 183.

<sup>85</sup>Docket 150.

discrimination and other claims.<sup>86</sup> Lewis also contends that it is the government's responsibility to file the administrative record of the MSPB proceedings with the court.<sup>87</sup> The court addresses the pending motions below.

### **III. STANDARD OF REVIEW**

Federal Rule of Civil Procedure 56 provides that summary judgment should be granted when there is no genuine dispute about material facts and when the moving party is entitled to judgment as a matter of law. The moving party has the burden to show that material facts are not genuinely disputed.<sup>88</sup> To meet this burden, the moving party must point out the lack of evidence supporting the nonmoving party's claim, but need not produce evidence negating that claim.<sup>89</sup> Once the moving party meets its burden, the nonmoving party must demonstrate that a genuine issue exists by presenting evidence indicating that certain facts are so disputed that a fact-finder must resolve the dispute at trial.<sup>90</sup> The court must view this evidence in the light most favorable to the nonmoving party, must not assess its credibility, and must draw all justifiable inferences from it in favor of the nonmoving party.<sup>91</sup>

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<sup>86</sup>Docket 174.

<sup>87</sup>*Id.*

<sup>88</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>89</sup>*Id.* at 325.

<sup>90</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

<sup>91</sup>*Id.* at 255; *Soldano v. United States*, 453 F.3d 1140, 1143 (9th Cir. 2006) (citation omitted).

## IV. DISCUSSION

### **A. Motions Pertaining to Selection Process**

Claims of intentional racial discrimination are subject to the Supreme Court's burden-shifting framework under *McDonnell Douglas Corp. v. Green*,<sup>92</sup> which held that a plaintiff alleging disparate treatment under Title VII must first establish a *prima facie* case of discrimination.<sup>93</sup> "Specifically, the plaintiff must show that (1) [s]he belongs to a protected class; (2) [s]he was qualified for the position; (3) [s]he was subject to an adverse employment action; and (4) similarly situated individuals outside h[er] protected class were treated more favorably."<sup>94</sup> Once established, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>95</sup>

"[I]f the employer articulates a legitimate reason for its action, 'the presumption of discrimination drops out of the picture, and the plaintiff may defeat summary judgment by satisfying the usual standard of proof required . . . under Fed. R. Civ. P. 56(c).'"<sup>96</sup> That is, the plaintiff must "introduce evidence sufficient to raise a genuine issue of material fact as to whether the reasons . . . articulated are pretexts for . . . discrimination."<sup>97</sup> Such evidence may take the form of evidence of a discriminatory motive or circumstantial evidence that tends to show that the articulated reason is not the true reason.<sup>98</sup> Where the evidence is circumstantial, it must be specific and substantial in order to create a triable issue of fact, while direct evidence need not be

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<sup>92</sup>411 U.S. 792, 802 (1973).

<sup>93</sup>*Id.*

<sup>94</sup>*Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1123 (9th Cir. 2009).

<sup>95</sup>*McDonnell Douglas*, 411 U.S. at 802.

<sup>96</sup>*Metoyer v. Chassman*, 504 F.3d 919, 931 n.6 (9th Cir. 2007) (quoting *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006)).

<sup>97</sup>*Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000).

<sup>98</sup>*Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998).

substantial in order to create a triable issue.<sup>99</sup> “When that evidence, direct or circumstantial, consists of more than the [prima facie] presumption, a factual question will almost always exist with respect to any claim of nondiscriminatory reason.”<sup>100</sup> “All of the evidence - whether direct or indirect - is to be considered cumulatively.”<sup>101</sup>

While summary judgment should be used prudently in Title VII cases involving motivation and intent, the establishment of a prima facie case based on the minimum evidence necessary to raise a presumption of discrimination does not preclude summary judgment.<sup>102</sup> Because Lewis has established her *prima facie* case, and the government has articulated a legitimate reason for its hiring decision (namely, that Barkley was the better candidate for the position), the remaining question is whether Lewis has shown circumstantially that the government’s articulated reason for its hiring decision is not the true reason. The opposition and reply briefs relating to disparate treatment in the selection process are organized by pointing to eight categories of evidence purporting to establish the reason for hiring Barkley over Lewis. The court finds these categories helpful as a framework for analyzing whether Lewis has established that the government’s articulated, non-discriminatory reason for its hiring decision is not the true reason.

### **1. Keeping the Teams Together and Tomlinson’s Advocacy on Behalf of Barkley**

First, Lewis claims that Tomlinson’s comment that he wanted to keep the Katmai and Sitka teams together may be evidence of racism. The government argues that Tomlinson’s comment was complimentary of the existing team structures, and indicated that he was happy with the status quo of operations in the child care facilities. But

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<sup>99</sup>*Id.* at 1221-22.

<sup>100</sup>*Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991).

<sup>101</sup>*Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003).

<sup>102</sup>*Coleman*, 232 F.3d at 1282.

Lewis responds that Tomlinson's comments should be interpreted as indicating that he desired to keep Caucasian employees and African-American employees segregated. Tomlinson testified that it wouldn't make sense for Lewis to apply to run the Sitka Center because she already held a position of equal value, and the government contends that Tomlinson's comment was made before he knew that Lewis would be applying for the Sitka Center directorship. Standing alone, the exact import of Tomlinson's comment is unclear.

However, it is clear that Tomlinson favored Barkley for personal reasons, and equally clear that Tomlinson did not have a good relationship with Lewis.<sup>103</sup> Neither did Fallon.<sup>104</sup> Moreover, Bartz lied about Tomlinson's recommendation of Barkley, evidencing an attempt to conceal the preselection of Barkley over Lewis.<sup>105</sup> Coupled with evidence of Tomlinson's favoritism, the court believes that Lewis has raised an inference of discrimination on the ground that Tomlinson favored a Caucasian employee over Lewis, and Bartz sought to cover that fact up.<sup>106</sup> Contrary to the government's suggestion, the district court may not spin evidence of favoritism supporting an inference of discrimination in favor of the moving party; rather, all such inferences must be drawn in favor of the nonmoving party.<sup>107</sup> The court therefore concludes that Lewis has marshaled specific evidence of Tomlinson's potential discriminatory intent in influencing Bartz's hiring decision sufficient to raise a genuine issue of material fact.

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<sup>103</sup>Docket 153, Exhibit A at 196.

<sup>104</sup>Docket 167, Exhibit 12 at 3.

<sup>105</sup>See Docket 167, Exhibit 4 at 1 and Exhibit 12 at 3.

<sup>106</sup>Indeed, there is also evidence in the record that the Katmai Center was an older facility with some alleged asbestos and mold issues, while the Sitka Center was brand new. See Docket 167, Exhibit 9. While the condition of the Katmai Center does not directly bear on Lewis' allegations of a discriminatory motive, Tomlinson's expressed desire to keep Lewis and Walker at the purportedly inferior Katmai Center may play a role in examining the government's explanation for its hiring decision.

<sup>107</sup>*Noyes v. Kelly Servs.*, 488 F.3d 1163, 1172 (9th Cir. 2007).

## 2. Interview Procedures

Among the allegations pertaining to improper interview procedures are Lewis' allegations that (1) Bartz was absent for a portion of the interviews, (2) Bartz's interview form was completed after the interview, and (3) Bartz failed to assemble a three-person interview panel. As an initial matter, Bartz is alleged to have been absent from both Lewis' interview and Barkley's interview. As a result, the court does not believe that illegal discrimination could have been a factor in Bartz's decision to interrupt Lewis' interview with a phone call. As discussed below, the interview was an optional part of the hiring process, and Bartz appears to have treated both Lewis and Barkley similarly.

With respect to Lewis' claims that Bartz's interview form reflected items that had not yet occurred, specifically the Denali accreditation, the court concludes that it does not matter for purposes of Lewis' discrimination claim when the accreditation occurred. Lewis supports her position that the Denali accreditation referenced on Bartz's interview form occurred after her interview, in June 2003, with a memorandum whose author is unknown.<sup>108</sup> In response, the government moves for leave to file the supplemental affidavit of Anthony Raas at docket 183, which states that the Denali accreditation took place prior to Lewis' interview.<sup>109</sup> That motion is granted. However, regardless of whether the accreditation occurred before or after Lewis' interview, the fact that she assisted in the accreditation process, and was given credit for having done so, would have only served to give her a higher score during her interview, and is not evidence of discrimination in the selection process.<sup>110</sup>

Finally, Bartz's decision to alter his predecessor's policy and use a two-member selection panel did not constitute discrimination because interviews were entirely optional.<sup>111</sup> Although Lewis claims that Bartz's exclusion of Baker-Waters, an African-

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<sup>108</sup>Docket 167, Exhibit 27.

<sup>109</sup>Docket 183, Exhibit A.

<sup>110</sup>Had the evidence shown, for example, that Lewis' interview form had items *removed* from it, discriminatory motive might be shown.

<sup>111</sup>Docket 153, Exhibit D.

American, because of her bias in Lewis' favor indicates that he was biased against Lewis on account of her race, Bartz also excluded Correa because of her bias against Lewis. While Fallon also harbored some ill will toward Lewis, she was the child development program supervisor and, as such, it was appropriate for Bartz to involve her in the selection of a position which Fallon would ultimately supervise. Thus, the court concludes that Bartz's decision to exclude Baker-Waters and Correa from the selection process was justified, and his decision to include Fallon in the selection process was not based on any discriminatory intent.

### **3. Selection Criteria**

Lewis contends that the selection criteria used by Bartz and Fallon gave significantly more weight to the subjective criteria, which focused on each candidate's answers to questions, than the objective criteria, which focused on a candidate's educational and experiential qualifications. As mentioned above, Bartz was free to design the selection process in any way he saw fit, and indeed, both the objective and subjective criteria Bartz used were approved by the Civilian Personnel Office.<sup>112</sup> Neither the objective nor subjective criteria favored a candidate of any particular race, and therefore are not indicative of a discriminatory intent.

### **4. Referral Brief Errors**

Lewis also claims that her referral brief contained errors that she was not permitted to correct prior to consideration for the Sitka directorship. The government correctly contends that Lewis alone - not Fallon or Bartz - knew her referral brief was incorrect, and did nothing to ensure it was accurate. Even if Lewis were somehow prevented from editing her referral brief, Lewis finished second in total points after the first stage of her evaluation - having achieved more points than Barkley - and was not prejudiced by her inability to edit her referral brief. As the government notes, "[h]ow can one argue that the grading process was racially bias[ed] when . . . two of the top three [candidates] were African-American[?]"<sup>113</sup> Bartz and Fallon had no responsibility to

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<sup>112</sup>Docket 153, Exhibit B at 6-7.

<sup>113</sup>Docket 182 at 18.

ensure the accuracy of Barkley's referral brief and, therefore, evidence of Lewis' inaccurate referral brief does not reveal any discriminatory motive.<sup>114</sup> Notwithstanding the above, Lewis makes an unsubstantiated allegation that Fallon assisted Barkley in preparing her referral brief in advance of her interview for the Sitka directorship. The government does not directly respond to this allegation. If it is true that Fallon assisted Barkley and actually knew about the errors in Lewis' referral brief, Lewis could have a claim that she was treated unfairly.

#### **5. Fallon's Assistance in Correcting Pauley's Referral Brief**

Lewis also contends that Fallon later assisted another Caucasian employee - Pauley, who had applied for the Sitka assistant directorship - in correcting her referral brief after Baker-Waters brought the inaccuracy to Pauley's attention. At her deposition, Baker-Waters alleges that Pauley or Fallon perpetrated a fraud in order to ensure that Pauley qualified for the assistant directorship.<sup>115</sup> As a result, Lewis contends that Fallon discriminated against her in failing to help correct her own inaccurate referral brief. This extrapolation is inapt. As mentioned above, neither Fallon nor Bartz knew that Lewis' referral brief contained any errors. Therefore, it was Lewis' responsibility to correct any inaccuracies. In the case of Pauley's brief, it was only the diligence of Baker-Waters that revealed an inaccuracy. The allegations of fraud are not supported by any evidence and, even if they were, the selection of Pauley took place well after the selection for the Sitka directorship and, therefore, would not constitute circumstantial evidence of discrimination in the selection of Barkley over Lewis.

In conclusion, although much of Lewis' circumstantial evidence of discrimination amounts to speculation, evidence of Tomlinson's dislike of Lewis, and advocacy on behalf of Barkley, and Bartz's attempts to cover up Tomlinson's favoritism has raised an inference of discrimination creating a triable issue of fact sufficient to preclude summary

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<sup>114</sup>Lewis argues that Barkley was awarded points during the subjective portion of the selection process equivalent to 3 additional years of experience, but Fallon notes that some of Lewis' experience was irrelevant because it was not experience running a federal program.

<sup>115</sup>Docket 183. The portion of the government's motion for leave at docket 183, which seeks to file excerpts of Baker-Waters' deposition, is granted.

judgment on Lewis' claim of disparate treatment. In addition, Lewis will be permitted to inquire into Fallon's alleged assistance of Barkley in correcting her referral brief in advance of her interview and whether she knew that Lewis' referral brief contained errors.

## **B. Motion Pertaining to Disparate Impact**

Disparate impact claims under Title VII attack "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."<sup>116</sup> To make out a prima facie case of disparate impact under Title VII, a plaintiff must show: "(1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [race] produced by the employer's facially neutral acts or practices."<sup>117</sup> "A disparate impact claim must challenge a specific business practice"<sup>118</sup> and be proven by evidence of "statistical disparities in the employer's work force."<sup>119</sup> For example, statistical evidence of "long-lasting and gross disparity between the composition of a work force" and the pool of qualified candidates would be of significance.<sup>120</sup> "Statistical evidence is used to demonstrate how a particular employment practice causes a protected minority group to be under represented in a specific area of employment (for example, hiring or promotion)."<sup>121</sup> "The statistical analysis must show a disparity that is 'sufficiently

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<sup>116</sup>*Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

<sup>117</sup>*Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) (quoting *Katz v. Regents of the Univ. of California*, 229 F.3d 831, 835 (9th Cir. 2000), quoting, in turn, *Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986)).

<sup>118</sup>*Pottenger*, 329 F.3d at 749.

<sup>119</sup>*Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988) (citation omitted).

<sup>120</sup>*Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (quoting *Int'l Brotherhood of Teamsters*, 431 U.S. at 340 n.20)).

<sup>121</sup>*Paige v. California*, 291 F.3d 1141, 1145 (9th Cir. 2002) (citing *Watson*, 487 U.S. at 994).

substantial' as to 'raise such an inference of causation.'"<sup>122</sup> "Summary judgment is appropriate when statistics do not support a disparate impact analysis."<sup>123</sup>

With respect to Lewis' disparate impact-in-hiring claims, the government makes two arguments. First, the government contends that Lewis failed to exhaust her claim before the EEOC. Lewis claims she exhausted her claim in a September 22, 2003 e-mail, which specifically added a claim resembling a disparate impact-in-hiring claim.<sup>124</sup> However, the government points out that Lewis' disparate impact-in-hiring claim arises from the racial composition of the child care centers in 2007, not 2003, and that Lewis was not an "aggrieved person" in 2007 because she was no longer an employee of the child care centers. Because an "aggrieved person" must initiate contact with a Counselor within 45 days of the matter alleged to be discriminatory, and Lewis did not initiate such contact, the claim fails.<sup>125</sup> Moreover, Lewis has "piggybacked" her disparate impact-in-hiring and promotion claim on facts supporting her disparate treatment in hiring and promotion claim, the subject of the government's other pending motion discussed *supra*. Lewis submits statistical evidence from the 2000 Census in support of her claim that the 2007 racial makeup of the child care management positions should be closer to 80% Caucasian, as opposed to its current 100% Caucasian composition. Standing alone, this evidence does not "show a disparity that is 'sufficiently substantial' as to 'raise such an inference of causation.'"<sup>126</sup> Lewis then attempts to bolster this evidence with evidence from the Sitka Center hiring decision made in 2003, a time at which no disparate impact could be alleged. The 2003 hiring decision does not relate to the alleged 2007 disparity in hiring and promotion in the way Lewis contends. Because Lewis was not personally aggrieved by the alleged disparate

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<sup>122</sup>*Paige*, 291 F.3d at 1145 (citing *Watson*, 487 U.S. at 995).

<sup>123</sup>*Pottenger*, 329 F.3d at 749 (citing *Katz*, 229 F.3d at 835).

<sup>124</sup>Docket 166, Exhibit 16.

<sup>125</sup>29 C.F.R. § 1614.105(a)(1).

<sup>126</sup>*Paige*, 291 F.3d at 1145 (citing *Watson*, 487 U.S. at 995).

impact in hiring and promotion in 2007, and indeed never submitted her complaint to the EEOC counselor, summary judgment must be granted. Lewis' disparate impact-in-hiring claim is dismissed.

The court also concludes that summary judgment must be granted on Lewis' disparate impact-in-segregation claim. Lewis is unable to establish that the Katmai and Sitka Centers were segregated. As the government points out, there was a substantial racial mix at each of the centers - Katmai had 4 African-American employees, 2 Caucasian employees, and 2 Asian employees; Sitka had 4 African-American employees, 10 Caucasian employees, 1 Hispanic employee, and 1 Asian employee; and Denali had an African-American director, 6 African-American employees, 13 Caucasian employees, and 1 Hispanic employee.<sup>127</sup> Moreover, Lewis asks this court to infer segregation from the fact that most Caucasian employees chose to remain at Sitka after the Katmai renovation was complete. Although Lewis explains that Caucasian employees chose to work at Sitka because Katmai was less desirable, the court cannot infer disparate segregative impact from choices made by employees of their own free will. Lewis' contention that "where people of Caucasian or non-Caucasian descent could have chosen either one or the other [center], 50% of each group should select each center" is without merit. It makes perfect sense that more individuals would choose to work at a brand new facility over an older, allegedly mold and asbestos laden facility. Lewis has not pointed to any specific business practice - aside from speculation about measures taken by Fallon and DeShasier to "divert" Caucasian employees to the Sitka Center - or statistical evidence of segregation between the Sitka and Katmai Centers that would preclude summary judgment. Therefore, the government's motion concerning Lewis' claim of disparate impact in segregation is granted, and the claim is dismissed.

### **C. Motion at Docket 174**

Finally, Lewis moves for guidance on whether Lewis' MSPB appeal should be briefed and decided before a jury trial, and to request that the agency file the

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<sup>127</sup>Docket 150, Exhibit L.

administrative record with the court. The parties recently stipulated that Lewis will file her opening brief in her MSPB appeal on or before February 15, 2010. An order approving the stipulation and setting the briefing schedule was entered at docket 201. Although it is unlikely that any portion of the MSPB appeal will go to a jury, a portion of Lewis' retaliation claim turns on facts arising from her MSPB appeal. As a result, the court would like the briefing completed prior to a jury trial on the merits of her disparate treatment and retaliation claims. Lewis' motion to compel the government to file the administrative record appears to have been resolved.

#### **V. CONCLUSION**

For the above reasons, the court rules as follows:

(1) The government's motion for leave to file additional factual materials is **GRANTED**, while the government's motion for summary judgment at docket 153 is **DENIED**.

(2) The government's motion for summary judgment at docket 150 is **GRANTED**. Plaintiff's disparate impact claims are dismissed.

(3) Lewis' motion at docket 174 is **DENIED**. The parties will brief the MSPB appeal in accordance with the schedule set at docket 201.

DATED at Anchorage, Alaska, this 11th day of February 2010.

/s/ JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE